[1980–87 Gib LR 154]

R. v. OLIVERO and EIGHT OTHERS

SUPREME COURT (Davis, C.J.): April 12th, 1983

Criminal Law—drugs—conspiracy—since obtaining and supplying drugs outside jurisdiction not offence "triable in Gibraltar" within Criminal Offences Ordinance, s.214A(3), conspiracy in Gibraltar to supply drugs obtained in Morocco to recipient in Spain not offence in Gibraltar

Criminal Procedure—jurisdiction—territorial jurisdiction—no offence if overt act in Gibraltar with criminal consequences abroad unless statutory authority—e.g. no conspiracy in Gibraltar to offer, intend to supply drugs, contrary to Misuse of Drugs Ordinance 1973, ss. 6(1)(b) and 7(3) if obtaining and supply occur outside jurisdiction

The defendants were charged under s.214A of the Criminal Offences Ordinance with conspiring to supply a controlled Class B drug contrary to s.6 of the Misuse of Drugs Ordinance 1973.

The defendants had made an agreement to obtain cannabis resin from Morocco and supply it to persons in Spain. They undertook acts in furtherance of the offence whilst in Gibraltar, such as keeping the boats to be used in the execution of the offence, transporting people involved in the conspiracy to and from Spain and, although they had not originally planned to do so, importing cannabis resin into Gibraltar. They were charged, *inter alia*, under s.214A of the Criminal Offences Ordinance with conspiracy to supply a controlled Class B drug to others, in contravention of s.6 of the Misuse of Drugs Ordinance.

The Crown submitted that (a) under s.214A(3) of the Criminal Offences Ordinance it was immaterial that the defendants intended the supply of cannabis resin to others to take place outside Gibraltar; the definition of "offence" in s.214A(3) meant that an offence triable "in principle" in Gibraltar could be the object of a conspiracy—as the law of Gibraltar made it an offence to supply cannabis resin to another, regardless of whether the supply was to take place in or out of Gibraltar; (b) s.6 of the Misuse of Drugs Ordinance 1973 made it an offence to supply a controlled drug to another and an agreement necessarily leading to the commission of an offence, regardless of where the offence was to occur, constituted the crime of conspiracy; and (c) the use by the defendants of Gibraltar as a base for their conspiracy and the acts carried out by them in Gibraltar, involving the making of arrangements to execute the conspiracy, including, ultimately, the importation of cannabis resin, were clearly matters

affecting the Queen's peace so as to give the Gibraltar court jurisdiction to try the charge of conspiracy.

The defendants submitted in reply that the agreement between them could not be the subject of a charge of conspiracy since collecting drugs from Morocco and supplying them in Spain was not "an offence triable in Gibraltar" within the meaning of s.214A(3) of the Criminal Offences Ordinance. Since s.6 of the Misuse of Drugs Ordinance 1973 had no extra-territorial effect, it was only applicable to the supply of a controlled drug in Gibraltar.

Held, ruling that conspiracy could not be sustained:

Although some of the overt acts of conspiring both to obtain and supply the cannabis resin outside Gibraltar had taken place within Gibraltar, there could be no valid indictment for the offence, as the conspiracy did not give rise to any consequence constituting "an offence triable in Gibraltar," within the meaning of the Criminal Offences Ordinance, s.214A(3). Those words had to be given their ordinary literal meaning, which was that the offence the defendants had conspired to commit had to be one which could actually be tried in Gibraltar. It was not sufficient that the offence was "in principle" triable in Gibraltar, *i.e.* that it satisfied the statutory requirements for the full offence, since the non-statutory requirements for conspiracy included the requirement that the acts to be committed would have taken place in Gibraltar. The intention here was that the supply of drugs would in fact have taken place in Spain and not in Gibraltar, with the result that conspiracy could not be charged at all (paras. 14–16).

Cases cited:

(1) *Board of Trade* v. *Owen*, [1957] A.C. 602; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411. applied.
(2) *R.* v. *Cox*, [1968] 1 W.L.R. 88; [1968] 1 All E.R. 410; (1967), 52 Cr. App. R. 106, referred to.
(3) *R.* v. *Governor of Brixton Prison*, *ex p. Rush*, [1969] 1 W.L.R. 165; [1969] 1 All E.R. 316, applied.

Legislation construed:

Criminal Offences Ordinance, s.214A: The relevant terms of this section are set out at para. 3.

Misuse of Drugs Ordinance 1973, s.6: The relevant terms of this section are set out at para. 3.

D. Hull, *Q.C.*, *Attorney-General*, for the Crown;
J.J. Neish and *E.C. Ellul* for the defendants.

1 **DAVIS, C.J.:** Mr. Neish and Mr. Ellul have submitted that Count 1 of the indictment against the defendants is defective in charging a conspiracy in Gibraltar, the object of which is an offence contrary to s.6 of the Misuse of Drugs Ordinance 1973, when it is clear from the evidence adduced by

the Crown that the object of the alleged conspiracy was to collect cannabis resin, the controlled Class B drug referred to in Count 1, from Morocco and to supply it to persons unknown in Spain. Accordingly, it is submitted, a charge of conspiracy under s.214A of the Criminal Offences Ordinance will not lie because the object of the conspiracy—*i.e.* the supply outside Gibraltar of cannabis to persons in Spain—is not an offence triable in Gibraltar. Mr. Neish referred me in support of this argument to the case of *Board of Trade* v. *Owen* (1).

2 Count 1 of the indictment reads as follows:

> "Charles Olivero, Eliott Victory, Alfonso Duo, John Frederick Crowson, Joseph Parody, Derek Fox, Mohamed Ben Zaib Tellan Boulaich, Albert John Caetano and Joseph Louis Caruana on divers days between October 29th, 1980, and August 6th, 1981 in Gibraltar conspired together and with other persons unknown to supply to others in contravention of the provisions of section 6 of the Misuse of Drugs Ordinance 1973 a controlled class 'B' drug . . ."

3 Section 214A of the Criminal Offences Ordinance, in so far as applicable in this case, reads as follows:

> "(1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.
>
> . . .
>
> (3) In this Part 'offence' means an offence triable in Gibraltar, except that it includes murder notwithstanding that the murder in question would not be so triable if committed in accordance with the intentions of the parties to the agreement."

Section 6 of the Misuse of Drugs Ordinance 1973, insofar as relevant to this case, reads as follows:

> "(1) . . . [I]t shall not be lawful for a person—
>
> . . .
>
> (b) to supply or offer to supply a controlled drug to another.
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> . . .
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> (3) . . . [I]t is an offence for a person—
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> (a) to supply or offer to supply a controlled drug to another in contravention of subsection (1) of this section; or

(b) to be concerned in the supplying of such a drug to another in contravention of that subsection . . .”

4 Mr. Neish submits that s.6 can relate only to the supply of a controlled drug in Gibraltar, as the section makes no reference to its having any extraterritorial effect. The only section in the Misuse of Drugs Ordinance 1973 having any such effect is s.16, as read with s.3, but this has not been called in aid in this case.

5 Having regard to the definition of “offence” in s.214A(3) of the Criminal Offences Ordinance as meaning “an offence triable in Gibraltar” and the fact that it is not disputed by the prosecution that the conspiracy alleged in Count 1 was to collect cannabis from Morocco and to supply it to persons in Spain, Mr. Neish submits that the object of the alleged conspiracy did not constitute an offence triable in Gibraltar.

6 In Archbold, *Criminal Pleading*, *Evidence & Practice*, 41st ed., para. 28–2, at 2032 (1982) in the note on s.1(4) of the Criminal Law Act 1977 (which corresponds to s.214A(3) of the Criminal Offences Ordinance), it is stated that this sub-section put into statutory form the decision of *Board of Trade* v. *Owen* (1) that where there is an agreement to pursue a course of conduct taking place abroad, the agreement could not be the subject of a charge of conspiracy unless that conduct constituted an offence triable in England and Wales—or, in the context of s.214A(3), in Gibraltar.

7 Mr. Ellul drew my attention to *R.* v. *Cox* (2) and *R.* v. *Governor of Brixton Prison*, *ex p. Rush* (3), both cases in which the decision in *Board of Trade* v. *Owen* (1) had been applied.

8 The Attorney-General pointed out that s.6 of the Misuse of Drugs Ordinance made it an offence under the laws of Gibraltar to supply a controlled drug to another. He submitted that an agreement necessarily leading to or involving the commission of an offence if carried out in accordance with the intentions of the parties to the agreement constituted the crime of conspiracy to commit the offence in question—in the present case the supplying of cannabis resin to others unknown. He submitted that in interpreting s.214A(3) it was necessary only to ask the question: Does the law of Gibraltar make it an offence to supply cannabis resin to another? If the answer to that question was “Yes,” the next question to be asked was: Has there been in Gibraltar a conspiracy to commit an offence of that kind? The Crown contended that there has been just such a conspiracy in this case; that this constituted a conspiracy under s.214A(1), and that it was immaterial that the actual supply of the cannabis to others was intended to take place outside Gibraltar. Furthermore, the Attorney-General submitted, the use by the defendants of Gibraltar as a base for their conspiracy and the many acts carried out by them in Gibraltar such as the keeping and preparation of boats to be used in execution of the conspiracy, the bringing over from Spain of persons involved in the

conspiracy and, generally, the making of arrangements for the execution of the conspiracy, including finally the bringing cannabis into Gibraltar, were clearly matters affecting the Queen's peace so as to give this court jurisdiction to try the charge of conspiracy preferred against the defendants in Count 1. He referred in this connection to the speech of Lord Tucker in *Board of Trade* v. *Owen* (1) in which, after referring to the historical origins of the crime of conspiracy, Lord Tucker said ([1957] A.C. at 626):

> "Accepting the above as the historical bases of the crime of conspiracy, it seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt, and that it is all part and parcel of the preservation of the Queen's peace within the realm. I cannot, therefore, accept the view that the locality of the acts to be done and of the object to be attained are matters irrelevant to the criminality of the agreement."

9 I think reference should also be made to the passage in which Lord Tucker said (*ibid.*, at 625):

> "The gist of the offence being the agreement, whether or not the object is attained, it may be asked why should it not be indictable if the object is situate abroad. I think the answer to this is that it is necessary to recognize the offence to aid in the preservation of the Queen's peace and the maintenance of law and order *within the realm* with which, generally speaking, the criminal law is alone concerned." [Emphasis supplied.]

10 In *Board of Trade* v. *Owen* the respondents had been charged with a conspiracy in London to defraud an export control department (known as Z.A.K.) of the Federal Republic of Germany by causing it to grant licences to export metals from Germany by fraudulently representing to Z.A.K. that the metals would be exported to Ireland, the respondents well knowing that they were in fact to be exported to Russia and Eastern European countries. As Lord Tucker said (*ibid.*, at 622), it was a conspiracy by unlawful means, namely, to make representations known to be false to procure from a government department an export licence which, but for such representations, could not have been lawfully obtained. It was therefore an example of a conspiracy by unlawful means to achieve an object in itself lawful, namely, the issue of an export licence.

11 In closing, Lord Tucker said (*ibid.*, at 634):

> "I have reached the conclusion that the decision of the Court of Criminal Appeal that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here is correct, and from what I have

> already said it necessarily follows that a conspiracy of the nature of that charged in count 3 as proved in evidence—which, in my view, was a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime—is not triable in this country, since the unlawful means and the ultimate object were both outside the jurisdiction. In so deciding I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad."

12 It may be that in the particular circumstances of Gibraltar in relation to Spain acts carried out in Gibraltar in the execution of a conspiracy hatched in Gibraltar to supply cannabis to persons in Spain are matters affecting the Queen's peace, but in this case, unlike *Board of Trade* v. *Owen*, the acts of the defendants appear from the evidence adduced by the Crown to have been perfectly lawful, with the exception of bringing into Gibraltar at the last minute, cannabis apparently destined for Spain. That aspect of the case, as Mr. Ellul has pointed out, is covered by Counts 2 and 3 of the indictment, in which the defendants or some of them are charged with possession of cannabis resin with intent to supply it to another contrary to ss. 6(1) and 7(3) of the Misuse of Drugs Ordinance 1973, and importing cannabis resin contrary to s.10(1) of the Imports and Exports Ordinance. Be that as it may, it appears to me that what I must consider in determining whether the charge of conspiracy preferred against the defendants in Count 1 will lie is whether the evidence adduced by the Crown shows that the course of conduct agreed upon by the defendants necessarily amounted to or involved the commission of an offence triable in Gibraltar and that this offence is the offence referred to in Count 1.

13 It appears from the evidence of the officers of the Police Drug Squad that they believed the defendants' plan was to collect cannabis from North Africa and to supply it to persons in Spain, and they said that they had made arrangements with the Spanish police accordingly. There is no evidence of any plan on the part of the defendants to supply cannabis to anyone in Gibraltar. In the particulars of Count 1, the defendants are charged with conspiracy together and with other persons unknown "to supply to others" a controlled drug contrary to s.6 of the Misuse of Drugs Ordinance 1973. As submitted by counsel for the defence (and this is not disputed by the Crown), the evidence shows that "the others" to whom it is alleged the cannabis was to be supplied were in Spain and that the cannabis was to be supplied to them there or in any event outside Gibraltar. It appears therefore that the object of the alleged conspiracy did not constitute an offence triable in Gibraltar.

14 I find that I cannot accede to the Attorney-General's submission that the definition of "offence" in s.214A(3) of the Criminal Offences Ordinance means an offence triable "in principle" in Gibraltar. In my view the words of sub-s. (3) must be given their ordinary literal meaning—that is, that the offence the object of the conspiracy must be an offence triable in Gibraltar. In this case, were the evidence to show that the object of the alleged conspiracy was to supply cannabis to persons in Gibraltar, then that object could be said to be an offence triable in Gibraltar and a charge of conspiracy to commit that offence would lie. But where the evidence leads to the conclusion that the object of the alleged conspiracy is to supply, outside Gibraltar, cannabis to persons outside Gibraltar, having no consequences in Gibraltar constituting criminal offences, then that object is not an offence triable in Gibraltar. It may be an offence triable in Spain and it may be that a charge of conspiracy to commit an offence contrary to s.16 of the Misuse of Drugs Ordinance 1973 (as read with s.3) could have been preferred in this case, but this has not been done. Accordingly, I have come to the conclusion that Count 1 as framed cannot lie in respect of the conspiracy alleged in this case.

15 I can see no substantial difference between the present case and the cases of *R.* v. *Cox* (2) and *R.* v. *Governor of Brixton Prison, ex p. Rush* (3). The latter case concerned an application under the Fugitive Offenders Act 1967 for the return to Canada of an offender, the applicant Rush, who had been charged with conspiracy in Canada to defraud the public by inducing members of the public to purchase shares in two companies which shares did not have the attributes ascribed to them by the accused or their agents. The evidence showed that Rush and others had caused letters and circulars, followed by telephone calls, to be sent from Canada or other countries to persons outside Canada inviting them to become shareholders in the two companies. Lord Parker, C.J. said, after referring to *Board of Trade* v. *Owen* (1) ([1969] 1 W.L.R. at 171):

> " . . . [I]t is quite clear now that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie here. The sole question then is whether on the facts disclosed, substituting England for Canada (in other words, the conspiracy taking place in England and not in Canada), an offence against English law was disclosed, which in turn means whether an indictment would lie in this country for the substantive offence. As has already been disclosed in the course of the narrative of the facts, apart from the conspiracy itself the only acts which did take place in Canada were the printing of the circulars, the typing of the letters, in some cases their posting, the telephone calls in the nature of follow-ups and the fact that both Mr. Britstone and the present applicant eventually got the cheques collected mostly in Canada and were credited, no doubt, with the

proceeds. In my judgment it is really impossible to say that an offence of that kind could have been indicted in this country.

In *Board of Trade* v. *Owen* some of the overt acts were acts which took place in England; the forged documents emanated from England; and the documents were sent from England to, in that case, Germany. It was urged that if a letter sent out of this country had been intercepted it would be very odd that there could be an indictment for an attempt and yet if the whole fraud had gone through there could not be an indictment for the fraud. All matters of that sort were fully argued in *Board of Trade* v. *Owen* but nevertheless it was held that no indictment would lie for the substantive offence and that accordingly the charge of conspiracy in that case could not be sustained.

That case was followed by the Court of Appeal in *Reg.* v. *Cox (Peter Stanley)*. That was a case in which the conspiracy alleged was to defraud persons by inducing them to part with goods by false pretences and the conspirators there acquired in England a cheque-book containing unused cheques. They took those cheques out of the country and by means of five cheques they persuaded French shopkeepers to part with jewellery by falsely representing that they had accounts with the bank on which the cheques were drawn and having got their jewellery they brought it back to England and sold it in Essex. The Court of Appeal, following the case of *Board of Trade* v. *Owen*, held the alleged conspiracy was not indictable in England.

For my part, I find it really impossible to distinguish this case from those and earlier cases."

16 I find myself in the same position. Accordingly I find that the charge of conspiracy preferred against the defendants in Count 1 of the Indictment should not lie and the jury should be directed accordingly.

Direction accordingly.