IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M161 of 2017

BETWEEN:

10 **THE QUEEN** **Appellant**

and

ROMANO FALZON **Respondent**

20

RESPONDENT'S SUBMISSIONS

Part I: Suitability for internet publication

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

Filed on behalf of the Respondent by:
James Dowsley & Associates
Level 7, 533 Little Lonsdale Street
Melbourne Victoria 3000
DX 449 Melbourne

Date of filing: 9 March 2018
Telephone: 8602 1400
Facsimile: 9640 0935
Email: dominicc@dowsleyassociates.com.au
Reference: Dominic Care

Part II: Concise statement of the relevant issues

2. This case turns upon the distinction between the two modes of reasoning identified below at paragraphs [16] – [17], for which of those modes of reasoning the evidence was admitted at trial, and to what end.

Part III: Notice under the *Judiciary Act* 1903

3. The respondent certifies that he has considered whether notice should be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth), and does not consider that such notice is necessary.

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Part IV: Factual issues in contest

4. The appellant has summarised the uncontroversial facts the subject of the respondent's trial at paragraphs [5.2] to [5.10] of her submissions, and has gone on to assert, at paragraphs [5.11] to [5.18], that evidence of the respondent's cash was admitted and relied upon as an indication of trafficking. To that summary may be added he following features of the trial that make clear precisely how the evidence presently in issue was admitted by the trial Judge.

5. In Victoria, the prosecution is required to file in advance of a criminal trial a
20 written opening, which must set out the 'the manner in which the prosecution will put the case against the accused', and must outline the 'acts, facts, matters and circumstances' relied upon by the prosecution.[1] The prosecution cannot depart in any substantial way from its opening,[2] and the oral opening must be restricted to the matters set out in the written

[1] *Criminal Procedure Act* 2009 (Vic) s 182(2)

[2] *Criminal Procedure Act* 2009 (Vic) s 184 (a presently irrelevant exception applies if leave is given)

opening.[3] In the written opening filed in this case, the prosecutor described with precision how the cash was said to be relevant:

> The prosecution alleges that the $120,800 cash located is the proceeds of trafficking in cannabis by Romano Falzon and Susan Falzon.[4]

6. The trial Judge confirmed this with the prosecutor in the course of argument before he admitted the evidence of the cash being found:

10

> HIS HONOUR: But is it your case that the money - let's take the 120,000 first which, as I understand it, is in Mr Falzon's home.
>
> [PROSECUTOR]: Yes.
>
> HIS HONOUR: The Crown case is what? That that's the proceeds of sales of earlier marijuana crops, cannabis crops?
>
> [PROSECUTOR]: Yes.[5]

7. The prosecutor made the point that the inference the Crown sought to invite, from the finding of the cash, was that there had been previous sales:

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> [I]n respect of both Mr Falzon and Mr Gusman there's a quantity of cash from which an inference can be drawn that this is the proceeds of past sales.[6]

8. He repeated the point at a later stage of the argument:

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[3] *Criminal Procedure Act* 2009 (Vic) s 224(2). It is against that background that appeals against conviction are ordinarily conducted without the oral opening being transcribed, as occurred in this case.

[4] At [28]

[5] Trial transcript at p 135 from line 1

[6] Trial transcript at p 72 from line 12

It's not direct evidence of sales, the money and the exercise book, but certainly it's an inference from which it could be drawn that there has been sales of cannabis.[7]

9. In fact, when counsel for the respondent later raised the concept of a cash float in the course of argument, the trial Judge made it clear that the evidence was not deployed that way:

HIS HONOUR: There's no suggestion that it's a float.

[COUNSEL]: No.

10 HIS HONOUR: It's just money that no doubt the prosecutor will say the presence of is completely unexplained.

[COUNSEL]: Yes, well the prosecution will say I imagine - - -

HIS HONOUR: Other than by trafficking - - -

[COUNSEL]: The prosecution will say it's a large amount and an inference can be drawn that it must have come from the sale of drugs, the cannabis. [8]

10. When he came to rule on its admissibility, the trial Judge set out the relevance of the finding of the cash:

20 The prosecution case is that the cash amounts are likely to be proceeds or are proceeds of cannabis.[9]

11. So, too, did the prosecutor address the jury on the same basis. The prosecutor's closing address discloses no reference to a 'cash float.' Nor did the prosecutor submit to the jury that cash found had any relevance, independent of its provenance. Rather, he explained the relevance of the cash by pointing out that the money had not been included in the respondent's tax returns in the years preceding its being found, and

[7] Trial transcript at p 73 from line 10

[8] Trial transcript at p 109 from line 23

[9] Trial transcript at p 294 from line 12

asserted that its absence from those tax returns demonstrated that it was the proceeds of drug trafficking during those preceding years. For example, and significantly, he submitted that:

> [T]he point that I wanted to make was that originally, that $120,000 wasn't [in the tax] return and why is that? The prosecution says, well, you're not going to return income from an illegal activity, black money, income from dealing in drugs and that's why the prosecution says that the possession of that cash money is indicative of a dealing in drugs and indicative of trafficking in drugs. What is being engaged in is a commercial profit making activity in relation to both the cultivating of cannabis, not for personal use but for the purposes of sale, for making a profit.[10]

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Part V: Applicable constitutional provisions, statutes and regulations

12. See attached schedule.

Part VI: Statement of argument

13. The essential difficulty for the appellant is that it she advances in this Court a case that she did not advance or rely upon at trial. Furthermore, she advances a new case on appeal that fails to grapple with the impermissible basis upon which the contested evidence was sought to be admitted – and was admitted – at trial.

20

14. To make good that point, it is necessary to identify two distinct modes of reasoning which might be employed when evidence such as the cash in the present case is admitted in proof of the purpose for which drugs are possessed. On the one hand, there is what might be termed 'past sales'

[10] Trial transcript at p 1351 from line 2, see also Trial transcript at p 1348 from line 19

reasoning, which relies upon an inference that cash located in an accused's possession is the proceeds of sales of drugs at some time in the past, as the foundation for a further inference that particular other drugs were possessed for the purpose of sale. This mode of reasoning depends upon an inference founded upon a person's past conduct as disclosing their disposition at the time of the charged act. It invites a process of inferential reasoning that commences with a finding on the jury's part that cash found was obtained by prior trafficking, and then – by dint of that finding or inference – invites the jury to reason that that it is more likely that an
10 accused's possession of a drug on a charged date is for the purpose of sale. That process of reasoning requires no demonstrated connection between the cash and drugs that have been located; rather the circumstances attending the cash itself are relevant to demonstrate that it is 'black money', which in turn must have been obtained from drug trafficking.

15. On the other hand, there is the process that might be described as 'tools of trade' reasoning. This reasoning process relies upon the presence of items commonly possessed by drug dealers as signifying that the accused person is a drug dealer, thus founding an inference that the drugs the subject of a charge were possessed for the purpose of sale. This second mode of
20 reasoning invites the inference – predicated upon the nature of the items found, and their intrinsic utility in, or connection to, the occupation of drug dealing – that the person who possesses those items has that occupation.[11] It does not involve any inference as to past conduct; it is the contemporary possession of the items, and their inherent nature, that permits the relevant inference to be drawn. When applied to cash, this second process of reasoning possesses little legitimate force, unless there is a demonstrable connection between the cash and the drugs. This is so because cash is not distinctive to drug dealing; only when it is possessed in circumstances that connect it to the possession of the charged drugs will it be properly

[11] *Sultana v R* (1994) 74 A Crim R 27 at 29 per Gleeson CJ

probative of a charge alleging possession for the purpose of sale.[12]

16. In this Court, the Appellant says, of this case, that "the simple possession of the money" was relevant to proof of the respondent's guilt of trafficking,[13] and emphasises that "the provenance of the money" was not to the point.[14] The mere possession of the money, it is argued, 'took forward the Crown case'[15] because the jury could perceive that it was akin to 'a cash float'.[16] This is quintessential 'tools of trade' reasoning. The legitimacy of that mode of reasoning is not here under attack; just as it was not under attack in the Court of Appeal. It is entirely uncontroversial. The majority in the Court of
10 Appeal expressly accepted that, where appropriate, resort to such reasoning is entirely proper.[17]

17. However, the difficulty with the appellant casting her case in this Court as a defence of 'tools of trade' reasoning is that the cash evidence was not admitted, or deployed, in that way at trial. As demonstrated above, far from being irrelevant, the provenance of the money was *the very point* of its admission at trial. The evidence was admitted,[18] and relied upon by the prosecution,[19] as the proceeds of past trafficking, and thus as proof that the respondent had been engaged in trafficking in the past. It was 'past sales' reasoning that the prosecution sought to deploy at trial; it is 'tools of trade'
20 reasoning that the Crown now contends was imperilled by the decision of the Court of Appeal.

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[12] See, by analogy, *Thompson and Wran v R* (1968) 117 CLR 313 at 317 per Barwick CJ and Menzies J

[13] Appellant's Submissions at paragraph [6.2]

[14] Appellant's Submissions at paragraphs [6.5] and [6.8]

[15] Appellant's Submissions at paragraph [6.4]

[16] Appellant's Submissions at paragraph [6.5]

[17] See, eg, Judgment below at [136], [138], [140], [142] and [145]

[18] Se above at paragraph [10]

[19] See above at paragraphs [5] – [9] and [11]

The reasoning of the majority in the Court of Appeal

18. The reasoning of the majority in the Court of Appeal involved four steps.

19. *First*, the majority identified how each of the two different modes of reasoning identified above at paragraphs [14] – [15] *might* have provided a basis for admitting the evidence as relevant at trial.[20] They observed that, when applied to cash, 'tools of trade' reasoning has generally relied upon proximity to demonstrate a sufficient link between the cash and the drugs the subject of the charge, but did not suggest such proximity was necessary.[21]

10 20. *Secondly*, the majority observed that, in this case, there was no attempt to demonstrate any link – other than by reference to earlier trafficking – between the cash that was found in the Essendon premises, and the drugs that were found elsewhere, whether by way of proximity or otherwise.[22] It followed that 'tools of trade' reasoning was not engaged.

21. *Thirdly*, the majority observed that admitting the evidence for 'past sales' reasoning was wrong. As the prosecution had abandoned the case that required it to establish an ongoing drug trafficking business,[23] 'past sales' reasoning invited either impermissible bare propensity, or tendency reasoning.[24] And if the prosecutor had sought the latter, it too was 20 impermissible, because the statutory prerequisites for the admission of tendency evidence had not been complied with.[25]

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[20] Judgment below at [130]

[21] Judgment below at [145]; as the majority observed at [144], cash alone is not inherently suspicious, and even an inordinately large and unexplained sum of cash will not generally be indicative of any particular crime

[22] Judgment below at [145]

[23] Judgment below at [146]

[24] Judgment below at [147]

[25] Judgment below at [147]

22. *Fourthly*, the majority concluded that, even if it had been admissible, the evidence would (or should) have been excluded by operation of s 137 of the *Evidence Act 2008* (Vic) because there was a high risk of misuse, and no directions were given as to the use of the evidence.[26]

23. Each of those steps is manifestly correct.

The appellant's argument in this Court

24. As the prosecution case at trial becomes more clearly understood, so the stitching that holds together the appellant's argument in this Court loosens. A further thread must be pulled. The appellant now contends
10 that the issue at stake in this case is the admissibility of evidence that incidentally reveals past wrongdoing, and thus a criminal tendency, but which was relevant and admissible for a different purpose.[27] Cleaving to this issue, the appellant contends that "it was the simple possession of the money", rather than any past conduct it signified, that was relevant in this case.[28] That contention cannot be accepted. It flies in the face of the prosecution opening; the basis upon which the evidence was admitted; and the lengths to which the prosecutor went to demonstrate that the finding of the cash signified past conduct.

25. Indeed, in his closing address to the jury, the prosecutor made clear that
20 the cash was probative of the trafficking charge *precisely because* the cash was (said to be) "income from dealing in drugs".[29] So understood, the reasoning deployed by the prosecution at the respondent's trial was tendency reasoning. It involved reasoning that the finding of the cash demonstrated a tendency to sell Cannabis, adduced in order to prove that,

[26] Judgment below at [148], [150]

[27] Appellant's Submissions at [6.1]

[28] Appellant's Submissions at [6.2]

[29] Trial transcript at p1351 from line 3

at the time the Cannabis was found, the respondent was in possession of it – in accordance with the established tendency – in order to sell it.[30] The permissibility of such reasoning is, in Victoria, governed by ss 97 and 101 of the *Evidence Act* 2008. In this trial, no notice having been given, it was impermissible.[31]

26. Returning to the four steps in the reasoning of the majority in the Court of Appeal, identified above at paragraphs [19] – [22], it appears that the appellant has misconstrued the first step; contests the correctness of the second and third steps; and seeks to impugn the reliability of the fourth
10 step.

27. As to the first step, the appellant seems to take the majority in the Court of Appeal as having concluded that tools of trade reasoning was permissible in this case.[32] Actually, the majority identified that such reasoning *might* have been available, but was not in this case because of the way the prosecution chose to put its case.[33] The prosecution case, as already pointed out, did not involve 'an attempt to show a relationship between' the cash and the drugs.[34]

28. Turning to the second step, it was hardly surprising that the majority below concluded that there was no attempt to link the cash to the Cannabis,
20 given that the prosecution had made clear in its Opening that its case involved 'past sales' reasoning, rather than 'tools of trade' reasoning. Counsel for the appellant in this Court, by his very endeavor to link the

[30] See, eg, *R v Ngatikaura* (2006) 161 A Crim R 329 at [87] per Rothman J, at [68] per Simpson J, *cf* at [25] per Beazley JA

[31] *Evidence Act* 2008 (Vic) s 97(1)(a)

[32] Appellant's Submissions at [6.15]

[33] Judgment below at [130]

[34] Judgment below at [145]

cash to the Cannabis,[35] emphasises that very point, for none of the links now or here drawn, were drawn by counsel at the trial.

29. Addressing the third step, the appellant contends that the prosecution at trial *did* rely upon a case that betrayed an allegation of ongoing drug trafficking.[36] In this respect, the respondent elides two discrete concepts. The prosecutor certainly did argue that the applicant had been conducting a business, and thereby invited a finding of past sales.[37] However, the majority's discussion of the fact that the prosecution eschewed any reliance upon a 'Giretti' charge,[38] or on a case founded upon an ongoing
10 business,[39] was not dealing with the content of the prosecution address, but rather with the requirements for proof of the charge. The point the majority made was that the trafficking offences – as a matter of formal proof – related to specific acts of possession, not to a course of conduct disclosing ongoing trafficking.[40] This elemental fact was unaffected by the prosecutor's decision to argue, in proof of the specific acts of possession, that the respondent had been conducting a business of trafficking, or indeed by his erroneous assertion that "it's this... business that is really

[35] Appellant's Submissions at [6.14] – [6.15]

[36] Appellant's Submissions at [6.15]

[37] See above at paragraph [11]

[38] Such a charge alleges the ongoing conduct of a business of trafficking: See *R v Giretti* (1986) 24 A Crim R 112

[39] Judgment below at [146]

[40] At trial, the prosecution initially sought to put two alternative cases within each charge alleging trafficking. The prosecution case on each such charge was that the accused had been in the business of trafficking Cannabis over a period of time (a *Giretti* charge), or alternatively, had been in possession of Cannabis for the purpose of sale at some unspecified time (see, eg, trial transcript at p 285 line 30 to p 286 line 18). However, before the trial commenced, and for presently irrelevant reasons, the trial Judge required the prosecution to elect a single basis for each allegation of trafficking (see trial transcript at p 291 line 7 to p 291 line 17). The prosecution thereafter decided not to pursue any *Giretti* charge, but instead pursued its trafficking case solely on the basis of possession for the purpose of sale on one particular day (see trial transcript at p 319 line 5 to line 12, and at p 321 from line 10). Consequently, by the time the trial commenced, the prosecution case involved an allegation relating to the possession for sale of particular Cannabis on a particular day, but no allegation of the existence of any ongoing business.

the subject of the charges".[41] Treating the prosecution case as extending beyond the confines of the charged offences, cannot have had the effect of rendering otherwise irrelevant or inadmissible evidence relevant and admissible.

30. Finally, the appellant challenges the majority's fourth step, largely by contesting that the evidence was deployed as tendency or propensity evidence.[42] Once that contest is resolved against the appellant, this aspect of the appellant's argument falls away. What remains of the appellant's argument is that the evidence was significantly probative as
10 'tools of trade' reasoning, but that too falls away, as the prosecution did not deploy it as such at trial.

Orders

31. For the foregoing reasons, the appeal ought be dismissed.

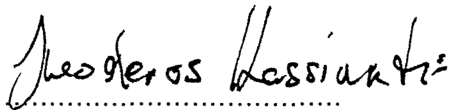
32. However, even if the appellant is successful, the relief he seeks ought not be granted. Because the respondent's convictions were quashed by the Court of Appeal on other grounds, neither the respondent's application to add a ground complaining of the failure to give appropriate directions, nor the respondent's application for leave to appeal against sentence, fell for
20 determination below. If the appellant were otherwise successful, it would be necessary to remit the case for further consideration of those applications by the Court of Appeal.

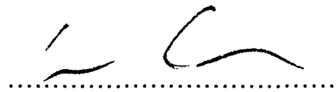
[41] Trial transcript at p 1351 from line 17. This comment was a very surprising one indeed, in light of the prosecutor having abandoned any case that involved the conduct of a business, when required to elect whether to pursue a Giretti charge or a single date charge

[42] Appellant's Submissions at paragraphs [6.20] – [6.21]

Part VIII:

33. It is expected that the presentation of the respondent's oral argument can be completed within two hours.





Theo Kassimatis QC
10 Gorman Chambers
Telephone: 9225 6899
Facsimile: 9225 2525
Email: theo.kassimatis@vicbar.com.au

Chris Carr
Gorman Chambers
Telephone: 9225 7777
Facsimile: 9225 8480
Email: chris.carr@vicbar.com.au

Dated: Friday, 9 March 2018

Schedule: Applicable statutes

Criminal Procedure Act 2009 (Vic)

Section 182: Summary of prosecution opening and notice of pre-trial admissions

(1) Unless the court otherwise directs, at least 28 days before the day on which the trial of the accused is listed to commence, the DPP must serve on the accused and file in court—

(a) a summary of the prosecution opening; and

(b) a notice of pre-trial admissions.

10 (2) The summary of the prosecution opening must outline—

(a) the manner in which the prosecution will put the case against the accused; and

(b) the acts, facts, matters and circumstances being relied on to support a finding of guilt.

(3) The notice of pre-trial admissions must identify the statements of the witnesses whose evidence, in the opinion of the DPP, ought to be admitted as evidence without further proof, including evidence that is directed solely to formal matters including—

(a) continuity; or

(b) a person's age; or

(c) proving the accuracy of a plan, or that photographs were taken in a certain
20 manner or at a certain time.

(4) If an accused has not received, under section 147, a copy of a statement identified in a notice of pre-trial admissions, the notice must contain a copy of the statement.

Section 184: Intention to depart at trial from document filed and served

If a party intends to depart substantially at trial from a matter set out in a document served and filed by that party under this Division, the party—

(a) must so inform the court and the other party in advance of the trial; and

(b) if the court so orders, must inform the court and the other party of the details of the proposed departure.

30

Section 220: Opening address by prosecutor

(1) The prosecutor must give an opening address to the jury on the prosecution case against the accused before any evidence is given in the trial.

(2) If documents have been served and filed by the prosecution under Part 5.5, the prosecutor must restrict himself or herself to the matters set out in those documents when opening the prosecution case, unless the trial judge considers that there are exceptional circumstances.

(3) For the purposes of subsection (2), a change of legal practitioner does not constitute exceptional circumstances.

10 (4) Despite subsection (2), the prosecutor is not restricted to a verbatim presentation of the summary of the prosecution opening as served and filed under Part 5.5.

(5) The trial judge may limit the length of the prosecution opening.

Evidence Act **2008 (Vic)**

Section 97: The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless—

20 (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1)(a) does not apply if—

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

30 **Note**

The tendency rule is subject to specific exceptions concerning character of and expert opinion about an accused (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.