[1999–00 Gib LR 120]

ATTORNEY-GENERAL v. LEONI and FOUR OTHERS

COURT OF APPEAL (Neill, P., Waite and Glidewell, JJ.A.):
March 19th, 1999

Criminal Procedure—stay of proceedings—autrefois acquit/convict—abuse of process for accused to be punished twice for substantially same offence or tried for more serious offence on ascending scale from offence already tried—inapplicable to charge of jettisoning cargo followed by drugs charge when cargo recovered, since offences unrelated in law

Criminal Procedure—stay of proceedings—autrefois acquit/convict—special circumstances for refusing stay—fact that evidence supporting new charge discovered only after trial of earlier charge, or fact that new charge requires different mode of trial may be special circumstances

The respondents were charged in the Supreme Court with the importation and possession of cannabis and with possession with intent to supply.

The respondents were arrested by the police following a chase within Gibraltar waters, during which they were seen to throw several packages overboard. The jettisoned packages sank and could not be immediately recovered. The respondents, who claimed that the packages contained tobacco, were charged in the magistrates' court with jettisoning cargo. The Crown invited the magistrates to adjourn the proceedings until a further search for the packages had been made, stating that it would not be possible to lay further charges without further evidence. At the respondents' request, and on the advice of the clerk that it was open to them to do so, the magistrates dealt with existing charges to which the respondents pleaded guilty, and sentenced them accordingly.

On leaving court, the respondents were re-arrested on charges relating to the possession of cannabis and were later charged with the present offences following the recovery of bales of cannabis from the sea. They applied to the Supreme Court to stay the proceedings before it.

The Supreme Court (Schofield, C.J.) held that it would be an abuse of process for the respondents to be tried for offences relating to cannabis, having already pleaded guilty to the lesser charges of jettisoning cargo. In accordance with the principles that no person should (i) be punished a second time for an offence arising out of the same facts as an offence already dealt with by the court, or (ii) be tried again on those facts for a more serious offence on an ascending scale of gravity, the proceedings

were stayed. Neither the public interest in punishing drugs-related offences nor the magistrates' refusal to adjourn when requested was a special circumstance in which the court would refuse to order a stay. The proceedings in the Supreme Court are reported at 1997–98 Gib LR 406.

On appeal, the Crown submitted that the court had erred in staying the proceedings since (a) the drugs offences in the present indictment did not arise from the same facts as those of jettisoning cargo dealt with by the magistrates' court; (b) the drugs offences were not on an ascending scale of gravity with the other offences; and (c) the court had not considered the special circumstances that (i) the evidence supporting the drugs charges only emerged after the hearing before the magistrates' court, and (ii) those charges were triable on indictment, whereas the jettisoning offences were triable only summarily.

Held, allowing the appeal:

(1) The Supreme Court had erred in staying the proceedings, since the principles that a person should not be punished twice for substantially the same offence and that he should not be tried again for an offence on an ascending scale to an offence already tried did not apply here. The charges of jettisoning cargo and those of being in possession of or importing drugs were not on an ascending scale. The cargo jettisoned need not have been drugs at all—it may, for example, have been tobacco or stolen goods of some other kind that the respondents wished to dispose of when chased by the police. The only element common to the two types of offence was that they must take place in territorial waters. Otherwise, the evidence necessary to prove the offences differed completely (paras. 14–15).

(2) Even if the court had not misdirected itself on the application of those principles, there were special circumstances in this case which might have justified its declining to order a stay. Had the court's attention been drawn to the relevant authorities, it might have concluded that the discovery of evidence supporting the new charges only after the proceedings in the magistrates' court was a special circumstance, as would be the subsequent occurrence of some new event which changed the nature of the offence. Furthermore, the new offences would necessarily have been tried separately from the others, as jettisoning cargo was a summary offence. In those circumstances, it would not have been an abuse of process for the respondents to be tried later for the drugs offences (paras. 16–19).

Cases cited:

(1) *Connelly* v. *D.P.P.*, [1964] A.C. 1254; [1964] 2 All E.R. 401; (1964), 48 Cr. App. R. 183, *dicta* of Lord Devlin and Lord Morris of Borth-y-Gest applied.

(2) *R.* v. *Beedie*, [1998] Q.B. 688; [1997] 2 Cr. App. R. 167, distinguished.

(3) *R.* v. *Elrington* (1861), 1 B. & S. 688; 121 E.R. 870; *sub nom. R.* v. *Ebrington*, 26 J.P. 117, distinguished.
(4) *R.* v. *Friel* (1890), 17 Cox, C.C. 325, followed.
(5) *R.* v. *Thomas*, [1950] 1 K.B. 26; (1949), 33 Cr. App. R. 200, followed.

Legislation construed:
Court of Appeal Ordinance (1984 Edition), s.9(2): The relevant terms of this sub-section are set out at para. 5.

R.R. Rhoda, Attorney-General, for the Crown;
R. Pilley for the respondents.

1 **GLIDEWELL, J.A.,** delivering the judgment of the court: This is an appeal against the order of Schofield, C.J., sitting in the Supreme Court on November 11th, 1998 that the proceedings against the respondents on an indictment dated August 14th, 1998 should be stayed and that the respondents should be discharged. The appeal is brought under s.9(2) of the Court of Appeal Ordinance.

2 The relevant facts are neatly summarized in the judgment given by the learned Chief Justice (1997–98 Gib LR at 408) and I cannot do better than to repeat them:

> "At about 3.00 a.m. on April 28th, 1998, police officers on duty in a police launch within Gibraltar waters sighted the five defendants in a semi-rigid inflatable craft. When the defendants saw the police launch they accelerated away and, during a chase, threw several square blue and yellow coloured packages overboard. Eventually the craft was boarded by police officers and the defendants were arrested for jettisoning cargo.
>
> During his interview with the police the defendant Leoni said that the cargo jettisoned was tobacco. Others of the defendants denied knowledge of any cargo. The police officers effecting the arrests believed that the cargo jettisoned was cannabis. I am told that the bales sank immediately, which is the way with bales of cannabis. Bales of tobacco float for a while before they sink."

We comment that although, for the reasons given by the learned Chief Justice, the police suspected that the bales contained cannabis, they were unable to prove it without recovering any of the bales. Thus, at the time of the arrest of the defendants, the police were unable to charge them with offences relating to the possession or importation of drugs. I return to the Chief Justice's judgment (*ibid.*, at 408–409):

> ". . . [O]n April 29th, 1998 . . . the defendants were taken before the magistrates' court. They were each charged with an offence of

jettisoning cargo and Leoni, who was the navigator of their craft, was further charged with obstructing the police officers and with navigating without proper navigation lights. . .

. . .[T]he justices were told by Crown Counsel that the charges which the defendants were facing were holding charges and he invited the justices to adjourn the hearing on the basis that investigations were ongoing. He told the justices that further serious charges might result from the search for the bales. The justices enquired of Crown Counsel whether he was laying further charges against the defendants, but he felt unable to do so because at that stage the bales had not been recovered. Defence counsel insisted that the charges already before the court be put to them and further submissions were made to the justices, after which they retired to consider whether to grant an adjournment.

. . . The justices determined to deal with matters on that day and . . . the defendants pleaded guilty to the charges they faced. . . . Leoni was sentenced to two months' imprisonment for the obstruction offence and was subjected to no separate penalty on the other charges. The other four defendants were each fined £1,500 on the one charge of jettisoning cargo. . .

Immediately they left the magistrates' court, all five defendants were re-arrested by the police. . ."

3 On the next day, April 30th, 1998, police divers searching for the jettisoned cargo recovered one bale from the bed of the harbour. Two days later they recovered two further bales. These were all found to contain cannabis resin, a total of 93 kg. in weight. The recovery of the bales, of course, enabled the police then to charge the defendants with offences relating to the cannabis and in due course the indictment was drawn, charging them with unlawful possession of the cannabis, importing the cannabis into Gibraltar and possession with intent to supply. To these counts they pleaded not guilty. In due course the Chief Justice heard extensive submissions from both counsel for the respondents (then the defendants) and counsel for the Crown on the application to stay the proceedings as being an abuse of process.

4 The Chief Justice's decision to stay the proceedings and discharge the defendants was based upon the recent decision of the English Court of Appeal in *R.* v. *Beedie* (2). In turn, that decision was based upon and reiterated principles derived from a number of earlier English decisions, particularly the decision of the House of Lords in *Connelly* v. *D.P.P.* (1) and the early decision of the Court for Crown Cases Reserved in *R.* v. *Elrington* (3).

5 Before turning to the authorities, it is necessary first to consider the Ordinance under which this appeal is brought. So far as is material, s.9(2) of the Court of Appeal Ordinance provides:

> "In any of the following cases, that is to say—
>
> (*a*) where an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged. . .
>
> the Attorney-General . . . may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."

6 The grounds of appeal in the present case are expressed as follows:

> "1. The learned Chief Justice erred in law in ordering a stay of the proceedings.
>
> 2. The learned Chief Justice misdirected himself in law in holding that the offences facing the defendants in the indictment before him were founded on the same facts as the offences of jettisoning cargo which were dealt with by the justices.
>
> 3. The learned Chief Justice misdirected himself in law in holding that the offences facing the defendants in the indictment before him came within the principle in *R.* v. *Elrington* (3), namely, that there should be no sequential trial for offences on an ascending scale of gravity.
>
> 4. In the event that the learned Chief Justice was correct in law in holding that the offences facing the defendants in the indictment before him were founded on the same facts, he misdirected himself in law in holding that there were no special circumstances for not exercising his discretion to stay the proceedings."

The Attorney General's appeal is, of course, based upon the facts of this particular case, but the questions raised are whether the Chief Justice directed himself correctly in applying the law to those facts. Clearly, those questions are all questions of law alone and thus he is entitled to bring this appeal under s.9(2)(*a*).

7 We turn to consider the authorities. We consider first *Connelly* v. *D.P.P.* (1). In that case, during a robbery at an office, an employee was killed. Four men, including Connelly, were charged with murder and also charged on a separate indictment with robbery with aggravation. At that time, some types of murder still being capital offences, it was the standard practice not to include any other count in an indictment charging murder. This was the reason for the robbery being put in a separate indictment. Connelly was convicted of murder. The judge at his trial

directed that the indictment charging robbery should remain on the file on the usual terms.

8 Connelly's appeal to the Court of Criminal Appeal succeeded on the ground that there had been a misdirection on the issue of whether he had been present at the scene of the crime. His conviction of murder was therefore quashed. That court granted leave to the Crown to proceed on the indictment for robbery. When this indictment came on for trial a plea of *autrefois acquit* was filed on behalf of Connelly but the judge directed the jury that this plea had not been established. The defence then asked the judge to exercise his discretion to prevent the Crown from proceeding with the indictment as being an abuse of process, but the judge declined to do so. The Crown did proceed and Connelly was convicted of the robbery. He appealed against their conviction to the Court of Criminal Appeal but the appeal was dismissed. He appealed further to the House of Lords.

9 Their Lordships defined the doctrine of *autrefois acquit* narrowly, holding that in order for such a plea to be made out, the charges on the first and second indictments had to be the same, or in effect the same, and that the evidence necessary to prove the second charge would have to have proved the first charge if it had been called in the trial of the first indictment. Since that was not the case, they agreed with the decision of the earlier courts in relation to this matter. For our purpose, the importance of the decision is as to abuse of process. In his speech Lord Devlin said (48 Cr. App. R. at 274):

> "As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are part of a series of offences of the same or a similar character as the offences charged in the previous indictment. . . . But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. Without attempting a comprehensive definition, it may be useful to indicate the sort of thing that would, I think, clearly amount to a special circumstance."

His Lordship then gave, as an example of such a special circumstance, a situation in which two charges had been included in one indictment but separate trials had been ordered on the direction of the trial court.

10 Lord Morris of Borth-y-Gest, whose speech was to the same effect, cited two earlier cases. He said (*ibid.*, at 227):

> "In a case tried on circuit in 1890 (Friel . . .) an accused had been summarily tried for assault and had been convicted. The person assaulted subsequently died of injuries resulting from the assault. The accused was then indicted for manslaughter and pleaded *autrefois convict*. The plea failed and Williams J. refused to reserve a case for the Court for Crown Cases Reserved. He said: . . . 'The indictment for manslaughter is not a charge in a new form based on the facts supporting the former charge, nor is it the former charge with the addition of matters of aggravation or of newly alleged consequences. It is a charge based on new facts; and the circumstance that some of those facts have been made the basis of a former charge of a different class is immaterial. The difference is not of degree merely. The characteristic new fact here is the death.'"

A similar situation arose much later in 1949, in the case of *R.* v. *Thomas* (5) also cited in *Connelly* (*ibid.*), in which—

> "it was held by the [English] Court of Criminal Appeal that where a person has been convicted of wounding with intent to murder and the person wounded subsequently dies of the wounds inflicted, a plea of *autrefois convict* is not a good answer to a subsequent indictment for murder."

11 In *R.* v. *Beedie* (2) the facts were somewhat unusual. A young woman died of carbon monoxide poisoning caused by a defective gas fire in her bed-sit. The appellant was her landlord who had a duty under health and safety legislation to ensure that the appliance was maintained and repaired, and had failed to carry out this duty. He was prosecuted by the Health and Safety Executive for an offence against that legislation, pleaded guilty before the justices and was fined. He was also charged with and pleaded guilty to other offences in relation to other gas appliances in the same premises. Subsequently the appellant was charged with manslaughter. The judge refused an application to stay the indictment and the appellant appealed.

12 The Court of Appeal held that for the reasons given in *Connelly*, that is to say that "a plea of *autrefois convict* is applicable only where the same offence is alleged in the second indictment" as was charged in the first, the accused could not rely on that plea. The court, however, held in all the circumstances that to proceed with the charge of manslaughter was an abuse of process, and it therefore allowed the appeal and stayed the indictment. The court commented that the situation would have been different had the Crown Prosecution Service been alerted by the Health and Safety Executive to the steps they were taking to prosecute in the magistrates' court. Giving the judgment of the court, Rose, L.J., Vice President, recited the second submission of Mr. Smith, Q.C. for the appellant in the following terms ([1997] 2 Cr. App. R. at 170):

> ". . . [T]he judge had a discretion to stay the proceedings because to proceed with them would offend the general rule that no man should be punished twice for an offence arising out of the same, or substantially the same, set of facts, and to do so would offend the established principle that a defendant is not to be tried again on the same facts for more serious offences on an ascending scale of gravity. Mr. Smith's third submission was that the judge wrongly exercised his discretion in failing to identify special circumstances justifying further proceedings. . ."

Relying on the decisions in *Connelly* v. *D.P.P.* (1) and *R.* v. *Elrington* (3), the Court of Appeal upheld both submissions and stayed the proceedings in that case.

13 In his judgment in the present case, the learned Chief Justice said (1997–98 Gib LR at 410):

> "Mr. Trinidad for the Crown has argued that the offence of jettisoning cargo is so dissimilar to the offences that the defendants now face that these principles are not offended. He argues that the present charges, all drugs related, are of a different species to that of jettisoning cargo.
>
> However, the facts which gave rise to the charge of jettisoning cargo are exactly the same facts as give rise to the new charges and those facts were in existence when the defendants appeared before the justices. It was simply that one piece of evidence was not available to support the facts giving rise to the charges now before the court. Where defendants are accused of the unlawful importation of cannabis jettisoned in a chase at sea, as in this case, there is an ascending scale of charges, with the offences of importation and possession with intent to supply at the top end of the scale and a charge of jettisoning cargo at the bottom end of the scale. In the middle of the scale of charges is a charge of simple possession of cannabis. The charges arise out of the same facts, and admissions on one charge may impact upon others. In this case an admission by the defendants that they jettisoned the cargo is an admission of an act of control or possession of it. It is also an admission that they were within the territorial waters.
>
> I find, therefore, that the offences facing the defendants in the indictment before me arise out of the same set of facts as the offence of jettisoning cargo and that they are on an ascending scale of gravity."

As to special circumstances, the Chief Justice said (*ibid*., at 411):

> "It is argued by Mr. Trinidad that the decision of the justices not to adjourn the trial was an irrational decision in the light of their

> being informed of the investigations then underway. I do not find that the failure of the justices to grant an adjournment gives rise to special circumstances. . .
>
> . . . Had the defendants been under arrest for the drugs offences and had the justices been warned of the dangers of their dealing with the charges before them they may well have come to a different decision and adjourned the case."

14 This court, with regret, has come to the conclusion that the learned Chief Justice fell into error in relation to the first issue. This court has no doubt that it is wrong to describe the offences of jettisoning cargo and those of being in possession of drugs and importing drugs as amounting to an ascending scale of charges. No doubt the jettisoning of cargo is an offence often committed because the cargo consists of drugs, but this need not be the case and sometimes is not. The contents of the cargo which the defendants think it right to dispose of may well be something which they wish to conceal for other reasons. It could be tobacco, as Leoni said it was in the present case. It may be that the cargo is jettisoned to conceal the fact that it has previously been stolen, or there may be other conceivable reasons not related to drugs offences at all. Moreover, save for the point to which the Chief Justice referred—that the fact that the arrest took place within territorial waters is a necessary ingredient both of the offence of jettisoning cargo and of the drugs offences—the evidence necessary to prove the offences differs completely. The evidence necessary to prove jettisoning does not prove that the drug offences have been committed, and the proof of drug offences is dependent upon evidence which is irrelevant on the charge of jettisoning.

15 This court therefore regretfully concludes that the passage which we have quoted from the Chief Justice's judgment contains a misdirection and that grounds 2 and 3 of the appeal are made out.

16 That is enough to deal with this appeal. However, we think it right to express our views about special circumstances. The argument before the Chief Justice on this issue seems to have centred on the magistrates' decision not to adjourn. We agree that that decision of itself would not amount to special circumstances. But, in our view, there are two related matters which, if we had not arrived at our conclusion that there had been a misdirection on the earlier issue, could amount to special circumstances.

17 The first is the fact that the evidence necessary to prove the drugs offences only came into existence when the packets were recovered from the sea bed after the conclusion of the case in the magistrates' court. It is true that there is a distinction to be drawn between a new fact coming into existence, such as the death of the victim in the cases of *R.* v. *Friel* (4)

and *R.* v. *Thomas* (5), and the discovery after an earlier conviction on a lesser charge of evidence which proves that fact as in the present case. We note that those decisions seem not to have been drawn to the attention of the Chief Justice when he was considering the abuse of process application. If they had been, it is possible that he would have concluded, as we do, that the recovery of the bales of cannabis after the date of the proceedings in the magistrates' court was a special circumstance which justified allowing the trial of the counts in the indictment to proceed.

18 The second special circumstance is the fact that the jettisoning offence is only triable summarily. This necessarily means that if all the offences were to be prosecuted there would have to be separate trials. This is analogous to, though not the same as, the example given by Lord Devlin in *Connelly* (1) of what might amount to special circumstances.

19 On both grounds, therefore, this court allows the Attorney General's appeal. We invite submissions as to what order the court should make in the circumstances.

Appeal allowed.
