[1991–92 Gib LR 145]

U., O.V. and E.M.V. v. R.

SUPREME COURT (Kneller, C.J.): June 26th, 1991

Criminal Law—drugs—investigation into drug trafficking—confiscation of assets—restraint order to be discharged under Drug Trafficking Offences Ordinance, s.10(5)(b) once proceedings against defendant concluded—proceedings concluded by dismissal of charges by committing magistrate, since no power to state case regarding dismissal for determination by Supreme Court

Courts—magistrates' courts—case stated—in committal proceedings no power to state case to Supreme Court, even if application by Attorney-General—case stated under Criminal Procedure Ordinance, s.295 applies only to final determination

The applicants were charged with drug trafficking offences.

The applicants were charged, with others, with possession of cannabis with intent to supply, and pleaded guilty. Restraint orders were made in respect of their property under the Drug Trafficking Offences Ordinance 1988. In committal proceedings, the Stipendiary Magistrate then dismissed the charges against them. They were released but later re-arrested, though no further charges were brought.

The Attorney-General asked the Magistrate to state a case for the opinion of the Supreme Court as to whether he had acted within his jurisdiction in dismissing the charges. The Magistrate refused and although the Attorney-General obtained leave to apply for judicial review of the decision to discharge the applicants, it was set aside by the Supreme Court on the application of the applicants. The proceedings are reported at 1991–92 Gib LR 107.

The applicants applied for the setting aside of the restraint orders submitting that (a) they were entitled to have them set aside under s.10(5)(b) of the Drug Trafficking Offences Ordinance, since the proceedings against them had concluded, there being no further possibility of a confiscation order being granted; (b) the proceedings were not deemed to be continued under s.77(5) of the Constitution, by virtue of the Attorney-General's request to the Magistrate to state a case for the Supreme Court, since the Magistrate had no power to state a case for the court when exercising his committal jurisdiction; (c) in particular, the Magistrate was not required to state a case by s.295 of the Criminal Procedure Ordinance, because that section applied only to final determi-

nations in proceedings, and not to committal proceedings, in which the Magistrate had only to decide whether there was a *prima facie* case to be tried; and (d) the wording of equivalent English legislation on which the Ordinance was based, as interpreted by the English courts, showed that the procedure for stating a case was not intended to resolve disputed matters of an interlocutory nature.

The Crown submitted in reply that (a) the applicants were not entitled to the discharge of the restraint orders against them, since the proceedings against them were not concluded within the meaning of s.2(9) of the Drug Trafficking Offences Ordinance; (b) the proceedings were still ongoing, within the meaning of s.77(5) of the Constitution, because a case stated was deemed to be a part of them; (c) under s.295(1) of the Criminal Procedure Ordinance, the Crown still had a right to question the "proceeding," namely, the Magistrate's decision to dismiss the charges, on the ground that it was wrong in law, by applying to him to state a case for the Supreme Court, and under s.295(5), the Magistrate had no power to refuse to state a case if the application was made by the Attorney-General; and (d) the "proceeding" in question was a final determination in the sense that the committing Magistrate had determined the only issue there was for him to decide, *i.e.* whether to commit, and was contemplated by the wide terms of both s.295 and the English legislation on which it was based.

Held, discharging the restraint orders:

(1) The court was obliged to discharge the restraint orders against the applicants under the Drug Trafficking Offences Ordinance on the basis that the proceedings against them had been concluded. The committing Magistrate had no power to state a case for the Supreme Court concerning his dismissal of the charges against the applicants. The Gibraltar legislation governing the stating of cases was based on the English Magistrates' Courts Act 1952, a consolidating Act, which had not altered the pre-existing law that committing magistrates had no power to state a case. The right to apply to state a case was conferred only on a person aggrieved by a final determination of the magistrates' court, since the phrase "or other proceedings" in s.87 of the 1952 Act and s.295 of the Criminal Procedure Ordinance was to be construed *ejusdem generis* with the preceding words "conviction, order or determination." A decision not to commit for trial was not a final determination contemplated by either statute, and accordingly it was irrelevant that the application to state a case had been made by the Attorney-General (paras. 6–8; paras. 10–12; paras. 16–18).

(2) Accordingly, a case stated, if presented to the Supreme Court, would be dismissed for want of jurisdiction. In these circumstances, and since the Crown had no intention of appealing against the setting aside of leave to seek judicial review of the dismissal of the charges, the restraint orders would be lifted. The Crown had had ample opportunity to assess the nature and extent of the realizable property covered by the orders, and

this information could be used for confiscation purposes if further criminal proceedings were instituted against the applicants. The discharge of the orders would be suspended pending the determination of any appeal by the Crown (paras. 19–22).

Cases cited:
(1) *Atkinson* v. *US Govt.*, [1969] 2 All E.R. 1151; on appeal, [1971] A.C. 197; [1969] 3 All E.R. 1317, applied.
(2) *R.* v. *Stipendiary Magistrate, ex p. Proetta*, [1812–1977] Gib LR 257, distinguished.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.295: The relevant terms of this section are set out at para. 8.

Drug Trafficking Offences Ordinance 1988, s.2(9): The relevant terms of this sub-section are set out at para. 6.
s.9: The relevant terms of this section are set out at para. 5.
s.10(1): The relevant terms of this sub-section are set out at para. 5.
(5)(b): The relevant terms of this paragraph are set out at para. 6.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.77(5): The relevant terms of this sub-section are set out at para. 7.

J.J. Neish for the applicants;
P. Dean, Senior Crown Counsel, for the Crown.

1 **KNELLER, C.J.:** The applicants, by separate summonses in chambers of February 26th this year, ask this court to make orders that—

> "(i) the restraint orders made by this court on August 17th and September 27th last year be discharged forthwith;
>
> (ii) such other order may be made as may be deemed just; and
>
> (iii) costs be granted to the applicant."

At the hearing of the summonses on February 26th, they were, by consent, heard together. They were opposed by the Crown. The applicants' counsel's affidavit of February 21st, 1991 set forth their grounds for the discharge of the restraint orders. The proceedings against the applicants had been concluded because the learned Stipendiary Magistrate dismissed all the charges against them on February 19th this year. They were re-arrested on the same day and bailed to appear at the Central Police Station on August 19th. They have not been charged again.

2 The Crown's opposition to the discharge of the restraint orders was encapsulated in Senior Crown Counsel's replying affidavit of February 26th. The proceedings against the applicants, he avers, are by no means concluded.

3 On February 21st, the Attorney-General asked the Magistrate to state a case for the opinion of the Supreme Court as to whether he had acted without or in excess of jurisdiction in discharging the applicants when and for the reason he did so. The very next day, the Magistrate refused to state a case because he was of the opinion that the application was frivolous and doubted that he had jurisdiction to do so. Three days later the learned Attorney-General wrote to the Magistrate to submit that he was obliged by law to do so and that he should comply. If not, the Attorney-General would move the Supreme Court for an order of mandamus.

4 Further matters of background to these applications surfaced during counsel's submissions. The applicants were charged with seven other men with being, on August 14th last year, in unlawful possession of 311 kg. of cannabis in Gibraltar with intent to supply it to others, or, with eight others, of being in possession of all that cannabis. Three of the other eight were further charged with importing the cannabis into Gibraltar. They all pleaded not guilty to each charge laid against them. Restraint orders and orders for discovery were made by this court on August 17th and varied on September 27th.

5 That is sufficient background for this application. I turn now to the relevant law. A restraint order under the Drug Trafficking Offences Ordinance 1988 ("the Ordinance") prohibits a person from dealing with "realisable property" (s.10(1)). A confiscation order is an order made under s.4 of the Ordinance (s.7). Under s.9(1), a restraint order may be made where—

> "(*a*) proceedings have been instituted against a defendant for a drug trafficking offence,
>
> (*b*) the proceedings have not been concluded, and
>
> (*c*) the Court is satisfied that there is reasonable cause to believe that the defendant benefited from drug trafficking."

A restraint order may also be made (s.9(2)) where the court is satisfied—

> "(*a*) that whether by the laying of an information or otherwise, a person is to be charged with a drug trafficking offence, and
>
> (*b*) that there is reasonable cause to believe that he has benefited from drug trafficking."

6 A restraint order must be discharged when proceedings are concluded (s.10(5)(b)) and (s.2(9)) proceedings for an offence are concluded—

> "(*a*) when (disregarding any power of a Court to grant leave to appeal out of time) there is no further possibility of a confiscation order being made in the proceedings; and

(*b*) on the satisfaction of a confiscation order made in the proceedings (whether by payment of the amount due under the order or by the defendant serving imprisonment in default)."

And (s.2(10)), an order is subject to appeal until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal on which the order could be varied or set aside.

7 Under s.77(5) of the Gibraltar Constitution Order 1969—

". . . any appeal from any determination in any criminal proceedings before any court of law, or any case stated or question of law reserved for the purposes of any such proceedings to any other court of law shall be deemed to be part of those proceedings."

8 The statutory law in Gibraltar for cases stated is set out in s.295 of the Criminal Procedure Ordinance and s.62 of the Magistrates' Court Ordinance and I am obliged to set it out in full. Here is s.295 of the Criminal Procedure Ordinance:

"(1) Any person who was a party to any proceedings before the magistrates' court or is aggrieved by the conviction, order, determination or other proceedings of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the Supreme Court on the question of law or jurisdiction involved:

Provided that a person shall not make an application under this section in respect of a decision which by virtue of any law is final.

(2) An application under subsection (1) shall be made within fourteen days after the day on which the decision of the magistrates' court was given.

(3) For the purpose of subsection (2), the day on which the decision of the magistrates' court is given shall, where the court has adjourned the trial of an information after conviction, be the day on which the court sentences or otherwise deals with the offender.

(4) On the making of an application under this section in respect of a decision any right of the applicant to appeal against the decision to the Supreme Court shall cease.

(5) If the justices are of the opinion that an application under this section is frivolous, they may refuse to state a case, and, if the applicant so requires, shall give him a certificate stating that the application has been refused:

Provided that the justices shall not refuse to state a case if the application is made by or under the direction of the Attorney-General.

(6) Where the justices refuse to state a case, the Supreme Court may, on the application of the person who applied for the case to be stated, make an order of mandamus requiring the justices to state a case."

Section 62 of the Magistrates' Court Ordinance is in exactly the same phrases save that the word "conviction" is absent. The source for s.295 of the Criminal Procedure Ordinance and s.62 of the Magistrates' Court Ordinance is s.87 of the English Magistrates' Courts Act 1952.

9 No decision of a Gibraltar court on the legality or otherwise of a *committing* magistrate's stating a case was cited during counsel's submissions. My attention has since been drawn to *R.* v. *Stipendiary Magistrate, ex p. Proetta* (2), in which Unsworth, C.J. held that the then Stipendiary Magistrate erred in law when he refused to state a case. He had dismissed the first of two charges because the prosecution offered no evidence, and rejected the plea of *autrefois acquit* when the second was brought. The first charge was that of unlawfully exporting regulated goods, and the second, attempting to do so, all contrary to the Imports and Exports Ordinance. The defendants submitted that they had been in peril for the attempt when they were charged with and acquitted of the substantive offence. Their plea was rejected so they applied for a case stated, which the Magistrate repelled because he was of the opinion that the application was frivolous. They then moved the Supreme Court for an order of mandamus requiring the Magistrate to state a case. There, the Magistrate was exercising his summary jurisdiction, so it is not relevant to whether or not he has to state a case when he is exercising his committal jurisdiction, and the Attorney asks him to do so.

10 The House of Lords in *Atkinson* v. *US Govt.* (1), by a majority of four to one, held, *inter alia*, ([1969] 3 All E.R. at 1317) that—

"(a) before the Magistrates' Courts Act 1952 (a consolidating Act) was enacted it had been settled law that examining [or committal] justices had no power to state a case . . .

(b) despite the ambiguous use of the term 'proceedings' in s.87(1) of the Act of 1952, it could not be said that the a strong presumption against the introduction by a consolidating Act of substantive changes in the law had been rebutted; accordingly, s.87 (which applied only to a final determination) had no application to committal proceedings and the magistrate had no power to state a case . . ."

The Divisional Court had consequently no jurisdiction to deal with a case stated by the magistrate and if it did it was a nullity.

11 The reasoning in the speeches of the noble and learned Law Lords was that the examining (or committing) magistrate does not come to a final decision but only comes to a conclusion whether or not a *prima facie* case had been made out to send for trial. If he decides to commit for trial the case goes on, and if he decides not to commit that is not a ground for a plea of *autrefois acquit*. Lord Reid explained that the drafting of s.87(1) was not ideal and continued ([1969] 3 All E.R. at 1324):

> "The word 'proceeding' where it first occurs must mean litigation or proceedings—something to which there are parties. But where it is next used it must mean adjudication or decision and where it is used for the third time it must also have that meaning . . . [I]t frequently happens that a court has to make a decision in the course of the proceedings—e.g. whether certain evidence is admissible but it cannot have been intended that the proceedings should be held up while a case on such a matter is stated and determined by the superior court. So an application for a case stated can only be made when the litigation or 'proceeding' is at an end."

12 Lord MacDermott agreed. So did Lord Guest, adding (*ibid.*, at 1332) that the complete answer was that "other proceeding" in s.87 had to be interpreted *ejusdem generis* with the words "conviction, order or determination," which are final proceedings. Lord Upjohn agreed with that, declaring (*ibid.*, at 1335–1336) that the second time "proceeding" appears, it "really means 'decision'" and later (*ibid.*, at 1336) that "if committing magistrates could be required to state a case it would, to put it mildly, be productive of highly inconvenient results."

13 Lord Morris of Borth-y-Gest, dissenting, doubted (*ibid.*, at 1329) that committing magistrates have no "power" to state a case but acknowledged that in 1969 in England it would be unlikely that anyone would ask for one, because in practice there would be no need for one. If the magistrate decides there is a case for trial all questions of guilt, innocence, admissibility of evidence, plea in bar can then be decided. If he declines to commit, the prosecution can press on if it believes it has valid reasons to prosecute by other means of procedure. He went on to declare that whether or not he committed, the committing magistrate had come to a final decision because he had decided the only issue for him to determine. The ultimate or final one—guilt or innocence—was not for him to determine at all.

14 The Divisional Court (Lord Parker, C.J., Melford Stevenson and Bridge, JJ.) had earlier unanimously held ([1969] 2 All E.R. 1151) that by virtue of s.87(1) of the Magistrates' Courts Act 1952, an appeal by way of

case stated lay from the magistrate's refusal to commit under the Extradition Act 1870, because the terms of s.87(1) were extremely wide, and would appear to cover a refusal to commit. It was a novel point, according to Lord Parker, C.J. (*ibid.*, at 1155). At first sight it seemed surprising that it should be, but he thought an appeal by way of a stated case did lie (*ibid.*, at 1156).

15 Although the tally of judges for and against the opinion that a case may be stated by a committing magistrate, in the Divisional Court and the House of Lords in *Atkinson* v. *US Govt.* (1), is four each way, the majority view in the House of Lords prevails, so far as the provisions of s.87 of the Magistrates' Courts Act 1952 are concerned. Its standing in the hierarchy of courts in the United Kingdom is greater than that of the Divisional Court.

16 Both the relevant Ordinances here, the Criminal Procedure Ordinance and the Magistrates' Court Ordinance, are expressed to be consolidating ones and their sections dealing with cases stated reflect word-for-word s.87 of the Magistrates' Courts Act 1952 (except for s.62 of the Magistrates' Court Ordinance which omits the word "conviction," for some unfathomable or no reason) and the Ordinances have the same proviso that the justices shall not refuse to state a case if the application for one is made by or under the direction of the Attorney-General.

17 The consequence is that this court should, until persuaded otherwise, also hold that a Gibraltar committing magistrate has no jurisdiction to state a case even if the application for one is made by or under the direction of the Attorney-General because, in short, the decision of the magistrate is not a final determination and a stated case would be incompetent.

18 Returning now to this case, we find that all charges against the applicants were dismissed by the Stipendiary Magistrate on February 19th this year. The Attorney-General moved on March 1st for leave to apply for judicial review of the Stipendiary Magistrate's decision. Alcantara, A.J. read the papers and, on March 4th, gave leave. All the defendants save one (P.M.G.) applied to the learned judge to set aside that leave, and he did so on May 22nd, having heard the matter *inter partes*. The Attorney-General has written to counsel for the applicants in this case to tell him that there will be no appeal from the judge's revocation of his granting of leave to apply for judicial review.

19 The Stipendiary Magistrate and Senior Crown Counsel are busy drafting and re-drafting the former's case stated, so it has not been entered in this court's registry yet. If and when it is, this court is more than likely to hold that the Stipendiary Magistrate (as committing magistrate) has no power to state a case for anyone, not even the

Attorney-General. The Supreme Court has no jurisdiction to deal with such a case stated save to dismiss it peremptorily, and if the Supreme Court made any other order apart from which party should pay the costs it would be a nullity.

20 That being so the (committal) proceedings (as distinct from investigations) have been concluded and the restraint orders of August 17th and September 27th, 1990 must be discharged, as s.10(5)(b) of the Drug Trafficking Offences Ordinance 1988 provides.

21 The Crown has had nine months in which to photograph and value the realizable property of the applicants covered by the orders made in August and September last year. If and when it comes to conviction and to assessing the benefit any applicant derived from drug trafficking, and the concomitant orders for confiscation and default terms of imprisonment, if any, these photographs, valuations and other admissible evidence can be tendered to the court.

22 The Crown will have leave to appeal if leave is necessary. The discharge orders will be suspended for 10 days to enable the Crown to file a notice of appeal, and if one is filed, suspended until the determination of the appeal or further order, whichever is the earlier, because without a stay the Crown's appeal if successful would be nugatory. There will be liberty to all parties to apply. Costs follow the event and, since the applicants have succeeded, the respondent must pay to the applicants the costs of and occasioned by this application.

Order accordingly.