

CRIMEWATCH

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CONTENTS

Recent Articles	1-2
Case Notes	
Drug Trafficking - Scientific Evidence	2
Legal Professional Privilege	2
Entrapment	3
Extraterritoriality - Statutory Interpretation	4
Sentencing -	5-6
Restraint Orders - Foreign <i>in rem</i> proceedings	6
International Conventions	7
Legislation	8

RECENT ARTICLES

Hot Pursuit - The case of R. v. Mills and ors.

This article examines a United Kingdom customs operation which resulted in the arrest of a ship in international waters and the subsequent trial of the persons arrested aboard the ship. The arrested ship and her crew had been monitored by British vessels prior to, during and after the transfer of a shipment of drugs from the arrested ship to another vessel which was subsequently allowed to dock in the UK where the crew was arrested and the drugs seized. The author examines the course of the case from the development of the operation through the resulting court cases.

Issues considered in this article include the right of hot pursuit, the 1958 Geneva Convention on the High Seas and the scope of the doctrine of constructive presence. The article by Dr W. Gilmore is published in *44 International and Comparative Law Quarterly* 949. (October 1995). (R. v. was reported in CrimeWatch Issue 8.)

Abuse of Process: Halting Criminal Prosecutions

Mr A. Choo of the University of Leicester examines against the background of the rationale underlying the discretion to stay a criminal case on the ground that the process of the court has been abused, a number of recent cases where application has been made for a stay of proceedings. The issues of double jeopardy, ulterior motive, breach of promise, police or prosecution impropriety and jurisdiction and procedural questions are considered. The article concludes that "the old notion that the courts should not effectively override prosecutorial discretion has clearly been discarded. The article, entitled *Halting Criminal Prosecutions: the Abuse of Process Doctrine Revisited*" appears in [1995] Criminal Law Review at p. 864.

Self-Incrimination, Corporate Misconduct and the Convention on Human Rights

The erosion of the privilege against self-incrimination by statutes which give those who investigate fraud and anti-competitive conduct special investigative powers is examined in an article by Nash and Furse. The article focuses on the conflict between the provisions of such UK statutes and the European Convention on Human Rights. Given the widespread use of similar investigative powers in Commonwealth countries and the close relationship between the European Convention and provisions appearing in various Commonwealth constitutions or bills of rights the article will be of interest to readers outside the United Kingdom. The article appears in [1995] Criminal Law Review at p.854.

CASE NOTES

Drug Trafficking: analysis of substance; evidence by chemist

The appellant was convicted of the offence of trafficking in a dangerous drug. He appealed on the ground that the trial judge had wrongly relied on the evidence of the chemist who analysed the drug because the evidence created a doubt as to the precise category into which the analysed drug should fall. The chemist had given evidence that the substance was "cannabis as defined in the Dangerous Drugs Act 1952 (Malaysia)" without mentioning the section of the Act to which he referred.

Held : Under the Act, "cannabis" and "cannabis (Indian Hemp)" may constitute the subject of different offences and hence be differently penalised. One of the offences involving cannabis can lead to a presumption of trafficking under the Act. When the court was left in doubt as to whether the accused had committed an offence in a lower or higher degree of seriousness it should make a finding of the lower degree, particularly when a finding in the higher degree would give rise to a mandatory death sentence.

Shukri bin Mohamad v. Public Prosecutor, [1995] 3 MLJ 229 (Malaysia).

Legal Professional Privilege: production by prosecution witness of proofs of evidence.

The appellant had made a statement admitting that he had murdered a person. He later retracted this statement and made another statement in which he accused another person of the murder. His second statement resulted in his later acquittal on a charge of murder and the person he had implicated in his revised statement was charged. During the committal proceedings for the second defendant, the appellant refused to waive privilege and respond to a question relating to the instructions he had given to his solicitor. The Stipendiary Magistrate issued two witness summons ordering the appellant, a prosecution witness in committal proceedings, and his solicitor to produce documents recording the appellant's factual instructions to his solicitor before he retracted his original statement. Judicial review of the magistrate's decision to issue the witness summons was sought.

Held: A defendant could not obtain a witness summons under s. 97 of the Magistrates' Courts Act 1980 (UK) to compel production by a prosecution witness of proofs of evidence and attendance notes recording the witness's factual instructions to his solicitor where the witness had not waived legal professional privilege. The witness's right to claim privilege was not to be weighed against the public interest in securing that all relevant evidence was

made available to the defence since legal professional privilege was a fundamental condition on which the administration of justice as a whole rested.

In so deciding the House of Lords expressly overruled the decisions of the Court of Appeal (Criminal Division) in *R. v. Ataou* [1988] QB 798 and *R. v. Barton* [1973] 1WLR 115.

Regina v. Derby Magistrates' Court; ex parte B: The Times, October 25, 1995 (HL)

Entrapment: unlawfully obtained evidence: discretion to exclude evidence: controlled delivery of drugs.

The appellant appealed against his conviction on charges of possessing, without reasonable excuse, a prohibited import (heroin). The appellant had arranged with a person who was, unbeknownst to him, an informer for the Malaysian Police to bring heroin into Australia. With the co-operation of the police of Malaysia, Singapore and Australia a consignment of heroin was bought in Malaysia and brought to Australia by a Malaysian police officer and the informant. These people were met by police in Australia and the heroin was, by prior arrangement, allowed to pass through the customs barrier and was subsequently sold to the appellant who was apprehended and charged with possession. The appeal was brought on the grounds that a defence of entrapment should have been allowed and that the police evidence was unfairly or improperly obtained and should therefore have been excluded by the trial judge.

Held:

- (a) That there is no substantive defence of entrapment in Australian law;
- (b) A court has a discretion to refuse to admit all evidence of a defendant's guilt of an offence (or an element of an offence) where the commission of the offence (or that element of the offence) was procured by the illegal or (grossly) improper conduct of law enforcement officials; and
- (c) this discretion is either an example of the court's *Bunning v. Cross* [(1978) 141 CLR at p. 75] discretion to exclude evidence that has been unlawfully or improperly obtained, or an independent but analogous discretion.

In determining whether to exercise the discretion to exclude evidence a court must balance the public interest in discouraging unlawful conduct by law enforcement officials against the public interest in bringing criminals to justice. Conduct will be sufficiently "improper" to constitute an appropriate case for the exercise of the discretion to exclude evidence where the actions of law enforcement officials fall below minimum acceptable standards of proper conduct, in light of all the circumstances.

The Court distinguished between two types of activity amounting to 'procurement' of an offence - the first being where law enforcement officials merely induce the commission of an offence through unlawful or improper conduct and the second where the unlawful or improper conduct of law enforcement officials involves the actual commission of an element of the offence with which the defendant is charged. In the former case it was held that a court should generally not exercise its discretion and should allow the evidence obtained to be admitted. In cases where law enforcement officials actually commit an

element of the offence and are not themselves charged with an offence, there will be an 'extremely formidable' case for discretionary exclusion of the evidence obtained as a result of the illegal/improper conduct.

In this case police had arranged and carried out the illegal importation, an element of the offence with which the defendant had been charged. The Court held that the evidence of the illegal importation should not have been admitted against the appellant; quashed the conviction on the basis that evidence of illegal importation was vital to proving the charge against him and permanently stayed proceedings in relation to charges against him under the Customs Act 1901 (Australia).

The Court commented to the effect that if the legislature wishes to pass laws authorising unlawful or improper conduct in the course of law enforcement (for example in relation to the making of controlled deliveries of narcotics) then it may do so. The result would be no unlawful or improper conduct in relation to which an exercise of the discretion to exclude evidence could be sought.

Three judges stated, *obiter*, that if charges of possession simpliciter had been (or were) brought for which no element had been committed by the police then the police illegality would be of the lesser 'inducement' type of procurement and the evidence obtained from the delivery would be likely to be admissible.

Ridgeway v. R. (1995) 69 ALJR 484 (High Court of Australia)

Extraterritoriality: Statutory interpretation: intention to supply controlled drugs: whether the intention to supply drugs must be an intention to supply within the jurisdiction.

The respondent imported cannabis resin into Gibraltar and subsequently exported the material from Gibraltar to the United Kingdom. He was arrested upon arrival in the UK, placed on bail and absconded. He returned to Gibraltar and surrendered to police where he admitted possession and importation and exportation of the cannabis resin but denied that he intended to supply anyone with it save in England.

In Gibraltar he was charged with possession of a controlled drug with intent to supply it to another person. He argued successfully at first instance that on the facts there was no offence disclosed and the count was quashed. The Attorney-General appealed.

The relevant provisions of the Drugs (Misuse) Ordinance law of Gibraltar are:

2(4) Reference in this Ordinance to the supply by any person of a controlled drug to another are references to the supply of such a drug to any other person whether or not such person is in Gibraltar.

6(1)(b) ... it shall not be lawful for a person ...to supply or offer to supply a controlled drug to another.

7(3) ... it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 6(1)

Held - dismissing the appeal - that, against the background of the Drugs (Misuse) Ordinance, section 2(4) (which was inserted by way of amendment in 1985) does not provide for a new *actus reus* of supplying abroad a drug to another, nor of possession of a drug with intent to supply it abroad. By concentrating on the location of the person to

be supplied and not on the location of the act of supply the legislation has not made criminal possession with intent to supply drugs abroad. For there to be an offence under section 7(3) there must still be possession of drugs with intent to supply them in Gibraltar, though to a person who need not be in Gibraltar.

Her Majesty's Attorney-General for Gibraltar v. Richard John Harris unreported; Court of Appeal for Gibraltar (undated judgment received in June 1995)

Bills of Rights: Sentencing: relevant sentence where statutory offence is reformulated between the occurrence of the acts constituting the offence and the imposition of a sentence.

An appeal was brought from a decision of the Court of Appeal of Hong Kong. The appellant was charged with offences relating to the possession of forged credit cards and blank embossed cards intended for forgery of credit card advice slips. At the time of the alleged offence the first attracted a penalty of seven years imprisonment and the second a penalty of fourteen years. Prior to the appellant entering a plea of guilty the statutory penalties for each of the offences were amended to three years for simple possession and fourteen years for possession with specific intent.

Held: The reformulation of a statutory offence between the commission of the acts constituting the offence and the time of imposing the sentence, where two different levels of gravity attract different maximum penalties, requires the court to measure the accused's conduct against the elements required to constitute the reformulated offence to determine which offence would have been the subject of a relevant charge and to pass sentence accordingly. Article 12(1) of the Hong Kong Bill of Rights, by providing that not heavier penalty shall be imposed than the one that was applicable when the criminal offence was committed, simply requires an answer to the question of how the defendant would have stood if he had been convicted and sentenced under the new law rather than the old.

Chan (Chi Hung) v. The Queen: The Times, 7 August 1995 (Privy Council).

Sentencing: acts or omissions constituting offences under two or more laws: whether sentences may be imposed for each offence for which a conviction is recorded.

The three appellants were jointly charged on an indictment containing counts of

- (a) being in unlawful possession of cannabis;
- (b) unlawful importation of the same cannabis;
- (c) trafficking in a controlled drug (related to the unlawful possession charge); and
- (d) trafficking in a controlled drug (relating to the unlawful importation charge).

All charges arose out of one transaction and involved the same consignment of a controlled drug (cannabis). Counts (c) and (d) above were in respect of offences under section 18(4) of the Drug Abuse (Prevention and Control) Act 1990 which offences are defined to include the unlawful importation or the unlawful possession of a trafficable quantity of a controlled drug.

The three were convicted and sentenced. On each of the first and third counts they were fined and sentenced to ten years imprisonment and on each of the second and fourth counts they were sentenced to 20 years imprisonment. The sentences were concurrent.

On appeal on sentence the question arose whether it was in order for the indictment to include:

- (a) charges for unlawful possession as well as for trafficking based on the same alleged unlawful possession; and
- (b) charges for unlawful importation as well as for trafficking based on the same alleged unlawful importation.

Held: The prosecution is entitled to prefer and proceed on all the charges that can be supported by the credible evidence that it has. The appellants could not, consistently with the principles of the criminal law, be punished both for being in unlawful possession of a trafficable quantity of the drug (the section 18(4) offence) as well as being in unlawful possession of an amount that was less than a trafficable quantity (the possession charge). Neither could they be punished for unlawfully importing a trafficable quantity of the drug as well as for the unlawful importation of an amount less than a trafficable quantity. In addition they could not be punished for the unlawful importation of a trafficable quantity as well as for the unlawful possession of a trafficable quantity.

The essence of the wrongdoing was the unlawful importation of a large quantity of cannabis which offence merited substantial punishment. Even though the terms of imprisonment were made to run concurrently, the principle that where an act or omission constitutes an offence under two or more than two enactments or under an enactment and at common law, the offender should be liable to be prosecuted and punished under either or any of those enactments or at common law, but shall not be liable to be punished twice for the same offence, must be applied. The sentences for the offences described at (a) to (c) above were discharged.

Mentor, Garcia and Drayton v. The Queen unreported, Court of Appeal May 16 1995 (Barbados).

Restraint orders: Whether court has power to make a restraint order where the foreign confiscation order is made in proceedings in rem.

A United Kingdom bank account was alleged to contain the proceeds of unlawful drug trafficking in the United States. The US Government instituted civil proceedings naming as defendant all funds on deposit in any account maintained in the names of specified persons and all funds traceable thereto at the London bank. It obtained an external confiscation order for the purpose of recovering the proceeds of drug trafficking. No criminal proceedings were commenced because the accused could not be brought within the jurisdiction of the United States. The US applied for and obtained a restraint order under the Drug Trafficking Offences Act 1986 (Designated Territories and Territories) Order 1990 (UK) on the ground that the money in the bank was realisable property of the putative defendant in putative criminal proceedings in the US which was a designated country under the 1986 Act.

An appeal against the issue of the restraint order was made on the ground that the UK legislation required external confiscation orders to be made in proceedings instituted against "the defendant" which must be construed as 'a person'.

Held: In reliance on the wording of s.7 of Schedule 3 to the 1990 Order, a restraint order may be made prohibiting any dealing with alleged proceeds of drug trafficking referred to

in an external confiscation order made by a foreign court in proceedings in rem, where property rather than a person was described as the defendant. Section 7 does not require a particular form of proceedings and is to be construed as including proceedings in rem. The section is concerned with the identification of the stage of proceedings instituted to obtain an external confiscation order.

Re S-L : [1995] 4 All ER 159 (U.K. Court of Appeal, Civil Division)

International Conventions: Conventions not implemented by domestic legislation: Status of Convention obligations in domestic law.

In a case recently determined by the High Court of Australia the question of the status of international conventions in domestic law was considered. Although the case does not deal with criminal matters it is reported here because it deals with a major issue given national assumption of wide-ranging obligations at international law as a consequence of signature of multilateral conventions.

Australia ratified the Convention on the Rights of the Child (the Convention) in 1990 which convention entered into force for Australia in January 1991. The provisions of the Convention had not been implemented in Australia by statute. Article 3(1) of the Convention provides that in all actions concerning children, including those undertaken by administrative bodies, the best interests of the child shall be the primary consideration. Article 9 requires that a child shall not be separated from his or her parents against their will except when such separation is necessary for the best interests of the child. The case arose from the refusal of residential status to a convicted criminal who had married an Australian citizen following which three children of the marriage were born in Australia. The respondent argued that Australia's accession to the Convention had given rise to a legitimate expectation in the respondent's children that his application for resident status would be treated in accordance with the terms of the Convention. The Minister for Immigration appealed a decision remitting the matter for reconsideration.

Held: The High Court refused the appeal. In so doing it said that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into municipal law by statute. Where there has been no such incorporation the treaty cannot operate as a direct source of individual rights but that does not mean that the ratification of a treaty holds no significance for Australian law. If the language of legislation is susceptible of a construction which is consistent with the terms of an international instrument and the obligations which it imposes on Australia then that construction should prevail. The provisions of an international convention may be used by the courts as a legitimate guide in developing the common law. The critical question to be resolved is whether the provisions of the Convention are relevant to the exercise of the statutory discretion and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention.

Minister for Immigration and Ethnic Affairs v. Teoh (1995) 128 Australian Law Reports 353

LEGISLATION

Australia: Controlled Delivery of Drugs

In response to the decision in *Ridgeway v. R.* (1995) 69 ALJR 484 reported above the Australian Government introduced the Crimes Amendment (Controlled Operations) Bill 1995 which has the object of "exempt(ing) from criminal liability law enforcement officers who, in the course of controlled operations authorised as provided ... take an active part ... in the importation or exportation of narcotic goods...".

Proceeds of Crime Laws Held by CCU (copies available on request)

Country	Name & Date of Act
Australia	Proceeds of Crime Act 1987 Crimes (Confiscation of Profits) Act 1986 (South Australia)
Bahamas	Tracing and Forfeiture of Proceeds of Drug Trafficking Act Designated Countries and Territories) Order 1990 Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986
Barbados	Proceeds of Crime Act 1990
Botswana	Proceeds of Crime Act 1990
Canada	Seized Property Disposition Regulations 1994 Seized Property Management Act (extract) 1993 Criminal Code (Extracts)
Cyprus	Confiscation of Proceeds of Trafficking of Narcotic Drugs and Psychotropic Substances Law of 1992
Hong Kong	Drug Trafficking (Recovery of Proceeds) Ordinance 1989 Drug Trafficking (Recovery of Proceeds) Designated Countries and Territories Order 1991
Jamaica	Drug Offences (Forfeiture of Proceeds) Act 1994
Malaysia	Dangerous Drugs (Forfeiture of Property) Act, 1988
New Zealand	Proceeds of Crime Amendment Act 1992 Proceeds of Crime Act 1991
Seychelles	Criminal Procedure Amendment Bill 1995 Misuse of Drugs Act 1990
St Lucia	Proceeds of Crime Act 1993
Tanzania	Proceeds of Crime Act 1991
Trinidad and Tobago	Dangerous Drugs (Amendment) Act 1994
United Kingdom	Criminal Justice Act 1998 (Part VI) Proceeds of Crime Act 1995 Criminal Justice Act 1993 (Part III)
Vanuatu	Serious Offences (Confiscation of Proceeds) Act No. 50 of 1989
Zambia	Dangerous Drugs (Forfeiture of Property) Act, 1989
Zimbabwe	Serious Offences (Confiscation of Profits) Act 1990