IN THE COURT OF APPEAL FOR GIBRALTAR

Neutral Citation Number 2024/GCA/003

2023/CACRI/002

BETWEEN:

REX

Appellant

-and-

JUAN CARLOS GUTIERREZ EXPOSITO

FRANCISCO ANDRES FERNANDEZ SANCHES

FRANCISO JAVIER ROCCA CABELLO

JUAN MANUEL RIVERA MONTERO

Respondents

Christina Wright (instructed by **Office of Criminal Prosecutions and Litigation)** for the **Appellant**

The Respondents were unrepresented and did not appear

Judgment date: 15 March 2024

JUDGMENT

This is the judgment of the Court comprising Sir Maurice Kay P, Sir Nigel Davis, JA and Sir Adrian Fulford, JA

SIR ADRIAN FULFORD, JA:

Introduction

1. This is an appeal by the Attorney-General from a ruling of Mr Justice Dudley, Chief Justice, delivered on 18 January 2023. The four Defendants in the court below, Francisco Javier Roca Cabello, Francisco Andres Fernandez Sanchez, Juan Manuel Rivera Montero and Juan Carlos Guiterrez Exposito stood trial in the Supreme Court of Gibraltar on two counts, namely:

    i) **Count 2**: Importing a prohibited import, contrary to section 15 of the Imports and Exports Act 1986, as read with the Crimes Act 2011, the particulars being that on 18 August 2021 they imported 2236.25 kilograms of cannabis into Gibraltar; and

    ii) **Count 3**: Importing a prohibited import, contrary to section 16(2)(b) of the Imports and Exports Act 1986, as read with Regulation 2 and Schedule 1,16(1)(a) of the Imports and Exports (Control) Regulations 1987 (this count concerned a rigid inflatable boat).

2. On 19 January 2023, the four Defendants were acquitted on both counts by a majority verdict. The Appellant is seeking to set aside the acquittals under sections 9(2) and 17(1) of the Court of Appeal Act 1969, but on the express indication that he will not seek an order for the case to be retried since an undertaking has been given to the Defendants' counsel that there would be no further criminal proceedings based on the facts of this case.

3. The Defendants pleaded guilty on 24 November 2022 to possession of a controlled drug (cannabis) on 18 August 2023, contrary to section 506(2) of the Crimes Act 2011, for which they received prison terms ranging between 3 years 2 months to 3 years 4 months' imprisonment. Sanchez pleaded guilty on 16 January 23 to damaging HMC Searcher (a vessel belonging to His Majesty's Customs Gibraltar) for which he received an additional sentence of 1 month's imprisonment. Two further offences against Sanchez were left to lie on the file.

4. The Defendants have been notified of the present appeal and have chosen not to appear personally, instruct counsel or to advance any submissions. Given they are not in that sense respondents to this appeal, I have referred to them as defendants in the course of this judgment.

5. The issue before us concerns the judge's decision as to the mental element of counts 2 and 3. There are two grounds of appeal:

> **The first ground** is that the judge erred in ruling that section 15 of the Imports and Exports Act 1986 requires the prosecution to prove that the Defendant in question had knowledge i) that the vessel had entered into British Gibraltar Territorial Waters and ii) that the goods being imported (*viz.* the cannabis resin) were prohibited in Gibraltar.
>
> **The second ground** is that the judge erred in ruling that section 16(2)(b) of the Imports and Exports Act 1986 requires the prosecution to prove that the Defendant in question had knowledge not only that the vessel had entered into British Gibraltar Territorial Waters but also of the fact that the goods being imported (*viz.* the rigid inflatable boat) were prohibited in Gibraltar.

6. Given this appeal solely concerns a matter of statutory interpretation, it is unnecessary to set out more than a short summary of the factual history leading up to the arrest of the Defendants.

7. On 18 August 2021 the Defendants were travelling on a rigid inflatable boat powered by three Yamaha engines and laden with 65 bales of cannabis resin which were destined for Spain. The vessel travelled through British Gibraltar Territorial Waters at various points en route to the Spanish coast. They were pursued by Royal Gibraltar Police Vessel Bravo 3, until such time as the Defendants' boat left the territorial jurisdiction of Gibraltar. Bravo 3 collected 15 bales of cannabis that had been jettisoned by the Defendants. Thereafter, His Majesty's Customs ship Searcher picked up the chase when the Defendants re-entered the territorial waters of Gibraltar. Further bales were thrown overboard, there was a collision and the Defendants' vessel was boarded and they were arrested. The case for the Appellant was that given the position of the Defendants'

vessel at various stages and the chase by the Royal Gibraltar Police, the coxswain (Fernandez Sanchez) would have known he was in British Gibraltar Territorial Waters and that as regards the other Defendants it was to be inferred that it would have been within the drug trafficking plan to enter British Gibraltar Territorial Waters if they needed to avoid detection by the Spanish authorities. The Defendants declined to answer the questions put to them in interview, they failed to serve Defence Statements, and they did not give evidence. Although no positive case was advanced, their defence, as summarised by the Chief Justice, was that the jury could not be sure that i) the coxswain knew he was in Gibraltar waters; ii) it was within the scope of the plan to enter the territorial jurisdiction of Gibraltar if necessary; and iii) the Defendants knew the vessel was a prohibited item in Gibraltar.

8. The sections are in the following terms:

"**Section 15 of the Imports and Exports Act 1986**

A person who imports goods comprising or including a controlled drug or Scheduled Substance contrary to the provisions of the Drugs (Misuse) Act, or who is in any way knowingly concerned with any such importation is guilty of an offence and is liable–

(a) where the drug is a Class A or Class B drug–

(i) on summary conviction, to a fine at level 5 on the standard scale and to imprisonment for 12 months;

(ii) on conviction on indictment, to a fine of such amount as the court may determine and to imprisonment, in the case where the goods were a Class A drug, for life or, where the goods were a Class B drug, for 14 years;

[…]"

Section 16 of the Imports and Exports Act 1986

16. (1) The Government may, if he thinks fit, from time to time, by regulations prohibit, restrict or regulate the importation of goods or class of goods.

(2) A person who–

(a) imports any goods the importation of which is prohibited; or

(b) imports any goods the importation of which is restricted or regulated except in accordance with the restriction or regulation applicable,

whether such importation is prohibited, restricted or regulated under this Act or under any other law, is guilty of an offence and is liable, on summary conviction, to a fine of three times the value of the goods or at level 4 on the standard scale, whichever is the greater."

Ground 1

9. On 16, 18 and 18 January 2023, before the judge summed up the case to the jury, there were various submissions on the law relating to both counts advanced by the Appellant and the Defendants. The judge gave a ruling which, as relevant to the issues before us, contained the following:

> "An offence contrary to section 15 can be committed in one of two ways, by importing the drugs, or by being knowingly concerned with any such importation. The mens rea in relation to the being concerned with the importation is "*knowingly*". But the legislation does not specifically state what mental element is required when the offence is committed by virtue of the importation itself. At Archbold at 17.46 makes clear "*when the word knowledge is included in the definition of an offence, it makes it plain that the doctrine of mens rea applies to that offence. However, its absence is no indication that the doctrine does not apply, the authority for that proposition is Sweet v Parsley.*" Knowledge is a mens rea term that arises in very many offences. It is used in relation to many circumstances for example possessing an article knowing it is prohibited.
>
> Importation of a prohibited good must in my judgment require knowledge of possession of that good, and knowledge that it is prohibited. Moreover, the legislature's (sic) knowledge as the mens rea required for the purposes of committing the section 15 offence under its second limb and in my judgment it is therefore appropriate to apply the same mental element to the commission of the offence under the first limb. I am fortified in that view because that is the approach I took in Crown v Lara Bebeagua and at the very least it was implicitly approved by the Court of Appeal when refusing leave to appeal."

10. The Appellant accepts that there is a long-standing presumption of the common law that mens rea is an essential ingredient of every offence unless Parliament has expressly or by necessary implication provided that is not the case. Furthermore, it is conceded that section 15 created a "*truly criminal offence*" (see [46] below), leading to the

presumption that the element of mens rea is required. Nonetheless, the Appellant argues that the Gibraltar legislature had intended that a person must be convicted if it is shown he entered Gibraltar whilst he was in possession of a substance which is a controlled drug, regardless of whether he meant to import it and whether or not he knew that the substance is a controlled drug. The extent of the mens rea, as it is submitted, is that he had known he had the substance, even if at the material time he had forgotten he had it.

11. In support of this submission, the distinction between the two ways that section 15 provides for the commission of this offence is emphasised: "*imports goods*" or is in any way "*knowingly concerned with any such importation*". The suggestion is made that the latter "*clearly requires some guilty knowledge*", because, as it is argued, you cannot be knowingly concerned without knowing that a controlled drug was being imported. In contrast, the Appellant argues that the legislature clearly intended that when the defendant is said to be someone who "*imports drugs*", the absence of the word "*knowingly*" or other similar language, indicates the Crown did not need to establish mens rea (save, as just set out at [10], the prosecution needed to prove he had been aware he had the substance, even if at the material time he had forgotten he had it).

Discussion

12. The offence created by section 15 forms part of the Imports and Exports Act 1986. It is instructive in this context to consider and contrast section 15, which charged the importation of a controlled drug or a Scheduled Substance, with the offence of simple possession of a controlled drug. The offence of possession of a controlled drug is to be found in section 506 of the Crimes Act 2011 (it carries a maximum sentence of 5 years' imprisonment for Class B):

> "**Restriction of possession**
>
> 506. (1) Subject to any regulations made under section 509 and subsection (4) of this section, it is unlawful for a person to have a controlled drug in his possession.

(2) Subject to section 526 and to subsection (4) of this section, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) of this section.

(3) Subject to section 526, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another in contravention of section 504(1).

(4) In any proceedings for an offence under subsection (2) in which it is proved that the defendant had a controlled drug in his possession, it is a defence for him to prove that, knowing or suspecting it to be a controlled drug,

(a) he–

(i) took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug; and

(ii) as soon as possible after taking possession of it, took all steps reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or

(b) he–

(i) took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it; and

(ii) as soon as possible after taking possession of it, took all steps reasonably open to him to deliver it into the custody of such a person.

(5) […]

(6) Nothing in subsection (4) or (5) affects any defence which it is open to a person charged with an offence against this section to raise apart from that subsection."

13. It is notable in my view that within the section creating the offence of simple possession, a defence is available to an accused based on his knowledge, namely if i) he knew he had the item in his possession and ii) he either knew or suspected it was a controlled drug **and** he was seeking to ensure that it was dealt with lawfully.

14. Section 526 of the Crimes Act 2011 additionally provides:

> "**Evidence and defences**
>
> 526.(1) This section applies to offences against any of sections […] 506(2) and (3) […].
>
> (2) Subject to subsection (3), in any proceedings for an offence to which this section applies it is a defence for the defendant to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.
>
> (3) If in any proceedings for an offence to which this section applies, it is necessary, if the defendant is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the defendant–
>
> a) is not to be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but
>
> (b) must be acquitted of the offence charged if he–
>
> (i) proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug or Scheduled Substance; or
>
> (ii) proves that he believed the substance or product in question to be a controlled drug or Scheduled Substance, or a drug or substance of a description, such that, if it had in fact been that drug or substance, or a drug of that description, he would not, at the material time, have been committing any offence to which this section applies.
>
> (4) Nothing in this section affects any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section."

15. This section, therefore, provides a defendant with two further "*knowledge*" defences, namely, first, that he neither believed nor suspected nor had reason to suspect that he was in possession of a controlled drug or scheduled substance or, second, that on the basis of his belief as to the nature of the controlled drug or scheduled substance, he would not have been committing a criminal offence.

16. These, therefore, are the statutory defences for simple possession, as set out in sections 506 and 526, in addition to any other common law defences. I note in passing, however, that they apply equally to the offence of possession with intent to supply.

17. It is relevant at this point to compare the position in Gibraltar with that in England and Wales as regards the charge of possession of a controlled drug. By section 5 (2) of the Misuse of Drugs Act 1971 ("MDA") it is an offence for "[…] *a person to have a controlled drug in his possession in contravention of subsection (1)* […]*"* which in turns provides that "[…] *it shall be unlawful for a person to have a controlled drug in his possession*". This is, accordingly, essentially identical to the offence of possession in section 506 of the Crimes Act 2011. Apart from irrelevant textual differences, the provisions regarding the accused's knowledge as contained in section 506 (4) and (5) are identical to those set out section 5 (4) of the MDA. Similarly, section 526 (2), (3) and (4) of the Crimes Act 2011 (see above) mirror section 28 of the MDA. Therefore, as regards the statutory provisions relating to the possession of a controlled drug, the position in England and Wales does not materially differ from that in Gibraltar.

18. Turning next to how those defences are to be applied, by a declaration dated 23 October 1953, the United Kingdom, pursuant to (the former) Article 63 of the European Convention on Human Rights ("ECHR"), extended the ECHR to Gibraltar. On 19 September 2003 in *Financial Services Commissioner -v- The Queen (on the application of a Gibraltar company, X, Y and Z, other respondents)* Civil Appeals 7, 9 & 10 of 2003, Glidewell P. in a judgment with which the other members of the court agreed, set out:

> "The status of the ECHR in and its relationship to the law of Gibraltar has been established by two decisions of this Court, namely: *Schiller v Attorney- General for Gibraltar* [1999] Civil Appeal 3 of 1997; and *Thauerer and Matichek v*

Attorney-General for Gibraltar [2000] Civil Appeal 9 of 2000. These decisions make it clear that the Convention is not incorporated into the law of Gibraltar. In *Thauerer and Matichek* Sir Christopher Staughton JA said at page 6:-

> "However, although the Human Rights Convention is not part of the law of Gibraltar, it may have some influence. When the United Kingdom subscribed to the Convention, in the early nineteen fifties, it did so on its own behalf and also on behalf of dependencies, including Gibraltar. We were told that if Gibraltar does not observe the Convention the United Kingdom is in breach of its international obligations, and liable to be brought before the European Court of Human Rights. It may perhaps follow that legislation since enacted for Gibraltar, whether by Order-in- Council or Ordinance, is presumed to accord with the Convention if that is a possible interpretation: compare K v Secretary of State for the Home Department ex parte Brind [19911] 1 AC 697 per Lord Bridge at p 748, Rantien v Mirror Group Newspapers Ltd [1994] QB 670 at p 691. [...]
>
> The alternative argument is that when a court in Gibraltar is exercising a discretion, it must do so in accordance with the law pronounced by the European Court of Human Rights.""

19. Additionally, section 18(a)(i) of the Gibraltar Constitution Order 2006 provides:

> "(8) (a) A court or tribunal determining a question which has arisen in connection with a right or limitation thereof set out in this Chapter must take into account any –
>
> (i) judgment, decision, declaration or advisory opinion of the European Court of Human Rights;
>
> […]"

20. The importance of this approach to the ECHR is that, in my view, the decision of the House of Lords in *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545 is binding in Gibraltar. In summary, applying the presumption of innocence provisions of article 6(2) of the ECHR, once the accused has sufficiently raised an issue as to one of the "*knowledge*" defences in section 506 (4) and (5) and section 526 (2), (3) and (4) of the Crimes Act 2011, it is for the prosecution to prove the requisite knowledge on the part of the accused beyond reasonable doubt.

21. Against that background, I note that there is authority from the Court of Appeal of Gibraltar that the prosecution is required to prove in a case of simple possession that the accused intended to possess the item which was in fact a controlled drug and had sufficient control of it. In *Hardy v R* [2013 – 15] Gib LR 145 at 151, Sir Paul Kennedy P. in the course of his judgment on the issue of whether the defendant had been wrongly advised to plead guilty rehearsed the following caselaw:

> "In *Lewis* (*R v Lewis* (1988) 87 Cr App R 270), the defendant was the sole tenant of the house where the drugs were found, but he claimed that he did not live there, having it only for social security purposes. Having considered the authorities, and in particular the speeches of the House of Lords in *Warner* (*Warner v Metropolitan Police Commr.*, [1969] 2 AC 256), May LJ said (87 Cr App R at 277):
>
> > "Call it a policy decision if you will, call it a matter for the jury, both Lord Pearce and Lord Wilberforce made clear that the question in the end is whether on the facts the defendant is proved to have or ought to have imputed to him the intention to possess or the knowledge that he does possess what is in fact a prohibited substance."

22. Given the issues in that case, Sir Paul Kennedy concluded that the appellant had been properly advised to plead guilty, given the clear evidence relied on by the Crown that he had sufficient control of the drugs in question (cocaine) and intended to possess them (*viz.* as Kennedy J observed, "*the jury would no doubt have concluded that he intended to possess the drugs, and his proximity was such that in the circumstances he did have sufficient control to support the charge*"). Although the author of the headnote summarised the import of the decision, *inter alia*, as follows "*The test for possession of drugs in the criminal law […] (is) "(t)here ha(s) to be evidence that the claimant knew he possessed, or intended to possess, the cocaine, and had some control over it* […].", in my judgment the court in *Hardy* in fact did no more than apply the approach adopted in England and Wales to the offence of possession of a controlled drug, to which I now turn.

23. Lord Lane CJ in *R v James McNamara* (1988) 87 Cr App R 246 at 252, in a decision approved by the House of Lords in *R v Lambert*, summarised the position as regards the elements that need to be proved by the prosecution on a charge of simple possession by reference to the example of someone with a box, namely that: i) the accused had the

box in his control that, in fact, contained the drug alleged; ii) the accused knew he or she had the box in his or her control; and iii) the accused knew it contained something. Ignorance of, or mistake as to, the quality of the substance in question does not prevent the accused from being in possession of it, provided that the substance turns out to be a controlled drug.

24. If, using that example, those three factors are proved, absent any of the potential defences, the accused will be guilty. However, if the accused seeks to rely on one of the "*knowledge*" defences as set out in sections 5(4) and 28 of the MDA, the evidential burden thereafter shifts to him or her to establish to the satisfaction of the judge that an issue in this regard has been sufficiently "*raised*". If it has, it will be for the prosecution to prove the requisite knowledge beyond reasonable doubt.

25. Ms Christina Wright for the Crown in a somewhat impromptu concession on behalf of the Crown, in answer to a question from the court, accepted that in Gibraltar for simple possession, the prosecution must prove knowledge on the part of the accused that they were in control of the item and, furthermore, that they knew the prohibited item was a controlled drug. In my view, that concession provided a helpful shorthand summary of what will frequently be the position, namely once a defendant has raised a relevant issue as to his or her knowledge, it will be for the prosecution to prove the requisite knowledge beyond reasonable doubt. For instance, if the accused sufficiently "*raises an issue*" to the effect that he or she neither believed nor suspected nor had reason to suspect that he or she was in possession of a controlled drug, the jury will be directed that the prosecution must prove, in accordance with Ms Wright's concession, that i) the defendant had possession/control of the item, ii) knew that he or she was in control/possession of the item, and iii) knew it was a controlled drug or Scheduled Substance.

26. In **summary**, therefore, similar to the position in England and Wales, for the offence of simple possession of a controlled drug in in Gibraltar, the prosecution is required to prove that i) the accused possessed/controlled the item which was is in fact the controlled drug, and ii) the accused knew he or she had the item in his or her possession/control. Moreover, once a defendant has sufficiently raised a relevant issue as to his or her knowledge as set out in section 506 (4) and (5) and section 526 (2), (3)

and (4) of the Crimes Act 2011, it will be for the prosecution to prove the requisite knowledge, beyond reasonable doubt. What the prosecution will be required to prove will depend on the nature of the particular defence that has been raised. That may frequently, in practice, involve the judge giving a straightforward direction to the jury that the prosecution bears the burden of establishing, for instance, that the defendant knew the item in his or her possession was a controlled drug. However, it will be unnecessary for the prosecution to prove the defendant knew it was the **particular** controlled drug or Scheduled Substance as set out in the charge.

27. I turn next to the charge of importing controlled drugs in England & Wales and Gibraltar. The equivalent provisions in England and Wales to the offence in Gibraltar contrary to section 15 of the Imports and Exports Act 1986 are section 170 (2) of the Customs and Excise Management Act 1979 ("CEMA") and the associated sections of the MDA, as follows:

"**Section 170(2) of the CEMA**

> Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion— […]
>
> > (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or […]
>
> he shall be guilty of an offence under this section and may be detained.
>
> **Section 3 of the MDA**
>
> (1) Subject to subsection (2) below—
>
> > (a) the importation of a controlled drug; and
> >
> > (b) the exportation of a controlled drug, are hereby prohibited.
>
> (2) Subsection (1) above does not apply—
>
> (a) to the importation or exportation of a controlled drug which is for the time being excepted from paragraph (a) or, as the case may be, paragraph (b) of

subsection (1) above by regulations under section 7 of this Act or by provision made in a temporary drug class order by virtue of section 7A; or

(b) to the importation or exportation of a controlled drug under and in accordance with the terms of a licence issued by the Secretary of State and in compliance with any conditions attached thereto.

Section 2 of the MDA
In this Act— (a) the expression 'controlled drug' means any substance or product for the time being specified—

(i) in Part 1, II or III of Schedule 2 …"

28. These provisions were considered recently in *R v Datson* [2022] EWCA Crim 1248; [2022] 4 WLR 102 per Sweeney J:

"53. […] the ingredients of the offence of being knowingly concerned in a fraudulent evasion of the prohibition on the importation of goods, contrary to section 170(2) of the CEMA, are well-settled and clear.

54. It is not necessary for the prosecution to prove that the defendant knew what the goods in fact were. What the prosecution must prove is that:

(1) The goods in question were subject to a prohibition on importation under statutory provision.

(2) A fraudulent (ie dishonest and deliberate) evasion has taken place in relation to those goods.

(3) The accused was involved in that fraudulent evasion.

(4) The accused was involved in that fraudulent evasion "knowingly", in that he knew at the time that: (a) the goods (whatever they were) were subject to a prohibition on importation; (b) the evasion was dishonest and deliberate.

55. It is not, of course, necessary for the prosecution to prove that the accused knew the chapter and verse of the prohibition on importation, only that he knew that the goods (whatever they were) were subject to a prohibition. The circumstances of the evasion will often give rise to an inference that such was the case, but wider evidence may also be relevant.

56. The offence therefore expressly makes relevant an accused's knowledge as to the legality of his, or another's, action. A genuine mistaken belief of law, at

> the material time, that goods were not subject to a prohibition, does not amount to knowledge that they were subject to a prohibition. Rather, such a mistaken belief can be relied upon to assert that the prosecution have failed to prove an essential ingredient of the offence."

29. Although the "*knowledge defences*" in section 5(4) and section 28 MDA do not apply, the prosecution in England and Wales needs to prove that the accused was involved in the "*fraudulent evasion*" and knew that the goods (whatever they were) were subject to a prohibition.

30. As set out above, the Gibraltar Parliament has closely mirrored the provisions in England and Wales as regards possession of a controlled drug, in the main using identical, or near-identical, language. A similar approach has been taken to possessing a controlled drug with intent to supply. In stark contrast, the Crown submits that for the offence of importing a controlled drug (for which the maximum sentence is 14 years' imprisonment for Class B), the legislature intended there should be a marked divergence from the approach adopted in England and Wales. It is suggested that having established the actus reus of possession of the controlled substance and the fact of importation, the Crown are not required to prove any element of mens rea, unless the defendant had not known he or she was in possession of the item at all (temporary forgetfulness that he was in possession of the item would not suffice).

31. The hurdle which the Crown would need to surmount in order to justify interpreting section 15 as having created an essentially strict liability offence is a high one. In *B (a minor) (Appellant) and Director of Public Prosecutions (Respondent)* [2000] 2 AC 428, Lord Steyn observed at 472:

> "[…] The sovereignty of Parliament is the paramount principle of our constitution. But Parliament legislates against the background of the principle of legality. […] In *Ex parte Simms* Lord Hoffmann explained the principle, at p. 131:
>
> > "But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic

> process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

This passage admirably captures, if I may say so, the rationale of the principle of legality. In successive editions of his classic work Professor Sir Rupert Cross cited as the paradigm of the principle the '"presumption' that mens rea is required in the case of statutory crimes:" Statutory Interpretation, 3rd ed. (1995), p. 166. Sir Rupert explained that such presumptions are of general application and are not dependent on finding an ambiguity in the text. He said they:

> "not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate as constitutional principles which are not easily displaced by a statutory text."

In other words, in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text. […]"

32. At page 478 of *B (a minor)*, Lord Hutton set out the following:

> "My Lords, the governing principle on the issue of strict liability in a statutory offence was stated by Lord Reid in *Sweet v. Parsley* [1970] A.C. 132, 148-149:
>
> > "whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea … it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly,' is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two

> interpretations, that interpretation which is most favourable to the accused must be adopted."

And Lord Diplock said, at p. 163:

> "[it is] a general principle of construction of any enactment, which creates a criminal offence, that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent. As was said by the Privy Council in *Bank of New South Wales v. Piper* [1897] A.C. 383, 389, 390, the absence of mens rea really consists in such a belief by the accused."

The principle has also been formulated by stating that the requirement for mens rea is only ruled out if by necessary implication this is the effect of the statute. In *Brend v. Wood* (1946) 62 T.L.R. 462, 463 Lord Goddard C.J. said:

> "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

33. It needs to be emphasised that the test is not whether it is a **reasonable** implication that the statute rules out mens rea as a constituent part of the crime—the test is whether it is a **necessary** implication. As regards section 15, there is no express language in the statute or any indication of a necessary implication that the effect of the statute was that the fundamental principles in this context will not apply. Returning to the judgment of Lord Reid in *Sweet v. Parsley* (above), absent a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all the relevant circumstances in order to establish that this must have been the intention of Parliament.

34. It follows that absent a sufficiently compelling justification, the prosecution will be unable sustainably to support the suggestion that the Gibraltar Parliament intended for there to be such a notable difference in the protections afforded to the accused between the lesser offence of possession (in which the prosecution must establish mens rea to

the extent provided by the statutory defences) and the more serious offence of importation (a suggested offence of strict liability). Indeed, if the Appellant's submission is correct, there would be a similar distinction between the offence of possession with intent to supply and that of importation. No such sufficiently compelling justification has been set out. The sole basis is an extract from Hansard from 9 January 1995 when the Hon P. R. Caruana reminded the House of Assembly that as part of a motion which had been agreed unanimously, the House had noted "*that on 6 July 1995 the Government had already taken action to prohibit the importation of rigid inflatable boats and that such types of vessels were the ones allegedly engaged in the transport of drugs from Morocco to Spain*". No material was offered by the prosecution as regards the extent of the problem of drugs being imported into Gibraltar or as to the use of rigid inflatable boats for that purpose (as opposed to trafficking between Morocco and Spain). Otherwise, Ms Wright in her written submissions simply sets out that "*the misuse of drugs is a great social evil and that the presence of drugs in Gibraltar is entirely dependent on the importation of the same*". Many crimes are suggested to constitute a great social evil but that simple assertion, standing alone, will not justify the exceptional step of relieving the prosecution of the burden of proving a guilty mind, for the reasons and applying the test set out above.

35. I need, additionally, to address certain discrete issues that have arisen in this regard. First, the use of the word "*knowingly*" in section 15, when dealing with those "*concerned with any such importation*", is unsurprising given the need to ensure that those who assist in an importation – for instance, dockers who are merely unloading containers at the docks – are not caught by this criminal provision. Furthermore, the definition of "*import*" as provided by section 2 of the Interpretation and General Clauses Act 1962 is that "'*import' means to bring* ***or cause to be brought*** *into Gibraltar by land, sea or air*" (my emphasis). I consider that the wording of this section provides a further obstacle to the Crown's submission that section 15 does not require proof of mens rea. This way of committing the offence clearly involves a mental element: an intention to bring the prohibited item into Gibraltar. Put otherwise, it requires proof that that the accused embarked upon a deliberate and conscious course of action to import the prohibited object.

36. It is suggested that section 15 is based on the former provision applicable in England and Wales, namely section 304 of the Customs and Excise Act 1952, and that the Gibraltar Parliament deliberately did not incorporate the word "knowingly". If that is correct, the two provisions bear little similarity to each other, as they are markedly different vis-à-vis their content, particularly given the ambit of section 304. I note that no basis has been provided as to the suggested link between section 15 and section 304. The latter provides:

> "Without prejudice to any other provision of this Act, if any person --
>
> > (a) knowingly and with intent to defraud Her Majesty of any duty payable thereon, or to evade any prohibition or restriction for the time being in force under or by virtue of any enactment with respect thereto, acquires possession of, or is in any way concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or Queen's warehouse, or which are chargeable with a duty which has not been paid, or with respect to the importation or exportation of which any prohibition or restriction is for the time being in force as aforesaid ; or
> >
> > (b) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition or restriction as aforesaid or of any provision of this Act applicable to those goods,
>
> he may be detained and, save where, in the case of an offence in connection with a prohibition or restriction, a penalty is expressly provided for that offence by the enactment or other instrument imposing the prohibition or restriction, shall be liable to a penalty of three times the value of the goods or one hundred pounds, whichever is the greater, or to imprisonment for a term not exceeding two years, or to both."

37. By the time the Crimes Act 2011 was passed, section 304 had been replaced by section 50 of the Customs and Excise Management Act 1979, which is phrased differently to both sections 304 and section 15. Save to note the absence of the word "*knowingly*" in section 15 before the words "*imports goods*", I have derived little assistance from this submission.

In all the circumstances, particularly bearing in mind that section 15 created a "*truly criminal offence*" and given no persuasive basis has been identified that displaces the presumption that the element of mens rea is required, this Ground of Appeal in my judgment must fail.

38. For section 15, I suggest the burden lies on the prosecution to prove i) that the goods comprise a controlled drug or Scheduled Substance; ii) that the accused was knowingly involved in the importation; and iii) that the accused knew at the time that the goods were a controlled drug or Schedule Substance. It will be unnecessary for the prosecution to prove the accused knew it was the **particular** controlled drug or Scheduled Substance as alleged.

39. The Chief Justice directed the jury that the prosecution must prove the accused i) knew the cannabis had entered into British Gibraltar Territorial Waters **and** ii) knew that the cannabis resin is a prohibited good in Gibraltar. As to i), I consider this was an overly generous direction as far as the Defendants were concerned. In my view, the judge should simply have directed the jury that they needed to be sure the Defendant they were considering was knowingly involved in the importation. He or she did not have to know the vessel had, in fact, entered Gibraltar's Territorial Waters because it would be sufficient that they had intended to enter Gibraltar' jurisdiction, if necessary, whilst en route to the Spanish coast, including as a result of any bad weather, pursuit by the authorities or any other event that may have unexpectedly occurred during such a hazardous enterprise. As long as this reflected the individual Defendant's intention, that would be sufficient to establish he or she was involved in the importation. As far as ii) is concerned, given the Defendants guilty pleas to possession of cannabis, the judge was correct to direct the jury to focus on whether they knew cannabis was a prohibited good in Gibraltar rather than leaving it more generally as to whether the accused knew it was a controlled drug or a Scheduled Substance.

Ground 2

40. The judge addressed this briefly in his judgment. Having dealt, as set out above, with section 15, the Chief Justice observed:

> "Section 16 provides no guidance as to what the mental elements is required, but in my judgment it has to be the same as that provided for the purposes of section 15"

41. The Appellant accepts the presumption that mens rea is required as regards the offence under section 16. However, given the penalty is no more than a fine and the offence is triable only summarily, it is suggested, relying on *Customs and Excise Commissioners, ex parte Claus* (1988) 86 Cr App R 189, that "*strict liability will be more readily inferred than if the offence is triable either way or on indictment*". Since the section is silent as to any mental element, the Appellant contends it follows that it is a "*necessary implication*" that mens rea is excluded. It is highlighted that the Imports and Exports Act 1986, as regards other offences, has expressly included a mental ingredient by reference, for instance, "*knowingly and with intent to defraud*" (section 105) and "*with intent to defraud*" (section 114). The Appellant suggests that the "*intention*" of the Imports and Exports Act 1986 is reflected in its long title "*an Act to control imports into and exports from Gibraltar and to provide for the imposition and collection of duties of customs, and for matters relating thereto*". Finally, it is highlighted that section 16 deals with the importation of prohibited, restricted or regulated goods, and Schedule 1 of the Imports and Exports (Control) Regulations 1987 list at the goods the importation of which are prohibited. It is emphasised that the products or goods set out therein are "*generally potentially harmful or dangerous to society*", such as "*unpasteurized goat's milk cheese*" and "*fresh meat and meat products imported otherwise than for sale for human consumption whose country of origin does not, at the time of importation, have its health marks recognised by the Chief Environmental Health Officer*". The argument, therefore, is that the importation of items such as these pose risks for the public and potential adverse economic consequences. As a consequence, it should be inferred that Parliament decided to create a strict liability offence.

Discussion

42. As with section 15, the slender evidential basis for suggesting there is a compelling justification for concluding that section 16 was intended to be an offence of strict liability is the extract from Hansard from 9 January 1995 in which the Hon P. R. Caruana is recorded as reminding the House of Assembly that as part of a motion which

had been agreed unanimously, the House had noted "*that on 6 July 1995 the Government had already taken action to prohibit the importation of rigid inflatable boats and that such types of vessels were the ones allegedly engaged in the transport of drugs from Morocco to Spain*". This statement was made nearly 30 years ago, ten years after section 16 had been implemented, and it merely records that steps have been taken in this regard in the mid-1990s. Nothing has been put before this court about the seriousness or extent of the suggested problem in 1986 when the legislation was passed, nor what was needed as regards a statutory response in order to address it.

43. The sections relied on by the Appellant, such as section 105 and section 114 of the Imports and Exports Act 1986, are differently worded and entail offences of an unlike kind in that they allege fraud. I do not consider that any material assistance is to be gained from the manner in which they have been framed, given that fraud offences will usually require a careful description of the relevant mental element.

44. The list contained in Schedule 1 of the Imports and Exports (Control) Regulations 1987 is truly heterogeneous, ranging from imitation coins (paragraph 4), Fast Launches (paragraph 9), Gibraltar Postage stamps in consignments containing unused stamps having a total face value in excess of £25 (paragraph 11); and motor vehicles manufactured over 5 years before the date of importation (paragraph 24). It is a varied collection of unconnected items and I do not accept that the contents of Schedule 1 are, as suggested by the Appellant, to be described in a uniform sense as being "*generally potentially harmful or dangerous to society*".

45. I accept that the fact that the offence is summary-only and non-imprisonable is, at least potentially, a material factor (it was suggested to be "noteworthy" by counsel for the prosecutor/applicant in *ex parte Claus*, at page 194). But I do not consider that the reliance by the Appellant on the distinction between "*truly criminal*" and other ("*non-truly"*) criminal offences is of assistance in the context of this case. References in the authorities to this latter group of cases originate in the decision of *Sherras v De Rutzen* [1895] 1 KB 918 and the description given by Wright J at page 922 of "*offences that are not criminal in any real sense"*. The long list he provided included the innocent possession of liquorice by a beer retailer, the innocent possession of adulterated tobacco and food, the innocent possession of game, the unintentional pursuit of game and a bona

fide belief in a legally impossible right to fish, and there were others in a similar vein (see Lord Reid in *Sweet v Parsley* at page 149 and Lord Scarman in *Gammon (Hong Kong) Ltd, Yee Chin Teo & Chak Shing Mak v Attorney-General of Hong Kong* [1985] AC 1 at page 14). These examples of when it was unnecessary to establish a guilty state of mind are at a considerable distance from the circumstances of the present case, in which, in my estimation, a "*truly criminal offence*" was charged. The accused were "*importing*" the rigid inflatable boat during the course of a potentially highly profitable international drug trafficking venture. The means of transportation was a critical part of this serious, ongoing criminal enterprise and, accordingly, proof of guilty knowledge was, in my view, necessary.

46. Returning once more to the judgment of Lord Reid in *Sweet v. Parsley* (above), since the Act does not indicate the offence was intended to be an absolute offence and since there are no relevant circumstances outside the Act which establish this must have been the intention of Parliament, the argument as regards "*necessary implication*" must fail. Although the Chief Justice did not analyse the position regarding section 16 in depth, I agree, therefore, with his conclusion that the same approach is appropriate for sections 15 and 16.

47. For section 16, I suggest the burden lies on the prosecution to prove i) that the importation of the goods was prohibited, restricted or regulated; ii) that the accused was knowingly involved in the importation; and iii) that the accused knew at the time that the importation of the goods was prohibited, restricted or regulated. The prosecution will not need to prove that the accused additionally knew what the imported goods, in fact, were. As Sweeney J set out at [55] in *Datson,* "(*i*)*t is not, of course, necessary for the prosecution to prove that the accused knew the chapter and verse of the prohibition on importation, only that he knew that the goods* ***(whatever they were)*** *were subject to a prohibition. The circumstances of the evasion will often give rise to an inference that such was the case, but wider evidence may also be relevant.*" (my emphasis)

48. As relevant, the Chief Justice directed the jury that the Defendant in question needed to know i) that he had entered the territorial jurisdiction of Gibraltar **and** ii) that the vessel was a prohibited good in Gibraltar. In accordance with my conclusions in [40] above, as to i), I consider this was an overly generous direction as far as the Defendants

were concerned. In my view, the judge should simply have directed the jury that they needed to be sure the Defendant they were considering was knowingly involved in the importation. He or she did not have to know the vessel had, in fact, entered Gibraltar's Territorial Waters because it would be sufficient that they had intended to enter Gibraltar' jurisdiction, if necessary, whilst en route to the Spanish coast, including as a result of any bad weather, pursuit by the authorities or any other event that may have unexpectedly occurred during such a hazardous enterprise. As long as this reflected the individual Defendant's intention, that would be sufficient to establish he or she was involved in the importation. The direction as to ii) was appropriate given the circumstances of the case.

Conclusion

49. In my view the Appellant's submissions on both Grounds of Appeal are unpersuasive, for the reasons set out above. I would dismiss this appeal.

SIR NIGEL DAVIS, JA.

I agree

SIR MAURICE KAY, P.

I also agree, accordingly the appeal is dismissed.