

# CRIMEWATCH

COMMERCIAL  
ALTH  
COMMONWEALTH

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## RECENT PUBLICATIONS

### International Organised Crime

Polimeni, G. "European Policy Responses to International Organised Crime", *Europa Institute Occasional Paper 3*, University of Edinburgh June 1995 18 pp.

In a paper delivered in March 1994 at the University of Edinburgh, Mr G. Polimeni, the Director of the International Criminal Affairs Office of the Italian Ministry of Justice, suggests that recent pan-European initiatives and proposals aimed at international organised crime are a new development and discusses why they have come about. He then outlines key co-operative activities which common European policies need to develop further (collection and common analysis of information, substantive criminal law legislative measures, investigations and gathering of evidence, international police and judicial co-operation), and discusses particular problems inherent in each of these areas.

### Money Laundering

Gilmore, William C. *Dirty Money: The Evolution of Money-Laundering and Counter-Measures*, Council of Europe Press, 1995 317 pp

Dr Gilmore, currently Head of the Department of Public International Law at the University of Edinburgh and formerly Head of the Commonwealth Secretariat Commercial Crime Unit, discusses the subject under the following chapter headings:

International and organised crime: the contours of the problem; Money Laundering: an overview of the process; Global responses to money laundering; The financial action task force; Western European responses to money laundering; The central and eastern European dimension; Widening the net: an overview of progress and prospects in other regions.

## **Fraud Control**

*Best Practice for Fraud Control: Fraud Control Policy of the Commonwealth, Commonwealth Law Enforcement Board, Australian Government Publishing Service, Canberra 1994 pp vii, 60*

To quote the Foreword, this statement of the [Australian] Commonwealth fraud control policy outlines the principles of fraud control, develops national standards, and provides a consistent set of policies and directions to assist Commonwealth departments and agencies to combat fraud against their programs. A detailed interim Ministerial Direction, incorporated into the publication, outlines agency responsibilities for fraud prevention, reporting of fraud information, fraud investigation case handling and training of agency fraud investigators.

## **CASE NOTES**

### **Corruption - Prevention of Corruption Act 1961 (Malaysia) - section 3(a)(ii)**

The appellant was a public officer serving in the Ministry of Finance, Malaysia. He was convicted of an offence against section 3(a)(ii) of the PCA for abetting a clerk, P, attached to the Department of Inland Revenue, to corruptly solicit and receive a sum of money from a company as a reward for the appellant expediting the company's approval for registration as one of the Ministry of Finance's contractors. P was caught red-handed with the gratification money and convicted under the same provision for corruptly receiving, but did not appeal.

Section 3(a)(ii) provides:

"Any person who shall by himself or in conjunction with any other person -

(a) corruptly solicit or receive or agree to receive for himself or for any other person ... any gratification as an inducement to or reward for, or on account of -

...

(ii) any member, officer or servant of a public body doing...anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the public body is concerned,

shall be guilty of an offence ..."

The appellant appealed on several grounds. Among them was the petition that the prosecution had failed to prove all the ingredients of the offence committed by P, namely by failing to prove that P was capable of obtaining the letter of gratification.

*Held*, dismissing the appeal, that inclusion of the word "solicit" in section 3(a)(ii) means that if a person invites payment of money in order allegedly to bribe a member of a public body or directly to carry out the desired act, he has committed an offence. Whether or not the recipient can, intends to or does carry out the corrupt purpose is irrelevant. In this case it was enough that P represented that he could carry out the desired act.

*Abd Khalid bin Abd Hamid v. Public Prosecutor*, High Court, [1995] 1 MLJ 692

### **Admissibility of evidence - Company Securities (Insider Dealings) Act 1985 (UK)**

The four appellants were convicted of offences under sections 1(4) and 1(8) of the Act for dealing with knowledge of, or communicating, price sensitive information in relation to two companies. Each count had charged one appellant only. Two other counts of conspiracy were dropped after the prosecution was required to elect.

The trial judge ruled that there was no case to answer in respect of a third company, but admitted the taped conversations concerning this company as evidence of offences in regard to the other two companies. He ruled that declarations of any conspirator in furtherance of a common design may be given in evidence against any other conspirator, even where the charge is of a crime committed in pursuance of a conspiracy and there is no charge of conspiracy itself. He told the jury that what one defendant said in the absence of another could only be evidence against the other if the Crown had proved that both were parties to a joint enterprise or agreement for continuing dissemination of price sensitive information, and the words spoken were in furtherance of a joint enterprise. The conversations concerning the third company were relevant and admissible as illustrative of a network amongst the defendants.

The appellants argued that the judge was wrong on all counts.

*Held*, allowing the appeal and quashing the convictions:

1. There is no question that evidence of acts or statements by co-conspirators in furtherance of a conspiracy may be admissible against a person if he or she is not present, provided it is proved there was a conspiracy to which he or she was a party. The question is how far the principle extends where there is no count of conspiracy.
2. The Crown's submission - that if there was evidence that a group of people had agreed to achieve a common objective, and individual members of the group were charged with substantive offences committed in pursuit of the objective, then any evidence of facts or statements made by one of the group which tended to prove furtherance of the agreement was admissible on the trial of any of the substantive offences, whether or not the particular defendant charged was present when the acts or statements were made - goes too wide and is not supported by the cases.
3. The narrower and correct principle is that where two persons are engaged in a common enterprise, the acts and declarations of one in pursuance of that common purpose are admissible against the other. The principle applies to the commission of a substantive offence or series of offences by one or more people acting in concert and is limited to evidence which shows the involvement of each of the defendants in the commission of the offence or offences.
4. Even if the principle were wider, the prosecution would need to formulate and the judge to explain to the jury the nature and limits of the agreement in pursuit of which the specific offences are alleged to have been committed. The judge's direction that the defendants may have been "parties to an agreement or joint enterprise for the unlawful dissemination of unpublished price sensitive information" was too loose and general. Further, not all the evidence of "a network" was

admissible against all the defendants - there were according to the prosecution two conspiracies, so that what one party did in pursuance of one cannot be evidence against another in respect of his involvement in the other.

5. Finally, the evidence relating to the third company was not admissible against any of the defendants. The judge was also wrong to admit a record of the conversations concerning the other two companies against all the other defendants without a direction as to which parts of the conversations were admissible in respect of whom.

*R v. Gray; R v. Liggins; R v. Rowlands; R v. Ridings, The Times* 5 August 1995, Court of Appeal

**Whether documents relevant to money laundering can be subject of production order sought in course of drug trafficking investigation - Misuse of Drugs Law (2nd Revision) ss. 2(b), 16L (Cayman Islands)**

The respondent successfully applied ex parte to the Grand Court for a production order under s 16L of the Misuse of Drugs Law (Second Revision) against the appellant, a lawyer whose client was being investigated for money laundering as part of a wider investigation into drug trafficking.

Section 16L(1) provides that a constable may "for the purpose of an investigation into drug trafficking" apply for a production order in relation to particular material. The court must be satisfied under s 16L(4) that, inter alia, there are "reasonable grounds for suspecting that a specified person has carried on or has benefited from drug trafficking". Section 2(b) defines "drug trafficking" as follows:

"'Drug trafficking' means doing or being concerned in any of the following...  
(a) producing or supplying a controlled drug...  
[etc]"

The appellant's grounds for appeal included the submission that the first prerequisite for the grant of a production order was that there should be an investigation into drug trafficking. This had not been met, as the evidence given in support of the application for the production order suggested laundering only (albeit on behalf of a person being investigated for drug trafficking). There was no allegation that the appellant's client had been directly involved in drug trafficking as defined.

*Held*, rejecting the appeal on this point though allowing it on other grounds:

1. Use of the word "means" rather than "includes" in s 2(b) leaves no room to extend the definition to include money laundering
2. However, s 16L does not require that the investigation mentioned in subs (1) need be in relation to the specified person in respect of whom reasonable grounds exist under subs (4); that person need only be someone who has benefited from drug trafficking, not someone who has directly engaged in it. In this case it was clear that the reasonable suspicion held in relation to the appellant's client arose in the course of an investigation into drug trafficking by other persons and

that, notwithstanding the conviction of one of these people for drug trafficking in the United States, the investigation could legitimately continue in order to trace individuals who had benefited from it.

*G v. S* [1992-93] CILR 203, Court of Appeal (Cayman Islands)

#### **Public interest immunity for police report**

In an action for wrongful arrest and malicious prosecution the plaintiff sought discovery of "Form 151", a pro forma document on which the police reported to the Crown Prosecution Service on the accused's personal particulars, witnesses, a summary of relevant facts, and comment on that information.

The Commissioner of Police resisted discovery on the basis that public interest immunity attached to that class of document. The plaintiff submitted that the decision to claim immunity should be taken by the relevant department's minister or permanent secretary.

*Held*, refusing the application:

1. While it was appropriate for a minister or senior public servant to decide to claim immunity where the interests of the state were directly affected, there was no rule of law that precluded the claim being raised in other ways. Where there was clear authority that class immunity applied, a responsible official in the police force could raise the objection.

2. Form 151 belongs to a class of documents to which public interest immunity attaches. Having reviewed the cases, the judge ruled that there was a clear distinction between the primary documents generated in an investigation, which were discoverable, and secondary documentation comprising a report based on that material and directed to the CPS.

The judgment seems to decide that the latter class attracted immunity because the proper functioning of the criminal process required freedom of communication between police forces and prosecuting authorities.

*O'Sullivan v. Commissioner of Police of the Metropolis, The Times*, 3 July 1995, Queen's Bench Division

#### **Appeal against orders under Proceeds of Crime Act 1991 (NZ) made following convictions under Misuse of Drugs Act (NZ)**

The appellant was sentenced to four years imprisonment and fined \$NZ 200,000 following conviction on drugs charges after cannabis valued conservatively at \$NZ 495,000 and \$NZ 31,000 in cash was found on his farm. It was clear that extensive cultivation had been carried on for many years.

Receipts from sales made after the Proceeds of Crime Act (PCA) came into force totalled over \$NZ 99,000.

The sentencing judge also ruled that the entire farm and \$NZ 32,000 in cash found in the house were "tainted property" as defined in section 2 of the PCA and made the following orders:

- (a) forfeiture of three of the ten certificates of title which comprised his farm. The forfeited land was valued at \$NZ 200,000
- (b) confiscation of nearly \$NZ 32,000

The total value of the forfeiture and confiscation represented the sum of the following:

the value of the cash found in the house (which could be confiscated under the Act); plus

a "pecuniary penalty" of \$NZ 67,750 as assessed under ss 25 and 27 (being cash received during the period from when the Act came into force - over \$NZ 99,000 - less the confiscated cash); plus

\$NZ 167,500, being the cash receipts of \$NZ 99,000 doubled "by way of penalty", less the forfeited cash found in the house.

The appellant challenged the orders and also appealed against sentence.

*Held*, upholding this aspect of the appeal but dismissing the appeal against sentence:

1. It was appropriate to order confiscation of the cash proceeds found in the house and to order payment of the pecuniary penalty of \$NZ 67,750.
2. However, it was wrong to build into the sum of \$NZ 167,500 a penalty payment. It is no part of the policy of the Act to punish offenders other than by requiring a person to forfeit property which represents the profits of criminal activity or which has been used to commit an offence. Taking into account the factors prescribed in s 15(2) of the Act (ordinary uses of property, hardship likely to be caused to any person, appellant's and others' interest in property, circumstances and gravity of offence) only one of the ten titles should be forfeited.

*R v. McCormick*, Court of Appeal of New Zealand, unreported 21 December 1994, C.A. 180/94

**USA external confiscation order pursuant to proceedings in rem - availability of restraint orders under Drugs Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 (UK)**

Pursuant to an action in New York between the USA as plaintiff and " All funds on deposit in any accounts" maintained in the names of certain named individuals at a named bank, the High Court granted a restraining order under the Drugs Trafficking Offences Act 1986 (DTA). The order was made on the basis that the property identified was the realisable property of a putative defendant in putative criminal proceedings in the USA and there were good grounds for believing that an external confiscation order might be made against him in that jurisdiction. There were no longer grounds for that belief as the defendant had not been arrested and there was no extradition treaty between the USA and the country in which he now resided.

Section 8 of the DTA states that the High Court may by means of a restraint order prohibit anyone from dealing with any realisable property. Section 7 provides that the powers

conferred in section 8 may be exercised where, inter alia, "proceedings have been issued against the defendant in a designated country". Article 3 of the 1990 Order provides that the 1986 Act shall have effect as set out in Schedule 3 of the Order; Schedule 3 section 1 states that "A person against whom an external confiscation order has been made .... is referred to in this Act as 'the defendant'".

It was accepted for the purposes of these proceedings that the funds in the London banks represented the proceeds of drug trafficking.

The appellant argued that reading the Act and Order together it was clear that the defendant must be a person and proceedings must have been instituted against him. Further, proceedings in rem were with one exception alien to English law and notions of comity did not permit the concepts of English law to be circumvented; both the Vienna Convention 1988 and a UK treaty signed with the USA in 1988 concerning inter alia the forfeiture of proceeds from drug trafficking required respect for national laws. The proceedings in rem in the USA therefore did not entitle the High Court to make a restraint order.

*Held*, dismissing the appeal:

1. It could not be seriously disputed that the purpose of the 1988 Convention and the 1988 Treaty was to cover situations such as the present.
2. On a purposive reading of the Act and Order the powers of the High Court to make a restraint order did extend to proceedings in rem. "The defendant" in Schedule 3 section 1 of the Order could include entities other than a person. Further, section 7 of the Act was concerned to identify the stage of the proceedings at which a restraint order could be made and did not require a particular form of proceedings to be effective.

*In re Londono*, *The Times*, 11 July 1995, Court of Appeal (UK)

## LEGISLATION

### United Kingdom

The *Proceeds of Crime Act 1995* amends Part VI of the Criminal Justice Act 1988. Part VI empowers the courts to confiscate the proceeds of indictable offences (other than the proceeds of drug trafficking- and certain terrorism offences under the Prevention of Terrorism (Temporary Provisions) Act 1989) and the proceeds of certain highly lucrative summary offences.

Key provisions:

- impose a duty on the court, on written notice by the prosecutor or on its own volition, to determine whether the defendant has benefited from relevant criminal conduct and if so, to order confiscation of an amount to be assessed according to a formula based on the amount of an offender's benefit from crime and the value of his or her realisable assets

- give the court under carefully defined circumstances a discretion, in assessing the fact and extent of the benefit derived from criminal conduct, to make the rebuttable assumption that property transferred to or amounts spent by the defendant in the six years prior to the institution of proceedings derived from crime
- require the prosecutor to provide the court with a statement containing information relevant to whether the defendant has benefited from relevant criminal conduct, and if so its value
- empower the court to order a defendant to provide it with information to assist it to carry out its functions under Part VI
- provide that service of a term of imprisonment in default of payment shall not expunge the amount owed under a confiscation order
- provide for interest to be added to unpaid confiscation orders and for imprisonment on default to be increased accordingly
- enable the amount to be recovered to be reduced on production by a receiver to the High Court of a certificate stating that the realisable property is inadequate to satisfy the order
- enlarge a Circuit judge's powers to order production of material and to issue a search warrant for the purpose of an investigation into whether a person has benefited from crime or into the whereabouts of proceeds
- enable a High Court to order production of material possessed by an authorised government department where this will assist a court or receiver to exercise its powers under Part VI

The Act also amends the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Criminal Justice (International Co-operation) Act 1990 to enable a domestic restraint order to be obtained at an early stage to prevent dealing in property which may later be subject to an external restraint or forfeiture order.

### **Canada**

Recent additions to the CCU database, courtesy of the Canadian Ministry of Justice, are extracts from the following Canadian statutes and regulations which are relevant to the Canadian proceeds of crime area :

- Criminal Code (up to 1994)
- Narcotic Control Act and Food and Drugs Act
- Proceeds of Crime Act and Regulations
- Seized Property Management Act and Regulations
- Customs Act (up to 1994)
- Excise Act

An overview and analysis of the Canadian Proceeds provisions has also been provided.