R. v. BONAVIA, SINCLAIR (S.J.) and SINCLAIR (J.M.)

SUPREME COURT (Alcantara, A.J.): January 24th, 1996

Criminal Law—creation of offence—relation of penalty to commission of offence—creating provision requires statement of prohibited conduct, declaration that conduct constitutes offence and statement of penalty on conviction—indictment charging accused under legislation not adequately linking penalty to commission of offence (e.g. Fast Launches (Control) Ordinance 1987, s.9) to be quashed

The accused were charged jointly with using and being in charge of a fast launch without a valid licence or permit.

The three accused were charged with offences under s.9 of the Fast Launches (Control) Ordinance, 1987. They applied for the indictment to be quashed on the basis that, on its proper construction, s.9 did not create a criminal offence punishable on conviction.

They submitted that (a) whilst s.9(1) of the Ordinance prohibited the use or being in charge of a fast launch without a licence or permit, the criminal offence was actually created by s.9(2), and s.9(3), which specified the penalty which followed on conviction, related back only to sub-s. (1); and (b) accordingly, the accused could not, on the strict construction of s.9, be convicted of or sentenced for the offences, and were entitled to have the indictment quashed and to be discharged.

The Crown submitted in reply that (a) although the strict construction of s.9(3) did indeed produce the result argued for by the accused, that construction should not be used, since the legislative intention to penalize persons who were guilty of offences under s.9(2) was clear; and (b) even if s.9(3) were to be strictly construed, the defect in the statute could be solved by amending the indictment.

Held, quashing the indictment and discharging the accused:

(1) Since the Fast Launches (Control) Ordinance, 1987 was a penal statute, the court was bound to construe it strictly according to the clear meaning of the words, and to interpret any ambiguity in favour of the accused. Accordingly, on the proper construction of s.9, no offence of using or being in charge of a fast launch as described in s.9(1) had been created which was punishable upon conviction. The court could not construe the provision in a different way merely because the legislature had failed in its objective of punishing under s.9(3) persons committing an offence under s.9(2) (page 212, line 10 – page 213, line 2; page 213, lines 8–9).

(2) Since the defect was not in the indictment but in the statute itself, it was inappropriate and insufficient to amend the indictment. Instead it would be quashed and the accused discharged (page 213, lines 8–20).

Cases cited:
(1) *Lieuw Sai Wah* v. *Public Prosecutor*, [1969] 1 A.C. 295; [1968] 2 All E.R. 738.
(2) *Magor & St. Mellons Rural District Council* v. *Newport Corp.*, [1952] A.C. 189; [1951] 2 All E.R. 827, *dictum* of Lord Simonds applied.

Legislation construed:
Fast Launches (Control) Ordinance, 1987, s.9: The relevant terms of this section are set out at page 211, line 39 – page 212, line 9.

C. Finch for the accused;
G. Licudi for the Crown.

ALACANTARA, A.J.: The defendants are jointly charged on an indictment containing two counts:

1. Using a fast launch without a valid licence or permit, contrary to s.9(1), as read in conjunction with s.9(2), of the Fast Launches (Control) Ordinance, 1987.

2. Being in charge of a fast launch without a valid licence or permit, contrary to s.9(1), as read in conjunction with s.9(2), of the Fast Launches (Control) Ordinance, 1987.

On arraignment they have pleaded not guilty to the offences. Before the jury is empanelled, Mr. Finch, who appears for the defence, is seeking to quash the indictment. Quite properly he has given advance notice to the court and to the prosecution of what his argument is going to be. In writing he has stated:

> "The short point under s.9 of the Fast Launches (Control) Ordinance is that each penal section must have three essential ingredients, namely, the proscribed conduct, the creation of an offence and the punishment provided by law for the offence. Sub-sections (1), (2) and (3) of s.9 purport to do just that. Unfortunately, the offence is created by sub-s. (2) and the penalty section in sub-s. (3) refers only to sub-s. (1), which in itself does not create any offence. Anatomically, the penal section has not been put together correctly and the drafting is so bad that the offence section and the punishment section are not linked together by any legislative device."

Section 9 of the Fast Launches (Control) Ordinance, 1987 reads:

> "(1) Subject to the provisions of sections 10 and 18, no person shall use or be in charge of a fast launch within the controlled area of Gibraltar unless he is—
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> (a) the holder of a valid licence granted under s.4; or
>
> (b) the holder of a valid permit issued under s.8.
>
> (2) If any person uses or is in charge of a fast launch within the controlled area of Gibraltar in contravention of sub-section (1), that

person and if that person is not the owner of the launch, the owner are each guilty of an offence:

Provided that the owner of the launch shall not be guilty of an offence if he proves to the satisfaction of the Court, the onus being on him, that the launch was taken by some other person without his knowledge or consent.

(3) A person guilty of an offence against sub-section (1) is liable on conviction on indictment, to a fine and to imprisonment for two years or, on summary conviction, to a fine of £10,000."

In support of his submission Mr Finch has referred me to Thornton, *Legislative Drafting*, 1st ed., at 258 (1970), where the learned author says:

"There are many satisfactory general forms in use for the creation of criminal offences . . . .

In every case,

(a) The prohibited act, omission or course of conduct must be stated with simplicity and precision;

(b) a breach of the prohibited act, omission or course of conduct should be declared to be an offence; and

(c) a punishment should be specified."

Counsel argues that s.9(1) creates a prohibition but not an offence. Sub-section (2) creates an offence but sub-s. (3) purports to create a penalty for the prohibition but not for the offence. The argument put forward is so simple and logical that at first instance one is against it because one suspects that it is bound to be flawed. No one drafting legislation could have gone so wrong.

In further support of the defence argument, counsel has referred me to 44 *Halsbury's Laws of England*, 4th ed., para. 910, at 560-561 for the following:

"It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. This general rule means no more than that if, after ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt. Equally, the language of a statute will not be construed as creating a criminal offence at all unless this is its clear result.

For a penalty to be enforced it must be quite clear that the case is within both the letter and the spirit of the statute. The literal meaning of the statute, if it is intelligible, must not be extended on the grounds that there has been a slip or a matter not provided for which should have been provided for, or that the case is so clearly within the mischief that it must have been intended to be included."

Mr. Finch has also drawn to my attention two cases, namely *Liew Sai Wah* v. *Public Prosecutor* (1), and *Magor & St Mellons Rural District*

Council v. *Newport Corp.* (2), where Lord Simonds stated ([1952] A.C. at 191): "If a gap is disclosed, the remedy lies in an amending Act."

Counsel for the Crown does not agree and argues that s.9 is clear as the intention is clear. He submits that sub-s. (3), the penalty clause, should be read as stating that sub-s. (2) is also covered. He agrees none the less with the law as stated by counsel for the defence. He also put forward the proposition that by amending the indictment we can save the day.

In my opinion, the submission of counsel for the defence is sound. He is entitled to succeed. The point in issue is a technical one; it does not go to the substance of the case but none the less it is a good point. In the circumstances there can be no question of giving leave to amend the indictment. The fault lies with the section not with the indictment.

The effect of a successful application is stated in *Blackstone's Criminal Practice*, 2nd ed., para. D8.39, at 1158 (1992):

> "The effect of a successful application is that the accused may not be tried on an indictment . . . but he is not thereby acquitted and further proceedings may be brought for the same offence. However, the quashing of the indictment exhausts the effect of the committal proceedings on which it was founded . . . ."

The indictment is to be quashed and the defendants discharged.

Order accordingly.