Neutral Citation Number: [2015] EWCA Crim 539

Case No: 2014/05518/C4, 2014/05791/C4, 2014/05616/C4 & 2015/00900/C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge Wide QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2015

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE CRANSTON
and
MR JUSTICE WILLIAM DAVIS

- -

Between :

Regina	**Respondent**
- and -	
Scott Derek Chapman	**Applicants**
Lynn Gaffney	
Lucy Rebecca Panton	
Regina	**Respondent**
- and -	
Ryan Sabey	**Applicants**

- -

Paul Mendelle QC for the **Appellant Chapman**
Emily Culverhouse for the **Appellant Gaffney**
J Butterfield QC for the **Appellant Panton**
J Rees QC for the **Respondent** in **Chapman and others**
Orlando Pownall QC and **Will Hays** for the **Appellant Sabey**
Julian Christopher QC and **Stuart Biggs** for the **Respondent in Sabey**

Hearing date: 10 March 2015

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

This is the judgment of the court to which each of us has contributed.

1. Over the past year and at present, there have been, are continuing and will be a number of trials where public officials (policemen, prison officers, soldiers and others) are being tried for the ancient common law offence of misconduct in public office on the basis that they passed information obtained in the course of their duties to the media in return for payment. Those in the media who dealt with them have been, are being or will be tried for aiding and abetting such misconduct and in some cases conspiracy.

2. There are before the court applications for leave to appeal in two such trials which have been tried at the Central Criminal Court before HH Judge Wide QC and a jury.

The evidence in R v Chapman, Gaffney and Panton

3. As is well known, in 1993 Jon Venables and another young person were convicted of the murder of Jamie Bulger. In due course he was released on licence for that offence under a new identity. That identity was protected by various orders of the court. In early 2010 he was recalled to prison in relation to further offences. In March 2010 Venables was held at HMP Woodhill.

4. One of the officers at HMP Woodhill was the first appellant in the first appeal, Scott Chapman, who had been employed there from 2003. Between then and 20 June 2011 Scott Chapman provided information about Venables to the newspapers. It was his case and his evidence that at first he did so because he believed Venables was receiving what he saw as special treatment which he believed to be wrong, unfair and contrary to the ethos of the prison. However he accepted that in the course of the period in which he supplied information to newspapers, his motivation changed to that of obtaining money, particularly after he had lost his job at HMP Woodhill on 6 April 2011. He had obtained more than £40,000. Nonetheless he contended that, although what he had done was wrong, it was not so wrong as to amount to a crime. The prosecution case was that he had deliberately exploited his public office for gain.

5. The money that was paid by the newspapers was paid to the bank account of the second appellant, Lynn Gaffney. Scott Chapman had had a relationship with her for many years; their son had been born in 1997. He remained close friends with her. That was not in dispute. It was Scott Chapman's account that at first he did not tell her the truth as to where the money was coming from but later he had said he told her that he was selling stories to newspapers which he had made up. Although the money was in her bank account he considered that the money was his. Her evidence was that when she saw the cheques were coming from News International, she asked him why he was being paid. He told her that he had been making up stories and selling them. The prosecution case was that she knew that her bank account was being used because of the seriousness of the misconduct he was committing in breach of his duties as a prison officer.

6. Both were charged with misconduct in public office, the case against Lynn Gaffney being that she had aided and abetted him.

7. One of the journalists to whom the information had been provided was the third appellant, Lucy Panton, a crime reporter who had joined *The News of the World* in 2002; there was powerful evidence before the jury about her professionalism as a journalist. It was the prosecution case against her that she had obtained information

from Scott Chapman which resulted in two articles about Venables and for which a payment of £1,250 had been made. It was her evidence and case that Scott Chapman had been referred to her in 2010 by the newsdesk when he telephoned the newspaper. He had been referred to as "Adam" and was an anonymous tipster. He was not the only anonymous source with information about Venables; she had published several stories but "Adam" was the source of only two. He told her that he had sold information to *The Sun.* She found him on the system with the payment details for Lynn Gaffney; she could see from the system that he was a tried and trusted source. Her evidence was that it was not her practice to cause public officials to be paid for stories; any decision to make a payment was for the legal managers and the editors. It was not her practice to ask for identification where the source was anonymous. She did not know he was a prison officer. She had sent an e-mail where she referred to having seen the source's Woodhill pass and wage slip; her case was that she probably made that up in order to ensure that her story was not "pulled". There was also a reference by her in an e-mail to a "prison tipster" but that did not necessarily mean a prison officer. She believed that the story was in the public interest.

8. She was charged with conspiracy to commit misconduct in public office on the basis she had entered into an agreement which would involve Scott Chapman who she knew to be a prison officer acting in breach of his duty by disclosing information about Venables.

9. The three were tried with another journalist at the Central Criminal Court before HH Judge Wide QC and a jury. All three were convicted on 5 November 2014 but the other journalist acquitted.

10. On 11 December 2014 Scott Chapman was sentenced to 42 months imprisonment, Lynn Gaffney to 30 weeks imprisonment and Lucy Panton to six months imprisonment, suspended for 12 months with 150 hour unpaid work requirement and a three month electronically monitored curfew requirement. Their application for leave to appeal against conviction has been referred to the Full Court by the Registrar. We grant leave.

The evidence in R v Sabey and Brunt

11. As is also well-known, HRH Prince Harry was an officer in the Blues and Royals of the Household Cavalry Mounted Regiment in 2006-7. There was intense press interest in any stories about him.

12. Paul Brunt was a Lance Corporal in the same Regiment. He provided information about Prince Harry to *The News of the World* between April 2006 and November 2007 in return for payments. There was evidence that all members of the armed forces were instructed not to talk to the media without permission; this instruction was reinforced when the Royal Princes joined the regiment. Paul Brunt did not give evidence, but his account in his interview (when he chose not to be represented by a lawyer) was that he had provided the information for money. The prosecution case was that he had abused his position as a soldier and received from *The News of the World* and *The Sun* (to whom he had also provided information) a total of £16,000.

13. Ryan Sabey was a journalist on *The News of the World*, joining in 2001, becoming a staff reporter in 2003 and a Royal reporter in 2005. The newsdesk had put him in

touch with Paul Brunt, telling him that there was someone with a potential story. He rang back. He was told his name was Steve and he might have a story. He kept in touch and some weeks went by before he provided information about the Prince horse riding. In the course of his dealings, Paul Brunt passed him a story with pictures of a soldier in his regiment with KKK dress and swastika symbols. He accepted that he learnt that Paul Brunt was a serving soldier and that Paul Brunt had been paid. The jury were provided with an e-mail in which Ryan Sabey asked if he could pay £1,500 in cash instead of paying it into his bank account as Paul Brunt had said his position could be jeopardised if the army ever asked to see his bank accounts. That payments was made in cash. His evidence was that many much more senior people in the paper had known he was receiving stories from a serving soldier and he had made the payments. It was the prosecution case that he encouraged Paul Brunt to provide the information, knowing that Paul Brunt was not allowed to provide it. Ryan Sabey contended that looked at overall the stories were in the public interest.

14. Paul Brunt and Ryan Sabey were charged with misconduct in public office, Ryan Sabey being charged with aiding and abetting Brunt.

15. They were tried at the Central Criminal Court also before HH Judge Wide QC and a jury on 19 February 2015; both were convicted. Sabey seeks leave to appeal on a single ground – the direction of the judge in respect of aiding and abetting. We grant leave. At the time of the hearing, the time for Paul Brunt to seek leave to appeal had not expired.

The issues.

16. Four issues arose on the first appeal. The second appeal involved the first and second issues only:

    i) Was the judge's direction in respect of the threshold required for misconduct in public office correct?

    ii) Was the judge's direction in respect of the *mens rea* of Lynn Gaffney/ Ryan Sabey as aiders and abettors correct?

    iii) What was the *mens rea* required to convict Lucy Panton in relation to the count of conspiracy?

    iv) Did the judge's response to a jury note in R v Chapman amount to a material irregularity affecting the safety of the conviction?

(1) Was the judge's direction in respect of the threshold required for misconduct in public office correct?

(a) The elements of the offence

17. Misconduct in public office is, as we have said, an ancient common law offence; it can be traced back to the thirteenth century, though the development of the present offence only began in 1783 in the judgment of Lord Mansfield CJ in *R v Bembridge* (1783) 3 Doug 327. The most recent formulation of the elements of the offence was

set out in the judgment of this court (Pill LJ, Hughes and Aikens JJ) in *Attorney General's Reference (No. 3 of 2003)* [2004] 2 Cr App R 23, [2005] QB 73. After the acquittal of four police officers in a trial involving a death in custody, the Attorney General sought the opinion of the court on the question: "What are the ingredients of the common law offence of misconduct in public office?" The Court after an extensive review of the authorities answered the question at paragraph 61 by stating it comprised four elements:

i) A public officer acting as such

ii) wilfully neglects to perform his duty and/or wilfully misconducts himself

iii) to such a degree as to amount to an abuse of the public's trust in the office holder

iv) without reasonable excuse or justification.

18. The element in issue on the applications before us was the third element – the threshold test for the misconduct to be sufficiently serious to amount to an abuse of the public's trust in the office holder. In the court's examination of the authorities on this element it relied in particular on the decisions in *R v Dytham* (1979) 69 Crim App R 722 (Lord Widgery CJ, Shaw LJ and McNeill J) and *Shum Kwok Sher* [2002] 5 HKFAR 381 (Final Court of Appeal, Hong Kong, where the leading judgment was given by Sir Anthony Mason). Its conclusion in respect of the third element was expressed at paragraphs 56-8:

> "56. … There must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to **an abuse of the public's trust in the office holder**. A mistake, even a serious one, will not suffice. The motive with which a public officer acts may be relevant to the decision whether the public's trust is abused by the conduct
>
> 57 ... the element of culpability must be of such a degree that **the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment**
>
> 58 … The conduct cannot be considered in a vacuum: the consequences likely to flow from it, viewed subjectively as in *R v G* will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer … There will be some conduct which possess the criminal quality even if serious consequences are unlikely, but it is always necessary to assess the conduct in the circumstances in which it occurs." (emphasis added)

19. In the light of the modern restatement of the law it is not necessary to refer to earlier cases as it was not suggested before us that the formulation in *AG Reference No 3 of*

2003 was in any way inaccurate. What was in issue was whether the way in which the judge set out this element of the offence accorded with the law as so formulated. It is, as was submitted to us, therefore helpful briefly to refer to that issue as raised in *Dytham* and *Shum Kwok Sher*.

20. In *Dytham* a police officer was charged with the offence in circumstances in which he had witnessed a very serious attack on an individual who died, but had failed to intervene; this was not an allegation of nonfeasance, but of deliberate failure and wilful neglect. The judge ruled that the offence was one known to the law and the officer was convicted. On appeal, the court said:

> This involves an element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct **is calculated to injure the public interest so as to call for condemnation and punishment**. Whether such a situation is revealed by the evidence is a matter that a jury has to decide. It puts no heavier burden upon them than when in more familiar contexts they are called upon to decide whether driving is dangerous or a publication is obscene or a place of public resort is a disorderly house. (emphasis added)

21. In *Shum Kwok Sher* a senior government officer had used his position to provide preferential treatment to a company and its directors to whom he was related. Sir Anthony Mason observed that the passage in the judgment of Lord Widgery CJ to which we have referred was not the language of definition. He went on to say at paragraphs 77 and 78:

> Read in context, the words suggest that his Lordship was endeavouring to convey the idea that the conduct complained of must be injurious to the public interest and of a sufficiently serious nature to warrant conviction and punishment. The linkage his Lordship makes with the idea of culpability reinforces this view of his lordship's purpose. In this respect, it is to be noted that Lord Widgery employs the concept of culpability to embrace two different matters, namely first the absence of reasonable excuse and justification and secondly that the conduct complained of may not involve corruption or dishonesty but must be of a sufficiently serious nature.
>
> The second point is that there was no clear previous authority for the proposition that, in any category of case of misconduct in public office the prosecution must prove to the satisfaction of a jury, as elements of the offence**, that the conduct of the defendant was calculated to injure the public interest so as to call for condemnation and punishment**" (emphasis added)

(b) The judge's direction on the threshold test for the misconduct

22. We turn therefore to consider whether the direction given by the judge accurately reflected the third element of abuse in the public's trust in the office holder as outlined in these cases.

23. The judge directed the jury, orally and in his route to verdict, as follows:

> "Are you sure that Mr Chapman's misconduct was so serious as to amount to an abuse of the public's trust in him as the holder of public office and that Mr Chapman has no reasonable excuse or justification for selling the stories."

This direction set out together and in a single sentence the third and fourth elements identified in *Attorney General's Reference No3 of 2003.* He then went on to amplify that by a further direction which he recorded in his route to verdict in a footnote (footnote 3) which read:

> "There must have been a serious, blameworthy departure from proper standards amounting to an affront to the standing of the public office held. Have regard to all the circumstances as you find them to have been including (what follows is not exhaustive) the responsibilities entrusted to Mr Chapman as an office holder, the importance to the public of his responsibilities, the nature and extent of his departure from those responsibilities and his motivation for doing so (for example, to try to right a perceived wrong/making money), the nature of the information sold by him, his perception of the potential and actual consequences of his misconduct and how that misconduct was viewed by him and others. Consider whether the information he provided was information which the public really ought to have known but was being kept from them and what, if any alternative means of addressing any wrong reasonably perceived by him was available to him. Bear in mind that for the members of the public to be interested in certain facts is not necessarily the same as it being in the public interest for those facts to be published."

24. The direction given in respect of Paul Brunt was the same. In that case the jury asked a question:

> According to law, can the seriousness of the misconduct be determined by the nature of the misconduct alone or can it/must it depend on the seriousness of the information imparted?

25. The judge answered it by saying that they had to take into account both but they also had to take into account all the circumstances set out in his direction at footnote 3.

(b) The contentions of the applicants

26. At the trial each of the appellants invited the judge to give a direction that the test for establishing criminal misconduct was a high one. They contend that the omission of a reference to the threshold being a high one, requiring conduct so far below acceptable standards as to amount to an abuse of public trust in the office holder should have been used. It was submitted that the judge should have made it clear that the conduct was so serious that it required punishment through the criminal courts.

27. It was also submitted on behalf of Lynn Gaffney, as part of the argument in relation to her position as an accessory, that the standard of misconduct was not to be judged objectively, but that the prosecution had to prove that the office holder intended his conduct to be so serious as to cross the threshold. We consider this argument at paragraphs 47 and following below as it arose solely in that context. For the reasons we give it is for the jury to decide whether, on the information known to the office holder, the conduct crossed the threshold. It is not necessary to establish that the office holder intended to cross the threshold.

(c) Our approach

28. We were referred to the direction given by Fulford J (as he then was) in a similar case involving a police officer's provision of information to a newspaper which was heard in January 2013. In it that judge said in relation to the third element that the prosecution must establish that:

> "What the defendant did was "wrong", in the sense that her actions were an abuse of the public's trust in her position as a police officer and what she said during the telephone call to *the News of the World* … substantially fell below the standards that the public are entitled to expect of police officers, particularly at a senior level. It must involve wrongdoing, therefore, that harms the public interest and is sufficiently serious to merit a criminal conviction in the context of this trial.
>
> You represent the public in this trial and it is for you to say whether the defendant's actions were wrong and constituted an abuse of the public's trust in the sense I have just described. However, the defendant's actions clearly must have been graver than a simple and straight forward mistake or an understandable error of judgment even a serious one. Instead it must constitute an abuse of the public's trust in this senior police officer."

29. We were given no explanation why the judge was not helped by the provision to him of this direction. Prosecuting counsel had not been made aware of it. This is without doubt a difficult area of the criminal law. An ancient common law offence is being used in circumstances where it has rarely before been applied. The judge was entitled to far more help by the prosecution than he was given.

30. It is clear, in our judgment, that no exact form of words is necessary to direct the jury as to what is required by the third element - misconduct of such a degree that it amounts to a breach of the public's trust in the office holder. However any direction must take into account the context in which the misconduct has occurred. In this appeal two points arise in the context of information being supplied by office holders to the media.

31. First, the judge had to make clear that the necessary misconduct was not simply a breach of duty or breach of trust. The judge directed the jury in respect of the first two elements identified in *Attorney General Reference No 3* that they had to be sure there was wilful misconduct, that is to say a deliberate breach of duty. In the context

of both trials, as there was overwhelming evidence that the prison officer and soldier had acted in breach and neglect of their duties and had done so deliberately, it was therefore necessary when turning to the third element to make clear in the direction to the jury that the misconduct must be more than a breach or neglect of duty or breach of trust; as was observed in *R v Borron* 106 ER 72, (1820) 3 B & Ald, to condemn anyone who had fallen into error or made a mistake, belonged only to the law of a despotic state. Although the judge did not make this expressly clear (and it might have been better if he had), we are in no doubt that it was clear from the direction read as a whole that misconduct at the level of breach of duty, neglect of duty or breach of trust was insufficient to satisfy the third element.

32. Second it was necessary in our view to explain to the jury how they should approach determining whether the necessary threshold of conduct was so serious that it amounted to an abuse of the public's trust in the office holder. Each of the cases refers (as we have indicated in the emphasis we have given to the citations) to that level as being one where it is calculated to injure, that is to say has the effect of injuring, the public interest so as to call for condemnation and punishment.

33. Again context is important in determining how the jury should be directed - the wilful misconduct of the office holder involved in the provision of information to the media. In a democratic society the media carry out an important role in making information available to the public when it is in the public interest to do so, not simply (as the judge pointed out) because the public may be interested in it. Those employed by the state in public office will generally be in breach of the duty owed by them to their employers or commanding officers by providing unauthorised information to the press. However, information is sometimes provided by such persons in breach of that duty where the provider of that information may benefit the public interest rather than harm it. The provision of the information may well in such a case be an abuse of trust by the office holder to his employer or commanding officer, even if the disclosure of the information may be in the public interest. It may therefore result in disciplinary action and dismissal of the officer holder. That is because the abuse of the trust reposed in the office holder by the employer/commanding officer in such a case is viewed through the prism of the relationship between the office holder and his employer or commanding officer. That is not the prism through which a jury should approach the issue of the abuse of the public's trust in an office holder.

34. The offence requires, as the third element, that the misconduct must be so serious as to amount to an abuse of the public's trust in the office holder. It is not in our view sufficient simply to tell the jury that the conduct must be so serious as to amount to an abuse of the public's trust in the office holder, as such a direction gives them no assistance on how to determine that level of seriousness. There are, we consider, two ways that the jury might be assisted in determining whether the misconduct is so serious. The first is to refer the jury to the need for them to reach a judgment that the misconduct is worthy of condemnation and punishment. The second is to refer them to the requirement that the misconduct must be judged by them as having the effect of harming the public interest. The direction adopted by Fulford J encompassed both of these.

35. In the argument before us, the emphasis was on the failure of the judge to refer to the conduct being of such seriousness as to require condemnation as criminal and punishment. We were referred to the type of direction given in gross negligence

manslaughter where the court makes clear that simple negligence is not enough; the level of conduct must be criminal. It is not necessary for us to consider the decisions in *R v Adomako* [1995] 1 AC 171 or *R v Misra* [2005] 1 Cr App R 21 and the difficulties that arise if a jury is told that the conduct must be so bad as to amount to a criminal act. We do not think that it was necessary in relation to the offence of misconduct in public office to tell the jury that they must decide if conduct must amount to criminal conduct. It is not, as we read the decisions, required and it has the dangers of circularity. It is, in our view, sufficient if the judge tells the jury that the threshold is a high one.

36. We therefore turn to examine the second way in which the standard of seriousness can be judged - by reference to the harm to the public interest. In our view, in the context of provision of information to the media and thus the public, that is the way in which the jury should judge the seriousness of the misconduct in determining whether it amounts to an abuse of the public's trust in the office holder. The jury must, in our view, judge the misconduct by considering objectively whether the provision of the information by the office holder in deliberate breach of his duty had the effect of harming the public interest. If it did not, then although there may have been a breach or indeed an abuse of trust by the office holder vis a vis his employers or commanding officer, there was no abuse of the public's trust in the office holder as the misconduct had not had the effect of harming the public interest. No criminal offence would have been committed. In the context of a case involving the media and the ability to report information provided in breach of duty and in breach of trust by a public officer, the harm to the public interest is in our view the major determinant in establishing whether the conduct can amount to an abuse of the public's trust and thus a criminal offence. For example, the public interest can be sufficiently harmed if either the information disclosed itself damages the public interest (as may be the case in a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (as may be the case if the public office holder is paid to provide the information in breach of duty).

37. The judge did not direct expressly direct the jury in these terms. He referred to the conduct being so serious as to amount to an abuse of the public's trust in the prison officer and the soldier. Did that sufficiently make clear, in the context with which these cases were concerned, the issue as to the public interest?

38. The provision of information which had the effect of harming the public interest would have been very properly viewed as an abuse of the public's trust in the prison officer/soldier as an office holder so as to amount to the necessary serious degree of misconduct. But the simple use of the term "an abuse of the public's trust in him as the holder of a public office" is simply conclusory. It does not explain to the jury how to determine whether the conduct was of a sufficient level of seriousness. Their task was to determine the level of seriousness by reference to whether the misconduct had the effect of harming the public interest. Does the footnote achieve this?

39. The footnote refers to the circumstances which the jury must take into account as extending to include whether the information was information the public really ought to have known, if there were alternative means of addressing the wrong and the nature of the public interest. It did not directly ask the jury to determine whether the conduct had the effect of harming the public interest as a step in deciding whether the conduct

was so serious as to amount to an abuse of the public's trust in the office holder. In the context of the subject matter of both appeals this was essential.

40. As the third ingredient of the offence was a central element of the case against Scott Chapman, Lynn Gaffney and Lucy Chapman and as it was not properly explained to the jury, there was a material misdirection. We have no doubt that it was open to the jury, in a case where the information itself might not be said to harm the public interest, to conclude that the manner in which the information was provided for payment would be of a sufficient level of seriousness to harm the public interest.

(2) Was the judge's direction in respect of the *mens rea* of Lynn Gaffney/ Ryan Sabey as aiders and abettors correct?

(a) The directions to the jury

41. We turn to the position of Lynn Gaffney and Ryan Sabey, each of whom was charged as aiding and abetting misconduct in public office. As we have set out, the allegation in Gaffney's case was that she had allowed her account to be used in the manner we have set in the knowledge (a) that Scott Chapman was being paid for information and (b) that Scott Chapman's activity amounted to wilful misconduct. The allegation in Ryan Sabey's trial was that he had assisted and encouraged Paul Brunt as the holder of a public office wilfully to misconduct himself.

42. Although the nature of the participation of these two appellants was different, the directions given to the jury in the route to verdicts in the different trials in relation to what had to be proved against them were very similar. The judge first made it clear to the jury in each case that Lynn Gaffney and Ryan Sabey only could be convicted if the principal offender – whether Scott Chapman or Paul Brunt –were to be convicted. The routes to verdict then set out the questions to be answered in relation to the principal offender. Only after answering those questions against the interests of the principal was the jury required to consider the case of Lynn Gaffney or Ryan Sabey. The routes to verdict document in the case of Ryan Sabey was as set out below. That relating to Lynn Gaffney differed in relation to the nature of the assistance said to have been given by her. This is of no consequence to the issues in these appeals and it has not been raised as an issue for our consideration.

> "4. Are we sure that Ryan Sabey encouraged and assisted, and intended to encourage and assist, Paul Brunt in providing information/photographs to him?
>
> If yes, go to question 5.
>
> If no, verdict: Not guilty
>
> 5. Are we sure that, when Ryan Sabey received information/photographs from Paul Brunt, he knew that Paul Brunt's actions amounted to wilful misconduct by him?
>
> If yes, go to question 6.

If no, verdict in relation to Ryan Sabey: Not Guilty

6. Are we sure that, in the circumstances of which Ryan Sabey was aware, Paul Brunt's misconduct was, in our judgment so serious as to amount to an abuse of the public's trust in Paul Brunt as the holder of a public office and for which he, Paul Brunt, had no reasonable excuse or justification.

If yes, verdict in relation to Ryan Sabey: Guilty

If no, verdict in relation to Ryan Sabey: Not Guilty."

43. Paragraph 5 was subject to two footnotes.

i) The first concerned the word "wilful". The explanatory footnote read:

> Deliberate, being aware of his duty not to conduct himself in the way that he did."

ii) The second related to the word "misconduct". The explanatory footnote was as follows:

> "i.e. that he breached a duty, of which he was aware, not to sell information/photographs to newspapers. The existence of that duty and his awareness of it need not derive from a specific regulation."

As we have observed, these two questions related essentially to their respective knowledge that Scott Chapman/Paul Brunt were in deliberate breach of their duties. They did not relate to the seriousness of the misconduct.

44. The element relating to the seriousness of the misconduct was dealt with in question 6 and the footnote at the conclusion of paragraph 6 which added to and explained the contents of that paragraph. It referred back to the lengthy footnote direction given in relation to the principal in respect of what has been termed the threshold as set out by us at paragraph 23 and then added:

> "but note you may take into account only those circumstances of which you are sure Ryan Sabey (Lynn Gaffney) was aware."

45. During the course of their retirement the jury in the trial of Scott Chapman and others asked if they should interpret the question as meaning:

> "Did Lynn Gaffney believe that Scott Chapman's conduct crossed a criminal threshold."

The jury was given the answer "No".

(b) The contentions made on behalf of Lynn Gaffney and Ryan Sabey

46. Both Lynn Gaffney and Ryan Sabey argued that the directions given were deficient in that they did not require the jury to find that each knew or intended that the misconduct of the holder of the public office should be so serious as to amount to an abuse of the public's trust in the office holder. They submit that this omission is contrary to the test of *mens rea* for an aider and abettor as expressed in Lord Goddard CJ in *Johnson v Youden* [1950] KB 544:

> "Before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence".

47. The first submission made on behalf of Lynn Gaffney was that anyone charged with the offence of misconduct in public office whether as a principal or as an accessory must intend the misconduct to be so serious as to cross the threshold and amount to a breach of the public's trust in the holder of the public office. It is to be noted that this was not a submission made by Scott Chapman, the principal in her case. It was not supported by Ryan Sabey, the other defendant in the position of aider and abettor. Indeed the written submissions made at trial on behalf of Ryan Sabey were to precisely the opposite effect in relation to the principal. The submission finds no direct support in any reported authority on the elements of the offence of misconduct in a public office. In the perfected grounds of appeal lodged on behalf of Lynn Gaffney, it is said that "the starting point is clearly the words of the statute". Section 1(1) of the Criminal Law Act 1977 then is cited. Since that is the statutory provision relating to the offence of conspiracy, this is of no assistance.

48. The prosecution submission was that, for the holder of a public office to be convicted of misconduct in a public office, he must know of the facts and circumstances which would lead the right-thinking member of the public to conclude that the misconduct was such as is required by the third element set out in *Attorney General's Reference No 3 of 2003*. However, it was not necessary for the prosecution to prove that the holder of the public office himself reached that conclusion. It was sufficient to prove that he had the means of knowledge available to him to make the necessary assessment of the seriousness of his misconduct; the assessment was for the jury.

49. We agree with that submission. In *R v Rimmington* [2006] 1 Cr App R 17 the House of Lords considered the mental element in relation to the offence of public nuisance. At paragraph 39 Lord Bingham of Cornhill said:

> The argument in this appeal was very largely directed to the issue of *mens rea*: what state of mind must be proved against a defendant to convict him of causing a public nuisance? The Crown contended that the correct test was that laid down by the Court of Appeal in *R. v Shorrock* [1994] Q.B. 279, 289, that the defendant is responsible for a nuisance which he knew, or ought to have known (because the means of knowledge were available to him), would be the consequence of what he did or omitted to do. That was a test clearly satisfied on the facts of that case, where the defendant deliberately permitted use of his field and should have known what the result would be. It is a test satisfied, I think, in all the public nuisance authorities considered above, save those based on vicarious liability

> (which are hard to reconcile with the modern approach to that subject in cases potentially involving the severest penalties, and may well be explained, as Mellor J. did in R v Stephens (1866) LR 1 Q.B. 702, 708–709, by the civil colour of the proceedings). I would accept this as the correct test, but it is a test to be applied to the correct facts.

50. Public nuisance involves (inter alia) endangering the life, health, property or comfort of the public or obstructing the public in the exercise of common rights. A defendant will be guilty of public nuisance if he ought to have known (because the means of knowledge were available to him) of the consequences of his actions. Similar considerations apply to the holder of a public office who engages in misconduct.

(c) The mens rea required of an aider and abettor

51. The second submission made by Lynn Gaffney was that, whatever the relevant mental element for the principal, an aider and abettor must have actual knowledge that the misconduct was or would be so serious that it amounted to criminal misconduct as we have discussed under the first issue. This submission was supported by Ryan Sabey. It was argued on his behalf that "the essential matters which constitute (the) offence" as per *Johnson v Youden* included the fact that the misconduct as assisted and encouraged by the aider and abettor would cross that threshold. To reflect that proposition Mr Pownall QC in oral argument offered this formulation of the proper direction on the mental element:

> Are we sure that, by the ordinary standards of reasonable people, what was done amounted to misconduct in a public office so serious as to amount to a breach of public trust in the office holder?
>
> If yes, are we sure that Ryan Sabey must have realised that what he assisted and encouraged was by the ordinary standards of reasonable people misconduct in a public office so serious as to amount to a breach of public trust in the office holder?

52. As well as arguing that this formulation was necessary because of the requirement of knowledge of "the essential matters which constitute (the) offence", Mr Pownall QC submitted that there was a clear distinction to be drawn between the position of the principal and the aider and abettor because the offence in relation to the principal was one of strict liability. Finally it was said on behalf of Ryan Sabey that, if actual knowledge on his part of the fact of the breach of public trust were not required, there would be a lack of legal certainty as to his liability.

53. The prosecution accept that *Johnson v Youden* accurately sets out the state of mind required of an aider and abettor. However, they argued that "the essential matters" did not include knowledge of how right thinking members of the public would regard the conduct. That was not a matter which had to be proved in relation to the principal. The principal must know that he had a duty not to conduct himself in the way that he did and he must deliberately breach that duty. He did not need to know that his deliberate breach of duty would be so serious as to amount to the conduct required in the third element of *Attorney General's Reference No3 of 2003*. Reliance was placed

on the passage in *Johnson v Youden* immediately following that relied on by Lynn Gaffney and Ryan Sabey.

> "He need not actually know that an offence has been committed because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence because to allow him to say "I knew all of these facts but I did not know that the offence was committed" would be to allowing him to set up ignorance of the law as a defence."

54. The prosecution contended that the offence of misconduct in a public office was not an offence of strict liability. The misconduct had to be wilful in the sense explained in the routes to verdict i.e. the office holder must act deliberately and he must be aware of his duty not to conduct himself in the way that he did. Moreover, he must act without justification. Whilst he did not have to intend or foresee that the level of misconduct must be so serious as to amount to the criminal offence, there remained a significant mental element in the offence for the principal.

55. We agree that misconduct in a public office is plainly not an offence of strict liability for the reasons identified above. Thus, this does not provide a basis for an enhanced mental element on the part of the aider and abettor. We also consider that there is no more lack of legal certainty for an aider and abettor if he is not required to know that the misconduct will be so serious as to amount to the criminal offence of misconduct in public office than there is for the principal in respect of whom, as Mr Pownall QC accepts, no such knowledge is required. We conclude that, just as the principal does not need to know or intend that the consequence of all of the facts of which he is aware will be so serious as to amount to the third element of the offence of misconduct in public office, the aider and abettor does not have to have such knowledge or intent. "The essential matters" which he must know are those set out in the routes to verdict: encouraging and/or assisting the principal in particular conduct; that conduct amounting to wilful misconduct i.e. deliberate breach of a duty as a public office holder; the circumstances which resulted in the conduct being so serious as to amount to the third element of the offence. Due to the requirement of knowledge on the part of the aider and abettor of the essential matters, the routes to verdict in relation to Lynn Gaffney and Ryan Sabey required the jury to be sure as to the circumstances of which they were aware. In assessing whether the misconduct aided and abetted by them was so serious as to amount to the third element, the jury were prohibited from taking into account matters not known to Lynn Gaffney and/or Ryan Sabey. That was sufficient to ensure that they were not convicted other than on the basis of "the essential matters" known to them. As Mr Christopher QC put it in relation to Ryan Sabey, it had to be shown he knew all of the facts and he encouraged Paul Brunt to do what he did in the light of that knowledge.

56. It is instructive to stand back and consider the position of Lynn Gaffney and Ryan Sabey respectively.

i) Lynn Gaffney had been the partner of Scott Chapman. She plainly knew what he did for employment i.e. a prison officer at HMP Woodhill. Over the course

of under two years a little over £40,000 was paid into two bank accounts in her name, the payments clearly coming from various newspapers. There was documentary and other evidence to show that much of the money coming into her accounts was paid over to Scott Chapman.

ii) Ryan Sabey was a Royal reporter at the *News of the World*. He knew that Paul Brunt was a serving soldier. He knew that Paul Brunt's position would be compromised if it became known that he was providing information to the News of the World yet he continued to encourage him (and to pay him) to provide the stories to which we have referred. It is against that background that the jury in each case were considering the circumstances as known to Lynn Gaffney and Ryan Sabey respectively.

(d) Was any additional burden placed on Ryan Sabey to prove matters of which he was aware?

57. It is also against that background that we must consider a subsidiary complaint raised by Mr Pownall QC about the footnote to paragraph 6 of the route to verdict. This required the jury to take into account only those circumstances of which they were sure Ryan Sabey was aware. Mr Pownall QC argued that this meant that Ryan Sabey had to prove to the criminal standard circumstances on which he wished to rely to suggest that there would not have been. It is not clear whether this issue was raised at trial.

58. Mr Christopher QC on behalf of the prosecution could not recall it being raised but he took no point on it only being raised before us if that were the position. It is also not clear which were the circumstances on which Ryan Sabey wished to rely to suggest that assessment thereof would have militated against a conclusion that there was an abuse of the public's trust in the office holder. Whatever the position we accept the answer to this complaint is as given by Mr Christopher QC. By the time that the jury came to consider the footnote to paragraph 6, they had convicted Paul Brunt. The footnote in reality was concerned only with issues pointing to guilt. The direction would not have led to the jury applying the criminal standard of proof to exculpatory matters.

(3) What was the *mens rea* required to convict Lucy Panton in relation to the count of conspiracy?

59. The particulars of the charge of conspiracy against Lucy Panton to commit misconduct in public office, contrary to section 1(1) of the Criminal Law Act 1977 ("the 1977 Act") were that:

> "between the 5 April and 11 September 2010 she conspired together with Mr. Chapman, Ms. Gaffney and a third person to commit misconduct in public office."

60. As we have said, Scott Chapman and Lynn Gaffney were not charged with conspiring but with the substantive offence. We asked Mr Rees QC why a conspiracy charge was preferred against Lucy Panton. He explained that conspiracy was used initially for Lynn Gaffney as well and, to avoid further changes to the indictment, conspiracy as regards Lucy Panton was continued with to trial. It was for the same reason that

she was not charged with aiding and abetting in the same way Ryan Sabey had been charged. It would have been much simpler if she had, for the additional complexities of a conspiracy count should if possible be avoided.

61. Section 1(1) and 1(2) of the 1977 Act provide as follows:

> "**The offence of conspiracy**
>
> (1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question.
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

62. In his route to verdict, the judge directed the jury that if the prosecution against Scott Chapman failed, it could not succeed against the other defendants. As to Lucy Panton, the jury had to be sure about four matters:

> (1) Are we sure that Ms. Panton agreed with Mr. Chapman and that Mr. Chapman provided information for payment for inclusion in a newspaper, intending that he would do so?
>
> (2) Are we sure that Ms. Panton knew, when she did so, that Mr. Chapman was a public official?
>
> (3) Are we sure that, when she did so, Ms. Panton knew that Mr. Chapman's selling the information to newspapers amounted to wilful misconduct by him?
>
> (4) Are we sure that, in the circumstances of which Ms. Panton was aware, Mr. Chapman's misconduct was so serious as to amount to an abuse of the public's trust in him as the holder of public office and for which he had no reasonable excuse or justification?

63. As regards (4), the judge referred the jury back to his explanation of the circumstances to which the jury could have regard in relation to Chapman as set out earlier at paragraph 23 above and added:

> "but note you may take into account only those circumstances of which you are sure Ms. Panton was aware. When considering Ms. Panton's awareness of Mr. Chapman's motivation and whether he, Mr. Chapman, had reasonable excuse or justification for selling the information, bear in mind that this question is not concerned with Ms. Panton's opinion as a journalist of whether publication of the information would be in the public interest."

64. Before the judge and before us, Mr Butterfield QC contended that in relation to issue (4), the seriousness threshold, the jury should have been directed that Lucy Panton had to intend or know that Scott Chapman's conduct would meet the requisite threshold. In other words, Lucy Panton's *mens rea* had to extend to the four elements of the offence identified by this court in *Attorney General's Reference No. 3 of 2003* as we have set out at paragraph 17 above, including the seriousness threshold. The judge was wrong in his direction that the seriousness threshold as regards Lucy Panton was simply an objective test for the jury, albeit that they had to approach the matter through the prism of the circumstances of which Ms Panton was aware.

65. In Mr Butterfield QC's submissions both sections 1(1) and 1(2) of the 1977 Act lead to this result. Section 1(1) required an agreement and a true agreement could not cover something which was unknown at the time i.e. that the jury would decide whether the threshold test of seriousness is met. To avoid that, what was required was that the conspirator intended or knew that the misconduct was so serious as to meet the threshold. Mr Butterfield invoked *R v Saik* [2007] 1 AC 18 in support.

66. In his submission s.1(2) also drove that result. The threshold test of seriousness was in the statutory language a "particular fact or circumstances necessary for the commission of the offence" and the sub-section demanded that there be no liability unless at least one of the conspirators intended or knew that it would exist at the time the conduct took place. Even if the threshold test was not part of the *mens rea* for the public official, it had to be for the journalist. Mr Butterfield called in support *Smith and Hogan's Criminal Law,* by Professor David Ormerod, 13th edition 2011, pp 442-3, that in appropriate circumstances the *mens rea* required for conspirators should rightly be in excess of that required for the substantive offence.

67. Mr Butterfield QC contended that we should approach the matter with legal policy firmly in mind. That legal policy was to adopt an interpretation which favoured the defendant in criminal matters, especially when the prosecutor's approach would criminalise the activities of journalists acting as part of a free press. Although we accept this proposition, we note that legal policy could also be said to be to put roadblocks in the way of corrupting public officials by paying them to provide information. Moreover, Mr Butterfield QC's interpretation might also enable journalists to do this without consequence on their evidence that, given the public interest in the information being available, they did not believe that its disclosure was a sufficiently serious breach of the public official's duties so as to satisfy the third element in *Attorney General's Reference No3 of 2003.*

68. In our judgment the judge was correct: to convict Lucy Panton the jury had to be sure first, that Scott Chapman was guilty of the substantive offence and secondly, that there was an agreement between Scott Chapman and Lucy Panton which, if it were carried out in accordance with their intentions, would necessarily involve Scott Chapman, acting as a public official, wilfully breaching his duties. The mental element on Lucy Panton's part was in the making of the agreement and intending Scott Chapman's wilful breach. Moreover, that misconduct on his part had to be in circumstances known to Lucy Panton which, on an assessment by the jury, met the threshold of seriousness. In our view nothing in section 1(1) of the 1977 Act requires that the prosecution make the jury sure that, at the time of the agreement, Ms Panton knew or intended that Mr Chapman's misconduct would meet the requisite threshold of seriousness. Nor does anything in *R v Saik* [2007] 1 AC 18.

69. As to s.1(2), "fact or circumstance" is not directed to the *mens rea* of an offence but to the elements of the *actus reus*: *R v Saik* [2007] 1 AC 18, [9], per Lord Nicholls. We accept Mr Rees QC's submission that the elements of the *actus reus* for the commission of the offence in this context are that the individual in question is a public officer, acting as such; that the behaviour in question constitutes a wilful breach of his or her duties as such; and that circumstances surrounding the misconduct are such that, on assessment by the jury, it reaches the requisite degree of seriousness required as the third element of the offence. Whether the misconduct meets the threshold of seriousness is not a fact or circumstance but an evaluative exercise by the jury. As the judge noted, it involved the jury taking into account matters Lucy Panton envisaged such as the importance to the public of Scott Chapman's responsibilities, his motivation and the nature of the information he was selling. In our view, balancing such matters is far removed from a "fact on circumstance" and s.1(2) has no role.

(4) Did the judge's response to a jury note in R v Chapman amount to a material irregularity affecting the safety of the conviction?

70. The jury retired on 3 November 2014. They continued their deliberations on 4 November. That evening they were again sent home. At about 5 p.m. that evening the judge received the following note from a juror:

> "The discussions within the jury room have become aggressive and the atmosphere is horrible.
>
> I went to speak and 2 other jurors rolled their eyes and stated 'again'. Another juror told them to stop being rude and voices were raised.
>
> Additionally a particular juror keeps insisting we go with a majority vote, despite being told otherwise repeatedly by several jurors and our foreman.
>
> One juror even got out a magazine and proceeded to read this whilst others were stating their points.
>
> Please be aware all of above is only the activity of 2 jurors however I strongly feel it is affecting the ability of us all to voice our opinions without fear of reprisal from them."

71. The following morning the judge told counsel that he had received a note from a juror which he did not propose showing to them. He said he would give a further direction about it. When the jury came into court, he directed them as follows:

> "Thank you ladies and gentlemen I am going to ask you in a moment when the jury bailiff has been sworn to retire and continue to deliberate. There is something I should add. When I asked you to retire to consider your verdicts I directed that you should elect a foreman to chair your discussions and act as your spokesman or spokeswoman when you come back to court. Perhaps I should have added this in relation to the word discussions. Discussion is not of course the same as argument. It is important to keep in mind that you are a jury of 12 and the collective collaborative nature of your decision-making is important. This involves paying collective attention to the consideration of the views of each individual member. It is also important for your discussion to be focused and for them to keep them moving forward in relation to the issues you have to decide. Finally this I also said to you just before you retired that your verdicts must each be unanimous and that remains the case unless I give your further direction."

72. Immediately after he gave that direction, he received a note from another juror.

> "I am being that.
>
> I am wasting oxygen!"

73. That note was not shown to counsel. When the application for leave to appeal was made, an application was made for both notes to be disclosed.

74. After considering the notes, we directed they should be disclosed. After hearing argument, we were satisfied, as the prosecution accepted, that they should have been disclosed as they showed that one juror was very concerned as to the way in which the deliberations were being conducted. The non-disclosure therefore amounted to an irregularity.

75. However we are quite satisfied that the non-disclosure has no bearing on the safety of the conviction. If the judge had provided the note to counsel, it is possible that the judge might have refined his direction, but we are quite satisfied that the direction was more than sufficient a response to the note.

Conclusion

76. The arguments of the appellants fail on the second and third issues in the appeals.

77. However, in the case of R v Chapman, each appellant contended on the first issue in the appeal that the judge had misdirected the jury on the third element of the offence, namely the requisite level of seriousness. We have set out our conclusion that there was a misdirection and considered very carefully whether it affected the safety of the conviction; the considerations were finely balanced given the great care the judge

took and overall approach taken by the judge and the parties in the case to the public interest. We have nonetheless concluded that in all the circumstances we cannot say that the jury would necessarily have convicted these appellants had they been directed in accordance with what we have set out. We must therefore quash the convictions.

78. In the case of R v Ryan Sabey, no point was taken in the context of that case as to the direction on the third element. We therefore do not take a similar course; we give Ryan Sabey liberty to apply to the court, if so advised.