Privy Council Appeal No. 50 of 1983

(1) Patrick John
(2) Julian David and
(3) Malcolm Reid — *Appellants*

v.

The Director of Public Prosecutions — *Respondent*

FROM

THE COURT OF APPEAL OF THE WEST INDIES ASSOCIATED STATES SUPREME COURT (DOMINICA)

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 22ND JANUARY 1985, DELIVERED THE 27TH FEBRUARY 1985

Present at the Hearing:

LORD SCARMAN
LORD ELWYN-JONES
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN

*[Delivered by **Lord Roskill**]*

At the conclusion of the submissions on behalf of the appellants their Lordships, who did not find it necessary to hear arguments from learned counsel for the respondent, stated that these three appeals would be dismissed and that their Lordships' reasons for that decision would be given later as they now are.

On 12th May 1982 the trial of the appellants and of another man named Dennis Joseph began before Mitchell J. and a jury on an indictment containing two counts. The first charged all four men with conspiring both together and with others "in the Commonwealth of Dominica and elsewhere ... to overthrow the lawfully constituted Government of the Commonwealth of Dominica by force of arms". The dates of that alleged conspiracy were between 19th September 1980 and 29th April 1981. The second count charged a similar conspiracy between the same dates to assault the police. On 19th May 1981 at the conclusion of the prosecution's case submissions were made on behalf of all four men that there was no case

[6]

to answer. On 20th May 1981 the learned judge upheld those submissions and directed the jury to return verdicts of not guilty in the case of all four men on both counts. On the same day the respondent gave notice that he would "... appeal to the Court of Appeal by way of special case against the direction of the trial judge in the above matter under section 37.(2) of the West Indies Associated States Supreme Court (Dominica) Act No. 10 of 1969 as amended by Act No. 16 of 1981". A document described as a special case was prepared. Their Lordships were told that it was prepared by the respondent alone without consultation with the appellants' advisers or indeed with the learned judge. Their Lordships will in due course and for ease of reference quote the text of the special case in full. The appeal was heard on 27th and 28th September 1982 by the Court of Appeal (Peterkin C.J. and Berridge and Robotham JJ.A). Judgment was given on 7th December 1982 at the conclusion of which the Court dismissed the respondent's appeal in the case of Dennis Joseph but allowed the appeals in the case of the three appellants, set aside the verdicts of acquittal in their cases and ordered them to be re-tried upon a fresh indictment. The three appellants were ordered to be retaken into custody but provision was made for them to be granted bail. The reasons for their decision are contained in a long and careful judgment prepared by Robotham J.A. with which the other members of the Court agreed.

On 11th May 1983 the Court of Appeal granted the appellants conditional leave to appeal to this Board and final leave was given on 8th December 1983.

Learned counsel for the appellants put in the forefront of his argument before the Board the submission that the 1981 amendment already referred to giving the respondent a right of appeal against an acquittal by way of case stated was unconstitutional and therefore null and void first as offending against section 8.(5) of the Constitution of Dominica and second as offending against section 9.(2) of the West Indies Associated States Supreme Court Order 1967 (S.I. 1967/223) - "the 1967 Order". He further argued that in any event the learned judge's decision was one of fact and was not on "a point of law or evidence" and therefore could not be the subject of an appeal by the respondent by way of case stated under section 37.(2).

The submissions that the 1981 amendment offended against both section 8.(5) of the Constitution and section 9.(2) of the 1967 Order are wholly independent of the last mentioned submission and can conveniently be dealt with without reference to the allegations of fact made by the prosecution at the trial. In order to appreciate these submissions it

is necessary to set out the relevant statutory provisions which their Lordships will do in chronological order.

The 1967 Order made pursuant to section 6 of the West Indies Act 1967.

"2. (1) In this Order 'State' means any of the following that is to say -
... Dominica ...

4. (1) There shall be a Supreme Court for the States which shall be styled the West Indies Associated States Supreme Court and shall be a superior court of record.

(2) The Supreme Court shall consist of a Court of Appeal and a High Court of Justice.

9. ....

(2) The Court of Appeal shall have, in relation to a State, such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred upon it by the Constitution or any other law of the State."

West Indies Associated States Supreme Court (Dominica) Act, 1969.

"37. A person convicted on indictment may appeal under this Act to the Court of Appeal -

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

(c) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.

38.(1) The Court of Appeal on any such appeal against conviction shall ... allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside

on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The Commonwealth of Dominica Constitution Order 1978 (S.I. 1978/1027) which took effect on 3rd November 1978.

"3. The Constitution of the Commonwealth of Dominica set out in Schedule 1 to this Order shall come into effect in Dominica at the commencement of this Order ...

8.(5) A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."

West Indies Associated States Supreme Court (Dominica) (Amendment) Act, 1981.

"4. Section 37 of the Act is amended as follows:-

(a) by re-numbering the Section as Section 37(1);

(b) by adding the following as Sections 37(2) and 37(3) thereof;

'37. (2) Where during the trial of a person on indictment the trial judge decides on a point of law or evidence, the Director of Public Prosecutions, if dissatisfied with the trial judge's decision may appeal by way of special case to the Court of Appeal for a determination of the point in issue: Provided that where a jury has deliberated and returns a verdict of not guilty there shall be no appeal against such verdict.'

'37. (3) The Court of Appeal in any such appeal by the Director of Public Prosecutions shall allow the appeal if it thinks that the decision was wrong in law and order a retrial and in any other case shall dismiss the appeal."

It was submitted to their Lordships, as it had been to the Court of Appeal, that the provisions of section 37.(2) and (3) eroded the judicial power of the courts - the phrase was learned counsel's - and for that reason offended against section 8.(5) of the Constitution. The background to the Constitution as with other constitutions founded on the Westminster model was one of separation of powers. The Constitution could only be changed by the special procedure for which section 42 of the Constitution made provision. This step had not been taken in the case of these amendments and accordingly they were avoided by reason of section 117 of the Constitution. The reason why it was submitted the judicial power of the courts was eroded was that section 37.(3) by its use of the word "shall" enjoined the Court of Appeal to allow the appeal if it thought "that the decision was wrong in law" and thus did not give the Court a discretion in those circumstances whether or not to allow the appeal.

Their Lordships do not doubt for one moment that the Constitution of Dominica like other similar constitutions takes for granted the basic principle of separation of powers and they emphatically endorse what was said in this connection by the Board in *Hinds v. The Queen* [1977] A.C. 195 at page 212 in the majority opinion given by Lord Diplock. But like the Court of Appeal their Lordships are unable to see how it can be successfully asserted that the amendments to section 37 made in 1981 infringe that basic principle. Neither the Constitution nor the legislation creating and conferring powers and duties upon the Court of Appeal in any way require that every exercise of judicial power shall be discretionary in character or that a court whether appellate or otherwise cannot be directed by statute to take a particular course in particular circumstances which the court determines to exist. To accept the submission involves accepting as correct the submission that had the word "may" been used in section 37.(3) no objection could have been raised on constitutional grounds but because the word "shall" has been used the provision is objectionable. Their Lordships find it impossible to accept this contention. There are many legislative precedents for the use of the word "shall" in statutory provisions of this kind.

So far as the submission based on section 9.(2) of the 1967 Order is concerned, in their Lordships' view this submission is but another way of making the same point as has just been rejected. It requires no separate consideration.

Their Lordships think it right to add these further observations. First, an order made pursuant to section 37.(2) and (3) is plainly within the saving

provision at the conclusion of section 8.(5) of the Constitution for it is an order of a superior court in the course of an appeal and also in the course of review proceedings relating to an acquittal. Second, these provisions are equally plainly within the words "any other law of the State" in section 9.(2) of the 1967 Order.

In their Lordships' view the Court of Appeal was entirely correct in rejecting the submissions advanced on the appellants' behalf and for the reasons they gave for that rejection.

Their Lordships now turn to the remaining question whether the learned judge's rulings were on matters which can properly be made the subject of an appeal by way of case stated by the respondent. It will be convenient in the first place to set out in full the text of the special case. For ease of reference they have numbered the paragraphs 1,2,3 and 4.

"Special case

1. The witness for the prosecution, Oliver Phillip, having stated that he was familiar with and knew the handwriting of the accused Patrick John by his having received official minutes from him in the course of his duties as Commissioner of Police while the said Patrick John was a Minister of Government responsible for security and there being no challenge to or contradictions of the said evidence, did the learned trial judge err and misdirect himself in law in rejecting such evidence as proving the handwriting of the said accused and in holding that it was not proved to his satisfaction to be the genuine handwriting of the said accused and in refusing to allow the said documents to be admitted in evidence for the purpose of comparison with the handwriting in relevant documents admitted in evidence.

2. The witness for the prosecution, Gene Pestiana, having stated that he was familiar with and knew the handwriting of the accused Malcolm Reid by his having seen him write on numerous occasions, and there being no challenge to or contradictions of the said evidence, did the learned trial judge err and misdirect himself in law in rejecting such evidence as proving the handwriting of the said accused and in holding that it was not proved to his satisfaction to be the genuine handwriting of the said accused, and in refusing to allow the said documents to be admitted in evidence for the purpose of comparison with the handwriting in relevant documents admitted in evidence.

3. The evidence for the prosecution being consistent, credible and substantially unshaken,

did the learned trial judge err or misdirect himself in law in upholding the no-case submission of the four accused on the grounds that the evidence for the prosecution was manifestly unreliable and it was unsafe that the case should be left to the jury.

4. The appellants pray that the questions set out above be answered in the affirmative and that accordingly that a new trial of the four accused be ordered."

Their Lordships think it right to make certain preliminary observations regarding this special case. The concept of an appeal by way of a special case or a case stated is very familiar in England. It arises in many branches of the law, as for example appeals on a matter of law from magistrates courts or from Commissioners of Income Tax and until recently on matters of law arising in arbitrations. In such cases the cases are stated by the tribunal in question even though the parties may and often are concerned with their preparation so as to ensure that the matters in issue together with the relevant findings of fact are correctly placed before the appellate tribunal. But the provisions of section 37.(2) are different in their nature since it appears from the language of the sub-section that it is for the respondent alone to determine how the special case required for his appeal is to be framed. Their Lordships were told that in the present appeals the respondent alone was concerned with its preparation. Neither the appellants' advisers nor indeed the learned trial judge were consulted. In consequence much time was spent before the Board in contending that paragraphs 1 and 2 of the special case did not correctly state the questions which arose for decision and also that in any event they raised only questions of fact as indeed (it was said) was the question raised in paragraph 3 of the special case. The difficulties were enhanced by the fact that the learned trial judge gave no judgment or reasons when he upheld the submissions of no case. Their Lordships are therefore left to deduce his reasons from his many rulings during the trial which are often but briefly recorded in his own notes with copies of which their Lordships were supplied.

Their Lordships were also told by counsel that the powers conferred by section 37.(2) and (3) had not previously been invoked by the respondent and no doubt therefore the procedure was unfamiliar. Nevertheless their Lordships venture to suggest for the consideration of those concerned in Dominica that, in the event of it being hereafter sought again to invoke these provisions, every effort should be made by the respondent to agree the contents of the special case with those representing the defendants

whose acquittals are being impugned and perhaps even seeking the agreement of the learned trial judge whose rulings are also being impugned so as to ensure that the special case correctly reflects the ruling or rulings complained of as well as the facts upon which that ruling or those rulings were based. Their Lordships think that much time will be saved during the hearing of any appeals if this practice were followed.

Since there must now be retrials of the appellants their Lordships will say as little about the facts as is consistent with the necessity to explain how the questions and especially questions 1 and 2 arise. They gratefully borrow from and rely upon the admirably lucid statement of the facts alleged by the prosecution which will be found in the judgment of the Court of Appeal.

On 23rd July 1980 The Honourable Eugenia Charles became Prime Minister of Dominica. Her accession to office followed the holding of elections before which there had been an interim government in power. Previously the appellant Patrick John had been Prime Minister of Dominica and the appellant Malcolm Reid a Captain and second in command of the Dominica Defence Force. Stated in general terms, the allegations were that the appellants together with Joseph and others including a man named Perdue and another man named Droege plotted to overthrow the new government by force. The principal oral evidence against the alleged conspirators was given by a man named Maffie. Maffie was described by the Court of Appeal as "a notorious character". He had many previous convictions including no less than six for violence. In August 1980 there was still a charge of murder pending against him but he was not then in custody having in August 1979 taken advantage of a hurricane to escape from the prison where he was then confined awaiting trial when that prison was destroyed. At the material times he had not been recaptured. The Court of Appeal described him as clearly an accomplice and not only as an accomplice but as a witness with an interest to serve since the murder charge was still pending against him. There was however other evidence. One witness was John Osburg. He was a United States Agent. He said he had in April 1981 taken a brief case from Perdue containing a number of articles and also certain documents including one signed with the name Patrick John.

The prosecution sought to support their case by seeking to prove that some documents were in the handwriting of the appellant John and that others were in the handwriting of the appellant Reid. To this end it was sought to put in evidence a passport application form allegedly signed by John to form the basis of comparison by handwriting experts with the

writing in the document in question purporting to be signed by John. A similar attempt was made in the case of Reid when a diary allegedly written by him was tendered in order that this should be the basis of comparison with other alleged writing of Reid.

The learned trial judge in both cases refused to admit in evidence what their Lordships will call "the comparison documents". His reasons, as the Court of Appeal stated, were that the witnesses, to whom the comparison documents were sought to be shown in order to prove the writing in them, knew nothing about those documents and had not seen them made. The result was, again to quote the Court of Appeal, the benefit of the handwriting experts "was lost to the State" since the foundation for the expert evidence had not been able to be laid.

Their Lordships have carefully read and re-read the learned trial judge's notes of what happened at each stage of the trial. They note with regret that there appears on several occasions to have been confusion as to the reason why the comparison documents were being tendered and equally a failure to distinguish between proving a document allegedly in a defendant's handwriting for the purpose of seeking to use the contents of that document as evidence against that defendant and proving a signature to or other writing on a document - the other contents of which may or may not be otherwise relevant - solely for the purpose of using that signature or other writing when proved as the foundation for expert comparison with an alleged signature on or writing in some document the contents of which it is desired to adduce in evidence for the purpose already stated. Reluctant as their Lordships are to criticise, it is apparent from the learned trial judge's notes that responsibility for much of the confusion must rest with counsel both for the prosecution and the defence as a result of which the real issue germane to the proof of the comparison documents was never clearly put before the learned trial judge on a number of occasions and, as the Court of Appeal rightly held, he was then allowed to fall into error. There was also at more than one point further confusion between issues of admissibility and issues of weight.

The confusion is well illustrated by taking three documents as examples. They were Exhibits T, W and N. T if properly proved incriminated the appellant John. W and N if properly proved incriminated the appellant Reid. T was produced by Osburg, the United States agent, and identified by him as having been found in Perdue's brief case. W was similarly produced and identified. Thus far the source of these two documents was properly proved. But before Osburg gave evidence the prosecution had called the Commissioner of Police of Dominica, Mr.

Oliver Phillip. He was shown document N which allegedly incriminated Reid but not John. He was then shown a passport application form allegedly signed by John. Though T had not been, and for some reason which their Lordships are unable to understand, never was shown to Mr. Phillip by prosecuting counsel, the purpose of the attempted production of the passport application form was that the signature on it allegedly of John might be compared with John's alleged signature and other writing on T. Mr. Phillip then said "I am familiar with the handwriting of John". Thus Mr. Phillip laid the foundation of his competence to identify John's alleged writing. There was no reason why with that foundation he should not have been asked to identify the signature on and the writing in T. But that was not done. The learned judge perhaps understandably in the circumstances rejected the passport application form, seemingly, as was the fact at that stage, because there was then no other "disputed" document with which the passport application form could be compared and also on the ground that Mr. Phillip had not seen John complete the passport application form. The latter ground is plainly erroneous. The former ground arose from the provisions of section 19 of the Dominica Evidence Act (cap 64) which in this respect is identical with section 8 of the English Criminal Procedure Act 1865. The learned judge seems never to have been told by counsel for the prosecution that the purpose was to compare the signature on the passport application form with T which at that stage had not been produced or shown to Mr. Phillip as well it might have been. But even so, though to proceed by this route seems to their Lordships unnecessarily complicated, Mr. Phillip could have proved the signature on the passport application form and then the expert witnesses could have been shown T and asked if the signature on, and the writing in, T was the same as the signature on that form. Their Lordships are of the clear view that for more reasons than one the learned trial judge's reasons for his rejection of the passport application form cannot be supported.

W was also produced and identified by Osburg. Another police witness Gene Pestiana gave evidence regarding this document. But before he identified the writing on W he was asked about the diary. The same objection was taken and upheld, seemingly on the ground that this document was not proved to be in Reid's writing because Pestiana had not been present when it was made. Then N was produced and identified as being in Reid's writing. Finally W was similarly produced and the writing identified. The writing in the diary was in these circumstances plainly admissible first since Pestiana could prove the writing and secondly on any view it was admissible for the purpose of comparison with W and N. Once

again with respect the learned trial judge's ruling cannot be supported.

Their Lordships therefore find themselves on both these issues in complete and respectful agreement with the Court of Appeal and would answer the questions arising on paragraphs 1 and 2 of the special case in the affirmative as did that Court in paragraphs 1 and 2 of their decision. In each case there was a wrong ruling on a point of law or evidence.

Learned counsel for the appellants asked their Lordships to support the learned trial judge's ruling on the ground that he was, when excluding all this evidence, doing no more than deciding an issue of fact namely that he was not "satisfied" with the comparison evidence. Having regard to what their Lordships have already said regarding the learned judge's ruling, this contention also cannot be supported.

It remains to deal with paragraph 3 of the special case. Since there must be new trials because of the erroneous rulings in relation to the matters contained in paragraphs 1 and 2 of the special case, their Lordships do not find it necessary to deal with this matter at any length. The submission was that the learned judge had upheld the submission of no case because of the "manifestly unreliable" nature of the prosecution evidence. The Court of Appeal clearly rejected this submission. Questions of the evaluation of evidence are essentially matters for the local appellate court and are not matters upon which generally speaking the Board would presume to differ from that Court whatever view their Lordships might have been disposed to take had the appeal in question initially come before the Board. But in the light of the views of the Court of Appeal and of their Lordships upon the first two paragraphs of the special case the learned judge must be taken to have reached his decision in the absence of evidence which was clearly highly material and it is difficult to see how therefore in any event this submission by the appellants could be upheld.

It was for all these reasons that their Lordships concluded that these appeals failed and must be dismissed.