

JERSEY / JUDGMENT

AG -v- Jackson [2010]

JRC 047 (01 March 2010)

[2010] JRC 047

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JUDGMENT

THE DEPUTY BAILIFF: 1. Article 8 of the Medicines (Jersey) Law 1995 (the "Medicines Law") is in these terms:- "No person shall import any medicinal product except in accordance with the product licence". 2. Article 44(1) of the same law provides:- "Subject to Article 45, a person who contravenes a provision of Article 8... shall be guilty of an offence". 3. Article 45 provides a number of special defences to the offences established in Article 44, including the offence under Article 8. Those defences go to mitigate what would otherwise be the harsher effects of what, at first glance, look like strict liability offences. They apply to circumstances inter alia where the holder of a product licence can be excused for importing a medicinal product which does not comply with the provisions of the licence by which it is governed; and where the holder of a manufacturer's licence can be excused if he reasonably believed that this product was being manufactured or assembled to the order of a person who held a product licence for that product, and was manufactured or assembled in accordance with that product licence. The existence of Article 45 provides some support indeed for the view that the prohibitions contained in the Articles mentioned in Article 44(1) of the Medicines Law are absolute, subject to Article 45, and the offences are thus strict liability offences. Such a conclusion would fit with the framework of the Medicines Law as a whole, the purpose of which is to provide a regulatory regime which protects public safety. 4. The offence created by these provisions renders the offender liable to imprisonment for a term not exceeding two years or to a fine or both. The question has arisen as to what the Prosecution have to prove, if anything, as the mens rea for this offence. 5. I am told that the offence created by these provisions is drawn from a similar offence created under the Medicines Act legislation in the United Kingdom, but that neither in Jersey nor in the United Kingdom has there been any authority identified so far which sets out the mens rea in question. Assuming that to be so, that might be unsurprising insofar as the United Kingdom is concerned, as it is a large enough jurisdiction that medicinal products, as opposed to illegal drugs, are likely to be manufactured in the UK rather than imported. The nearest thing to a precedent appears to be the case of AG-v- Metzner

[2009] JRC 222 , where Sir Philip Bailhache, Commissioner, was determining a question of costs following the abandonment of a prosecution of the accused under Article 8(3) from which it appears both the Judge and prosecuting counsel considered that the offence required

mens rea , although the precise intention was not identified. Coincidentally, defence counsel in that case had in the first instance considered that the offence carried strict liability. It was with that case in mind that the Prosecution here considered that the offence did not carry strict liability, and identified as the necessary mens rea a requirement for the Prosecution to prove that the defendant knew that he was importing something into the Island. In the course of argument, the Crown contended that the statute created a framework for regulating medicines, and dealt with public safety. It was said that public safety was the key. The reason it was right to apply a restricted mens rea to the offence was that the person who was importing a package into the Island ought to take steps to ensure he knew what that packet was, so that he did not in fact import a substance which was in fact a medicinal product which might be dangerous to the public.

6. By contrast the Defence contention was that to assert that the defendant need only know he was importing something was hopelessly vague. The Medicines Law covered medicines, and the mens rea applied to the whole offence; accordingly a person only committed an offence under Article 8(3) if he knew he was importing a medicinal product without a product licence.

7. It is quite clear that although there are numbers or provisions within the Medicines Law which are of a regulatory character, the provision in Article 8(3) is truly criminal in nature. It carries a custodial sentence of up to two years or an unlimited fine or both, and accordingly must be treated with a degree of seriousness. It is noteworthy that there are other offences under the Medicines Law where the draftsman of the statute has provided for proof of the relevant mens rea . Thus in Article 44(2), one of the offences created is in these terms:- "If a medicinal product... is imported in contravention of Article 8..., a person who otherwise than for the purpose of performing or exercising a duty or power imposed or conferred by or under this Law or any other enactment, is in possession of the product... knowing or having reasonable cause to suspect that it was so imported shall be guilty of an offence".

8. This offence clearly carries a requirement for knowledge for illegal importation as a requirement before one could be convicted of possession of the product in question. This provision recognises, in my judgment, that once the medicinal products are in the Island, persons are entitled to deal in them upon the basis that it is lawful to do so, unless they can be shown to know or have reasonable cause to suspect that they had been illegally imported. By its different express provision, it can be taken to emphasis that a different intention, or no intention, is necessary for the offence of importation as opposed to possession.

9. Article 43 requires in certain circumstances for the provision of information to the Minister for Health and Social Services. By Article 44(6):- "A person who, in giving information which he or she is required to give under Article 43, makes a statement which he or she knows to be false in a material particular shall be guilty of an offence".

10. And again in Article 44(7):- "A person who without reasonable excuse fails to comply with the requirement imposed on him or her by a notice under Article 43(2) shall be guilty of an offence".

11. There is therefore no doubt that the draftsman of the statute was alert to the various potential intentions which needed to be proved by the Prosecution in relation to the offences created by the statute.

12. By contrast, Articles 8(3) and 44(1) provide for no mens rea . In

my judgment, a strong case which could be made for the proposition that this is a strict liability offence. I recognise, of course, that there is a legal presumption that mens rea is required before a person can be found guilty of a criminal offence. That was established in our jurisdiction by Attorney General's Reference (No. 1 of 1990)

[1991] JLR 346 where the Court of Appeal held that the presumption could be displaced only if that was clearly or by necessary implication the effect of the statute. In its judgment the Court of Appeal applied the Privy Council decision in the case of *Gammon (Hong Kong) Limited-v-Attorney General (Hong Kong)*

[1985] AC 1 ,

[1984] 2 All ER 503 . 13. In *Gammon* , Lord Scarman, giving the opinion of the Board, said this at page 508F of the All England Report: "The law relevant to this appeal may be stated in the following propositions...: (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effected to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act". 14. In that case, the Privy Council was considering a building ordinance of Hong Kong, which, though "truly criminal" in nature, the Privy Council found to create offences of strict liability as the provisions, on their proper construction, were aimed at public safety. The fact that the offences carried severe penalties did not mean that strict liability was not the intention of the legislature. The Privy Council found that the legislature could reasonably have intended severity to be a significant deterrent, bearing in mind the risks to public safety arising from some contraventions of the ordinance. 15. The dispute about the relevant mens rea was raised with me on the morning of the trial, and I was minded to find for the reasons set out above that, subject to Article 45, strict liability applied to offences under Article 8(3) of the Medicines Law. Two factors have inclined me against that construction. First of all, it is not entirely clear that, if the offence carried strict liability, it would always promote strict vigilance which would have the effect of preventing the importation of all medicinal products without a product licence. It would not, for example, prevent a person importing a medicinal product without a product licence when he was genuinely unaware that the product had been clamped to the underside of his car. As Crown Advocate Cadin put it for the Crown, it would be unreasonable to require a driver to strip his car before bringing it into the Island to ensure that the car did not have anything hidden within it. While this is not conclusive, it is in my judgment a strong reason why the Court should try to find a mens rea which would both achieve both the aims of the statute and properly provide for

justice in individual cases. 16. The second reason that I have been persuaded that some mens rea is appropriate is that the Crown both in this case and in AG-v- Metzner took that view, as did apparently the trial judge in Metzner , albeit it is unclear what the mens rea was thought to be. 17. Crown Advocate Cadin pointed out that there is a variety of potential facts which would give rise to an offence under Article 8(3), running from the deliberate importation of medicinal products for gain at one end of the spectrum to importing a product which although licensed elsewhere was, unknown to the accused, not licensed in Jersey. It was contended by the Crown that if one followed the defence line on mens rea under Article 4(3), the Court would be authorising a charter for importers, enabling importers to defeat the purpose of the statute. It would follow that shops could acquire unlicensed products in good faith and sell them to unsuspecting members of the public who needed protection. 18. In my judgment, these considerations outweigh the contentions of the Defence. It appears to me that there is no doubt that the Medicines Law 1995 does create a framework for regulating medicines in the Island, and it is consistent with the objectives of the statute that the criminal offence created by Article 8(3) on importation should in its practical effect put a duty on the importer who knows that he is importing something into the Island to identify exactly what it was. Whereas imposing strict liability might not always lead to greater vigilance, because that greater vigilance could not be exercised by someone who had no knowledge that he was importing anything at all, the limited mens rea for which the Crown contended would promote such vigilance. In those cases where the importer knew he was importing something, he could and should reasonably ask himself what was in the package which was being imported, whether it contained medicinal products, and if so whether they were licensed. A requirement that the Crown prove an intention on the part of the defendant to import something is in my judgment a consistent approach with the framework of this legislation. 19. For these reasons I accept the Crown's submissions on the appropriate mens rea for offences under Article 8(3) and I will direct the Jurats accordingly. Authorities Medicines (Jersey) Law 1995. AG-v- Metzner

[2009] JRC 222 . Attorney General's Reference (No. 1 of 1990)

[1991] JLR 346 . Gammon (Hong Kong) Limited-v-Attorney General (Hong Kong)

[1985] AC 1 ,

[1984] 2 All ER 503 . Page Last Updated: 02 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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