

CRIMEWATCH

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RECENT EVENTS

United Nations Congress on the Prevention of Crime and Treatment of Offenders, Cairo, Egypt, 29 April and 8 May 1995

30 Commonwealth countries were represented at the Congress whilst the Commonwealth Secretariat was represented by an observer.

Resolutions adopted by the Congress included: "Action against transnational and organized crime, and the role of criminal law in the protection of the environment"; "Crime prevention strategies, in particular as related to crime in urban areas and juveniles and violent criminality, including the question of victims"; and "Criminal justice management in the context of accountability of public administration and sustainable development".

RECENT PUBLICATIONS

Tackling Drugs in England

In a government Green Paper entitled *Tackling Drugs Together: A consultation document on a strategy for England 1995-1998* a new approach to strategic thinking on drugs issues is laid out. It proposes, *inter alia*, vigorous action by law enforcement agencies and a new emphasis on education and prevention.

Reformulating the Intoxication Rules

The Law Commission has published a final report on *Legislating the Penal Code: Intoxication and Criminal Liability*. The Report (Law Com No.229) is available from: HMSO, P.O. Box 276, London SW8 5DT. Fax: 44 171 873 8200.

Criminal Justice Systems

The European Institute for Crime Prevention and Control has published two books on criminal justice systems in Europe and North America: *Profiles of Criminal Justice Systems in Europe and North America* edited by Kristiina Kangaspunta (HEUNI publication no. 26); and *Crime and Criminal Justice Systems in Europe and North America* (HEUNI publication no. 25).

CASE NOTES

Burden of Proof

Constitution of South Africa, section 25 - Right to a fair trial - Admissibility of confession - Constitutionality of "reverse onus of proof" provision

The accused were indicted on two counts of murder and one of robbery. The prosecution tendered confessions which had been made by two of the accused before a magistrate and reduced to writing and invoked the presumption in section 217(1)(b)(ii) of the Criminal Procedure Code. This placed on the accused the burden of proving on a balance of probabilities that the confessions were not free and voluntary.

At their trial, counsel for the accused raised the issue of the constitutionality of section 217(1)(b)(ii) vis a vis the "right to a fair trial" provisions in section 25 of the South African Constitution. The matter came before the Constitutional Court for determination.

Held: declaring the section invalid

The practical effect of section 217 was that an accused was required to prove a fact on the balance of probabilities in order to avoid conviction

The common law rule placing the onus of proving voluntariness on the prosecution was an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights were, in turn, a necessary reinforcement of the rule that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt (see, *Woolmington v DPP* [1935] AC 462). The common law rule was inherent in the rights specifically mentioned in section 25(2) and (3)(c) and (d) and formed part of the right to a fair trial.

Zuma v The State, Constitutional Court of South Africa, unreported, 5 April 1995

Drugs (Misuse) Ordinance - Possession of drugs - Constitutionality of provision placing onus of proof on accused - Constitution of Gibraltar, section 8

The appellants were charged with an offence contrary to section 7(B)(1) of the Drugs (Misuse) Ordinance which provides that:

Any person who is proved to have had in his possession a commercial quantity of a controlled drug shall, until the contrary is proved, be presumed to have had such drug in his possession for the purpose of supplying it to another.

The constitutionality of the section was challenged in that it was in conflict with section 8(2)(a) of the Gibraltar Constitution Order 1969 which provides that every person charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty. The Attorney-General submitted that the burden cast upon the appellants under section 7 was no more than the burden of proving particular facts within the meaning of section 8(11) of the Constitution.

Held: Section 7(B) was inconsistent with the Constitution

If proved to be in unlawful possession of drugs, each defendant was then required to prove, albeit on a preponderance of probabilities, that he did not intend to supply them to anyone in Gibraltar. Each defendant did not merely have the burden of establishing a statutory exception or proviso but was required to disprove an essential and important limb of an offence. Thus section 7(B) was not covered by section 8(11) of the Constitution and it was for the prosecution to prove each element of the offence beyond reasonable doubt.

R v Reina and Peralta, Supreme Court, Gibraltar, unreported, 7 March 1995

Restraint and other orders

Restraint order - Order made against bank accounts of person not charged with any offence - Whether jurisdiction to make such an order

D was charged with others with various drug trafficking offences and a restraint order was obtained over his assets under section 8 of the Drug Trafficking Offences Act 1986 (DTOA).

The restraint order also placed a freeze on two bank accounts held by D's father, FD and imposed obligations on FD to disclose details of transactions through his UK and overseas bank accounts. There was no direct evidence to link these transactions to any of the accused and FD himself was never charged with any offence.

FD sought to have the restraint order varied to discharge him from these requirements.

Held: application dismissed

1. Section 8 of the DTOA empowered the court to make a restraint order prohibiting "any person" from dealing with any realisable property of the accused. The ambit of the section was wide and extended beyond parties to the action.
2. The interests of the prosecutor in the proceeds of drug trafficking is of the nature of a proprietary claim as "once located, such assets are liable to confiscation even when they have been innocently obtained".

Re D, Queen's Bench Division, U.K., *The Times* 26 January 1995

Restraint order - Requirement that defendant disclose identify all individuals with whom he had had recent financial dealings - Possibility of self-incrimination - Appropriate wording of order

A defendant was subject to a restraint order made under the Drug Trafficking Offences Act 1986 which required him to identify all individuals with whom he had had financial dealings during the previous six years. He sought a variation of the order arguing that he was entitled to be protected from the possibility that the police might collect evidence from such individuals for use against him.

Held: restraint order varied

1. The courts would not countenance any inroads into the privilege of refusing to incriminate oneself unless either it was required by statute that the privilege took second place to a wider public interest or that there was some adequate protection afforded (e.g. an undertaking from the prosecuting authority not to use the material obtained in consequence of the affidavit in any criminal proceedings)
2. The discretion of the court to exclude evidence under section 78 of the Police and Criminal Evidence Act was not to be regarded in law as an adequate and independent safeguard. However much one might have confidence over the proper exercise of judicial discretion, anything that involved reliance on an exercise of discretion on the authorities did not constitute an adequate substitute for the absolute privilege against self-incrimination.
3. To the restraint order which read "No disclosure made in compliance with this order shall be used in evidence in the prosecution of an offence alleged to have been committed by [the defendant]" were added the following words "and no use shall be made in any such prosecution against [the defendant] of evidence obtained as a direct result of such disclosure".

In re C (Restraint orders: Identification), Queen's Bench Division, U.K., *The Times* 21 April 1995

Restraining Order - Proceeds of Crime Act 1991 - Property held by tenants-in-common - Whether restraining order to be made against the tenants-in-common not charged with a serious offence in terms of the 1991 Act

The applicant applied for a restraining order under the Proceeds of Crime Act 1991 against property held by four persons as tenants-in-common in equal shares. Two of them, B and P were charged with "serious offences" in terms of the Act whilst the other two, H and J, were found to have no connection with the alleged offences.

Held: application allowed in part

A restraining order would be made against the property interests of B and P.

When B and P used the property for drugs selling, or permitting others to do so, they were exercising their rights to do so pursuant to their own individual interests as tenants-in-common. They did not need, and were not using the separate interests of H and J. Accordingly, the interests of H and J were not property in respect of which the court might make a restraining order.

Solicitor-General for New Zealand v Foster and others, High Court of New Zealand, unreported, 11 July 1994

Proceeds of Crime Act 1991 - Orders made under the Proceeds of Crime Act 1991 - Factors to be taken into account in assessing a pecuniary penalty

Confiscation orders - Whether such orders should be taken into account when assessing sentence

The appellant was convicted of a number of drug related offences. In addition to a sentence of imprisonment and a fine, he was ordered, under the Proceeds of Crimes Act 1991 (PCA), to forfeit a sum of money and to pay a pecuniary penalty to the Crown.

He appealed against the orders on the grounds that in assessing the pecuniary penalty, the court should have had regard to, *inter alia*, the proceeds of the sale of the farm and his solicitor's fees and there should be deducted arrears of income tax due to the Inland Revenue Department. Further the forfeiture or pecuniary penalty orders made under the PCA should have been taken into account when considering the sentences to be imposed.

Held: appeal dismissed

1. The trial judge was correct in not taking into account the proceeds of the sale of the farm and other items for they had nothing to do with the assessment of a pecuniary penalty under the PCA.
2. Having regard to the scheme of the Act, as a general proposition, confiscation orders should not be taken into account when assessing sentence, subject to two qualifications. First, there may be exceptional or unusual circumstances where

orders made, particularly orders to forfeit valuable property used in the commission of the offence, may have a disproportionate or exceptional affect on the offender, sufficient for some regard to be had to it when imposing sentence. Second, recognising that one of the purposes of the sentence to be imposed is to deter others who may be minded to commit like offences, if forfeiture orders of property used in the commission of offences were particularly severe, some adjustment to the sentence may be appropriate because the deterrent effect of the forfeiture orders may lessen the need for the deterrent element in the sentence. However, it was difficult to conceive of circumstances where orders to forfeit the proceeds of the offence or for a pecuniary penalty order reflecting the benefit derived from the commission of an offence, should have any relevance to an appropriate sentence. These reflected the offender's ill-gotten gains which, in accordance with the policy of the Act, and irrespective of sentencing for the offences, the offender should be required to disgorge.

Queen v Brough, Court of Appeal of New Zealand, unreported, 21 December 1994

Evidence

Right to remain silent - Whether principles of fundamental justice violated by Crown's subpoena of co-accused to give evidence in separate trial of accused - Section 7 Canadian Charter of Rights and Freedoms

S and M were separately charged with property offences. S's case came to trial first and M, who was alleged to be an eye-witness, was subpoenaed by the Crown. The trial judge quashed the subpoena on the ground that section 7 of the Canadian Charter of Rights and Freedoms afforded M the right to remain silent. Following the acquittal of S, the Crown appealed on the sole ground that the trial judge had erred in quashing the subpoena in that the right to silence did not extend to protect a witness from giving evidence at a trial.

Held: appeal allowed

The right to silence is not absolute and the application of section 7 required a careful balancing between the interests of the state and those of the individual. The right of an accused to remain silent at his or her trial had long existed side by side with the compellability of a witness who had been charged with the same offence but who would be tried separately. There was no question that an accused person who was compelled to give evidence concerning the same subject matter as that upon which he or she was subsequently to be tried might expose lines of defence or information leading to the discovery of derivative evidence which might not otherwise have come to the attention of the authorities.

However a concession that fundamental justice includes a right to silence in those circumstances would erode the functioning of the centrepiece of the entire justice system - the trial and the search for a just result.

R v S, Court of Appeal for Ontario, Canada, 12 O.R. 774

Drug trafficking - Evidence of large amounts of money found in possession of defendant - Whether admissible having regard to its probative value and its prejudicial effect

The accused was charged with the possession of drugs with intent to supply. At her trial, leave was given to adduce evidence of quantities of cash which were seized during a search of her home address but the trial judge failed to spell out the inferences which he considered capable of being drawn by the jury from that evidence. On appeal against conviction:

Held: allowing the appeal and ordering a retrial

If a judge decided that such evidence was admissible in law, he then had to decide whether or not to admit it in his discretion, having regard to its probative value and its prejudicial effect.

If such evidence was admitted it was incumbent upon the judge to spell out to the jury what its probative significance could be while making it clear to the jury that it was for them to decide whether it had or had not that probative significance.

The judge had then to warn the jury that, if they reached the conclusion that the defendant was a drug dealer that was not of itself either evidence of possession of drugs on a particular occasion or a basis for disbelieving the defendant.

In the present case, because of the manner in which that evidence was admitted and the failure of the trial judge to give proper directions about it the conviction was unsafe and unsatisfactory.

R v Morris, Court of Appeal, U.K., *The Times* October 20 1994

Interview with a customs officer - Breaches of Code of Practice - Whether evidence interview admissible

On arrival at an airport, O had his luggage searched by a customs officer who, unknown to the appellant, found a quantity of cocaine therein. O was not arrested nor informed of what had been discovered but was questioned by the customs officer without a caution being administered. He was allowed to proceed in the hope of identifying others involved in the affair and was only arrested later.

The trial judge ruled that the conversations between the customs officer and O amounted to an interview and that there had been breaches of the Code of Practice under the Police and Criminal Evidence Act 1984 (PACE). However he ruled the evidence admissible accepting that it was in the public interest to allow the customs authorities to proceed in this manner. O was convicted of a drug trafficking offence and appealed

Held: dismissing the appeal

1. The Code of Practice applied to the conversation since O was searched and questioned by a person who was manifestly in authority and exercising control over customs and immigration.
2. In view of the significant breaches of the Code of practice, the evidence should have been excluded. However, no miscarriage of justice had occurred.
3. Where a customs officer has reason to suspect that an offence has been committed, he must either avoid asking questions in relation to the offence or he must administer a caution in compliance with the Code of Practice.

R v Okafor, Court of Appeal, U.K., [1994] 3 All ER 741

Evidence obtained by use of tracker dog - Whether admissible - Need for establishment of a proper foundation for the reliability of the dog in question

Evidence of a tracker dog following a trail and finding a incriminating item was admitted at the trial of the accused. The trial judge held that providing a proper foundation was laid for the reliability of the dog in question to be able to follow a scent by reason of its training and experience, the evidence should be admitted.

It was contended on appeal that the trial judge should not have admitted the evidence.

Held: dismissing the appeal:

1. Adopting the approach in some other Commonwealth countries, if a dog handler could establish that a dog had been properly trained and that over a period of time its reactions indicated that it was a reliable pointer to the existence of a scent from a particular individual, then its evidence should properly be admitted. (Cases referred to with approval included *Haas* 35 D.L.R. 172 (Canada) and *McCartney* [1976] 1 N.Z.L.R. 472 (New Zealand). The South African decision of *Trupedo* (1920) App Div 58 which held that such evidence was not admissible was not followed).
2. Two safeguards were important:
(i) a proper foundation must be laid by detailed evidence establishing the reliability of the dog in question; and (ii) the judge must alert the jury to the care they needed to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog might not always be reliable and could not be cross-examined.
3. On the facts, the proper foundation had not been properly laid and the evidence ought not to have been admitted but, as it only supported other evidence, this did not amount to a material irregularity.

R v Pieterston and Holloway, Court of Appeal, U.K., [1995] Crim L.R. 402