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Operation Elveden: Beyond Misconduct in Public Office

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David Spens QC and Tom Coke-Smyth write

On April 17, 2015, the CPS announced that following the Court of Appeal's judgment in *R. v. ABC, EFG, IJK; R. v. Sabey* [2015] EWCA Crim 539 (*Sabey*) it had reviewed all cases brought under Operation Elveden, the investigation into payments made to public officials by journalists, and that it would no longer be prosecuting 14 journalists. Prior to this, 13 journalists had been acquitted after trial. So where does this leave the common law offence of misconduct in public office (MIPO) and what is its scope as far as journalists are concerned? Ironically, recent legislation has increased the risk of prosecutions against journalists.

Misconduct in Public Office: The Offence

In *Attorney General's Reference (No.3 of 2003)* [2004] EWCA Crim 868 a review of the authorities by Pill LJ confirmed at para.61 that the elements of the offence are:

- A public official acting as such.
- Wilfully neglects to perform his duty and/or wilfully misconducts himself.
- To such a degree as to amount to an abuse of the public's trust in the office holder.
- Without reasonable excuse or justification.

Conspiracy to Commit Misconduct In Public Office

According to *Sabey* at para.68 for a journalist to be guilty of conspiracy to commit MIPO a jury must be sure that:

- The public official has committed the offence.
- That there was an agreement between the public official and the journalist.
- If the agreement were carried out in accordance with their intentions, this would necessarily involve the public official, acting as a public official, wilfully breaching his duties.

The mental element therefore for the journalist will be making the agreement with the public official and intending his wilful breach of his duty as a public official. Importantly the misconduct of the public official has to be in circumstances known to the journalist, which are in the jury's view sufficiently serious so as to cross the threshold of an abuse of the public's trust in the office holder.

Aiding And Abetting Misconduct In Public Office

CPS guidance [http://www.cps.gov.uk/legal/a_to_c/cases_involving_payments_made_to_corr...] published in the wake of *Sabey* now relies from the practice of charging journalists with conspiracy to commit MIPO. Instead prosecutors are encouraged to use the charge of aiding and abetting, but the challenges here are in fact similar. For a journalist to be guilty of aiding and abetting a public official in committing MIPO a jury must be sure that:

- The public official is guilty of MIPO.
- The journalist encouraged and assisted and intended to encourage and assist the public official.
- When the journalist received information from the public official, he knew that the public official's actions amounted to wilful misconduct by them.

- That in the circumstances of which the journalist was aware, the public official's conduct was so serious as to amount to an abuse of a public office for which the public official had no reasonable excuse or justification.

Aiding and abetting therefore also gives rise to a requirement to demonstrate that the journalist has sufficient knowledge that the public official's actions amounted to misconduct. Again a journalist would have a defence if he was unaware that what he was asking the public official was seriously wrong or contrary to his duties as a public official.

The challenges of prosecuting journalists even for aiding and abetting MIPO are perhaps now more clearly recognized than they were previously. CPS guidance now states:

"It is necessary to consider the facts and circumstances, as the aider and abettor knew them to be, including the circumstances which it is alleged resulted in the conduct being so serious as to amount to the third element of the offence of misconduct in public office. Compared to a public official, a journalist may well have a more limited knowledge of the circumstances that increase the seriousness of the misconduct, such as the harm caused within a public body of the leaking of information. Additionally, in comparison to a public official, a journalist may have a clearer idea of the public interest in a story which may reduce the seriousness of the misconduct which was being aided and abetted."

So Serious as to Amount to An Abuse of The Public's Trust

Leaving to one side the issue of proving the requisite knowledge of the journalist, another more challenging aspect of prosecuting the offence is its third limb that the public official's wilful misconduct must be "to such a degree as to amount to an abuse of the public's trust in the office holder".

From *Sabey* we can then extrapolate some further qualifications necessary for the misconduct to be sufficiently serious to be captured by the offence:

- It must involve wrongdoing which actually harms the public interest;
- The wrongdoing must be sufficiently serious to merit criminal conviction.

Misconduct In Public Office: Challenges For The Jury

What is striking is that it is entirely up to the jury to decide first, whether the conduct has "harmed the public interest" and secondly whether this is "sufficiently serious to merit criminal conviction". This is not a straightforward exercise and the CPS can perhaps be excused for their more cautious evaluation of the "public interest" in no longer pursuing the prosecution of the remaining 14 journalists charged with making payments to public officials.

Harm From Disclosure of The Information Not The Effect

Whilst reinforcing the high bar required for the third limb of MIPO, *Sabey* also emphasized that, quite irrespective of the subject matter of the information being disclosed, the circumstance in which information is disclosed alone could in itself amount to wrongdoing which harms the public interest and be sufficiently serious to merit conviction. At para.36, it was said that:

"the public interest can be sufficiently harmed if either the information disclosed itself damages the public interest (as may be the case in a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (as may be the case if the public office holder is paid to provide the information in breach of duty)".

In theory at least this means that the very act of paying a public official for information, irrespective of whether any harm is in fact done to the public interest from disclosure of this information could be sufficient for the offence to be made out. It seems that there is no significant change in its applicability to the accused public official but a narrower more restricted use in so far as it is likely to be used in future against journalists.

Bribery Act 2010

As a result it is likely that the Bribery Act would now be considered given its lower threshold for conviction. It simply requires that the offender gives a financial or other advantage to another and that he intends that person to "perform improperly a relevant function". [Section 4 of the Act states: (1) For the purposes of this Act a relevant function or activity: (a) is performed improperly if it is performed in breach of a relevant expectation, and (b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation. The relevant expectation includes performing the function in good faith, impartially and that the person performing the function is in a position of trust whilst performing it.]

The functions regulated are wide and include any function of a public nature.

The Bribery Act has no requirement of "harm to the public interest" or that the act is "sufficiently serious to merit criminal conviction". Most significantly there is no suggestion of reasonable excuse or a public interest defence. An argument could convincingly be put forward by the prosecution that, irrelevant of any public interest in the information being disclosed, its disclosure for money was improper and the journalist must have known this.

New Police Corruption Offence – CJCA 2015

Another tool for prosecutors will be the Criminal Justice and Courts Act 2015 (CJCA) which came into effect on April 13, 2015 and created an offence of corrupt or other improper exercise of police powers and privileges. [Section 26(1) makes it an offence for a police officer to exercise power or privileges improperly where the officer knows or ought to know that it is improper.] Subsection (4) provides that a police constable exercises the powers and privileges of a constable improperly if the exercise of a power or privilege is for the purpose of achieving a benefit to the officer, or a benefit or detriment for another person, and that a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment.

Subsection (9) defines “benefit” or “detriment” as meaning any benefit or detriment, whether or not in money and whether or not permanent.]

This means that there is now a far lower threshold for proving a criminal offence against a police official on the basis that he in some way acted outside of his duties. As with the Bribery Act the focus is on behaving improperly as opposed to on the harm which results. Subsection 4(b) requires that for the police official to behave improperly:

“a reasonable person would not expect the power or privilege to be exercised for the purpose of achieving that benefit or detriment.”

A defence for a police official might be that a reasonable person would expect him to disclose certain confidential information in the public interest. However, it would be difficult to argue that this reasonable person expected him to do so “for the purpose of achieving that benefit or detriment”, or in other words in return for being paid.

As with the Bribery Act this offence lacks any requirement of harm to the public interest caused by the disclosure of information and the statute’s wording also includes a clear focus on the “benefit” received by the police official. This allows a situation where it is far easier for a journalist to be guilty of an offence by way of conspiracy or aiding and abetting simply by paying for a story even if that story was undoubtedly in the public interest.

Conclusion

The landscape in which payments from journalists to public officials are likely to be prosecuted has changed significantly. Although the rightly high threshold of MIPO has been underlined, it is unlikely to be the prosecutor’s choice for such conduct in future. The Bribery Act and s.26 CJA offence provide far easier options for those intent on prosecuting journalists for payments to public officials. This will create more, not less, risk of criminal prosecutions against journalists.

About the Authors

David Spens QC, assisted by Tom Coke-Smyth, both of QEB Hollis Whiteman, acted for Clive Goodman, the *News of the World* Royal editor who was jointly accused of conspiracy to commit misconduct in public office with Andy Coulson on the basis that they allegedly bought telephone directories of the Royal household from police officers. Following a hung jury at trial the CPS decided that it was not in the public interest to pursue a re-trial and offered no evidence.

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