REPORTING RESTRICTIONS APPLY TO THIS CASE

Trinity Term
[2018] UKSC 36
On appeal from: [2017] EWCA Crim 129

JUDGMENT

R *v* Sally Lane and John Letts (AB and CD) (Appellants)

before

Lady Hale, President
Lord Mance
Lord Hughes
Lord Hodge
Lord Burnett

JUDGMENT GIVEN ON

11 July 2018

Heard on 19 April 2018

Appellants	*Respondent*
Tim Moloney QC Richard Thomas (Instructed by ITN Solicitors)	Louis Mably QC Alison Morgan (Instructed by CPS Appeals and Review Unit)

LORD HUGHES: (with whom Lady Hale, Lord Mance, Lord Hodge and Lord Burnett agree)

1. The ruling under challenge in this case was made by the Crown Court judge at a preparatory hearing, held in anticipation of a criminal trial. That means that as yet no evidence has been heard and it cannot be known what the facts of the case may turn out to be. Such rulings are occasionally necessary in order to establish the basis on which the trial will be conducted. But it needs to be remembered that a point raised at that early stage may turn out to be at the centre of the trial, or to be merely peripheral, or indeed sometimes not to arise at all, depending on what evidence emerges, and which parts of it are in dispute. For this reason, reporting restrictions apply to this hearing: see para 26 below.

2. The two appellants are charged with the offence of entering into funding arrangements connected with terrorism, contrary to section 17 of the Terrorism Act 2000 ("the Act"). Because it is not yet known what course the trial will take, as little as possible should be said now about the allegations, which may or may not be proved. It is enough to say that the appellants are charged with sending money overseas, or arranging to do so, when they knew or had reasonable cause to suspect that it would, or might, be used for the purposes of terrorism.

3. The section of the Act which creates this offence says as follows:

> "**17. Funding arrangements.**
>
> A person commits an offence if -
>
> > (a) he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and
> >
> > (b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism."

4. The question which arises on this appeal concerns the correct meaning of the expression "has reasonable cause to suspect" in section 17(b). Does it mean that the

accused must actually suspect, and for reasonable cause, that the money may be used for the purposes of terrorism? Or is it sufficient that on the information known to him there exists, assessed objectively, reasonable cause to suspect that that may be the use to which it is put?

5. Of course, it may well be that at any trial under this section it will be the Crown case that a defendant actually did suspect, and for reasonable cause, that the money might be used in this way, and it may well be that an important issue at the trial will be whether that allegation is proved or not. But the judge in the present case addressed the question posed in the previous paragraph in case it were to arise at the trial.

6. The question posed above has been addressed by counsel on both sides with commendable accuracy and lucidity. Both the trial judge and the Court of Appeal (Criminal Division) concluded that the correct answer was that the words used in the statute plainly mean that it is sufficient that on the information known to the accused, there exists, assessed objectively, reasonable cause to suspect that the money may be used for the purposes of terrorism.

7. The appellants contend that this conclusion is wrong. They say that:

(i) the words used are capable of either meaning;

(ii) given that, the well-established presumption that an offence-creating provision ought to be construed as requiring an element of a guilty mind ("mens rea") operates to accord to the section the meaning that an accused must actually suspect that the money may be put to terrorist use;

(iii) this is particularly so since the offence here created is a serious one, to be contrasted with the kind of regulatory contexts where a legislative intention to create an offence of strict liability may more easily be divined;

(iv) the Court of Appeal erred in starting by asking the natural meaning of the words, and then whether that meaning had been displaced; it is said that it ought to have begun with the presumption of mens rea and asked whether that presumption had been displaced by the words of the section; and

(v) the Court of Appeal erred in giving too much emphasis to the fact that the statute was designed to protect the public against the grave threat of terrorism; whilst this is so, it is not a reason to dilute the presumption.

The presumption as to mens rea

8. The presumption on which the appellants rely is indeed well-established and has often been applied to the construction of statutes creating offences where the meaning is in doubt. The conventionally authoritative statement of the presumption is found in the speech of Lord Reid in *Sweet v Parsley* [1970] AC 132, 148, 149:

> "our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.
>
> …
>
> … it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.
>
> It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word 'knowingly' is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

This statement of the principle was described by Lord Nicholls in *B (A minor) v Director of Public Prosecutions* [2000] 2 AC 428, 460 as "magisterial". It has often been applied, and it is unnecessary to multiply examples. They include recent cases in this court, such as *R v Brown (Richard)* [2013] UKSC 43; [2013] 4 All ER 860, *R v Hughes (Michael)* [2013] UKSC 56; [2013] 1 WLR 2461, and *R v Taylor (Jack)* [2016] UKSC 5; [2016] 1 WLR 500.

9. Whilst the principle is not in doubt, and is of great importance in the approach to the construction of criminal statutes, it remains a principle of statutory construction. Its importance lies in ensuring that a need for mens rea is not inadvertently, silently, or ambiguously removed from the ingredients of a statutory offence. But it is not a power in the court to substitute for the plain words used by Parliament a different provision, on the grounds that it would, if itself drafting the definition of the offence, have done so differently by providing for an element, or a greater element, of mens rea. The principle of Parliamentary sovereignty demands no less. Lord Reid was at pains to observe that the presumption applies where the statute is silent as to mens rea, and that the first duty of the court is to consider the words of the statute.

10. *Hughes (Michael)* and *Taylor (Jack)*, mentioned above, concerned offences of causing death by driving. They were cases where the language of the statutes was ambiguous and the presumption assisted the court to reach the conclusion that they imported an element of fault (although not necessarily of subjective mens rea rather than of error of driving). The words used by Parliament were words of causation of death. This court construed those words as importing an element of fault, principally because there were ample unambiguous alternative expressions which could and would have been used if the intention had been to create an offence of homicide which could be committed simply by being present on the road to be run into by someone else.

11. By contrast, *Brown (Richard)* was a case in which this court had no doubt that the statutory offence of unlawful carnal knowledge of a girl under 14 did not contain a requirement that the accused know that the girl was under age. This conclusion was mandated despite the fact that the offence-creating section was silent as to whether such knowledge was required or not. It was a conclusion compelled by the prior common law and statutory context, against which the offence had been created, by other provisions in the legislation, which had to be construed as a whole, and by the social mischief which the Act had been passed to meet.

12. Thus these three recent cases are good illustrations of the truism that the presumption on which the appellants here rely is a principle of statutory construction, which must give way to either the plain meaning of the words, or to other relevant pointers to meaning which clearly demonstrate what was intended. It

follows that the Court of Appeal in the present case did not fall into the error suggested, of wrongly starting with the words of the Act. On the contrary, that is the inevitable first port of call for any issue of construction, as Lord Reid's statement of the principle in *Sweet v Parsley* expressly stated.

The language of the statute

13. Mr Moloney QC, for the appellants, was characteristically realistic, and correct, to recognise that the words of section 17(b) are such as, at first sight, suggest an objective test. The section makes it an offence where the defendant either "knows" or "has reasonable cause to suspect". It does not say what one would expect it to say if it meant that the defendant must be proved actually to have suspected, that is:

> "if … he knows or suspects …"

Nor, for that matter, does it say:

> "if … he knows or reasonably suspects …"

It is thus very difficult to see this statutory provision as one of the kind which Lord Reid was describing in *Sweet v Parsley*, that is to say one which is silent as to the state of mind required for commission of the offence.

Saik and O'Hara

14. The appellants nevertheless contend that, if not silent, the provision is ambiguous, and thus that the presumption should operate to resolve the doubt in favour of the construction which favours an accused by requiring a greater degree of mens rea. This argument is founded largely upon the House of Lords decision in *R v Saik* [2006] UKHL 18; [2007] 1 AC 18 and particularly on some passages in the speech of Lord Hope in that case and in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286.

15. In *Saik* the substantive offence under consideration was one of the now repealed offences of money-laundering contained in section 93A-C of the Criminal Justice Act 1988. The relevant one was section 93C(2):

> "(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he -
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property or removes it from the jurisdiction,
>
> for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order."

16. It is certainly true that in *Saik* the House of Lords concluded that this section imported a requirement that the defendant actually suspect, as well as that he did so on reasonable grounds. Whilst the section under discussion in the present case speaks not of reasonable "grounds" but of reasonable "cause" for suspicion, it is not necessary to contemplate any distinction between the two for the purposes of the present argument. The appellants rely particularly on what Lord Hope said at paras 51-53, where he concluded that to stipulate for reasonable grounds for suspicion assumed the existence of actual suspicion. Lord Hope drew an analogy with statutory powers of arrest, including that considered in *O'Hara* which was section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984. There a constable was given powers to arrest without a warrant if he had reason to suspect the person arrested was concerned in terrorism. As Lord Hope remarked in both cases, such a power of arrest plainly *assumes* an actual suspicion and adds the requirement that it be held on reasonable grounds. It plainly does not contemplate a constable arresting someone whom he might have grounds to suspect, but of whom he has no suspicion, still less someone about whom he has not thought at all, but of whom it could be said that objectively there existed reasonable grounds to suspect him.

17. The existence or otherwise of reasonable grounds for suspicion was not an issue in *Saik*. The defendant there concerned had made no bones about admitting that he suspected that the property which he had dealt with was the proceeds of crime; his contention was that he suspected but did not know. The charge he faced was not brought under section 93C(2). It was a charge of conspiracy to commit that statutory offence, and the point at issue related to the terms of section 1(2) of the Criminal Law Act 1977 which mandates proof of knowledge or intent when conspiracy is charged, even if the substantive offence is one which can be committed without such a state of mind. Accordingly, the construction of section 93C(2) arose

only en route to the real question, which was the meaning of the requirement for knowledge if the charge is conspiracy. As all their Lordships, including Lord Hope at para 51, made clear, section 93C(2) contained within its own terms the answer to any issue about its construction. Since the statutory offence which it created could be committed only if the defendant acted with the purpose of assisting someone else to avoid either prosecution or a confiscation order, the section necessarily meant, or assumed, that the defendant had actual suspicion. As Lady Hale succinctly put it at para 102:

> "Without that actual suspicion, he cannot act with the purpose required."

For these reasons it is not possible to read either *Saik* or *O'Hara* as laying down a universal proposition that if a statute speaks of a person having "reasonable cause to suspect", that will always assume that he has to have actual suspicion.

The statutory context

18. An offence of providing funding towards terrorism first appeared in the Prevention of Terrorism (Temporary Provisions) Act 1976. Section 10(2) of that Act provided:

> "If any person gives, lends or otherwise makes available to any other person, whether for consideration or not, any money or other property, **knowing or suspecting** that the money or other property will or may be applied or used for or in connection with the commission, preparation or institution of acts of terrorism to which this section applies, he shall be guilty of an offence." [Emphasis supplied]

That subsection was re-enacted in essentially identical form in section 10(2) of the replacement statute, the Prevention of Terrorism (Temporary Provisions) Act 1984. These sections thus provided for an offence which required proof either of knowledge or of actual suspicion.

19. However, when the 1984 Act was in turn replaced by the Prevention of Terrorism Act 1989 a change was made. Section 9(2) said:

> "(2) A person is guilty of an offence if he -

> (a) gives, lends or otherwise makes available to any other person,
>
> (b) whether for consideration or not, any money or other property; or
>
> enters into or is otherwise concerned in an arrangement whereby money or other property is or is to be made available to another person, **knowing or having reasonable cause to suspect** that it will or maybe applied or used as mentioned in subsection (1) above." [Emphasis supplied]

A similar formulation ("intending … or having reasonable cause to suspect") was applied by the 1989 Act to the related offence contrary to section 9(1) of soliciting or receiving contributions; this offence had, in previous statutes, required proof of intention rather than of any form of suspicion. These changes can only have been deliberate. They are inexplicable unless it was the Parliamentary intention to widen the scope of the offences to include those who had, objectively assessed, reasonable cause to suspect that the money might be put to terrorist use, as well as those who intended that it should be, or knew that it would be. In particular, the change in the definition of the offence which is now section 17 of the Terrorism Act 2000, and here under question, is a change from "knows or suspects" to "knows or has reasonable cause to suspect". That change can only have been intended to remove the requirement for proof of actual suspicion. It is not open to the court to ignore this kind of clear Parliamentary decision.

20. That inevitable conclusion is reinforced by the presence in the 2000 Act of section 19. This creates an offence for specified groups of people of failing to disclose to a police officer a belief or suspicion, which has come to their attention in the course of their work, that another person has committed one of a number of specified terrorist offences. The offence is committed, according to section 19, where a person

> "believes or suspects …"

Thus the 2000 Act, here in question, demonstrates the currency, in the context of terrorist offences, of a reference to actual suspicion, at the same time as turning its back on such a reference section 17, with which this court is now concerned. The contrast is clearly a relevant pointer to the meaning of section 17.

21. Similarly, section 18 of the same Act creates an offence of money laundering in relation to terrorist property. The offence contains no requirement of a mental element as a definition of the offence. Rather, by subsection (2), it provides that it is a defence for a person charged to prove that "he did not know and had no reasonable cause to suspect" that he was dealing with terrorist property. Thus the mental element provided for is consistent with that in the adjacent section 17, namely objectively assessed reasonable cause to suspect, although the onus of proof is reversed. This section also compellingly reinforces the construction of section 17 arrived at by the judge and the Court of Appeal. The contention of the appellants that section 18 can be read as providing a defence to a defendant who shows that he did not in fact suspect the terrorist nature of the property with which he was dealing is simply not consistent with the words used. If that is what had been the intention, section 18 would no doubt have provided a defence for an accused who "did not know or suspect", using the juxtaposition of knowledge and suspicion which appears in the next following section 19.

22. Although it is derived from a subsequent legislative amendment, section 21A is perhaps a further indication, if one were required, that the difference between actual suspicion and objectively assessed reasonable cause for suspicion remains one which is observed by Parliament. Section 21A (inserted into the Act by the Anti-terrorism, Crime and Security Act 2001) creates an offence, for those operating within the regulated sector, of non-disclosure of information suggesting an offence by another. By subsection (2) the first element of the definition of this offence is in the alternative:

> "(2) The first condition is that he -
>
> (a) knows or suspects, or
>
> (b) has reasonable grounds for knowing or suspecting,
>
> that another person has committed or attempted to commit an offence under any of sections 15 to 18."

In that section, or any other similarly constructed, it is plain beyond argument that the expression "has reasonable grounds for suspicion" cannot mean "actually suspects".

Strict liability?

23. The presumption of which Lord Reid spoke in *Sweet v Parsley*, and which has been invoked since where consistent with the principles of statutory construction, is a presumption that Parliament "did not intend to make criminals of persons who were in no way blameworthy in what they did": see para 8 above. The magistrates had found specifically that Miss Sweet, who did not live in the house which she owned but let out "had no knowledge whatever that the house was being used" by her tenants for the purpose of consuming prohibited drugs. The question posed for the House of Lords by the Divisional Court was whether the relevant section of the Dangerous Drugs Act created "an absolute offence". Lord Reid adverted at p 150B to the fact that Parliament could have dealt with the social problem involved either by inverting the onus of proof so as to require an accused to demonstrate lack of knowledge, or by providing that the offence could be committed by negligence. It had not, however, in that case done so.

24. In the present case it would be an error to suppose that the form of offence-creating words adopted by Parliament result in an offence of strict liability. It is certainly true that because objectively-assessed reasonable cause for suspicion is sufficient, an accused can commit this offence without knowledge or actual suspicion that the money might be used for terrorist purposes. But the accused's state of mind is not, as it is in offences which are truly of strict liability, irrelevant. The requirement that there exist objectively assessed cause for suspicion focuses attention on what information the accused had. As the Crown agreed before this court, that requirement is satisfied when, on the information available to the accused, a reasonable person would (not might or could) suspect that the money might be used for terrorism. The state of mind of such a person is, whilst clearly less culpable than that of a person who knows that the money may be used for that purpose, not accurately described as in no way blameworthy. It was for Parliament to decide whether the gravity of the threat of terrorism justified attaching criminal responsibility to such a person, but it was clearly entitled to conclude that it did. It is normal, not unusual, for a single offence to be committed by persons exhibiting different levels of culpability. The difference in culpability can, absent other aggravating features of the case, be expected to be reflected in any sentence imposed if conviction results.

Conclusion

25. For these reasons it is clear that the conclusions arrived at by the trial judge and the Court of Appeal were correct. The appeal must be dismissed.

Reporting restrictions

26. Section 37 of the Criminal Procedure and Investigations Act 1996 imposes statutory reporting restrictions in relation to the hearing of interlocutory appeals such as the present. The objective is to ensure that the jury's consideration of the evidence and issues put before it is not at risk of being affected by prior reporting, for example of the details of the allegations or of discussion of possible issues. Those restrictions apply to the hearing of this appeal. Until the conclusion of the trial, nothing may be reported except the following:

(a) the identity of the court(s) and the name of the judge(s);

(b) the names, ages, home addresses and occupations of the accused and witnesses;

(c) the offences charged, as summarised in this judgment;

(d) the names of counsel and solicitors engaged in the appeal;

(e) whether for the purposes of the appeal representation was provided to either of the accused under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012; and

(f) this judgment.