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Cross-border enforcement of arrest warrant – Scotland to Northern Ireland – person assuming name of innocent third party in criminal charge and then absconding before sentence – warrant issued in name of innocent party – whether arrest amounted to false arrest – whether warrant for arrest of “person charged with an offence”- Criminal Law Act 1977, s. 38(3) (UK)

Mackin and another man (Barker) were arrested and charged with theft of a car, by officers of the Dumfries and Galloway Constabulary. Mackin gave the police the name and details of McGrath, the plaintiff in this case. Mackin had attended the same school as McGrath and knew him well. Mackin persisted in this deception throughout the subsequent proceedings in the Sheriff Court at Stranraer. All the details in the charge and court records relating to Mackin, were in the name of McGrath, and a schedule of previous convictions of Terence Joseph McGrath was prepared in connection with the charge against him. Mackin pleaded guilty to the charge against him and in accordance with practice Mackin was asked to sign his plea of guilt and he did so using the name McGrath. The case was then adjourned for reports and sentence, and Mackin, under the name of McGrath, and Barker were granted bail. They both failed to appear at court for sentencing. The sheriff accordingly on that day, on the application of the procurator fiscal, granted a warrant for the arrest of both men. That was sent to the procurator fiscal so that the police might enforce it. It was confirmed by a Scottish advocate who gave evidence before the court in Northern Ireland that the warrant which was issued was a proper and valid warrant under the law of Scotland and that its effect was to authorise police officers to search for and arrest the persons named therein.

On 25 September 1991 the real McGrath was arrested by a constable of the Royal Ulster Constabulary. Later on that day the plaintiff was transferred into the custody of two officers of the Dumfries and Galloway Constabulary and was taken to Stranraer. It was then discovered that he was not the person who had been detained in January 1991. He was released and given some money for his fare to travel back to Belfast.

McGrath sued the Royal Ulster Constabulary, claiming damages for wrongful arrest. He argued that he had been arrested

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For further information or copies, please
contact: The Editor, Criminal Law Unit,
Legal & Constitutional Affairs Division (LCAD),
Commonwealth Secretariat,
Marlborough House, Pall Mall,
London SW1Y 5HX, United Kingdom.
Tel: +44 (0)20 7747 6417/6420/6423
Fax: +44 (0)20 7839 3302
E-mail: k.prost@commonwealth.int
v.wright@commonwealth.int

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wrongfully, unlawfully and without reasonable cause. The Police on the other hand contended that the arrest was lawful relying on section 38(3) of the Criminal Law Act 1977. The claim failed at first instance. McGrath appealed.

The Court of Appeal considered the terms of section 38(3) and took the view that the subsection did not avail the defendants because the McGrath was not "a person charged with an offence" for the purposes of the subsection. The person charged with an offence was Mackin. The warrant "was for the arrest of Mackin, the person who had been before the sheriff and whom the latter intended to have brought back to his court." [2000] NI 56, 60.

The court did not think it possible: "to construe the phrase 'person charged' as meaning the person whose name is set out in the warrant if he was not the person who had been before the court and whom the sheriff intended to have arrested."

The court continued, at p 61:

"We recognise that this penalises a police officer who has acted in good faith and who has been misled by the deception perpetrated by the accused, but we think that it would be less than just if a third person who has been arrested and detained, although innocent of any wrongdoing, were left without a remedy.

The Chief Constables appealed to the House of Lords

► Held, allowing the appeal:

1. The intention of the sheriff in granting the warrant to arrest Terence McGrath was no doubt to have the man who had appeared before him in court to be arrested and brought back for sentence.

The question still remains whether the execution of the warrant was lawful.

The present case concerns a mistake of fact in the identity of the person named in the order of the court. The order was not unlawful. The only issue is whether its execution upon the person named in it constituted an unlawful arrest. In *Henderson v Preston* (1888) 21 QBD 362, an action for false imprisonment failed where the warrant ordered the prison governor to receive the plaintiff and keep him for the space of seven days. The sentence ran from 24 August but the plaintiff was only lodged in prison on 25 August.

Hoye v Bush (1840) 1 Man & G 775 stated the principle that the person executing a warrant should follow and be entitled to rely on the face of the warrant. He may not act outside the terms of the warrant. But he should not be held to have acted unlawfully if he carries out the instruction which appears from the face of the warrant. It is not for him to question that instruction if it is clear.

2. If warrants which are apparently valid are to be taken at their face value and justify the action taken in conformity with them it is necessary that there be strict controls governing the granting and the execution of them. In so far as warrants may authorise what would otherwise be an unlawful invasion of private rights, there are various safeguards which accompany the granting and execution of them. Whether or not they are granted under statutory provision the procedures required for the granting of them must be carefully followed. They must state whatever the particular statutory provision under which they are issued requires them to state (e.g. *R v Inland Revenue Commissioners, Ex p Rossminster Ltd* [1980] AC 952. The warrants must be sufficiently clear and precise in their terms so that all those interested in their execution may know precisely what are the limits of the power which has been granted. As Coltman J stated in *Hoye* (p 788): "It is of the essence of a warrant that it should be so framed, that the officer should know whom he is to take, and that the party upon whom it is executed should know whether he is bound to submit to the arrest." Compliance with the proper procedure is particularly important where the liberty of the subject is concerned (*R v Metropolitan Police Commissioner, Ex p Hammond* [1965] AC 810, 837). Where legislation requires particular information to be given to the arrested person, as in section 28(3) of the Police and Criminal Evidence Act 1984, the failure to give the information will make the arrest unlawful (e.g. *Mullady v Director of Public Prosecutions* [1997] EWHC 595).

3. So far as this case was concerned the warrant was lawfully and validly issued under the law of Scotland. The evidence to that effect was not disputed. The sheriff was acting within his jurisdiction in directing that the order be issued. But, albeit mistakenly, it was on the face of it a valid warrant for the arrest of the plaintiff. It was not a warrant for the arrest of Mackin. If a constable had attempted to arrest Mackin on the strength of the warrant the arrest would

have been as unlawful as was the arrest in *Hoye*. That it might be possible to strike it down on the ground of the mistake did not render it a nullity. The granting of the warrant was a lawful judicial act and the validity of the warrant would remain until it was recalled or cancelled. While the granting of a warrant is a judicial act, an endorsement of the warrant is merely a ministerial act (*R v Metropolitan Police Commissioner, Ex p Hammond* [1965] AC 810, 837) and, as was noticed in *Hoye*, the execution of it is correspondingly also a ministerial act

4. As to the question of the construction of section 38(3), there was no doubt that the warrant was "a warrant issued in Scotland". The problem then was whether the phrase "for the arrest of a person charged with an offence", as stated by the Court of Appeal, were words that require that the person named in the warrant is a person who has actually been charged with an offence. Although this was a possible construction of the phrase, it was not the only possible construction. It was also possible that they simply describe the kind of warrant with which the subsection is concerned, namely a warrant to arrest, as distinct from a warrant to search, or any other kind of warrant. On this approach the words are not detailing the substance of the warrant so as to require that the person arrested had in fact been charged with an offence.

Their Lordships preferred the latter construction. If *McGrath* had been in Scotland and the warrant had been executed in Scotland the arrest in conformity with the warrant would have been lawful. That position should still be the same when by virtue of the legislation the power is given to execute it in Northern Ireland. Section 38(3) simply gave the power to execute the warrant within another jurisdiction. If the execution was lawful in the one country, then it should be lawful in the other. The purpose of the section was to enable warrants granted in one of the stated jurisdictions to be readily enforceable in another within the United Kingdom. Endorsement of the warrant is expressly declared in subsection (4) not to be required. The phrase "for the arrest of a person charged with an offence" appears in all of the first three subsections, covering the three jurisdictions in which the warrants in question may be executed. In each case the words have no greater significance than to denote that the warrants are, as mentioned in the side-note,

"warrants of arrest." The construction adopted by the Court of Appeal would have more weight if the subsection had read "may be executed against that person." But those last three words do not appear in the legislation and there is no obvious reason for construing the subsection as if they were there.

Even if this construction was incorrect and the critical phrase should be understood as requiring that the warrant should in its substance be for the arrest of a person who has been charged with an offence, the situation here was that the plaintiff had been, albeit mistakenly, charged with an offence. It was against the plaintiff by name that the indictment had been issued. The plaintiff could thus qualify as a person "charged with an offence" for the purposes of the subsection. This alternative approach was also acceptable. Their Lordships did not consider that the Court of Appeal was correct in requiring that the warrant could only be executed against the plaintiff if he had in fact been the person who actually appeared before the sheriff and whom the sheriff intended to be arrested. That construction would involve a questioning of what appeared clearly, even although mistakenly, on the face of the warrant. Where there is no reason to question what appears on the face of the warrant, the constable enforcing it has no obligation to do so: indeed on the contrary he has the duty to enforce it. And if in executing it he complies with the terms of the instruction embodied in the warrant he should not be regarded as having acted unlawfully.

The alternative view would involve, as the Court of Appeal recognised, penalising the officers engaged in the enforcement of the warrant where they had acted reasonably and in perfect good faith. It would impose an unfair burden upon the police in acting responsibly and honestly in carrying out what is a ministerial function. The Court of Appeal considered it would be unjust that the third party who had been arrested without any evident wrongdoing on his part should be without a remedy. But if he is without a remedy that is not because the law deprives him of any right to a remedy but because the circumstances of the person who caused the mistake to be made by his own deliberate deception may be such that the remedy is not worth pursuing.

McGrath v. Chief Constable of the Royal Ulster Constabulary and Another [2001] 3 WLR 312.

Criminal Procedure – young offender – evidence adduced from offender at preliminary inquiry of another accused person – other witness subsequently giving evidence incriminating young offender at latter’s trial and supporting young offender’s evidence at preliminary inquiry – admissibility of that other witness evidence – Whether use of preliminary inquiry primarily to obtain evidence against young offender unfair and undermining privilege against self-incrimination – whether witness evidence constituted derivative evidence – whether breach of sections 7 and 24(1) of Charter of Rights and Freedoms – (Canada)

B died of stab wounds sustained in a brawl at a bar in Toronto. L and D and other people were involved in the brawl. The police had considerable difficulty obtaining the co-operation of individuals present at the scene. However, after interviewing a number of witnesses, the police came to the conclusion that L and D were the probable killers. At the time, L was of an age that required that he be treated as a young offender, but D was charged as an adult. The prosecution attempted to have the appellant transferred to adult court so that there could be a single trial, but that application was unsuccessful.

However, at the preliminary hearing for D’s trial, L was called as a witness, on the grounds that there was sufficient evidence to support the conclusion that L had material evidence to give at the preliminary inquiry. L was asked very few questions relating to the possible role of D in the killing. The overwhelming majority of the questions addressed to L were in relation to his activities on the night of the murder, as well as those of his companions other than D. L admitted at the preliminary enquiry that he had stabbed the victim twice and that he had acknowledged this fact to his friends. Another witness, B had testified at D’s preliminary enquiry, that he did not see D with a knife. D was discharged at the preliminary enquiry.

At L’s trial, B was again called as a witness. He was reluctant to give evidence against L, and the prosecution treated him as a hostile witness and put to him L’s admission at D’s preliminary enquiry, of stabbing the victim twice. B then gave evidence implicating L and L was convicted of second degree murder.

L appealed to the Court of Appeal for Ontario arguing that:

1. The trial judge erred in refusing to stay proceedings as an abuse of process following the preliminary inquiry hearing of an alleged adult co-perpetrator of the offence. This preliminary inquiry resulted in the compelled evidence of the appellant being used to create additional evidence against him.
2. A derivative use immunity arises in relation to the testimony of any witness that was obtained as a result of the appellant’s compellable evidence at the same preliminary inquiry and, subsequently, entered in evidence at the appellant’s trial.

The prosecution argued that the process at the preliminary inquiry was simply a “search for the truth”.

► **Held:** allowing the appeal;

Persons separately charged with offences are ordinarily compellable at the preliminary inquiries of other persons charged with the same offence: *R. v. Primeau*, [1995] 2 S.C.R. 60. (See also the majority decisions in *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 and *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3, in which the court formulated an approach to testimonial compellability that focuses on the purpose for which the state desires the testimony.) In *Primeau*, the court stated that “even if separately charged as an accused person, a witness appearing in another person’s criminal trial will ordinarily be compellable in the criminal trial unless it is established that the predominant purpose in compelling the testimony is incrimination of the witness”. *Branch*, also held that if testimony is sought from a witness in a criminal prosecution for the predominant purpose of obtaining evidence in furtherance of that prosecution, that witness will be compellable.

In the present case the charges against D and the subsequent preliminary inquiry, were not *prima facie* objectionable, and the prosecution did have reason to believe that D was involved in the murder, and it could not be said *ipso facto* that the predominant purpose of the issuance of a subpoena to the appellant was to incriminate him. The separate proceedings against D and the appellant were necessitated by administrative procedure, and commenced for a valid public purpose and that, without more, neither the initial purpose of the preliminary

inquiry nor the fact that a subpoena was issued against the appellant can be impugned in this appeal as an abuse of process.

This did not protect the prosecution from an allegation that its subsequent conduct amounted to unfairness. It is possible for proceedings commenced for a valid public purpose to be transformed into what was referred to in *S. (R.J.)* at p. 536 as “an inquisition of the most notorious kind”. At page 542, Iacobucci J. said:

The search for truth in a criminal trial against a named accused has an obvious social utility, and the truth-seeking goal operates to limit effectively the scope of the proceedings in terms of the “inquiry effect”. The laws of relevancy would preclude the random examination of individuals within a criminal trial.

The passage supposes that the laws of relevancy would generally guard against the usurpation of valid proceedings to an invalid purpose, but in the present case where L’s counsel was refused standing at D’s preliminary inquiry, the court could only determine from the records, whether specific unfairness occurred through a perversion of the preliminary inquiry’s purpose.

This requires a determination as to whether the prosecution’s conduct throughout D’s preliminary inquiry was consistent with the valid purpose of that proceeding. There is a substantial body of jurisprudence to the effect that the sole purpose of the preliminary inquiry provisions of the *Criminal Code* is to establish a charge screening device. The proceedings are oriented towards the determination of whether there is sufficient evidence to force the accused to stand trial: *R. v. Patterson*, [1970] S.C.R. 409 at 412. In this sense, the purpose of the preliminary inquiry is directed squarely at the accused who is subject of the proceedings.

As regards derivative evidence, the court noted that during D’s preliminary inquiry, counsel for the prosecution’s line of questioning showed that her predominant purpose was to obtain evidence against L.

In *S. (R.J.)*, Iacobucci J. made the following statement relating to the exclusion of derivative evidence in subsequent proceedings at p. 561:

“Turning back to the problem of compelled testimony, then, I see no reason not to draw the obvious analogy. Since it is the

principle against self-incrimination which is at stake, and since that principle finds recognition under s. 24(2) as I have described, we should avoid the incongruity which would result if a different quality of protection was offered to the witness who is compelled to answer questions. The *Charter* should be construed as a coherent system: *Hebert, supra*. Accordingly, I think that derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the *Charter* in the interests of trial fairness. Such evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown’s case. To this extent, the witness must be protected against assisting the Crown in creating a case to meet. [Emphasis in original.]”

The court found that that the evidence of the witness B implicating L in all probability would not have been obtained if it had not been for L’s compelled testimony at D’s preliminary inquiry. While L was a compellable witness to give evidence at a preliminary inquiry, it was unfair to use that process for the predominate purpose of compelling him to incriminate himself for the purpose of creating new evidence against him from another witness. The predominant purpose of the preliminary inquiry in relation to D was to build up a case against L. Although the prosecution characterized the preliminary inquiry as a “search for truth” and, indeed, all court processes involve a search for truth, it used the D preliminary inquiry to serve as an inquisitorial process for the purpose of developing new evidence against L. The use of the examination of L at D’s preliminary inquiry for this collateral purpose under the rubric of a “search for truth”, was to distort it into an inquisitorial-type of investigative model, in which the privilege against self-incrimination was undermined. The inculpatory evidence of B could not have been obtained but for the ‘conscripted’ evidence of L at the preliminary enquiry, and was therefore derivative evidence. Therefore, the introduction of evidence of the witness B from D’s preliminary inquiry rendered the trial unfair and a breach of s. 7 of the *Charter*.

R. v. L.Z. [2001] O.R. 97.

CRIME — Evidence — Admissibility — Telephone intercept — Made by telephone engineer without authority for private purposes — Whether “engaged in the running of a public telecommunication system” — Intercept used by police to obtain confession — Whether confession admissible in evidence — Interception of Communications Act 1985 (c 56), s 9(2)(c) (UK)

P was the victim of arson with respect to his car and house. He suspected that his ex-wife and her lover S, were involved in the arson. He worked as a telephone engineer, with a company called Nynex Cable Co. and knew that his company provided his wife's telephone line. His job enabled him to monitor and record telephone calls, but not for private purposes. Nonetheless, he listened in on a conversation between his ex-wife and her lover and recorded it. In that conversation, there was discussion about the arson attack. P then took the tape and transcript to the police. S was arrested and interviewed about the arson. Initially, he denied any involvement in it, but when he was told about the taped conversation and heard the recording he admitted the crime. He was charged and convicted of arson with intent to endanger life. At his trial, S elected not to give evidence, but objected to the admission of the intercepted evidence. The trial judge overruled his objection and admitted the evidence.

S appealed to the Court of Appeal but his appeal was dismissed. He appealed further to the House of Lords.

► Held: allowing the appeal;

1. A telephone engineer intercepting a conversation without authority for his own purposes, contrary to s 1(1) of the Interception of Communications Act 1985, was a “person engaged in the running of a public telecommunication system” within s 9(2)(c) of the Act and under s 9(1) evidence of the intercept and its contents was inadmissible at trial.

The words “engaged in” could either simply indicate a person's office, status or position with the telecommunications operator for which he worked or indicate that at the relevant time he had been embarked on a particular activity. On the latter view, admissibility of an intercept made by him would depend on his acting within the scope of his authority or his instructions.

The difficulties involved in investigating those matters and the scheme of the Act suggested that the first meaning was the correct one. Accordingly, evidence of the intercept and its contents was inadmissible at the trial. Although that did not of itself make a confession at a police interview induced by the intercept inadmissible, it had been crucial to the success of the prosecution's case that the jury should accept the confession as genuine, and powerful support for that acceptance was afforded by S's reaction on being made aware of the intercept. The jury would not inevitably have convicted if the transcript of the police interview, which had been made available to them, had been edited to exclude all mention of the intercept and if the transcript of the intercept itself had been withheld from them.

2. On the facts of the case, N was at the material time a person engaged in the business of running a public telecommunications system, and he took advantage of the opportunity it provided to intercept S's telephone conversation with N's ex-wife, contrary to section 1 of the Act. The evidence of his having done so and the fruits thereof were therefore inadmissible under s. 9(1) and should have been excluded. Their admission into evidence made the convictions unsafe.

R. v. Sargent (HL) [2001] 3 WLR 1004.

Criminal Law – DNA sample – stay of order to take sample pending appeal against order – S. 487.052 Criminal Code – (Canada)

B applied to the Ontario Court of Appeal for a stay of execution of another order under section 487.052 of the Criminal Code, that a DNA sample be taken from him. This application was made pending the hearing of an appeal against that order.

► Held: allowing the application;

Section 487.056(1) did not remove from the appeal court its jurisdiction to properly regulate proceedings before it. It simply provides that the taking of an appeal does not *per se* stay that order.

In addressing whether the court should exercise its jurisdiction to grant a stay pending appeal, the criteria in *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 312 should be applied - whether there is a serious issue to

be tried, whether without the stay irreparable harm will occur and the balance of convenience.

As to the issue to be tried, the Supreme Court held in *RJR*, that the threshold for making this determination was a low one. The question of whether the order made sufficiently recognized the privacy interests of B and otherwise meets the best interests of the administration of justice was arguable and thus the test was met in this case.

As regards the issue of inflicting irreparable harm, without the stay the appellant may face an unconstitutional invasion of privacy, which even though minor, involved the risk of a matching process which ought not to be undertaken if the appeal succeeded.

As regards the balance of convenience, the interest of the state was fully protected given that the appellant was in custody, and could be accessed at any time by the prosecution.

The Court granted a stay of execution of the order for a set period within which B's appeal was to be perfected, failing which the stay would lapse.

R. v. Briggs [2001] O.R. 124.

CRIME — Child pornography — Prohibition on importation of goods — Prohibited photographs — “Knowingly concerned in ... fraudulent evasion of ... prohibition” — Defendant importing indecent video films of children — Defence of mistaken belief as to nature of prohibited goods — Whether necessary to know precise nature of goods — Customs and Excise Management Act 1979, s 170(2) (as amended by Police and Criminal Evidence Act 1984, 2 114(1)) — Customs Consolidation Act 1876, s 42 — (UK)

F went to England from Amsterdam and was stopped at the airport at Heathrow. He was found in possession of two video films which were labelled respectively as “Spartacus” and “The Godfather Part 2”. These were ordinary films on general release. Each film, after beginning as its label indicated, contained footage which included indecent photographs of teenage boys under the age of 16.

He was arrested and charged under section 42 of the Customs Consolidation Act 1876 which prohibits the importation of indecent

photographs of young persons under the age of 16, but it does not prohibit the importation of indecent photographs of adults if the photographs are not obscene. F accepted at his trial that the pictures on the two video films were of young persons under the age of 16 and it was not in dispute that their importation was prohibited by section 42.

F's defense was that he met a man at a bar in Amsterdam for whom he agreed to do a favour and take the films for a friend in London. When the man gave him the two video films, the man told him that they contained “The Exorcist” and “Kidz”, but written on the videos were the titles, “Spartacus” and “The Godfather Part 2”. F believed that the films “The Exorcist” and “Kidz” were prohibited films. F said that when he got to the Airport in Amsterdam, he bought genuine video films of “Spartacus” and “The Godfather Part 2” for which he received receipts. On arrival at Heathrow he left the two genuine video films in a lavatory at Heathrow. He then went through customs with the two video films containing the indecent pictures, and he was able to produce, and did produce, the receipts for the genuine video films which appeared to relate, by virtue of their external labelling, to the two video films which he was carrying. The films “The Exorcist” and “Kidz”, to which F referred in his evidence were films which were not indecent or obscene and their importation was not prohibited.

In effect, F's defence was that he believed that he was carrying two films the importation of which, contrary to his belief, was not prohibited. If the jury had accepted that such a belief was a reasonable possibility they would have had to acquit him on both counts, and in his summing up the trial judge so directed them in accordance with the decision of this House in *R v Taaffe* [1984] AC 539.

His appeal to the Court of Appeal, having been rejected, the matter was referred to the House of Lords as points of law of general public importance:

◆ **Held dismissing the appeal:**

1) In delivering the judgment of the Court of Appeal in *R v Hussain* Widgery LJ stated, at pp 571H-572A:

“It seems perfectly clear that the word ‘knowingly’ in section 304 (b) is concerned with knowing that a fraudulent evasion of a prohibition in respect of goods is taking place. If, therefore, the accused knows that

what is on foot is the evasion of a prohibition against importation and he knowingly takes part in that operation, it is sufficient to justify his conviction, even if he does not know precisely what kind of goods are being imported. It is, of course, essential that he should know that the goods which are being imported are goods subject to a prohibition. It is essential he should know that the operation with which he is concerning himself is an operation designed to evade that prohibition and evade it fraudulently. But it is not necessary that he should know the precise category of the goods the importation of which has been prohibited."

The principle stated by Widgery LJ in relation to knowledge contains two parts. The first part is that the prosecution must prove that the defendant knew that the goods were goods subject to a prohibition. The second part is that if the prosecution proves such knowledge it is not necessary for it to prove that the defendant knew what kind of goods were being carried. The issue for the jury becomes blurred if they are required to consider the knowledge of the defendant as to the kind or category of goods being carried.

2) In the present case it is not in dispute that the goods carried by the appellant were prohibited goods. Once the jury had rejected (as they did) the "Taaffe defence" advanced on behalf of the appellant that he believed he was carrying two prohibited video films but that, in reality, those films were not prohibited, the only issue for the jury to decide was whether the defendant knew that the goods which he was carrying were subject to a prohibition. The judge on a number of occasions correctly directed the jury that this was the issue which they had to decide. He also correctly told the jury that the prosecution had to satisfy them that the defendant "by his behaviour, and the situation which you will find as a matter of fact, that he knew he was bringing in prohibited photographs."

3. The offence created by section 170(2)(b) of the 1979 Act is the offence of being "knowingly

concerned in any fraudulent evasion ... of any prohibition ... with respect to the goods ...". The essence of the offence is being knowingly concerned in the evasion of a prohibition. The jury was fully entitled to find that the behaviour of the appellant was such that he was knowingly concerned in the evasion of a prohibition. His behaviour in buying genuine video films of "Spartacus" and "The Godfather Part 2" in the airport shop at Amsterdam Airport and obtaining receipts for them, leaving the genuine video films in the lavatory at Heathrow, and then producing the receipts which appeared to relate to the two video films containing indecent material, pointed quite clearly to the conclusion that he knew that he was involved in the evasion of a prohibition against importation.

4. In many cases a person who, at the request of another and, (whether or not for money) takes into the United Kingdom an article, knowing that he is taking part in the fraudulent evasion of a prohibition against importation, will not know the precise nature of the article which he is carrying. In such a case the task for the prosecution in proving an offence would be virtually impossible if, in addition to having to prove that the article was a prohibited one and that the defendant knew that he was involved in the evasion of a prohibition, it also had to prove that he knew the precise nature of the article. The application of the principle stated in *R v Hussain* [1969] 2 QB 567 gives rise to no injustice in the present case because it was open to the defendant to seek to rely on the "Taaffe defence" if his case was that he believed that he was carrying an article which in reality and contrary to his belief was not prohibited.

5. The two certified questions, as formulated, did not permit an answer to the issue which arises on this appeal as the first question referred to the defendant's knowledge of the importation of "an indecent photograph" rather than to the importation of "prohibited material" and therefore it was not appropriate to answer them.

R. v. Forbes (Giles) (HL) [2001] Weekly Law Reports 428.