HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **The King**
Appellant

and

TSZ CHEUNG HERMAN KO
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of the Issues

2. In a case where the prosecuton relied upon the extended definition of "import" under the *Criminal Code 1995* (Cth) to prove the accused dealt with a substance in connection with its importation, as opposed to physically bringing the substance into Australia, was it necessary in order to prove intention by inferential reasoning for the jury to be directed that it was open to them to infer an intention to import a substance if they were satisfied the accused knew or believed there was a real or significant chance that the substance was in the container and (words to the effect) that being aware of that chance, he/she nevertheless persisted, or notwithstanding this awareness, meant to import the substance ("the further step")?

3. Were the directions to the jury in this case adequate to convey to the jury that:

(i) an awareness of a real or significant chance that the substance was in the container was not sufficient to draw the inference of intention without the further step in reasoning; and

(ii) there must be temporal coincidence between the physical element of attempt to import a substance and the fault element of intention for that physical element?

Part III: Section 78B Notice

4. No notice under s78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Relevant facts

5. At trial, the appellant relied on the extended definition of "import" under s300.2 of the *Criminal Code* (*Ko v R* [2025] NSWCCA 129 (**CCA**) [49]-[50] Core Appeal Book (**CAB) 81-82**). The case against the respondent was that his role in arranging for the consignment to clear customs and filing paperwork with freight forwarders constituted dealing with the consignment in connection with its importation (CCA [49]-[50] **CAB 81-82**). It was not a case where the respondent personally brought into Australia a case, object or other thing. There was no evidence, and it was not part of the Crown's case, that the respondent ever had or intended to have physical contact with the consignment or dough mixer (see CCA [50] **CAB 81-82**, CCA [15] **CAB 73**). The Crown relied upon 16 actions of the respondent to establish his attempt to import a substance concealed within a dough mixer that was in the consignment, the first being using his experience in logistics to ensure the consignment cleared customs and the last pertaining to delivery at the end of the period (see SU 25-26 **CAB 31-32**).

6. No issue is taken with the description of the elements of the offence set out in the Appellant's Submissions (**AS**) at [9]. The second and fourth elements were the elements in dispute at trial. The adequacy of the directions in respect of the second element was the focus of ground 1 of the respondent's appeal against conviction in the intermediate court of appeal. The Crown's case at trial was that the second element of intention was proved by inference from seven identified circumstances (see CCA at [63], [52] **CAB 85, 82-83**).

7. The use of the iphone 7 by the respondent was not in dispute, said for the main part to be at the direction of Mr Yang, and the respondent denied having any suspicion,

knowledge or intention, while accepting that "when the police put everything together it did not look right but …at the time that is not what he was thinking"(CCA at [23], [27], [31] **CAB 76-7**). The defence case was that the respondent believed at all relevant times that he was assisting Mr Yang with a legitimate consignment, and that he was a person of good character who gave honest explanations for matters relied on by the Crown, with Mr Yang betraying his trust. There was also no evidence of any reference to any substance in communications, or indicia of drugs, cash, financial problems or large transactions (CCA at [55], [65], **CAB 83, 85-6;** SU 29-30 **CAB 35-36**).

8. Prior to the direction on the elements of the offence, the jury were directed that there were two inferences that were essential to the Crown case, and therefore had to be established beyond reasonable doubt. They were (1) that the respondent had possession of and used an iPhone 7 between about 8 October 2021 until about 20 October 2021; and (2) that the respondent perceived that there was a real or substantial chance of a substance being present in the consignment containing the dough mixer (SU 16 **CAB 22**). The trial judge then gave directions set out at CCA [86]-[96], [98]-[100], [102]-[103] **CAB 94-99** (SU 11-28 **CAB 17-34**).

9. A significant part of the context of the appeal was that the Crown's case, in closing and in the context of discussing the second element of the offence, was that the respondent's "knowledge developed over time and that it was not necessarily the case that the [respondent] "was aware of the substantial risks of the presence of border-controlled drugs in the dough mixer" back in September or even the start of October 2021" (CCA at [62] **CAB 85**). The indictment charged a period of between 6 September and 20 October 2021 (**CAB 5**).

Part V: Argument

10. The appellant argues that the CCA erred at [125] **CAB 106-107** in concluding that the trial judge failed to direct the jury to consider whether the respondent "nevertheless persisted with that conduct" or whether he "intended to import the substance in the sense that he meant to import the consignment notwithstanding that significant or real chance" (AS at [2]-[3], [32]-[34], [38]). The conclusion at CCA [125] **CAB 106-107** was correct and accords with and applies the terms of the offence provision, the definition of intention under the *Criminal Code* and the need for temporal coincidence of the physical

and fault elements of the offence applying Chapter 2 principles, for the reasons explained below. The conclusion at CCA [125] **CAB 106-107** also accords with and applies the decisions of this Court in *Kural v The Queen* (1987) 162 CLR 502 (***Kural***) at [14] and *Smith v The Queen; Afford v The Queen* (2017) 259 CLR 291(***Smith and Afford***) at [1], [7], [10], [12], [27], [49], [58], [60], [63], [68]-[69] as to the requirements for proof of intention by inferential reasoning in this case.

11. The finding of the CCA at [125] is to be read in the context of the issues between the parties on the appeal and the whole of the judgment. The CCA's reasoning and conclusion at [125] and its reference to the directions and guidance given in *Smith and Afford* were framed by reference to the way in which the appeal had been argued in the Court below. The appellant's argument in the court below was that the directions given in the respondent's case were to be assessed against the "sufficient" directions given in *Smith and Afford* (that is the trial directions in each of *Smith* and *Afford,* found to be of 'sufficiency' in *Smith and Afford* at [68]), as well as the "guidance" given in *Smith and Afford* at [69], and further that the directions given on element 2 were comfortably in line with the (sufficient) directions and the guidance in that case (CCA at [116] **CAB 103**).

12. In respect of the comments by the CCA at [71], [126], [128] (**CAB 89, 107**), the appellant accepts that the CCA did not conclude that the directions were erroneous on the basis that the trial judge did not direct the jury that each and every one of the seven facts relied upon by the Crown to infer intent had to be proved beyond reasonable doubt (AS at [20]-[23], [41]-[42]). The appellant does not advance a separate ground of appeal on this issue and it is unnecessary to address it further in these submissions. However, it is the case that not all of the seven facts were sufficient alone to establish an intention to import.

13. The fault element under consideration by the CCA in this case was that the accused intended to import a substance. This fault element was concerned with intention with respect to conduct, and "[a] person has intention with respect to conduct if he or she means to engage in that conduct" (s5.2(1) *Criminal Code*). This was the applicable fault element by virtue of s5.6 and s 11.1(3) of the *Criminal Code*. The fault element must coincide with the physical element (ss3.1 and 3.2 *Criminal Code*). In the circumstances

of the respondent's case, this required proof that the person meant to import a substance at the time he dealt with the consignment in connection with its importation (*Smith and Afford* at [6]).

14. Prior to the introduction of the *Criminal Code*, in *Kural* at 504-505, this Court held that an inference of intent to import a narcotic drug under the predecessor provision to s307.1 of the *Criminal Code* could be drawn where it was established that the accused knew or believed there was a significant or real chance that the article contained narcotic drugs and "he nevertheless persisted" in the conduct of bringing the article into Australia. This reasoning was affirmed in *Saad v The Queen* (1987) 61 ALJR 243 (***Saad***) at 244 and *Pereira v Director of Public Prosecutions (Cth)* (1988) 63 ALJR 1 at 3.

15. Following the introduction of the *Criminal Code*, it was held in *R v Saengsai-Or* (2004) 61 NSWLR 135 (***Saengsai-Or***) at [74] and *R v Cao* (2006) 65 NSWLR 552 (***Cao***) at [53]-[54] that the inferential reasoning outlined in *Kural* continued to apply to proof of intention in offences contrary to the predecessor provision to s307.1 of the *Criminal Code* as well as offences of possession or attempted possession of imported goods (see also *Luong v Director of Public Prosecutions (Cth)* (2013) 46 VR 795 (***Luong***) at [60]-[74], *Weng v The Queen* (2013) 279 FLR 119 (***Weng***) at [63]-[64]).

16. It was confirmed in *Smith and Afford* at [1] that *Kural* reasoning is applicable to proof of an intention to import a substance as an element of the offence contrary to s307.1 of the *Criminal Code*. As this Court traced in *Smith and Afford*, *Kural* has been repeatedly affirmed as an applicable mode of inferential reasoning to establish proof of intention under Chapter 2 of the *Criminal Code* in relation to drug importation offences (see [10]-[12], [57]-[59], [60]-[64]). The important distinction between proof of intention and proof of recklessness was maintained through the *Kural* inferential reasoning process (*Smith and Afford* at [11], quoting Bell J in *Saengsai-Or* at 147 [69], *Smith and Afford* at [58]).

17. This Court in *Smith and Afford* at [68] emphasised the importance of directing the jury in accordance with the language of the *Criminal Code* and the definition of intention, and provided guidance to trial judges at [69] as to the content of directions on the subject of intention in the second element of an offence contrary to s307.1 of the *Criminal Code,* "always tailored to the issues in the case at hand and the facts and circumstances which

are relevant to determination of the issues". The guidance in [69](8) is neither a stand alone direction, nor does it use compulsory language. The suggested directions at [69] repeatedly refer to the necessity of the prosecuton to prove the accused intended to import the substance, [in the sense of meaning to] bring a substance into Australia (see [69](2), (3)(i), (5), (8), (10)).

18. This Court in *Smith and Afford* made clear at [58], [63], [65], and [68] that in order to draw an inference of an intention to import a substance, it is not enough for the prosecution to simply prove beyond reasonable doubt that the accused was aware of a real or significant chance that the container or package included a substance. This Court observed at [63] that to support an inference of intention, "the accused must be shown to have known or believed there to be a significant chance that there was a substance within an object that the accused was carrying into the country, *and, knowing or believing that to be so, he meant to carry it in*" (see also *Smith and Afford* [62], emphasis added). Expressed in other words, "the person's state of mind is, in truth, that he or she *is prepared to proceed* with bringing the object into Australia *even if* the substance is in the object…" (*Smith and Afford* at [59] (emphasis added)).

19. In *Smith and Afford* this Court concluded at [66]-[68] the directions in the circumstances of each of the trials of Smith and Afford were sufficient. The direction in *Afford* included specific reference to the jury needing to be satisfied that the accused was aware of a real or significant chance the suitcase contained a substance and "he neverteheless persisted with that conduct" (see extract at [26] of *Smith and Afford*). In *Smith and Afford* the Court concluded at [67] that the directions in *Smith,* as set out at [46] of *Smith and Afford,* made "abundantly clear to the jury that, while it was relevant for them to consider whether Smith knew or believed there to be a real or significant chance that there was a substance in the items which he brought into Australia, they would then need to go on to consider whether that was sufficient to satisfy them beyond reasonable doubt that Smith intended to import the concealed packages which contained the substance, in the sense that he meant that those packages would be imported…".

20. The CCA's reasoning and conclusion at [125] accorded with and applied *Smith and Afford* and *Kural* as well as *Saad, Saengsai-Or, Cao, Luong,* and *Weng*. Contrary to the appellant's submission, the CCA did not misunderstand *Smith and Afford*, rather, it

applied the decision to the circumstances of the respondent's case in the context of the argument being advanced by the appellant below (cf. AS at [33]).

21. The CCA found the directions to the jury in the present case on the second element were deficient because they "fell short of saying that an awareness of a real and significant chance that the conduct involved the importation of the substance would not of itself be sufficient to draw the necessary inference" (CCA [125] **CAB 106**). In addressing the appellant's argument as to the 'sufficient' directions, the CCA went on to say that the directions in the respondent's trial fell short because it also must be proved beyond reasonable doubt that the [respondent] 'nevertheless persisted with that conduct' notwithstanding that awareness or belief" (CCA at [125], citing the direction given in *Afford*, and reasoning in *Kural* at [14]) or in "other words", that the jury must go on to consider whether that was sufficient to satisfy it beyond reasonable doubt that the [respondent] intended to import the substance in the sense that he meant to import the consignment notwithstanding that significant or real chance" (CCA at [125], citing the direction given in *Smith* at [46]). This reasoning cannot be impugned having regard to the statements of principle in *Smith and Afford* set out above and the statements of principle at [58]-[59], and the guidance directions at [69], tailored to the issues in the case at hand. That it did not dictate a particular form of wording in cases to come, or all cases, as opposed to emphasising the further step in reasoning that was necessary and missing in the respondent's case is apparent from the CCA's explanation at [125] "in other words".

22. The appellant appears to suggest that it is sufficient to prove intent to prove that the accused was aware of the real or significant chance that a substance was in the consignment at the time of the physical acts alleged to constitute the offence (AS at [3], [36], [37]). This proposition is contrary to *Smith and Afford* at [58], [63], [65], and [68], and its application of the *Criminal Code* which the appellant does not challenge. It is inconsistent with intermediate appellate authority applying that decision in the context of s5.2(1) of the *Criminal Code* (*Lin v R* [2019] NSWCCA 127 at [61]-[62]). It ignores the qualifier of "in cases like this" repeated in *Smith and Afford* at [60] and [69]. It risks the conflation of the two distinct fault elements and directions as to the fault element of recklessness imposing a higher threshold than that for inferred intention.

23. As the Court said in *Smith and Afford* at [69], the directions to be given to the jury must be tailored to the facts and circumstances that arise in any given case. *Smith* and *Afford* were cases of substances concealed in items within suitcases and carried into Australia by each of Smith and Afford respectively, and where real suspicion and concern as to the contents of their luggage had been expressed by each (see *Smith and Afford* at [17]-[20], [40]-[41]). In the respondent's case the Crown relied upon the extended definition of "import" and alleged the respondent's role was to facilitate the importation of a dough mixer by filling out paperwork and arranging for the container it was in to clear customs, without any physical contact with or sighting of the dough mixer, let alone its contents (cf. *Smith and Afford* at [59], [60]). In addition, the Crown case as to the respondent's intention was that it evolved over time, with developing awareness of substantial risk, while the trial prosecutor addressed the jury in closing "working backwards" (CCA [61]-[62], **CAB 84-85**). Defence counsel emphasized the matter should not be looked at with hindsight reasoning, and from the subjective state of mind of the applicant at the relevant time (CCA [55], **CAB 83**) The issues in the trial highlighted the need for the directions to make clear to the jury the necessity of temporal coincidence between the physical and fault elements, and the need for the jury to be satisfied that there was not only advertence to the chance but persistence in the particular act with the requisite knowledge/belief of the risk, before they could convict. The effect of the use of the terms identified by the CCA, expressed in terms of *Kural* itself and in "other words", achieves the same end as the guidance directions in *Smith and Afford* at [69].

24. The appellant argues that the CCA erred in its conclusion at [125] in part relying on the fact that the words the CCA considered to be missing in the direction in this case were not included in the suggested direction at [69](8) of *Smith and Afford*. The guidance directions suggested at [69] in *Smith and Afford* were not singular and specifically disavowed as 'anything in the nature of a template' in their prelude. Moreover, they were said to be appropriate "*in cases like this*, where it is not disputed that the accused *brought a substance into Australia* …" (emphasis added, see also [60]). Similarly, the suggested direction at [69](8) of *Smith and Afford* starts with a qualifier "[w]here, as here, the accused brought into Australia a case, object or other thing (the container) which has a substance in it …". Unlike *Smith and Afford*, the very reason for reliance on the extended definition of import was that the respondent did not physically bring the dough mixer into Australia.. This is a further reason why words to the effect of those

found to be missing by the CCA in this case (set out at [125]) were required in this case (cf. AS at [33]). The reasoning in *Smith and Afford* at [59] as to the inferential reasoning to intent that arises in cases where the substance is brought into Australia via an accused's luggage has some material differences with a case where the person does not have physical contact with the object imported (and, for example, cannot physically check or 'inspect' to ascertain whether there is a substance concealed in the object). The further step was an important part of the reasoning process in this context.

25. As *Smith and Afford* makes clear, it is correct and desirable for a trial judge to direct the jury as to the how the Crown may establish intent by inferential reasoning tailored to the facts and circumstances of the case (cf. AS at [35]). The appellant accepts that the trial judge is required to explain so much of the law as the jury requires to perform its task (AS at [35]). In the present case, language such as that omitted from the direction as found by the CCA at [125], was necessary for the jury to understand its task given the manner in which issue was joined in the trial and that it was not necessarily the case that he "was aware of the substantial risks of the presence of border controlled drugs in the dough mixer" throughout the charge period (CCA at [62] **CAB 85**).

26. The appellant is also critical of the CCA because, it submits, the CCA proffered no reasoning as to why the omitted language mattered (AS at [33]). This is to read the judgment out of the context of the manner in which the respondent cast its argument in the appeal. In any case, the CCA made it clear that the conclusion at CCA [125] followed from an application of *Kural* and *Smith and Afford*. Further, even assuming it to be correct (which is not conceded), a lack of identification as to precisely why the omitted language mattered, is only of significance to the CCA's conclusion if the appellant can show there is no permissible reasoning or justification for the inclusion of the omitted language. However, as the appellant goes on to accept, one reason for including words to that effect (approved as correct directions in *Kural* and *Smith and Afford*) was to ensure that the jury appreciate that the awareness of the real or significant chance must coincide and co-exist with being prepared to take the risk by engaging in the conduct comprising the alleged importation (cf. AS at [3], [35], *Smith and Afford* at [59], [63]). The further step in reasoning was also critical in this case to ensure that the inference of intent was properly drawn for the jury to understand that an awareness of a real or substantial chance on its own did not suffice to draw the inference of intention.

The words used by the CCA at [125] were sufficient to convey these were the reasons for its conclusion.

27. The overlap of facts relied on in the Crown case to prove elements two and four as pointed out earlier at CCA [63]-[64] **CAB 85**, also supports that the CCA's conclusion was correct in order to maintain the clear distinction between the process of inferring intention and satisfaction of recklessness alone, one that has been consistently defended by this Court, and to prevent intention being satisfied through a proof lower than that required for recklessness.

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28. Contrary to the appellant's submission, the trial judge's directions were not sufficiently "close to" or consistent with [69](8) of *Smith and Afford* read in context, and were inadequate (cf. AS at [3], [33], [36]-[39]). Nor is [69](8) of *Smith and Afford* mandatory in its terms or a stand alone direction. The direction omitted key parts of *Kural* reasoning affirmed in *Smith and Afford* and did not address the difficulty with the directions identified by the CCA at [125] in the circumstances of this case or fully meet the principles expressed as guidance *Smith and Afford* at [69].

29. The directions relied on by the appellant that an inference of intent can only be drawn
20 if it is the only inference available or open on the facts (SU 21 and 24 **CAB 27 and 30**), reflected part only of the separate subparagraphs of the suggested direction in *Smith and Afford* (at [69](7) and (10)). Critically, these directions were only given after the jury had been told it was open to infer intent from an awareness that there was a real or substantial chance of a substance being present without reference to the further step despite its necessity in this case (SU 21 **CAB 27**). The direction that the jury had to decide whether the accused meant to bring the substance into Australia (SU 20 and 24 **CAB 26 and 30**), again reflected separate subparagraphs of the suggested direction in *Smith and Afford* (at [69](1) and (5)). The summary of the Crown and defence cases relied on by the appellant did not cure the deficiency (see AS at [36.2]-[36.3], SU 26
30 **CAB 32**, SU 28 **CAB 34**).

30. The CCA at [125] did not err in its conclusion. The single ground in the notice of appeal (**CAB 135**) should be dismissed.

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Part VI: Argument on notice of contention or cross-appeal

31. There is no notice of contention or cross-appeal.

Part VII: Estimate for oral argument

32. It is estimated it will take 45 minutes to present the respondent's oral argument.

Dated 12 February 2026

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ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version *eg:* *Version 26 (1 July 2020 to 24 March 2024)*	Provision(s)	Reason for providing this version *eg:* • *Act in force on the date of the offence;* • *date of judgment in Court of Appeal;* • *for illustrative purposes only*	Applicable date or dates (to what event(s), if any, does this version apply) *eg:* *21 April 2018: date of Minister's decision*
1	*Criminal Code 1995* (Cth)	Compilation 140 (3 September 2021-2 December 2021)	Sections 3.1, 3.2, 5.2, 5.6, 11.1, 300.2, 300.6 and 307.1	This compilation was in operation and effect at the time of the alleged offending.	6 September 2021 to 20 October 2021