

# CRIMEWATCH

COMMONWEALTH COMMERCIAL

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COMMONWEALTH COMMERCIAL CRIMEWATCH aims to assist Commonwealth Governments with the task of combating crime by modernising their criminal laws. As our governments face the problems of ensuring that their courts can handle increasingly complex commercial cases Crimewatch will report developments in investigative, prosecutorial and trial techniques used around the world.

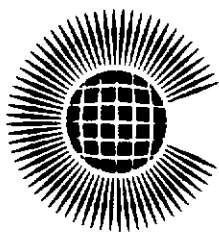
Another area of concern to our courts is the increasing incidence of accused and convicted persons challenging the criminal justice systems on the grounds of inconsistency with bills or charters of rights and the tendency for such people to take their cases to human rights courts or tribunals. To the extent possible we will report these cases as well.

As we introduce and attempt to enforce laws permitting the confiscation of proceeds of crime so the courts are faced with challenges to decisions relating to the assessment of what is, or is not, proceeds of criminal conduct. These cases will find a place in *CRIMEWATCH*.

The Commercial Crime Unit (CCU) would very much appreciate copies of any cases relevant to the operation of that part of the criminal justice system which relates to serious commercial crime or to organised or enterprise crime and to the ancillary areas of money laundering, confiscation of proceeds of crime or to the powers of regulatory bodies to order commercial activity. A sharing of experience will enable Commonwealth Countries, when developing new laws, to avoid known pitfalls, to learn from each others' experience and to develop new techniques and rules to combat major crime.

A new issue of *CRIMEWATCH* will be printed whenever sufficient material is available. It could become one of the most immediate sources of criminal law learning if member countries send the decisions of the courts to the CCU as soon as they become available. Subsequently longer reports of the cases will appear in the *Commonwealth Law Bulletin*.

The CCU looks forward to your assistance.



## FORTHCOMING CONFERENCE



### THE OXFORD CONFERENCE ON INTERNATIONAL AND WHITE COLLAR CRIME

Christ Church  
Oxford, UK  
30 August - 3 September 1993

The 1993 annual Oxford Conference on International and White Collar Crime is again being organised by the Commercial Crime Unit (Legal and Constitutional Affairs Division) of the Commonwealth Secretariat and the Business Crime Committee of the International Bar Association.

The Conference will review recent developments and prospects in a number of areas of current interest and concern including the following:

- \* EFFORTS TO COMBAT  
MONEY LAUNDERING/ASSET  
FORFEITURE
- \* CO-OPERATION IN THE  
CONTROL OF PRECURSOR CHEMICALS
- \* MUTUAL ASSISTANCE BETWEEN  
BUSINESS REGULATORS
- \* TRENDS IN CRIMINAL LAW  
RELEVANT TO THE ENVIRONMENT
- \* FINANCIAL INVESTIGATION IN  
MODERN POLICING

This year the Conference programme will include a formal debate on the controversial issue of the compatibility of current trends, domestic and international, in the investigation and prosecution of White Collar Crime with accepted standards of protection for the individual.

On the 4th day of the Conference, there will be a choice of two programmes: *White Collar Crime and the Financial Sector* a session of which will focus on the Fraud in the City; and *Aspects of International Police and Customs Cooperation* which will include topics such as "The Role of INTERPOL in the Modern World", and "Following the Paper Trail -- money laundering case studies from the public and private sector".

The Conference, which will be in residence at Christ Church, an historic Oxford college, will bring together a wide range of persons from around the world from government service -- law makers, regulatory and law enforcement agencies; from the private commercial sector -- the legal profession, accountants, and bankers; as well as academics and others with a special interest in the subjects.

This Conference will provide delegates with an invaluable opportunity to mingle informally, to exchange views and to make personal contacts for the future. This year, we have created more time for discussion within the programme in order to ensure that delegates have a greater opportunity to develop even more fully their thinking on the various issues.

There is still time to book a place. Registration Forms are available from CCU at the address at the foot of page 1 of *CRIMEWATCH*.

## CASE LAW UPDATE

### **Evidence - Hearsay - Computer Records**

In 1992 the Lord Advocate (Scotland) presented a petition to the High Court asking their Lordships' opinion on, inter alia, the following question:

"Was evidence of the content of entries in the computer records of a public body competent and admissible where the computer operations controller in charge of the relevant department described the system of working whereby entries were made in the course of their duties by a number of employees engaged in similar duties but where authorship of entries was not recorded and the authors were accordingly not identifiable."

The Lord Justice-General (with whom the remainder of the court concurred) *held*:

- 1) it is open to the court, when considering the exceptions to the rule which may be permitted, to take account of changing circumstances which may render the continued application of the rule against hearsay unacceptable;
- 2) hearsay is admissible when it becomes the best evidence. There is no fundamental objection in principle to recognition of the application of this exception to the case of computer records, provided always that the evidence establishes that, due to the manner of the operation of the computer or the method of organisation by which information is put into it, it is not only reasonably [im]practicable, but impossible to identify the authors of the entries which require to be proved;
- 3) in all cases where impossibility can be demonstrated, the hearsay rule may be relaxed so as to enable the content of entries in the computer records to be spoken to by a responsible person in charge of the operation of the computer.

*Lord Advocate's Reference (No 1 of 1992)* [1992] SCCR 724.

[This decision must be read in the context of the state of the statute law in Scotland at the time it was heard. It will be of particular interest in jurisdictions not having provisions paralleling sections 68 and 69 of the Police and Criminal Evidence Act 1984 (UK).]

### **Bills of Rights - Statutory Offences - Burden of Proof - Presumption of Innocence**

The Attorney-General of Hong Kong appealed to the Privy Council against one decision to quash indictments and another to dismiss an information on the grounds that certain provisions in the laws of Hong Kong were inconsistent with the Hong Kong Bill of Rights which, inter alia, enshrines the presumption of innocence.

The first impugned provision was *section 30 of the Summary Offences Ordinance, Cap 228, Laws of Hong Kong* which creates the offence of being in possession or conveying anything which may be reasonably suspected of having been stolen or unlawfully obtained without giving a satisfactory account of how he came by it. This provision their Lordships determined had three elements (a) possession or conveyance; (b) reasonable suspicion of stealing or unlawfully

obtaining; and (c) inability of the defendant to satisfactorily account. The third element was the focus of attention because it was an ingredient of the offence which placed the onus on the defendant. This element was described as "the most significant of the offence in that it reduced the burden on the prosecution to proving matters likely to be a formality in the majority of cases". Their Lordships held that section 30, as drafted, contravened Article 11(1) of the Bill of Rights with the effect (pursuant to section 3 of the Bill) that it had been repealed by the Bill.

*Section 25(1) of Drug Trafficking (Recovery of Proceeds) Ordinance, Cap 405, Laws of Hong Kong* was the second statutory provision considered by the Board. The offence created is of entering or being otherwise concerned in an arrangement either to facilitate the retention or control of proceeds of drug trafficking or to use proceeds of drug trafficking to acquire funds or investment property in circumstances where the person entering into the arrangement (or being otherwise concerned with it) knows or has reasonable grounds to believe that the person having the proceeds is or has been involved in drug trafficking. Subsection (4) creates statutory defences to charges under subsection (1). On this provision their Lordships held that the substance of the offence was contained in subsection (1) as to which the onus is on the prosecution. It is for the prosecution to prove that the defendant had the necessary knowledge or reasonable grounds to believe the specified facts. The Board then examined the steps which a person can, under the statute, take to ensure that he does not commit an offence or has available to him a statutory defence. It being "virtually impossible for the prosecution to fulfil the burden of proving that the defendant had not taken those steps" their Lordships held that for the defendant to bear the onus under section 25(4) was manifestly reasonable and clearly did not offend Article 11(1).

The decision (as yet unreported) provides a particularly useful analysis of "due process" and "presumption of innocence" guarantees in constitutions and their effect on offence provisions in statutes. It does so by reference to various jurisdictions and the judgment is one which may interest a number of Commonwealth countries.

*Attorney-General of Hong Kong v. Lee Kwong-kut*

*Attorney-General of Hong Kong v. Lo Chak-man and Tsoi Sau-ngai*

(Judicial Committee of the Privy Council, Privy Council Appeals Nos 59 and 60 of 1992; judgment delivered 19 May 1993)

### **Proceeds of Crime - Confiscation - Assumptions as to source of property**

In the following two cases the Court of Appeal (comprised in each case of different judges) delivered quite different decisions on the same issue. The decisions are noted here and as the issue progresses we will report the outcome.

(1) *R v Redbourne* [1992] 1 WLR 1182; [1993] 2 All ER 753

Section 2 of the Drug Trafficking Offences Act 1986 (UK) allows the court, in some circumstances, to make certain assumptions for the purposes of (a) determining whether a defendant has benefited from drug trafficking and (b) assessing the value of proceeds of drug trafficking.

Following a conviction on a charge of possession with intent to supply a controlled drug, a confiscation order in an amount exceeding the value of the drugs which was the subject of the charge, was made. In making the order, the court assumed that some of the property transferred to the appellant in the six years preceding the institution of the drug charge proceedings was received in connection with drug trafficking.

On the question of how a judge should decide whether to make the assumption referred to in section 2(3) the court held that before a judge makes any or all of the assumptions he must have some *reason to suspect* that the defendant has benefited from drug trafficking and no question of the standard of proof arises when the judge is deciding whether the assumptions should be made. The judge does *not* have to be satisfied *on the evidence* that the defendant had benefited from

drug trafficking.

(2) *R v Rose* [1993]1 WLR 844; [1993]2 All ER 761

The Court of Appeal in this case doubted the correctness of the decision in *R. v. Redbourne*. Specifically the court in *Rose* held that the words, in section 2(3), "appearing to the court" were not satisfied if there was merely reason to *suspect*. What was required to satisfy the description of property in the opening words of section 2(3) was *prima facie* evidence that property has been held by or transferred to the defendant as payment or reward in connection with drug trafficking.

**Business regulatory authorities - Compulsory powers of investigation - Bill of Rights - "arbitrary detention" - "privacy"**

The appellant sought an order of certiorari quashing a direction that he attend on and answer questions by an officer of the Securities and Futures Commission relating to an investigation of suspected offences contrary to the Securities Ordinance. Relief was sought on the basis that the provisions of the Securities and Futures Commission Ordinance, Cap 24, were inconsistent with Articles of the Bill of Rights guaranteeing liberty and security of person (including freedom from arbitrary detention) (i.e. Article 5) and protection of privacy (i.e. Article 14).

The Court of Appeal, in dismissing the appeal *held*:

- (1) in respect of the Articles 5 argument, that the requirement to attend an interview under s. 33(4) of the SFC Ordinance cannot possibly amount to arbitrary detention. Before an investigation can be set in train the Commission must have reason to believe that specified matters need investigation. The possibility of an investigator acting arbitrarily is no measure of the reasonableness of the law which gives him power to act; and
- (2) in respect of the Article 14 ground (where Article 14 effectively prohibits arbitrary or unlawful interference with privacy) that in balancing the interests of the individual on the one hand against the interests of society on the other, and in so doing remembering the broad purpose of the Bill of Rights which is the protection of the individual, the interests of society must prevail. Such "privacy" as the appellant, and persons in a similar position, might have cannot stand against society's requirements of a proper investigation under section 33(4).

*The Queen v The Securities and Futures Commission; ex parte Le Kwok Hung*  
(Court of Appeal, Hong Kong; No 7 of 1993 (Civil); judgment delivered 19 February 1993)

**Statutory Authorities - Disclosure of documents obtained under compulsory powers - Secrecy Obligations - Insolvency.**

The Serious Fraud Office, exercising its statutory powers, obtained documents from the auditors of a bank (BCCI). Other documents were provided to the SFO by the police who had obtained them using their investigative powers. The liquidators of the now insolvent bank sought, in connection with their efforts to recover the bank's assets, production of the documents by the SFO. Two issues arose for consideration by the Court. First, whether the SFO could voluntarily disclose information to a liquidator and second, whether the court, in considering an application

for a production order under s.236 of the Insolvency Act 1986, should consider the interests of person other than those from whom the documents had been seized before reaching a decision.

*Held*: The power of the Director of the Serious Fraud Office to disclose documents was limited by statute and that he had no implied power to release documents to a liquidator. On the second issue the court held that where an application is made under the Insolvency Act for an order for production, the person from whom documents had been seized, or the true owner of the documents, should, in general, be given an opportunity to present to the court any objections to the making of the order sought. The court must balance the potential prejudice to the liquidator which would result from the refusal of the order against that the holder of the documents (here

the SFO) and third parties if the order was made. A third party which objected to production should be joined as respondent to an application.

*Morris & Ors v. Director of the Serious Fraud Office & Ors* [1993] 3 WLR 1

**Sentencing - Courts Martial - Whether conviction by a military court is a previous conviction for the purpose of subsequent sentence of a civilian court.**

Following a plea of guilty by a person charged with possession of a controlled substance a court was required to sentence the offender. The Singapore Misuse of Drugs Act (Cap 185) requires the imposition of a minimum sentence of two years in cases where the convicted person has a previous conviction. In this case the convicted person had a previous conviction for a relevant offence before a subordinate military court. The military court, established by the Singapore Armed Forces Act (Cap 295) has, in addition to its exclusive military jurisdiction, jurisdiction to try a person subject to military law for any offence punishable by the law of Singapore.

*Held:* A conviction before a subordinate military court can be regarded in a court of ordinary criminal jurisdiction as a previous conviction for the purpose of sentencing.

*Public Prosecutor v. D'Crus* [1993] 1 Singapore LR 864

**Criminal Law - Common Intention: inference from circumstantial evidence - Export: meaning of**

Two accused were charged with having a common intention to attempt to export drugs contrary to ss 7 and 12 of the Singapore Misuse of Drugs Act (Cap 185). One had been arrested whilst attempting to enter the departure lounge at Changi Airport and the other arrested on board the aircraft. At all times the relevant drugs were in the possession of only one of the accused. The court had to consider (a) whether common intention could be inferred from the evidence adduced; and (b) whether the departure of the aircraft was necessary to complete the offence.

*Held:* Common intention can be inferred from the surrounding circumstances and the conduct of the parties, provided the court is able to find something palpable connecting the second accused. The mere presence of a person at the time of the commission of an offence by a confederate is not in itself sufficient to bring the case within the statutory provision. The second accused was accordingly acquitted. In consequence of the dismissal of the charge against the second accused, the court amended the charge against the first accused to one of simply attempting to export controlled drugs. As to the second issue the court held that the word "attempt" connotes an effort or endeavour towards a particular goal. A person walking into a departure gate and checking in a bag with drugs hoping it would be cleared was not merely performing preparatory acts. There had been an attempt to export.

*Public Prosecutor v. Wong Wai Hung & Anor* [1993] 1 Singapore LR 927

[Note: The first accused has appealed to the Court of Criminal Appeal: the outcome of the appeal will appear in a later issue of *CRIMEWATCH*.]