律師會就中國內地與香港特別行政區法院在刑事司法管轄權上的衝突提交的意見書

I. 中國內地與香港特別行政區法院在刑事司法管轄權上的衝突

就某主權國對在另一主權國領域內所引起的事宜的司法管轄權範圍，律師會同意律政司提出的一般立場。

1. 領域管轄權

我們認同 Lotus 一案顯示的刑事司法管轄權原則，就是國際間接受某國家可根據下列原則執行其刑事司法管轄權——

- 某國家對其領域內的所有人士具有執行司法管轄權的初步權利；及

- 某國家對其在海外的公民具有對人的司法管轄權，但其執行該司法管轄權的能力卻是有限的。

在嘗試解決中國內地與香港特別行政區（下稱“香港特區”）法院在刑事司法管轄權上的衝突時，此等原則是可予考慮的相關事項，但另有一些更關鍵性的考慮因素：

a) 中華人民共和國（下稱“中國”）是一個統一的主權國，但藉《基本法》的頒布賦予香港特區享有高度自主的司法管轄權；

b) 必須適當確認：按普通法和香港特區的成文法則發展而來的香港特區領域管轄權（而該等普通法和成文法則是根據《基本法》第八、十九、七十三（一）及八十一條的規定予以保留的），以及中國法律（包括《中國刑法》）所規定的內地司法管轄權；及

c) 必須遵守：按《基本法》第三十九條及《香港人權法案條例》規定香港特區根據《公民權利和政治權利國際公約》所須履行的義務，以及現時已成爲《公民權利和政治權利國際公約》締約國的中國所須履行的義務。

香港特區刑事司法管轄權的一般原則，在 Gary N. Heilbronn 先生的著作“*Criminal Procedure in Hong Kong*”（第 3 版）第 3 章第 3.2 段（第 89 至 101 頁）已有清楚論述。

Heilbronn 先生是根據作出有關行爲的地點論述該等原則：

a) 在香港特區領域範圍內犯罪；
b) 涉及域外因素的罪行；
c) 在香港特區以外的船隻上犯罪；及
d) 在飛機上的罪行及危害航空安全的罪行。

顯而易見的是在法律上，香港特區法院的刑事司法管轄權在若干情況下超越在香港特區境內所犯的罪行。

2. 法治

在若干情況下，內地與香港特區法院顯然可以同時聲稱對某宗案件具有刑事司法管轄權。兩地的刑事司法制度及證據規則均有差異。但在尋求解決此問題的方法時，首要考慮因素必然是法治。

3. 《中國刑法》第六及七條

律政司認爲，"……*憑藉《中國刑法》第六及七條，內地法院可以對涉及任何有關香港的因素的案件具司法管轄權。兩個司法管轄區對同一宗案件具司法管轄權是常見的事*"。若按此推論，依據《中國刑法》第七條，若某內地人在香港犯罪，內地法院可審理有關罪行。

該看法是否成立，必須先分析《中國國籍法》。根據《基本法》附件三，該法亦適用於香港特區。因此，可以提出的一個論點是，《中國國籍法》的應用會對《中國刑法》第七條的詮釋有影響。憑藉《基本法》第十八條及《基本法》附件三，"公民"一詞可解釋爲包括香港特區居民。

我們接納《基本法》附件三並無載列《中國刑法》，故此律師會認爲，《中國刑法》並不適用於香港特區。律師會不贊同律政司的看法，即根據《中國刑法》第六及七條，內地法院可以對在香港特區犯案的內地人具有司法管轄權。

律師會認爲，若某項指控罪行*全然在特區內進行*，因著《基本法》第十八條的明確規定，《中國刑法》第六及七條的條文均不適用。

律政司不能單憑"……*若由於對《中國刑法》第七條作出字面上的解釋，以致剝奪了內地法院對那些在特區犯案後逃到內地的中國居民執行刑事司法管轄權的權力，便是對"一國兩制"整個概念的一大諷刺*"的言論，便作爲其有關內地司法管轄權的看法的理據。

《中國刑法》第七條清楚訂明，該法例條文適用於在中國領域*外*犯罪的中國公民，但*香港特區並非在中國領域外*。

香港特區可自行決定如何詮釋與香港有關的普通法及成文法則，但對於內地如何理解《基本法》與《中國刑法》的關係，似乎至今仍無任何明確指示。

首先，《中國刑法》在香港特區的應用情況須予澄清，因爲香港特區《基本法》及《中國刑法》均是由全國人民代表大會制定的。

4. 初步意見

律師會目前對於刑事司法管轄權的意見是，憑藉《基本法》第十八條及《基本法》附件三的條文，若某罪行的犯罪行爲全然在香港特區內進行，則內地不能根據《中國刑法》或其他法律具有對該罪行進行檢控或審訊的司法管轄權。

有關方面有必要就多重罪行、持續罪行及先行罪行再進行討論。律師會特別提述樞密院在 Somchai Liangsiriprasert 訴美國政府[1991]1 AC 225 一案中的判決（第 244 至 251 頁），以及在 1996 年 3 月 8 日開始實施的《刑事司法管轄權條例》。在前述判決中，a)處理涉及刑事司法管轄權的普通法規則的一般事宜；及 b)特別處理在海外干犯的先行罪行（串謀控罪）；及 c)處理關於引渡案件的特別證據規則。

附錄：Somchai 一案的判決文本及《刑事司法管轄權條例》的文本。

II. 引渡

律師會暫時不會就與內地達成任何引渡協議一事發表意見。律師會希望政府當局會就任何引渡協議的擬稿進行全面諮詢。

香港律師會

1999 年 1 月 14 日

APPENDIX: COPY OF THE SOMCHAI CASE AND THE CRIMINAL JURISDICTION ORDINANCE

with quarterly certificates on behalf of the directors. House and August were directors but the bank was not a director. The bank never accepted or assumed any duty of care towards the plaintiff. In the absence of fraud or bad faith on the part of the bank, no liability attached to the bank in favour of the plaintiff for any instructions or advice given by the bank to House and August. Of course, it was in the interests of the bank to give good advice and to see that House and August conscientiously and competently performed their duties both under the trust deed and as directors of A.I.C.S. But such advice is not attributable to any duty owed by the bank to the plaintiff, which was only entitled to the protection which the trust deed provided, namely quarterly certificates furnished on behalf of all the directors of A.I.C.S. By the trust deed the directors of A.I.C.S. accepted and assumed responsibility for the quarterly certificates, and the directors did not include the bank. The Companies Act 1955 cannot alter the construction of the trust deed or impose on the bank a duty assumed by House and August but never assumed by the bank.

Thus the statement of claim does not disclose any cause of action against the bank. The pleading would therefore be fit to be struck out on the application of the defendant bank. It complies, in their Lordships' opinion with the test enunciated in *Takaro Properties Ltd. v. Rowling* [1978] 2 N.Z.L.R. 314, 316–317, namely, that the cases pleaded as causes of action are so clearly untenable that they cannot possibly succeed. The fact that applications to strike out may raise difficult questions of law requiring extensive argument does not exclude the jurisdiction to do so: *Gartside v. Sheffield Young & Ellis* [1983] N.Z.L.R. 37, [illegible], and the same principle applies to applications under rule 131 of the High Court Rules and R.S.C., Ord. 12, r. 8. There is no need for the circuity of procedure which would be involved in an application to strike out the statement of claim in a case like the present, since "no cause of action" provides the ultimate example of failing to show a good arguable case. Having regard to their Lordships' conclusions and to the terms of rule 131, the appropriate order, by analogy with successful applications to set aside service under Ord. 12, r. 8 (which is on its face concerned with absence of jurisdiction), is to dismiss the proceedings as against the bank.

Finally there is the matter of costs. In the light of the conclusions which they have reached on the appeal, their Lordships are of the opinion that the bank is entitled against the plaintiff to its costs in the courts below and before their Lordships' Board. And, because for good reasons the date of trial of the action was fixed for the month of February 1990, the bank will also receive all its costs necessarily incurred in preparing for that trial, but not the costs of preparing and presenting a petition to this Board for leave to appeal.

Solicitors: Macfarlanes; Wray Smith & Co.

S. S.

[PRIVY COUNCIL]

SOMCHAI LIANGSIRIPRASERT . . . . . APPELLANT

AND

GOVERNMENT OF THE UNITED STATES OF AMERICA AND ANOTHER . . . . . RESPONDENTS

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1990 May 14, 15, 16, 17; July 2 — Lord Templeman, Lord Roskill, Lord Griffiths, Lord Goff of Chieveley and Lord Lowry

Crime—Conspiracy—Abroad, to commit acts—Agreement in Thailand to import heroin into United States—Accused arrested in Hong Kong—Whether conspiracy justiciable in Hong Kong—Whether accused to be extradited from Hong Kong to United States

Hong Kong—Crime—Drugs—Drug trafficking—Thai national in Thailand trafficking in heroin and doing acts preparatory to exporting drugs to United States—Arrest in Hong Kong—Whether activities in Thailand constituting offences in Hong Kong—Dangerous Drugs Ordinance (Laws of Hong Kong, 1988 rev., c. 134), ss. 4(1), 39[1]

In Thailand in September 1988 an American undercover drug enforcement agent arranged for the appellant, a Thai national, to supply him with heroin to be imported into the United States for sale by an organisation there. Meetings were held in which the appellant's cousin also participated. The appellant travelled to the north of Thailand to collect the heroin, which was delivered to the agent on 21 September. On 23 September some of it was taken to New York in a diplomatic pouch by another agent and a Thai police officer and they arrived the same day. As arranged the appellant and his cousin went to Hong Kong to collect payment and they were arrested. On a requisition by the Government of the United States of America for their extradition the Governor of Hong Kong issued to the magistrate his order to proceed in respect of crime 1, which alleged that between 1 and 27 September the appellant and his cousin conspired with others to traffic in a dangerous drug, contrary to common law and section 39 of the Dangerous Drugs Ordinance, crimes 2 and 3, that on 21 and 23 September respectively they trafficked in a dangerous drug, contrary to section 4, and crime 4, that between 14 and 22 September they did acts preparatory to trafficking in a dangerous drug, contrary to section 4(1)(c). The magistrate committed them to a reception centre to await extradition to the United States. The judge dismissed the appellant's application to the High Court for an order that a writ of habeas corpus ad subjiciendum should issue, and the Court of Appeal upheld that decision.

On appeal to the Judicial Committee:—

[1] Dangerous Drugs Ordinance, s. 4(1): see post, p. 252a–c.

S. 39: "Any person convicted of conspiracy to commit an offence under this Ordinance shall be liable to the penalty prescribed for that offence and any special rules of evidence which apply with respect to the proof of that offence under this Ordinance shall apply in like manner to the proof of conspiracy to commit such offence."

Held, dismissing the appeal in relation to crimes 1 and 3, (1) that the crimes were extradition crimes and so the magistrate applying Hong Kong law had to determine whether the evidence established a prima facie case against the appellant on the assumption that the drugs were to be imported into Hong Kong instead of the United States; that section 39 of the Dangerous Drugs Ordinance did not create a statutory offence of conspiracy to commit an offence under the Ordinance but merely related to the penalty for such common law conspiracy and the applicability of special rules of evidence; that the law of conspiracy in Hong Kong was the same as the common law of conspiracy in England, and that, accordingly, the conspiracy to traffic in a dangerous drug in Hong Kong entered into in Thailand could be tried in Hong Kong without any act pursuant to that conspiracy being done in Hong Kong (post, pp. 241G–H, 243G, 244A, 251B).

(2) That, whether or not the American agents and the Thai police officer were co-conspirators with the appellant and his cousin, they imported the heroin illegally in accordance with the agreement, thereby performing in the United States an overt act in pursuance of the conspiracy which also constituted trafficking in a dangerous drug in the United States; that, although the appellant could not have been extradited to the United States from Thailand for drug offences, he was voluntarily in Hong Kong and the correct extradition procedures had been followed, and so there was no oppression, abuse of judicial process or breach of international comity by the Government of the United States in seeking his extradition from Hong Kong; and that, therefore, the magistrate's order for his detention to await extradition was justified in respect of crimes 1 and 3 (post, pp. 242C, 242G, 243G, 251F–H).

Dicta of Lord Salmon in *Reg. v. Doot* [1973] A.C. 807, 832–833, H.L.(E.); of Lord Diplock in *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55, 67, H.L.(E.) and of Roberts C.J. in *Attorney-General v. Yeung Sum-shun* [1987] H.K.L.R. 987, 998, applied.

Dictum of Lord Keith of Kinkel in *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55, 93, H.L.(E.) not applied.

Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C. distinguished.

But, (3) allowing the appeal in relation to crimes 2 and 4, that section 4(1) of the Ordinance had no extraterritorial effect and, since the trafficking in drugs by the appellant to which those crimes related occurred in Thailand, he thereby committed no offence under section 4(1) (post, pp. 252C, 253G).

Decision of the Court of Appeal of Hong Kong [1990] 1 H.K.L.R. 85 reversed in part.

The following cases are referred to in the judgment of their Lordships:

A. v. Hayden (No. 2) (1984) 156 C.L.R. 532
Air-India v. Wiggins [1980] 1 W.L.R. 815; [1980] 2 All E.R. 593, H.L.(E.)
Attorney-General v. Yeung Sum-shun [1987] H.K.L.R. 987
Board of Trade v. Owen [1957] A.C. 602; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411, H.L.(E.)
Director of Public Prosecutions v. [illegible]house [1978] A.C. 55; [1977] 3 W.L.R. 143; [1977] 2 All E.R. 9[illegible], H.L.(E.)

Holmes v. Bangladesh Biman Corporation [1989] A.C. 1112; [1989] 2 W.L.R. 481; [1989] 1 All E.R. 852, H.L.(E.)
Libman v. The Queen (1985) 21 C.C.C. (3d) 206
Nielsen, In re [1984] A.C. 606; [1984] 2 W.L.R. 737; [1984] 2 All E.R. 81, H.L.(E.)
Reg. v. Baxter [1972] 1 Q.B. 1; [1971] 2 W.L.R. 1138; [1971] 2 All E.R. 359, C.A.
Reg. v. Bow Street Magistrates, Ex parte Mackeson (1981) 75 Cr.App.R. 24, D.C.
Reg. v. David Yung Te Chow [1987] 30 A.Crim.R. 103
Reg. v. Doot [1973] A.C. 807; [1973] 2 W.L.R. 532; [1973] 1 All E.R. 940, H.L.(E.)
Reg. v. Hartley [1978] 2 N.Z.L.R. 199
Reg. v. Treacy [1971] A.C. 537; [1971] 2 W.L.R. 112; [1971] 1 All E.R. 110, H.L.(E.)

The following additional cases were cited in argument:

British Columbia Electric Railway Co. Ltd. v. The King [1946] A.C. 527, P.C.
Croft v. Dunphy [1933] A.C. 156, P.C.
Macleod v. Attorney-General for New South Wales [1891] A.C. 455, P.C.
Mharapara v. The State [1986] L.R.C. (Const.) 235
Mulcahy v. The Queen (1868) L.R. 3 H.L. 306, H.L.(I.)
Moins Molvan, Owner of Motor Vessel "Asya" v. Attorney-General for Palestine [1948] A.C. 351, P.C.
Public Prosecutor v. Rajappan [1986] 1 M.L.J. 152
Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong [1970] A.C. 1136; [1970] 2 W.L.R. 1264, P.C.
Reference by the Governor in Council concerning the continental shelf offshore Newfoundland [1985] L.R.C. (Const.) 159
Reg. v. Cho Campo Juan En Kui (unreported), 24 December 1986, Court of Appeal of Hong Kong, Criminal Appeal No. 503 of 1985
Reg. v. Lau Tung-sing [1989] 1 H.K.L.R. 490
Reg. v. Martin [1956] 2 Q.B. 272; [1956] 2 W.L.R. 975; [1956] 2 All E.R. 86, C.C.C.
Reg. v. Plymouth Justices, Ex parte Driver [1986] Q.B. 95; [1985] 3 W.L.R. 689; [1985] 2 All E.R. 681, D.C.
Reg. v. Sanders [1984] 1 N.Z.L.R. 636
Reg. v. Shewes [1981] 7 A.Crim.R. 276
Reg. v. Wall [1974] 1 W.L.R. 930; [1974] 2 All E.R. 245, C.A.
Reg. v. Warburton (1870) L.R. 1 C.C.R. 274
Rex v. Brisac (1803) 4 East. 164
Rex v. Cavenett [1917] 1 K.B. 98, C.A.
Stanley v. The Queen [1985] L.R.C. (Crim.) 52
Thompson v. Commissioner of Stamp Duties [1969] 1 A.C. 320; [1968] 3 W.L.R. 875; [1968] 2 All E.R. 896, P.C.
White v. Ridley (1978) 140 C.L.R. 342

APPEAL (No. 6 of 1990) with special leave by the applicant, Somchai Liangsiripraserl, from the judgment of the Court of Appeal of Hong Kong [1990] 1 H.K.L.R. 85 (Yang C.J., Fuad V.-P. and Huntes J.A.) given [illegible] October 1989 dismissing the applicant's appeal from the judgme[illegible] of Sears J. delivered on 3 May 1989 in the High Court (Criminal Jurisdiction) whereby his application for a writ of habeas

corpus ad subjiciendum was dismissed. The application arose as a result of the applicant having been committed into the custody of the second respondent, the Lai Chi Kok Reception Centre, by the magistrate, M.P. Burrell, prior to the applicant's extradition at the request of the first respondent, the Government of the United States of America.

The facts are stated in the judgment of their Lordships.

Martin Thomas Q.C. and *G. J. X. McCoy* (of the English, Hong Kong and New Zealand Bars) for the appellant. This appeal involves important issues of law and practice. The extradition treaties between Thailand and the United Kingdom, and Thailand and the United States of America, contain no provision for extradition for drug offences, and so the appellant could not be extradited to the United States from Thailand for the alleged offences. The Government of the United States has attempted to plug that gap in the treaty between the United States and Thailand by devising a very careful plan in order to bring a Thai drug dealer before the courts of the United States, because the appellant was enticed to Hong Kong from where extradition to the United States for drug offences is possible. One of the issues therefore is whether in such circumstances it is permissible for the government to seek the appellant's extradition from Hong Kong to the United States.

The appellant's main contention is that he can only be extradited to the United States from Hong Kong if his conduct in Thailand would have been an offence in Hong Kong. Hong Kong can only claim jurisdiction over the appellant at common law or by statute. For a conspiracy to be triable in Hong Kong something has to happen in Hong Kong, because at common law there is no jurisdiction to prosecute a foreign national for what he has done in his own country. For example, if a Frenchman murders an Englishman in Paris the English courts have no jurisdiction to prosecute the Frenchman. There has been no reported case in which it has been held that a conspiracy formed abroad without any impact on England is justiciable in England. For Hong Kong to claim extraterritorial jurisdiction it must do so at common law by extending jurisdiction over conspiracy, or by statute under the Dangerous Drugs Ordinance.

Section 4 of the Dangerous Drugs Ordinance does not by its terms create extraterritorial jurisdiction and it cannot do so. By section 4(1) and (2) the other person referred to need not be in Hong Kong nor the dangerous drug but the activity of the person charged with drug trafficking must take place in Hong Kong.

According to the law of England a person cannot be prosecuted for a crime unless that crime has been committed within the jurisdiction, although there are certain statutory provisions to the contrary. At common law if acts pursuant to a conspiracy entered into in Thailand are carried out in Hong Kong, any conspirator caught can be tried in Hong Kong, because continuing the conspiracy in Hong Kong gives jurisdiction to the Hong Kong courts. The agreement is deemed to be a continuing one until it is discharged or frustrated. If acts are done in furtherance of the conspiracy in Hong Kong, the conspiracy is deemed

to be continuing in Hong Kong. Overt acts are evidence that the agreement is continuing.

The principles relating to extradition are not in dispute. [Reference was made to sections 2, 10 and 26 of the Extradition Act 1870 and section 33 of the Misuse of Drugs Act 1971.] Regard must be had to the appellant's conduct in Thailand to see if it constitutes an offence in Hong Kong since otherwise he cannot be extradited from Hong Kong to the United States. A conspiracy in Thailand to import drugs into Hong Kong is not actionable in Hong Kong if there are no overt acts in Hong Kong pursuant to that conspiracy.

The drug enforcement agents were not in law co-conspirators with the appellant and his cousin. An agreement between two or more persons that a course of conduct shall be pursued is a criminal conspiracy where that course, if carried out in accordance with their intentions, necessarily amounts to or involves the commission of an offence by one or more of the parties. Section 1 of the United Kingdom Criminal Law Act 1977 defined conspiracy and attempted to state in statutory terms the common law position. This agreement was not, and never would have been, carried out in accordance with the intentions of the appellant and his cousin. It was not the purpose of the agreement nor their intention that the drugs should be imported into the United States to be handed over to the drug enforcement agency. It would be impossibly artificial to aver that the physical importation of the drugs, being simply one step in the course of conduct envisaged, was part of their intention, so as to clothe the agents with the role of co-conspirators for that purpose alone. Certainly it was never the intention of the agents that the drugs should be imported *for* the purposes of a criminal conspiracy. The respondents appear to have conceded before Sears J. that the agents were not co-conspirators, and his findings assumed that to be the case. Reliance is placed on *Reg. v. Cho Campo Juan En Kui* (unreported), 24 December 1986, Court of Appeal of Hong Kong, Criminal Appeal No. 503 of 1985. The covert acts of the agents were not acts carried out in furtherance of the conspiracy.

Further, the agents were not innocent or unwitting agents of the conspirators like airline or post office officials, but were determinedly furthering the purposes of the Government of the United States. *White v. Ridley* (1978) 140 C.L.R. 342; *Reg. v. Skewes* [1981] 7 A.Crim.R. 276 and *Reg. v. Wall* [1974] 1 W.L.R. 930 can be distinguished. In the present case the causal link between the conspiracy and the importation into the United States was broken, because the drugs were taken into the custody of the Government of the United States before they left Thailand. The conspiracy was frustrated from the moment the drugs came into the agents' hands.

If the agents were not co-conspirators no act in furtherance of the conspiracy was done in the United States, and therefore by the law of Hong Kong the United States courts have no jurisdiction to try the conspirators for a conspiracy entered into in Thailand. The situation is the same as if a conspirator had loaded the drugs onto an aircraft which crashed so that the drugs were never imported into the United States and accordingly no offence was committed in the United States. The

essence of a conspiracy is that it is a course of conduct carried out in accordance with the intention of the conspirators, but the agents imported the drugs into the United States for their own purposes and not those of the conspirators, and did not deliver the drugs to the person the conspirators expected would receive them.

The conduct to which the courts of the country where extradition proceedings are brought must have regard is conduct, or acts, within the jurisdiction of the requesting country, which in the present case is the United States: see *In re Nielsen* [1984] A.C. 606. The court must decide whether in accordance with its own domestic law an offence has been committed by the person whose extradition is being sought. This gives rise to three questions: (1) What conduct, if any, had the appellant been a party to in the United States? (2) Would the conduct of the appellant in Thailand give jurisdiction to the Hong Kong courts? (3) Did the visit to Hong Kong for the purpose of collecting a share of the proceeds give jurisdiction to the Hong Kong courts to extradite the appellant to the United States?

With regard to the first question, the only conduct relied on within the jurisdiction of the United States was that of the drug enforcement agents, and so the appellant was not a party to that importation. The Court of Appeal relied on *Reg. v. David Yung Te Chow* [1987] 30 A.Crim.R. 103 but that case is distinguishable.

The central issue is the second question. As to that, a conspiracy formed abroad to do an illegal act in Hong Kong cannot be tried in the courts of Hong Kong where no acts in furtherance of the conspiracy have been performed within its territorial jurisdiction. The position has been expressly reserved in England on this point by the House of Lords: see *Reg. v. Doot* [1973] A.C. 807.

The basic principle is that law is territorial and jurisdiction in criminal law is territorial, although there are certain exceptions. It would be an extension of the common law for a conspiracy entered into abroad to be justiciable in England where no acts pursuant to the conspiracy take place in England. Such extension should only be made by statute. It is a matter of policy whether drug enforcement agents should be permitted to induce a drug dealer to go so far and then say he has attempted to illegally import drugs into the United States, so that if he can be arrested he can be prosecuted in the United States. The United States has assumed extraterritorial jurisdiction by passing legislation whereby once the appellant is in the United States he can be charged with trafficking in drugs in Thailand. At common law the English courts have no jurisdiction over a conspiracy abroad to import dangerous drugs into England if the attempt to carry out the importation fails either fortuitously or due to the intervention of drug enforcement agents. [Reference was made to *Reg. v. Treacy* [1971] A.C. 537; *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55; *Libman v. The Queen* (1985) 21 C.C.C. (3d) 206; *Reg. v. Sanders* [1984] 1 N.Z.L.R. 636; *Mharapara v. The State* [1966] L.R.C. (Const.) 235 and *Attorney-General v. Yeung Sun-shun* [1987] H.K.L.R. 987.]

As to the third question, it may be [illegible] the appellant, by coming to Hong Kong with the intention of collecting his share, committed a

criminal offence against the law of Hong Kong, but that is immaterial for the purposes of extradition proceedings to the United States. The Hong Kong court must consider the position as though the visit to collect the money had taken place in another jurisdiction.

Crime 1 charges the appellant with conspiracy to traffic in a dangerous drug contrary to common law and section 39 of the Dangerous Drugs Ordinance. The reference to section 39 shows that a statutory conspiracy is being alleged, and that cannot relate to a conspiracy outside Hong Kong. Crimes 2, 3 and 4 charge the appellant with offences contrary to section 4. The Ordinance does not have extraterritorial effect and cannot do so, since the Hong Kong legislature had no power to pass legislation with extraterritorial effect in relation to drug offences.

The basic principle is that a foreign national is not answerable to English criminal jurisdiction for an act done totally outside England, and neither on a British ship nor within British territorial waters. The exceptions are well recognised and are based on international law, and include piracy, hijacking and other offences against aircraft. There is a presumption that in the absence of clear and specific words to the contrary, an offence-creating section is not intended to make conduct outside the territorial jurisdiction of the Crown an offence triable in an English court. [Reference was made to *Air-India v. Wiggins* [1980] 1 W.L.R. 815; *Stanley v. The Queen* [1985] L.R.C. (Crim.) 52 and *Public Prosecutor v. Rajuppan* [1986] 1 M.L.J. 152.] Crimes 2 and 4 relate wholly to acts by a foreign national within his own country. It would be extraordinary if section 4 of the Ordinance conferred extraterritorial jurisdiction on the Hong Kong courts in respect of such acts.

It is oppressive and an abuse of process, and does not conform with international comity, for a government agency to entice a criminal to a jurisdiction from which extradition is available. It is contrary to the rule of law that a sovereign state such as the United States, appreciating that it cannot legally extradite a drug trafficker from Thailand, should employ an underhand method such as this. Where a sovereign state deems it necessary to try foreign nationals who are affecting its own national security or way of life, the rule of law demands that it should approach the country concerned and ask for the person to be handed over. Entrapment is not something which the law encourages law enforcement agents to do. This is a policy matter which should be taken into consideration in relation to whether or not the common law as to extraterritorial jurisdiction should be extended. [Reference was made to *Reg. v. Hardey* [1978] 2 N.Z.L.R. 199; *Reg. v. Plymouth Justices, Ex parte Driver* [1986] Q.B. 95 and *Reg. v. Bow Street Magistrates, Ex parte Mackeson* (1981) 75 Cr.App.R. 24.]

R. Alun Jones Q.C. and *Michael Blanchflower*, Senior Crown Counsel, Hong Kong, for the respondents. There is no issue between the appellant and the respondents about the extradition aspects of the case.

The [illegible]orical background is important because it throws light on the applicability of the proposition that all crime is local. That has never been the ratio of any case other than those cases which deal with narrow

issues of venue. In many cases in the English courts this century that phrase has been used, but in all of them some part of the crime had been committed in the United Kingdom.

The only jurisdictional condition for the trial of a common law crime is that the Queen's peace is attacked or threatened: see *Blackstone's Commentaries on the Laws of England*, 20th ed. (1841), book 4, p. 2. Conspiracy in Hong Kong is a common law crime. Formerly a second condition existed in the common law courts, because the crime, or part of it, had to have been committed within the county of trial. By reason of that second condition the first was unimportant. The old rules as to venue within a county have been used in recent times to argue that the same rules apply to countries.

English law has always treated certain actions as criminal because an attack or threat to the Queen's peace existed. English criminal law has always protected the Queen's peace by penalising such attacks or threats from within or without the realm. Serious crimes were crimes in English law wherever committed. Serious crimes committed outside the realm were usually tried outside the common law courts, for example by the admiral, constable or marshal. Reliance is placed on *Russell on Crime*, 12th ed. (1964), vol. 1, p. 612; *Coke's Institutes of the Laws of England*, 19th ed. (1832), part 3, pp. 10–11 and 47–48; *Reg. v. Martin* [1956] 2 Q.B. 272; *Reg. v. Treacy* [1971] A.C. 537; Statute of Treasons 1351 (25 Edw. 3, st. 5, c. 2); Treason Act 1541 (33 Hen. 8, c. 23); Act for the Trial of Treasons 1543 (35 Hen. 8, c. 2); Statute against the Forging and Counterfeiting of Foreign Coin 1570 (14 Eliz. 1, c. 3); Offences at Sea Act 1536 (28 Hen. 8, c. 15); *Stephen's History of the Criminal Law of England* (1883), vol. 2, pp. 9, 12–14 and 18, and *Rex v. Brisac* (1803) 4 East. 164. These statutes show that the common law courts acquired the power to try serious crimes committed beyond the realm by the use of specific statutory exceptions to the usual rules as to venue.

Conspiracy is a common law crime and is, like the crime of attempt, an auxiliary offence attaching to the completed offence. There is no reason to suppose that at the time when conspiracy developed there was hostility by the common law towards extraterritorial jurisdiction. Now that the restrictions on venue have been abolished all common law crimes attacking or threatening the Queen's peace can be tried without impediment. [Reference was made to *Rex v. Casement* [1917] 1 K.B. 98.]

It is not inconsistent with the comity of nations for someone to be prosecuted in England for conspiring abroad to attack the Queen's peace. In many cases there are overlapping jurisdictions. Where there is such a conspiracy the accident of a person doing an act in England cannot be the basis for trial and punishment in England in relation to the whole conspiracy. The very act of agreement is the criminal offence, and so the conspirators can be prosecuted even if the conspiracy is abandoned. Overt acts are no more than evidence of the conspiracy; their commission is not a necessary ingredient of the offence. Under old statutes, which created specific offences relating to combinations, an overt act may have been expressly required, because there might be no

direct evidence of a conspiracy, but in modern conditions there may be other evidence such as the tape recording of conversations.

If considerations of comity are relevant, they must be applied by the courts in accordance with 20th century standards. They are no bar to the exercise of jurisdiction in the present case. Although the appellant could not have been extradited from Thailand to the United States, the authorities in Thailand were investigating the matter and permitted him to go to Hong Kong, which was an act of international co-operation, and so there was no infringement of the rules of comity.

The expression "all crime is local" is misleading and has been cited out of context. It was asserted without authority in *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455, which in any event can be distinguished because it was asserted only in the context of the extent of a local, colonial statute. The statute referred to in *Coke's Institutes of the Laws of England*, 19th ed. (1832), part 3, p. 80, created both extraterritorial and extraterritorial liability. The words, at p. 80, "the offence is locall" in the commentary meant that the administration of justice was local rather than the crime itself.

The question in relation to crime 1 is not one relating to jurisdiction but to the nature of the common law crime of conspiracy. It is a creation of the common law courts after the Restoration, and it developed against a background of law which recognised extraterritorial crime. It is analogous to attempt, is preventative in character, and its utility lies in forestalling crime. [Reference was made to *Mulcahy v. The Queen* (1868) L.R. 3 H.L. 306.]

English courts can try conspiracies formed outside England to commit offences in England without evidence of any acts in furtherance or continuance in England. Reliance is placed on dicta of Lord Tucker in *Board of Trade v. Owen* [1957] A.C. 602, 622–626, and *Attorney-General v. Yeung Sun-shun* [1987] H.K.L.R. 987. This case is the reverse of the situation in *Board of Trade v. Owen*, and a conspiracy entered into abroad to commit offences in England is triable in England. [Reference was made to *Reg. v. Warburton* (1870) L.R. 1 C.C.R. 274; *Reg. v. Treacy* [1971] A.C. 537 and *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55.]

Parliament does not legislate for the territorial extent of inchoate crimes but leaves the subject to the courts. Section 1(1) of the Taking of Hostages Act 1982 provides that there is extraterritorial liability for hostage taking because the offence can be committed by any person, of whatever nationality, in the United Kingdom or elsewhere. In section 1 of the Criminal Attempts Act 1981 there is no suggestion that the offence of attempt to which that section relates may be extraterritorial, and to that is for the courts to determine.

Absurdity results from a strictly territorial approach to the crime of conspiracy. If three men agree in Belgium to murder persons in England, and on their way to Ireland for an innocent purpose they land in England owing to bad weather, are they indictable or must the police wait for a murder? If one of those three men comes to England to attend a funeral before the conspiracy is put into effect, and lawfully acquires a map of London, intending to use it to find the place of the

funeral but also to use it later in connection with the conspiracy, is the conspiracy continuing in England? Do different principles apply if two of the conspirators buy the map, or if the other two in Belgium have asked him to buy it? Is it material that one of the conspirators comes innocently to England but then commits a crime such as applying for a passport in a false name for use in the conspiracy? These are all questions which cannot be resolved by the narrow ratio in *Reg. v. Doot* [1973] A.C. 807. The conspirators would be indictable in any of these circumstances. In the first situation there are no overt acts, and in the others the actions are no more than overt acts of purely evidential importance in establishing the conspiracy. The possible range of overt acts, in themselves innocent or guilty, is infinitely variable. Many could be said to establish the conspiracy in England, though all are evidence of the conspiracy threatening the Queen's peace.

If, therefore, (1) the conspiracy is complete when the agreement is made; (2) the commission of overt acts is not a necessary element of the crime and (3) the justification for the law forbidding the crime is the utility of forestalling and preventing a substantive crime to which the crime of conspiracy is auxiliary, then the place where the agreement was formed is irrelevant, provided that the substantive crime was to be committed in England.

Alternatively, there was in the instant case full agreement on all the essential elements of the contemplated offence, and the conspiracy was continued, either within the principle in *Reg. v. Doot* [1973] A.C. 807, by virtue of the importation of the drugs into the United States, or through instruments of the appellant. There is no middle category between innocent and guilty agency. This applies also to crime 3.

In the further alternative, the appellant's visit to Hong Kong to collect his money justified the magistrate in committing him to custody under section 10 of the Extradition Act 1870. By going to Hong Kong for that purpose the appellant was doing an act in Hong Kong.

With regard to crimes 2 and 4, the question of territorial extent depends on statutory construction. The principle that all crime is local is no longer an appropriate test. Section 4 of the Dangerous Drugs Ordinance is plainly intended to have extraterritorial effect. It can be contrasted with the United Kingdom Misuse of Drugs Act 1971 and the Customs and Excise Management Act 1979. Parliament adopts one of two approaches to extent. Either it says that the enactment shall apply anywhere in the world, or it remains silent, in which case construction of purpose is essential.

In a statute which plainly has an international element one should start with no presumption as to extent. Section 4(1) of the Dangerous Drugs Ordinance has the words "no person" and it should be construed widely because its scope is limited to activities aimed or directed at Hong Kong. Although "no person" must mean no person anywhere in the world, the person's activities must be directed at Hong Kong.

Reliance is placed on the interpretation of section 4 by the Hong Kong courts, to whom the legislation and its purpose are familiar. The Board should only interfere if that construction is plainly wrong. The

courts of Hong Kong have applied a purposive construction of the Ordinance.

The respondents' approach is consistent with the comity of nations. Where there is a threat to the Queen's peace there is no breach of comity in punishing it. [Reference was made to articles 2 and 4 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1989) (Miscellaneous No. 14 of 1989) (Cmnd. 804).]

Thomas Q.C. in reply. The respondents' proposition that a crime at common law exists whenever there is a threat to the Queen's peace is inconsistent with the accepted principle that all crime is territorial with certain well established exceptions. Reliance is placed on the Law Commission's Working Paper No. 29 (12 May 1970), Second Programme Item 18, Codification of the Criminal Law, subject 3: Territorial and Extraterritorial Extent of the Criminal Law, pp. 2–4, 10–11, 33, 37–38, 47–48, 51–54.

The question is what is meant by a threat to the safety or peace of persons within the Queen's realm? In *Board of Trade v. Owen* [1957] A.C. 602 it was held that a conspiracy in England to commit a crime abroad was not justiciable in England. It is wrong to turn that round and say that a conspiracy abroad to commit a crime in England is without more justiciable in England. There must be an impact on the country concerned for it to be such a threat. It would be wrong for this country to assume jurisdiction to try a conspiracy formed abroad which had no impact on the people or institutions of this country. In *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55 it was decided that what the defendant had done had had an impact in England. In the present case the activities of the appellant had no impact on the United States, assuming that the drug enforcement agents were not co-conspirators or innocent agents. The impact must be relevant in the sense of being related to the crime which is alleged, because otherwise the threat to the Queen's peace would be a totally empty threat. There is no authority that at common law a conspiracy entered into abroad has always been justiciable here even though it has had no impact on this country.

Thailand was not a signatory to the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the United Kingdom has not yet ratified the Convention. It is open to the United States, Thailand and the United Kingdom to make treaty arrangements for the extradition of persons from Thailand for drug offences.

Crimes 2 and 4 relate to specific statutory offences, which were only committed in Thailand. Unless the Dangerous Drugs Ordinance has extraterritorial effect the appellant cannot be guilty of crimes 2 and 4. If the Hong Kong courts sought to try the appellant, a foreign national, it would be in respect of acts done in a foreign territory. [Reference was made to *Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1970] A.C. 1 ... *Holmes v. Bangladesh Biman Corporation* [1989] A.C. 1112.] In ... there is a presumption against legislation of this country having extraterritorial application. In Hong Kong the powers ... legislate are more limited, and in criminal law such construction should be even more narrowly applied.

The definition of "trafficking" in section 2 of the Ordinance is not a totally embracing one, because the word "includes" is used. To traffic in drugs there must be mens rea involving more than knowledge of possession and the nature of the drugs. There must be an intention to traffic illicitly in the drugs. To say that the drug enforcements agents were trafficking would be to strain improperly the language of the Ordinance. They were not acting as the instruments of the conspirators. An instrument is someone employed by another to effect a purpose. The agents were not effecting the purpose of the conspirators. It would be artificial to suggest that the conspirators' purpose was that the drugs should be carried into United States airspace. Their purpose was the importation of the drugs into the United States for trafficking in them, and the agents did not import the drugs for that purpose. The agents' own purpose broke the causal link between the conspiracy and the importation.

[LORD TEMPLEMAN. Their Lordships wish to hear submissions on the validity of the legislation, if it has extraterritorial effect.]

McCoy following for the appellant in relation to whether section 4 of the Dangerous Drugs Ordinance could have extraterritorial effect. *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455 is clear authority for colonial legislative incompetence to pass criminal laws having extraterritorial effect. That doctrine has been followed and applied by the Privy Council on a number of occasions. The respondents argued that that decision was without an ancestor, but in fact it was born of a distinguished pedigree, namely the common law, imperial statute law and the opinions of the English law officers.

The doctrine is still the major premise when colonial laws are passed by Parliament at Westminster: see the Admiralty Offences (Colonial) Act 1860 (23 & 24 Vict. c. 122) and section 3 of the Courts (Colonial) Jurisdiction Act 1874 (37 & 38 Vict. c. 27). Both those statutes were enacted on the basis that there was a territorial limit to colonial legislation. Section 3 of the Statute of Westminster 1931 for the first time enabled the Parliament of a dominion to make laws having extraterritorial operation. [Reference was made to the long title and sections 3 and 11 of the Act of 1931.] Section 3 was an enabling provision and did not apply to colonies: see *British Columbia Electric Railway Co. Ltd. v. The King* [1946] A.C. 527.

The position of Hong Kong as to making extraterritorial laws remained the same as its position prior to the Statute of Westminster 1931. It had no jurisdiction to pass extraterritorial laws until the United Kingdom Parliament passed the Hong Kong Act 1985. [Reference was made to section 1.] Paragraph 3(1)(*b*) of the Schedule to the Act of 1985 authorises Her Majesty by Order in Council to make provision for enabling the legislature of Hong Kong to make laws having extraterritorial effect. Pursuant thereto the Hong Kong (Legislative Powers) Order 1986 was made, and it came into operation on 6 August 1986. Section 2(*b*) permits, for the first time, the Hong Kong legislature to make laws having extraterritorial operation in relation to civil aviation, merchant shipping and admiralty jurisdiction. The Hong Kong legislature can therefore only legislate with extraterritorial effect for those three matters.

The whole thrust of colonial constitutional law is that only the United Kingdom Parliament may legislate for extraterritorial matters: see the dictum of Lord Diplock in *Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1970] A.C. 1136a. To the extent that section 4 of the Dangerous Drugs Ordinance purports to extend to proscribing the conduct of foreign nationals abroad, it is ultra vires. [Reference was made to section 2 of the Colonial Laws Validity Act 1865.] The legislation is repugnant via the Colonial Laws Validity Act 1865 to the Hong Kong (Legislative Powers) Order 1986. Repugnancy may arise in respect of either antecedent or subsequent legislation.

Although it is an extradition case, this appeal focuses on the true parameters of the criminal law and the jurisdiction of colonial constitutional law. Hong Kong is still bound by limitations. Colonies do not enjoy full international personality and do not have legislative omnipotence. Apart from the Immigration Ordinance and the Prevention of Bribery Ordinance, which purport to apply expressly to acts committed in Hong Kong or anywhere outside Hong Kong, there is no Hong Kong legislation with a specific extraterritorial element. This is relevant in considering what is ordinarily embraced by Hong Kong legislative practice, and since only those two Ordinances in Hong Kong purport to have extraterritorial effect, there was a clear intention that the Dangerous Drugs Ordinance was not intended to operate outside Hong Kong.

Legislation does not ordinarily have extraterritorial effect. Reliance is placed on *Halsbury's Laws of England*, 4th ed., vol. 6 (1974), para. 1075, pp. 514–515; *Reference by the Governor in Council concerning the continental shelf offshore Newfoundland* [1985] L.R.C. (Const.) 159 and *Thompson v. Commissioner of Stamp Duties* [1969] 1 A.C. 320. *Reg. v. Lau Tung-sing* [1989] 1 H.K.L.R. 490 was wrongly decided. The Privy Council has held that there must be a relevant territorial connection to validate extraterritorial legislation. To allow the Hong Kong courts to adjudicate now over alleged criminal actions which take place, for example, wholly in Greenland, would be to give the Hong Kong legislature full sovereignty.

As a matter of construction it cannot be right that section 4 of the Dangerous Drugs Ordinance applies to any person anywhere in the world who engages in trafficking in a dangerous drug, because it would mean that no relevant connection with Hong Kong is required and so there would be no basis for the Hong Kong legislature passing such a law. If section 4 was intended to cover acts of foreigners committed abroad which have no impact on Hong Kong, section 4 is ultra vires to that extent. Crimes 2, 3 and 4 are substantive crimes fully completed in Thailand.

Blanchflower for the respondents with regard to section 4 of the Dangerous Drugs Ordinance. The operation of section 4 is not restricted to conduct within the territory of Hong Kong, so long as it is aimed or directed at Hong Kong, or there is a real and substantial link between the conduct and Hong Kong. Crimes 2, 3 and 4 fall within that category. Reliance is placed on *Croft v. Dunphy* [1933] A.C. 156; *Reg. v. Lau Tung-sing* [1989] 1 H.K.L.R. 490 and *Naim Molvan, Owner of Motor Vessel "Asya" v. Attorney-General for Palestine* [1948] A.C. 351.

The preamble to the Hong Kong Act 1985 states that it was enacted to make provision for and in connection with the ending of British sovereignty and jurisdiction over Hong Kong. The Act of 1985 gave Parliament and the Hong Kong legislature power to establish Ordinances which would continue after 1 July 1997. Prior to the Act of 1985 the Hong Kong legislature could enact laws which had extraterritorial effect.

The Hong Kong Act 1985 and the Hong Kong (Legislative Powers) Order 1986 were passed to enable Hong Kong, in advance of 1997, to localise United Kingdom legislation which had been extended to Hong Kong and which had extraterritorial operation. Section 2 of the Hong Kong (Legislative Powers) Order 1986 has the words "in addition to any other power conferred on the legislature of Hong Kong," and section 2(*a*) relates to a United Kingdom enactment which has become part of the law of Hong Kong. That was why the three categories civil aviation, merchant shipping and admiralty jurisdiction were referred to in section 2. Others will be added. Section 4 of the Dangerous Drugs Ordinance is not repugnant to any United Kingdom legislation and validly has extraterritorial effect.

McCoy in reply. The Hong Kong (Legislative Powers) Order 1986 does not cover offences relating to dangerous drugs.

Cur. adv. vult.

2 July. The judgment of their Lordships was 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 [1990] 1 H.K.L.R. 85, 90–91, 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 U.S.A. ('D.E.A.'), 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 org[illegible]ation in New York which was anxious to obtain a new source of h[illegible] to supply to its customers in New York.

> "Mike met the appellant on 14 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 two or three 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.
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> "It was agreed that the heroin would be released on a down payment by Mike of U.S.$50,000. In answer to the appellant's inquiry, Mike told him that they should be able to sell the heroin in New York for U.S.$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 ten units; the appellant would have eight shares and the remaining two 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.
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> "On 16 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 17 September the appellant duly met Mike again and they talked about the appellant's experience of imprisonment in the U.S.A. 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. 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 U.S.$50,000 down payment would not be enough. The 'front price' per unit would be U.S.$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.
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> "On 18 September S.C. met Mike and his companion again and infor[illegible] him that the appellant was finalising the plan for delivery. The [illegible]e men met again on the following day and had discussions about possible future deals.

"On the next day, 20 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 U.S.$50,000), which had been provided by the D.E.A. 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 a.m. on the following morning, 21 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 D.E.A. 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 D.E.A. 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 22 and 24 September. It was agreed that the two men would meet Mike in Hong Kong on or about 26 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 22 September.

"On 23 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 27 September, in accordance with arrangements made on 24 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 per cent. The evidence also showed that 20 units

of that quality of heroin would command a wholesale price in New York of between U.S.$2,240,000 and U.S.$2,280,000. The approximate retail, or 'street level,' value of the heroin would be between U.S.$22m. and U.S.$28m."

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 United States in excess of 1 kilogram of heroin . . . ;

"Importation into the United States 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 be imported into United States . . ."

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 1 September 1988 and 27 September 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, c. 134.

"*Crime 2*: Somchai Liangsiriprasert and Sutham Chokvanitphong (also known as 'Ah Bai'), on or about 21 September 1988, did traffic in a dangerous drug, contrary to section 4 of the Dangerous Drugs Ordinance, c. 134.

"*Crime 3*: Somchai Liangsiriprasert and Sutham Chokvanitphong (also known as 'Ah Bai'), on or about 23 September 1988, did traffic in a dangerous drug, contrary to section 4 of the Dangerous Drugs Ordinance, c. 134.

"*Crime 4*: Somchai Liangsiriprasert and Sutham Chokvanitphong (also known as 'Ah Bai'), between 14 September 1988 and 22 September 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, c. 134."

The Extradition (Hong Kong) Ordinance (c. 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 1870–1935 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 of the Extradition Act 1870 and *In re Nielsen* [1984] 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 D.E.A. agents were not in law co-conspirators with the appellant and S.C. The respondents 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 D.E.A. 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 S.C. On the other hand it can be argued that the D.E.A. agents had taken it upon themselves to break the law by importing heroin into the United States (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 *Reg. v. David Yung Tee Chow* [1987] 30 A.Crim.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 D.E.A. agents were not co-conspirators with the appellant and S.C.

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

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 D.E.A. agents in their attempt to bring the appellant to justice in the United States 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 S.C. they clearly had them within their grasp. The irresistible inference is that Thailand preferred to go along with the D.E.A. plan to bring the appellant and S.C. to justice in the United States.

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 *Reg. 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, at pp. 31–32, cited with approval from the judgment of Woodhouse J. in *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199, 216–217, 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 S.C. 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 S.C. 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 S.C.

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 D.E.A. 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 D.E.A. 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 respondents 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 p. 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 recognise 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 apears 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* (1945) vol. V, Lord Tucker continued, at p. 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 p. 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 also expressly reserved the following question, at p. 634:

> ". . . 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 *Reg. 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 *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55, 67, Lord Diplock said:

> "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 while still in Northern Ireland."

In *Reg. 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, at p. 816:

> "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 p. 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, at p. 818, 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. 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 pp. 832–833:

> "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 p. 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 *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55 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, at p. 64:

> "Whether the offence of attempting on 20 November 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 p. 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, 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 a 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 pp. 66–68, 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, at pp. 67–68:

"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 *Smith and Hogan's Criminal Law*, 6th ed. (1988), support Lord Diplock's view of the law. They wrote, at p. 299:

"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 p. 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] H.K.L.R. 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. Roberts C.J. said, at p. 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 Roberts C.J., at p. 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 suppport in *Reg. v. Treacy* [1971] A C 537, 561–562 *per* Lord Diplock; *Libman v. The Queen* (1985) 21 C.C.C. (3d) 206, in the Supreme Court of Canada; and *Mharapara v. The State* [1986] L.R.C. (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 *Reg. v. Treacy* [1971] A.C. 537 to which Roberts C.J. refers is the celebrated discussion by Lord Diplock of the bounds of comity and the judgment of La Forest J. in *Libman v. The Queen*, 21 C.C.C. (3d) 206 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 p. 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 of Kinkel in *Director of Public Prosecutions v. Stonehouse* [1978] A.C. 55, 93, 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 *Board of Trade v. Owen* [1957] A.C. 602, 626, 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 p. 54, 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 the crime 3 which alleges trafficking contrary to section 4 of the Dangerous Drugs Ordinance on 23 September 1988. This was the date on which the D.E.A. 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 (United States) in breach of section 4 of the Ordinance and in the manner intended by the appellant and S.C. If the D.E.A. agents had been co-conspirators or if they had been innocent couriers unaware of what they were carrying both the appellant and S.C. 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 *Reg. v. Doot* [1973] A.C. 807 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 S.C. 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 ceased [illegible] they cannot be permitted to [illegible]

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 S.C. in Thailand. Crime 2 charges trafficking contrary to section 4 of the Ordinance on 21 September 1988 which was the day on which the heroin was handed to the D.E.A. 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 14 September and 22 September 1988 which covers events in Thailand from the first meeting between the appellant and the D.E.A. 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 D.E.A. 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 W.L.R. 815 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:

> "(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 (c. 156): 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 (United States) but that feature of the activity cannot clothe section 4(1) with extraterritorial effect in respect of activity aimed at Hong Kong, because subsection (2) provides that subsection (1) shall apply "whether or not the dangerous drug . . . is to be imported into Hong Kong." So if subsection (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.

Solicitors: Philip Conway Thomas & Co., Macfarlanes.

S. S.

CHAPTER 461

CRIMINAL JURISDICTION

An Ordinance to make provision about the jurisdiction of courts in Hong Kong in relation to certain offences and for connected purposes.

[8 March 1996] *L.N. 130 of 1996*

1. Short title

(1) This Ordinance may be cited as the Criminal Jurisdiction Ordinance.
(2) *(Omitted as spent)*

2. Offences to which this Ordinance applies

(1) This Ordinance applies to 2 groups of offences—
  (*a*) any offence mentioned in subsection (2) (a "Group A"offence); and
  (*b*) any offence mentioned in subsection (3) (a "Group B" offence).
(2) The Group A offences are—
  (*a*) an offence under any of the following provisions of the Theft Ordinance (Cap. 210)—
    section 9 (theft)
    section 17 (obtaining property by deception)
    section 18 (obtaining pecuniary advantage by deception)
    section 18A (obtaining services by deception)
    section 18B (evasion of liability by deception)
    section 18D (procuring false entry in certain records by deception)
    section 19 (false accounting)
    section 21 (false statements by company directors, etc.)
    section 22(2) (procuring the execution of a valuable security by deception)

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第 461 章

刑事司法管轄權條例

本條例旨在就香港法院對某些罪行的司法管轄權，以及為有關連的目的，訂定條文。

[1996 年 3 月 8 日] *1996 年第 130 號法律公告*

1. 簡稱

(1) 本條例可引稱為《刑事司法管轄權條例》。
(2) *(已失時效而略去)*

2. 本條例所適用的罪行

(1) 本條例適用於下列兩類罪行——
  (*a*) 第 (2) 款所述的任何罪行 ("甲類" 罪行)；及
  (*b*) 第 (3) 款所述的任何罪行 ("乙類" 罪行)。
(2) 甲類罪行為——
  (*a*) 《盜竊罪條例》(第 210 章) 下列條文所訂的任何罪行——
    第 9 條 (盜竊)
    第 17 條 (以欺騙手段取得財產)
    第 18 條 (以欺騙手段取得金錢利益)
    第 18A 條 (以欺騙手段取得服務)
    第 18B 條 (以欺騙手段逃避法律責任)
    第 18D 條 (以欺騙手段促致在某些紀錄裏產生虛假記項)
    第 19 條 (偽造帳目)
    第 21 條 (公司董事等人作出虛假報表)
    第 22(2)條 (以欺騙手段促致有價產權書的簽立)

section 23 (blackmail)
section 24 (handling stolen goods)

(*b*) an offence under any of the following provisions of the Crimes Ordinance (Cap. 200)—

section 71 (forgery)
section 72 (copying a false instrument)
section 73 (using a false instrument)
section 74 (using a copy of a false instrument)
section 75 (possessing a false instrument)
section 76 (making or possessing equipment for making a false instrument)

(3) The Group B offences are—

(*a*) conspiracy to commit a Group A offence;
(*b*) conspiracy to defraud;
(*c*) attempting to commit a Group A offence;
(*d*) incitement to commit a Group A offence.

(4) The Governor in Council may, by order in the Gazette, amend subsection (2) or (3) by adding or removing any offence.

(5) No order shall be made under subsection (4) unless a draft of it has been laid before and approved by resolution of the Legislative Council, and section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) shall not apply in relation to any such order.

3. Jurisdiction in respect of Group A offences

(1) For the purpose of this section, "relevant event" (有關事情), in relation to any Group A offence, means any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.

(2) For the purpose of determining whether or not a particular event is a relevant event in relation to a Group A offence, any question as to where it occurred is to be disregarded.

(3) A person may be guilty of a Group A offence if any of the events which are relevant events in relation to the offence occurred in Hong Kong.

[*cf. 1993 c. 36 s. 2 U.K.*]

4. Questions immaterial to jurisdiction in the case of certain offences

(1) A person may be guilty of a Group A or Group B offence—

(*a*) whatever his citizenship or nationality, or whether or not he was a permanent resident of Hong Kong at any material time;

第 23 條 (勒索)
第 24 條 (處理贓物)

(*b*) 《刑事罪行條例》(第 200 章) 下列條文所訂的任何罪行 —

第 71 條 (偽造)
第 72 條 (製造虛假文書的副本)
第 73 條 (使用虛假文書)
第 74 條 (使用虛假文書的副本)
第 75 條 (管有虛假文書)
第 76 條 (製造或管有用作製造虛假文書的設備)

(3) 乙類罪行為——

(*a*) 串謀犯甲類罪行；
(*b*) 串謀詐騙；
(*c*) 企圖犯甲類罪行；
(*d*) 煽惑他人犯甲類罪行。

(4) 總督會同行政局可藉在憲報頒布命令，修訂第 (2) 或 (3) 款的條文，增訂或刪除任何罪行。

(5) 除非有關命令的草稿事先已提交立法局，並經立法局以決議通過，否則不得根據第 (4) 款作出任何命令；《釋義及通則條例》(第 1 章) 第 34 條不適用於該類命令。

3. 對甲類罪行的司法管轄權

(1) 為本條的施行，"有關事情" (relevant event)，就任何甲類罪行而言，指就該罪行定罪而須予以證明的任何作為或不作為或其他事情 (包括一項或多項作為或不作為所產生的任何後果)。

(2) 為確定某一事情就任何甲類罪行而言是否屬有關事情，任何關於該事情在何地發生的問題，均不須理會。

(3) 就任何甲類罪行而言，如有任何有關事情是在香港發生的，則任何人可因犯該甲類罪行而被判有罪。

〔*比照 1993 c. 36 s. 2 U.K.*〕

4. 對就某些罪行行使的司法管轄權而言屬於無關重要的問題

(1) 任何人可被判犯了甲類或乙類罪行，不論——

(*a*) 他的公民身分或國籍，亦不論他在有關時間是否香港永久性居民；

(*b*) whether or not he was in Hong Kong at any such time.

(2) On a charge of conspiracy to commit a Group A offence, or conspiracy to defraud in Hong Kong, the defendant may be guilty of the offence whether or not—

(*a*) he became a party to the conspiracy in Hong Kong;

(*b*) any act or omission or other event in relation to the conspiracy occurred in Hong Kong.

(3) On a charge of attempting to commit a Group A offence, the defendant may be guilty of the offence whether or not—

(*a*) the attempt was made in Hong Kong;

(*b*) it had an effect in Hong Kong.

(4) On a charge of incitement to commit a Group A offence, the defendant may be guilty of an offence whether or not the incitement took place in Hong Kong.

(5) Subsection (1)(*a*) does not apply where jurisdiction is given to try the offence in question by an enactment which makes provision by reference to the citizenship or nationality of the person charged.

[*cf. 1993 c. 36 s. 3 U.K.*]

5. Location of events for jurisdictional purposes

In relation to a Group A or Group B offence—

(*a*) there is an obtaining of property in Hong Kong if the property is either despatched from or received in Hong Kong; and

(*b*) there is a communication in Hong Kong of any information, instruction, request, demand or other matter if it is sent by any means—

(i) from Hong Kong to elsewhere; or

(ii) from elsewhere to Hong Kong.

[*cf. 1993 c. 36 s. 4 U.K.*]

6. Extended jurisdiction in relation to certain conspiracies, attempts and incitements

(1) Subject to section 7(1), a person may be guilty of conspiracy to commit any Group A offence, or of conspiracy to defraud, if—

(*a*) a party to the agreement constituting the conspiracy, or a party's agent, did anything in Hong Kong in relation to the agreement before its formation; or

(*b*) a party to it became a party in Hong Kong (by joining it either in person or through an agent); or

(*c*) a party to it, or a party's agent, did or omitted anything in Hong Kong in pursuance of it,

(*b*) 他在任何上述時間是否身在香港。

(2) 被控串謀犯甲類罪行或串謀在香港詐騙的被告人，可被判犯了該罪，不論——

(*a*) 他是否在香港成為串謀的一方；

(*b*) 任何關乎該項串謀的作為或不作為或其他事情是否在香港發生。

(3) 被控企圖犯甲類罪行的被告人，可被判犯了該罪，不論——

(*a*) 該企圖犯罪的行為是否在香港作出；

(*b*) 該企圖犯罪的行為是否在香港產生作用。

(4) 被控煽惑他人犯甲類罪行的被告人，可被判犯了該罪，不論該煽惑他人的行為是否在香港發生。

(5) 如某成文法則賦予司法管轄權以對有關罪行進行審訊，而該成文法則就被控人的公民身分或國籍問題，訂有條文，則第(1)(*a*)款並不適用。

〔*比照 1993 c. 36 s. 3 U.K.*〕

5. 以事情發生地點決定司法管轄權

就甲類或乙類罪行而言——

(*a*) 若有任何財產是從香港發送或在香港收到的，該財產即屬在香港取得；及

(*b*) 若有任何資料、指示、請求、要求或其他事宜以任何方式——

(i) 從香港傳遞至香港以外的任何地方；或

(ii) 從香港以外的任何地方傳遞至香港，

則該資料、指示、請求、要求或其他事宜即屬在香港傳送。

〔*比照 1993 c. 36 s. 4 U.K.*〕

6. 擴大對某些串謀、企圖犯罪及煽惑他人的罪行的司法管轄權

(1) 在符合第7(1)條的條文下，任何人可被判犯了串謀犯任何甲類罪行或串謀詐騙，只要——

(*a*) 在構成該串謀罪的協議中的一方或一方的代理人，曾在該協議達成前在香港作出任何與該協議有關的事；或

(*b*) 在該協議中的一方是在香港(不論是親身或透過代理人)成為該協議的一方；或

(*c*) 在協議中的一方或一方的代理人依據該協議曾在香港作出或不作出任何事，

and the conspiracy would be triable in Hong Kong but for the offence or fraud which the parties to it had in view not being intended to take place in Hong Kong.

(2) Subject to section 7(2), a person may be guilty of attempting to commit or incitement to commit a Group A offence if—

(*a*) the attempt is made or the incitement takes place in Hong Kong; and

(*b*) the attempt or the incitement would be triable in Hong Kong but for what the person charged had in view not being an offence triable in Hong Kong.

7. Relevance of external law

(1) A person is guilty of an offence triable by virtue of section 6(1) only if the pursuit of the agreed course of conduct would at some stage involve—

(*a*) an act or omission by one or more of the parties; or

(*b*) the happening of some other event,

constituting an offence under the law in force where the act, omission or other event was intended to take place.

(2) A person is guilty of an offence triable by virtue of section 6(2) only if what he had in view would involve the commission of an offence under the law in force where the whole or any part of it was intended to take place.

(3) Conduct punishable under the law in force in any place is an offence under that law for the purpose of this section and section 8, however it is described in that law.

[*cf. 1993 c. 36 s. 6(1)–(3) U.K.*]

8. Proof of external law

(1) Subject to subsection (3), a condition specified in section 7(1) or (2) shall be taken to be satisfied unless, within a time specified by rules of court made by the Chief Justice, the defence serve on the prosecution a notice—

(*a*) stating that, on the facts as alleged with respect to the relevant conduct, the condition is not in their opinion satisfied;

(*b*) showing their grounds for that opinion; and

(*c*) requiring the prosecution to show that it is satisfied.

(2) In subsection (1), "the relevant conduct" (有關行為) means—

(*a*) where the condition in section 7(1) is in question, the agreed course of conduct; and

(*b*) where the condition in section 7(2) is in question, what the defendant had in view.

以及假若不是因為該串謀罪中的各方所構想的罪行或欺詐行為並非擬在香港發生，該串謀罪是可在香港審訊的。

(2) 在符合第7(2)條的條文下，任何人可被判犯了企圖或煽惑他人犯甲類罪行，只要——

(*a*) 該企圖犯罪或煽惑他人的行為是在香港作出的；及

(*b*) 假若不是因為被控人所構想的事不屬可在香港審訊的罪行，該企圖犯罪或煽惑他人的行為是可在香港審訊的。

7. 外地法律的適用程度

(1) 如為實施所協定的行為過程而會在某個階段涉及——

(*a*) 一方或超過一方的作為或不作為；或

(*b*) 其他事情的發生，

而根據在該作為、不作為或事情擬發生的地方的有效法律，該作為、不作為或事情是構成一項罪行的，則任何人只有在此情況下方被判犯了可憑藉第6(1)條審訊的罪行。

(2) 如任何人所構想的事會涉及犯一項該事或其任何部分擬發生的地方的有效法律所訂的罪行，則該人只有在此情況下方被判犯了可憑藉第6(2)條審訊的罪行。

(3) 任何行為如根據任何地方的有效法律是可予懲罰的，就本條及第8條而言，即屬該法律所訂的罪行，不管該法律如何描述該行為。

〔*比照1993 c. 36 s.6 (1) (3) U.K.*〕

8. 外地法律的證明

(1) 除第(3)款另有規定外，第7(1)或(2)條內所指明的條件須視為已予符合，除非在首席大法官所訂立的法院規則所指明的時間內，辯方向控方送達通知書——

(*a*) 述明根據對有關行為所指稱的事實，辯方認為該條件未予符合；

(*b*) 說明辯方如此認為所依據的理由；及

(*c*) 要求控方證明該條件已予符合。

(2) 在第(1)款中，"有關行為"(the relevant conduct)——

(*a*) 若關乎第7(1)條內的條件，即指協定的行為過程；及

(*b*) 若關乎第7(2)條內的條件，即指被告人所構想的事。

(3) The court, if it thinks fit, may permit ... ...ce to require the prosecution to show that the condition is satisfied without the prior service of a notice under subsection (1).

(4) In a trial in the High Court, the question whether the condition is satisfied shall be decided by the judge alone, and may be decided by him before a jury is empanelled.

(5) The Chief Justice may make rules of court specifying the time within which a notice under subsection (1) shall be served on the prosecution.

[*cf. 1993 c. 36 s. 6(4)–(7) U.K.*]

9. Application

Nothing in this Ordinance applies to any act, omission or other event occurring before the coming into force of this Ordinance.

[*cf. 1993 c. 36 s. 78(5) U.K.*]

(3) 法院如認為適當，可准許辯方在無須根據第(1)款事先送達通知書的情況下要求控方證明該條件已予符合。

(4) 在高等法院的審訊中，該條件是否已予符合的問題，須由大法官單獨裁定，並可在陪審團組成前作出裁定。

(5) 首席大法官可訂立法院規則，指明在甚麼時間內將第(1)款所指的通知書送達控方。

〔*比照 1993 c. 36 s. 6(4)–(7) U.K.*〕

9. 本條例的適用性

本條例的任何條文均不適用於本條例實施前發生的任何作為、不作為或其他事情。

〔*比照 1993 c. 36 s. 78(5) U.K.*〕