Case No: 200902557 B5

Neutral Citation Number: [2009] EWCA Crim 2615
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
HIS HONOUR JUDGE GOLDSTAUB QC
T20080472

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2009

Before :

LORD JUSTICE RIX
MR JUSTICE McCOMBE
and
MR JUSTICE BURNETT

- -

Between :

Crown Prosecution Service	**Appellant**
- and -	
M and B	**Respondents**

- -
- -

Mr Anthony Arlidge QC , Mr David Pickersgill (instructed by **The Crown Prosecution Service**) for the **Appellant**
Ms Trisha Lynch QC, Mr Ian Boyes (instructed by **BTMK Solicitors)** for the **Respondent M**
Mr Christopher Harding (instructed by **SJ Law Solicitors**) for the **Respondent B**

Hearing dates : 12th October 2009

- -

Judgment

Lord Justice Rix :

1. This is an appeal by the Crown against the trial judge's ruling rejecting the submission that the offence of bringing a prohibited article into prison under section 40C(1)(a) of the Prison Act 1952 as amended is an offence of absolute or strict liability which does not require the prosecution to prove any element of mens rea.

2. The ruling was made on 25 February 2009 by HHJ Goldstaub QC at a preparatory hearing pursuant to section 29(1) of the Criminal Procedure and Investigations Act 1996. On 11 May 2009 the judge granted the Crown leave to appeal pursuant to section 35(1) of that Act, principally on the ground that the statutory provisions in question had only recently come into effect and there was no authoritative decision on the issue.

3. The respondents are DM and YB who on 16 May 2008 were visiting a prisoner at HMP Chelmsford. DM had been instructed by a firm of solicitors as its agent to visit their client, a Turkish national. Also instructed to attend was YB, a Turkish interpreter. The two met in the visitors' centre and together went through into the security entry area. As required, they left their mobile phones in the lockers provided. They then sought to pass through the security check-point. YB went first, and the x-ray machine detected something metallic in his jacket's breast pocket. It was a Turkish SIM card. He said that he had forgotten about it since his last trip to Turkey. In interview he explained that that had been some 5/6 weeks earlier, and that the card did not work in Britain. Next through the x-ray machine was DM, and he was found to have a phone battery on him. He said that it was a spare for his mobile phone but that he had not realised he still had it on him.

4. The respondents were subsequently charged and indicted under section 40C(1)(a) of the Prison Act 1952 as amended by the Offender Management Act 2007. The new offences inserted by the 2007 Act had come into effect only some six weeks prior to the prison visit in question. The Crown accepts that it is has no evidence to suggest that the items were going to be handed over to the prisoner, and no evidence of any kind to suggest that the two respondents were acting together by way of joint enterprise. They were separately charged on the same indictment, and the judge's view was therefore that, if the trial continued, their indictment would have to be severed. Nevertheless, the Crown's position is that the offence charged is an absolute offence of strict liability, requiring no mens rea.

The statute

5. The new provisions of sections 40A - 40C create three categories of prohibited articles, divided into List A, List B and List C. List A articles are the most serious, viz controlled drugs, explosives, firearms or ammunition, and any other offensive weapons (section 40A(2)). The maximum sentence for contravening the prohibition on bringing List A articles into prison is 10 years (section 40B(6)). List B articles are of intermediate seriousness, and the maximum sentence in their case is one of 2 years (section 40C(5)(a)). List B articles are alcohol, mobile telephones, cameras and sound-recording devices (section 40A(3)). The reference to "mobile telephone" includes "a component part of a device of that description". Thus DM and YB were charged with an offence of bringing into the prison a List B article. List C articles are prescribed by prison rules (section 40A(6)), viz the Prison (Amendment) Rules 2008, which amend the Prison Rules 1999 by inserting a new rule 70A listing articles such as tobacco, money, clothing, food, drink, letters and books. The maximum sentence for an offence involving List C articles is one year (section 40C(5)(b)).

6. The offence with which each of the respondents was charged was that contained in section 40C(1)(a), namely –

> "(1) A person who, without authorisation –
> (a) brings, throws or otherwise conveys a List B article into or out of a prison…
> is guilty of an offence."

7. That provision has to be seen against the background of the relevant amendments as a whole which were introduced by the 2007 Act. Thus the original section 39 of the Prison Act 1952 was replaced by a new substituted section 39. The original section 39 provided as follows:

> "39. Any person who aids any prisoner in escaping or attempting to escape from a prison or who, with intent to facilitate the escape of any prisoner, conveys any thing into a prison or places anything anywhere outside a prison with a view to its coming into the possession of a prisoner, shall be guilty of a felony and liable to imprisonment for a term not exceeding two years."

8. The substituted section 39 is as follows:

> "(1) A person who –
> (a) assists a prisoner in escaping or attempting to escape from a prison, or
> (b) intending to facilitate the escape of a prisoner –
> (i) brings, throws or otherwise conveys anything into a prison,

(ii) causes another person to bring, throw or otherwise convey anything into a prison, or

(iii) gives anything to a prisoner or leaves anything in any place (whether inside or outside a prison),

is guilty of an offence."

The section 39 offence of "assisting a prisoner to escape" has a maximum sentence of ten years (section 39(2)).

9. It will be observed that the offence stated by section 39(b)(i) is in almost the same language as section 40C(1)(a) save that it is preceded by the words "intending to facilitate the escape of a prisoner". The ten year maximum sentence laid down for the section 39 offence is a grave escalation of the maximum sentence under the original section 39.

10. Section 40A then proceeds to replace section 40 of the 1952 Act. The original section 40 had provided as follows:

> "Any person who contrary to the regulations of a prison brings or attempts to bring into the prison or to a prisoner any spirituous or fermented liquor or tobacco, or places any such liquor or any tobacco anywhere outside the prison with intent that it shall come into the possession of a prisoner, and any officer who contrary to those regulations allows any such liquor or any tobacco to be sold or used in the prison, shall be liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding twenty pounds or both."

11. The substituted provisions are those of sections 40A, 40B and 40C of the 2007 Act. Section 40A defines the categories of articles, ie Lists A, B and C, referred to above. Section 40B then deals with List A offences, while section 40C deals with Lists B and C offences. They provide as follows:

> "**40B Conveyance etc of List A articles into or out of prison**
>
> (1) A person who, without authorisation –
>
> (a) brings, throws or otherwise conveys a List A article into or out of prison,
>
> (b) causes another person to bring, throw or otherwise convey a List A article into or out of prison,
>
> (c) leaves a List A article in any place (whether inside or outside a prison) intending it to come into the possession of a prisoner, or
>
> (d) knowing a person to be a prisoner, gives a List A article to him,
>
> is guilty of an offence…

40C Conveyance etc of List B or C articles into or out of prison

(1) A person who, without authorisation –

(a) brings, throws or otherwise a List B article into or out of prison,

(b) causes another person to bring, throw or otherwise convey a List B article into or out of prison,

(c) leaves a List B article in any place (whether inside or outside a prison intending it to come into the possession of a prisoner, or

(d) knowing a person to be a prisoner, gives a List B article to him,

is guilty of an offence.

(2) A person who, without authorisation –

(a) brings, throws or otherwise conveys a List C article into a prison intending it to come into the possession of a prisoner,

(b) causes another person to bring, throw or otherwise convey a List C article into a prison intending it to come into the possession of a prisoner,

(c) brings, throws or otherwise conveys a List C article out of prison on behalf of a prisoner,

(d) causes another person to bring, throw or otherwise convey a List C out of a prison on behalf of a prisoner,

(e) leaves a List C article in any place (whether inside or outside a prison) intending it to come into the possession of a prisoner, or

(f) while inside a prison, gives a List C article to a prisoner,

is guilty of an offence…

(3) In proceedings for an offence under this section it is a defence for the accused to show that –

(a) he reasonably believed that he had authorisation to do the act in respect of which the proceedings are brought, or

(b) in all the circumstances there was an overriding public interest which justified the doing of that act.

(4) In proceedings for an offence under this section it is a defence for the accused to show that –

(a) he reasonably believed that he had authorisation to do the act in respect of which the proceedings are brought, or

(b) in all the circumstances there was an overriding public interest which justified the doing of that act."

12. It will be observed that: (i) the offences listed under section 40B(1) in relation to List A articles are framed in identical terms to the corresponding offences listed under section 40C(1) in relation to List B offences; (ii) in respect of those offences described in sections 40B(1) and 40C(1) there is no express statement of any mens rea element in subsections (a) and (b), whereas there is in subsections (c) ("intending it to come into the possession of a prisoner") and (d) ("knowing a person to be a prisoner"); (iii) each of the offences relating to List C articles under section 40C(2) contains an express mens rea element (assuming "on behalf of a prisoner" to amount

to such); (iv) the defence under section 40C(4) in relation to List B and C offences is not available under section 40B in relation to List A offences. It will be recalled that the maximum penalties in relation to Lists A, B and C offences are respectively ten years, two years and one year imprisonment.

The jurisprudence

13. It has long been recognised that there is a legal presumption that mens rea is an essential ingredient of any criminal offence, although that presumption may be rebutted by the words of the statute or necessary implication: see for instance *Sherras v. De Rutzen* [1895] 2 QB 918 at 921 *per* Wright J and *Sweet v. Parsley* [1970] AC 132 at 148/9 *per* Lord Reid. Lord Reid there said (subsequently described by Lord Nicholls in *B (a minor) v. Director of Public Prosecutions* [2000] 2 AC 428 at 460G as a "magisterial statement") –

> "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 that mens rea is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary."

14. For these purposes it is not sufficient for that presumption to be rebutted merely to find that other provisions of a statute expressly require some element of mens rea whereas the section under analysis is silent (*Sweet v. Parsley* at 149D). It is recognised, however, that there are certain classes of offence, which are sometimes described as quasi-criminal or not truly criminal, especially when the state seeks to regulate the conduct of business in the interests of public health and safety, where the presumption may be more easily rebutted.

15. The applicable principles were restated by Lord Scarman giving the advice of the Privy Council in *Gammon (Hong Kong) Ltd v. Attorney-General of Hong Kong* [1984] AC 1. At 14B/D he summarised the matter thus:

> "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions…(1) there is a presumption of law that mens rea is required before a person can be found guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the

> only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

16. In *Gammon* the ordinance in question concerned the regulation of the planning, design and construction of building works, and public safety was involved. The Privy Council held that the offences charged were of strict liability.

17. Since *Gammon* these principles have been applied in a number of recent decisions of the House of Lords. In *B (a minor) v. Director of Public Prosecutions* [2000] 2 AC 428 it was held that the offence under section 1(1) of the Indecency with Children Act 1960 of inciting a girl under the age of 14 to commit an act of gross indecency was not an offence of strict liability but required the prosecution to prove the absence of a genuine belief that the complainant was 14 or more. Lord Nicholls said that "necessary implication" connoted an interpretation which was "compellingly clear", albeit such an implication could be found –

> "in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament in creating the offence" (at 464A).

Lord Steyn referred to Professor Sir Rupert Cross in *Statutory Interpretation* (3rd ed, 1995, at 166) writing of the presumption as a constitutional principle not easily displaced by a statutory text, and said that in the absence of express words or a truly necessary implication, Parliament "must be presumed to legislate on the assumption that the principle of legality will supplement the text" (at 470F/G). Lord Hutton accepted that strict liability might in that case be a reasonable inference, but it was not a *necessary* one (at 481G).

18. A similar answer was given in *R v. K* [2001] UKHL 41, [2002] 1 AC 462 in connection with the offence of indecent assault under section 14 of the Sexual Offences Act 1956, which provides that a girl under the age of 16 cannot give any consent which would prevent an act being an assault for the purpose of that section. The House of Lords again held that the presumption in favour of the requirement of mens rea meant that the prosecution was required to prove absence of genuine belief on the part of the defendant that the girl was 16. Lord Bingham of Cornhill referred to Lord Reid's speech in *Sweet v. Parsley* as containing the "classic statement of principle" (at 471G), and Lord Steyn referred to the presumption as a "constitutional principle of general application" (at 477E). That case again illustrated the difficulty of arguing from the presence of an express mens rea element in one sub-section and its

absence in the sub-section under review to a conclusion that the latter sub-section was intended to enact an offence of absolute liability: at any rate where the statutory provisions were not part of a "single, coherent legislative scheme" but instead came in a consolidation Act whose provisions derived from diverse sources, and amounted to a "patchwork of pre-existing offences" (at paras 3/4). Lord Bingham described the presumption as an "overriding presumption" (at 474E).

Submissions

19. On behalf of the Crown, Mr Arlidge QC nevertheless put in the forefront of his concise submissions the fact that section 40C(1)(a), *unlike* other sub-sections contained in the amendments introduced by the 2007 Act, contained no mens rea element. Thus he referred the court to sub-sections 40C(1)(c) and (d), with their express mens rea elements, and to section 40C(2) generally, for the same purpose, to support the submission that Parliament could not have intended sub-section 40C(1)(a), which contained no express mens rea element, to provide for other than an offence of strict liability. All that the prosecution had to prove under that sub-section was that the defendant (without authorisation) "brings…a List B article into or out of a prison". Mr Arlidge described the statutory scheme as one where the elements of actus reus and mens rea had been carefully worked out.

20. Mr Arlidge supported that basic submission on the language of the statute by these further considerations, in particular by reference to Lord Scarman's restatement of applicable principles in *Gammon*. Thus, while accepting the general presumption, he did not concede that the section 40C(1) offences were "truly criminal". They were part of a code for the regulation of prison security, itself part of an Act concerned with the "management" of offenders, and although the maximum penalty prescribed was two years, that could be compared with the offence in *Gammon* for which a maximum of three years was enacted. So, severe penalties could be imposed for something less than true crime. The regulation of prison security was a matter of social concern, and strict liability had been chosen for the sound reasons that the introduction of articles such as mobile phones led to serious problems (of which there was evidence before the trial judge) and that without strict liability it was too easy for a defendant to deny knowledge of what he was bringing into prison. Moreover, strict liability would be effective to encourage those visiting prison to be all the more vigilant to ensure that they brought nothing that was prohibited with them past the reception area. By deliberately omitting some such word as "knowingly" in section 40C(1)(a), Parliament had demonstrated that a major mischief was to be dealt with, in an appropriate case and if necessary severely, by means of strict liability. In other cases, there remained a discretion not to prosecute.

21. On behalf of the respondents, Ms Lynch QC and Mr Harding, supported the judge's ruling, essentially for the reasons which he had given. There was no necessity for

setting aside the natural presumption. Some of the other sub-sections may have identified some kind of specific intent, such as "intending it to come into the possession of a prisoner", but there was no good reason to override the natural and general presumption that it had to be shown that a defendant had acted knowingly. The absence of any express mens rea language merely reflected Parliament's expectation that the courts would apply the general presumption. The context was truly criminal, as the severe penalties demonstrated, and in this respect it had to be remembered that section 40B(1)(a), with its ten year penalty in the case of a List A article, contained the same language as section 40C(1)(a). Such severe penalties could only be justified on the basis of criminal intent. The social mischief concerned went beyond the mere management of prisons and prisoners. The sections concerned were not a carefully worked out code, but a reformulation of earlier sections in the original Prison Act 1952.

Discussion

22. In our judgment, the ruling was correct and there has been no rebuttal of the overriding presumption in favour of mens rea as a vital ingredient of the offence in question.

23. The default position is that, despite the absence of any express language, there is a presumption, founded in constitutional principle, that mens rea is an essential ingredient of the offence. Only a compelling case for implying the exclusion of such an ingredient as a matter of necessity will suffice. Therefore the absence of express language, even in the presence of express language elsewhere in the statute, is not enough to rebut the presumption unless the circumstances as a whole compel such a conclusion.

24. We start with the language of the statute itself. Section 40C(1)(a) is in terms identical to section 40B(1)(a), dealing with List A articles and its ten year maximum penalty. It is counter-intuitive to think that such an offence is one of absolute liability.

25. As for the actus reus of the section 40C(1)(a) (or section 40B(1)(a)) offence, that is defined in terms of the verbs "brings, throws or otherwise conveys". It is hard to think that the verb "throws" does not involve an intentional act of some kind. It is difficult to conceive (but I do not say impossible) of a person throwing some List B (or A) article into or out of prison without knowing what he is doing. The verb "brings" is perhaps more neutral, but it takes its colour from the verb "throws". The expression "otherwise conveys", being of a catch-all nature, must plainly take its colour from what has gone before. These are therefore unpromising words with which to begin to find an offence of absolute liability.

26. Moreover, section 40C(1)(a) (and section 40B(1)(a)) have to be interpreted as only one among a number of offences to be found in section 40C(1) (or section 40B(1)). Those other offences in sub-sections (b), (c) and (d) are expressed in identical terms for both List A articles (section 40B)) and List B articles (section 40C)). The sub-section (b) offence is closely modelled on the sub-section (a) offence, save that the bringing, throwing or otherwise conveying is done by another person at the instance of a defendant "who causes" the bringing, throwing or otherwise conveying. Although there is again an absence of express mens rea language, the clear inference is that the causing of those events is an intentional act. Sub-section (c) is concerned with leaving a listed article in any place (whether inside or outside a prison) with the express mens rea element of "intending it to come into the possession of a prisoner". That is a more specific intent than any basic mens rea element of knowledge to be inferred to be part of the sub-section (a) offence. However, such specific intent is not in any way inconsistent with a mens rea element in sub-section (a): on the contrary, a person who leaves *within prison* a prohibited article intending it to come into the possession of a prisoner will almost certainly already have either already committed an offence within sub-sections (a) or (b) or be complicit with someone else who has: but it allows for the possibility that use is made of someone who has innocently brought a prohibited article into prison (as where it has been planted on the conveyer). Importantly, however, sub-section (c) also deals with the case not provided for within sub-sections (a) and (b) where the article is left *outside* the prison. In such a case the additional specific intent required is necessary to bring the offence home to the subject-matter of the regulation of prison security. Finally, sub-section (d) also contains an express and specific mens rea element, "knowing a person to be a prisoner", which is presumably needed to deal with cases such as giving prohibited articles to prisoners who are temporally outside prison, for instance on a home visit.

27. Thus a review of all the acts contemplated under section 40C(1) (or section 40B(1)) as a whole strongly suggests, in our judgment, that none of them are intended to be offences of absolute liability. It would be strange if, alone of the offences under sub-section (1), that in sub-section (1)(a) was an offence of absolute liability. It is more likely that Parliament intended the presumption to apply to that offence, while emphasising more specific (but consistent) mens rea elements in contexts where they were necessary.

28. Mr Arlidge placed particular emphasis, however, on a comparison of section 40C(1)(a) (dealing with List B articles) and section 40C(2)(a) (dealing with List C articles). In the former case, the subsection is silent as to any mens rea element, whereas in the latter case there is express reference to the mens rea element of "intending it to come into the possession of a prisoner". That is despite the fact that the actus reus in both cases is the same (bringing, throwing or otherwise conveying). Therefore, the submission goes, Parliament must have intended the sub-section (1)(a) offence to be one of absolute liability. He could make the same point about section 40C(1)(b) and section 40C(2)(b). However, we do not consider that analysis to be cogent. If it were a good point, it would lead to the most surprising result that the

more serious offences under section 40C(1)(a) and 40B(1)(a) (the latter with its ten year penalty) were dealt with as a matter of absolute liability, whereas the less serious List C offence under section 40C(2)(a) required mens rea. That makes no sense at all. In our judgment, all these sub-sections require the same presumptive mens rea element (which at present can be glossed as "knowingly"), but in addition the 40C(2)(a) and (b) offences require the express mens rea element of intending the article in question to come into the possession of a prisoner. Thus a person who knowingly brings food or drink into a prison (perhaps for the consumption of a child) but does not intend it to come into the possession of a prisoner would not be committing this offence. In our judgment, the additional mens rea requirement is not only consistent with the underlying presumptive mens rea element, but supports it.

29. A consideration of the offence of assisting a prisoner to escape in the new section 39 is consistent with this view of the matter. Section 39(1)(b)(i) uses much of the same language as section 40C(1)(a) save that it refers to "anything" rather than to a List B article: and in the former case the additional words "intending to facilitate the escape of a prisoner", which qualify section 39(1)(b) as a whole, emphasise the mens rea gravamen of that offence, for which a penalty of ten years is imposed. However, such language is entirely consistent with an article being brought knowingly into prison. Here again, the additional mens rea requirement is not only consistent with the underlying presumptive mens rea element, but supports it.

30. It is suggested that the new provisions introduced into the Prison Act 1952 by the 2007 Act amount to a carefully worked out code. Even if that be assumed to be the case, for the reasons expressed above we have found nothing in the language of such a code to require the rebuttal of the required presumption. However, we consider that our reasoning is also consistent with the underlying philosophy to be found in the original sections of the 1952 Act which we have cited above. Even though the offences found in the original sections 39 and 40 prescribed in general a lower tariff of penalty and section 40 in particular was a merely summary offence, those sections are redolent of an underlying requirement of mens rea. That remains true in the language closest to the wording with which we are concerned, viz "brings or attempts to bring into the prison or to a prisoner any spirituous or fermented liquor or tobacco" etc (see original section 40).

31. It is submitted that the section 40C(1)(a) offence is not "truly criminal" but is aimed at an issue of (merely) social concern, namely the regulation of the management of prisons and prisoners. In our judgment, however, the offences with which sections 40A, B and C are concerned have nothing in common with the typical health and safety provisions which may be matters of absolute liability in the context of the regulation of business activities. It therefore matters not that it could be argued that absolute liability might be an extra spur to vigilance on the part of prison visitors. It seems to us to be impossible to argue that the bringing or throwing into prison of a List A article (controlled drugs, explosives, firearms etc) with the statute's potential ten year penalty is not truly criminal. If that is so in relation to section 40B(1)(a), the

same must be so also in relation to the identical language in section 40C(1)(a). It is noticeable that even in the case of List C articles, the language of section 40C(2) contains in each of its sub-sections (a) to (f) some language expressly or implicitly consistent with a requirement of mens rea.

32. The presence of a defence (under section 40C(4)) where an accused can show that he reasonably believed that he had authorisation to do the act in respect of which the proceedings are brought, or that in all the circumstances there was an overriding public interest which justified the doing of that act, is at best a neutral factor. It applies to all offences within section 40C.

33. It is submitted that absolute liability is necessary, and thus must be inferred to have been Parliament's intention, because otherwise it is too difficult for the prosecution to deal with defences of ignorance and forgetfulness. That was not, however, an argument that impressed Lord Reid in *Sweet v. Parsley* (see at 149/150). In any event, it is a common experience that the prosecution must deal with such defences, for instance in offences involving possession.

34. It is common ground that a requirement of mens rea does not here involve knowledge that the article in question is a listed prohibited article.

35. It is also common ground that although the presumptive mens rea element may be appropriately glossed as "knowingly", the correct definition of it is that laid down in cases such as *B* and *K*, amending the original formulation in *Sweet v. Parsley*, namely that what the prosecution has to prove is the absence of a genuine belief on the part of a defendant that the offence was not being committed. In the case of section 40C(1)(a) the defence would be "I honestly believed that I was not bringing it in", and the prosecution would have to prove the absence of an honest belief on the part of a defendant that he was not bringing the article in question with him when he entered the prison.

Conclusion

36. It was for these reasons that at the hearing we dismissed the Crown's appeal.