**[2022 Gib LR 222]**

## AA v. GOVERNOR

SUPREME COURT (Dudley, C.J.): July 27th, 2022

2022/GSC/22

*Criminal Procedure—jurisdiction—extraterritorial jurisdiction—Gibraltar legislature may make laws for peace, order and good government of Gibraltar (Constitution, s.32)—s.298 of Crimes Act 2011, which establishes criminal jurisdiction over accused person in respect of sexual offence committed outside Gibraltar regardless of accused's or complainant's nationality, country of residence or any other relation to Gibraltar, ultra vires—court unable to adopt purposive interpretation of s.298 because of semantic ambiguity of "person"—court also unable to correct drafting error in s.298 because, although inadvertent failure to establish jurisdictional link to Gibraltar, court cannot ascertain substance of provision legislature would have made*

The claimant sought a declaration that s.298 of the Crimes Act 2011 was *ultra vires* the legislative powers of the Gibraltar Parliament and therefore void and of no effect.

Section 298(1) of the Crimes Act 2011 provided:

"298.(1) Subject to subsection (2), any act done by a person in a place outside Gibraltar which—

(a) constituted an offence under the law in force in that place; and

(b) would constitute a sexual offence to which this section applies if it had been done in Gibraltar, constitutes that sexual offence under the law of Gibraltar."

The claimant had been indicted with counts alleging the commission of sexual offences outside Gibraltar. The claimant sought a declaration that s.298 of the Crimes Act was *ultra vires* the legislative powers of the Gibraltar Parliament and therefore void and of no effect.

Section 298 of the Crimes Act was derived from s.72 of the UK Sexual Offences Act 2003 but subsection (2) of the UK Act, which provided that "proceedings by virtue of this section may be brought only against a person who was on 1st September 1997, or has since become, a British citizen or resident in the United Kingdom," had been omitted in the Crimes Act. The effect of the omission was that, on its plain reading, s.298 established a criminal jurisdiction over an accused person regardless of where the alleged sexual offence was committed and regardless of the accused's or complainant's nationality, country of residence or any other relation to

Gibraltar. The legislative powers of the Gibraltar Parliament were constrained by the Constitution, s.32 of which provided: "Subject to this Constitution, the Legislature may make laws for the peace, order and good government of Gibraltar."

The defendant submitted that a literal reading of s.298 did not reflect the intention of the legislature. He urged a purposive construction, submitting that the mischief at which s.298 was aimed was to protect the general public from Gibraltarians or Gibraltar residents who committed sexual offences abroad. The defendant also submitted that the failure to make provision for a Gibraltarian status or residency requirement in s.298 was merely a drafting error.

**Held,** judgment as follows:

(1) Although the defendant's submission that the court should adopt a purposive construction of s.298 was superficially attractive, the semantic ambiguity of "person" was such that a purposive interpretation of s.298 was not possible. Was "person" to be interpreted as "Gibraltarian," presumably as defined in s.4 of the Gibraltarian Status Act, or by reference to the entitlement to be so registered pursuant to s.5 of that Act, and if linked to residence, should it be by establishing a test of habitual residence or to a right of residence acquired under the Immigration, Asylum and Refugee Act? An additional difficulty was that the Crimes Act itself adopted different criteria in respect of different extraterritorial offences. Section 154(1) provided that an offence of murder or manslaughter committed on land anywhere outside Gibraltar by a Gibraltarian could be dealt with in Gibraltar. Similarly, the extraterritorial provisions in relation to computer misuse offences in s.370(1A) extended only to Gibraltarians. In contrast, s.191C(2) and (3), which dealt with extraterritorial jurisdiction over offences involving human trafficking, applied to a person who was a Gibraltarian or resident of Gibraltar. It was not possible to interpret "person" as meaning a person who was a Gibraltarian, because it was equally possible to interpret it as applying to a person with a residential connection with Gibraltar, or indeed to both (paras. 12–15).

(2) Before the court could correct a drafting error in legislation it had to be sure of three matters: (a) the intended purpose of the statute or provision in question; (b) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (c) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. Applying this test in the present case, it was evident that the intention of the legislature in enacting s.298 of the Crimes Act was to criminalize certain extraterritorial sexual offences committed by persons with a connection to Gibraltar. The legislature could not have intended to legislate in a way which exceeded its constitutional remit, indeed other provisions with extraterritorial effect were circumscribed by provisions which established the jurisdictional link to Gibraltar, therefore establishing a sufficiently substantial relationship with the peace, order and good

government of Gibraltar. It was evident that by inadvertence the draftsman failed to include a provision in s.298 which established that jurisdictional link to Gibraltar. However, the court was not able to ascertain the substance of the provision the legislature would have made. It could possibly be a subsection similar to that found in s.72(2) of the UK Sexual Offences Act, with a reference to Gibraltarian or Gibraltar resident or both. The Crimes Act itself did not offer any assistance given that other extraterritorial provisions in the Act adopted different criteria. To adopt "Gibraltarian" merely on the basis that it might be the more circumscribed group would amount to impermissibly crossing the boundary between construction and legislation. The default position was that s.298 must be given its literal meaning. As that literal meaning offended s.32 of the Constitution, it could not be relied upon for the purpose of pursing a prosecution (paras. 17–19).

**Cases cited:**

(1) *Inco Europe Ltd.* v. *First Choice Distribution*, [2000] 1 W.L.R. 586; [2000] 2 All E.R. 109; [2000] 1 All E.R. (Comm) 674; [2000] 1 Lloyd's Rep. 467; [2000] C.L.C. 1015; (2000), 2 T.C.L.R. 487, followed.

(2) *Jersey Fishermen's Assn.* v. *States of Guernsey*, [2007] UKPC 30; 2007–08 GLR 36, followed.

(3) *Marrache* v. *Att.-Gen. (Appointment of Puisne Judge)*, 2013–14 Gib LR 520, considered.

**Legislation construed:**

Crimes Act 2011, s.154(1): The relevant terms of this subsection are set out at para. 13.

s.191C(2): The relevant terms of this subsection are set out at para. 13.

s.298: The relevant terms of this section are set out at para. 6.

Gibraltarian Status Act 1962, s.4: The relevant terms of this section are set out at para. 12.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), s.24: The relevant terms of this section are set out at para. 5.

s.32: The relevant terms of this section are set out at para. 9.

Sexual Offences Act 2003 (c.42), s.72(2): The relevant terms of this subsection are set out at para. 8.

*C. Gomez* with *N. Gomez* (instructed by Charles A. Gomez & Co.) for the claimant;

*C. Rocca*, *Q.C.*, *D.P.P.* with *K. Drago* (of the Office of Criminal Prosecutions and Litigation) for the defendant.

1 **DUDLEY, C.J.:** This is a Part 8 Claim by which the claimant seeks a declaration that s.298 of the Crimes Act 2011 ("the Act") is *ultra vires* the legislative powers of the Gibraltar Parliament and therefore void and of no effect.

**Proper defendant**

2 These proceedings have been instituted against HE the Governor on the premise that s.24 of the Gibraltar Constitution Order 2006 ("the Constitution") constitutes the legislature as Her Majesty and the Gibraltar Parliament, with the Governor, who is Her Majesty's representative in Gibraltar, being empowered by s.33 of the Constitution to assent to bills passed by Parliament. The then Governor assented to the Crimes Bill on August 15th, 2011 and it was thereby enacted.

3 In the draft embargoed version of this judgment, I said this:

> "In this regard our constitutional arrangement mirrors the constitutional arrangement in the United Kingdom of the Queen in Parliament which refers to the Crown in its legislative role, acting with the advice and consent of Parliament. Section 12 of the Crown Proceedings Act provides that Civil proceedings by or against the Crown shall be instituted by or against the Attorney-General. On that analysis it would follow that the proper Defendant should have been the Attorney General. That said, I have not been addressed on this point and the issue does not require determination given that the Director of Public Prosecutions, who in the discharge of his duties and functions is answerable to the Attorney General, does not resist the claim on any such basis."

4 Since receiving that embargoed draft, Messrs. Gomez very properly provided me with written submissions, and brought to my attention my earlier decision in *Marrache* v. *Att.-Gen. (Appointment of Puisne Judge)* (3). In that case, one of the many issues that arose was whether judicial review and/or a constitutional motion were "civil proceedings against the Crown" within the meaning of the Crown Proceedings Act 1951. I said (2013–14 Gib LR 520, at paras. 33–34):

> "33 In any event, I am of the view that, given the decision of the House of Lords in *Davidson* v. *Scottish Ministers (No. 1)*, the contention advanced by Mr. Gomez is simply unarguable. In that case, the issue arose because the definition in s.38(2) of the United Kingdom Act does not explain how the reference to proceedings on the Crown side of the King's Bench Division is to be interpreted when applying s.21 (our s.14) in Scotland, where there is no precise analogous counterpart to the Crown side in the supervisory jurisdiction exercised by the Scottish courts. The determination by the House of Lords is succinctly set out in judgment of Lord Nicholls (2006 S.C. (H.L.) 41, at para. 33):
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> > '. . . [B]y analogy with the exclusion of Crown side proceedings from sec. 21 in England, when applied in Scotland references to civil proceedings in sec. 21 are to be read as not including

> proceedings invoking the supervisory jurisdiction of the Court of Session in respect of acts or omissions of the Crown or its officers. By this means effect can be given to the intention of Parliament. Uniformity will be achieved. The coercive remedies available in judicial review proceedings against the Crown and its officers will be substantially the same in both countries.'
>
> The same analysis must follow when interpreting our s.14 and it is clear beyond peradventure that our section applies exclusively to proceedings brought by subjects against the Crown in relation to the Crown's private law obligations.
>
> 34 It follows that the claimant cannot rely upon s.12 of the Crown Proceedings Act 1951 to bring either claim against the Attorney-General. I am of the view that the proper defendant would have been the Governor, and joining him as an interested party to the judicial review does not cure this fundamental irregularity. The claimant has aimed at the wrong target and for that reason also, both actions fail."

5 I immediately accept that if *Marrache* (3) was properly decided, these proceedings could not properly have been brought against the Attorney-General. There may however be a nuance which was not considered in *Marrache* and which is more conspicuous in these proceedings given that it is an enactment that is challenged. Section 24 of the Constitution provides: "There shall be a Legislature for Gibraltar, which, subject to this Chapter, shall consist of Her Majesty and the Gibraltar Parliament." Section 33 then empowers Her Majesty, or the Governor on behalf of Her Majesty, to assent. Sovereign immunity would preclude proceedings being instituted against Her Majesty personally. It is I think arguable that similarly proceedings cannot be instituted against the Governor *qua* delegatee of a power specifically retained by Her Majesty. Otherwise, it would result in the incongruous outcome that legislation could only be capable of challenge if assented to by the Governor, but not if assented to by Her Majesty. Be that as it may, prior to proceedings being instituted the Director of Public Prosecutions and Messrs. Gomez agreed that HE the Governor should be the named defendant and in those circumstances that issue does not require determination. Putting to one side those possibly esoteric constitutional arguments, the substantive issue before the court is one of some importance.

**The statutory provisions and the issue**

6 Section 298 which is to be found in Part 12 of the Act and which deals with sexual offences makes provision for the prosecution of certain offences alleged to have been committed outside Gibraltar, on the following terms:

"298.(1) Subject to subsection (2), any act done by a person in a place outside Gibraltar which—

(a) constituted an offence under the law in force in that place; and

(b) would constitute a sexual offence to which this section applies if it had been done in Gibraltar, constitutes that sexual offence under the law of Gibraltar.

(2) An act punishable under the law in force in any place constitutes an offence under that law for the purposes of this section, however it is described in that law.

(3) Subject to subsection (4), the condition in subsection (1)(a) is to be taken to be met unless, not later than rules of court may provide, the defendant serves on the prosecution a notice—

(a) stating that, on the facts as alleged with respect to the act in question, the condition is not in his opinion met;

(b) showing his grounds for that opinion; and

(c) requiring the prosecution to prove that it is met.

(4) The court, if it thinks fit, may permit the defendant to require the prosecution to prove that the condition is met without service of a notice under subsection (3).

(5) In the Supreme Court the question whether the condition is met is to be decided by the judge alone.

(6) Part A of Schedule 2 lists the sexual offences to which this section applies."

7 The claimant has been indicted with counts alleging the commission of sexual offences outside Gibraltar which are to be found in Part A of Schedule 2. Beyond that essential fact, the factual background is irrelevant to the issue which falls to be determined. The criminal proceedings are extant and conscious that the integrity and fairness of those proceedings should not be compromised, I ordered the anonymization of the claimant, so that this judgment, which deals with a matter of some general public importance may be made public.

8 Section 298 is evidently derived from s.72 of the United Kingdom Sexual Offences Act 2003, with the appropriate jurisdictional substitutions. There is however a fundamental difference in that subs. (2) of the United Kingdom provision has been omitted in Gibraltar. It provides:

"Proceedings by virtue of this section may be brought only against a person who was on 1st September 1997, or has since become a British citizen or resident in the United Kingdom."

The effect of that omission is that on its plain reading s.298 establishes a criminal jurisdiction over an accused person regardless of where the alleged sexual offence was committed and regardless of the accused's or complainant's nationality, country of residence or any other relation whatsoever to Gibraltar. Simply put, the section purports to allow for the exercise by Gibraltar authorities and institutions of universal jurisdiction in relation to the sexual offences in Part A of Schedule 2 of the Act.

9 Unlike the United Kingdom Parliament, which by virtue of the United Kingdom constitutional principle of parliamentary sovereignty can create any law, the legislative powers of the Gibraltar Parliament are constrained by the Constitution, and in particular s.32, which provides: "Subject to this Constitution, the Legislature may make laws for the peace, order and good government of Gibraltar." Implicit in that provision is some territorial limitation to the Gibraltar Parliament's legislative powers. In *Jersey Fishermen's Assn.* v. *States of Guernsey* (2), Lord Mance delivering the judgment of the Judicial Committee of the Privy Council, dealing with the powers of subordinate legislatures to legislate, said (2007–08 GLR 36, at para. 33):

> "33 The principle governing the extra-territorial jurisdiction of colonial legislatures is stated in 6 *Halsbury's Laws of England*, 4th ed. (2003 Reissue), para. 840, at 492, as follows:
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> > 'The rule is not that the territorial limits of a legislature define the possible limits of its legislative enactments; rather, the rule is that those enactments which purport to have an extra-territorial operation, application or effect will be valid only if they bear a substantial relationship to the peace, order and good government of the territory concerned, whether generally or in respect of particular subjects. In particular, legislation creating any liability must base that liability on some fact, circumstance, event or thing which is relevantly connected, to a sufficient degree, with the territory concerned.'
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> . . . Broadly, a subordinate legislature may legislate with extra-territorial effect where the legislation has in nature and effect a sufficiently substantial relationship with the peace, order and good government of the relevant territory and is for a purpose for which the subordinate legislature has power to legislate."

10 As I understood the submissions, none of the foregoing is in issue. Mr. Rocca does not seek to challenge the proposition that Parliament's powers are constrained by s.32. And I do not understand it to be controversial that Parliament may make laws that have extraterritorial effect, provided that any such law is for the good government of Gibraltar.

**"Person"**

11 Mr. Rocca's primary submission turns on the interpretation of the word "person" in s.298 of the Act. He submits that a literal reading of the provision does not reflect the intention of the legislature. That the legislative text needs to be read in light of the Act as a whole and the purpose of the provision. That although the word "person" appears in other parts of the Act and there is generally a presumption that a word used in one section will have the same meaning in another section, that the meaning of "person" in other parts of the Act cannot be attributed to its meaning in s.298, given that in other provisions which deal with acts giving rise to an offence taking place in Gibraltar, the nationality and or residence of an individual are not in issue.

12 Mr. Rocca urges a purposive construction. He submits that the mischief which s.298 of the Act seeks to target is to protect the general public from Gibraltarians or Gibraltar residents who commit sexual offences abroad, with this being achieved by ensuring that Gibraltar takes responsibility where appropriate for the acts of such individuals and so that they do not avoid prosecution in Gibraltar because the offence was committed outside the jurisdiction. In this regard reliance is placed upon the principle set out in *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed., s.11.7, at 413–414 (2020):

> "When considering which of the opposing constructions of an enactment would give effect to the legislative intention, the court should presume that the legislature intended common sense to be used in considering the enactment."

Albeit superficially attractive, the difficulty with that submission is what purposive construction? Is "person" to be interpreted as "Gibraltarian," presumably as defined in s.4 of the Gibraltarian Status Act, which provides: "A Gibraltarian is a person who is registered as a Gibraltarian in the register." Or should it be by reference to the entitlement to be so registered pursuant to s.5 of that Act, which includes certain descendants of persons entitled to be registered, who may beyond that familial link have no other connection with Gibraltar. If linked to residence, should it be by establishing a test of habitual residence or to a right of residence acquired under the Immigration, Asylum and Refugee Act?

13 The added difficulty is that the Act itself adopts different criteria in respect of different extraterritorial offences. Section 154(1) of the Act provides:

> "An offence of murder or manslaughter committed on land anywhere outside Gibraltar by a Gibraltarian may be dealt with, inquired of, tried, determined, and punished in Gibraltar."

Similarly, the extraterritorial provisions in relation to computer misuse offences found at s.370(1A) extend only to Gibraltarians. In contrast, the provisions at s.191C(2) and (3) of the Act, which deal with extraterritorial jurisdiction over offences involving human trafficking, provide:

> "(2) Any act done by a person ('A') in a place outside Gibraltar which if done in Gibraltar would constitute an offence under section 191A, constitutes an offence under the law of Gibraltar if any of the following conditions are met—
>
> (a) the first condition is that A is a Gibraltarian or a resident of Gibraltar;
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> (b) the second condition is that A's victim ('V') is a Gibraltarian or a resident of Gibraltar;
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> (c) the third condition is that the offence is committed for the benefit of a body corporate that is situate in Gibraltar.
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> (3) In subsection (2)—
>
> 'Gibraltarian' has the meaning given in the Gibraltarian Status Act; and
>
> 'resident of Gibraltar' means a person residing in Gibraltar with a valid permit of residence issued under section 18 or 19 of the Immigration, Asylum and Refugee Act."

14 I surmise that the absence of a consistent approach within the Act itself is what led Mr. Rocca to abandon his submission that "person" in s.298 is to be read as including persons habitually resident in Gibraltar, and limiting his submissions to it being read as "Gibraltarian persons." Presumably on the basis that this would, on one view, be the narrowest construction. I say on one view because so interpreted the provision would expose a registered Gibraltarian who may have lived all his life away from Gibraltar to prosecution whilst not so exposing an individual who is not a registered Gibraltarian, but has been resident in Gibraltar for most or all of his life.

15 In my judgment it is not possible to interpret "person" as meaning a person who is a Gibraltarian, because it is equally possible to interpret it as applying to a person with a residential connection with Gibraltar, or indeed both. In my judgment on the basis of the submissions advanced, the semantic ambiguity of "person" is such that a purposive interpretation of s.298 is not possible.

**Mistake**

16 In what is an alternative but also related submission, Mr. Rocca argues that the failure to make provision for a Gibraltarian status or residency

requirement in s.298 is simply no more than a drafting error by way of omission.

17 The test to be applied by the court when correcting a drafting error is to be found in *Inco Europe Ltd.* v. *First Choice Distribution* (1) where Lord Nicholls said ([2000] 1 W.L.R. at 592–593):

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation*, 3rd ed. (1995) pp. 93–105. He comments, at p. 103:
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> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation (see *per* Lord Diplock in *Jones* v *Wrotham Park Settled Estates* [1980] A.C. 74, 105–106."

With the caveat thereafter:

> "Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the

> insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature."

18 Applying the *Inco* three-prong test, in my judgment, it is evident that the intention of the legislature in enacting s.298 of the Act was to criminalize certain extraterritorial sexual offences committed by persons with a connection to Gibraltar. The legislature could not have had the intention of legislating in a way which exceeded its constitutional remit, indeed other provisions with extraterritorial effect are circumscribed by provisions which establish the jurisdictional link to Gibraltar therefore, adopting Lord Mance's words in *Jersey Fishermen's Assn.* (2) (2007–08 GLR 36, at para. 33), establishing "a sufficiently substantial relationship with the peace, order and good government" of Gibraltar. In my judgment it is evident that by inadvertence the draftsman failed to include a provision in s.298 which established that jurisdictional link to Gibraltar. In the present case the difficulty lies with the application of the third *Inco* test. That test requires the court to ascertain "the substance of the provision Parliament would have made." I am not able to do so. It could possibly be a subsection similar to that found in s.72(2) of the United Kingdom Sexual Offences Act, with a reference to Gibraltarian or Gibraltar resident or both. The Act itself does not offer any assistance given that other extraterritorial provision in the Act adopt differing formulas including, in human trafficking offences, a jurisdictional link on the part of the alleged victim and not just the alleged offender. To adopt "Gibraltarian" merely on the basis that it may be the more circumscribed group would amount to crossing the boundary between construction and legislation.

19 Given the drafting error, and it not being possible to construe the provision in a way which satisfies the *Inco* test, the default position must be that the provision is to be given its literal meaning. The literal meaning being one which offends s.32 of the Constitution, it cannot be relied upon for the purposes of pursuing a prosecution.

20 I shall hear the parties as to the precise terms of the declaration and as to costs.

*Judgment accordingly.*

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