Privy Council Appeal No. 6 of 1990

Somchai Liangsiriprasert *Appellant*

v.

(1) The Government of the United States of America and
(2) The Lai Chi Kok Reception Centre *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY 1990

Present at the hearing:-

LORD TEMPLEMAN
LORD ROSKILL
LORD GRIFFITHS
LORD GOFF OF CHIEVELEY
LORD LOWRY

*[Delivered by **Lord Griffiths**]*

This appeal concerns the criminal international drug trade. The drug in this case is heroin. The Federal Drug Enforcement Administration of the United States have identified the appellant as a major criminal exporter of heroin from Thailand to the United States and seek his extradition from Hong Kong to stand trial in the United States. The Magistrate in Hong Kong committed the appellant to prison to await extradition. The High Court dismissed the appellant's application for habeas corpus in which he alleged that he had been unlawfully committed by the Magistrate, and the Court of Appeal dismissed the appellant's appeal from the judgment of the High Court. The appellant will therefore be extradited to the United States unless this appeal succeeds.

The facts.

The unchallenged facts placed in evidence before the Magistrate are summarised in the judgment of the Court of Appeal which with some slight expansion their Lordships will adopt:-

> "Acting upon information about the appellant received over a number of years by the Federal Drug Enforcement Administration of the USA

('DEA'), in August 1988, a plan was devised that one of their undercover agents would be introduced to the appellant in Thailand. We will use the name 'Mike' by which the agent was known. Mike, who is Chinese and was born in Hong Kong, was to pose as a member of a Chinese organisation in New York which is anxious to obtain a new source of heroin to supply to its customers in New York.

Mike met the appellant on 14th September 1988 in Bangkok and asked if he could supply heroin for the organisation's New York market. The appellant said that he had '40 pieces of stuff' readily available, 'up North'. This was understood as a reference to 40 units, (i.e 28 kilos) of heroin. The appellant told Mike that he would go 'up North' and have the 'stuff' (the heroin) brought down to Bangkok in 2 or 3 days' time. The appellant assured Mike that he had connections so there would be no problems in getting the heroin out of Bangkok. It could be sent to New York, via the Philippines, in two suitcases through his contacts in the airlines.

It was agreed that the heroin would be released on a down payment by Mike of US$50,000. In answer to the appellant's enquiry, Mike told him that they should be able to sell the heroin in New York for US$65,000 per unit. The appellant agreed to this price. It was also agreed that if the heroin was successfully smuggled into New York in two suitcases each containing 20 units, Mike's share in the first suitcase shipment would be 10 units; the appellant would have 8 shares and the remaining 2 shares would be owned by the other man (also an agent) who was with Mike at the time of the discussions. The appellant agreed to meet Mike when the 40 units reached Bangkok.

On 16th September there was a meeting between Mike and Sutham Chokvanitphong ('S.C.') who is the appellant's cousin. S.C. was there, he said, at the appellant's behest, to tell Mike that the appellant would return to Bangkok on the following day after getting the package together.

On 17th September the appellant duly met Mike again and they talked about the appellant's experience of imprisonment in the USA and the need to be careful in a number of ways. When they came to discuss the shipment of the heroin to New York, Mike (who again was accompanied by the other agent) said that his people had arranged for a diplomatic courier to come to Bangkok and take the heroin to New York. The appellant fell in with this new plan and agreed that it would be better to send it through the diplomatic bag than through the Philippines. The appellant offered to give the heroin to Mike that day but Mike said his people were not ready.

The appellant said that if he were to deliver the whole consignment in one, the US$50,000 down payment would not be enough. The 'front price' per unit would be US$4,800. They talked about the appellant's activities in the drugs world and arranged that the appellant would contact Mike about the delivery plans later that evening. S.C. met Mike in the evening and told him that the police had searched the place where the heroin was hidden but it had been moved to safety before the police arrived. On this occasion, too, Mike had the other agent with him. There were further discussions about delivery plans.

On 18th September S.C. met Mike and his companion again and informed him that the appellant was finalising the plan for delivery. The three men met again on the following day and had discussions about possible future deals.

On the next day, 20th September, the same three men met again. This time the appellant was also present. The appellant told Mike that delivery would take place at the back of the parking lot of the hotel outside which they were talking while seated in the appellant's car. At the appellant's request, Mike went to his hotel room and came back with 1,200,000 Thai Bahts (the approximate equivalent of US$50,000), which had been provided by the DEA. Mike gave the money, in a brown bag, to the appellant. The appellant said it would take between two to three hours for the delivery to be made and told Mike to wait for S.C. at the hotel. When these two eventually met at about midnight, S.C. informed Mike that delivery would have to take place on the next day because of police activities.

At about 6.00 a.m. on the following morning, 21st September, S.C. returned and took Mike to a side street near the hotel parking lot. Two men drove up in a car. S.C. said that they were his 'boys'. The boot of the car was opened and S.C. invited Mike to inspect the heroin. Mike saw two bags in the boot. He opened them and looked at their contents - compressed bricks wrapped in brown paper and plastic. S.C. told his 'boys' to drive Mike back to the hotel, which they did.

Mike took the two bags to his hotel room and opened them in the presence of another DEA agent and a lieutenant of the Thai police. He counted a total of 20 compressed bricks. Two of the bricks were not of 'unit' size. Mike went down to the coffee shop of the hotel where S.C. was waiting and told him of the discrepancy. S.C. said he would look into the matter and left. The bricks were counted again by the DEA agent and the police lieutenant, and the latter took them away.

Later that day, the appellant met Mike at the hotel and said that he was pleased that everything had gone so well. The appellant acknowledged that the delivery, by weight, amounted to 19 units and not 20 as had been agreed. There were further meetings between Mike, the appellant and S.C. on 22nd and 24th September. It was agreed that the two men would meet Mike in Hong Kong on or about 26th September to collect their share of the proceeds from the sale of the heroin in New York. The appellant said that the proceeds could be invested in the next shipment. Mike had paid the appellant another 70,000 Thai Bahts, the outstanding balance of the 'front money' on 22nd September.

On 23rd September another agent took the 20 bricks from the Thai police lieutenant and put 10 of them into a diplomatic pouch. The two men then flew to New York with the pouch, arriving on the same day.

On 27th September, in accordance with arrangements made on 24th September, the appellant and S.C. met Mike at an hotel in Hong Kong and they were arrested by the Hong Kong police.

There was also affidavit evidence before the magistrate that the 10 bricks, which weighed 6.6 kilos contained heroin hydrochloride with a purity of 86%. The evidence also showed that 20 units of that quality of heroin would command a wholesale price in New York of between US$2,240,000 and US$2,280,000. The approximate retail, or 'street level', value of the heroin would be between US$22 million and US$28 million."

Upon these facts the appellant and S.C. were indicted by a grand jury in the United States for drug offences and a warrant for their arrest was issued in the United States for:-

"Conspiracy to import into the U.S. in excess of 1 kilogram of heroin;

Importation into the U.S. of in excess of 1 kilogram of heroin and

Distribution in Bangkok, Thailand of in excess of 1 kilogram of heroin with intent the heroin imported into U.S."

At the request of the United States the Governor of Hong Kong issued to the Magistrate his order to proceed in accordance with the terms of the Extradition Acts 1870-1935 in respect of the following crimes:-

"Crime 1:

Somchai LIANGSIRIPRASERT and Sutham CHOKVANITPHONG (also known as 'Ah Bai'), on or about and between September 1, 1988 and September 27, 1988 both dates being approximate and inclusive, did conspire with other persons to traffic in a dangerous drug, contrary to Common Law and section 39 of the Dangerous Drugs Ordinance, Cap. 134.

Crime 2:

Somchai LIANGSIRIPRASERT and Sutham CHOKVANITPHONG (also known as 'Ah Bai'), on or about September 21, 1988, did traffic in a dangerous drug, contrary to section 4 of the Dangerous Drugs Ordinance, Cap. 134.

Crime 3:

Somchai LIANGSIRIPRASERT and Sutham CHOKVANITPHONG (also known as 'Ah Bai'), on or about September 23, 1988 did traffic in a dangerous drug, contrary to section 4 of the Dangerous Drugs Ordinance, Cap. 134.

Crime 4:

Somchai LIANGSIRIPRASERT and Sutham CHOKVANITPHONG (also known as 'Ah Bai'), between September 14, 1988 and September 22, 1988 both dates being approximate and inclusive, did do acts preparatory to trafficking in a dangerous drug, contrary to section 4(1)(c) of the Dangerous Drugs Ordinance, Cap. 134."

The Extradition (Hong Kong) Ordinance (Cap 236) provides by sections 2 and 3 that the powers etc given to the Secretary of State and the police magistrate in the United Kingdom by the Extradition Acts 1870 to 1935 may be exercised, respectively by the Governor of Hong Kong and by any magistrate.

It is common ground that these crimes are all extradition crimes and that the task of the Magistrate was to apply Hong Kong law and to consider whether the evidence disclosed a *prima facie* case against the appellant upon the assumption that the drugs were to be imported into Hong Kong rather than into the United States. (See section 10 Extradition Act and *In re Nielson* [1984] 1 A.C. 606.)

Before turning to the appellant's specific submissions relating to the four crimes it will be convenient first to deal with two submissions of a more general nature. The appellant submits that the DEA agents were not in law co-conspirators with the appellant and SC. The

respondent did not argue to the contrary and the High Court judge and the Court of Appeal dealt with the case upon this assumption. Whether or not the DEA agents should be regarded as co-conspirators is not an easy question. They were obviously not co-conspirators to a plan to sell heroin on the streets of the United States as were the appellant and SC. On the other hand it can be argued that the DEA agents had taken it upon themselves to break the law by importing heroin into the USA (Hong Kong) and however laudable their motives and however unlikely it is that they would be prosecuted or punished they are in law to be regarded as co-conspirators in the agreement to break the law by importing the drugs and thus to traffic in drugs; support for this view is to be found in the Australian cases of *A. v. Hayden* (No.2) [1984] 156 C.L.R. 532 and *David Yung Tee Chow* 30 A.C.R. 103. For the purpose of deciding this appeal their Lordships do not find it necessary to decide this question and would not wish to do so without hearing full argument. Their Lordships will therefore assume as did the Court of Appeal that the DEA agents were not co-conspirators with the appellant and SC.

The second submission arises from the fact that the 1924 Extradition Treaty between the USA and Siam does not list drug offences as extraditable crimes. And so although the local police in Thailand were co-operating with the DEA, as appears from the recital of the facts, the appellant and SC could not be extradited to the USA from Thailand. It was obviously for this reason that the DEA suggested payment in Hong Kong so that the appellant and SC could be arrested in Hong Kong and extradited from there to the USA.

The submission of the appellant is that it would be oppressive and an abuse of process and would not conform with international comity for a government agency to entice a criminal to a jurisdiction from which extradition is available. This submission was not made either before the magistrate or on the application for habeas corpus and although raised in the Court of Appeal it was not specifically dealt with in the judgment. Their Lordships are not surprised as in their view it is entirely without merit. Although drug offences have not yet been made an extradition crime between the United States and Thailand the death penalty for drug offences is still retained in Thailand and the Thai police were co-operating with the DEA agents in their attempt to bring the appellant to justice in the USA which was the country destined to suffer from their drug dealings. In these circumstances to suggest that extradition should be refused on grounds of international comity is unsustainable. If Thailand had wished to deal with the appellant and SC they clearly had them within their grasp. The irresistible inference is that Thailand preferred to go along with the DEA plan to bring the appellant and SC to justice in the USA.

As to the suggestion that it was oppressive or an abuse of process the short answer is that international crime has to be fought by international co-operation between law enforcement agencies. It is notoriously difficult to apprehend those at the centre of the drug trade; it is only their couriers who are usually caught. If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red letter day for the drug barons. The appellant relied upon *R. v. Bow Street Magistrates ex parte Mackeson* (1981) 75 Cr.App.R. 24 but that was an entirely different case in which a British citizen wanted for fraud in England was removed from Zimbabwe-Rhodesia by unlawful means, namely by a deportation order which was in the circumstances a disguised form of extradition and which circumvented all the safeguards for an accused which are built into the extradition process. The Divisional Court cited with approval from the judgment of Woodhouse J. in *Hartley* [1978] 2 NZLR 199, in which he stressed the importance of following the correct statutory procedures for extradition, and exercised their discretion to prohibit the Bow Street Magistrate committing the applicant to stand trial on charges preferred against him on his return under the deportation order: to do otherwise would have been to condone a flagrant abuse of extradition procedures.

In the present case the appellant and SC came to Hong Kong of their own free will to collect, as they thought, the illicit profits of their heroin trade. They were present in Hong Kong not because of any unlawful conduct of the authorities but because of their own criminality and greed. The proper extradition procedures have been observed and their Lordships reject without hesitation that it is in the circumstances of this case oppressive or an abuse of the judicial process for the United States to seek their extradition.

Their Lordships now turn to the appellant's submissions in respect of the particular crimes with which he and SC were charged.

Crime 1

The charge is of a conspiracy to traffic in a dangerous drug contrary to common law and section 39 of the Dangerous Drugs Ordinance. One submission may be shortly disposed of. The appellant submitted that the reference to section 39 of the Dangerous Drugs Ordinance imported an allegation of statutory conspiracy and therefore had no application to a conspiracy entered into abroad or alternatively was *ultra vires* the powers of the Hong Kong legislature. This submission was neither raised in any lower court

nor foreshadowed in the appellant's case. It is without substance. Section 39 is not an offence- creating section but is a section which limits the penalty for conspiracy, which at common law is at large, to the penalty for the offence to which the conspiracy relates. It also provides that special rules of evidence which apply to proof of offences under the Ordinance shall also apply to proof of a conspiracy to commit such offences. The reference to section 39 in the charge does no more than alert the accused to those penalties and, more importantly in an extradition case, to the special rules of evidence. No point arises on evidence in this case and it is conceded that, subject to the submissions which follow, the evidence established a *prima facie* case of conspiracy against the appellant and SC.

The law of conspiracy in Hong Kong is the same as the common law of conspiracy in England. The appellant submits that a conspiracy entered into abroad is not a common law crime unless either some overt act pursuant to the conspiracy takes place in England, or alternatively at least the impact of the conspiracy is felt in England. The appellant further submits that the actions of the DEA agents in using the diplomatic bag to import the heroin into the United States did not constitute an overt act pursuant to conspiracy, because the DEA agents were neither co-conspirators nor innocent agents of the appellant.

As a broad general statement it is true to say that English criminal law is local in its effect and that the common law does not concern itself with crimes committed abroad. The reason for this is obvious; the criminal law is developed to protect English society and not that of other nations which must be left to make and enforce such laws as they see fit to protect their own societies. To put the matter bluntly it is no direct concern of English society if a crime is committed in another country. It was for this reason that the law of extradition was introduced between civilised nations so that fugitive offenders might be returned for trial in the country against whose laws they had offended.

There have, however, from medieval times been a number of exceptions to this general principle, such as treason, piracy and murder committed by a British subject abroad. In more recent times the English Parliament has legislated to make certain crimes committed abroad triable in England, particularly those crimes which have been the subject of international conventions. There has as yet however been no decision in which it has been held that a conspiracy entered into abroad to commit a crime in England is a common law crime triable in English courts in the absence of any overt act pursuant to the conspiracy taking place in England. There are however a number

of dicta in judgments and academic commentaries suggesting that it should be so.

In *Board of Trade v. Owen* [1957] A.C. 602 the respondent had been convicted of a conspiracy entered into in London to defraud the Export Control Department in the Federal Republic of Germany into granting an export licence for certain metals by fraudulently representing that the metals would be exported to Ireland when in fact they were to be exported to the Soviet bloc. The House of Lords upheld the decision of the Court of Appeal to quash the conviction and held that a conspiracy in England to commit a crime abroad was not indictable unless the contemplated crime was one for which an indictment would lie in England. In the course of his speech, with which all their Lordships agreed, Lord Tucker said (at page 625):-

> "The gist of the offence being the agreement, whether or not the object is attained, it may be asked why should it not be indictable if the object is situate abroad. I think the answer to this is that it is necessary to recognize the offence to aid in the preservation of the Queen's peace and the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned. Furthermore, historically it appears to be closely allied in its development to the law with regard to attempts."

Then after citing a substantial passage from Holdsworth's History of English Law, Lord Tucker continued (at page 626):-

> "Accepting the above as the historical basis of the crime of conspiracy, it seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt, and that it is all part and parcel of the preservation of the Queen's peace within the realm. I cannot, therefore, accept the view that the locality of the acts to be done and of the object to be attained are matters irrelevant to the criminality of the agreement."

This reasoning leads to the conclusion that as the defrauding of Germans in Germany is not a threat to English society such a crime should be dealt with by the Germans and not by the English courts and that if the English courts will not allow an indictment for the substantive crime no indictment will lie in respect of the conspiracy. But looking at the obverse side of the coin what should be the position if a conspiracy is entered into in Germany to commit a crime in England? Such a conspiracy is obviously a threat to English and not to German society and it would appear that the Court of Criminal Appeal and Lord Tucker considered

that such a conspiracy would constitute an indictable crime in this country for Lord Tucker cited (at page 627) the following passage from the judgment of the Court of Criminal Appeal [1957] 1 Q.B. 174, 191:-

> "In our opinion the true rule is that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. That does not mean that there must always be found a statutory provision declaring that the crime is punishable here because if persons do acts abroad for the purpose of defrauding someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable."

Lord Tucker (at page 634) also expressly reserved the following question:-

> "... I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad."

In *Regina v. Baxter* [1972] 1 Q.B. 1 the defendant posted in Northern Ireland letters written by him and addressed to pools promoters in Liverpool falsely claiming that he had correctly forecast the results of certain competitions and was entitled to the winnings. The claims were unsuccessful and the defendant was charged on three counts of attempting to obtain money by deception. Before arraignment the defence submitted that the court had no jurisdiction to try the defendant as the attempts were completed when the letters were posted in Northern Ireland and that no criminal act had been committed within the jurisdiction of the English courts. The recorder ruled that the court had jurisdiction and the defendant was convicted. The Court of Appeal upheld the conviction on the ground that the attempt was a continuing offence and occurred at the moment of discovery when the three letters were seen by the pools promoters in Liverpool and accordingly the crime was committed within the jurisdiction; or alternatively a part of the attempt was the use of the post facilities within the jurisdiction. Commenting on this decision in *D.P.P. v. Stonehouse* [1978] A.C. 55 Lord Diplock said (at page 67):-

> "For my part I think there would have been jurisdiction in *Baxter's* case even if the fraudulent claims had been intercepted in the post whilst still in Northern Ireland."

In *D.P.P. v. Doot* [1973] A.C. 807 the respondents, American citizens, formed a plan abroad to import cannabis into the United States by way of England. Two vans in which cannabis was concealed were shipped

from Morocco to Southampton. The cannabis in one van was discovered in Southampton and in the other van in Liverpool from whence it was intended to ship the vans to the United States. The respondents were charged with, *inter alia*, conspiracy to import dangerous drugs. At the trial they contended that the court had no jurisdiction to try them on that count since the conspiracy had been entered into abroad. Lawson J. overruled that submission but the Court of Appeal quashed the respondents' convictions holding that the offence of conspiracy was completed when the agreement was made.

The following point was certified for consideration by the House of Lords:-

> "Whether an agreement made outside the jurisdiction of the English courts to import a dangerous drug into England and carried out by importing it into England is a conspiracy which can be tried in England."

The House of Lords answered the question in the affirmative and restored the convictions.

As there had been acts performed in England, namely the importation of the cannabis, in pursuance of the conspiracy, Lord Pearson who gave the leading speech confined himself to that situation. He said (at page 827):-

> "On principle, apart from authority, I think (and it would seem the Court of Appeal also thought) that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England."

Lord Wilberforce expressly reserved his opinion on the question of whether a conspiracy formed abroad to do an illegal act in England, but not actually implemented in England could be tried in England (see page 818). The general tenor of Lord Salmon's speech appears to be in favour of the view that a conspiracy entered into abroad to commit a crime in England is triable in England even if no other act pursuant to the conspiracy takes place in England. Lord Salmon started his discussion of the problem by saying (at page 832):-

> "It is obvious that a conspiracy to carry out a bank robbery in London is equally a threat to the Queen's peace whether it is hatched, say, in Birmingham or in Brussels. Accordingly, having regard to the special nature of the offence a conspiracy to commit a crime in England is, in my opinion, an offence against the common law even when entered into abroad, certainly if acts in furtherance of the conspiracy are done in this country. There can in such circumstances be no doubt that the conspiracy is in fact as well as in theory a real threat to the Queen's peace."

And he finished his discussion by saying (at page 835):-

> "My Lords, even if I am wrong in thinking that a conspiracy hatched abroad to commit a crime in this country may be a common law offence because it endangers the Queen's peace, I agree that the convictions for conspiracy against these respondents can be supported on another ground, namely, that they conspired together in this country notwithstanding the fact that they were abroad when they entered into the agreement which was the essence of the conspiracy. That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed."

In *D.P.P. v. Stonehouse (supra)* the facts were that soon after insuring his life in England for the benefit of his wife the defendant, a man prominent in English public life, fabricated the appearance of his death by drowning abroad. He was charged in England with attempting to obtain in England property by deception. He was convicted and the Court of Appeal upheld his conviction but certified the following point of law:-

> "Whether the offence of attempting on November 20, 1974, to obtain property in England by deception, the final act alleged to constitute the offence of attempt having occurred outside the jurisdiction of the English courts, is triable in an English court, all the remaining acts necessary to constitute the complete offence being intended to take place in England."

The House of Lords were unanimous in their view that the charge was justiciable in England. The majority laid stress upon the fact that the effects of the defendant's actions were felt in England through the false reports of his death in the media which he intended and anticipated would result from his faked death and which would be followed by false claims being made upon the insurance companies.

The appellant relies in particular upon the following passage in the speech of Lord Keith of Kinkel (at page 93):-

> "In my opinion it is not the present law of England that an offence is committed if no effect of an act done abroad is felt there, even though it was the intention that it should be. Thus if a person on the Scottish bank of the Tweed, where it forms the border between Scotland and England, were to fire a rifle at someone on the English bank, with intent to kill him, and actually did so, he would be guilty of murder under English law. If he fired with similar intent but missed his intended victim, he would be guilty of attempted murder under English law, because the presence of the bullet in England

would be an intended effect of his act. But if he pressed the trigger and his weapon misfired, he would be guilty of no offence under the law of England, provided at least that the intended victim was unaware of the attempt, since no effect would have been felt there. If, however, the intended victim were aware of the rifle being pointed at him, and was thus put into a state of alarm, an effect would have been felt in England and the crime would have been committed there. The result may seem illogical, and there would appear to be nothing contrary to international comity in holding that an act done abroad intended to result in damage in England, but which for some reason independent of the actor's volition had no effect there, was justiciable in England. But if that were to be the law, I consider that it would require to be enacted by Parliament.

Turning to the facts of this case, I am of opinion that the actions of the appellant in Florida, which consisted in staging a scene intended to deceive people into believing that he had drowned, had effects which were intentionally felt in England."

Lord Diplock, however, at page 67, expressed a different view. He pointed out that if the defendant's plan had succeeded and the insurance companies had been defrauded his completed crime would have been justiciable in the English courts and he continued:-

"The accused had done all the physical acts lying within his power that were needed to comply with the definition of a complete crime justiciable by an English court; and his state of mind at the time he did them also satisfied the definition of that crime. All that was left was for him not to be found out before the intended consequence could occur. Once it is appreciated that territorial jurisdiction over a 'result-crime' does not depend upon acts done by the offender in England but on consequences which he causes to occur in England, I see no ground for holding that an attempt to commit a crime which, if the attempt succeeded, would be justiciable in England does not also fall within the jurisdiction of the English courts, notwithstanding that the physical acts intended to produce the proscribed consequences in England were all of them done abroad. ... If in order to found jurisdiction it were necessary to prove that something had been actually caused to happen in England by the acts done by the offender abroad a qualified answer to the certified question would be called for. I do not think that it is necessary. So I would answer with an unqualified 'Yes'."

The editors of the sixth edition of Smith and Hogan's Criminal Law support Lord Diplock's view of the law. At page 299 they wrote:-

"It is submitted that, where D has gone beyond mere preparation, the better view is that it is immaterial that no effect occurs in England. Why should the result have been different if D had been 'rescued' from the sea and confessed before any report of his death appeared in England?"

The editors express a similar view in respect of conspiracy (at page 269):-

"At common law, an agreement abroad to commit a crime in England is indictable if the parties act in England in concert and in pursuance of the agreement. Whether such a conspiracy is indictable if the parties take no steps in England to implement it has not been decided. It is submitted that the better view is that any of the parties entering the jurisdiction during the continuance of the agreement should be indictable at common law."

In *Attorney General v. Yeung Sun-shun* [1987] HKLR 987 the respondents had been charged with conspiracy to import elephant tusks into Hong Kong in breach of the Import and Export Ordinance and the Animals and Plants (Protection of Endangered Species) Ordinance. The respondents had agreed in Macau to ship the tusks to Hong Kong. They bribed the assistant purser to misdescribe the ivory on the cargo manifest. The offence was discovered when the vessel carrying the tusks was intercepted by customs officers in Hong Kong waters. A district judge who tried the case acquitted the respondents on the ground that not one act had been done by any conspirator in Hong Kong to facilitate the importation of the tusks into Hong Kong. The Court of Appeal reversed his finding. The Chief Justice said (at page 997):-

"As soon as the ivory was carried into Hong Kong waters, these were acts of performance of the conspiracy within the jurisdiction. They were innocent acts, in the case of the master of the vessel, who had no knowledge of the offence, and guilty acts by the assistant purser, who had misdescribed the ivory on the manifest and knew what was contemplated."

The respondents rely upon the following obiter observations of the Chief Justice (at page 998):-

"It has not been necessary for us to consider the further question of whether a conspiracy, formed abroad, to commit an offence in Hong Kong, is within the jurisdiction of the Hong Kong courts if no acts in furtherance of the conspiracy are committed within Hong Kong.

In principle, however, we are not unsympathetic to the view, expressed in recent cases, that the territorial basis for jurisdiction is becoming outmoded, and that in such circumstances the Hong

Kong courts should assume jurisdiction upon the basis that:

(a) the conspiracy is aimed at Hong Kong and intended to bring about a breach of the peace here;

(b) since the conspiracy is not directed at the residents of the country where it is entered into, the courts of that country could raise no reasonable objection to this course on the ground of comity.

This approach finds support in *Treacy v. D.P.P.* [1971] A.C. 537, per Lord Diplock at p. 561-2; *Libman v. R.* (1985) 21 C.C.C. (3d) 206, in the Supreme Court of Canada, and *Mharapara v. The State* [1986] LRC (Const) 235, in Zimbabwe.

Thus those who conspire in Macau to send a parcel bomb to Hong Kong should be triable here, even if for some reason the parcel does not arrive within the Territory."

The passage in *Treacy* to which the Chief Justice refers is the celebrated discussion by Lord Diplock of the bounds of comity and the judgment of La Forest J. in *Libman* contains a most valuable analysis of the English authorities on the justiciability of crime in the English courts which ends with the following conclusion (at page 221):-

"The English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country."

Apart from the dictum of Lord Keith in *Stonehouse* there is no affirmative statement in the authorities that an inchoate crime is not justiciable in England unless its effect or some action pursuant to the crime takes place in England, and there are the dicta of the Court of Appeal, Lord Diplock and Lord Salmon to the contrary effect. As Lord Tucker pointed out in *Owen*, (see *Board of Trade v. Owen* [1957] A.C. 626) the inchoate crimes of conspiracy, attempt and incitement developed with the principal object of frustrating the commission of a contemplated crime by arresting and punishing the offenders before they committed the

crime. If the inchoate crime is aimed at England with the consequent injury to English society why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures? If evidence is obtained that a terrorist cell operating abroad is planning a bombing campaign in London what sense can there be in the authorities holding their hand and not acting until the cell comes to England to plant the bombs, with the risk that the terrorists may slip through the net? Extradition should be sought before they have a chance to put their plan into action and they should be tried for the conspiracy or the attempt as the case may be. Furthermore, if one of the conspirators should chance to come to England, for whatever purpose, he should be liable to arrest and trial for the criminal agreement he has entered into abroad.

The Law Commission in their Working Paper No. 29- "Territorial and extraterritorial extent of the criminal law" published in 1970 said (at para. 96):-

> "As to conspiracies abroad to commit offences in England, we take the view that such conspiracies should not constitute offences in English Law unless overt acts pursuant thereto take place in England."

But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.

Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong. This then is a sufficient reason to justify the magistrate's order under crime 1.

There is a further ground on which the magistrate's order under crime 1 is justified and this applies also to crime 3 which alleges trafficking contrary to section 4 of the Dangerous Drugs Ordinance on 23rd September 1988. This was the date on which the DEA agents took the drugs into the United States in the diplomatic bag and thus imported them into the United States (or Hong Kong for the purposes of the extradition proceedings).

The drugs were imported into Hong Kong (US) in breach of section 4 of the Ordinance and in the manner intended by the appellant and SC. If the DEA agents had been co-conspirators or if they had been innocent couriers unaware of what they were carrying both the appellant and SC would have been criminally liable for the importation. The importation would have been an overt act carried out in pursuance of the conspiracy, thus bringing the case within the direct authority of *D.P.P. v. Doot (supra)* for the purpose of crime 1 and would have established trafficking by importation for the purpose of crime 3. The appellant however submits that the fact that the persons whom the appellant and SC believed were parties to their criminal plan to sell heroin in the United States were in truth law officers breaks the chain of causation and that the importation cannot be attributed to criminal activity on their part. Their Lordships cannot accept this submission. The heroin was imported illegally and as intended by the conspirators, the criminality of their intent never varied and they cannot be permitted to take advantage of the fact that those carrying out their plan intended to hand them over to justice. If the appellant's submission is accepted it will go far to frustrate the actions of undercover law officers who penetrate drug dealing rings and obtain evidence by appearing to co-operate in their plans.

Crimes 2 and 4

These charges relate to the activities of the appellant and SC in Thailand. Crime 2 charges trafficking contrary to section 4 of the Ordinance on 21st September 1988 which was the day on which the heroin was handed to the DEA agents in Bangkok. Crime 4 charges doing acts preparatory to trafficking in a dangerous drug contrary to section 4(1)(C) of the Ordinance between 14th September and 22nd September 1988 which covers events in Thailand from the first meeting between the appellant and the DEA agents- the appellant's journey to the north of the country to collect the drugs and the payment of the balance of the "upfront" money for the heroin which the appellant handed over to the DEA agents. The activities of the appellant covered by both crimes all took place in Thailand and it is submitted that they do not contravene the Ordinance because on its true construction section 4 of the Ordinance has no extraterritorial effect, or alternatively if it does

purport to have extraterritorial effect it was *ultra vires* the power of the Hong Kong legislature to pass such legislation.

When approaching the construction of a statute, particularly a criminal statute there is a strong presumption that it is not intended to have extraterritorial effect and clear and specific words are required to show the contrary: see *Air India v. Wiggins* [1980] 1 C.A.R. 213 and *Holmes v. Bangladesh Biman Corporation* [1989] A.C. 1112. This presumption arises from the assumption that the legislature does not intend to intrude upon the affairs of other countries which should be left to order affairs within their own boundaries by their own laws.

Section 4 under which the charges are laid provides:-

"4(1) Save under and in accordance with this Ordinance or a licence granted by the Director hereunder, no person shall on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong -

(a) traffic in a dangerous drug;

(b) offer to traffic in a dangerous drug or in a substance he believes to be a dangerous drug; or

(c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug or in a substance he believes to be a dangerous drug.

(2) Subsection (1) shall apply whether or not the dangerous drug is in Hong Kong or is to be imported into Hong Kong or is ascertained, appropriated or in existence."

Section 2 defines trafficking and importing:-

"'trafficking' in relation to a dangerous drug, includes importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drug, and 'traffic in a dangerous drug' shall be construed accordingly;

'import' means to bring or cause to be brought into Hong Kong or any other country, as the case may be, by land, air or water;"

If this section is intended to have extraterritorial effect it would mean that the Hong Kong legislature has taken it upon itself to make the supply of a drug such as barbitone, (a dangerous drug within the meaning of Schedule 1) by a dentist to a patient in Bangkok a criminal act unless the dentist is registered under the Hong Kong Dentists Registration Ordinance (see the

definition of trafficking which includes supply and section 22 and section 2 which authorise a registered dentist to supply drugs for the purpose of his practice). Such an absurd example merely shows that it cannot have been the intention to take a power to treat, as criminal, activity taking place in its entirety in another country. Furthermore the wording of section 4(1) so far from expressing a clear extraterritorial effect points to the contrary conclusion. The words "whether or not such other person is in Hong Kong" in section 4(1) would be superfluous if the section was intended to have extraterritorial effect; the phrase is used in contrast to "the person trafficking" who is by implication assumed to be in Hong Kong.

It is true that the activity in Thailand covered by crimes 2 and 4 was intended to have the ultimate result of importation into Hong Kong (US) but that feature of the activity cannot clothe section 4(1) with extraterritorial effect in respect of activity "aimed at Hong Kong", because sub-section (2) provides that sub-section (1) shall apply "whether or not the dangerous drug is to be imported into Hong Kong". So if sub-section (1) is to be given extraterritorial effect it must cover all extraterritorial trafficking and not merely trafficking aimed at importing drugs into Hong Kong. Their Lordships are satisfied, for the reasons they have given, that section 4(1) cannot bear this construction and that it is limited to activity of an accused within the territory of Hong Kong.

In the light of this construction of the Ordinance it is unnecessary for their Lordships to express any view on the more far-reaching submission that it was in any event *ultra vires* the power of the Hong Kong legislature to legislate with extraterritorial effect.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed in relation to the magistrate's order on crimes 1 and 3 but that the appeal ought to be allowed in relation to the magistrate's order on crimes 2 and 4 and the order quashed to that extent. In relation to crimes 1 and 3 the appellant ought to remain in custody to await extradition.