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ISSUE 4: EDITORIAL REVIEW

The four cases in this issue cover several areas not previously covered in the *Bulletin*.

The case of *United States of America v Kay and Murphy* is the first United States decision to appear in this Bulletin. Its importance stems from the view taken by the Court of Appeals on the scope of the offence of bribery of foreign public officials contained in the Foreign Corrupt Practices Act (FCPA). Here the court reverses the decision of a federal judge that the bribery of foreign public officials (in this case Haitian customs officers) in order to reduce a company's tax burden or customs duties did not constitute an offence under the FCPA.

The relatively short judgment of the Court of Appeal of New Zealand in *The Queen v Dawson* does not deal specifically with corruption. Yet its value lies in reminding prosecutors of their responsibilities towards the defence: in this case the issue of the prosecution's obligation of disclosure of evidence to the defence.

The long-awaited judgment of the Supreme Court of Zambia in *Chiluba v Attorney-General* raises a matter of constitutional importance. This case concerns the application of a former Zambian President for judicial review of the

decision of the National Assembly removing his immunity from prosecution on charges of corruption. The judgment contains both a useful analysis of the scope of judicial review and the scope of the power of a legislature to lift the immunity enjoyed by a former Head of State.

The scope of the right of the media to publish articles or other material alleging, sometimes in forthright terms, that politicians or public officials have indulged in corrupt practices is controversial. In *Worme and Grenada Today v Commissioner of Police*, the Privy Council was faced with this issue in the context of whether the offence of criminal libel violated the right to freedom of expression enshrined in the Constitution of Grenada.

CRIMINAL LAW

One reason why the successful prosecution of western companies in the Lesotho Highlands Water Project cases (see Bulletin 2 Issue 3) is so significant stems from the perceived failure of Western states to tackle effectively those who bribe foreign public officials.

Efforts to target "active bribery" i.e. the offering side of the corrupt bargain, go back to 1977 when the United States passed the Foreign Corrupt Practices Act (FCPA). This was then followed by the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, article 1 of which mandates state parties to criminalise the bribery of foreign public officials in the following terms:

> 1(1) Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
>
> 1(2) Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Whilst state parties have largely enacted the appropriate legislation designed to meet their commitments under the OECD Convention, very few prosecutions have resulted. The situation applies in the US where the Department of Justice

has prosecuted only some forty cases in the entire history of the FCPA.

The case of *US v Kay and Murphy* threatened to make the operation of the FCPA even more problematic, if not unworkable. Here the defendants, Kay and Murphy, two senior officials of American Rice Inc., were accused of bribing Haitian customs officials for the purposes of reducing customs duties and the tax burden faced by the company in Haiti. The issue was raised as to whether, as a matter of law, an indictment alleging illicit payments to foreign officials for the purpose of avoiding substantial portions of customs duties and sales taxes covered the kind of conduct that the FCPA criminalises i.e. payments to foreign public officials in order to "obtain" or "retain" business.

The United States District Court for the Southern District of Texas granted the defendant's motion to dismiss the indictment for failure to state an offence. On appeal, the Court of Appeals reversed the ruling holding that such conduct could (but did necessarily) come within the Act's prohibition against payments to foreign officials in order to obtain or retain business. As the court "hastens to add" this conduct does not automatically constitute a violation of the FCPA. It must still be shown that the bribery was intended to produce an effect, in this case through tax savings, that would "assist in obtaining or retaining business". The court also ruled that the indictment did not need to go further than "tracking" the language of the FCPA in stating the business nexus element of the offence.

The case itself also contains valuable material concerning the circumstances in which a court may consider the title of a statute in resolving putative ambiguities as well as the use that may be made of the legislative history when a statute is found to be ambiguous.

Foreign Corrupt Practices Act --scope of the offence of bribery of foreign public officials --meaning of the phrase "in order to assist in obtaining or retaining business" -- whether offence extended to bribing customs officials for purposes of reducing customs duties and sales taxes Statutory interpretation -- ambiguity in statute -- whether appropriate for court to consider title of statute to help resolve ambiguities Statutory interpretation -- ambiguity in statute -- whether court may look at the legislative history of a statute to aid interpretation Indictment -- sufficiency of -- key information to be supplied therein

UNITED STATES OF AMERICA v KAY and MURPHY

United States Court of Appeals, Fifth Circuit
Wiener, Benavides and Dennis, Circuit Judges

February 4 2004

Cases referred to in the judgment

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Appeal from the United States District Court for the Southern District of Texas.

WIENER, Circuit Judge:

Plaintiff-appellant, the United States of America ("government") appeals the district court's grant of the motion of defendants-appellees David Kay and Douglas Murphy ("defendants") to dismiss the Superseding Indictment[1] ("indictment") that charged them with bribery of foreign officials in violation of the Foreign Corrupt Practices Act ("FCPA").[2] In their dismissal motion, defendants contended that the indictment failed to state an offense against them. The principal dispute in this case is whether, if proved beyond a

[1] A copy of the Superseding Indictment is appended hereto in its entirety and identified as Appendix A

[2] 15 U.S.C. § 78dd-1 *et seq.* (2000)

reasonable doubt, the conduct that the indictment ascribed to defendants in connection with the alleged bribery of Haitian officials to understate customs duties and sales taxes on rice shipped to Haiti to assist American-Rice, Inc. in obtaining or retaining business was sufficient to constitute an offense under the FCPA. Underlying this question of sufficiency of the contents of the indictment is the preliminary task of ascertaining the scope of the FCPA, which in turn requires us to construe the statute.

The district court concluded that, as a matter of law, an indictment alleging illicit payments to foreign officials for the purpose of avoiding substantial portions of customs duties and sales taxes to obtain or retain business are not the kind of bribes that the FCPA criminalizes. We disagree with this assessment of the scope of the FCPA and hold that such bribes *could* (but do not necessarily) come within the ambit of the statute. Concluding in the end that the indictment in this case is sufficient to state an offense under the FCPA, we remand the instant case for further proceedings consistent with this opinion. Nevertheless, on remand the defendants may choose to submit a motion asking the district court to compel the government to allege more specific facts regarding the intent element of an FCPA crime that requires the defendant to intend for the foreign official's anticipated conduct in consideration of a bribe (hereafter, the "*quid pro quo*") to produce an anticipated result--here, diminution of duties and taxes--that

would *assist* (or is meant to *assist*) in *obtaining* or *retaining* business (hereafter, the "business nexus element"). If so, the trial court will need to decide whether (1) merely quoting or paraphrasing the statute as to that element (as was done here) is sufficient, or (2) the government must allege additional facts as to just *what* business was sought to be obtained or retained in Haiti and just *how* the intended *quid pro quo* was meant to assist in obtaining or retaining such business. We therefore reverse the district court's dismissal of the indictment and remand for further consistent proceedings.

I. FACTS AND PROCEEDINGS

American Rice, Inc. ("ARI") is a Houston-based company that exports rice to foreign countries, including Haiti. Rice Corporation of Haiti ("RCH"), a wholly owned subsidiary of ARI, was incorporated in Haiti to represent ARI's interests and deal with third parties there. As an aspect of Haiti's standard importation procedure, its customs officials assess duties based on the quantity and value of rice imported into the country. Haiti also requires businesses that deliver rice there to remit an advance deposit against Haitian sales taxes, based on the value of that rice, for which deposit a credit is eventually allowed on Haitian sales tax returns when filed.

In 2001, a grand jury charged Kay with violating the FCPA and subsequently returned the indictment, which charges both Kay and Murphy with 12 counts of FCPA violations. As is readily apparent on its face, the indictment contains detailed factual allegations about (1) the timing and purposes of Congress's enactment of the FCPA, (2) ARI and its status as an "issuer" under the FCPA, (3) RCH and its status as a wholly owned subsidiary and "service corporation" of ARI, representing ARI's interest in Haiti, and (4) defendants' citizenship, their positions as officers of ARI, and their status as "issuers" and "domestic concerns" under the FCPA. The indictment also spells out in detail how Kay and Murphy allegedly orchestrated the bribing of Haitian customs officials to accept false bills of lading and other documentation that intentionally understated by one-third the quantity of rice shipped to Haiti, thereby significantly reducing ARI's customs duties and sales taxes. In this regard, the indictment alleges the details of the bribery scheme's machinations, including the preparation of duplicate documentation, the calculation of bribes as a percentage of the value of the rice not reported, the surreptitious payment of monthly retainers to Haitian officials, and the defendants' purported authorization of withdrawals of funds from ARI's bank accounts with which to pay the Haitian officials, either directly or through intermediaries--all to produce substantially reduced Haitian customs and tax costs to ARI. Further, the indictment alleges discrete facts regarding ARI's domestic incorporation and place of business, as well as the particular instrumentalities of interstate and foreign commerce that defendants used or caused to be used in carrying out the purported bribery.

In contrast, without any factual allegations, the indictment merely paraphrases the one element of the statute that is central to this appeal, only conclusionally accusing defendants of causing payments to be made to Haitian customs officials: for purposes of influencing acts and decisions of such foreign officials in their official capacities, inducing such foreign officials to do and omit to do acts in violation of their lawful duty, and to obtain an improper advantage, in order to *assist* American Rice, Inc. in *obtaining and retaining business* for, and directing business to American Rice, Inc. and Rice Corporation of Haiti. (emphasis added).

Although it recites in great detail the discrete facts that the government intends to prove to satisfy each other element of an FCPA violation, the indictment recites no particularized facts that, if proved, would satisfy the "assist" aspect of the business nexus element of the statute, i.e., the nexus between the illicit tax savings produced by the bribery and the assistance such savings provided or were intended to provide in *obtaining or retaining business* for ARI and RCH. Neither does the indictment contain any factual allegations whatsoever to identify just *what* business in Haiti (presumably some rice-related commercial activity) the illicit customs and tax savings assisted (or were intended to assist) in obtaining or retaining, or just *how* these savings were supposed to assist in such efforts. In other words, the indictment recites no facts that could demonstrate an actual or intended cause-and-effect nexus between reduced taxes and obtaining identified business or retaining identified business opportunities.

In granting defendants' motion to dismiss the indictment for failure to state an offense, the district court held that, as a matter of law, bribes paid to obtain favorable tax treatment are not payments made to "obtain or retain business" within the intendment of the FCPA, and thus are not within the scope of that statute's proscription of foreign bribery.[3] The government timely filed a notice of appeal.

II. ANALYSIS

A. *Standard of Review*

We review *de novo* questions of statutory interpretation, as well as "whether an indictment sufficiently alleges the elements of an offense."[4] As a motion to dismiss an indictment for failure to state an offense is a challenge to the sufficiency of the indictment, we are required to "take the allegations of the indictment as true and to determine whether an offense has been stated."[5]

> "[I]t is well settled that an indictment must set forth the offense with sufficient clarity and certainty to apprise the accused of the crime with which he is charged."[6]

The test for sufficiency is "not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimum constitutional

standards"; namely, that it

> "[(1)] contain [ ] the elements of the offense charged and fairly inform [ ] a defendant of the charge against which he must defend, and [(2)], enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[7]

Because an offense under the FCPA requires that the alleged bribery be committed for the purpose of inducing foreign officials to commit unlawful acts, the results of which will assist in obtaining or retaining business in their country, the questions before us in this appeal are (1) whether bribes to obtain illegal but favorable tax and customs treatment can ever come within the scope of the statute, and (2) if so, whether, in combination, there are minimally sufficient facts alleged in the indictment to inform the defendants regarding the nexus between, on the one hand, Haitian taxes avoided through bribery, and, on the other hand, assistance in getting or keeping some business or business opportunity in Haiti.

B. *Words of the FCPA*

"[T]he starting point for interpreting a statute is the language of the statute itself."[8] When construing a criminal statute, we "must follow the plain and

[3] *United States v. Kay,* 200 F.Supp.2d 681, 686 (S.D.Tex.2002)

[4] *United States v. Santos-Riviera,* 183 F.3d 367, 369 (5th Cir.1999).

[5] *United States v. Hogue,* 132 F.3d 1087, 1089 (5th Cir.1998)

[6] *United States v. Bearden,* 423 F.2d 805, 810 (5th Cir.1970) (citations omitted).

[7] *United States v. Ramirez,* 233 F.3d 318, 323 (5th Cir.2000)

[8] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)

unambiguous meaning of the statutory language."[9] Terms not defined in the statute are interpreted according to their "ordinary and natural meaning ... as well as the overall policies and objectives of the statute."[10] Furthermore, "a statute must, if possible, be construed in such fashion that every word has some operative effect."[11] Finally, we have found it "appropriate to consider the title of a statute in resolving putative ambiguities."[12] If, after application of these principles of statutory construction, we conclude that the statute is ambiguous, we may turn to legislative history. For the language to be considered ambiguous, however, it must be "susceptible to more than one reasonable interpretation"[13] or "more than one accepted meaning."[14]

The FCPA prohibits payments to foreign officials for purposes of:
(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage ... in order to assist [the company making the payment] in obtaining or retaining business for or with, or directing business to, any person.[15]

None contend that the FCPA criminalizes every payment to a foreign official: It criminalizes only those payments that are intended to (1) influence a foreign official to act or make a decision in his official capacity, or (2) induce such an official to perform or refrain from performing some act in violation of his duty, or (3) secure some wrongful advantage to the payor. And even then, the FCPA criminalizes these kinds of payments only if the result they are intended to produce--their *quid pro quo*--will *assist* (or is intended to assist) the payor in efforts to get or keep some *business* for or with "any person." Thus, the first question of statutory interpretation presented in this appeal is whether payments made to foreign officials to obtain unlawfully reduced customs duties or sales tax liabilities can ever fall within the scope of the FCPA, i.e., whether the illicit payments made to obtain a reduction of revenue liabilities can *ever* constitute the kind of bribery that is proscribed by the FCPA. The district court answered this question in the negative; only if we answer it in the affirmative will we need to analyze the sufficiency of the factual allegations of the indictment as to the one element of the crime contested here.

The principal thrust of the defendants' argument is that the business nexus element, i.e., the "assist ... in obtaining or retaining business" element, narrowly limits the statute's applicability to those payments that are intended to obtain a foreign official's approval of a bid for a new government contract or the renewal of an existing government contract. In contrast, the government

[9] *Salinas v. United States,* 522 U.S. 52, 57, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (citations and quotation marks omitted).

[10] *United States v. Lowe,* 118 F.3d 399, 402 (5th Cir.1997) (citations omitted).

[11] *United States v. Nordic Village, Inc.,* 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (recognizing this principle as a "settled rule"); *United States v. Naranjo,* 259 F.3d 379, 383 (5th Cir.2001) (*citing Nordic Village, Inc.*).

[12] *United States v. Marek,* 238 F.3d 310, 321 (5th Cir.2001)

[13] *Lowe,* 118 F.3d at 402

[14] *United Serv. Auto. Ass'n v. Perry,* 102 F.3d 144, 146 (5th Cir.1996)

[15] 15 U.S.C. § 78dd-1(a)(1)

insists that, in addition to payments to officials that lead directly to getting or renewing business contracts, the statute covers payments that indirectly advance ("assist") the payor's goal of obtaining or retaining foreign business with or for

some person. The government reasons that paying reduced customs duties and sales taxes on imports, as is purported to have occurred in this case, is the type of "improper advantage" that *always* will assist in obtaining or retaining business in a foreign country, and thus is always covered by the FCPA.

In approaching this issue, the district court concluded that the FCPA's language is ambiguous, and proceeded to review the statute's legislative history.[16] We agree with the court's finding of ambiguity for several reasons. Perhaps our most significant statutory construction problem results from the failure of the language of the FCPA to give a clear indication of the exact scope of the business nexus element; that is, the proximity of the required nexus between, on the one hand, the anticipated results of the foreign official's bargained-for action or inaction, and, on the other hand, the assistance provided by or expected from those results in helping the briber to obtain or retain business. Stated differently, how attenuated can the linkage be between the effects of that which is sought from the foreign official in consideration of a bribe (here, tax minimization) and the briber's goal of finding assistance or obtaining or retaining foreign business with or for some person, and still satisfy the business nexus element of the FCPA?

Second, the parties' diametrically opposed but reasonable contentions demonstrate that the ordinary and natural meaning of the statutory language *is* genuinely debatable and thus ambiguous. For instance, the word "business" can be defined at any point along a continuum from "a volume of trade," to "the purchase and sale of goods in an attempt to make a profit," to "an assignment" or a "project."[17] Thus, dictionary definitions can support both
(1) the government's broader interpretation of the business nexus language as encompassing any type of commercial activity, and (2) defendants' argument that "obtain or retain business" connotes a more pedestrian understanding of establishing or renewing a particular commercial arrangement. Similarly, although the word "assist" suggests a somewhat broader statutory scope,[18] it does not connote specificity or define either how proximate or how remote the foreign official's anticipated actions that constitute assistance must or may be to the business obtained or retained.

16 *Kay,* 200 F.Supp.2d at 683. Neither the district court nor this court concludes that the ambiguity in the FCPA even closely approaches the level of *vagueness,* in the constitutional criminal sense, that could lead to declaring the statute void for vagueness.

17 *Webster's Encyclopedic Unabridged Dictionary,* at 201 (1989).

Invoking basic economic principles, the SEC reasoned in its amicus brief that securing reduced taxes and duties on imports through bribery enables ARI to reduce its cost of doing business, thereby giving it an "improper advantage" over actual or potential competitors, and enabling it to do more business, or remain in a market it might otherwise leave.

Third, absent a firm understanding of just what "obtaining or retaining business"

or "assist" actually include, the parties' remaining arguments prove little. For instance, the separation of the statutory prohibition into two aspects:
(1) seeking to induce a foreign official to act in consideration of a bribe (*quid pro quo*) (2) for purposes of assisting in obtaining or retaining business (business nexus) -- provides little insight into the precise scope of the statute. The government may be correct in its contention that the *quid pro quo* requirement expands the scope of the statute, because Congress otherwise could have dispensed with the *quid pro quo* requirement entirely and simply prohibited only those payments resulting directly in obtaining or retaining business contracts. It is at least plausible, however, as defendants argue, that the *quid pro quo* requirement was not necessarily meant to expand the statutory scope, but instead was meant to distinguish acts of a foreign official in his official capacity from acts in his private capacity. Similarly, defendants might be right in urging that the business nexus element restricts the scope of the statute to a smaller universe of payments than those made to obtain *any* advantage; yet it is conceivable that this restriction was included to exempt more marginal facilitating payments, but not the types of payments that defendants are accused of making.

Neither does the remainder of the statutory language clearly express an exclusively broad or exclusively narrow understanding of the business nexus element. The extent to which the exception for routine governmental action ("facilitating payments" or "grease") is narrowly drawn reasonably suggests that Congress was carving out very limited categories of permissible payments from an otherwise broad statutory prohibition.[19] As defendants suggest, however, another plausible implication for including an express statutory explanation that routine governmental action does not include decisions "to award new business to or to continue business with a particular party,"[20] is that Congress was focusing entirely on identifiable decisions made by foreign officials in granting or renewing specific business arrangements in foreign countries, and not on a more general panoply of competitive business advantages.

[19] Section 78dd-1(b) excepts from the statutory scope "any facilitating or expediting payment to a foreign official ... the purpose of which is to expedite or to service the performance of a routine governmental action by a foreign official...." 15 U.S.C. § 78dd-1(b). Section 78dd-1(f)(3)(A), in turn, provides that: [T]he term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--
(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature. 15 U.S.C. § 78dd-1(f)(3)(A).[20] 15 U.S.C. § 78dd-1(f)(3)(B)

The fourth and final interpretive factor, the statute's title --"Foreign Corrupt Practices Act" --is more suggestive of a relatively broad application of its provisions, but only slightly so. By itself, such a generic title fails to make one interpretation of the statutory language more persuasive than another, much less establish one as the only reasonable construction of the statute.[21] In sum, neither the ordinary meaning nor the provisions surrounding the disputed text are sufficiently clear to make the statutory language susceptible of but one reasonable interpretation. Inasmuch as Congress chose to phrase the business nexus requirement obliquely, and to say nothing to suggest how remote or how proximate the business nexus must be, we cannot conclude on the basis of the provision itself that the statute is either as narrow or as expansive as the parties respectively claim.

C. *FCPA Legislative History* As the statutory language itself is amenable to more than one reasonable interpretation, it is ambiguous as a matter of law. We turn therefore to legislative history in our effort to ascertain Congress's true intentions.

1977 Legislative History
Congress enacted the FCPA in 1977, in response to recently discovered but widespread bribery of foreign officials by United States business interests. Congress resolved to interdict such bribery, not just because it is morally and economically suspect, but also because it was causing foreign policy problems for the United States.[22] In particular, these concerns arose from revelations that United States defense contractors and oil companies had made large payments to high government officials in Japan, the Netherlands, and Italy.[23] Congress also discovered that more than 400 corporations had

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Defendants also contend that the few reported decisions under the FCPA lend additional support to their narrow reading of the statutory language, because each of these cases involved payments linked to the acquisition or renewal of contracts or commercial agreements. *See, e.g., United States v. Liebo,* 923 F.2d 1308, 1311-12 (8th Cir.1991) (defendant paid gifts to foreign official in exchange for contract approval); *United States v. Castle,* 925 F.2d 831, 832 (5th Cir.1991) (defendants made a payment to win bid to provide buses to Canadian provincial government). According to defendant, these cases did not involve payments made to influence some aspect of existing business, i.e., some particular cost of doing business. Defendants nevertheless concede, and the government reiterates, that none of these decisions squarely addresses the scope of the "obtain and retain business" language.

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The House Committee stated that such bribes were "counter to the moral expectations and values of the American public," "erode[d] public confidence in the

integrity of the free market system," "embarrass[ed] friendly governments, lower[ed] the esteem for the United States among the citizens of foreign nations, and lend[ed] credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." H.R.Rep. No. 95-640, at 4-5 (1977); S.Rep. No. 95-114, at 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100-01.[23] H.R.Rep. No. 95-640, at 5; S.Rep. No. 95-114, at 3.
made questionable or illegal payments in excess of $300 million to foreign officials for a wide range of favorable actions on behalf of the companies.[24]

In deciding to criminalize this type of commercial bribery, the House and Senate each proposed similarly far-reaching, but non-identical, legislation. In its bill, the House intended "broadly [to] prohibit[ ] transactions that are *corruptly* intended to induce the recipient to use his or her influence to affect *any* act or decision of a foreign official...."[25] Thus, the House bill contained no limiting "business nexus" element.[26] Reflecting a somewhat narrower purpose, the Senate expressed its desire to ban payments made for the purpose of inducing foreign officials to act "so as to direct business to any person, maintain an established business opportunity with any person, divert any business opportunity from any person or influence the enactment or promulgation of legislation or regulations of that government or instrumentality."[27]

At conference, compromise language "clarified the scope of the prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official ... so as to assist an issuer in obtaining, retaining or directing business to any person."[28] In the end, then, Congress adopted the Senate's proposal to prohibit only those payments designed to induce a foreign official to act in a way that is intended to facilitate ("assist") in obtaining or retaining of business.

Congress expressly emphasized that it did not intend to prohibit "so-called grease or facilitating payments,"[29] such as "payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties."[30] Instead of making an express textual exception for these types of non-covered payments, the respective committees of the two chambers sought to distinguish permissible grease payments from prohibited bribery by only prohibiting payments that induce an official to act "corruptly," i.e., actions requiring him "to misuse his official position" and his discretionary authority,[31] not those "essentially ministerial" actions that "merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[32]

[24] H.R.Rep. No. 95-640, at 4; S.Rep. No. 95-114, at 3.

[25] H.R.Rep. No. 95-640, at 7 (emphasis added).

[26] H.R. Conf. Rep. No. 95-831, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4124-25.

[27] S.Rep. No. 95-114, at 17; S. 305, 95th Cong. § 103 (proposing to ban payments that induce action by a foreign official so as "to assist ... in obtaining or retaining business for or with, or directing business to, any person, or influencing legislation or regulations of that government or instrumentality").

[28] H.R. Conf. Rep. 95-831, at 12.

[29] H.R.Rep. No. 95-640, at 4; S.Rep. No. 95-114, at 10

[30] S.Rep. No. 95-114, at 10.

[31] H.R.Rep. No. 95-640, at 7-8; S.Rep. No. 95-114, at 10

[32] H.R.Rep. No. 95-640, at 8. Similarly, when the House defined "foreign official" it excluded those individuals "whose duties are essentially ministerial or clerical." *Id.*

In short, Congress sought to prohibit the type of bribery that (1) prompts officials to misuse their discretionary authority and (2) disrupts market efficiency and United States foreign relations,[33] at the same time recognizing that smaller payments intended to expedite ministerial actions should remain outside of the scope of the statute. The Conference Report explanation, on which the district court relied to find a narrow statutory scope, truly offers little insight into the FCPA's precise scope, however; it merely parrots the statutory language itself by stating that the purpose of a payment must be to induce official action "so as to assist an issuer in obtaining, retaining or directing business to any person."[34]

To divine the categories of bribery Congress did and did not intend to prohibit, we must look to the Senate's proposal, because the final statutory language was drawn from it,[35] and from the SEC Report on which the Senate's legislative proposal was based.[36] In distinguishing among the types of illegal payments that United States entities were making at the time, the SEC Report identified four principal categories: (1) payments "made in an effort to procure special and unjustified favors or advantages in the enactment or *administration of the tax* or other *laws*" of a foreign country; (2) payments "made with the intent to assist the company in obtaining or retaining government contracts"; (3) payments "to persuade low-level government officials to perform functions or services which they are obliged to perform as part of their governmental responsibilities, but which they may refuse or delay unless compensated" ("grease"), and (4) political contributions.[37] The SEC thus exhibited concern about a wide range of questionable payments (explicitly including the kind at issue here) that were resulting in millions of dollars being recorded falsely in corporate books and records.[38]

As noted, the Senate Report explained that the statute should apply to payments intended "to *direct business* to any person, *maintain an established business opportunity* with any person, divert any business opportunity from any person or

influence the enactment or promulgation of legislation or regulations of that government or instrumentality."[39] We observe initially that

[33] *See Lamb v. Phillip Morris, Inc.,* 915 F.2d 1024, 1029 (6th Cir.1990) (finding that "the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets"). [34] H.R. Conf. Rep. 95-831, at 12.

As the House intended its proposed legislation to apply even more broadly to payments soliciting *any* corrupt act by a foreign official, we assume that any restrictions of scope emanated from the Senate version. [36] Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976 [hereinafter, "SEC Report"]. The Senate Report explained that its bill was identical to the bill introduced the year before, which in turn, was based substantially on the SEC Report and its recommendations. S.Rep. No. 95-114, at 2. [37] SEC Report, at 25-27 (emphasis added). [38] *Id.* at a (Introduction), 25-27 [39] S.Rep. No. 95-114, at 17 (emphasis added).

the Senate only loosely addressed the categories of conduct highlighted by the SEC Report. Although the Senate's proposal picked up the SEC's concern with a business nexus, it did not expressly cover bribery influencing the administration of tax laws or seeking favorable tax treatment. It is clear, however, that even though the Senate was particularly concerned with bribery intended to secure new business, it was also mindful of bribes that influence legislative or regulatory actions, and those that maintain established business opportunities, a category of economic activity separate from, and much more capacious than, simply "directing business" to someone.

The statute's ultimate language of "obtaining or retaining" mirrors identical language in the SEC Report. But, whereas the SEC Report highlights payments that go toward "obtaining or retaining *government contracts,*" the FCPA, incorporating the Senate Report's language, prohibits payments that assist in obtaining or retaining *business,* not just government contracts. Had the Senate and ultimately Congress wanted to carry over the exact, narrower scope of the SEC Report, they would have adopted the same language. We surmise that, in using the word "business" when it easily could have used the phraseology of SEC Report, Congress intended for the statute to apply to bribes beyond the narrow band of payments sufficient only to "obtain or retain government contracts." The Senate's express intention that the statute apply to corrupt payments that *maintain* business opportunities also supports this conclusion.

For purposes of deciding the instant appeal, the question nevertheless remains whether the Senate, and concomitantly Congress, intended this broader statutory scope to encompass the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states. To reach this conclusion, we must ask whether Congress's remaining expressed desire to prohibit bribery aimed at getting assistance in retaining business or maintaining business

opportunities was sufficiently broad to include bribes meant to affect the administration of revenue laws. When we do so, we conclude that the legislative intent was so broad.

Congress was obviously distraught not only about high profile bribes to high-ranking foreign officials, but also by the pervasiveness of foreign bribery by United States businesses and businessmen. Congress thus made the decision to clamp down on bribes intended to prompt foreign officials to misuse their discretionary authority for the benefit of a domestic entity's business in that country. This observation is not diminished by Congress's understanding and accepting that relatively small facilitating payments were, at the time, among the accepted costs of doing business in many foreign countries.[40]

[40] We recognize that all payments to foreign officials exist on a continuum in which any payment, even if only to connect telephone service in two days instead of two weeks, marginally improves a company's competitive advantage in a foreign country. Nevertheless, Congress was principally concerned about payments that prompt an official to deviate from his official duty, not necessarily payments that get an official to perform properly those usually ministerial duties required of his office. As explained
In addition, the concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid. Obviously, a commercial concern that bribes a foreign government official to award a construction, supply, or services contract violates the statute. Yet, there is little difference between this example and that of a corporation's lawfully obtaining a contract from an honest official or agency by submitting the lowest bid, and--either before or after doing so--bribing a different government official to reduce taxes and thereby ensure that the under-bid venture is nevertheless profitable. Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business. This demonstrates that the question whether the defendants' alleged payments constitute a violation of the FCPA truly turns on whether these bribes were intended to lower ARI's cost of doing business in Haiti enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations that ARI already had there, so as to come within the scope of the business nexus element as Congress used it in the FCPA. Answering this fact question, then, implicates a matter of proof and thus evidence.

In short, the 1977 legislative history, particularly the Senate's proposal and the SEC Report on which it relied, convinces us that Congress meant to prohibit a

range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements. On the other end of the spectrum, this history also demonstrates that Congress explicitly excluded facilitating payments (the grease exception). In thus limiting the exceptions to the type of bribery covered by the FCPA to this narrow category, Congress's intention to cast an otherwise wide net over foreign bribery suggests that Congress intended for the FCPA to prohibit all other illicit payments that are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business for some person. The congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement. In light of our reading of the 1977 legislative history, the subsequent 1988 and 1998 legislative history is only important to our analysis to the extent it confirms or conflicts with our initial conclusions about the scope of the statute.

infra, Congress enacted amendments in 1988 in an effort to reflect just how limited it envisioned the grease exception to be.

1988 Legislative History

After the FCPA's enactment, United States business entities and executives experienced difficulty in discerning a clear line between prohibited bribes and permissible facilitating payments.[41] As a result, Congress amended the FCPA in 1988, expressly to clarify its original intent in enacting the statute. Both houses insisted that their proposed amendments only clarified ambiguities "without changing the basic intent or effectiveness of the law."[42]

In this effort to crystallize the scope of the FCPA's prohibitions on bribery, Congress chose to identify carefully two types of payments that are not proscribed by the statute. It expressly excepted payments made to procure "routine governmental action" (again, the grease exception),[43] and it incorporated an affirmative defense for payments that are legal in the country in which they are offered or that constitute bona fide expenditures directly relating to promotion of products or services, or to the execution or performance of a contract with a foreign government or agency.[44]

We agree with the position of the government that these 1988 amendments illustrate an intention by Congress to identify very limited exceptions to the kinds of bribes to which the FCPA does not apply. A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions. Routine governmental action, for instance, includes "obtaining permits, licenses, or other official documents to

qualify a person to do business in a foreign country," and "scheduling inspections associated with contract performance or inspections related to transit of goods across country."[45] Therefore, routine governmental action does not include the issuance of *every* official document or *every* inspection, but only (1) documentation that qualifies a party to do business

[41] S.Rep. No. 100-85, at 53 (1987) (stating that "the method chosen by Congress in 1977 to accomplish [the task of distinguishing grease payments from bribery] has been difficult to apply in practice"). [42] *Id.* at 54; H.R.Rep. No. 100-40, pt. 2, at 77 (1987) (stating that the amendments, particularly the exception for facilitating payments, "will reflect current law and Congressional intent more clearly").

[44] 15 U.S.C. §§ 78dd-1(b) & (f)(3)(A). *See supra* note 19 for language of these subsections 15 U.S.C. § 78dd-1(c). The subsection provides in full: It shall be an affirmative defense to actions under subsections (a) or (g) of this section that--
(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services;or

(B) the execution or performance of a contract with a foreign government or agency thereof. *Id.*

[45] 15 U.S.C. § 78dd-1(f)(3)(A)

and (2) scheduling an inspection--very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries. In contrast, the FCPA uses broad, general language in prohibiting payments to procure assistance for the payor in obtaining or retaining business, instead of employing similarly detailed language, such as applying the statute only to payments that attempt to secure or renew particular government contracts. Indeed, Congress had the opportunity to adopt narrower language in 1977 from the SEC Report, but chose not to do

[46] so.

Defendants argue, nevertheless, that Congress's decision to reject House-proposed amendments to the business nexus element constituted its implicit rejection of such a broad reading of the statute. The House bill proposed new language to explain that payments for "obtaining or retaining business" also includes payments made for the "procurement of legislative, judicial, regulatory,

or other action in seeking more favorable treatment by a foreign government."[47] Indeed, defendants assert the proposed amendment itself shows that Congress understood the business nexus provision to have narrow application; otherwise, there would have been no need to propose amending it.

Contrary to defendants' contention, the decision of Congress to reject this language has no bearing on whether "obtaining or retaining business" includes the conduct at issue here. In explaining Congress's decision not to include this proposed amendment in the business nexus requirement, the Conference Report stated that the "retaining business" language was not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment....*
The term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.[48]

At first blush, this statement would seem to resolve the instant dispute in favor of the government; however, the district court interpreted Congress's decision to leave the business nexus requirement unchanged as a determination not to extend the scope of the statute. The court thus declined to defer to the report

[46] Defendants argue that Congress intended to maintain the statute's narrow scope by excluding from the routine governmental action exception "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party...." 15 U.S.C. § 78dd-1(f)(3)(B). We disagree with defendants' contention that the language these amendments indicates a narrow statutory scope. Read in light of Congress's original desire to stamp out foreign bribery run amok, we find that its intention in 1988 to exclude from the grease exception "decision[s] by a foreign official whether, or on what terms ... to continue business with a particular party" replicates the equally capacious language of prohibition in the 1977 legislative history.

[47] H.R. Conf. Rep. 100-576, at 918 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1951

[48] H.R. Conf. Rep. No. 100-576, at 918-19 (emphasis added).

because, in the court's estimation, the legislative history "consist[ed] of an after-the-fact interpretation of the term 'retaining business' by a subsequent Congress more than ten years after the enactment of the original language."[49]

We agree that, as a general matter, subsequent legislative history about unchanged statutory language would deserve little or no weight in our analysis. The Supreme Court has instructed that "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."[50] In this case, moreover, Congress's enactment of subsequent legislation did not include changes to the business nexus requirement itself.

Nevertheless, the Supreme Court has also stated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[51] And, we have concluded that Congress is "at its most authoritative [when] adding complex and sophisticated amendments to an already complex and sophisticated act."[52] Although in 1988 Congress refused to alter the business nexus requirement itself, it did enact exceptions and defenses to the statute's applicability, both of which the pertinent Conference Report language helps to explain vis-à-vis the statute's overall scope. And it must be remembered that clarifying the scope of the 1977 law was the overarching purpose of Congress in enacting the 1988 amendments.[53] Thus, the legislative history that the district court rejected as irrelevant in fact explains how the 1988 amendments relate to the original scope of the statute and concomitantly to the business nexus element.

First, the Conference Report expresses what is implied by the new affirmative defense for bona fide expenditures for the execution or performance of a contract. The creation of a defense for *bona fide* payments strongly implies that *corrupt,* non-bona-fide payments related to contract execution and performance have always been and remain prohibited. Instead of leaving this prohibition implicit, though, the Conference Report's description of "retaining business" explained that this phrase, and thus the statutory ambit, includes "a prohibition against *corrupt* payments related to the execution or performance of contracts...."[54]

[49] *Kay,* 200 F.Supp.2d at 685 [50] *Central Bank of Denver v. First Interstate Bank of Denver,* 511 U.S. 164, 185, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (citations omitted). [51] *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380-81, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). [52] *Mount Sinai Hosp. v. Weinberger,* 517 F.2d 329, 343 (5th Cir.1975) [53] We recognize that the Supreme Court has warned repeatedly that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n,* 447 U.S. at 117, 100 S.Ct. 2051 (citations omitted). The amendments Congress passed in 1988, however, expressly sought to clarify Congress's intent from 1977. Thus, the views and amendments of Congress in 1988 are necessary to our analysis of the precise scope of the original law. [54] H.R. Conf. Rep. 100-576, at 918 (emphasis added).

Similarly, in its 1988 statutory description of routine governmental action, Congress stated that this exception *does not* include decisions about "whether, or on what terms ... to continue business with a particular party,"[55] which must mean, conversely, that decisions that do relate to "continu[ing] business with a particular party" *are* covered by, i.e., are not excepted from, the scope of the statute. The Conference Report, in turn, states that "retaining business" means "the carrying out of existing business," thereby simply repeating statutory intent

without explaining it.[56] We discern no meaningful distinction between the phrase "continuing business" in the statutory text, and "carrying out of existing business" in the Conference Report.

Third, the Conference Report states that "retaining business" should not be construed so broadly as to include lobbying or "other normal representations to government officials."[57] This statement directly reflects the Conference Committee's decision not to include language from the House bill focusing on legislature and regulatory activity so as to avoid any interpretation that might curb legitimate lobbying or representations intended to influence legislative, judicial, regulatory, or other such action. Thus, like other language of the report, far from being irrelevant to Congress's intentions in 1988, this provides a direct explanation of why Congress elected not to include the newly proposed language.

The remaining contested language in the 1988 Conference Report states that "retaining business" includes--covers--payments such as those made "to a foreign official *for the purpose of obtaining more favorable tax treatment.*"[58] We know that the SEC was concerned specifically with these types of untoward payments in 1977, and that Congress ultimately adopted the more generally-worded prohibition against payments designed to *assist* in obtaining or retaining business. This specific reference in the Conference Report therefore appears to reflect the concerns that initially motivated Congress to enact the FCPA. But even if this language is not dispositive of the question, the rest of the passage does reflect Congress's purpose in passing the 1988 amendments, and therefore deserves weight in our analysis.

Finally, it is inaccurate to suggest, as defendants do, that this report language constituted an attempt to insert by subterfuge a meaning for "retaining business" that Congress had expressly rejected in conference. The only language that Congress chose not to adopt regarding the business nexus requirement concerned payments for primarily legislative, judicial, and regulatory advantages.[59] Corrupt payments "related to the execution or

[55] 15 U.S.C. § 78dd-1(f)(3)(B)

[56] H.R. Conf. Rep. No. 100-576, at 918.

[57] *Id.* at 918-19.

[58] *Id.* at 918 (emphasis added).

[59] We recognize that the House proposal prohibited payments for "procurement of legislative, judicial, regulatory, or *other* action in seeking more favorable treatment by a foreign government." H.R.Rep. No. 100-40, pt. 2, at 75. Applying the *ejusden generis* maxim, we must conclude that by using a term as vague as "other action" directly after the words "legislative, judicial, or regulatory," Congress intended to include only actions quite similar to these types in its amendment, not any other

performance of contracts or the carrying out of existing business" have no direct connection with the proposed language on legislative, judicial, and regulatory action, and thus were not part of the proposed amendment.[60]

3. *1998 Legislative History* In 1998, Congress made its most recent adjustments to the FCPA when the Senate ratified and Congress implemented the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"). Article 1.1 of the Convention prohibits payments to a foreign public official to induce him to "act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business *or other improper advantage* in the conduct of international business."[61] When Congress amended the language of the FCPA, however, rather than inserting "any improper advantage" immediately following "obtaining or retaining business" within the business nexus requirement (as does the Convention), it chose to add the "improper advantage" provision to the original list of abuses of discretion in consideration for bribes that the statute proscribes. Thus, as amended, the statute now prohibits payments to foreign officials not just to buy any act or decision, and not just to induce the doing or omitting of an official function "to assist ... in obtaining or retaining business for or with, or directing business to, any person,"[62] but also the making of a payment to such a foreign official to secure an "improper advantage" that will assist in obtaining or retaining business.[63]

The district court concluded, and defendants argue on appeal, that merely by adding the "improper advantage" language to the two existing kinds of prohibited acts acquired in consideration for bribes paid, Congress "again declined to amend the 'obtain or retain' business language in the FCPA."[64] In contrast, the government responds that Congress's choice to place the Convention language elsewhere merely shows that Congress already intended for the business nexus requirement to apply broadly, and thus declined to be redundant.

The Convention's broad prohibition of bribery of foreign officials likely includes the types of payments that comprise defendants' alleged conduct. The commentaries to the Convention explain that " '[o]ther improper advantage' refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory

conceivable action (aside from discrete contractual arrangements) that might result in favorable treatment from a foreign government.

[60] H.R. Conf. Rep. No. 100-576, at 918.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1.1, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, 4 (1998) (emphasis added).[62] *See* 15 U.S.C. § 78dd-1(a)(1)

[63] *Id*

[64] *Kay,* 200 F.Supp.2d at 686

requirements."[65] Unlawfully reducing the taxes and customs duties at issue here to a level substantially below that which ARI was legally obligated to pay surely constitutes "something [ARI] was not clearly entitled to," and was thus potentially an "improper advantage" under the Convention.

As we have demonstrated, the 1977 and 1988 legislative history already make clear that the business nexus requirement is not to be interpreted unduly narrowly. We therefore agree with the government that there really was no need for Congress to add "or other improper advantage" to the requirement.[66] In fact, such an amendment might have inadvertently swept grease payments into the statutory ambit--or at least created new confusion as to whether these types of payments were prohibited--even though this category of payments was excluded by Congress in 1977 and remained excluded in 1988; and even though Congress showed no intention of adding this category when adopting its 1998 amendments.[67] That the Convention, which the Senate ratified without reservation and Congress implemented, would also appear to prohibit the types of payments at issue in this case only bolsters our conclusion that the kind of conduct allegedly engaged in by defendants can be violative of the statute.[68]

[65] Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. at 8 [hereinafter "Commentaries"].

Although Congress intended to expand the scope of the FCPA in its implementation of the Convention, such expansion did not clearly implicate the business nexus element. Obviously, Congress added "any improper advantage" to the quid pro quo requirement. Other ways in which Congress intended to expand FCPA coverage included: (1) amending the statute to apply to "any person," instead of the more limited category of issuers registered under the 1934 Act and domestic concerns; (2) expanding the definition of "foreign official" to include officials of public international organizations; and (3) extending the FCPA to cover "acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States." S.Rep. No. 105-277, at 2-3.

[67] Even though the Commentaries to the Convention also excepted small facilitation payments from its scope, a change in the business nexus requirement to include "other improper advantage" still may have created undue confusion as to whether payments previously allowed were now prohibited by the statute, as the Convention's precise understanding of "facilitating payments" may ultimately differ with Congress's.

[68] Indeed, given the United States's ratification and implementation of the Convention without any reservation, understandings or alterations specifically pertaining to its scope, we would find it difficult to interpret the statute as narrowly as the defendants suggest: Such a construction would likely create a conflict with our international treaty obligations, with which we presume Congress meant to comply fully. *See* Restatement (Third) of Foreign Relations Law, § 115, cmt. a (1987) ("It is generally

assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law, or by making it impossible for the United States to carry out its obligations."); *Boureslan v. Aramco,* 857 F.2d 1014, 1023 (5th Cir.1988) (King, J. dissenting) (recognizing the "presumption that Congress does not intend to violate international law"). We recognize that there may be some variation in scope between the Convention and the FCPA. The FCPA prohibits payments inducing official action that "assist[s] ... in obtaining or retaining business"; the Convention prohibits payments that induce official action "to obtain or retain business or other improper advantage in the conduct of international business." Potential variation exists

4. *Summary* Given the foregoing analysis of the statute's legislative history, we cannot hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts. Instead, we hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage. In 1977, Congress was motivated to prohibit rampant foreign bribery by domestic business entities, but nevertheless understood the pragmatic need to exclude innocuous grease payments from the scope of its proposals. The FCPA's legislative history instructs that Congress was concerned about both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country; and that Congress was aware that this type includes illicit payments made to officials to obtain favorable but unlawful tax treatment.

Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country. Finally, Congress's intention to implement the Convention, a treaty that indisputably prohibits any bribes that give an advantage to which a business entity is not fully entitled, further supports our determination of the extent of the FCPA's scope.

Thus, in diametric opposition to the district court, we conclude that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription. We hasten to add, however, that this conduct does not automatically constitute a violation of the FCPA: It still must be shown that the bribery was intended to produce an effect--here, through tax savings--that would "assist in obtaining or retaining business."

D. *Sufficiency of the Indictment* As in every indictment, the instant indictment's allegations must clearly inform the defense of what it is that the government intends to prove in satisfying each element of the crime, and must enable the defendant to assert double jeopardy and not be subject to prosecution for charges not presented to the grand jury. Here, the question of sufficiency of the

factual allegations centers

because it is unclear whether the Convention's "other improper advantage in the conduct of international business" language requires a business nexus to the same extent as does the FCPA. This case, however, does not require us to address potential discrepancies (including whether they exist) between the scope of the Convention and the scope of the statute, i.e., payments that clearly fall outside of the FCPA but clearly fall within the Convention's prohibition or vice versa, because we have already concluded that the type of bribery engaged in by defendants has the potential of violating the statute.
on the business nexus element of the crime, viz., the producing-cause relationship between the substantial avoidance or evasion of duties and taxes and getting or keeping business in Haiti. This, in turn, poses the question, what allegations of the indictment, if any, so inform the defendants of the government's intended proof of such linkage as to be sufficient for mounting a defense?[69] Because the district court determined that the alleged bribes are of a type that can never be covered by the FCPA, that court never reached or addressed the sufficiency of the indictment vis-à-vis the business nexus element. We shall do so now in an effort to assist the district court's proceedings on remand.

We observe as a preliminary matter that this is the kind of case that a relatively few reported opinions have analyzed to determine whether an indictment that sets out the elements of the offense charged *merely by tracking the words of the statute itself,* is insufficient. Most reported opinions that have addressed this issue appear to approve the practice of tracking the statute as long as the words used expressly set out all of the elements necessary to constitute the offense.[70] The cases in which an indictment that parrots the statute is held to be insufficient turn on a determination that the factual information that is *not* alleged in the indictment goes to the very *core of criminality* under the statute.

The Supreme Court took this approach in *Russell v. United States,*[71] in which it found indictments defective because the allegations under 2 U.S.C. § 192, which prohibits witnesses before congressional committees from "refus[ing] to answer any question pertinent to the question under inquiry,"[72] failed to identify the "question under inquiry." The Court ruled that the "core of criminality" under the statute was the pertinency to the subject under inquiry of the question a witness refused to answer.[73] The Court stated:

> "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute".[74]

The Court concluded that the indictments failed this test because, even though they did list the questions that the defendants had refused to answer, they failed totally to specify the topic under inquiry, which was the key to the

[69] See, e.g., *United States v. Richards,* 204 F.3d 177, 192 (5th Cir.2000) (finding that an indictment was sufficient, despite the supposed failure to allege clearly the materiality element of the offense, because the facts alleged "warrant[ed] an inference that the false statements were material") (citation omitted).

[70] See, e.g., *United States v. Davis,* 336 F.3d 920, 922-24 (9th Cir.2003); *United States v. Akers,* 215 F.3d 1089, 1101 (10th Cir.2000); *United States v. Monus,* 128 F.3d 376, 388 (6th Cir.1997); *United States v. Cochran,* 17 F.3d 56, 61 (3d Cir.1994); *United States v. Chandler,* 996 F.2d 1073, 1097 (11th Cir.1993); *United States v. Young,* 618 F.2d 1281, 1286 (8th Cir.1980).

[71] 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)

[72] *Id.* at 752 n. 2, 82 S.Ct. 1038

[73] *Id.* at 764, 82 S.Ct. 1038.

[74] *Id.* at 771, 82 S.Ct. 1038

legality or illegality of the defendants' acts.[75] In short, the defendants faced trial with the "chief issue undefined."[76]

The First Circuit, in *United States v. Murphy*[77], followed *Russell* to invalidate an indictment that charged the defendant with threatening a particular witness to influence his testimony in an official proceeding. The indictment quoted the statute,[78] and identified the threatened witnesses and the date of the threat.[79] The indictment did not, however, identify any official proceeding. In invalidating the indictment for that omission, the First Circuit concluded that the missing information went to the core of criminality under the statute. Without that information, reasoned the *Murphy* court, the defense did not know what proceeding the grand jury was charging the defendants with attempting to influence.[80]

United States v. Pirro[81] exemplifies the difficulties courts confront with this kind of issue. In that case, the indictment charged violations of section 7206 of the Internal Revenue Code ("I.R.C."), which makes it a felony for "any person ... [to] [w]illfully make [ ] and subscribe [ ] any [tax] return ... which he does not believe to be true and correct as to every material matter."[82] The allegations were that the defendant, the company president who signed its tax return, failed to report another individual's "ownership interest" in the company on its tax return for a particular year, and also misstated his own ownership interest in that company on the return.[83] The *Pirro* majority concluded that the indictment was deficient in several respects, including its failure to charge a violation of a known legal right and its failure to allege the essential facts constituting the offense charged. In finding the indictment insufficient, the majority relied on the Supreme Court's opinion in *Russell*.[84] The flaw identified by the *Pirro* majority was the indictment's failure to allege what it was that made the omission from the tax return criminal.[85] The allegation that the "ownership interest" of the chairman was not reported was

found insufficient because the term "ownership interest" was *generic,* and no specifics were provided. The statute--I.R.C. § 7206(1)--prohibits an omission only if there is a duty to report.[86] The majority reasoned that because the term "ownership interest" is broader than "share ownership," and there was no duty to report the interest at issue, absent other shareholders, the government's allegation

[75] *Id.* at 765-68, 82 S.Ct. 1038

[76] *Id.* at 766, 82 S.Ct. 1038

[77] 762 F.2d 1151 (1st Cir.1985)

[78] 18 U.S.C. § 1512(a)(1)

[79] *Murphy,* 762 F.2d at 1153

[80] *Id.* at 1154-55 ("[T]he indictment was defective because it did not adequately apprise the defendants of the charges against them.").

[81] 212 F.3d 86 (2d Cir.2000).

[82] 26 U.S.C. § 7206(1). *See also Pirro,* 212 F.3d at 97

[83] *Id.* at 87-88.

[84] *Id.* at 92-95.

[85] *Id.* at 93.

[86] *Id.*

might (or might not) make the tax return incorrect and thus violative of the statute.[87]

The thrust of the vigorous dissent in *Pirro* was that the indictment did allege a crime and did so with sufficient specificity when it alleged that the defendant violated the law by failing to disclose identified ownership interests in the tax return.[88] The dissent emphasized that indictments that do little more than track the language of the statute and state the time and place of the alleged crime in proximate terms are sufficient.[89] In *Pirro,* the indictment provided dates and times, tracked the statute, and alleged all the elements of the offense by tracking the statute. The dissent found that the definition of the offense did not include any "generic term" that required a "descen[t] to particulars," asserting that even without the added information that the defendant wanted, the parties knew the issues.[90] Consequently, the dissent was satisfied that the indictment was sufficient, leaving for trial--not pre-trial, on a scant record--the question whether the government could prove its case with sufficient evidence.[91]

Here, the issue can be phrased in a number of ways. In *Russell*-like terms, the issue is whether the alleged *quid pro quo* of bribery-obtained reductions in sales

taxes and customs duties has an "intent- to-assist" nexus to obtaining or retaining business in the foreign country. As explained *ad nauseam* in the foregoing analysis of the legislative history of the FCPA, the "assist" nexus is indisputably the element of the crime that distinguishes it from garden-variety bribery on the broad end of the spectrum and bribery to obtain or retain a particular government contract on the narrow end.[92] In terms of the sufficiency of the indictment, however, the question is whether the business nexus element--which in the instant indictment is merely a paraphrase of that part of the statute--goes to the "core of criminality"[93] under the statute and contains generic terms, requiring more particularity. Stated differently, the question is whether the lack of detail in that part of the indictment that deals with this one element is more like an absence of detail as to how the crime was committed than a failure to specify what the crime was.

Obviously, an indictment does not have to set out evidence or details of how a crime was committed as long as it gives the defendant notice of what the government is charging.[94] Here, the question is whether the statutory prohibition against a bribe that "assists [the defendant] in obtaining and retaining business" for some person can properly be viewed as containing only "generic" terms, which demand more particularity in the indictment.

87 *Id.* at 93-94.
88 *Id.* at 100-04.
89 *Id.* at 92-93.
90 *Id.* at 93 (quoting *United States v. Cruikshank,* 92 U.S. 542, 23 L.Ed. 588 (1875)).
91 *Id.* at 105.
92 *See supra*
93 *Russell,* 369 U.S. at 764, 82 S.Ct. 1038
94 *See, e.g., United States v. Ellender,* 947 F.2d 748 (5th Cir.1991) ("To comply with [Federal Rule of Criminal Procedure] 7(c), an indictment need not provide the evidentiary details of the government's case.") (citations omitted).

Without more, the words "assists" and "business" are certainly candidates for classification as generic terms. There are innumerable ways and degrees of assisting; and--as we have seen in conjunction with the FCPA's legislative history--"business" is as broad as it is tall. True, there are many crimes that include nexus elements, such as effects on interstate commerce or use of the mails in connection with a scheme to defraud, in which the nexus element cannot be said to go to the core of criminality. For such crimes, the courts appear to take the approach that those kinds of nexus elements can be alleged without factual detail and still not violate the Fifth or Sixth Amendments.

The line between deficient and sufficient factual detail in an indictment is not a

bright one, particularly when, as here, the statute itself does not clearly define the offense. Although the instant indictment does allege in sufficient detail the linkage between the payment of bribes and the tax benefit obtained (*quid pro quo*), it does not detail any "assist" nexus between the tax benefit and getting or keeping business. Like the defendants, we are left to ask *how* the tax benefit was intended to *assist* in obtaining or retaining business, and *what* was the business or business opportunities sought to be obtained or retained? All that is known from the indictment is that the business involves rice imported into Haiti at below-legal tax and custom rates.

Although we recognize that lowering tax and customs payments presumptively increases a company's profit margin by reducing its cost of doing business, it does not follow, *ipso facto,*--as the government contends--that such a result satisfies the statutory business nexus element. Even a modest imagination can hypothesize myriad ways that an unwarranted reduction in duties and taxes in a large-volume rice import operation could *assist* in obtaining or retaining business. For example, it could, as already indicated, so reduce the beneficiary's cost of doing business as to allow the beneficiary to underbid competitors for private commercial contracts, government allocations, and the like; or it could provide the margin of profit needed to fend off potential competition seeking to take business away from the beneficiary; or, it could make the difference between an operating loss and an operating profit, without which the beneficiary could not even stay in business; or it could free up funds to expend on legitimate lobbying or other influence-currying activities to favor the beneficiary's efforts to get, keep, or expand its share of the foreign business. Presumably, there are innumerable other hypothetical examples of how a significant diminution in duties and taxes could assist in getting or keeping particular business in Haiti; but that is not to say that such a diminution *always* assists in obtaining or retaining business. There are bound to be circumstances in which such a cost reduction does nothing other than increase the profitability of an already-profitable venture or ensure profitability of some start-up venture. Indeed, if the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage--a conclusion that we are forbidden to reach.
If the business nexus element does go to the *core of criminality* of the FCPA, a criminal defendant cannot be left to read the government's mind to determine what existing businesses or future business opportunities the government might, at trial, try to link causally with assistance provided by a lessened customs and tax burden. If business nexus is core, then in addition to alleging at least minimally sufficient facts that, if proved, will meet the other elements of a violation of the FCPA (such as the citizenship of the briber, the identity of the qualified business entity, the particular instrumentalities of foreign and interstate commerce employed, the identity of the foreign country and of the officials to whom the suspect payments are made, and the sought-after unlawful actions taken or not taken by the foreign official in consideration of the bribes), a

sufficient FCPA indictment would also have to allege facts that at least minimally put the defense on notice of *what* business transactions or opportunities were purportedly sought to be obtained or retained, and *how* the results of the foreign official's unlawful acts were meant to "assist" in getting or keeping such business. In other words, if the business nexus element goes to the core of the FCPA's criminality, the indictment would have to allege facts that, if proved, would establish an intended causal *assistance* link between the illicit benefit of reduced taxes and duties and the obtaining or retaining of the business venture or activity thus identified.

As noted at the outset of this opinion, the indictment contains no such specific allegations. Except for closely paraphrasing the objective "purpose" language of the statute regarding the aim of the bribe being to produce some conduct by a foreign official, the results of which (*quid pro quo*) will assist in obtaining or retaining foreign business for some person (business nexus), the indictment alleges nothing whatsoever about (1) the nature of the assistance purportedly intended or produced by the lowered taxes, (2) the identity of the particular business or business opportunity the obtaining or retaining of which was being sought, or (3) the way (nexus) such assistance was supposed to help get or keep such business or opportunity.[95] As such, the indictment's sufficiency hinges on a determination whether the business nexus element of the crime is core.[96]

[95] The potential lacuna in the instant indictment is distinguishable from the failure of the indictment clearly to allege the element of materiality in *Richards,* in which we found the indictment sufficient because the other facts alleged in it "warrant[ed] an inference that the false statements were material." 204 F.3d at 192. Except for the overbroad, generic reference to the rice business, no combination of facts here alleged in the indictment allow an inference of what business was purportedly obtained or retained or how the illicit tax savings produced by the bribery were intended to assist ARI or RCH in obtaining or retaining it.

On appeal, as in the district court, defendants advance alternative bases for holding the indictment insufficient. One such defense was grounded in the rule of lenity in the face of the statute's ambiguity, and another was grounded in the fair-warning requirement of the Due Process Clause in the face of the dearth of case law on the subject. As today we reverse the district court's dismissal of the indictment as insufficient and remand for further proceedings which might include a requirement that the government be more specific regarding the business nexus element, we do

We conclude that, as important to the statute as the business nexus element is, it does not go to the FCPA's core of criminality. When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner. The business nexus element serves to delimit the scope of the FCPA by eschewing applicability to those bribes of foreign officials that are not intended to assist in getting or keeping business, just as the "grease" provisions eschew applicability of the FCPA to payments to foreign officials to cut through bureaucratic red tape and thereby

facilitate matters. Therefore, the indictment's paraphrasing of the FCPA's business nexus element passes the test for sufficiency, despite alleging no details regarding what business is sought or how the results of the bribery are meant to assist, passes the test for sufficiency.

III. CONCLUSION

We cannot credit the district court's *per se* ruling that the fiscal benefits of the mal-administration of foreign revenue laws by foreign officials in consideration for illicit payments by United States businessmen or business entities can never come within the scope of the FCPA. Just as bribes to obtain such illicit tax benefits do not *ipso facto* fall outside the scope of the FCPA, however, neither are they *per se* included within its scope. We are satisfied that--for purposes of the statutory provisions criminalizing payments designed to induce foreign officials unlawfully to perform their official duties in *administering* the laws and regulations of their country to produce a result intended to assist in obtaining or retaining business in that country--an unjustified reduction in duties and taxes can, under appropriate circumstances, come within the scope of the statute.

As the district court held the indictment insufficient based on its determination that the kind of bribery charged in the indictment does not come within the scope of the FCPA, that court never reached the question whether the indictment was sufficient as to the business nexus element of the crime, for which the charging instrument merely tracked the statute without alleging any discrete facts whatsoever. As we conclude that the business nexus element of the FCPA does not go to the core of criminality of that statute, we hold that the indictment in this case is sufficient as a matter of law. For the foregoing reasons, therefore, the judgment of the district court dismissing the indictment charging defendants with violations of the FCPA is reversed and the case is remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

not address these alternative propositions. They can, however, be addressed for the first time by the district court on remand.

APPENDIX A SUPERSEDING INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

1. 1. At all times material to this Indictment, the Foreign Corrupt Practices

Act of 1977 (FCPA), as amended, 15 U.S.C. §§ 78dd-1, *et seq.,* was enacted by Congress for the purpose of, among other things, making it unlawful for United States persons, businesses and residents to use the United States mails, or any means or instrumentality of interstate or foreign commerce in furtherance of an offer, promise, authorization, or payment of money or anything of value to a foreign government official for the purpose of obtaining or retaining business for, or directing business to, any person.
2. 2. At all times material to this Indictment:

.a. American Rice, Inc. ("ARI") was a business incorporated under the laws of the State of Texas, and having its principal place of business in Houston, Texas. American Rice, Inc. had a class of securities registered pursuant to Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. § 78o) and was required to file reports with the U.S. Securities & Exchange Commission under Section 12 of the Securities Exchange Act (15 U.S.C. § 78l). As such, American Rice, Inc. was an "issuer" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1.
.b. Rice Corporation of Haiti ("RCH") was a subsidiary of defendant American Rice, Inc. that was incorporated in the Republic of Haiti. RCH was formed to act as a "service corporation" to represent American Rice, Inc.'s interest in Haiti. At all times prior to September 1999, American Rice, Inc. controlled all of RCH's actions, paid all of RCH's expenses, employed all of RCH's management, retained title to all rice imported by RCH until sold to third parties and consolidated its financial statements with those of Americian Rice, Inc.
.c. Defendant DAVID KAY was an American citizen and a vice-president for marketing of American Rice, Inc. who was responsible for supervising sales and marketing in Haiti. As such, KAY was an officer of an "issuer" and a "domestic concern" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2.
.d. Defendant DOUGLAS MURPHY was an American citizen and president of American Rice, Inc. As such, MURPHY was an officer of an "issuer" and a "domestic concern" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2.

1. 3. Beginning in or about 1995 and continuing to in or about August 1999, defendants KAY and MURPHY and other employees and officers of American Rice, Inc. paid bribes and authorized the payment of bribes to induce customs officials in the Republic of Haiti to accept bills of lading and other documents which intentionally understated the true amount of rice that ARI shipped to Haiti for import, thus reducing the customs duties owed by Americna Rice, Inc. and RCH to the Haitian government.
2. 4. In addition, beginning in or about 1998 and continuing to in or about August 1999, defendant KAY and other employees and officers of American Rice, Inc. paid and authorized additional bribes to officials of other Haitian agencies to accept the false import documents and other documents which understated the true amount of rice being imported into and sold in Haiti, thereby

reducing the amount of sales taxes paid by RCH to the Haitian government.
3. 5. In furtherance of these bribes, defendant KAY directed employees of American Rice, Inc. to prepare two sets of shipping documents for each shipment of rice to Haiti, one that accurately reflected and another that falsely represented the weight and value of the rice being exported to Haiti.
4. 6. In furtherance of these bribes, defendants KAY and MURPHY, acting on his own behalf and as an agent of American Rice, Inc., agreed to pay and authorized the payment of bribes, calculated as a percentage of the value of the rice not reported on the false documents or in the form of a monthly retainer, to customs and tax officials of the Haitian government to induce these officials to accept the false documentation and to assess significantly lower customs duties and sales taxes than American Rice, Inc. would otherwise have been required to pay.
5. 7. In furtherance of these bribes, defendants KAY and MURPHY authorized employees of American Rice, Inc. to withdraw funds from American Rice, Inc. bank accounts and to pay these funds to officials of the Haitian government, either directly or through intermediary brokers.
6. 8. As a result of the bribes and the Haitian officials' acceptance of the false shipping documents, American Rice, Inc. reported only approximately 66% of the rice it actually imported into Haiti between January 1998 and August 1999 and thereby significantly reduced the amount of customs duties it was required to pay to the Haitian government.
9. As a further result of these bribes, American Rice, Inc., using official Haitian Customs documents reflecting the amounts reported on the false shipping documents, reported only approximately 66% of the rice it sold in Haiti and thereby significantly reduced the amount of sales taxes it was required to pay to the Haitian government.
COUNTS ONE--TWELVE FOREIGN CORRUPT PRACTICES ACT (15 U.S.C. § 78dd-1)
7. 10. The grand jury incorporates by reference the allegations set forth in paragraphs 1-9 above and charges that:
8. 11. On or about the dates set forth below, in the Southern District of Texas and elsewhere, defendants DAVID KAY and DOUGLAS MURPHY, domestic concerns and officers of American Rice, Inc., an "issuer" within the meaning of the Foreign Corrupt Practices Act, did use and cause to be used instrumentalities of interstate and foreign commerce, to wit, an overnight express service, facsimile transmissions, and an ocean-going barge, which were used to transport and transmit false shipping documents, corruptly in

furtherance of an offer, payment, promise to pay and authorization of the payment of money to foreign officials, to wit, customs officials of the Government of the Republic of Haiti, directly and through third persons, for purposes of influencing acts and decisions of such foreign officials in their official capacities, inducing such foreign officials to do and omit to do acts in violation of their lawful duty, and to obtain an improper advantage, in order to assist American Rice, Inc. in obtaining and retaining business for, and directing business to, American Rice,

Inc. and Rice Corporation of Haiti.

COUNT	DATE	BARGE
1	January 6, 1998	LaurieKristie
2	February 20, 1998	Balsa 51
3	April 20, 1998	LaurieKristie
4	June 4, 1998	LaurieKristie
5	June 27, 1998	LaurieKristie
6	October 7, 1998	LaurieKristie
7	December 7, 1998	LaurieKristie
8	February 16, 1999	LaurieKristie
9	April 14, 1999	LaurieKristie
10	May 27, 1999	LaurieKristie
11	June 30, 1999	LaurieKristie
12	August 3, 1999	Blumarlin

EVIDENCE AND PROCEDURE

This case raises a number of useful practical issues concerning the duty of the prosecution to disclose evidence to the defence. In particular the position where evidence has been lost by the police in circumstances where there is an allegation of bad faith.

Here the Court of Appeal of New Zealand does not follow the approach of the US Supreme Court which has "erected a major obstacle for defendants" in such

matters (para 88). Rather it adopts the view of the Supreme Court of Canada in *R v La* that the "main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure" (para 89).

Theft as a servant --appeal against conviction --application by defence for disclosure of documents -- alleged failure to receive all relevant documents -- whether a miscarriage of justice -- principles to be applied Loss of evidence by prosecution -- approach to be taken by the court -- duty placed on prosecution to provide explanation Investigation undertaken by private individual --whether police under an obligation to ensure impartial and objective assessment of the evidence before commencement of criminal proceedings

THE QUEEN v DAWSON

Court of Appeal of New Zealand
William Young J, Williams J, Wild J 27 May 2004, 17 June 2004

Cases referred to in the judgment
Arizona v Youngblood 488 US 51 (1988 *California v Trombetta* 467 US 479 (1984) *Jago v District Court (NSW)* (1989) 168 CLR 23 *Penney v The Queen* (1998) 72 ALJR 1316 *R v Harmer* (Unreported, Court of Appeal of New Zealand, 26 June 2003) *R v La* (1997) 116 CCC (3d) 97 *R v O'Connor* (1995) 130 DLR (4th) 235 *Tuia v R* [1994] 3 NZLR 553

For the appellant: T K Stevens
For the Crown: C J Lange

WILLIAMS J (giving the judgment of the court)

[1] On 12 September 2003, at the conclusion of her second trial, a jury convicted the appellant, Ms Dawson, on 48 counts of theft as a servant. She was formerly employed as a part-time receptionist at Orana Wildlife Trust, a private zoo, and 45 of the counts related to her thefts from the till at Orana Park on many of the days she was on duty. Two other counts related to theft of two Orana Park T-shirts and a disposable camera. The final count was described as a "wrap-up" count alleging theft of $1937.30 from Orana Park between 29 January 2000 and 6 May 2001, that being a representative count and said by Mr Stevens, counsel

for Ms Dawson, to be an aggregation of till discrepancies which could not be ascribed to a particular day when Ms Dawson was working or were amounts too small to warrant a separate charge.

[2] This judgment deals with Ms Dawson's appeal against all convictions. There was no appeal against the sentence of 300 hours community work and reparation of $13,000.

[3] The grounds of appeal were:

a) That the investigation of the deficiencies was inadequate, particularly because they were conducted by a Mr Stewart, Orana Park's administration manager, rather than by Police.

b) There was inadequate prosecution disclosure, particularly a failure to retain all Orana Park's till and EFTPOS records, especially those for days Ms Dawson was not working.

c) That a ruling was wrong which prevented counsel from cross-examining a witness on a remark she allegedly made to the officer-in-charge which was overheard by a juror during the first trial and relayed to Mr Stevens.

d) That the verdicts were unreasonable and could not be supported having regard to the evidence.

Investigation and Disclosure Grounds of Appeal

[4] The Crown case was that Ms Dawson was employed by Orana Park as a receptionist and counter sales person, her duties including receipt of admission fees and other payments by means of a cash register and, where the customer wished to use EFTPOS, completing the transaction on a nearby EFTPOS machine. She was also responsible for sales of souvenirs for which there was a separate till. The Crown alleged that up to 25 times daily when the EFTPOS facility was used, Ms Dawson entered the transaction on the EFTPOS machine but failed to enter it on the cash register. At the end of the day she tallied up the sums rung up on the EFTPOS machine but not rung up on the till and removed that amount of cash. Her actions meant her daily cash register summary still balanced. She was alleged to have stolen money in that way on almost every day she worked, taking sums totalling approximately the amount of reparation ordered. The specific counts related to souvenirs and a disposable camera which she took from the souvenir shop and gave to a colleague.

[5] Mr Stewart was responsible for Orana Park's financial affairs. Returning from holiday in early 2001 he checked Orana Park's banking reconciliations and daily till sheets. He became concerned at the high proportion of EFTPOS transactions by comparison with the comparatively small amounts of cash being banked. The position was particularly pronounced on Sundays and Mondays when Ms Dawson usually worked. In April-May that year he rechecked the position, covering a longer period than in his original investigation, and found a number of EFTPOS transactions that did not appear on the till tapes. After spending hundreds of hours checking the dates, times and amounts of thousands of transactions, he produced documentation and schedules of various transactions

on the days listed in the indictment. At trial these became the principal basis for the prosecution including the representative count. The base documents relating to each day listed in the indictment were produced in separate exhibit booklets.

[6] Police were contacted at a fairly early stage of Mr Stewart's analysis. At that point he believed he discerned a trend pointing to Ms Dawson as a thief. There was then a delay until Mr Stewart completed his analysis covering every day Ms Dawson worked. The Police accepted Mr Stewart's calculations. They did no similar examination themselves nor contracted any independent person to repeat or check Mr Stewart's calculations though Sergeant White, the officer-in-charge, analysed Mr Stewart's calculations and familiarised himself with their detail.

[7] Disclosure followed Ms Dawson being charged. In addition to material relating to the days Ms Dawson worked which formed the basis of Mr Stewart's calculations and, ultimately, the prosecution case, in December 2001 the defence also sought disclosure of all documentation including EFTPOS receipts, tapes for both tills and daily summary sheets for the days Ms Dawson did not work to check whether there was a pattern of discrepancies in her absence.

[8] What the defence received by way of disclosure was photocopies of all the many documents on which the prosecution intended to rely plus the originals of all other documents still held by Orana Park. The photocopies of the documents underlying the charges filled two boxes. The defence was given five other cartons. One contained 56 complete till tapes. The other four contained boxes of receipts. All five related to days Ms Dawson did not work. The defence signed a receipt for all that material.

[9] Police took the view they had disclosed to Mr Stevens all the EFTPOS and till tapes still held by Orana Park. They included not just the souvenir till tapes but also those relating to the main till and the EFTPOS tapes. Mr Stevens claimed the defence never received the main till tapes.

[10] It was common ground that till and EFTPOS records for days Ms Dawson did not work at Orana Park were not adduced in evidence. But the impasse was not resolved as to whether they were ever disclosed to the defence or whether, having been disclosed, they had been mislaid or even destroyed by the accused.

[11] Without evidence from Sergeant White and Mr Stevens, it is impossible for us to resolve that question, but we note that Mr Stevens' receipt for the boxes of disclosed documents a description which, on its face, included the requested records for the days Ms Dawson did not work. All of that notwithstanding, Mr Stevens – who has acted for Ms Dawson ever since she was charged – felt able to submit to us that the appellant had suffered a possible miscarriage of justice through inability to check whether there were discrepancies on days she did not work similar to those on days she was at Orana Park. For the reasons mentioned, there is no evidential basis on which we could conclude Ms Dawson's defence was prejudiced through incomplete disclosure.

[12] For the Crown, Mr Lange submitted the Court should regard the defence receipt of all the documents listed as binding. In any case, he submitted,

evidence which has been lost does not afford an appellant relief unless the loss occurs through inadequate police investigation or a failure to preserve items held. That appears from the decision of this Court in *R v Harmer* (CA324/02 and CA352/02 26 June 2003 paras [87]-[91]) where the following appears:

> [87] It is not of course the position that a criminal trial cannot proceed or must be regarded as unfair to the defence or in breach of the right guaranteed under s24(d) merely because certain material or testimony which might possibly have contradicted the Crown case is unobtainable or is no longer available or has been contaminated. But what if the reason for the absence or contamination of evidence is the failure by the police to carry out an adequate investigation or a failure to preserve items which have come into their possession or which they could have secured? Some guidance is to be found in the jurisprudence of the North American jurisdictions although the constitutional guarantees, while largely concerned with the same values, are not identical to the guarantees found in our Bill of Rights.
>
> [88] In the United States in the two leading cases, *California v Trombetta* 467 US 479 (1984) and *Arizona v Youngblood* 488 US 51 (1988), the Supreme Court has erected a major obstacle for defendants. The failure to preserve evidence of "apparently exculpatory value" will not result in a violation of the right to due process unless (a) the exculpatory value of the evidence was apparent before it was destroyed; (b) there are no reasonable alternative means of obtaining evidence of comparable value to that lost; and (c) the accused demonstrates actual bad faith on the part of the police. That approach seems overly restrictive and we do not propose to follow it.
>
> [89] In Canada the majority view of the Supreme Court in *R v La* (1997) 116 CCC (3d) 97, was that there is a breach of the right to make full answer and defence under s7 of the Charter whenever the police have destroyed or failed to secure evidence with the deliberate intention of making it unavailable to the defence or as a result of "unacceptable negligence". In the principal judgment of Sopinka J, it was said that in order to determine whether the explanation of the Crown was satisfactory, the court should analyse the circumstances surrounding the loss of the evidence:
>
> The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is

expected of the police. (para [21])

Thus the Supreme Court regarded the failure to preserve evidence as a breach of an obligation to make full disclosure which was seen as an important means of ensuring that an accused was afforded the right to make full answer and defence. In addition, there was said to be an abuse of process if evidence had been deliberately destroyed for the purpose of defeating the Crown's obligation of disclosure.

[90] We find particularly helpful the concurring judgment of L'Heureux-Dubé J, in which La Forest, Gonthier and McLachlin JJ joined. She agreed with Sopinka J that where relevant material once in the possession of the Crown or the police has become unavailable, the Crown must explain the circumstances which led to its absence. The focus must be on the reason why the material did not make it into the hands of the defence. But, she said, where no abuse of process is demonstrated, that concludes the inquiry into the lack of disclosure. However, the accused can still attempt to demonstrate that there is a real likelihood of prejudice to the trial as a result of the loss. Earlier in her judgment L'Heureux-Dubé J quoted from her own opinion in *R v O'Connor* (1995) 130 DLR (4th) 235 at para [74], in which she approved the statement of the British Columbia Court of Appeal in the same case ((1994) 89 CCC (3d) 109 at 148-9) that there will be no violation of the accused's right unless the accused establishes that the non-disclosure has probably prejudiced, or had an adverse effect on, his or her ability to make full answer and defence. L'Heureux-Dubé J said in *O'Connor*, and affirmed in *La*, that:

Where the accused seeks to establish that the non-disclosure by the Crown violates s.7 of the *Charter*, he or she must establish that the impugned nondisclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the Charter in this respect. I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the *effect* of the impugned actions on the fairness of the accused's trial. (para [41]) [Emphasis in original]

[91] In our view, there are two relevant considerations, namely whether the evidence has been lost because of acts or omissions by the police involving bad faith, and whether it is probable that the lost evidence would have been of real assistance to the defence in the circumstances of the particular case. The emphasis, we consider, should be upon the need for a showing by the accused or convicted person that it is more probable than not that the lost evidence would have been of real benefit to the defence because it would have created or contributed to creating a reasonable doubt. That is after all the fundamental question. The characterisation of the conduct of the police in this regard will not

be determinative save that, if it appears that they were motivated by a desire to avoid having the evidence before the court or otherwise acted in bad faith, it may readily be inferred that the evidence would have been helpful to the defence. But, in the absence of such deliberate conduct or other bad faith by the police – which is the position in this case - the concern should be with the effect on the defence of the absence of the evidentiary material rather than with whether the police have been negligent. The particular significance of the missing evidence to the defence will necessarily have to be considered in light of all the available evidence. When, as here, the issue arises on an appeal from a conviction, the ultimate question will be whether the unavailability of the evidence to the defence appears to have given rise to a miscarriage of justice.

[13] For the reasons discussed in the next paragraph, the position as outlined in that extract shows there is nothing in this point which avails Ms Dawson.

[14] All material in Police possession – both relating to days when Ms Dawson worked and other days – was disclosed to the defence, or arguably so. It was acknowledged by prosecution witnesses that the entirety of the till and EFTPOS records for the whole of the period covered by the charges had not been retained by Orana Park but, beyond that, there is no evidence that what was unable to be disclosed would have been of real assistance to the defence. Responsibility for the records, after all, lay with Orana Park rather than the Police. There is no basis for any conclusion Police acted in bad faith. Mr Stevens vigorously cross-examined witnesses as to the absence of records, possibilities of errors or discrepancies on days other than those on which Ms Dawson worked and lack of independent checking of Mr Stewart's calculations. Within the records available, Mr Stevens mounted as effective a defence as was possible. For the reasons mentioned, we are unable to make a ruling one way or the other on whether Mr Stevens received the main till tapes. All of that notwithstanding, the jury plainly regarded the documentary and oral evidence as providing sufficient proof of the charges. Even if Orana Park failed to hand all their records to the Police or did not keep them, no basis has been made out for concluding there was any miscarriage of justice or significant prejudice to Ms Dawson on this aspect of the appeal.

[15] The second aspect of the investigation which was attacked was the fact that it was wholly conducted by Mr Stewart of Orana Park, the complainant. After his initial analysis, Mr Stewart was claimed to be biased in favour of concluding Ms Dawson was the thief. That analysis, it was said, was accepted, unchecked, by the Police. Additionally, no checks were made to verify its accuracy such as the installation of security cameras filming employees, there was no comparison between days worked and not worked and no independent interviews of other till operators or evidence of till practice. Orana Park was also said to be biased against Ms Dawson because of an employment dispute arising out of her dismissal.

[16] In relation to this aspect of the appeal Mr Stevens submitted that before criminal proceedings are commenced it is crucial the State conducts all inquiries

and investigations underlying criminal prosecutions so as to ensure impartial and objective assessment by experienced investigators. He submitted Ms Dawson's defence was severely and irretrievably compromised by the lack of such an investigation, a submission buttressed by extensive reference to evidence. He relied on the High Court of Australia's decision in *Penney v The Queen* (1998) 72 ALJR 1316 where deficiencies of a police investigation were in issue. However, in that case, Callinan J, speaking for the Court, said (at para [18] p1319) that "there is no general proposition of Australian law that a complete and unexceptionable investigation of an alleged crime is a necessary element of the trial process or indeed of a fair trial". The Judge went on to cite (para [22] p1320-1321) from *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 which created an exception to that principle for cases of "actual or ostensible bias". Mr Stevens submitted those exceptions applied in this case.

[17] The broad proposition advanced by Mr Stevens is unsupported by authority and cannot be accepted. While, of course, investigations underlying criminal proceedings are usually undertaken by Police or other State agencies, there is no rule of law requiring such. Not infrequently services of private individuals are retained where investigations require information or the application of skills not available from State agencies. It is by no means uncommon for investigations of circumstances giving rise to possible criminal conduct to be undertaken privately before matters are reported to Police. Corporate, insurance or other frauds are commonly-found examples. Private prosecutions would be impossible if Mr Stevens' propositions were held to be law.

[18] While Mr Stewart adhered in evidence as to the correctness of his analysis, he could not be said to have been biased in his investigation within the meaning normally accorded that term. And, again, he was vigorously cross-examined on all aspects of his investigation yet the jury still found the proof adequate to convict Ms Dawson.

[19] That aspect of the appeal must accordingly also be dismissed.

Restricted cross-examination

[20] After the first jury had been discharged following disagreement, a juror sent Mr Stevens a computer disc expressing concerns about the trial. One issue apparently raised was that she said she heard Detective White and a Ms Anderson, the Chief Executive of Orana Wildlife Trust, speaking in the courthouse lift during a luncheon adjournment. According to Mr Stevens, Ms Anderson said words to the effect that "If I thought those bloody tapes were so important I would never have got rid of them". Without seeking directions beforehand (*Tuia v R* [1994] 3 NZLR 553, 556) Mr Stevens arranged for a private investigator to obtain a statement from the juror. The conversation recorded in that statement was that Ms Anderson said "If I knew those tapes were so important I would have kept them".

[21] During the retrial Mr Stevens put to Ms Anderson the purport of both conversations. He received indignant denials. She said "I did not destroy those

tapes" and any statement to the contrary was untrue. Cross-examination on the topic was then halted by the trial Judge. He directed the jury to disregard that evidence. Mr Stevens submitted he was in error in so doing as the cross-examination was relevant and bore on whether the defence had received all the till tapes for the days Ms Dawson did not work.

[22] This aspect of the appeal again raises the sufficiency of disclosure. To that extent, it has already been dealt with.

[23] Secondly, the point does not raise a question of juror misconduct since it was fortuitous that the person who overheard the conversation was a juror. However, in light of this Court's decision in *Tuia*, it may have been prudent for Mr Stevens to have sought leave before having the matter investigated and raising the topic in cross-examination.

[24] In any event, the form of the conversation to be preferred is that in the juror's signed statement. In that form, it appears innocuous. It amounts to no more than an acknowledgement that all tapes would have been retained had it been realised that the alleged investigative deficiencies were to be so thoroughly probed by Mr Stevens in cross-examination. Seen in that light, the remark would appear to have been no more than regretful acceptance that, as matters turned out, retention of all tapes would have been desirable and would have avoided that line of cross-examination. It certainly does not appear to be any acknowledgement of deliberate destruction of evidence.

[25] We therefore find ourselves unable to accept that ground of appeal.

Verdict unreasonable or unsupportable?

[26] Mr Stevens' submission on this aspect was that, if the verdicts were to be upheld, they meant Ms Dawson committed theft on virtually every day she worked despite never being seen. Further, Mr Stewart's analysis made no allowance for her ever making an error and disregarded evidence given by Ms Dawson and accepted by others as to how till anomalies may have innocently occurred. From that, he submitted, the jury must have been unable to understand the detail of the case, the verdicts were not based on any proper comprehension of the evidence and were therefore unreasonable.

[27] In response, Mr Lange pointed to passages in the summing-up dealing with defence evidence and alternative scenarios advanced to explain the discrepancies. He submitted that, on the totality of the evidence, there was a sufficient evidential basis to justify the verdicts.

[28] We agree, having considered the evidence and the submissions. It is apparent that despite the numerous matters raised in cross-examination and in Ms Dawson's evidence and the innocent explanations proffered for the discrepancies, there was ample material before the jury to justify the verdicts it reached on the individual counts, the representative count and the counts relating to the T-shirts and camera.

[29] We accordingly again find ourselves unable to accept that any basis has been made out to interfere with the jury's verdicts on this ground.

Result

[30] All grounds on which the verdicts were challenged having been rejected, all the appeals against conviction are dismissed.

CONSTITUTIONAL AND ADMINISTRATIVE LAW

The background to *Chiluba v Attorney-General* merits attention. On 16 July 2002 in a special address to the National Assembly, the Zambian President, Levy Mwanawasa levelled various allegations of corrupt practices against his immediate predecessor, Frederick Chiluba. Following a heated and relatively brief debate, members of the National Assembly passed a resolution, purportedly in exercise of powers under article 43(3) of the Constitution of Zambia, removing Chiluba's immunity from prosecution.

Article 43(3) provides:

> "A person who has held, but no longer holds, the office of President shall not be charged with a criminal offence or be amenable to the criminal jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of President, unless the National Assembly has, by resolution, determined that such proceedings would not be contrary to the interests of the State."

Chiluba then sought to apply for judicial review. The judgment of the Supreme Court of Zambia contains both a useful analysis of the scope of judicial review and the scope of the power of a legislature to lift the immunity enjoyed by a former Head of State. Of particular interest is the view of the Supreme Court that it had jurisdiction to review the decision of the National Assembly to lift the immunity applying the well-known *Wednesbury* tests.

The Supreme Court also undertakes a detailed review of when oral evidence is admissible in a judicial review application. In doing so, it notes that in "all applications for judicial review, the principal source of evidence is from affidavits" but notes that the court has power to require a deponent, and not any other witness, to give oral evidence and to be cross-examined. The court then adopts the approach of Lord Denning MR in *George v Secretary of State for the Environment* as to when such cross-examination may be ordered.

The Supreme Court also rejects the view that under article 43(3) the National Assembly was under an obligation to allow the former president a right to be heard. In doing so, the court adopts a helpful comparison with presidential impeachment proceedings.

Finally, the case is noteworthy for the comments made by Chief Justice Sakala on the reasons for the lengthy delay in handing down the decision.
Constitution of Zambia, article 43(3) -- scope of the power of parliament to lift immunity from prosecution on former president Judicial review --application for orders of certiorari and mandamus -circumstances when such orders can be made Application for judicial review --Order 53 --powers of the High Court -- admissibility of viva voce evidence -- basic principles to be applied Constitution of Zambia, article 43(3) --right to be heard --whether article provides right for former president to be heard by the National Assembly Section 34 National Assembly (Powers and Privileges) Act --whether court may review to the decision of the National Assembly to remove the immunity from prosecution of a former president

CHILUBA v ATTORNEY GENERAL

Supreme Court of Zambia
Appeal no 125 of 2002

Cases referred to in the judgment:
Associated Provincial Picture Houses Limited v Wednesbury Corporation [1947] AII ER 680
Attorney-General and the Speaker of the National Assembly v The People

(Unreported, SCZ Judgment No. 34 of 1999)
Chief Constable of North Wales Police v Evans [1982] 1 W.L.R. 1155; [1982] 3 ALL ER 141
Chitala v Attorney-General [1995/1997] ZR 91
Council of Civil Service Union v Minister for the Civil Service [1984] 3 AII ER

Edwards (Inspector of Taxes) v Bairstow [1955] 3 AII ER 48, [1956] AC 14
New Plast Industries v Attorney-General SCZ Judgment No. 8 of 2001
O'Reilly v Mackman [1982] 3 AII ER 680
Patriotic Front ZAPU v Minister of Justice, Legal and Parliamentary Affairs

[1986] LRC (Const) 672
R v Stokesley (Yorkshire) Justices, ex parte Bartram [1956] 1 AII ER 563n
Zambia National Holding and United National Independence Party v Attorney-General of Zambia [1994] ZR 22

For the appellant: Mr. J. Sangwa and Mr Simeza
For the respondent: Dr. J. Sakala

SAKALA, CJ. delivered the judgment of the Court

At the time we heard this appeal, the members of the court had then a heavy workload and schedule of other cases which they had to contend with. Among the cases contribution to the heavy workload were the ongoing Presidential Election Petition and the Treason Appeal whose judgment is now pending. These matters had been scheduled to be heard one after the other. In addition, at the end of hearing this appeal on 21st November, 2002, when judgment was reserved, the members of the court had also to prepare for a scheduled session in Ndola. Upon return from Ndola, the court was scheduled to hear the reason Appeal which was followed by the continuous sittings in the Presidential Election Petition, the court had also to hear the Parliamentary Election Appeals. The judgments in these appeals are also pending.

The court was very mindful of the public interest this appeal has generated. But the court was equally very mindful of the constitutional importance of the appeal of this kind and the magnitude and the need, which was self-evident, for thorough reflection and consideration of law and facts. As has been [noted] elsewhere, the novel point raised in the appeal was being discussed for the first time in Zambia. We make these observations not for the sake of defending ourselves; but to make the point that under no circumstances would this court set a “bad example” as stated in some media and quarters. Indeed, justice delayed is justice denied. Equally, justice hurried is justice denied also. We find it most unfortunate that some members of the public took it upon themselves to champion the cause of speedy justice without ascertaining the facts on the ground. We do not subscribe to trials by the press.

This is an appeal against the judgment of the High Court dated 30 August 2002, dismissing the appellant’s application for judicial review of the decision of the National Assembly removing the appellant’s immunity. There is also a cross-appeal by the respondent. Before the hearing of the appeal could commence, the court had to resolve three preliminary issues; one was based on the record itself; and the other two were raised on behalf of the appellant. The preliminary issue based on the record, raised by the court itself, arose from an argument that there were no proceedings on record in respect of the motion. The record at the time of the argument showed that nothing took place on the 16th of August after the court had delivered its ruling in an application by the 21 interested Members of Parliament; suggesting that the motion was not heard although the learned judge delivered his judgment on 30 August. The submission on this issue was that the record was incomplete and that, being the case, the matter be sent back for retrial before another Judge. Subsequently, the proceedings of the 16 August were traced. The court ruled that the record was complete. The first preliminary issue on behalf of the appellant related to the cross-appeal by the 21 interested Members of Parliament. After hearing arguments on this issue and for reasons contained in our ruling, we struck out the notice of the cross-appeal and the memorandum of appeal by the 21 Members of Parliament. The second preliminary issue, also raised on behalf of the appellant, related to the cross-

appeal by the respondent.

We dismissed that issue and granted the respondent leave to appeal out of time. By his application for judicial review, the appellant prayed for the following orders and declarations:-

1. 1. An Order of certiorari to remove into the High Court for the purpose of quashing the said decision of the National Assembly;
2. 2. An Order of Mandamus to oblige the National Assembly to reconsider the decision to sanction the prosecution of the Applicant as former President of the Republic of Zambia of Zambia in line with the provisions of article 43(3) of the Constitution and the rules of natural justice
3. 3. A declaration that the resolution of the National Assembly to sanction the criminal prosecution of the applicant is ultra vires article 43(3) of the Constitution hence null and void;
4. 4. A declaration that the Respondents were obliged under the rules of natural justice to act fairly and afford the Applicant an opportunity to be heard in person on the motion to remove his immunity under article 43(3) of the Constitution
5. 5. A declaration that the procedure adopted by the National Assembly to table the motion for the removal of the Applicants immunity was irregular;
6. 6. Order that the cost of and occasioned by this application be paid by the Respondent to the Applicant

The facts and the circumstances of the appeal appear to be common cause. They are to be distilled from the notice of application to apply for judicial review, from the affidavit filed in support, from the decision of the National Assembly, from an excerpt of the speech of the President, from an excerpt from the Debate on the removal of immunity and from an affidavit in opposition. The sequences of events are these: On 11 July 2002, the President of the Republic of Zambia addressed the National Assembly. In that address, allegations against the appellant, as former President were made. The President also discussed, in his address, the issue of the National Assembly lifting the immunity of the appellant. On 16 July 2002 the National Assembly met, and considered the removal of the former President's immunity. After a lengthy and heated debate, the National Assembly passed a resolution, in exercise of its powers under article 43(3) of the Constitution, removing the appellant's immunity. The resolution removing the appellant's immunity was in the following terms:

> "That in terms of article 43(3) of the Constitution of Zambia, this House do resolve that Mr. FJT Chiluba who has held, but no longer holds, the office of President may be charged with any criminal offence or be amenable to the jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of the President and that such proceedings would not be contrary to the interests of the State, and further that the immunity available to him be removed." [97]

On 17 July 2002, the appellant applied to the High Court for leave to apply for judicial review of the decision of the National Assembly pursuant to Order 53(3) of the Rules of the Supreme Court. The application for leave, comprising seven pages, set out the decision/resolution of the National

> Article 43(3) provides: "A person who has held, but no longer holds, the office of President shall not be charged with a criminal offence or be amenable to the criminal jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of President, unless the National Assembly has, by resolution, determined that such proceedings would not be contrary to the interests of the State."

Assembly, the relief, and the grounds on which the relief's were sought supported by facts set out in twelve paragraphs and also set out the grounds for review comprising nine paragraphs. The application also set out miscellaneous matters which the court was asked to be aware of, which were in essence, a list of cases decided by this court and the High Court. The application concluded with a paragraph seeking for a stay of the decision of the National Assembly and the proceedings pending the determination of the application for judicial review.

The application for leave to apply for judicial review was supported by an affidavit sworn by the appellant verifying the facts. The affidavit exhibited the decision of the National Assembly, a copy of an excerpt from the speech of the President and a copy of an excerpt from the Debate on the removal of the immunity of the appellant. The court granted the Order for leave to apply for judicial review on the same day of 17 July 2002. The Order granted was in these terms:-

> "ORDER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UPON HEARING the notice of application for leave to apply for judicial review dated the 17th day of July 2002 for an order of Certiorari, Mandamus and Declarations. AND UPON READING the affidavit of FREDERICK JACOB TITUS CHILUBA the applicant herein sworn on the 17th day of July, 2002, and the exhibits thereto. AND UPON HEARING Counsel on behalf of the Applicant.
>
> It is ordered that the application be allowed and that the said Application be allowed and that the said Applicant to have leave to issue Notice of Motion for judicial review as aforesaid. THE COURT FURTHER directed that the decision of the National Assembly to remove the Applicant's immunity from criminal prosecution for things done or omitted to be done in his private capacity whilst occupying the office of President and or further proceedings related to the said decision IS HEREBY STAYED pursuant to Rule 3(10) (a) of Order 53 of the Rules of the Supreme Court until after the hearing and determination of this matter. THE COURT FURTHER directed that the hearing of the said motion be expedited. Dated the 17th day of July 2002".

On 18 July 2002, subsequent to leave being granted, the appellant filed an originating notice of motion for judicial review. 29 July was set down as the date of hearing the motion. The notice of motion in part reads:

> "AND TAKE NOTICE that at the hearing of this motion the applicant will use the affidavit which accompany this notice and any subsequent affidavits to be filed".

However, on 23 July 2002, Messrs MNB filed a notice of appointment as advocates for 21 Members of Parliament as interested parties in the matter. On 25 July 2002, the respondent filed an affidavit in opposition to the application for judicial review. On 26 July 2002, Messrs MNB, on behalf of the 21 Members of Parliament, filed summons applying to the court to dismiss the Order for leave to apply for judicial review obtained by the appellant. Thus, on 29 July 2002, instead of the court hearing the motion for judicial review as set out on the originating notice of motion, the court proceeded to hear an application by the 21 Members of Parliament. At the hearing of the application by the 21 Members the hearing of the application by the 21 Members of Parliament, the respondent to this appeal stated that they were not a party to the application by the 21 Members of Parliament.

At the conclusion of the hearing of that application by the 21 Members of Parliament the court stated:-

> "I have heard and I will have to wait, so I am asking you to write your Submissions and submit them within the next three days. The Review case is further stayed. The matter comes up on Friday, 16th August, 2002, in Chambers".

On the 8 August, 2002, a twenty-two page submission was filed on behalf of the appellant in the application by the 21 Members of Parliament. On 15 August, a notice to produce documents was filed on behalf of the appellant. These documents included numerous correspondence and some documents relating to financial transactions. On the same date, according to the record, summonses to witnesses James Mtonga, Lt General Sunday Kayumba and Mr. Christopher Mulenga were issued for these witnesses to appear before the court on 16 August 2002, at 09.00 hours to give evidence in the application for judicial review. It must be observed here that the notice of motion had specifically stated that the appellant would rely on affidavits filed. On the 16 August, the court delivered its ruling rejecting the application by the 21 Members of Parliament and declining to discharge the ex parte order for leave to apply for judicial review granted on 17 July 2002. In the same ruling, the court directed that the application for judicial review be heard and determined on its merit. What transpired, on 16 August 2002, after the ruling was delivered on the issue raised by the 21 Members of Parliament, forms the appellant's first ground of appeal. Since the proceedings of 16 August, form the first ground of appeal, it is pertinent

to set them out in full to appreciate the context in which the issues for determination arose.

The proceedings of 16 August went as follows:- "*Mr. Nkonde Att-Gen*. May it please your lordship, I continue appearing for the Respondent, I am with Mr. Mutembo Nchito of MNB Associates, Mr. JB Sakala and Mr. Chisulo. Mr. Simeza and Mr. John Sangwa appear for the Applicant. I understand my lord; Mr. Simeza has got an application. *Mr. Simeza* Yes my lord, if it may please your lordship, we would like to be heard on viva voce evidence and we would like to call some witnesses. *Court* Gentlemen, following that lengthy ruling and the skeleton submissions filed by some parties from the Attorney-General's Chambers as well as those from the other party and I have got a wealth of materials here, so I refuse to hear viva voce evidence unless there is something that you want to add or substract from what you heard from this court. In fact what's in issue here is a question of Parliament removing Mr. Chiluba's immunity which you have eloquently argued in your skeleton arguments, what are those witnesses going to tell me, this is a matter of law and I will pass judgment on the affidavits on record, the court is not going to allow that which happened in Parliament following the address of the President, you have eminently and eloquently argued everything in your affidavits. [Court addresses Counsel off record] *Mr. Sangwa* My lord, we would like to file a further affidavit. *Court* Yes, you can do so… you can file the Affidavit if you wish to do so, 14 days from today."

Following the court's directive to file [a] further affidavit, the record shows that on 28 August 2002, a further affidavit, verifying facts, deposed to by one Peter Machungwa was filed. On the same 28th of August, 2002, written submissions on behalf of the appellant were filed with the court. On behalf of the Attorney-General, skeleton arguments were also filed. After the "hearing" of 16 August 2002, the court reserved the judgment fourteen days from that day. On 30 August 2002, the court delivered its judgment. In the judgment, the learned trial judge reviewed the sequence of events after granting leave to apply for judicial review. The learned trial judge examined the reliefs sought and the grounds on which the reliefs were sought and the grounds for review. The court also reviewed the affidavit in opposition and the skeleton arguments on behalf of the Attorney-General. The learned judge pointed out that they had carefully considered all the matters and the arguments presented by the parties and that he had already decided that courts have jurisdiction to inquire into the workings of the National Assembly where certain issues had been questioned by an aggrieved party. The court summarized the issue for determination as being: whether there was impropriety on the part of the National Assembly, either in lifting the immunity of the appellant or in the manner such lifting of immunity was done.

Before dealing with this issue, the learned judge reflected on the basic principles and the scope underlying the judicial review process. The learned judge examined the provisions of article 43(3) of the Constitution. He concluded that

the meaning of the Article is that:-

> "The National Assembly may, in its absolute discretion, remove from the Head of State, the veil or the protection shield placed on him by the Article for purposes of facilitating investigations into his activities while he held the position of the president and subsequent prosecution for the same as if such investigations establish the prima facie case against him."

The learned judge found that there was no impropriety in lifting the appellant's immunity for purposes of facilitating investigations into the allegations made against him in the Special Session Address to Parliament on 11 July 2002. He also found that the National Assembly's decision to lift the appellant's immunity was not ultra-vires the Constitution. On the question of method used to lift the appellant's immunity, the court observed that the Constitution which confers power on the National Assembly to lift the immunity of a former Head of State has itself provided the method namely; that the decision to lift the immunity of the former Head or State would be by resolution of the house and not by a Select Committee. The learned judge observed that the High Court could not prescribe a particular way in which the powers of the National Assembly should be exercised in making a decision to lift the immunity. The court rejected, as erroneous, a contention that the appellant has had his rights to be heard violated by the National Assembly. The court also rejected the contention that the President usurped the powers of the Director of Public prosecutions. The court declined to grant the relief of Certiorari. Hence this appeal before us.

On behalf of the appellant, a Memorandum of Appeal was filed containing five grounds of appeal. These are:

1. 1. That the learned trial judge misdirected himself in law by determining the motion without a hearing and without considering affidavit evidence and submissions filed in support of the motion.
2. 2. The learned trial judge erred in law when he held that article 43(3) of the Constitution of Zambia is meant to empower the National Assembly to remove the immunity of a former Head of state for purposes of facilitating investigations into his activities while he held the office of President.
3. 3. The learned judge in the court below erred in law when he held that there was no procedural impropriety in lifting the appellant's immunity based on allegations made against him by President Levy Mwanawasa during his special address to the National Assembly and, that the President acted as complainant on behalf of the people of Zambia.
4. 4. The learned judge erred in law when he held that there was no requirement for the appellant to be given an opportunity to be heard by the National Assembly to rebut allegations made against him by the President because he will be afforded a hearing during interrogations by the police or Anti-corruption Commission and later by the courts of law when he will be expected to defend himself.

5. 5. The learned judge in the court below erred in law when he held that there was no procedural impropriety in tabling and circulating the motion for the removal of the appellant's immunity at less than 24 hours notice since the appellant was not required to be heard by the National Assembly and therefore suffered no prejudice.

Both Parties filed written heads of argument supplemented by oral submissions based on these five grounds of appeal. The first ground of appeal alleged misdirection in law on the part of the court below allegedly by determining the motion without a hearing and without considering affidavit evidence and submissions filed in support of the motion. The written arguments and submissions on this ground were that the refusal to hear the appellant's motion was a serious misdirection necessitating the matter to be referred back to the High Court for a hearing and that the procedure adopted by the learned judge in deciding the matter without a hearing is not supported by any rule. On these arguments, we were referred to Order 53 of the Supreme Court Rules (White Book), 1999 edition. It was also argued in the written heads that the rules do provide for a hearing of parties to an application (Order 53 rule 9); that the rules do allow parties to lodge bundles for use at the hearing (Order 53/14/11] and Order 53/14/18); that the rules do require applications for judicial review to be held in open court (Order 53/14/13); and that rules do allow the court to admit fresh evidence in addition to the affidavit evidence (Order 53/14/85). It was thus submitted that the refusal by the learned judge to hear the appellant was a serious negation of the rules.

Responding to the written heads of argument on the first ground, written heads of argument were also filed on behalf of the respondent. It was contended on behalf of the respondent that the learned trial judge was on firm ground when he refused to hear viva voce evidence. It was argued that the refusal was in full compliance of the procedure for hearing applications for judicial review as set out in Order 53 and that the learned judge even allowed the appellant to file further affidavits to be deposed to by the witnesses that the appellant had desired to call to give viva voce evidence and that the refusal to allow viva voce evidence did not prejudice the appellant's case. The respondent cited the case of *New Plast Industries v Attorney-General* (SCZ Judgment No. 8 of 2001) in support of their submissions and in particular to a passage where this court said:

> “Where the evidence in support of an application is by way of affidavit, a deponent cannot be heard to say that he was denied the right to a hearing simply because he did not adduce oral evidence."

In considering the written heads of argument, we have taken cognisance of the fact that the same were filed before our ruling of 31 October 2002, in which we confirmed, after discovering the proceedings of 16 August 2002, that the court had sat on that day to consider the motion. The position taken on behalf of the appellant before that ruling was that there was no hearing at all on 16 August, but

that the learned judge simply reserved judgment on the motion. It was further, the position taken on behalf of the appellant that the record, without the proceedings of 16 August, was incomplete. As it turned out, these positions could not be supported after the court, on its own initiative, traced the proceedings of 16 August. We were satisfied then, that the record was complete and we accordingly proceeded to hear the appeal. We have deliberately taken the trouble to set out in full what transpired in court on 16 August, 2002, in order to place in a proper context the legal arguments and the issues raised in ground one which is based on what happened in court on 16 August. From what transpired in court on that day, we cannot accept a submission that the motion was never heard at all. On the other hand, we agree that on that day, the learned judge refused to hear viva voce evidence contending that: "Following that lengthy ruling and the skeleton submissions filed by the parties I have got a wealth of materials here, so I refuse to hear viva voce evidence... ".

After the court declined to hear viva voce evidence, Mr. Sangwa, for the appellant, informed the learned judge that they would like to file a further affidavit. The court granted the request. The record shows that one, Peter Machungwa, did actually file a further affidavit. Whether the learned judge was correct or not in his ruling refusing to hear viva voce evidence is a different question from saying that there was no hearing at all in the court below on that day in question. In his oral submission on behalf of the appellant, Mr. Banda contended that the application to call viva voce evidence was made in the light of the special circumstances of the case in that it hinged on the powers of Parliament pursuant to article 43(3) of the Constitution and because a case of this nature had never been litigated upon in Zambia or in the Commonwealth.

The other special circumstance contended by Mr. Banda was that the case emanated from powers of Parliament against a person who had earned himself immunity; and the decision affecting him was made in his absence, on the basis of allegations made by a sitting President to which he, the appellant, had no opportunity to offer his side of the story. It was Mr.Banda's spirited submission that on the special circumstances of this case, viva voce evidence should have been allowed. In support of these arguments and submissions on ground one, Mr. Banda referred us to several passages in a book entitled *Applications for Judicial Review, Law and Practice of the Crown office (*2nd edition by Grahame Aldous and John Alder). Mr. Banda also cited the case of *O'Reilly v Mackman* [1982] 3 AII ER 680. Mr. Banda contended that the justice of this particular case demanded that the appellant should have been allowed to adduce viva voce evidence which would have established that the acts purported to have been committed by him did not warrant the removal of his oral submissions on ground one by praying that the case be remitted to the High Court to enable the appellant present his side of the story.

Responding to the oral submissions on ground one, Dr. Sakala, on behalf of the respondent, submitted that the court below rightly decided to proceed by way of

affidavit evidence which contained facts tendered by the deponents of the affidavits. He submitted that the question of the case being one of special circumstances was not raised in the court below. Dr. Sakala also submitted that the court properly exercised its discretion to do away with viva voce evidence. We have carefully examined the proceedings of 16 August. They were very short. According to these proceedings, Mr. Simeza did not advance any reason for the application to call more witnesses. The court gave reasons for not accepting viva voce evidence. We agree with the submission on behalf of the respondent that the question of special circumstances of the case warranting viva voce evidence was never raised in the court below. We have also very anxiously addressed our minds to the oral arguments and submissions on ground one of appeal by both parties. The thrust of the submissions centres on the nature of evidence on applications for judicial review; whether it should be by way of affidavit only or by way of both affidavit and viva voce evidence.

But before delving into the issue of the nature of the evidence on applications for judicial review, a point must be made at this juncture that the hearing of all application for judicial review does not start from the day set for the motion. The application starts with a notice of application for leave to apply for judicial review accompanied by an affidavit verifying the facts relied upon, which frequently are not in dispute. The requirement of an affidavit commits an applicant to stating the basis of his case on oath. Thus, the affidavit must contain all the basic factual material on which reliance will eventually be placed; the affidavit forms the basis of the applicant's application for judicial review together with the notice of motion. The scope of judicial review must also be understood. In volume I of the *Supreme Court Practice*, 1999 edition, under Order 53/14/19, sub-heading entitled "Nature and scope of judicial review" at page 902, the authors state:-

> "The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that individual is given fair treatment by the authority to which he has been subject and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.' (*Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 at 1160; [1982] 3 ALL E.R. 141 at 143, per Lord Hailsham L.C.). Thus a decision of an inferior court or a public authority may be quashed (by an order of certiorari made on an application for judicial review) where that court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the *Wednesbury* sense (see para.53/14/27). The court will not, however, on a judicial review application act as a 'court of appeal' from the body concerned; nor will the court interfere in any way with the

> exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is *Wednesbury* unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power, be guilty itself of usurping power *(Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 at 1173; [1982] 3 All ER 141 at 154, per Lord Brightman)".

The authors of the book entitled *Applications for Judicial Review*, already referred to above, make the point that:-

> "… the basis of the power of the High Court to review decisions of inferior courts, or public bodies or tribunals is that it can make such bodies do their duty and stop them doing things which they have no power to do. Thus the High Court cannot determine, in an application for judicial review, whether the decisions by such bodies are right or wrong on their merits. It is now settled that the procedure under Order 53 is thus not an avenue for appeal against decisions of such bodies".

We have no reason to disagree with this proposition.

Having found that the record of appeal was complete; that there was a hearing on 16 August 2002; and that the court rejected a request for viva voce evidence, we now turn to consider the issue of the nature of evidence on applications for judicial review. The starting point, in our view, is to examine the general rule. The general rule is that the High Court may admit evidence in applications for judicial review as long as it is relevant to the issues before it. Aldous and Alder, in their book, make the point that it is a fundamental principle of administrative law that a public body's power to make a decision includes the power to choose between different options and even to make decisions which, on their merits, may appear wrong or mistaken to a different body. The emphasis is that the purpose of judicial review is not to provide an appeal procedure against decisions of public bodies on their merits but to control the jurisdiction of public bodies by ensuring that they comply with their duties or by keeping them within the limits of their powers. For instance, when the High Court is reviewing a decision of a public body it will not admit evidence which is relevant to whether the decision is a reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it. We are in total agreement with these propositions on the general rule.

From the foregoing propositions, we are satisfied that there are limits on the powers of the High Court in an application for judicial review. Strictly speaking, it is never open to the High Court to open an investigation of facts and admit

"fresh" evidence in reviewing the acts and decisions of inferior bodies or public bodies. This position makes the distinction that when the High Court sits in an appellate capacity, it may be permitted to consider the merits of a decision. But when it sits in all applications for judicial review, the High Court is not permitted to consider the merits of a decision. The practice in Zambia and in England is that in all applications for judicial review, the principal source of evidence is from affidavits. But the court has power to order that a deponent and not any other witnesses attend to give oral evidence and to be cross-examined (Order 53 rule 8 and Order 38 rule 2).

It is important to emphasise the point that the only witnesses that may give viva voce evidence on applications for judicial review are the deponents of the affidavits on record. The practice in England, which we follow here in Zambia, is that courts are very reluctant to order cross-examination on applications for judicial review. In the case of *George v Secretary of State for Environment* at page 1615, Lord Denning, then the Master of Rolls, gave three reasons for the "judicial reluctance to order cross-examination in cases of judicial review". These were stated as follows:

.(i) That because the affidavits will usually speak as to what took place before a judicial or quasi-judicial body they may have to be sworn by a planning inspector or a magistrate, or someone of that kind. Since it is undesirable that such a person should be subjected to cross-examination, the applicant should not be liable to cross-examination either;
.(ii) Experience shows that on procedural questions arising on judicial review there is very little conflict on the affidavits; and

(iii) if cross-examination is permitted there will be a temptation to try and undermine the actual findings of the inferior body.

Lord Goddard, C.J., in the course of the main judgment in *R v Stokesley (Yorkshire) Justices, ex parte Bartram* [1956] 1 All ER 563n where fraud was alleged, explained further the judicial reluctance to order cross-examination in these terms:-

> "As this was such a remarkable case, and there was this unfortunate incident of an altered order having been put before the court, on which, at any rate to some extent, the court relied, we accordingly ordered that the deponents should attend in court today. They have attended and they have been cross-examined. It is the first time in my experience and, I think, the first time in anyone else's experience in Crown practice matters, viz, application for prerogative orders or writs, that cross-examination has ever taken place. I do not want this to be thought to be easy precedent. We allowed cross-examination in this case because it is one of a very remarkable character."

The emphasis in all these authorities is that in applications for judicial review, the

evidence is by affidavit. And if need arises for viva voce evidence, it is in the discretion of the court to order the deponents of those affidavits to give that evidence. In the instant case, we are satisfied that the learned judge cannot validly be criticised for rejecting the application for viva voce evidence and for not hearing the parties for the reasons he stated. And we must add that when we looked at the proposed viva voce evidence, we found that it was irrelevant because it was intended to rebut the allegations against the appellant and had nothing to do with the judicial review proceedings. Indeed, from the record, the learned judge had a wealth of material before him. Whether he was correct or not in his conclusion is a different question which we are capable of addressing since an appeal operates as a rehearing on the record. But for the reasons we have discussed, we reject the prayer to remit this case to the High Court. The first ground of appeal therefore fails.

We have discussed Ground One at great length because some of the issues considered in that ground have a bearing on the issues raised in the remaining other grounds of appeal. Grounds Two and Three were argued by Mr. Sangwa as one ground. The first part of this ground alleges that the trial judge erred in law when he held that article 43(3) of the Constitution of Zambia is meant to empower the National Assembly to remove the immunity of a former Head of State for purposes of facilitating investigations into his activities while he held the office of President. The second part alleges misdirection on the part of the learned judge when he held that there was no procedural impropriety in lifting the appellant's immunity based on allegations made by the President.

On these two grounds argued as one, we were taken through ten pages of written heads of argument in addition to oral submissions. We heard arguments that the court below seriously misdirected itself on the issue of illegality as a ground for judicial review and the import of article 43(3) of the Constitution. We also heard an argument that the decision of the National Assembly to sanction the prosecution of the appellant was illegal. It was also argued that the National Assembly did not understand correctly the provisions of article 43(3) and hence failed to give effect to it as the steps taken or followed to sanction the prosecution of the appellant were not consistent with the Constitution. According to Counsel, this was evidenced from the Parliamentary Debates in which none of the members of Parliament made reference to the language of article 43(3). Mr. Sangwa complained that the resolution, the subject of the judicial review, was formulated, presented to the House and passed within three hours. He submitted that this was contrary to the practice and procedure of the House which requires a motion to be formulated and distributed to members twenty-four hours before debate. Mr. Sangwa conceded that there was no procedure to be followed by the National Assembly when invoking the powers under article 43(3). But he contended that whatever had to be done, had to be consistent with the provisions of the Constitution. He did not allude to those provisions. He pointed out that the National Assembly acted on representations by the President, which were in form of an address to the House in which the President outlined a number of

allegations against various people who served under the appellant. Counsel argued that in his address, the President misdirected the House on the question as to who should determine whether one should be prosecuted or not.

Mr. Sangwa then went to great length citing the powers of the Director of Public Prosecutions under the Constitution. He submitted that by calling for the prosecution of the appellant, the President acted illegally and usurped the powers of the Director of Public Prosecutions.

Further arguments by Mr. Sangwa were that there are pre-conditions that must be satisfied before the National Assembly can pass a resolution under Article 43(3). He argued that the Hon. Members did not examine the language of the article and consequently failed to satisfy the pre-conditions. He submitted that a former President can only be prosecuted or be amenable to the criminal jurisdiction of a court for: things he did or omitted to do in his private capacity and the National Assembly must make a determination that the prosecution would be in the interest of the State. He submitted that such a determination can only be made if the nature of the charges is known at the time the National Assembly is being called to invoke its powers under article 43(3). To fortify his arguments, Mr. Sangwa outlined the historical background of article 43(3) from the independence Constitution of 1964 to the 1996 Constitution while citing the various Constitution Commissions' recommendations. Thereafter, Counsel set out the functions of the President. Then at great length, he outlined the various allegations made against the appellant in the President's address. Counsel submitted that the things done or omitted to be done by the appellant in his private capacity which may be the subject of the criminal prosecution or form the basis for bringing him before the criminal jurisdiction of the court, fell outside his functions. Mr. Sangwa concluded his submissions on grounds two and three by contending that the resolution of the National Assembly was null and void for illegality as the National Assembly did not give effect to the provisions of article 43(3).
The short response to these submissions by Dr. Sakala, on behalf of the respondent, was that article 43(3) is very clear in its ordinary context by stating that [the] immunity of a former Head of State shall be lifted by a resolution the National Assembly. Dr.Sakala contended that it would be incorrect to import into Article 43(3) a particular procedure to be followed by the National Assembly in lifting the appellant's immunity. According to Dr. Sakala, for purposes of investigations, the National Assembly had to remove the immunity of the appellant. On procedural impropriety, Dr. Sakala pointed out that there was vigorous debate before the resolution was passed. He submitted that the National Assembly had the right to choose its own method of dealing with the matter. This concluded the parties' submissions and arguments on grounds two and three.

We have very carefully examined the judgment of the learned judge. We have also anxiously considered the ingenious submissions on the two grounds argued as one. The upshot of Mr. Sangwa's detailed and resourceful submissions, which

included a search into the history and origins of article 43(3) of the Constitution, is that the resolution of the National Assembly, lifting the appellant's immunity, was null and void for illegality and non-compliance with article 43(3) of the Constitution.

Before dealing with the issue of illegality and non-compliance with article 43(3) of the Constitution, the learned judge, rightly so, in our view, reflected on the basic principles underlying the judicial review process. He considered the objectives and the scope of the remedy of judicial review and examined some of the decided cases on the subject including authors on the same subject. In dealing with ground one, we, too, examined the same principles and the same authorities. We alluded to the fact that the remedy of judicial review is concerned with reviewing the decision-making process itself and not the merits of the decision. We noted that in judicial review proceedings, the court is not acting as a court of appeal. To determine whether the resolution of the National Assembly was null and void for illegality, the starting point must be to review the decision-making process itself that the learned trial judge took for his starting point, article 43(3) of the Constitution.

We find no valid reasons for criticising his approach. After setting out article 43(3), the learned judge stated:-

> "The import of this Article is quite plain and straightforward. It simply means what it says - that the National Assembly may, in its absolute discretion, remove from the former Head of State, the veil or the protective shield placed on him by the Article for purposes of facilitating investigations into his activities while he held the office of President and subsequent prosecution for the same if such investigations establish a prima facie case against him. There is simply no other meaning apt enough that can be placed on this Article."

In his oral submissions, Mr. Sangwa attacked this finding, contending that immunity is against prosecution and that its lifting is not for the purposes of facilitating investigations. It was Mr. Sangwa's submission that nothing stops the authorities from investigating the appellant even without lifting his immunity. We agree with Mr. Sangwa. The lifting of immunity as envisaged in the article is not for purposes of facilitating investigations but for facilitating prosecution, Thus, under immunity, the appellant can still be investigated, but he cannot be prosecuted because, immunity is his shield. It would appear to us that Dr. Sakala too, laboured under the wrong impression that the appellant cannot be investigated before removal of his immunity. This, in our view, is a mistaken and incorrect understanding of the immunity as provided in article 43(3).

Mr.Sangwa further argued that article 43(3) sets out pre-conditions before a prosecution against a former head of State can be initiated. He submitted that before immunity can be lifted, charges must be known and must exist. He

submitted that this was not the case here. We are inclined to conclude that these arguments take us into considering the merits of the decision of the National Assembly. This, in our view, would be against the spirit, the scope and the purpose of the remedy of judicial review. We decline to address ourselves to these arguments, forceful as they may be though. However, the plain meaning of article 43 (3) does not stipulate that specific charges have to be presented to the National Assembly before immunity of the former President can be removed. Immunity can be removed even for a purpose of making a former president amenable to the criminal jurisdiction of the court. Amenability to criminal jurisdiction can envisage allegations of criminal conduct, which in essence, was the gist of the President's address to the National Assembly. In deciding on whether there was here illegality and procedural impropriety in the lifting of the appellant's immunity based on the allegations made against him by the President, we have to be guided, as we said in *Chitala v The Attorney-General* [1995/1997] ZR 91 by the three grounds enunciated by Lord Greene, but at the same time being mindful of not trying to substitute our own view for that of the National Assembly under the guise of judicial review. The three grounds, enunciated by Lord Greene in
Associated Provincial Picture Houses Limited v Wednesbury Corporation
[1947] AII ER 680, are illegality, irrationality and procedural impropriety. These principles have been further expounded in the case of *Council of Civil Service Union v Minister for the Civil Service* [1984] 3 AII ER 935 by Lord Diplock at pages 950-951 when he stated:-

> "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one call conveniently classify under three heads the grounds on which administrative action is subject of control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice. By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 ALL ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived

> at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radeliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker:-
>
> > "'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review. I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

The above has been cited with approval in a number of cases, including the Zimbabwean case of *Patriotic Front ZAPU v Minister of Justice, Legal and Parliamentary Affairs* [1986] LRC (Const) 672.

We, too, respectfully agree with Lord Diplock's three grounds on reviewability of decisions of public bodies. We begin with illegality. To succeed under this ground, the appellant has to prove that the decision of the National Assembly contravened or exceeded the terms of the law which authorised the making of that decision or that the decision pursues an objective other than that for which the power to make the decision was conferred. By looking at the wording of the power and the context in which the power is to be exercised, the court's ultimate function is to ensure that the exercise of the power is within or intra-vires the statute. Article 43(3) states:

> "A person who has held, but no longer holds, the office of President shall not be charged with a criminal offence or be amenable to the criminal jurisdiction of any court, in respect of any act done or omitted to be done by him in his personal capacity while he held office of President, unless the National Assembly has, by resolution, determined that such proceedings would not be contrary to the interests of the State."

This Article, in our view, sets out the parameters in which the power to lift the immunity of a former President is to be exercised. The challenge for the drafters of this article was to bring out in clear words the power and the circumstances in

which it was to be exercised. The former President in terms of this article must be alleged to have committed some acts while in office which amount to criminal offences or would make him amenable to the criminal jurisdiction of the court and it is in the interest of the State that his immunity be lifted. The facts leading to the removal of the appellant's immunity are common cause. There was before the National Assembly the address by the President. In the address, various allegations were made against the appellant and others. It is not for the court, in an application for the remedy of judicial review, to determine the truthfulness or the falsity of those allegations. The discretion conferred on the National Assembly by article 43(3) is wide and it can be validly exercised by resolution once the National Assembly has before it allegations showing prima facie criminal conduct to the Assembly's satisfaction. Indeed, there were emotions and heated debate before the resolution was passed. But we cannot infer any illegality of the decision they arrived at. We are therefore satisfied that given the address of the President to the National Assembly, the National Assembly properly exercised its powers under article 43(3). The question of 'illegality' did not arise.

In the same vein, we find nothing irrational in the manner the resolution was passed. It cannot be seriously argued that the decision of the National Assembly was "so outrageous in its defiance of logic or of accepted moral standards that no sensible tribunal which had applied its mind to the question to be decided could have arrived at it". The decision of the National Assembly here was based on serious and unprecedented allegations of criminal conduct in this country. And no doubt, these are the allegations which were taken into account before the decision was arrived at.

On 'procedural impropriety' we find that the issue does not arise because the article itself provides for the procedure for lifting immunity. In any event, before the immunity was lifted, the National Assembly debated the procedure to be followed. The fact that there was lengthy debate before the resolution was finally passed did not suggest any procedural impropriety. While we agree that removal of immunity cannot be for purposes of facilitating investigations, we do not agree that article 43(3) means that immunity cannot be removed unless specific charges have been framed. Grounds two and three are therefore not successful.

Ground four alleged that the learned judge erred in law by holding that there was no requirement for the appellant to have been given an opportunity to be heard by the National Assembly. Counsel referred us to numerous authorities on the requirement for an opportunity to be heard. We have anxiously considered these authorities. But after looking at the provisions of article 43(3) we find nothing in these provisions which suggest to us that before lifting the immunity of a former President the National Assembly should give a former president the opportunity to be heard. The provisions of article 43(3) should not be read in isolation but together with the other relevant provisions in the Constitution. The other relevant provisions we find are those in article 37 "Impeachment of the President".

Unlike the provisions dealing with removal or immunity of a former President, which do not give the right to be heard, the provisions in article 37 dealing with impeachment of the President specifically gives the President the right to be heard and to be represented by counsel. Which means that while in article 37 the President has the right to be heard, it was never the intention of the framers of the Constitution that when the issue of removal of immunity of a former President arises, the former President would have the right to be heard. Of course, one cannot seriously argue that article 43(3) and article 37 conflict with each other because constitutional provisions cannot contradict each other.

The rationale for this arrangement is very easy to find. In impeachment proceedings, the National Assembly has, after going through the whole process, power to finally determine the fate of the President by its own resolution. The National Assembly can either "acquit" the impeached President or remove him from office. In proceedings to remove the immunity of a former President, the National Assembly has no power to call upon a former President to give evidence to rebut allegations against him before removal of his immunity by the national assembly. What action would the National Assembly take after hearing a former President? The National Assembly cannot "acquit" or make a finding that there is a prima facie case made out against a former President and should therefore be charged with a criminal offence(s) because the National Assembly has no such powers under the Constitution. The power to determine the guilt or innocence of a person in a criminal matter is assigned to the courts by the Constitution. For the reasons we have given above we hold the view that the provisions of article 43(3) are very clear. We cannot imply anything in these provisions. Nor can we bring into the interpretation of these provisions glosses and interpolations derived from doctrine or case law. None of the numerous cases cited to us gives identity and visibility to any principle of law which persuades and entitles us to imply anything in a Constitutional provision which is very clear.

We are satisfied that the framers of the Constitution never intended that on removal of immunity, a former President should be heard. Indeed, Mr. Simeza quite properly conceded that article 43(3) makes no provision for hearing of a former President whose immunity is to be removed. We agree with him. But Counsel contended that the same article does not make provision for the incumbent President to initiate the removal of immunity of the former President. This argument begs the question. The truth is that there is no provision for an individual to be heard in Parliament. Above all, it is not in all cases where rules of natural justice are always applicable. Ground four too fails.
Ground five alleges procedural impropriety. This we have discussed in grounds two and three. While it is not in dispute that there was haste in circulating the motion, it is not correct, as argued, that the National Assembly is obliged to religiously follow its own rules of procedure. Be that as it may, Parliament regulates its own procedure (article 86). We are satisfied that there was no impropriety in the manner the motion was circulated and adopted. Ground five also fails.

Before concluding the discussion on the appeal, we turn to consider the cross-appeal by the respondent. The notice of cross-appeal reads as follows:

> "TAKE NOTICE that the Respondent being dissatisfied with the judgment of judge Anthony Nyangulu given in the High Court on 30 August 2002 and ruling of 16 August 2002 intends to cross appeal to the Supreme Court against the judgment in so far as it decides that section 34 of the National Assembly (Powers and Privileges) Act is inconsistent with the provisions of Article 94(1) of the Constitution."

The ground of appeal in the memorandum of the cross appeal alleges an error in law on the part of the learned judge when he held that section 34 of the National Assembly (Powers and Privileges) Act is inconsistent with the provisions of article 94(1) of the Constitution of the Republic of Zambia. The short background leading to the cross appeal is that 21 Members or Parliament applied to be joined to the proceedings brought about by the appellant for judicial review as interested parties pursuant to Order 53 rule 9(I) of the Rules of the Supreme Court. The 21 Members of Parliament sought to set aside the leave granted to the appellant to apply for judicial review. It was then the contention of the 21 Members of Parliament that since the appellant in his substantive application was challenging what transpired in the National assembly, his application should fail as section 34 of the National Assembly (Powers and Privileges) Act has ousted the jurisdiction of the High Court to inquire into the affairs of the National Assembly and whatever it does.

It was further the contention of the 21 members of Parliament that article 86(1) of the Constitution has conferred authority upon the National Assembly to determine its own procedure. It is in the light of the foregoing arguments that the High Court considered section 34 of the National Assembly (Powers and privileges) Act. In dealing with the arguments based on section 34 of the Act, the learned judge had this to say:-

> "If it is indeed the contention on behalf of the 21 members of parliament that this court should dissolve the order for grant of leave to apply for judicial review granted on 16 July 2002 on the strength of the provisions of section 34 of the National Assembly (Powers and Privileges) Act, that this court cannot look into the manner in which the resolution of the National Assembly 'lifting' the appellants immunity was arrived at and satisfy itself whether indeed it was made pursuant to the provisions of article 43(3), it is the finding of this Court that the said section is inconsistent with the provisions or article 94(1) of the Constitution. It is the Court's view that to the extent that the said section purports to limit the jurisdiction of the High Court, it is null and void and therefore of no effect on this court".

On behalf of the respondent written heads or argument in the cross appeal were filed supplemented by oral arguments and submissions. The advocates for the

appellant filed detailed written heads of argument in response to the cross appeal. But after hearing the arguments of Mr Jalasi on the cross appeal, Mr Sangwa, on behalf of the appellant, informed the court that there was no need for him to argue on the cross appeal. The gist of the submissions on the cross-appeal is that, the learned judge's holding on section 34 had the effect of striking out that section. It was contended that legislation in Zambia cannot be impugned by way of judicial review proceedings but by way of a petition. Mr. Jalasi referred the court to the case of *Attorney-General and the Speaker of the National Assembly v The People* (Unreported, SCZ Judgment No. 34 of 1999). He submitted that section 34 is not inconsistent with the provisions of article 94(1) of the Constitution. Mr. Jalasi also referred us to the case of *Zambia National Holding and United National Independence Party v Attorney-General* [1994] ZR 22 where this court discussed the meaning of the word "unlimited" jurisdiction of the High Court.

Our short answer to the cross-appeal is that the learned judge was never invited to make a determination on the validity of section 34 of the National Assembly (Powers and Privileges) Act Cap.12 of the Laws of Zambia. The 21 members of Parliament only asked him to set aside the Order of the court granting leave to the appellant to apply for judicial review. He was not asked to strike out section 34.

In conclusion, for the reasons we have discussed in the appeal, although the application for judicial review was neither frivolous nor vexatious, all the five grounds having failed, the whole appeal also fails. The whole appeal is accordingly dismissed.

The cross-appeal on the other hand, is allowed; we set aside the portion of the learned judge's ruling which has the effect of striking out section 34 of the National Assembly (Powers and Privileges) Act.

Appeal dismissed Cross-appeal allowed

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The role of the media in investigating corruption is widely seen as an essential element of just and honest government. Certainly it is not uncommon to find members of the media making assertions, sometimes forcefully, of corrupt practices by politicians and public officials. Whilst the use of the civil law of libel may be seen by some as the appropriate avenue for any redress, a number of Commonwealth countries still retain laws relating to criminal libel, an offence that usually dates back to pre-independence days.

Many view criminal libel laws with concern. As the *Commonwealth Freedom of Expression, Assembly and Association: Best Practice Principles* (Chapter 5 para 5.1) state:-

> The rights [of freedom of expression and freedom of association] need to be not only recognised and defined [but] they should be sufficiently secured so that citizens' enjoyment of these rights will be guaranteed….
>
> Other legislation should also be reviewed to ensure that it does not conflict with constitutional provisions. All legislation should have to comply with the provisions of the Constitution, including legislation which pre-dates it. …
>
> Particular attention should be paid to laws relating to public order, criminal libel and sedition. Such laws have often resulted in stifling dissent or criticism, and therefore [deny] the rights of freedom of assembly, association and expression.
>
> Commonwealth members should ensure that as part of [any] constitutional review process, they remove any provisions which may have that effect".

In *Worme and Grenada Today v Commissioner of Police*, the Judicial Committee of the Privy Council considered a challenge to the constitutionality of a criminal libel law contained in section 252(2) of the Criminal Code of Grenada based on the argument that it infringed the right to freedom of expression enshrined in section 10 of the Constitution of Grenada.

There was common cause that the crime of intentional libel constituted a hindrance to the enjoyment of section 10 rights. Thus the case revolved around whether the respondent had shown that the provisions of the Criminal Code were "reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons" and, if so, whether the appellants could show that the provision was not reasonably justifiable in a democratic society (see para 41).

Upholding the constitutionality of the section, the Privy Council points out that the "intention to damage the other person's reputation is important" and that the "law rightly attaches a high value to a person's reputation not only for that individual's sake but also in the wider interests of the public". They concluded that they were:

> "… therefore satisfied that the objective of an offence that catches those who attack a person's reputation by accusing him, falsely, of crime or misconduct in public office is sufficiently important to justify limiting the right to freedom of expression. Moreover, the offence is rationally connected to that objective and is limited to situations where the publication was not for the public benefit". (para 42)

They also reject the view that such a crime is not reasonably justifiable in a democratic society (para 43).

Faced with the argument that the tort of libel provides a remedy for damages

against those who make such attacks, Lord Rodger of Earlsferry considers that this:-

> "no more shows that a crime of intentional libel is unnecessary than the existence of the tort of conversion shows that a crime of theft is unnecessary. Similarly, the fact that the law of criminal libel has not been invoked in recent years does not show that it is not needed" (para 42).

Constitution of Grenada, section 10 -- right to freedom of expression -- scope of the right Criminal Code of Grenada, section 252(2) --libel --whether crime of libel inconsistent with constitutional right to freedom of expression -- principles of interpretation to be adopted Constitution of Grenada, section 8(2) -- presumption of innocence -- burden of proof --whether prosecution to prove publication of the defamatory matter was made "unlawfully"

WORME and GRENADA TODAY LIMITED v
COMMISSIONER OF POLICE

Judicial Committee of the Privy Council
Lord Bingham of Cornhill, Lord Browne-Wilkinson, Lord Slynn of Hadley, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe

29th January 2004

The facts appear in paras 1- 6

Cases referred to in the judgment

Benjamin v Minister of Information and Broadcasting [2001] 1 WLR 1040

Cable and Wireless (Dominica) v Marpin Telecoms and Broadcasting Co Ltd

[2001] 1 WLR 1123

de Freitas v Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC

Hector v Attorney General of Antigua [1990] 2 AC 312
Kleinwort Benson Ltd v Lincoln County Council [1999] 2 AC 349

Lingens v Austria (1986) 8 EHRR 407

Lucas v The Queen [1998] 1 SCR 439

Mancini v Director of Public Prosecutions [1942] AC 1

Nyambirai v National Social Security Authority [1996] 1 LRC 64

R v Butler [1992] 1 SCR 452

R v Labal [1994] 3 SCR 965

R v Lambert [2002] 2 AC 545

R v Lobell [1957] 1 QB 547

R v Lucas [1998] 1 SCR 439,

R v Stevens (1995) 96 CCC (3d) 238

R v Whyte (1988) 51 DLR (4th) 481

Reynolds v Times Newspapers Ltd [2001] 2 AC 127

Spautz v Williams [1983] 2 NSWLR 506

Waterhouse v Gilmore [1988] 12 NSWLR 270

Woolmington v Director of Public Prosecutions [1935] AC 462
For the appellants: Mr C Nichol QC

For the respondent: Mr J Dingemans QC

LORD RODGER OF EARLSFERRY delivered the judgment

1. In 1999 the first appellant, Mr George Worme, was the editor of the weekly newspaper "Grenada Today" which was published by the second appellant, Grenada Today Ltd. The issue dated 17 September 1999 included a letter signed "The People's Man" and addressed to the Prime Minister (Dr Keith Mitchell). It was printed under the heading "Doc, stop playing politics". The letter was critical of the Prime Minister's attitude towards teachers' pay. It included this sentence:

> "During the election campaign you spent million of dollars to bribe people to vote for you and your party, disregarding what the law says governing the electoral process."

Their Lordships understand that elections to the House of Representatives, which Dr Mitchell's party won, were held on 14 January 1999.

1. 2. Following publication of the letter, Mr Worme was invited to attend at

the Central Division of the Criminal Investigation Department of the Royal Grenada Police. He went there on 21 September, accompanied by his lawyer. The police put a number of written questions to him about Grenada Today Ltd, about the Grenada Today newspaper and about the letter. He answered the questions and was not arrested or charged.

3. In the next issue, published on 24 September 1999, Grenada Today reprinted the letter preceded by these words:

"The letter which angered Prime Minister Mitchell and forced him to attempt to use law enforcement officers of the Criminal Investigation Department (CID) to try and 'silence' the GRENADA TODAY newspaper."

2. 4. Three days later, on 27 September, the Prime Minister raised civil proceedings for libel against Mr Worme and Grenada Today Ltd in relation to the publication of the letter. The next day, 28 September, the police arrested Mr Worme and charged him with two offences, relating respectively to the publication of the letter on 17 and 24 September. The charge relating to the first publication was in these terms:

> "For that the Defendant on Friday the 17th day of September, 1999, at St John Street in the town of St George Southern Magisterial District, did publish a Defamatory Libel concerning Keith Claudius MITCHELL, Prime Minister of Grenada, in the form of a letter under the caption 'Doc stop playing Politics', which said letter contained the following Defamatory matter concerning the said Keith Claudius MITCHELL, 'During the Election Campaign you spent million of dollars to bribe people to vote for you and your Party disregarding what the Law says governing the Electorial Process,' with an intention to defame the said Keith Claudius MITCHELL. Contrary to Section 252(2) of the Criminal Code Chapter 1 of Volume 1 of the 1994 Revised Laws of GRENADA."

The charge relating to the publication of the letter on 24 September was identical in all respects save for the date of the alleged offence. Subsequently, two summonses were served on Grenada Today Ltd to answer charges in terms that were in all material respects identical to those of the two charges on which Mr Worme had been arrested. All the charges were of intentional libel, contrary to section 252(2) of the Criminal Code of Grenada ("the Code"). The civil action brought by the Prime Minister against the appellants has been stayed pending the determination of the criminal proceedings.

5. On 19 October 1999 the Chief Magistrate began a preliminary inquiry into the charges, which was adjourned, without any evidence being led, until 18 January 2000. On that date the prosecution led the evidence of the Prime Minister. After his examination-in-chief had been completed, counsel for the appellants made a submission to the effect that the relevant provisions of Title XIX of the Code, relating to libel, were inconsistent with the appellants' right to freedom of expression under section 10 of the Constitution of Grenada ("the Constitution"). He asked the Chief Magistrate to refer the matter to the High Court. Under

section 16(3) of the Constitution, which their Lordships set out below, when so requested, the Chief Magistrate was obliged to make the reference. She duly stated a case with three questions for the decision of the High Court:

> "(1) Does the freedom of expression guaranteed by section 10 of the Constitution of Grenada protect a freedom to publish material:
> .(a) discussing political matters
> .(b) of and concerning the conduct of public figures in relation to the election of persons to the House of Representatives of the Parliament of Grenada
> .(c) in relation to the suitability of persons for office as members of the House of Representatives of the Parliament of Grenada?
> .(2) If the answer is yes to any part or parts of question 1, is the guaranteed freedom of expression under section 10 of the Constitution of Grenada violated by section 252(2) of the Criminal Code of Grenada which makes a person liable to imprisonment for two years if convicted of intentional libel, such intentional libel being defined by section 253 of the Criminal Code as the unlawfully publishing by a person of 'any defamatory matter' concerning another person with intention to defame that person?
> .(3) If the answer is yes to any part or parts of question 1, is the guaranteed freedom of expression under section 10 of the Constitution of Grenada being violated by the Director of Public Prosecutions sanctioning these criminal prosecutions by the State for such criminal defamatory intentional libel when the subject of the alleged libels herein concerns the reputation of an individual and does not touch and concern any public interest?"

The fact that the Chief Magistrate had to refer the constitutional points to the High Court at this stage in the proceedings means, of course, that they have had to be determined without the facts being explored.

6. In a judgment dated 9 November 2000 Alleyne J answered Questions 1 and 2 in the affirmative and found it unnecessary to answer Question 3. The Commissioner of Police appealed to the Court of Appeal who, by judgment dated 5 June 2001, allowed his appeal. In so doing the Court of Appeal, like Alleyne J, answered Question 1 in the affirmative, but then went on to answer both Questions 2 and 3 in the negative. On 19 November 2001 the Court of Appeal granted final leave to appeal to their Lordships' Board.

The Constitution

7. The Constitution is to be found in schedule 1 to the Grenada Constitution Order 1973 ("the Order") which came into force when Grenada became an independent state on 7 February 1974. Chapter I of the Constitution, comprising sections 1 to 18, is entitled "Protection of Fundamental Rights and Freedoms". Section 1 provides inter alia:

> "Whereas every person in Grenada is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely – ...
>
> (b) freedom of conscience, of expression and assembly and association ... the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

Section 8(2)(a) provides that "Every person who is charged with a criminal offence … shall be presumed to be innocent until he is proved or has pleaded guilty".

Section 10, again so far as relevant, is in these terms:

> "(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> ...
>
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings ... ...
>
> and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society."

Section 16(3) and (4), which govern the present proceedings, provide:

> "(3) If in any proceedings in any court (other than the Court of Appeal, the High Court or a court martial) any question arises as to the contravention of any of the provisions of sections 2 to 15 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.
> (4) Where any question is referred to the High Court in pursuance of

> subsection (3) of this section, the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council."

Section 106 of the Constitution provides:

> "This Constitution is the supreme law of Grenada and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

8. Schedule 2 to the Order contains a series of transitional provisions. Paragraph 1(1) and (5) are in these terms: "(1) The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Courts Order. ...

> (5) For the purposes of this paragraph, the expression 'existing law' means any Act, Ordinance, law, rule, regulation, order or other instrument made in pursuance of (or continuing in operation under) the existing Constitution or the West Indies (Dissolution and Interim Commissioner) Order in Council 1962 (a) and having effect as part of the law of Grenada or of any part thereof immediately before the commencement of this Constitution."

By virtue of paragraph 5(2) the provisions of section 111 of the Constitution are to apply for the purposes of interpreting the schedule. In terms of section 111(1) "law" includes any instrument having the force of law and any unwritten rule of law. It follows that paragraph 1(1) of schedule 2 to the Order will apply to the construction of the provisions of the Code relating to libel, if the Code, or that part of the Code, was an existing law immediately before 7 February 1974 when Grenada became an independent state and the Constitution was commenced. Their Lordships return to that point in paragraphs 32-34 below.

Crime of Libel in the Criminal Code

9. The Code is to be found in Chapter 1 of Volume 1 of the Continuous Revised Edition of the Laws of Grenada prepared under the authority of the Continuous Revision of the Laws Act 1994. Title XIX of the Code is headed "Libel" and contains elaborate provisions creating and defining the offences of negligent and intentional libel and setting out defences to them. The first of these provisions, section 252, is in these terms:

> "(1) Whoever is convicted of negligent libel shall be liable to imprisonment for six months.
> (2) Whoever is convicted of intentional libel shall be liable to imprisonment for two years."

The charges against the appellants were charges of intentional libel in terms of section 252(2). Section 253 explains who is guilty of libel under the Code:

> "A person is guilty of libel who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, either negligently or with intent to defame that other person."

1. 10. Counsel helpfully identified the ingredients of the actus reus of the offence as defined in section 253. The person must publish matter; he must do so in certain specified ways, including by print; the publication must be unlawful; the matter must be defamatory and it must concern another person. So far as the person's state of mind is concerned, the section merely specifies that he must act negligently or with intent to defame the other person. Mr Nicol accepted that, for these purposes, a person has an intent to defame if he intends to injure the other person's reputation: cf *Lucas v The Queen* [1998] 1 SCR 439, at para 104 per Cory J.
2. 11. The sections that follow section 253 in the Code spell out the meaning and effect of certain of the elements of the actus reus. First, section 254 defines "defamatory matter":

> "(1) Matter is defamatory which imputes to a person any crime, or misconduct in any public office, or which is likely to injure him in his occupation, calling or office, or to expose him to general hatred, contempt or ridicule.
> (2) In this section, 'crime' means any offence punishable on indictment under this Code, and any act punishable on indictment under any law in force within the jurisdiction of the Court, and also any act, wheresoever committed, which if committed by a person within the jurisdiction of the Court, would be punishable on indictment under any law."

12. Next, section 255 defines "publishes" for the purposes of section 253. In argument Mr Nicol QC for the appellants drew particular attention to section 255(1):

> "A person publishes a libel if he causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed, to be so dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, as that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person."

Section 256 goes on to give guidance on what is meant by publishing "unlawfully" in terms of section 253:

> "Any publication of defamatory matter concerning a person is unlawful, within the meaning of this Title, unless it is privileged on one of the grounds hereafter mentioned in this Title."

The grounds of privilege are to be found in section 257, dealing with absolute privilege, and section 258, dealing with conditional or qualified privilege.

13. So far as section 257 is concerned, it is sufficient to draw attention to only some of the grounds of absolute privilege:

> "(1) The publication of defamatory matter is absolutely privileged, and no person shall under any circumstances be liable to punishment under this Code in respect thereof, in any of the following cases, namely –
>
> …

.(b) if the matter is published in the Senate or the House of Representatives by the Governor-General or by any member of either house; ...
.(h) if the matter is true, and if it is found by the jury that it was for the public benefit that it should be published.

> (2) Where a publication is absolutely privileged, it is immaterial for the purposes of this Title (notwithstanding any of the general provisions of Book I of this Code with respect to justifications or excuses) whether (except as in the last paragraph of the preceding subsection is mentioned) the matter be true or false, and whether it be or be not known or believed to be false, and whether it be or be not published in good faith: Provided that nothing in this section shall exempt a person from any liability to punishment under any other Title of this Code or under any other law."

14. So far as relevant, section 258, on qualified privilege, provides:

> "A publication of defamatory matter is privileged, on condition that it was published in good faith, in any of the following cases, namely –
>
> ...

.(d) if the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to this personal character so far as it appears in such conduct;
.(e) if the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct. ...
.(j) if the matter is published in good faith for the protection of the rights or interests of the person who publishes it, or of the person to whom it is published, or of some person in whom the person to whom it is published is interested."

Finally section 259 is in these terms:

> "(1) A publication of defamatory matter shall not be deemed to have been made in good faith by a person, within the meaning of the last preceding section, if it is made to appear either –
>
> .(a) that the matter was untrue, and that he did not believe it to be true;
>
> .(b) that the matter was untrue, and that he published it without having taken reasonable care to ascertain whether it was true or false; or
>
> .(c) that, in publishing the matter, he acted with intent to injure the person defamed in a substantially greater degree or substantially otherwise than was reasonably necessary for the interest of the public or for the protection of the private right or interest in respect of which he claims to be privileged.
>
> (2) If it is proved, on behalf of the accused person, that the defamatory matter was published under such circumstances that the publication would have been justified if made in good faith, the publication shall be presumed to have been made in good faith until the contrary is made to appear, either from the libel itself, or from the evidence given on behalf of the accused person, or from evidence given on the part of the prosecution."

The Submissions of Counsel in Outline

1. 15. In brief, Mr Nicol QC for the appellants contends that section 252(2) of the Code, as it falls to be interpreted and applied in the light of sections 253 to 257, is inconsistent with their right of freedom of expression under section 10 of the Constitution. In the first place, a crime of libel, however narrowly defined, hinders freedom of expression. Moreover, it is an unnecessary remnant of the past: nowadays the remedies afforded by the civil law are sufficient to protect the reputations, rights and freedoms of the people concerned. The Prime Minister has indeed raised such an action against the appellants. The fact that prosecutions are virtually unknown in Grenada shows that the crime of libel is not reasonably required to secure the necessary protection of people's reputations in terms of section 10(2)(b). Alternatively, sections 252 and 253 of the Code make it criminal for the appellants to publish material imputing crime or misconduct in their office to persons, even if what they publish is true. These provisions hinder the appellants in their enjoyment of their freedom of expression and, since they prevent publication of what is true, they cannot be said to be reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons in terms of section 10(2)(b). The provisions embodying the particular form of the crime of libel in Grenada are accordingly inconsistent with the Constitution and so void in terms of section 106. Moreover, since the provisions are contained in a Code that was re-enacted in 1994, they are not "existing laws" for the purposes of paragraph 1(1) of schedule 2 to the Order. So the special power of construction in that paragraph does not apply and the provisions must simply be regarded as void. Even if paragraph 1(1) did apply, however, the

inconsistencies with section 10 of the Constitution are so deep and wide-ranging as to make it impossible to bring them into conformity with the Constitution by using that power. On any view, therefore, the provisions on libel in the Code are void and the proceedings against the appellants based on them should therefore be dismissed. The Board should answer Questions 1 and 2 posed by the Chief Magistrate in the affirmative. In the light of those answers the Chief Magistrate would require to dismiss the charges against the appellants.

16. For the respondent Mr Dingemans QC argues that the appeals should be dismissed. There is no basis for holding that the crime of intentional libel is of its very nature inconsistent with section 10 of the Constitution: examples of such a crime are to be found in the law of many democratic societies, including English law. The provisions in the Code were drafted many years ago and, like the provisions in the criminal codes of other Caribbean states, they now require to be read in the light of subsequent developments, in particular the decision of the House of Lords in *Woolmington v Director of Public Prosecutions* [1935] AC 462, which showed that the burden of proving a crime lies on the prosecution throughout the trial. In this case the Crown has to prove that the appellants published the relevant material "unlawfully" and this meant proving, if the defence raises the issue, that the defamatory material was not true. Otherwise, having regard to sections 256 and 257(1)(h), the Crown would not have proved that the material had been published unlawfully in terms of section 253. A crime which requires the

prosecution to prove that the accused published false matter imputing to another person crime or misconduct in public office with the intention of damaging that other person's reputation is consistent with section 10 of the Constitution. While it hinders the accused's freedom of expression, it is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons; it cannot not be said that such a crime is not reasonably justifiable in a democratic society when it is to be found in the legal systems of other democratic countries. In this case the Board need not, and should not, consider the constitutionality of other aspects of the provisions on libel in the Code. The Code falls to be regarded as an existing law for the purposes of paragraph 1(1) in schedule 2 to the Order and so, if required, the powers of construction in that paragraph are available to the Board.

2. 17. Their Lordships were not told about any specific crime in the law of Grenada, relating to the conduct of elections, which the appellants might be thought to have imputed to the Prime Minister. In particular they heard no submissions as to whether any such crime would fall within the definition of "crime" in section 254(2). Mr Nicol, who appeared for the appellants, did not take any point that it would not. On the other hand he specifically reserved his position on whether the letter should be regarded as imputing any crime at all to the Prime Minister, as opposed to being merely fair comment on the way he had supposedly deployed government expenditure in the hope of achieving party political advantage. Since the facts have not been explored and these points were not developed in argument before the Board, their Lordships express no opinion on them. For present purposes they proceed on the basis that the

charges set out offences in terms of section 252(2) and 253 of the Code. The essential question is whether the relevant provisions of the Code are consistent with the Constitution.

3. 18. The first question in the Chief Magistrate's stated case asks whether section 10 of the Constitution protects freedom to publish material, discussing political matters, or about the conduct of public figures in relation to elections to the House of Representatives, or in relation to their suitability for membership of the House. As in the courts below, counsel were agreed that section 10 did indeed protect freedom to publish such matters, but subject to the limitations set out in subsection (2). So, like the courts below, their Lordships will answer Question 1 in the affirmative. The issues that divide the parties are focused in Question 2.

Freedom of expression under section 10 of the Constitution

19. In considering in more detail the arguments advanced by counsel for both parties in their helpful submissions, their Lordships bear in mind the importance that is attached to the right of freedom of expression, particularly in relation to public and political matters, guaranteed by section 10 of the Constitution. The spirit of the statement of the European Court of Human Rights in *Lingens v Austria* (1986) 8 EHRR 407, 418-419, at para 42, that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention" has been reflected in decisions of courts throughout the world. In *Hector v Attorney General of Antigua* [1990] 2 AC 312, 318, for instance, Lord Bridge of Harwich said: "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind."

In *Benjamin v Minister of Information and Broadcasting* [2001] 1 WLR 1040, 1050–1051 the Board gathered similar views from a variety of courts. Their Lordships refer to them without repeating them. But section 10 of the Constitution can be applied only once the scope of the provisions which are said to infringe it has been ascertained. The first step is accordingly to determine what the prosecution is required to prove in order to secure a conviction of intentional libel under the Code.

The onus of proof of defences under sections 257 and 258 of the Code

1. 20. Mr Nicol argued that, when sections 253–259 of the Code were examined as a whole, it was clear that the prosecution did not require to establish that the defamatory matter was untrue. In general, the truth or falsity of the defamatory matter was irrelevant. The only qualification was that sections 256 and 257(1)(h) gave the accused a defence if, first, he could show -

presumably on the balance of probabilities - that the matter was true and if, secondly, the jury found that it was for the public benefit that it should be published. These provisions were intended to produce a scheme that was broadly similar to the position in English law after the enactment of section 6 of the Libel Act 1843, Lord Campbell's Act.

2. 21. Under that Act criminal libels are divided into two categories, false defamatory libel, usually referred to as aggravated libel, punishable by a maximum of two years' imprisonment (section 4) and malicious defamatory libel punishable by a maximum of one year's imprisonment (section 5). To obtain a conviction of aggravated libel the prosecution has to prove that the defendant knew that the matter was false. But the truth or falsity of the defamatory matter is otherwise irrelevant to a conviction unless the defendant takes advantage of the defence introduced by section 6. This allows him, when pleading to the charge, to allege the truth of the matters charged and to allege that it was for the public benefit that they should be published, giving the specific reasons why that was so. If the defendant does this, the truth of the matters charged can be inquired into and the defendant is entitled to give evidence that they were true - but truth does not amount to a defence unless it was for the public benefit that they should be published. If the position in English law were taken into account, sections 256 and 257(1) of the Code could be seen as giving the Grenadian defendant the same opportunity to establish a defence by showing that the matter was true and persuading the jury that it was for the public benefit that it should be published. The burden of establishing these points was on the defendant.

3. 22. It is indeed plain, and was not disputed, that the English law of criminal libel forms an important part of the background to the provisions in the Code. But, as Mr Nicol himself was careful to point out, the provisions in the Code by no means exactly replicate the English law. Most obviously, the Code distinguishes between negligent and intentional libel, whereas English law makes no mention of negligent libel and distinguishes between aggravated libel, where the defendant knew that the defamatory matter was false, and malicious libel. The truth of the defamatory matter is relevant to that distinction which is found only in English law. Furthermore, the terms of section 6 of Lord Campbell's Act leave no doubt that it is for the defendant to raise and to establish the defence that it provides. The position under the Code is less specific. This is partly because the draftsman has chosen to include what appears to be the equivalent of the section 6 defence in Lord Campbell's Act, not as a free-standing defence, but as one aspect of the much broader defence of absolute privilege. The particular defence relating to the truth of the defamatory matter has accordingly to be seen, first of all, in the wider context of the defences in sections 257 and 258 as a whole.

4. 23. There is nothing in either section 256 ("Any publication of defamatory matter…is unlawful…unless it is privileged on one of the grounds hereinafter mentioned…"), section 257(1) ("The publication of defamatory matter is absolutely privileged…in any of the following cases …") or section 258 ("A publication of defamatory matter is privileged, on condition that it was published in good faith, in any of the following cases …") to fix the burden of proving the defence on the defendant. That is the more striking when in section 259 the

draftsman uses language that is designed to specify which party bears the burden of showing that a publication was in good faith, for the purposes of qualified privilege. In subsection (1) the draftsman says that a publication shall not be deemed to have been made in good faith "if it is made to appear" that certain factors were present. By contrast, in subsection (2) the defendant is entitled to a particular presumption "if it is proved, on behalf of the accused person," that the defamatory matter was published in certain circumstances. The contrast between the drafting of section 259 and the drafting of the other sections indicates that the language of the other sections was not chosen with a view to specifying where the burden of proof lies. At the very least, therefore, the language of sections 256-258 is not designed to specify that the burden of proving the facts or circumstances giving rise to absolute or qualified privilege rests on the defendant. It may well be, of course, that the draftsman of these provisions wrote them with certain prevailing general assumptions about the burden of proof in mind. But they fall to be interpreted in the light of the position which the law adopts today as to the burden of proof in criminal trials, even if the position has changed in the intervening years.

5. 24. The position today is governed by the famous decision of the House of Lords in *Woolmington v Director of Public Prosecutions* [1935] AC 462 and in particular by the words of Viscount Sankey LC, at pp 481–482:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

The House reaffirmed the generality of the principle thus laid down in *Mancini v Director of Public Prosecutions* [1942] AC 1, 11 per Viscount Simon LC. Their Lordships have already pointed out that the language of the relevant provisions of the Code is not designed to place the burden of proof of absolute privilege on the defendant. So this is not a case where the statute introduces an exception to the general principle. The general principle must therefore apply.

1. 25. One integral element of the actus reus of the crime under section 253 is that the defendant published the defamatory material "unlawfully". In section 256 the legislature has made any publication of defamatory matter unlawful unless it is privileged. This also means that any publication that is privileged is lawful. In other words a person who publishes defamatory matter in any of the situations set out in section 257(1) acts lawfully and commits no crime. This is

obvious, for example, where a member of the House of Representatives publishes the matter in the house or where a judge publishes it in a judgment (section 257(1)(b) and (e)), but the same must apply to the other situations covered by subsection (1). Of course, unless the point is raised, the prosecution does not have to lead evidence to show that the matter was not published in such circumstances. But their Lordships readily conclude that, if the defendant raises such a defence and there is evidence to support it, then, in accordance with *Woolmington*, the prosecution must exclude that defence in order to prove that the defendant published the defamatory matter "unlawfully". There is in principle no reason to treat such a defence differently from self-defence, for example, which also exonerates the defendant and which the prosecution must exclude if the defendant raises it and there is evidence to support it.

2. 26. Support for this view is to be found in the decision of Hunt J in *Spautz v Williams* [1983] 2 NSWLR 506 which was brought to the Board's attention thanks to the diligent research of Mr Davenport's pupil. The case concerned a private prosecution for criminal libel raised by a Dr Spautz against various university officials in New South Wales. Section 50(1) of the Defamation Act 1974 provided: "A person shall not, without lawful excuse, publish matter defamatory of another living person ...". At the committal hearing the magistrate held that the onus of proving lawful excuse rested on Dr Williams, one of the defendants. In a hearing in the Common Law Division in which Dr Spautz sought various declarations, Hunt J held that the magistrate had been wrong so to hold. Despite passages in textbooks to the contrary, he held that,

unless the words of the statute placed the burden of proving a defence on the defendant, in criminal libel as in other cases, the Crown had to negative any defence if it was raised. Hunt J said this, at p 533D–E:

> "In my view, the time has come for the law relating to prosecutions for criminal defamation to catch up with developments in the general criminal law which have occurred since *Woolmington's* case, particularly as such prosecutions may now become more frequent .... There is no reason why the 'golden thread' should not run throughout the law relating to criminal defamation just as it does throughout the web of English criminal law generally."

Their Lordships respectfully agree that such an approach should be applied to the defences under section 257 of the Code. They note that Hunt J subsequently followed his own decision in *Waterhouse v Gilmore* [1988] 12 NSWLR 270, 279-280.

27. All this involves nothing more than the application of well-established principles of criminal law and procedure to this particular situation. But further support for this approach is to be found in section 8(2)(a) of the Constitution under which everyone charged with a criminal offence shall be presumed innocent until he is proved guilty. Although that provision does not prevent the

legislature placing the burden of proof of certain facts on the defendant in an appropriate case, there would indeed be an inroad into the presumption if sections 256 and 257 were interpreted in such a way that a defendant could be convicted of criminal libel under section 253 while there remained a reasonable doubt whether he had acted unlawfully: *R v Whyte* (1988) 51 DLR (4th) 481, 493 per Dickson CJC, cited with approval by Lord Steyn in *R v Lambert* [2002] 2 AC 545, 570, at para 35. Where possible, legislation should be interpreted in such a way that it is consistent with the Constitution. The interpretation which their Lordships would in any event be disposed to adopt tends to make the relevant provisions conform to section 8(1)(a) of the Constitution.

The defence under section 257(1)(h)

28. So far their Lordships have looked at the provisions of sections 256–258 as a whole. They must now look more closely at section 257(1)(h), which is the critical provision in these proceedings. The approach based on *Woolmington's* case and subsequent authorities can readily be applied to the limb of that paragraph ("if the matter is true") dealing with proof of the truth of the defamatory matter. In a case like the present, for instance, there is nothing unduly onerous in requiring the prosecutor to prove that the statement, that the Prime Minister had spent millions of dollars to bribe people to vote for him and his party in contravention of the electoral laws, is false. This does indeed mean that the prosecutor bears a burden that no plaintiff in a civil action of defamation has to shoulder, but that difference is more than justified by the fundamentally different nature, purpose and effect of criminal prosecutions and civil proceedings. Moreover, as Hunt J noted in *Spautz v Williams* [1983] 2 NSWLR 506, 533E–F, a difference of this kind in the burden of proof is not

unprecedented. The onus relating to the issue of self-defence in assault undergoes the same mutation between civil and criminal proceedings: *R v Lobell* [1957] 1 QB 547, 550 per Lord Goddard CJ.

2. 29. While the prosecution requires to prove that the defamatory matter was not true, there is nothing in the terms of the legislation to indicate that the prosecution has to go further and prove that the defendant knew that it was untrue. In the Court of Appeal Redhead JA, at para 32 of his judgment, appears to derive such a requirement from the requirement on the prosecution to prove an intent to defame. But that argument is untenable: a defendant can unlawfully publish defamatory matter that is untrue, with the intention of damaging someone's reputation even though he does not know that the matter he is publishing is untrue. Under section 253 a defendant is guilty of an offence in these circumstances, but his knowledge or ignorance of the falsity of the statement is, of course, relevant to any defence of conditional or qualified privilege and may well be relevant to the question of penalty – as indeed under sections 4 and 5 of Lord Campbell's Act.

3. 30. The prosecution does have to do more than prove that the defamatory matter was untrue, however: under the second limb of section 257(1)(h) it must

also persuade the jury to find that it was not for the public benefit that the matter should be published. So, ultimately, if the defamatory matter was untrue, the lawfulness of the defendant's publication depends on whether or not the prosecutor can persuade the jury to find that publication was not for the public benefit. The prosecutor thus has two hurdles to surmount if the defendant is to be convicted. The second hurdle is, admittedly, of a somewhat uncertain height since it depends on the view taken by the particular jury trying the case. But this ensures that the decision is taken by the defendant's peers. Whatever the height of the hurdle for the prosecution, it is an additional safeguard for the defendant.
4. 31. In any trial for criminal libel in terms of section 253 of the Code, where the defendant raises the defence under section 257(1)(h) that the defamatory matter was true and its publication was for the public benefit, and there is evidence before them on which the jury could reach that view, the onus is on the prosecution to prove, first, that the defamatory matter published by the defendant was not true and, secondly that it was not for the public benefit that it should be published. Only by proving both will the prosecution establish that the defendant published the matter unlawfully.

Is the Code an existing law?

1. 32. The Board have deployed no special approach to construction in reaching this conclusion. It is therefore unnecessary for them to express a concluded view on Mr Nicol's argument that paragraph 1(1) of schedule 2 to the Order does not apply to the provisions on criminal libel in the Code, since in terms of paragraph 1(5) the Code was not "an existing law" immediately before 7 February 1974 when the Constitution was commenced. Nevertheless, their Lordships think it right to record their initial reaction to the argument.
2. 33. As Mr Nicol pointed out, in February 1974 the Criminal Code 1897, which had been amended at various times, was in force. The provisions on criminal libel were to be found in Title XIX of that code, comprising sections 256–263. Except for the numbering, those provisions are identical to the provisions in Title XIX of the present Code. So the law on criminal libel was indeed exactly the same immediately before 7 February 1974 as it is at present. Mr Nicol drew attention, however, to section 14(2) of the Continuous Revision of the Laws Act 1994. In terms of that provision, when the Governor-General brings the whole or part of the Continuous Revised Edition of the Laws into force, then, from the date, and to the extent, specified in the proclamation

> "the enactments in the whole or, as the case may be, the part or parts so proclaimed shall be substituted for the enactments therein reproduced and revised ..."

So in 1994 the relevant provisions in Part XIX of the present Code had been substituted for the provisions in Part XIX of the 1897 code. The present provisions had therefore formed part of the law of Grenada only since 1994 and were not part of the law immediately before Independence. It would not be

legitimate to construe the term "existing law" generously so as to cover such substituted provisions since, where that was intended, other Caribbean constitutions made special provision to include such re-enactments. Mr Nicol referred to section 26(8) and (9) of the Constitution of Jamaica, section 6(1) and (2) of the Constitution of Trinidad and Tobago and section 30(1) and (2) of the Constitution of Barbados.

34. It is indeed plain that in these other constitutions, care has been taken to extend the meaning of "existing law" so as to cover re-enactments etc. But all these provisions are savings clauses of a familiar kind that are designed to protect the existing law, to a greater or lesser degree, from challenge on the basis of inconsistency with the human rights provisions in the constitution. In the case of such an exception from the code of human rights a court could be expected to apply a restrictive interpretation to the phrase "existing law". The legislatures have forestalled that by expressly extending the definition in the savings clauses to cover re-enactments etc. The Constitution of Grenada, by contrast, contains no such provision to exclude existing laws from the impact of the human rights provisions in Chapter I. In the present case, therefore, the phrase has to be construed solely within the, very different, context of paragraph 1(1) which is designed to help bring existing laws into conformity with all the provisions of the Constitution, including the human rights provisions. Given this different, and indeed beneficent, context, their Lordships reserve their opinion whether the narrow construction of paragraph 1(1) advocated by Mr Nicol is appropriate or whether, rather, the paragraph should be held to extend to provisions that are identical to those in force immediately before 7 February 1974.

Further arguments against the Board's construction

35. Mr Nicol argued further that, in any event, whether under paragraph 1(1) or otherwise, it was not open to the Board to interpret the relevant provisions in the Code as requiring the Crown to prove that the defamatory matter had not been true. If the Board were to do that, he said, the principle of legal certainty under the Constitution would be infringed since the law so interpreted would be different from what it had been at the time when the appellants published the statement in September 1999. That argument must be rejected. Their Lordships pass over the very real objection that, according to the usual understanding, the decision of the Board on the proper interpretation and application of the Code in the light of the Constitution is deemed to represent the law as it always has been: *Kleinwort Benson Ltd v Lincoln County Council* [1999] 2 AC 349, especially at pp 377-379 per Lord Goff of Chieveley. But, if the supposed starting point is that in 1999 section 253 of the Code was understood to contain no requirement for the Crown to prove that the defamatory statement was untrue and that its publication was not for the public benefit, then their Lordships' interpretation removes an ambiguity, narrows the scope of the offence

and makes the position more, not less, certain. Thus the Board's interpretation cannot prejudice any editor or publisher who proceeded in 1999 on the kind of interpretation of the provisions of the Code put forward by Mr Nicol. On the contrary, the appellants gain potential advantages and suffer no disadvantages from the Board's interpretation.

2. 36. Mr Nicol further submitted that, even if the Board could identify and deal with any infringements in the provisions that apply in the present proceedings, they should not do so since there were other provisions which were equally open to question as being inconsistent with section 10 of the Constitution. He pointed, for example, to the possibility of convicting someone of negligent libel: sections 252(1) and 253. Another problematical provision was to be found in section 255(1) under which there could be publication in terms of section 253 even where the defamatory meaning of the matter was merely "likely to become known", as opposed to becoming known, and where it became known only to the person defamed, rather than to any other person. Finally, he submitted that there was no room for the kind of defence of qualified privilege envisaged in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 since none of the heads in section 258 was wide enough to embrace a duty on the part of newspapers to inform the public and engage in public discussion of matters of public interest, coupled with a corresponding interest in the public to receive information. Title XIX was thus riddled with provisions that infringed the Constitution. The Board should treat its provisions as a whole as void, rather than examining them individually to see whether certain parts could be regarded as constitutional and be made to work.

3. 37. Their Lordships see no reason in principle to follow the approach advocated by Mr Nicol, especially in an area of the law where so few cases arise and where the validity of the other provisions to which he referred may never come up for consideration in an actual case. It is sufficient if the provisions on which the present prosecution is based are consistent with the Constitution. The Supreme Court of Canada follows a similar approach when faced with a number of challenges under the Charter. For instance, in *R v Butler* [1992] 1 SCR 452, 471 Sopinka J said this:

> "The constitutional questions, as stated, bring under scrutiny the entirety of section 163. However, both lower courts as well as the parties have focused almost exclusively on the definition of obscenity found in section 163(8). Other portions of the impugned provision, such as the reverse onus provision envisaged in section 163(3), as well as the absolute liability offence created by section 163(6), raise substantial Charter issues which should be left to be dealt with in proceedings specifically directed to these issues. In my view, in the circumstances, this appeal should be confined to the examination of the constitutional validity of section 163(8)."

Other passages to the same effect are conveniently gathered in the opinion of Twaddle JA in *R v Stevens* (1995) 96 CCC (3d) 238, 278. If in due course in the present proceedings the defence raises other constitutional issues, then the courts will deal with them at the proper time. None the less it might be helpful to

the parties if the Board briefly indicated their views on two points arising out of Mr Nicol's submission.

38. First, the question that Mr Nicol raised as to whether negligent libel, as provided for in sections 252(1) and 253, is consistent with section 10 of the Constitution would arise in the present case if it would be open to a jury to convict the appellants of negligent libel under section 252(1) in the event of the prosecution failing to establish intentional libel under section 252(2). In this connexion counsel referred to section 60 of the Criminal Procedure Code, the relevant part of which is in these terms:

> "Every complaint or count shall be deemed divisible; and when a person is charged with a crime, and part of the charge is not proved, but the part which is proved amounts to a different crime, he may be convicted of the crime which he is proved to have committed, although he was not charged with it, or he may be convicted of an attempt to commit any offence so included, although not charged with the attempt."

That provision appears to be aimed at a rather different situation where, in the course of trying to prove the offence charged, the prosecution prove part of that offence, which in itself constitutes another offence. The defendant can be convicted of that other offence. In the present case, however, at any trial the prosecution will lead evidence to prove that the appellants published the defamatory matter with intent to defame the Prime Minister, ie with the intention of injuring his reputation. Publishing the matter negligently is not part of that offence. Hence the evidence properly led to prove intentional libel would not in practice provide a legitimate basis for convicting the appellants of negligent libel. Accordingly, the issues raised by Mr Nicol about negligent libel and section 10 of the Constitution do not arise for determination in these proceedings.

39. Secondly, the Board were not persuaded by Mr Nicol's submission that section 258 of the Code was too narrowly drafted to permit a defendant to raise the kind of defence of qualified privilege for the press envisaged in *Reynolds v Times Newspapers.* The rationale of that defence is that the press have a duty to communicate and the public have an interest to receive the information in question. Section 258(j) confers qualified privilege on a publication in good faith for the protection of the interests of the person to whom it is published. In their Lordships' view that provision would be wide enough to accommodate a *Reynolds* defence of qualified privilege for the press in appropriate circumstances.

Is the crime of intentional libel, thus interpreted, consistent with section 10 of the Constitution?

40. In *de Freitas v Ministry of Agriculture, Fisheries, Lands and Housing*

[1999] 1 AC 69, 80 the Board adopted the analysis of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, 75 for determining whether a limitation on freedom of expression is arbitrary or excessive:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

2. 41. It is, as already explained, common ground that the crime of intentional libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under section 10(1) of the Constitution. It is therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, then the burden shifts to the appellants to show, in terms of the last limb of section 10(2), that the provisions are not reasonably justifiable in a democratic society. See *Cable and Wireless (Dominica) v Marpin Telecoms and Broadcasting Co Ltd* [2001] 1 WLR 1123, 1132 per Lord Cooke of Thorndon.

3. 42. For present purposes, the crime of intentional libel, as interpreted by the Board, is committed where a defendant publishes any false defamatory matter, imputing to another person a crime or misconduct in any public office, with the intention of damaging the reputation of that other person, in circumstances where the jury consider that the publication was not for the public benefit. The intention to damage the other person's reputation is important. The law rightly attaches a high value to a person's reputation not only for that individual's sake but also in the wider interests of the public. In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201a-c Lord Nicholls of Birkenhead explained the position in this way:

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others."

The protection of good reputation is conducive to the public good. It is also in the public interest that the reputation of public figures should not be debased falsely. Their Lordships are therefore satisfied that the objective of an offence that catches those who attack a person's reputation by accusing him, falsely, of crime or misconduct in public office is sufficiently important to justify limiting the right to freedom of expression. Moreover, the offence is rationally connected to that objective and is limited to situations where the publication was not for the public benefit. Of course, the tort of libel provides a civil remedy for damages against those who make such attacks, but this no more shows that a crime of intentional libel is unnecessary than the existence of the tort of conversion shows that a crime of theft is unnecessary. Similarly, the fact that the law of criminal libel has not been invoked in recent years does not show that it is not needed. After all, prosecutions are in one sense a sign not of the success of a criminal law, but of its failure to prevent the conduct in question. In *R v Lucas* [1998] 1 SCR 439, at paras 55 and 56 Cory J, for the Supreme Court of Canada, rejected a similar argument against the constitutionality of the crime of defamatory libel in the Canadian Criminal Code:

> "55. The appellants argued that the provisions cannot be an effective way of achieving the objective. They contended that this was apparent from the fact that criminal prosecutions for defamation are rare in comparison to civil suits. However, it has been held that '[t]he paucity of prosecutions does not necessarily reflect on the seriousness of the problem', rather it 'might be affected by a *number* of factors such as the priority which is given to enforcement by the police and the Crown' (*R v Labal* [1994] 3 SCR 965, 1007 (emphasis added)). There are numerous provisions in the Code which are rarely invoked, such as theft from oyster beds provided for in section 323 or high treason in section 46. Yet, the infrequency of prosecutions under these provisions does not render them unconstitutional or ineffective. I agree that the small number of prosecutions under section 300 may well be due to its effectiveness in deterring the publication of defamatory libel ...
>
> 56. In my view section 300 is rationally connected to the legislative objective of protecting the reputation of individuals."

For much the same reasons as the Supreme Court, their Lordships reject this particular argument for saying that the crime of intentional libel is not reasonably required in Grenada. Looking at the position overall, they are satisfied that it is indeed reasonably required to protect people's reputations and does not go further than is necessary to accomplish that objective.

43. Nor can the Board say that such a crime is not reasonably justifiable in a democratic society. Of course, some democratic societies get along without it. But that simply shows that its inclusion is not the hallmark of the criminal law of all such societies. In fact criminal libel, in one form or another, is to be found in the law of many democratic societies, such as England, Canada and Australia. It

can accordingly be regarded as a justifiable part of the law of the democratic society in Grenada.

Conclusion

1. 44. Question 1 in the stated case must be answered in the affirmative. On the basis that, for the reasons explained above, the prosecution must prove that the defamatory matter published by the defendant was untrue and that its publication was not for the public benefit, their Lordships answer Question 2 in the negative. Again for reasons given above, their Lordships cannot proceed on the assumption in Question 3 that the alleged defamatory matter in the present proceedings did not touch or concern any public interest. Question 3 is accordingly superseded and does not require an answer.
2. 45. For all the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. There will be no order as to costs.