

**(1) George Worme and
(2) Grenada Today Limited**

Appellants

v.

The Commissioner of Police

Respondent

FROM

THE COURT OF APPEAL OF GRENADA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 29th January 2004

Present at the hearing:-

Lord Bingham of Cornhill
Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe

[Delivered by Lord Rodger of Earlsferry]

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.

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.”

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 Electoral 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.”

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.

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

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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?

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.

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.

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.

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.”

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.

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

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.

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.

