[2013–14 Gib LR 271]

IN THE MATTER OF ATTORNEY-GENERAL'S REFERENCE NO. 1 OF 2013 (THE "YEAR AND A DAY" RULE)

COURT OF APPEAL (Kennedy, P., Aldous and Potter, JJ.A.): October 31st, 2013

Criminal Law—murder—"year and a day" rule—rule that death occur within "year and a day" of accused's unlawful act survived until abolished by Crimes Act 2011, s.147(4)—rule not element of murder but irrebuttable presumption as to causation in most cases of criminal acts causing death

The Attorney-General made a reference on a point of law to the Court of Appeal, pursuant to the Criminal Procedure and Evidence Act 2011, s.236.

In 2008, a man had suffered head injuries from an assault and lost consciousness. He remained unconscious until he died in 2011. Four men were charged with his murder, and all four were found not guilty by direction of the trial judge, on the basis that the deceased had not died within a year and a day of the assault.

The Attorney-General made a reference to the Court of Appeal, seeking its opinion whether, on an indictment for murder under the Criminal Offences Act 1960, s.59, the death must follow within a year and a day of the unlawful act of the accused. He submitted, *inter alia*, that the "year and a day" rule had been abolished in Gibraltar in 1983, when the 1960 Act was amended to provide a statutory definition of murder, because (a) murder then ceased to be a common law offence, and the new statutory offence made no mention of the rule, so the English common law on the matter was thereby excluded; and (b) had Parliament intended to retain the rule, it would have expressly done so, as was done elsewhere in the 1960 Act with the specific preservation of common law conspiracy alongside the new statutory offence.

The respondents submitted in reply, *inter alia*, that the "year and a day" rule survived in Gibraltar until it was expressly abolished by the Crimes Act 2011, because (a) the "year and a day" rule was not a constituent element of the offence of murder but an irrebuttable presumption of causation in favour of the defendant which applied to all offences involving the death of the victim; the statutory definition of murder did not purport to list all the constituent elements to be proved; and (b) there was no evidence that Parliament had intended to change that law, or that it

had even been discussed in 1983, and the considerable number of other express abolitions and changes made to the 1960 Act indicated that the lack of reference to the "year and a day" rule was deliberate; as the amendments took place when medical advances did not warrant a change in the law, and no other common law jurisdictions had abolished the rule, the Gibraltar Parliament could not be taken to have intended to make such a change by inference.

Held, answering the question in the affirmative:

The "year and a day" rule survived in Gibraltar until expressly abolished by the Crimes Act 2011, s.147(4). There was no evidence that, at the time the Criminal Offences Act 1960 was amended in 1983, there was any intention to abolish the rule in Gibraltar, and no evidence of it even having been discussed. Other common law jurisdictions were similarly not concerned at that time with abolishing the rule. The 1983 amendment gave a statutory definition of murder, but did not set out to provide an exhaustive list of everything the prosecution was required to prove; the "year and a day" rule was an irrebuttable presumption as to causation which operated in favour of the defence in the case of several criminal acts causing death. The 1960 Act should not have been construed, by inference, to impose criminal liability where otherwise there would be none. The wording of the 2011 Act, on the other hand, clearly abolished the "year and a day" rule; it did not suggest that it was simply restating the existing law. Changing the law in 2011 made sense in the context of both medical advances and the influence of the rest of the common law world, whereas changing the law in 1983 would have been out of step with both (para. 27).

Cases cited:

(1) *R.* v. *Holloway Prison Gov.*, *ex p. Jennings*, [1983] 1 A.C. 624; [1982] 3 W.L.R. 450; [1982] 3 All E.R. 104; (1982), 75 Cr. App. R. 367; [1983] R.T.R. 1, considered.

(2) *R.* v. *Inner W. London Coroner*, *ex p. de Luca*, [1989] Q.B. 249; [1988] 3 W.L.R. 286; [1988] 3 All E.R. 414, considered.

(3) *Thet* v. *D.P.P.*, [2007] 1 W.L.R. 2022; [2007] 2 All E.R. 425; [2006] EWHC 2701 (Admin), considered.

Legislation construed:

Crimes Act 2011, s.149(4): The relevant terms of this sub-section are set out at para. 12.

Criminal Offences Act 1960, s.59(1): The relevant terms of this sub-section are set out at para. 10.

s.282: The relevant terms of this section are set out at para. 25.

Criminal Procedure and Evidence Act 2011, s.236(1):

"If a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney-General

may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court must, in accordance with this section, consider the point and give its opinion on it."

s.700: The relevant terms of this section are set out at para. 6.

English Law (Application) Act 1962, s.2(1):

"The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar . . . save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by . . . any Act."

R.R. Rhoda, *Q.C.*, *Attorney-General*, appeared in person;
K. Azopardi, *Q.C.*, *I. Winter*, *Q.C.*, and *Ms. M. Bossino* for the respondents.

1 **KENNEDY, P.,** delivering the judgment of the court:

Introduction

Section 236(1) of the Criminal Procedure Evidence Act 2011 provides that where a person tried on indictment has been acquitted, the Attorney-General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to this court, and the court must then consider the point and give its opinion on it.

2 It is worth noting in passing that a reference under s.236 does not affect the acquittal (see s.236(5)) and that the identity of the respondent to a reference must normally not be disclosed (see s.236(6)).

Facts

3 We therefore propose to say very little about the facts. For present purposes, it is enough to say that in 2008 a man who was at work in Gibraltar was assaulted and sustained head injuries. He was rendered unconscious and never recovered consciousness, but did not die until the autumn of 2011. Three men were then charged on an indictment which contained 4 counts, all arising out of the incident in 2008. One of the counts charged all three of them with murder, contrary to s.59(1) of the Criminal Offences Act 1960. After the jury had been sworn, counsel on behalf of all three defendants submitted to the trial judge that there could be no conviction on the count of murder because the deceased did not die within a year and a day of the assault, there being, at common law, an irrebuttable presumption that when death did not occur within that time frame it was attributable to some other cause. The judge accepted that submission, and verdicts of not guilty were returned by order of the trial judge.

The point of law

4 The point of law on which the Attorney-General now requires the opinion of this court is: "On an indictment for murder under s.59 of the Criminal Offences Act, must the death follow within a year and a day of the unlawful act of the accused?"

History

5 The "year and a day" rule is of great antiquity in most common law jurisdictions. In *R.* v. *Inner W. London Coroner*, *ex p. de Luca* (2), a 1989 case concerned with suicide, Bingham, L.J. (as he then was) said ([1989] Q.B. at 252):

> "It is an essential ingredient of the crime of murder that 'the party wounded, or hurt, etc. die of the wound, or hurt, etc. within a year and a day after the same.' The rule was so stated in *Coke's Institutes*, Pt. III (1797 ed.), p.47 and was (one infers) well established by his day. It has been applied by analogy to manslaughter. In *Rex* v. *Dyson* [1908] 2 K.B. 454, 456, Lord Alverstone C.J. said:
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> > 'whatever one may think of the merits of such a rule of law, it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause.'"

As Bingham, L.J. went on to point out, it was imported into the statutory crime of infanticide, and into suicide.

Transitional provisions

6 At the start of his submissions, the Attorney-General invited our attention to the transitional provisions in s.700 of the Criminal Procedure and Evidence Act 2011, which read as follows:

> "(1) Proceedings for an offence under any enactment or at common law that had commenced before the commencement of this Act must continue in accordance with the provisions of the Criminal Procedure Act as if it had not been repealed.
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> (2) A provision of this Act applies—
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> (a) in relation to proceedings on indictment for an offence—only if the person charged with the offence is arraigned on or after the commencement of the relevant provision;
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> (b) in relation to proceedings in the Magistrates' Court—only if the time when the court begins to receive evidence in the

> proceedings falls after the commencement of the relevant provision."

7 The Attorney-General submits that the section is not well worded, and that probably Parliament intended to differentiate between the situation envisaged in s.700(1) and that envisaged in s.700(2), s.700(1) relating to a situation where proceedings have commenced under an enactment which preceded the commencement date of the statute (November 23rd, 2012) and a procedural point arises. It should be dealt with under the Criminal Procedure Act as if that Act had not been repealed. The Attorney-General goes on to submit that s.700(2) relates to proceedings on indictment in which a new statutory provision has come into effect before the defendant is arraigned.

8 Mr. Ian Winter, Q.C. and Ms. Bossino prepared a skeleton argument for this reference, in which they say:

> "The Act does not apply to proceedings for a criminal offence which proceedings commenced before November 23rd, 2012 (s.700(1)); but does apply to criminal proceedings taking place on indictment where arraignment took place on or after November 23rd, 2012 (s.700(2)(a)); and does apply to proceedings taking place in the Magistrates' Court where evidence is received on or after that day (s.700(2)(b))."

9 For what it is worth, we believe that the submission of Mr. Winter and Ms. Bossino in that skeleton argument is correct, but that is of limited value because, as the Attorney-General accepts, a decision in relation to the meaning of s.700 is not really relevant in relation to this particular reference.

Attorney-General's submissions on the point referred

10 The Attorney-General accepts that, until 1983, the "year and a day" rule was part of the law of Gibraltar because murder was still a common law offence, but he submits that in 1983 the position changed, because Gibraltar's Criminal Offences Act 1960 was then amended in a way which codified offences against the person. Section 59(1) of the 1960 Act, as amended, defined the offence of murder, and nothing is said in that section about the need for the victim to die within a year and a day. It says simply "A person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder and on conviction upon indictment shall be sentenced to imprisonment for life."

11 That, the Attorney-General submits, is clear, and applying Lord Herschell's rule, where the statutory language is clear there is no need to be concerned about what the law may have been before 1983. In England

and Wales, however, murder remained a common law offence, so the "year and a day" rule remained part of the law until specifically abolished by statute in 1996.

12 Returning to Gibraltar, murder was again defined in s.149(1) of the Crimes Act 2011, and s.149(4) of that statute states: "In relation to murder and other fatal offences there is no requirement that the death should occur within a year and a day after the infliction of injury . . ."

13 The section then goes on to provide that in certain cases the consent of the Attorney-General may be required. In s.150, the same Act also repeated the statutory abolition of the doctrine of constructive malice. As the Attorney-General pointed out, that abolition had previously been in s.60 of the 1960 Act, as amended, so statutes do sometimes repeat an earlier provision.

14 The Attorney-General's submission is a simple one. It is that in 1983, in Gibraltar, the offence of murder ceased to be a crime at common law. It became statutory, and as the statute said nothing about the "year and a day" rule, that rule fell away. Pursuant to s.2(1) of the English Law (Application) Act 1962, English common law applies in Gibraltar, but only in so far as it is not modified or excluded by any Act, and the "year and a day" requirement is, the Attorney-General submits, so excluded.

15 We have been shown some extracts from the *Hansard* record of the debate in the Gibraltar House of Assembly in 1983, when the relevant amendments to the 1960 Act were being considered as part of the Criminal Offences (Amendment) Bill. Those passages make it clear that what the Attorney-General of the day was proposing was to provide a statutory definition of murder to assist ordinary members of the public to understand the law. He said: "I do not consider that we are changing the law but as I say we have adopted definitions which are used elsewhere and they are simply intended to state the law in statutory form."

16 There appears to have been no specific discussion of the "year and a day" rule, and that—in our view—is perhaps not surprising. Other common law jurisdictions only began to consider seriously whether the "year and a day" rule should be abolished when advances in medical science made it possible to prolong life, so, for example, it was in 1990 that the rule was abolished in New South Wales. Other Australian states quickly followed. In 1990, abolition was recommended in Canada. In 1996 abolition took place in the United Kingdom, and in 1997 abolition was recommended in Hong Kong.

17 As the Attorney-General points out, there are examples of the "year and a day" rule being specifically retained, but that seems to have been only when a statutory definition of homicide was being enacted at an earlier date, as for example in s.227 of the Canadian Criminal Code.

18 The Attorney-General also points out that Part IV of the 1960 Act, as amended, dealt with conspiracy. Section 11 put it on a statutory footing, but s.11(5) provided that Part IV "shall not apply to any conspiracy under the common law of England." So common law conspiracy was preserved alongside statutory conspiracy until it was largely abolished by s.35(1) of the Crimes Act 2011. In 1983, the Attorney-General points out that the common law offence of murder was not specifically retained, and the legislature must therefore have intended to abolish it.

19 The Attorney-General acknowledges that the common law offence of murder does not appear in Appendix 3 to the English Law (Application) Act 1962 which purports to list offences which are no longer offences at common law in Gibraltar, but, as he points out, it is specifically stated in the legislation that "these appendices are printed without legislative authority. It should not be assumed that they are either complete or correct."

20 Mr. Azopardi, Q.C. said something about the care with which Appendix 3 has been prepared, but having regard to the "health warning" just quoted we cannot properly derive any assistance from it in this case.

21 Mr. Azopardi, Q.C. and Ms. Bossino, for the respondents, separately submit that the "year and a day" rule is not a constituent element of the offence of murder. It is a common law irrebuttable presumption as to causation, going back to times when those seriously injured were unlikely to live very long. It was not directly referred to by Parliament when defining infanticide, or the offence of being involved with the suicide of another, but in such cases, in England and Wales, prior to 1996, the prosecution had to show that death occurred within a year and a day (see *Luca* (2)). The rule, it is submitted, applied in all criminal cases involving death, such as causing death by dangerous driving, causing death by careless driving whilst under the influence of drink or drugs, and aggravated vehicle taking, even though the statutory provisions creating those offences made no reference to it. That is why, in 1996, the English statute is worded as it is, to encompass all offences allegedly causing death. That proposition, which apparently derived some support from an English Law Commission report, is not accepted by the Attorney-General. He submits that there is no authority to support it, and we have not found any. In *R*. v. *Holloway Prison Gov*., *ex p. Jennings* (1), an extradition case, Lord Roskill said that the legal ingredients of manslaughter and of causing death by reckless driving were identical, but the "year and a day" rule was not in issue in that case.

22 Mr. Winter, Q.C., in his skeleton argument, adopted by Ms. Bossino, submitted that s.59 of the 1960 Act, as amended, did not set out everything that had to be proved in a case of murder. In addition to the ingredients of the statutory definition as set out, a defendant had also to be shown to be of sound mind and discretion when he caused the injury, had to be a

reasonable creature, and had to attack a victim in being within the jurisdiction.

23 The same Act went on to abolish constructive malice in cases of murder (s.60), to establish accident and self-defence as statutory defences to murder (s.64), to codify the defences of diminished responsibility (s.61) and provocation (s.62), and to codify the offences of manslaughter (s.63), solicitation to murder (s.65), threats to kill (s.66), suicide pacts (s.67), complicity in suicide (s. 68), infanticide (s.69), and child destruction (s.70). Against that background, the omission of any reference to the "year and a day" rule can only mean that it was retained. The Act was largely a consolidation Act, and should not be interpreted as causing the law of Gibraltar to depart from the law of England.

24 The respondents also submit that in 1983 there was not much reason to address the "year and a day" rule. Life-support machines had yet to become widespread, and it should not readily be inferred that a provision favouring a defendant would be abolished by inference. In *Thet* v. *D.P.P.* (3), an asylum case, the English Divisional Court was invited to have regard to parliamentary material to interpret a criminal statute. Lord Phillips of Worth Matravers, C.J. said ([2007] 1 W.L.R. 2022, at para. 15):

> "If a criminal statute is ambiguous, I would question whether it is appropriate by the use of *Pepper* v. *Hart* to extend the ambit of the statute so as to impose criminal liability upon a defendant where, in the absence of the parliamentary material, the court would not do so. It seems to me at least arguable that if a criminal statute is ambiguous, the defendant should have the benefit of the ambiguity."

25 Mr. Azopardi, Q.C. also invited our attention to s.282 of the 1960 Act, as amended (originally s.4 of the 1960 Act), which provides as follows:

> "Save as hereinafter expressly provided, nothing in this Act shall affect—
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> (a) the liability, trial or punishment of a person for an offence against the common law or against any other law in force in Gibraltar other than this Act . . ."

26 The Attorney-General submits that in looking at that section we should concentrate on the last four words, which show that the saving provision in s.282 was not intended to override a proper construction of s.59. We agree, and so derive no real assistance from s.282.

Conclusion

27 In our judgment, the "year and a day" rule survived in Gibraltar until expressly abolished by s.149(4) of the Crimes Act 2011. We reach that

conclusion for those reasons given by the respondents' counsel in argument and on paper, which we accept. In summary—

(1) In 1983 there was in Gibraltar no evidence of any pressure to change the "year and a day" rule, and not even any evidence of discussion of it. The same was true elsewhere in the common law world.

(2) The 1983 amendment provided a statutory definition of murder, but it did not seek to particularize everything that had to be proved in any given case.

(3) The "year and a day" rule was an irrebuttable presumption as to causation. It would not be relevant in most cases, but it operated in favour of the defence, and a statute should not be so construed as by inference to disadvantage the defence.

(4) The wording of the 2011 Act, abolishing the rule, is clear. It does not indicate that it is simply restating the existing law. At that time a change in the law in Gibraltar can easily be understood, having regard to advances in medicine, and to what was happening elsewhere in the common law world.

28 It follows that Black, J. was right to decide as he did, and that the point of law referred to us by the Attorney-General must be answered in the affirmative.

Orders accordingly.