HIGH COURT OF AUSTRALIA

8 December 2011

DALE CHRISTOPHER HANDLEN v THE QUEEN
B26/2011

DENNIS PAUL PADDISON v THE QUEEN
B27/2011

[2011] HCA 51

Today the High Court allowed appeals by Dale Christopher Handlen and Dennis Paul Paddison against the decision of the Court of Appeal of the Supreme Court of Queensland, which had upheld each appellant's convictions for several drug-related offences under the *Criminal Code* (Cth) ("the Code").

The appellants were each charged with multiple drug-related offences under the Code, including two counts of importing a commercial quantity of border controlled drugs into Australia contrary to s 307.1 of the Code. At trial, the appellants were each convicted of the charged offences. The trial was conducted on the mistaken assumption, shared by the parties and the trial judge, that guilt of the importation offences could be established by proof that the appellants were parties to a joint criminal enterprise or "group exercise" to import the drugs into Australia. At the date of the appellants' trial, participation in a joint criminal enterprise was not a basis for the attachment of criminal responsibility respecting a substantive offence under the laws of the Commonwealth. The only basis upon which criminal responsibility could be fixed on the appellants for the importations was under s 11.2 of the Code for aiding, abetting, counselling or procuring the offences of Matthew Reed, who had pleaded guilty and been convicted in relation to the same importations before the appellants' trial.

The appellants appealed against their convictions to the Court of Appeal. The Court of Appeal found that the jury had been misdirected as to the basis of the appellants' liability for the importation offences, but that the misdirection had not involved a fundamental departure from a trial according to law. The Court of Appeal was satisfied that the appellants' guilt had been established beyond reasonable doubt, which was a necessary although not sufficient condition for the application of the proviso in s 668E(1A) of the *Criminal Code* (Q). Section 668E(1A) provides that the Court of Appeal may dismiss an appeal, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in the appellant's favour, if it considers that "no substantial miscarriage of justice has actually occurred". The appeals were dismissed under the proviso.

The appellants appealed to the High Court upon a single ground challenging the application of the proviso. The appellants submitted that s 80 of the Constitution, which requires a "trial by jury" for Commonwealth offences tried on indictment, is inconsistent with the exercise by an appeal court of the power under the proviso in a case in which there has been a misdirection as to the elements of liability.

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By majority, the High Court upheld each of the appellants' appeals against conviction, and ordered a new trial. The Court considered that the prosecution of the appellants for the importation offences upon a basis that was not known to law was a fundamental departure from the proper conduct of the trial, which denied application of the proviso. The verdicts on the importation counts reflected the jury's satisfaction that each appellant was a party to the "group exercise", but it did not follow that the jury must have been satisfied of the facts necessary to establish the appellants' guilt on the basis of their having aided, abetted, counselled or procured Mr Reed's offences. Consequently, the Court found it unnecessary to address the appellants' constitutional arguments.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*