



HIGH COURT OF AUSTRALIA

14 March 2018

POUYAN KALBASI v THE STATE OF WESTERN AUSTRALIA
[2018] HCA 7

Today the High Court, by majority, dismissed an appeal from the Court of Appeal of the Supreme Court of Western Australia.

The appellant was convicted, following a re-trial before judge and jury in the District Court of Western Australia, of attempting to possess a prohibited drug with intent to sell or supply to another, contrary to ss 6(1)(a) and 33(1) of the *Misuse of Drugs Act* 1981 (WA) ("the MDA"). It was the prosecution case that the appellant had attempted to possess a consignment of 4.981 kg of 84% pure methylamphetamine. The police had removed the drugs and replaced them with rock salt prior to the collection of the consignment. The consignment note recorded a mobile telephone number to be contacted for collection. Evidence linked the appellant to that number. The consignment was collected by a man named Lothian, who was known to the appellant. The appellant was present at Lothian's premises when the "drugs" were unpacked. Mixing bowls, digital scales, disposable gloves and a substance used to cut methylamphetamine were found in the premises shortly after the appellant's arrest. The appellant's DNA was found on the inside of one of the disposable gloves. The sole issue at trial was whether the appellant was in possession (whether jointly with Lothian or otherwise) of the "drugs" during the period that he was inside Lothian's premises.

Under s 11 of the MDA, a person who is in possession of more than 2 g of methylamphetamine is deemed to possess it with intent to sell or supply to another subject to proof to the contrary. In *Krakouer v The Queen* (1998) 194 CLR 202, the High Court held that s 11 does not apply to the prosecution of a charge of attempted possession of a prohibited drug with intent to sell or supply to another. The appellant's trial was conducted on the common, mistaken, assumption by the parties and the trial judge that s 11 was engaged. The jury was directed that, in the event it was satisfied that the appellant was in possession of the "drugs", his intention to sell or supply them to another would be proved beyond reasonable doubt. The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Western Australia. The State conceded that the trial judge's direction concerning proof of the element of intention was wrong. The Court of Appeal upheld the State's submission that the appeal should nonetheless be dismissed under s 30(4) of the *Criminal Appeals Act* 2004 (WA), which provides that the Court of Appeal may dismiss the appeal if it considers that "no substantial miscarriage of justice has occurred" ("the proviso").

By grant of special leave, the appellant appealed to the High Court on the ground that the Court of Appeal erred in applying the proviso. The High Court declined to re-open the principles governing the proviso stated in *Weiss v The Queen* (2005) 224 CLR 300. The majority rejected the appellant's contention that he was "not in reality tried for the offences for which he was indicted". The majority found that there was no basis in the evidence, or in the way the appellant's case had been run, that left open that the appellant may have been in possession of a lesser quantity of the "drugs" with a view to purchase for his own use, or that he possessed the "drugs" without intent to sell or supply to another. Rather, the sole issue at trial was whether he was in possession of the whole of the substitute "drugs". In the circumstances, the majority held that the Court of Appeal was correct

to reason that proof of the attempt to possess nearly 5 kg of 84% pure methylamphetamine compelled the conclusion that it was the appellant's intention to sell or supply the drugs to another. Therefore, the majority held that the Court of Appeal was correct in concluding that the misdirection did not result in a substantial miscarriage of justice.

- *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.*