



LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

H. STEEL, CMG OBE
LEGAL SECRETARY

25 February, 1985

Dear Anthony,

I am sending you, as requested, copies of the ruling which McGowan J. gave on the question of what is meant by "in the interest of the State" and his subsequent direction to the jury. May I point out that what you are getting is a "contraband copy", made in this Department, of another "contraband copy" made by the DPP from a copy which he legitimately obtained from the shorthand writers on the usual commercial basis. The making of extra copies in this way is, I think, a breach of the shorthand writers' copyright and I think that they would be aggrieved if they knew about it. I should therefore be grateful if you would use the enclosures with discretion.

*Yours ever,
Henry Steel*

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CENTRAL CRIMINAL COURT

No. 841330.

Old Bailey, LONDON, EC4.

Friday, 8th February 1985.

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Before:

MR JUSTICE McCOLLAN

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REGINA

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-v-

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OLIVE SHERIDAN PONTING

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MR R. AYLOT and MR T. LANGDALE appeared for the PROSECUTION.
MR B. LAUGHLAND QC and MR J. CAPLAN appeared for the DEFENDANT

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Transcript of the shorthand notes of George Walpole & Co
Official Shorthand Writers to the Central Criminal Court

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SUMMING - UP
DIRECTIONS IN LAW

SUMMING-UPDIRECTIONS IN LAW

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MR JUSTICE McCOWAN: I come to the first matter of law upon which I must direct you and it is a very important one which concerns the burden and standard of proof. The burden of proof is on the prosecution to establish the defendant's guilt and it is on the prosecution throughout. He does not have to establish his innocence. As to the standard of proof before you can convict him, you must be sure -- which is the same thing as being satisfied beyond reasonable doubt -- of his guilt.

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I turn to the next matter of law which is the charge, and I know you have copies of the indictment. May I ask you at this stage to look at them. What I am going to do is to tell you the ingredients that the prosecution have to prove, and as I have said I am directing you here on law and you have to accept the law from me.

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The first thing that has to be proved is that at the material time -- that is about the 16th July, no problem about that -- the defendant had in his possession or control information obtained by him or to which he had access as a person who held office under Her Majesty. The information that is being referred to there is, of course, the two documents, Exhibits No.1 and 2. Plainly, you may think, he had those two documents in his possession because he was a civil servant holding office under Her Majesty. I do not think you will have to trouble another moment about that ingredient because the defence have made a formal admission about it, no problem.

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Secondly, the prosecution have to prove that the defendant communicated that information to Mr Tam Dalyell, who, as you know, is a Back Bench Member of Parliament of the largest party in Opposition. Again, the defence formally admitted that communication and so I say again no problem for you.

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Thirdly, the prosecution have got to prove that Mr Dalyell was not a person to whom he was authorised

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to communicate. Evidence on that came from Mr Motram, the Private Secretary to the Secretary of State for Defence, who said in simple terms Mr Ponting had no authority to disclose that material to Mr Dalyell.

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He was cross-examined about the fact and he said, "Ministers authorise who are entitled to reveal information. Either ministers themselves make statements in public or authorise others to reveal the information. It is not at all vague. Unless you are authorised to disclose information you may not."

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Mr Hastie-Smith also gave evidence on this subject, namely, that Mr Dalyell was not an authorised person to receive official information. He said that, of course, a minister can authorise a civil servant in his department to disclose something to a Member of Parliament but there is no suggestion that that happened here, and, you may think, that obviously if Mr Ponting had asked a minister to give him authority to send this material to Mr Dalyell he would not have got it.

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There the matter rested until the defendant himself gave evidence when he said this when cross-examined in terms of Civil Service Regulations, "I did not have authority to send the documents. The only person who could have given me authority was the Secretary of State." Following that the defence agreed that they could not mount a defence under these words, in other words, they accept that the evidence is all one way, that Mr Ponting was not authorised to communicate the information to Mr Dalyell. In those circumstances you will, I am sure, have no difficulty in concluding that that ingredient is made out.

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So we are left with only one ingredient which is in dispute and that is the fourth and it is this. The prosecution have got to prove that Mr Dalyell was not a person to whom it was in the interests of the State his duty to communicate the information.

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"His duty", may I start with those words. "His duty" I direct you means an official duty, a duty imposed

on him by his office under Her Majesty, namely, that of an Assistant Secretary in the Ministry of Defence, to communicate those documents to Mr Dalyell.

B The prosecution say, in effect, "Where is there a scintilla of evidence that he was under any such official duty? On the contrary", they say, "it is plain that his duty was to preserve these documents."

C What then of the words "in the interests of the State"? I direct you that those words mean the policies of the State as they were in July 1984 when Mr Ponting communicated the information to Mr Dalyell and not the policies of the State as Mr Ponting, Mr Dalyell, you or I might think they ought to have been. "The policies of the State" mean the policies laid down for it by its recognized organs of government and authority. D We have a general election from time to time and after the general election the party that can command the support of the majority of the House of Commons forms the Government. If it loses the support of the majority of the House of Commons it will cease to be the Government but while it has that support it is the E Government and its policies are for the time being the policies of the State. It is not a question of the Conservative Party being the State no more than it would be of the Labour, Liberal or SDP Parties being the State if any one of them happened to be the Government. This F is not a political matter at all. They would be in exactly the same position. So please do not be misled about that. The policies of the State in July 1984 were the policies of the Government then in power, the policies as they were and not as they might have been or any one of us might think they ought to have been.

G It is not in dispute that it was Government policy in July 1984, rightly or wrongly, not to give this further information. That is exactly what Mr Ponting was complaining about. He was saying, "This is the Government policy and I do not like it." So, as I say, there is no H dispute that that was the Government policy. "So", say

the prosecution, "it cannot have been in the interests of the State, which means the Government then in power, to leak these documents to Mr Dalyell, the Government's self-proclaimed critic and interrogator."

B Now what evidence or argument is there against that? In an endeavour to try to help you I will see if I can help about that, the result, however, is this. On my direction you are not concerned with whether you agree with the policies of the Government at that time. A political debate on those policies is wholly outside the proper range of your discussion.

C I further direct you that you are not concerned with whether the defendant honestly believed when he leaked the documents that it was his duty to do so in the interests of the State.

D The prosecution, as you know, have suggested that he was not motivated by noble sentiments at all. They say he was motivated, in a word, by pique. Whether they are right or wrong about that would be a matter for my consideration, if you convict him, on the question of sentence because, obviously, if somebody does things from noble motives, that is a mitigating factor which could lead to mercy. But it really does not matter, though we have spent a lot of time on it as we have on many other things in this case, from your point of view whether he was motivated by the highest sentiments or the lowest because I direct you in law that it is no defence that he honestly believed it was his duty to leak the documents in the interests of the State if, in fact, it was not his duty to do so in the interests of the State.

E F You may well be beginning to say to yourselves, "We have been treated for days to a great deal of irrelevant material." So, on my direction, you have, but in fairness to counsel they had not at the stage when you heard the evidence had my ruling in law. As you know, they advanced arguments to me that afternoon when I allowed you to go away, and having heard their arguments for the whole of that afternoon the following morning

B having reflected on their arguments I gave my ruling in law, and what I am now directing you reflects the ruling that I gave. So, as I say, I am not in any sense seeking to blame either counsel for going into matters which may now seem immaterial because they had not then sought my ruling.

C May I make something quite plain. The Act does not restrict the type of information that you must not communicate to classified information. We have learnt in the course of this case that there are four categories of classified information. Starting at the bottom and going up: RESTRICTED, CONFIDENTIAL, SECRET and TOP SECRET. CONFIDENTIAL, the second from the bottom, and its definition is, "a document of which the unauthorised disclosure would be prejudicial to the interests of the Nation."

D In this case Exhibit No.3, the Legge minute, was classified CONFIDENTIAL; Exhibit No.2, the draft letter to Mr Dalyell had no classification at all. It makes no difference. It is not one of the ingredients of the charge that it should be a classified document. It is not necessary that the disclosure should have prejudiced National Security, the prosecution have never suggested that it did, but it is no defence, you see, to say that it did not prejudice National Security though, let me say again, it would be a matter proper for me to take into account on sentence that it was not a matter which prejudiced National Security, but it is not, it has no part to play in your deliberations.

E F May I quote some words of a past Lord Chief Justice which I hope will make this very clear to you. "It matters not what the document contains, what the motive for disclosure was or whether the disclosure would, in fact, be prejudicial to the State."

G H This Act, most of us will have seen or heard, over the years has been a great deal criticised. Governments, whatever their complexion, they always say they are going to do something about it and they never do. Maybe that

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is because it suits all Governments not of a different complexion to keep it as it is, I know not and it really does not matter. You may have heard the jokes that are made about it, that if the order for mid-morning refreshments in DS5, namely, 12 coffees and 8 teas, had come into the defendant's possession or control as head of that department and he had communicated that to Mr Dalyell it would have been an offence under the Act. Well, all that one can, I hope reasonably, assume is that the Attorney General would not in those circumstances give his consent to the bringing of the prosecution. Anyway, there is no question in this case but that these were not joke documents whatever else you think about them, they were clearly serious documents dealing with serious matters.

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I do want to emphasise, we are not concerned in this court with whether this Act requires repeal or amendment. Until Parliament sees fit either to repeal or amend it my duty and your duty is to apply the law as it is. We cannot pick and choose and say, "This is a law we do not like and, therefore, we are not going to apply it." That would be acting wholly contrary to our oaths and that would be so whatever the colour of the Government.

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You may have noted the last remark of Mr Laughland in his speech to you last night, that a conviction here could be a licence for ministers to withhold information from Parliament with the assistance of an acquiescent Civil Service. May I say to you quite emphatically that that would be a wholly wrong approach to your duties and to the oath you have taken. If the case is proved it is your duty to convict whatever the consequences. To say to yourselves, "Well, it is proved but I am not going to convict in case it discourages ministers from being forthcoming" would be being false to your oath. It would have been equally wrong for Mr Amlot to say, which he did not, that if you acquit Mr Ponting civil servants will be leaking documents all over the place.

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B That would be an equally wrong approach. The political consequences of a conviction or of an acquittal are not a matter for you or me to trouble with for a second; let Parliament argue about those. If the case is proved in accordance with the law as I direct you then you must convict: if it is not proved you acquit.

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D There are a lot of other things that this case is not and I want to get those out of the way early on before I seek to get down to what it is about. It is not about which country, Britain or Argentina, has the better right to the Falklands. It is not about could or should the Falklands' War have been avoided. It is not about whether Falklands' Fortress is a good idea. It is not about whether there is likely to be any further Argentine aggression. It is not about whether Mr Ponting was wiser than Mr Heseltine.

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F Mr Ponting thought, as he has told us, that there was no good reason for withholding this information on tactical or any other ground; that more information could have been given without damage to National Security "because", he said, "this Country had nothing to be ashamed of", in other words, there were sound tactical as well as moral reasons for doing what he advised. It appears that the politicians, Mr Heseltine, the Secretary of State, and Mr Stanley, the Minister of State for the Armed Forces, thought otherwise. They believed that if they answered Mr Dalyell's points, his nine questions, he would be back for more and that little by little ministers would be led into security sensitive areas. These were the two viewpoints.

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H As Mr Ponting himself said at one stage of the story "these were political decisions." He thought he knew better but, as I have said, the case does not turn on which viewpoint was the wiser. Civil Servants cannot be unused to having their advice not followed by ministers and this they must bear with fortitude even when, as I am sure they often do, they think themselves infinitely more intelligent and wiser than their minister they may be but that is not the point.

Again what this case is certainly not is a political contest. If any of you support a particular political party, and why should you not, it is your duty to put your political allegiances or prejudices on one side and decide the case fairly and dispassionately according to the law as I direct you and the facts as you find them.

As It happens Mr Ponting chose, for what it is worth, to tell us his political allegiance. He put it like this: "I had worked closely with Sir John Nott during the Defence Review. I would have said I was in tune with the philosophy of the Government particularly with regard to the Civil Service. In my view a good civil servant has to take a day-to-day interest in political affairs", but he himself approached the problem in a neutral way. "For a number of years I have tended to incline to the Liberal party: that goes back to 1963. I have never been a member of that Party or of the Conservative or Labour Parties or of any extremist parties. I have been positively vetted a number of times. I joined the SDP when it was founded in 1981. My wife did so at the same time. I paid a subscription but at my level in the Civil Service I could not take an active part. My views did not bring me into conflict with the policies of any Government I worked for."

Nobody has suggested for a moment that he was or is a member of any extremist party. Bear in mind that it is the essence of democracy that it can be anticipated that one party will go out of Government and another come in and that any Government whatever its political complexion will have to face the problems about what it can or should reveal to the public and to expect from its civil servants loyalty and that they will not leak Government documents to politicians who oppose the Government. That, as I say, you may think -- this is a comment but it is entirely a matter for you -- is a problem that would face any Government of any colour.

B I turn to another topic, the defendant's character. This is not a case where you do not know anything about his background: you know a great deal. It is not merely a case where he has no previous convictions -- obviously if he had he would not have been in the position that he was in -- you know positively that he is of previous good character. A man of ability and intelligence who had very much prospered in his chosen career. He told us a good deal about this himself and I will remind you of it in summary form.

C He is now aged 38. He won a local authority scholarship to a grammar school. He has nine "O" levels, three "A" levels and two scholarship levels. He went to Reading University, read history and got a First. In 1970 he obtained a place on the Fast Stream Graduate Entry Scheme into the Civil Service. He went first to the Ministry of Technology and then to the Ministry of Defence. He was sent to the Civil Service College in 1973. He married a lady in the Ministry of Defence who remained there until last month when she was transferred to the Department of Employment. In October 1973 he became Private Secretary to the Head of the Procurement Section. In April 1974 he was promoted to Principal. In June 1979 the Conservatives came back into power and the Prime Minister invited Sir Derek Raynor, a Director of Marks and Spencers, to head the drive in Whitehall for greater efficiency. Each Ministry was asked to nominate one principal to work with Sir Derek and Mr Ponting was the person nominated for the Ministry of Defence. He had to consider one area of the Ministry and in 60 days suggest ways in which it could be improved. He produced a short report as to what he found making recommendations for savings. Then there was a two-day conference and each of these Ministry representatives had to give a ten minute presentation and Sir Derek was obviously so impressed by Mr Ponting's presentation that he asked Mr Ponting along with his colleague from the Department of Health and Social Security to come along to 10 Downing

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B Street and make their presentations to the Prime Minister. She in turn was so delighted with their presentations that she whipped them off into the Cabinet Room and made them give the same presentations to the Cabinet. There they stayed for about an hour or so to hear the Cabinet talk about how similar savings could be made in Whitehall. In the next Birthday Honours because of what he had done he was given the OBE and he added, "I think that is rare for a civil servant of my level and experience."

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D In September 1981 he was promoted to Assistant Secretary. There are only three grades in the Civil Service above that: Under Secretary, Deputy Secretary and highest of all Permanent Under Secretary. "Aged 35", he said, "is about the youngest you can be as an Assistant Secretary. I was then appointed Head of DS15. That Department has two separate parts: one dealing with the training establishments and the other with legal matters. We went to the Treasury Solicitors or the Foreign Office or the Attorney General's Office for legal advice."

E It is a matter for you -- you may think that his knowledge of those legal processes may be of some significance.

Under him in that Department there were some 25 people. That is the defendant's account of his career and character.

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H You may remember that a statement was read to you which became part of the evidence from Lord Raynor, as he now is, and I repeat the relevant passage. "He", that is Mr Ponting, "proved himself to be outstanding in contributing towards policy formation and the presentation of subsequent recommendations. In carrying out the work he undertook on my behalf he had to present his findings to colleagues across Whitehall, senior ministers and officials after consulting a wide range of interests. He handled this difficult task with distinction showing a capacity to think with clarity of purpose and having the strength of character to make his report with authority."

B Obviously the fact that a defendant has no previous convictions and a positively good character does not mean that he cannot commit an offence or in those circumstances nobody ever would. The good character of the defendant is relevant primarily to his credibility, in other words, as to whether or not you believe his evidence. If, of course, you are satisfied that he lied to the police that might be taken adversely to affect his credibility.

C The question of his credibility will arise in the areas where his evidence conflicts with that of prosecution witnesses. I would identify three of those areas: first, as between himself on the one hand and the two Ministry of Defence Police Officers, Hughes and Broom, as to the conversations he had with them; secondly, as between himself and Mr Darms and Miss Aldred as to whether he approved the line of the Darms minute which led to the Legge minute which he leaked; thirdly, as between himself and Mr Hastie-Smith as to whether, on his case, he was told the matter would be dealt with by resignation or internal disciplinary proceedings with no mention of prosecution -- that is what the defendant alleges -- or whether, as Mr Hastie-Smith asserts, he was plainly told by Mr Hastie-Smith that day that prosecution was one of the possibilities.

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F When it comes to deciding between the defendant on the one hand and those various witnesses who disagree with him on the other -- they are obviously of good character also or they would not be where they are, so in that context good character may not assist -- it is a matter for you but you will have to look, I suspect, at the probabilities and in the end you will have to decide having seen the people who you believe.

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H Another word about something that you must not allow to sway you and that is sympathy for the defendant. I imagine you are bound to feel some because of his comparative youth and his promotion and his lost career. All these would be matters properly for me to take into

account if you convict him. They are not matters which can properly be taken into account by you in deciding whether the case against him is proved.

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