R. v Latif

R. v Shahzad

[1996] 2 Cr. App. R. 92

LORD KEITH OF KINKEL:

My Lords, for the reasons given in the speech to be delivered by my noble and learned friend Lord Steyn, which I have read in draft and with which I agree, I would dismiss these appeals.

LORD JAUNCEY OF TULLICHETTLE:

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Steyn. For the reasons which he gives I too would dismiss these appeals.

LORD MUSTILL:

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Steyn. For the reasons which he gives I would dismiss these appeals.

LORD STEYN:

My Lords, during February and March 1991, in the Crown Court at Southwark, the two appellants stood trial on two charges. Count 1 charged the appellants with the offence of being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, contrary to section 170(2) of the Customs and Excise Management Act 1979 . The particulars of the offence asserted that the drug was about 20 kilograms of diamorphine, and that the appellants committed the offence between February 6 and May 20, 1990 in London and elsewhere in England and Wales. Count 2, which was based on the same events, charged the appellants with the offence of attempting to be knowingly concerned in dealing with goods subject to a prohibition on importation with intent to evade such prohibition, contrary to section 1(1) of the Criminal Attempts Act 1981 . After a lengthy trial the jury convicted both appellants on count 1. The judge sentenced Latif and Shahzad to terms of imprisonment of 16 and 20 years' respectively. The judge discharged the jury from returning a verdict on count 2.

With the leave of the single judge the appellants appealed against their convictions on the ground of three rulings made by the judge during the course of the trial. First, the judge considered a submission that an informer and customs officers by subterfuge incited Shahzad to commit the offence and then lured Shahzad into the jurisdiction. Counsel for the appellants submitted that in those circumstances it was an abuse of process to institute criminal proceedings against the appellants and that the proceedings should be stayed. Secondly, and relying on essentially the same

assertions of fact, counsel for the appellants invited the judge to exercise his discretion to exclude the central core of prosecution evidence under section 78 of the Police and Criminal Evidence Act 1984 . Thirdly, counsel for the appellants submitted at the end of the prosecution case that on the prosecution evidence the appellants were not guilty of the offence charged under count 1, which was by then the only count pursued by the prosecution. The judge ruled against the appellants on all three submissions. On appeal to the Court of Appeal counsel for the appellants challenged each of the judge's rulings. The Court of Appeal rejected the three grounds of appeal and dismissed the appeals of both appellants.

The Court of Appeal refused leave to appeal to your Lordship's House but certified that certain questions of law of public importance arose. Those questions covered the first and third issues but not the second. The Appeal Committee granted leave to appeal. On the hearing of the appeal counsel for the appellants challenged the three rulings of the judge, and the conclusions of the Court of Appeal on all three matters.

The undeniable facts

Both appellants gave evidence. In short they testified that they were under the impression that they were dealing with an intended importation of gold. The jury rejected their explanations. Given the verdict of the jury, I need only give a narrative of the essentials of the prosecution case. In 1990, Honi, a shopkeeper in Lahore, Pakistan, was a paid informer employed by the United States Drugs Enforcement Agency. He knew local suppliers of heroin. On February 6, 1990 he met two men who wanted to import heroin into the United Kingdom. Honi reported this to Mr Bragg, the British Drugs Liaison Officer in Rawalpindi. Mr Bragg encouraged Honi to foster the connection with the two men. Honi acted under the instructions of Mr Bragg. Honi suggested to the two men that he knew an airline pilot who could be used as a courier. That was untrue. The two men then introduced the appellant Shahzad to Honi. Shahzad made it clear to Honi that he, Shahzad, was ready and willing to export heroin when the occasion presented itself. At first Shahzad proposed to Honi that he could export heroin from Pakistan to Holland. Honi rejected this idea. All three men then agreed to supply Honi with heroin for exportation to the United Kingdom. That was the historical background to the subsequent and critical dealings between Honi and Shahzad.

A few days later Shahzad alone approached Honi. He proposed an export of 20 kilograms of heroin on his own, cutting out the other two men. Honi agreed. The arrangement made between them was that Shahzad would deliver the heroin to Honi in Pakistan: Honi would arrange for an airline pilot to carry it to the United Kingdom; Honi would take delivery of the heroin in London; and Shahzad or somebody on his behalf would collect the heroin in London and arrange for its distribution in the United Kingdom. On April 1, 1990 Shahzad delivered 120 kilograms of heroin to Honi. The street value of the drugs in England was £3.2 million. In accordance with

his instructions Honi delivered the drugs to a Drugs Enforcement Agency officer. On April 10, 1990 Mr Bolton, a Customs and Excise officer travelled from England to Pakistan and collected the packages of heroin and on April 13, 1990 he brought them to England. The officer did so on the instructions of his superiors. But he had no licence to do so. The Pakistani authorities had been kept informed of what was going on.

In May 1990 Honi came to England. Customs and Excise officers arranged for Honi to stay in a hotel room under surveillance. The customs officers arranged for Honi's telephone calls to be intercepted. Events in his room were recorded by video camera. Honi did not, however, have possession of the packages of heroin. Honi then set about trying to persuade Shahzad to come to England to take delivery of the drugs. On May 19, 1990 Shahzad arrived in London. During the next two days Shahzad and Honi discussed the details of the delivery of the heroin and payment. On the afternoon of May 20 the appellant Latif joined Honi and Shahzad. Shahzad and Latif knew each other. Latif said words to Shahzad to the effect that Shahzad could tell Islamabad that he (Latif) had arrived. Shahzad and Latif continued to discuss the proposed delivery of the heroin.

A man, who pretended to have possession of the heroin on behalf of Honi, then arrived. He was in fact a customs officer carrying six bags of Horlicks, got up so as to resemble the original bags of heroin. The customs officer delivered the bags to Shahzad who was immediately arrested. Latif had been arrested a little earlier outside the hotel room.

The judge's rulings on abuse of process and exclusion of evidence under section 78

The principles applicable to the court's jurisdiction to stay criminal proceedings, and the power to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 in a case such as the present, are not the same. Nevertheless, there is a considerable overlap. It will therefore be convenient to consider the judge's findings under these two headings together.

Before making his rulings at the start of the trial the judge would have studied the depositions. Honi gave evidence on the *voire dire* . Latif and Shahzad did not testify at that stage. As to the dealings between Honi and Shahzad in Pakistan, the judge summarized the position as follows:

> "… this is a case in which, as I find, all the suggestions for the crime came from the defendant [Shahzad]. I have to say, having heard the detail of how the arrangement was made in Pakistan, according to Mr Honi, I think it would be a misuse of language to say there was an incitement by Mr Honi of the defendant or a soliciting of the offence. The defendant voluntarily acted to explain his plan to Mr Honi in Pakistan and

> Mr Honi was merely his agent to arrange the carriage. Of course, Mr Honi told him there was the opportunity to import these drugs to the United Kingdom by means of this carriage. Of course, all that was a deception, but the action all came from the defendant and the defendant … voluntarily came to the United Kingdom to deal in drugs here."

On appeal to the *Court of Appeal Staughton L.J. [1995] 1 Cr.App.R. 270, 275* , added to the judge's observations that the importation, which Shahzad had arranged through Honi would not have taken place when and how it did without the assistance of Honi and the customs officers. The trial judge found that the Customs and Excise lured Shahzad to the United Kingdom by trickery and deception. He also found, however, that he was not brought to England by force: he came voluntarily with a visa he applied for. There was no extradition treaty between the United Kingdom and Pakistan. No breach of extradition laws was involved. The judge said that

> "what happened here is that every step the defendant [Shahzad] wished to take was facilitated by the authorities in order to make sure that they could bring a suspected and substantial drugs dealer to book."

The judge concluded that a stay would not be justified. The *gravamen* of his reasoning appears in the following passage:

> "Though no court will readily approve of trickery and deception being used, there are some circumstances in which one has to recognise living in the real world, that this is the only way in which some people are ever going to be brought to trial, otherwise the courts will not get to try this sort of offence against people who are seriously involved in it."

Dealing with the application to exclude the evidence of Honi and others under section 78(1) of the 1984 Act the judge concluded:

> "to my mind, there is nothing of substance here which is unfair to the defendant in admitting this evidence. The incriminating remarks are on tape, so that proof of them does not depend on recollection of witnesses. He was not deprived of any rights that he had or sought to avail himself of. It is not evident to me that any legislation or rules of practice designed to protect people from authority, has been infringed. Nor is it evident to me that the defendant is in any way handicapped from conducting his defence, whatever that may be, to this charge."

The ruling on the submission of no case to answer

It will be convenient to consider the judge's ruling on the submission that the appellants had no case to answer in respect of the first count after I have considered the issues on abuse of process and section 78(1) of the 1984 Act.

The abuse of process issue

Both in the Court of Appeal and in your Lordship's House the argument concentrated virtually exclusively on the position of Shahzad. Despite the fact that Latif was separately represented, I will concentrate on the position of Shahzad and turn to Latif at the end of my speech.

At first instance and in the Court of Appeal counsel for Shahzad made much of the undoubted fact that customs officers by deception arranged for Honi to lure Shahzad to this country. Counsel for Shahzad drew your Lordship's attention to observations of Lord Griffiths in *Somchai Liangsiriprasert v. Government of the United States of America (1991) 92 Cr.App.R. 77, 83, [1991] 1 A.C. 225, 242, 243* , Lord Griffiths said:

> "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."

Recognizing the force of Lord Griffiths' observations, counsel for Shahzad realistically accepted that there was nothing oppressive about that part of the conduct of the customs officers.

Instead, counsel for Shahzad concentrated his argument on two other features of this case. First, he submitted that the customs officers encouraged Shahzad to commit the offence. Secondly, he argued that the customs officer, who brought the drugs to England, himself committed the offence of which Shahzad was convicted. It is necessary to examine these arguments. As to the first, I approach the matter on the basis that Shahzad took the initiative at the critical meeting between him and Honi. He was 37 years of age. He was not a vulnerable and unwilling person. He was an organiser in the heroin trade. He made clear from the start that he was ready and willing to arrange the export of heroin from Pakistan. But I also accept Staughton L.J.'s qualification that the particular importation would not have taken place when and how it did without the assistance of Honi and the Customs and Excise. The

highest that the argument for Shahzad can be put is that Honi gave him the opportunity to commit or to attempt to commit the crime of importing heroin into the United Kingdom if he was so minded. And he was so minded. That is not necessarily a decisive factor, but it is an important point against the claim of abuse of process.

That brings me to the second matter, *i.e.* the question whether the customs officer, who brought the heroin to England, was himself guilty of criminal behaviour. Section 50(3) of the Customs and Excise Management Act 1979 reads as follows:

> "(3) If any person imports or is concerned in importing any goods contrary to any prohibition or restriction for the time being in force under or by virtue of any enactment with respect to those goods …, and does so with intent to evade the prohibition or restriction, he shall be guilty of an offence under this subsection …"

It was common ground in argument before your Lordships that the customs officer had committed an offence under this statutory provision. Despite the requirement of "intent to evade", I incline to the view that this concession was rightly made. In the Court of Appeal the prosecution accepted that the customs officer had also committed an offence under section 170(2). That provision reads as follows:

> "(2) … if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion … (*b*) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or … he shall be guilty of an offence under this section and may be detained."

The Court of Appeal rejected the concession of the prosecution and held that the customs officer did not commit an offence under section 170(2) because he did not act fraudulently. On the appeal, counsel for the prosecution argued that section 170 should be read as if the section provides:

> "if any person is … *fraudulently and* knowingly concerned in any fraudulent evasion …"

In my judgment there is no justification for adding the italicised words as an additional ingredient to the offence in section 170(2). Indeed, such a construction may cause practical difficulties in other cases. Having said that, I am prepared to assume, without deciding, that the customs officer was guilty of an offence under section 170(2).

It is now necessary to consider the legal framework in which the issue of abuse of process must be considered. The starting point is that entrapment is not a defence

under English law. That is, however, not the end of the matter. Given that Shahzad would probably not have committed the particular offence of which he was convicted, but for the conduct of Honi and customs officers, which included criminal conduct, how should the matter be approached? This poses the perennial dilemma: see W. G. Rosser, *Entrapment: Have the Courts Found a Solution to this Fundamental Dilemma in the Criminal Justice System* ?, *(1993) 67 A.L.J. 722* ; and Andrew L.-T. Choo, *Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited* , *[1995] Crim. L.R. 864* . If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *R. v. Horseferry Road Magistrates' Court, ex parte Bennett (1994) 98 Cr.App.R. 114, [1994] 1 A.C. 42* . *Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

In my view the judge took into consideration the relevant considerations placed before him. He performed the balancing exercise. He was entitled to take the view that Shahzad was an organizer in the heroin trade, who took the initiative in proposing the importation. It is true that he did not deal with arguments about the criminal behaviour of the customs officer. That was understandable since that was not argued before him. If such arguments had been put before him, I am satisfied that he would still have come to the same conclusion. And I think he would have been right. The conduct of the customs officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed.

Realistically, any criminal behaviour of the customs officer was venial compared to that of Shahzad.

In these circumstances I would reject the submission that the judge erred in refusing to stay the proceedings.

Section 78(1) of Police and Criminal Evidence Act 1984

By way of alternative submission, counsel for Shahzad argued that the judge erred in not excluding the evidence of Honi and the customs officers under section 78(1) of the 1984 Act. Exclusion under section 76, which deals with confessions, does not arise. Section 78(1) reads as follows:

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

The judge found as a fact that Shahzad was not in any way prejudiced in the presentation of his defence. Counsel found it impossible to challenge that finding. Given that conclusion counsel accepted that if his submissions on abuse of process failed his separate argument based on section 78(1) of PACE must inevitably also fail. I need say no more about this aspect of the case.

The submission of no case to answer:

At the end of the prosecution case, counsel for Shahzad submitted that on count 1 there was no case to answer. The judge ruled to the contrary. He said that on the prosecution evidence it was a case of knowing evasion of a prohibition rather than attempted evasion. In the Court of Appeal and in your Lordship's House, counsel for Shahzad submitted that on the prosecution case Shahzad has not committed an offence under section 170(2) of the Customs and Excise Management Act 1979 . For convenience I again quote the relevant part of this provision. It reads as follows:

> "(2) … if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion … (*b*) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or … he shall be guilty of an offence under this section and may be detained."

Section 3 of the Misuse of Drugs Act 1971 provides that, with certain exceptions, the importation of a controlled drug (and heroin is a controlled drug) is prohibited. This section creates no offence and imposes no sanction. The relevant offence under section 170(2) of the Customs and Excise Management Act 1979 is created by a combination of section 170(2) and section 3 of the Misuse of Drugs Act 1971 . The ingredients of that offence are as follows:

(a) the goods in question are subject to a prohibition on importation under statutory provision; and
(b) a fraudulent evasion or attempted evasion of a prohibition has taken place in relation to those goods; and
(c) the accused was concerned in that fraudulent evasion or attempted evasion; and
(d) the accused was concerned in that fraudulent evasion or attempted evasion "knowingly".

It is inherent in the concept of an evasion of a prohibition on importation ***103*** that an importation has taken place. If no importation has taken place no evasion has taken place. On the other hand, if no importation has taken place, there may still be an attempted evasion of a prohibition.

Given this statutory framework, counsel for Shahzad argued before the Court of Appeal and again before your Lordship's House, that Shahzad had not been concerned in the importation carried out by the customs officers. Counsel for Shahzad emphasized that in full knowledge of the content of the packages, and of the prohibition of the importation of heroin without a licence, the officer arranged an importation. The prosecution argued that despite the fact that the customs officer and Shahzad did not act in concert there had been an evasion in which Shahzad was concerned. In the alternative the prosecution submitted in the Court of Appeal that:

> "… if the full offence had not been committed, then the alternative offence of being knowingly concerned in an attempted evasion of the prohibition was committed."

That was not a reference to count 2, *viz.* an attempt contrary to section 1(1) of the Criminal Attempts Act 1981 . By the end of the prosecution case count 2 had been withdrawn. The prosecution expressly stated in the Court of Appeal that they were referring to an attempted evasion under section 170(2).

Giving the judgment of the Court, Staughton L.J. *[1995] 1 Cr.App.R. 270, 273, 274* observed:

> "At first sight one might have thought that there had to be some fraudulent person bringing the goods into this country and deceiving the Customs and Excise in the process. If that be right there was no completed offence in this case, for even without a licence Mr Bolton was not

> fraudulent and did not deceive anybody. His superiors knew what he was doing. Mr Shahzad and Mr Latif would not be guilty of the complete offence, but it is arguable they would be guilty of an attempt.
>
> "Such a construction of section 170(2) is not, in our judgment, correct. It would not catch the man who organises an importation by an innocent courier. There would be no fraudulent evasion by anybody in such a case, and the organiser could not therefore be knowingly concerned in the fraudulent evasion. Mr Bloom submitted that the organiser would be liable as the principal of the courier who acted as his agent. We do not find that suggestion of vicarious liability plausible.
>
> "In our judgment the words 'fraudulent evasion' include a good deal more than merely entering the United Kingdom with goods concealed and no intention of declaring them. They extend to any conduct which is directed and intended to lead to the importation of goods covertly in breach of a prohibition on import."

On appeal to your Lordship's House the prosecution did not try to support this reasoning. It is established law that the offence charged can be committed through an innocent agent, *e.g.* an innocent but duped courier. The foundation of the reasoning of the Court of Appeal was therefore wrong. In any event, in ruling that the offence of evading the prohibition (as opposed to attempting to evade the prohibition) can be committed by any conduct which is directed or intended to lead to the importation of the goods the Court of Appeal went too far. It gave no effect to the fact that an evasion (as opposed to an attempted evasion) necessarily involves an importation. Moreover, this reasoning does not allow for the fact that section 170(2) in so far as it is directed at an attempted evasion already covers certain pre-importation acts. The reasoning of the Court of Appeal seems to allow little or no scope for an attempted evasion for which section 170(2) provides: see a note on the judgment of the Court of Appeal: Professor Sir John Smith, *[1994] Crim. L.R. 751–752* . For these reasons I am unable to accept the reasoning of the Court of Appeal.

Counsel for the prosecution attempted to support the conviction on a different basis. He submitted that there was in truth a criminal evasion because Shahzad delivered the heroin intending that it should be imported into the United Kingdom: it was imported into the United Kingdom; and Shahzad sought to take delivery in England of the heroin. Counsel emphasized the continuing nature of the offence. He said it did not matter that the customs officers acted for their own purpose. The problem, as Sir John Smith pointed out in the note in the *Criminal Law Review* , is one of causation. The general principle is that the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is held to relieve the first actor of criminal responsibility: see Hart and Honorâ, Causation in the Law, 2nd ed. (1985) , 326 *et seq.* ;

Blackstone's Criminal Practice, (1995) , 13–15 . For example, if a thief had stolen the heroin after Shahzad delivered it to Honi, and imported it into the United Kingdom, the chain of causation would plainly have been broken. The general principle must also be applicable to the role of the customs officers in this case. They acted in full knowledge of the content of the packages. They did not act in concert with Shahzad. They acted deliberately for their own purposes whatever those might have been. In my view consistency and legal principle do not permit us to create an exception to the general principle of causation to take care of the particular problem thrown up by this case. In my view the prosecution's argument elides the real problem of causation and provides no way of solving it.

That is, however, not the end of the matter. There is another principle solution to be considered, namely the alternative argument of the prosecution in the Court of Appeal, *viz.* that Shahzad was guilty of an attempted evasion under section 170(2). Initially, counsel for the prosecution did not on the hearing before your Lordships rely on this alternative argument. After your Lordships raised the question counsel for the prosecution did advance this alternative argument. On this question your Lordships heard oral submissions and subsequently received further written submissions.

Shahzad delivered the heroin to Honi in Pakistan for the purpose of exportation to the United Kingdom and subsequently Shahzad tried to collect the heroin from Honi for distribution in the United Kingdom. In these circumstances the guilt of Shahzad of an offence under that part of section 170(2) which creates the offence of an attempt at the evasion of a prohibition is plain. Counsel for Shahzad suggested that the jury might have viewed Shahzad's conduct as mere preparatory steps falling short of an attempted evasion. In my view that would have been a wholly unrealistic suggestion. In common sense and law that was only one possible answer: Shahzad committed attempts at evasion in Pakistan and in England. Indeed I am confident that counsel would not have devalued his speech to the jury with a suggestion that on the prosecution case there was no attempt at evasion. For my part I have no doubt that this case must be approached on the basis that the guilt of Shahzad of an attempt at evasion under section 170(2) cannot seriously be disputed.

Counsel for Shahzad also argued that if the movement of the heroin from Pakistan to England was not a fraudulent evasion it was impossible for Shahzad to be guilty of an offence of attempt at evasion. It will be recalled that I accepted that the customs officer, who brought the heroin to England, committed an offence under section 50(3) of the Customs and Excise Management Act 1979 and further that I assumed that the customs officer also committed an offence under section 170(2) of the same Act. In these circumstances the argument apparently falls away. In any event, Shahzad committed the attempt at evasion in Pakistan and nothing that the customs officer subsequently did could deprive Shahzad's conduct of its criminal character. And Shahzad's attempt at evasion by distribution of heroin in England was an offence. It was sufficient to prove that Shahzad intended to commit the full offence and was guilty of acts which were more than merely preparatory to the commission of the full offence.

Counsel for Shahzad further submitted that in the circumstances of this case an English court would not have had jurisdiction to try an offence of an attempt at evasion under section 170(2) in England. The attempted evasion in Pakistan, as well as the attempted evasion in England, were respectively directed at importation into the United Kingdom and associated with an importation into the United Kingdom. In these circumstances counsel's submission in regard to the attempt at evasion, which Shahzad committed in Pakistan, is destroyed by the decision of the *House of Lords in D.P.P. v. Stonehouse (1977) 65 Cr.App.R. 192, [1978] A.C. 55, (1991) 92 Cr.App.R. 76, [1991] 1 A.C. 225* . The English courts have jurisdiction over such criminal attempts even though the overt acts take place abroad. The rationale is that the effect of the criminal attempt is directed at this country. Moreover, as Lord Griffiths explained in the *Liangsiriprasert* case, *supra* , at pp. 90 and 251, as a matter of policy jurisdiction over criminal attempts ought to rest with the country where it was intended that the full offence should take place: see also A. T. H. Smith, Property Offences, The Protection of Property through the Criminal Law, (1994) p. 23 . In any event, in the present case Shahzad also committed an attempt at evasion in England. I have no doubt that counsel's submission is misconceived.

It is true, of course, that the indictment in the first count charged an actual evasion rather than an attempted evasion. That means that the prosecution charged more than was necessary. It is clear that if the prosecution had pinned their colours to an attempt at evasion under section 170(2) exactly the same evidence would have been led, and the speeches would have been the same. I would reject the submission of counsel that the defence of Shahzad might have been conducted differently if the indictment had charged an attempt at evasion under section 170(2). The fact is that Shahzad did testify. And, as the judge observed, in this case “the factual basis of the prosecution case against these defendants is exactly the same” whether the full offence or an attempt is considered. Moreover, the prosecution submitted in the alternative before the Court of Appeal that Shahzad was at least guilty of an attempt at evasion under section 170(2). Given that there was no prejudice to Shahzad, the Court of Appeal could have upheld that submission. The Court of Appeal found it unnecessary to consider this aspect. It is now open to your Lordships to reconsider that issue. In a more formalistic age counsel's complaint that that was not how the prosecution presented the case at first instance might have had a greater appeal. Nowadays, the view of a criminal trial as a sporting contest is a thing of the past. The concentration is on substance rather than form. Given the undeniable guilt of Shahzad of an attempt at evasion under section 170(2), and absence of any prejudice to him, there is no reason why a technical mistake by the prosecution should allow him to go free.

That leaves the question of what order should be made. One possibility is that section 170(2) contains two separate offences. On this supposition it would be permissible to substitute a verdict on the basis that Shahzad was guilty of an offence of an attempt at evasion under section 170(2). In my view this is not the correct view. In my view there is one offence under section 170(2), which can be committed

in one of two different ways, namely by evasion or an attempt at evasion. Shahzad has correctly been found guilty of an offence under section 170(2). Such misdescription as is contained in the indictment can be ignored.

I would dismiss Shahzad's appeal. Given the terms of this judgment it is unnecessary to deal directly with the certified questions of law.

Latif

Counsel for Latif adopted the submissions of counsel for Shahzad. He further sought to argue that on the facts Latif's role was insufficient to constitute an offence under section 170(2). I have already described Latif's role on May 20, 1990 when he and Shahzad attempted to take possession of the drug for distribution in the United Kingdom. In the light of these facts the submissions made on behalf of Latif are without substance. I would dismiss these submissions.

I would dismiss the appeal of Latif against conviction.

LORD HOFFMANN:

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Steyn. For the reasons which he has given I too would dismiss these appeals.