

COURT OF APPEAL

88

13th July, 1993.

Before: Sir Godfray Le Quesne, Q.C., President,
R.D. Harman, Esq., Q.C.,
Sir Charles Frossard, K.B.E.

Between: The Owner of the Account styled "J & N McMahon" First Appellant

And: Ronald Colin George Probets Second Appellant

And: Her Majesty's Attorney General Respondent

Representation of the Respondent, praying the Court to determine whether it had jurisdiction to determine the Appellants' appeals.

Advocate J.A. Clyde-Smith for the Respondent.
Advocate R.J. Michel for the First Appellant.
Advocate G.R. Boxall for the Second Appellant.

JUDGMENT.

THE PRESIDENT: On 24th November, 1992, the Attorney General, acting under a power contained in the Investigation of Fraud (Jersey) Law 1991, issued a notice requiring the manager of A.I.B. Bank (C.I.) Ltd., to furnish information regarding the account held in the name of J. & N. McMahon, and to provide additional information concerning a bank draft payable to the Order of Ronald Colin George Probets.

The Appellants separately responded by issuing Representations on 7th and 9th December, 1992, respectively, challenging the validity of the Attorney General's Notice.

These Representations were heard in the Royal Court on 22nd and 23rd March, 1993. In a reserved judgment delivered on 7th April, 1993, the Court dismissed the Representations making no order as to costs, granted the Appellants leave to appeal, and ordered a stay of execution.

On 5th May, 1993, the First Appellant gave notice of appeal, and the Second Appellant on 6th May, 1993.

On 28th June, 1993, the Attorney General made a Representation to this Court, asking the Court to determine whether it had jurisdiction to hear the appeals. The Attorney General contends that his order made under the Investigation of Fraud (Jersey) Law, 1991, was for the purposes of a criminal investigation and possible prosecution and is, therefore, properly to be categorised as a criminal matter. He further contends that the notices of appeal issued in the present case seek to initiate appeals in a criminal matter; that the jurisdiction of the Court of Appeal in criminal matters is that conferred by Part III of the Court of Appeal (Jersey) Law, 1961; and that the jurisdiction conferred by that part does not extend to this case.

It is necessary, before going further, to set out the Article under which the Attorney General issued his Notice, Article 2 of the Investigation of Fraud (Jersey) Law 1991. The Article is entitled: "**Attorney General's powers of investigation**":

(1) The powers of the Attorney General under this Article shall be exercisable in any case in which it appears to him that -

- (a) there is a suspected offence involving serious or complex fraud, wherever committed; and**
- (b) there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.**

(2) The Attorney General may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person who he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.

(3) The Attorney General may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified any specified documents which appear to the Attorney General to relate to any matter relevant to the investigation or any

documents of a specified description which appear to him so to relate; and

- (a) if any such documents are produced, the Attorney General may -
 - (i) take copies or extracts from them;
 - (ii) require the person producing them to provide an explanation of any of them;
- (b) if any such documents are not produced, the Attorney General may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are".

It is also interesting to notice one paragraph of Article 3 which is headed "*Disclosure of information*". Paragraph 3 reads:

"Subject to" (various matters to which we need not refer) "information obtained by the Attorney General or a Crown Advocate duly authorized under paragraph (10) of Article 2 may be disclosed in the interests of justice to any person or body for the purposes of any investigation of an offence or prosecution in the Bailiwick or elsewhere".

We come therefore to the question whether there is jurisdiction in this Court to hear appeals from the judgment of the Royal Court relating to the validity of the Attorney General's Notice.

The jurisdiction of this Court is entirely statutory. It is created by the Court of Appeal (Jersey) Law, 1961. Before we come to the provisions of that law, it is necessary to say something about the system of appeals which existed before 1964, when the Court of Appeal Law came into force.

Before 1964 there was a right of appeal from judgments of the Inferior Number of the Royal Court to the Superior Number. This right embraced both civil cases and criminal. It was not available in petty cases, that is to say those in which the sum at stake or the fine imposed were below a certain figure. Apart from this the right of appeal was comprehensive and applied to all judgments of the Inferior Number without any distinction between those which were civil and those which were criminal.

The long title of the Court of Appeal Law is: "**A Law to constitute a Court of Appeal, to amend the Law relating to appeals in civil and criminal cases, and to provide for matters ancillary thereto....**". Part I of the Law deals with the Court and its organisation; Part II is entitled: "**APPEALS IN CIVIL CAUSES AND**

MATTERS"; and Part III: **"APPEALS IN CRIMINAL AND QUASI-CRIMINAL MATTERS"**. Article 1 provides:

"There shall be a Court of Appeal with such jurisdiction as is conferred upon it by this Law".

The jurisdiction is conferred by three subsequent Articles. The first is Article 12, which is the first Article of Part II. Paragraph (1) of Article 12 provides:

"There shall be vested in the Court of Appeal all jurisdiction and powers hitherto vested in the Superior Number of the Royal Court when exercising appellate jurisdiction in any civil cause or matter".

Paragraph (2) of Article 12 confers jurisdiction in cases decided by the Superior Number when exercising original jurisdiction in any civil cause or matter, but it is not necessary to refer any further to that for the purposes of the question before us.

The second Article conferring jurisdiction is Article 24, which is in Part III of the Law. Its opening words are:

"A person convicted on indictment by the Royal Court, whether sitting with or without a jury, may appeal under this Part of this Law to the Court of Appeal".

Under a proviso to this Article, in a case in which the Appellants had been convicted and sentenced by the Inferior Number, appeal continued to lie to the Superior Number. On this point the law has subsequently been changed by amendment.

The third Article conferring jurisdiction is Article 42, also in Part III, which by paragraph (3) applies Part III of the Law to cases of convictions by the Royal Court otherwise than by way of indictment.

These are the only provisions of the Court of Appeal Law conferring jurisdiction upon this Court. The whole of our jurisdiction therefore has to be found within the confines of these three enactments.

The Law confers jurisdiction upon this Court separately in civil causes and matters and criminal and quasi-criminal matters. In the former, the pre-existing appellate jurisdiction of the Superior Number is vested in this Court. In the latter, this Court was given jurisdiction to hear appeals from the Superior Number, and the Superior Number's jurisdiction to hear appeals from the Inferior Number was preserved, but no right of appeal is given in a criminal matter except to a person convicted.

It is likely that when the Court of Appeal Law was passed its framers thought that these provisions would be entirely comprehensive and would deal with rights of appeal in all cases decided by the Royal Court. The expressions "civil causes and matters" and "criminal and quasi-criminal matters" appear to have been intended to embrace between them all cases in the Royal Court. It may well be that very close consideration was not given to the distinction since it was not a distinction which had ever arisen under the law previously governing rights of appeal. In criminal matters the framers of the Law probably took it for granted that there would be no question of any appeal other than an appeal following conviction. It is most unlikely, in our view, that they contemplated the possibility of other kinds of appeals in criminal matters and intended to exclude them. In 1961, the law of judicial review was in its infancy, if indeed in Jersey it had even come to birth. We doubt whether the idea had ever arisen of application to the Royal Court to control or to authorise police investigations. There was no reason why the framers of the Law should have supposed that there might be a proceeding in the Royal Court which, though not a trial ending in conviction or acquittal, might nevertheless be regarded as criminal.

However that may have been, such a proceeding has now occurred. The proceeding in the Royal Court in this case was not a trial of anybody on any charge. The Attorney General contends, nevertheless, that it was criminal in character, not civil. We have to decide how this proceeding, even if the framers of the Court of Appeal Law never dreamed of it, can be fitted into that Law's categories.

It is clear that in this case there is no jurisdiction under Part III of the Law. This is not an appeal by a person convicted and it is only a person convicted who can appeal under Part III. So everything depends upon the alternative source of jurisdiction in Part II. Does the case fall within **"all jurisdiction and powers hitherto vested in the Superior Number of the Royal Court when exercising appellate jurisdiction in any civil cause or matter"**?

But for those last six words there would be no doubt about the answer. All the parties agree that if the Royal Court's judgment in this case of 7th April, 1993 had been given before 1964, there would have been a right of appeal from it to the Superior Number. There would have been no need to consider whether the case was civil or criminal. The right of appeal would not have depended on any such distinction. Either way the case would have been within the Superior Number's appellate jurisdiction.

The problem arises because it is not the whole of this jurisdiction that Article 12 vests in the Court of Appeal. What that Article transfers to us is the appellate jurisdiction

formerly exercised by the Superior Number "**in any civil cause or matter**". The Superior Number would have had jurisdiction before 1964 to hear this appeal, but when it heard the appeal would it have been exercising jurisdiction in any civil cause or matter? That is the question we must answer, and it can be answered only by deciding whether the appeal before us is a civil cause or matter.

The Appellants submit that the right of appeal from the Inferior Number to the Superior Number was, before 1964, a right which under the common law of Jersey had existed for centuries. It follows, they say, that the Court of Appeal Law should not be interpreted as abrogating that right to any extent unless its language displays a clear intention to do so.

They argue further that in fact it was not the intention of the legislature to abrogate any part of this right, and the language of the Law should therefore be given a sense which results in the possession by this Court of the whole of the appellate jurisdiction formerly enjoyed by the Superior Number. This can be done, the Appellants submit, by interpreting any civil cause or matter in Article 12 paragraph (1) as meaning any cause or matter not involving actually or potentially conviction or sentence. The words we have used here are not the precise words used by Advocate Michel, but we consider that they set out accurately the substance of his submission.

The words "**any civil cause or matter**" of Article 12 have certainly to be interpreted in the context both legislative and historical of the Court of Appeal Law. One feature of the context is the age old right of appeal from the Inferior Number to the Superior Number. The Law should not lightly or gratuitously be interpreted as restricting that right. It must be remembered, however, that that principle is not a fetter upon the power of the legislature, but a canon of construction to be applied in case of ambiguity. The intention of the legislature has to be given effect in interpreting the law, but that intention has to be gathered from the language used in the Law. The first task is to look at the words of the Article and see whether any ambiguity lurks in them.

Advocate Michel submitted that the only question in the appeal, and, he said, the only question before the Royal Court on 22nd and 23rd March, 1993, is the question of the existence or the extent of the jurisdiction in the Royal Court to review the exercise by the Attorney General of his powers under Article 2 of the Investigation of Fraud (Jersey) Law, 1991. This, he says, is a civil question and gives rise to civil proceedings.

It is necessary in our judgment to look a little further back. The Attorney General's power is exercisable "**if it appears to him that there is a suspected offence involving serious or**

complex fraud and there is good reason to exercise the power for the purpose of investigating the affairs or any aspect of the affairs of any person". These two conditions must clearly be read together. The power is exercisable if it appears to the Attorney General that somebody suspects a serious offence of fraud has been committed, and in connection with that suspicion there is good reason to exercise the power for the purpose of investigating somebody's affairs.

The purpose of the power is the facilitating of the investigation of a suspected crime - what is commonly called a criminal investigation. If information is obtained as a result of the order, the use of it allowed by Article 3 of the Law is disclosure for the purposes of investigation of an offence or of a prosecution.

The purpose of the proceedings in the Royal Court was to stop a particular step in the investigation of the suspected offence which the Attorney General's order would have made possible. In other words, to curb the criminal investigation. The Attorney General's power is a power to authorise a form of criminal investigation. The object of the proceedings was to invalidate the exercise of the power and so restrict the criminal investigation.

We bear in mind the legislative and historical context of the Court of Appeal Law, but we find it impossible to characterise proceedings brought with this object in relation to this power as a civil cause or matter.

In considering this question we do not find any ambiguity in those terms in paragraph (1) of Article 12 of the Court of Appeal Law. Giving to those words "**in any civil cause or matter**" their ordinary meaning which, in our judgment, is the meaning which they bear in that paragraph, we consider it impossible to bring within them the proceedings now before us.

Since it is admitted on all sides that the case cannot be brought under the alternative source of jurisdiction in Part III of the Law and in our judgment it does not fall within the source of jurisdiction in Part II of the Law, it follows that it is not within the jurisdiction of the Court at all.

We should say a word about the English authorities to which we were referred by both sides. These authorities are directed to the issue whether orders were made in a criminal cause or matter. That question arises in England because when the English Court of Appeal was set up by the Judicature Act 1873, it was a purely civil tribunal. There is, therefore, to be found in section 47 of that Act a provision excluding appeals in criminal causes or matters from the jurisdiction of the Court. This was repeated

successively in section 31 of the Judicature Act 1925 and now section 18 of the Supreme Court Act 1981 which provides:

"No appeal shall lie to the Court of Appeal except as provided by the Administration of Justice Act 1960..." (which relates to contempt of court) **"from any judgment of the High Court in any criminal cause or matter".**

Amand -v- Home Secretary & Minister of Defence of Royal Netherlands Government (1943) A.C. 147 has for long been the leading authority on this enactment. It provides authority for the proposition that if the cause or matter is one which, if carried to its conclusion, may result in the trial and conviction of the person charged and in a sentence of some punishment, it is criminal. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English Court is an order in a criminal cause or matter, even though the order taken by itself is neutral in character and might equally have been made in a cause or matter which is not criminal. (See Lord Simon L.C. at p.156, and Lord Wright at p.182.) The proceeding from which appeal is attempted must be a step in a criminal proceeding but it need not itself end in a criminal trial or punishment. It is enough if it puts the person in jeopardy of a criminal charge. (See Lord Porter at p.164.)

It is unnecessary for us to refer to all the cases cited. We mention two of these cases, which for present purposes are the most important. The first is Bonalumi -v- Secretary of State for the Home Department & Anor. (1985) QB 675 C.A., in which comments are to be found upon the Amand decision. Carr & Ors. -v- Atkins (1987) QB 963 is of some significance because the English Court of Appeal there held that an order made by a Circuit Judge under the first schedule to the Police and Criminal Evidence Act, 1984 to produce documents to a constable was an order made for the purpose of a criminal investigation and was therefore a criminal cause or matter, although criminal proceedings might not, at that stage, have been instituted in any court.

These cases appear to us to support the conclusion to which we have come in this appeal as a matter of interpretation of the Jersey statute.

We add the comment, however, that these English authorities are essentially directed to the interpretation of the English statutes and to demonstrating positively that a cause or matter is criminal. We have had to consider whether, since a right of appeal cannot arise here under Part III of the Court of Appeal Law, it can arise under Part II. The question which arises here, therefore, is the similar but not identical question whether the cause or matter is shown to be civil.

As we have said we regard the English cases as lending support to the conclusion to which we have come. We have come to that conclusion, however, by arriving at what in our judgment is the right interpretation of the Court of Appeal (Jersey) Law. Upon that interpretation our conclusion is that the present appeals lie outside the jurisdiction of this Court.

ADVOCATE MICHEL: Sir, in the light of the Court's judgment, the Court will be aware that I wrote the Court a letter this morning with two authorities. In the light of that judgment a number of things will obviously flow. Firstly that this Court declines jurisdiction in respect of the appeal which leave has been granted by the learned Bailiff to the decision which he gave on 7th April. And in the light of that fact the question must equally flow as to where that appeal - if it may proceed - is to proceed. Historically, if there was no appeal to the Superior Number which is almost unheard of one could apply by way of *doléance* to the Judicial Committee of the Privy Council as it now is. Such a procedure is, I think, properly no longer with us and in fact you must now apply by way of petition for special leave to the Judicial Committee in accordance with the 1982 laws. I, Sir, provided for you this morning two authorities which I submit are pertinent to how this Court should now deal with the matters which are before it.

It will not be unknown to you, Sir, that the Privy Council declines to exercise a jurisdiction in the air, so to speak, it wishes to exercise its jurisdiction dealing with the full substance of the matter, rather than on an interlocutory basis, rather than a small bite of the cherry followed by a further small bite of the cherry maybe followed by in the third instance swallowing the cherry, or what is left of it.

Therefore, I would submit, Sir, that notwithstanding the fact that this Court has declined jurisdiction it should follow the procedure which took place in United States Government -v- Bowe and Tann -v- Cameron. Obviously, Sir, my first application is with respect to apply for leave to appeal from the decision which you have just given. Having said that I accept that I have a difficulty, Sir, because the amount in issue is zero, and the provision in the statute gives an absolute right of appeal where there is an amount of - I think it's now £10,000 - the amendment was quite recent. But without the financial limitation I am obliged I think, Sir, to apply for leave to appeal. It would not be a surprise to me as to what your response would be, but I am obliged to apply to you for leave to appeal.

Having said that, Sir, I also submit that the Court should nevertheless proceed to hear the substance of the appeal in the way it was dealt with in Bowe and in Tann. That means, Sir, that if the Court is minded to proceed that way, the Judicial Committee, if it is minded ultimately to grant leave on a special petition, will have before it all the various facts and matters in issue in this appeal.

THE PRESIDENT: You say these two authorities say that having found we have no jurisdiction to hear the appeals, we should nevertheless go on to hear them.

ADVOCATE MICHEL: Yes, Sir, and in fact

THE PRESIDENT: Just show us that, will you, please?

ADVOCATE MICHEL: Yes, Sir. I turn first to the United States Government -v- Bowe which was - it's reported in 3 WLR at p.1256. I refer you first, Sir, to the headnote on p.1258.

THE PRESIDENT: Let's read it from the beginning, could we? We'll read it to ourselves, Mr. Michel, it's rather long.

ADVOCATE MICHEL: It's seven pages otherwise to read it all out loud.

Authorities

Carr & Ors. -v- Atkins (1987) 3 All ER 684 C.A. (1987) QB 963.

Bonalumi -v- Secretary of State for the Home Department & Anor.
(1985) 1 QB 675 C.A.

Investigation of Fraud (Jersey) Law, 1991.

In Re O [1991] 2 QB 520.

R -v- Secretary of State for the Home Department, *ex parte*
Doody [1993] 1 All ER 151.

R -v- Secretary of State for the Home Department, *ex parte*
Doody. House of Lords: Unreported.

Court of Appeal (Jersey) Law, 1961.

Royal Court Rules 1992: Rule 3/1(2).

Taylor -v- Constable of St. Helier (1980) JJ 29.

Tett -v- States of Jersey (1972) JJ 2249.

In re an Advocate (1978) JJ 193.

Judicature Act 1873 s.47.

Judicature Act 1925: s.31.

Supreme Court Act 1981 s.18.

Amand -v- Home Secretary & Minister of Defence of Royal
Netherlands Government (1943) A.C. 147.