HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **THE KING**

Appellant

and

TSZ CHEUNG HERMAN KO

Respondent

REPLY

PART I FORM OF SUBMISSIONS

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

PART II REPLY

2. The appellant joins issue with the respondent generally. It is sufficient in this brief reply to make three points.

No conflation of the second element (intention) and the fourth element (recklessness)

3. The appellant's argument is not inconsistent with *Smith and Afford* at [58], [63], [65] and [68] as the respondent contends at **RS [22]**. At those paragraphs, the joint judgment drew attention to the difference between intention to import a substance (here, the second element) and recklessness as to the nature of the substance to be imported (here, the fourth element) and emphasised the importance of keeping them separate and distinct.

4. The trial judge's directions when read as a whole did not conflate the two in any respect.

5. A direction such as that given in this case that "if you are satisfied beyond reasonable doubt that the accused perceived that there was a real or substantial chance of a substance being present in the consignment that he attempted to import, then it is open to you to infer, having regard to all the facts and circumstances of the case, that he intended to import the substance" (**SU 21** (**CAB 27**)) does not leave it open to the jury to find intention based on mere recklessness as to the presence of a substance in the consignment. The respondent's case at trial, accurately summarised by the trial judge to the jury, was that "the Crown has not excluded the reasonable possibility that the accused neither knew nor believed that there was a real significant chance that there was another substance in the consignment" (**SU 28** (**CAB 34**)). The respondent's case was not that, had he believed

there was a real or significant chance, he would not have engaged with the consignment. As the joint judgment in *Smith and Afford* recognised at [58], proof beyond reasonable doubt that an accused was aware of the real or significant chance when he or she engaged in the physical acts, does leave the mere "theoretical possibility" that the respondent had a state of mind amounting to mere recklessness even if their state of mind was: "although there is a real or significant chance of the presence of the substance in the object, I would not be prepared to take the object into Australia if I knew or believed that the substance is in the object". The majority observed that in most cases this was unlikely to occur. And it was not a possibility that was left to the jury to consider in this case.

6. Further, reading the directions as a whole, the trial judge expressly directed the jury that "[e]ach of those mental elements must be considered separately, so element 2 is different to element 4 and must be considered apart even though they seem similar" (**SU 23-24** (**CAB 29-30**)). The primary judge then returned to intention (element 2) separately from element 4 (**SU 24** (**CAB 30**)):

> To decide whether the accused meant to bring the substance into Australia, it is permissible to draw an inference as to the accused's state of mind, at the time of dealing with the substance, in connection with bringing it into Australia and importantly, here, making it available to another person. As I said, making it available to another person is another aspect of importing it.
>
> It must be stressed, however, that it is not permissible to draw an inference that he meant to bring the substance into Australia unless that is the only inference available or open on the established facts and the circumstances of the case.
>
> If it is established beyond reasonable doubt that the accused meant to bring the substances into Australia, then, it will be necessary to decide whether the accused knew, or was reckless as to, whether the substance was a border controlled drug.

7. That there was no conflation of intention in element 2 and recklessness in element 4 is reinforced by the fact that trial counsel for the respondent did not seek any further or clarifying direction. Trial counsel was clearly alive to the need to separate the two, for this was a matter raised by him with the trial judge in relation to draft directions on the elements.[1]

8. *Lin v R* [2019] NSWCCA 171 at [60]-[62] does not assist the respondent: **RS [22]**. The Crown prosecutor in that case was said to have conducted the prosecution on the basis that it was enough to show that the accused intended to import a container that just so

[1] Transcript of 10 July 2024 at T269:9-17 (**SBFM 28**).

happened to contain a substance. That is not how the present prosecution was conducted.[2] The Crown expressly addressed the jury on the basis that "[w]hat I need to do in element 2 is prove beyond reasonable doubt that the accused intended to import a substance, that is, a substance beyond just a dough mixer".[3] Moreover, the trial judge's directions never suggested that an intention to import the dough mixer would be enough to establish the second element of the offence. The trial judge's directions referred to an intention to import "a substance, that is something in the consignment other than the dough mixer" (**SU 11** (**CAB 17**)).

Temporal coincidence

9. The respondent contends that "[t]he 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": **RS [23]**. This is not controversial. Nothing the Crown said in its closing address denied that there had to be temporal coincidence or suggested to the contrary.

10. After dealing with the first element, the Crown prosecutor turned to a discrete factual question about whether and when the respondent used an iPhone 7 and Acer computer, as material found on those devices was critical to the Crown case.[4] In doing so, the Crown prosecutor went through messages found on those devices in reverse chronological order.

11. After finishing that exercise, the Crown prosecutor then said:[5]

> Thank you. So I hope over the last hour or so, perhaps longer, not only have I addressed with you when Mr Ko receives – started using the iPhone 7 and the Acer computer, because the Acer computer is tied up with it, but also I've covered a lot of the messaging that was necessary to go through with you anyway. So having gone through it backwards, I hope you're relieved to hear I'm not going to go through it forwards now.
>
> There is a difference going forwards though, and I need to address that with you. That is, if you were just to do it backwards in terms of considering what it actually means for his knowledge, you're looking at it with the benefit of hindsight when you think about it. That is, what I'm saying to you is that the Crown accepts that Mr Ko's knowledge developed over time. It's not necessarily the case that he realised back in September or October or the first day of October that he was aware of the substantial risks of the presence of border-controlled drugs in the dough mixer. He could have developed that

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2 The Crown prosecutor referred the trial judge to *Lin* in the context of ensuring the two elements were addressed separately: T269:19-25 (**SBFM 28**).

3 Transcript of 10 July 2024 at T291:50-T292:2 (**SBFM 50-51**).

4 See Transcript of 10 July 2024 at T281:26-34 (**SBFM 40**).

5 Transcript of 10 July 2024 at T291:14-35 (**SBFM 50**).

> over time. If all we do is look at the back end and work our way forwards, that would be wrong.
>
> So what I intend to do now is just look at the bare facts and establish for you those things that the Crown says we point to in terms of establishing his - the two fault elements. …

12. In this passage (on which the respondent relies at **RS [23]**), the Crown prosecutor was drawing attention to the need for temporal coincidence between the fault and physical elements,[6] acknowledging that the respondent's knowledge may have developed over time, during the charged period.

13. The trial judge clearly directed the jury that there had to be temporal coincidence ("at the time of dealing with the substance", **SU 24** (**CAB 30**)). Trial counsel for the respondent did not raise any concerns as to the sufficiency of the directions in this regard. The appellant addressed these matters in chief. But because the respondent relies on the above passage at **RS [23]**, it is important to clarify that both the Crown and the defence, as well as the trial judge, proceeded before the jury that there had to be temporal coincidence. There was no real chance that the jury thought otherwise.

"Cases like this"

14. Finally, at **RS [22]-[24]** generally, the respondent seeks to confine *Smith and Afford* to what the joint judgment referred to as "cases like this", being cases where the accused brings a container into Australia that contains a substance. The appellant submits that the guidance provided by the joint judgment in *Smith and Afford* is of more general relevance and application. The point is that whenever an act of importation occurs while perceiving there to be a real or substantial chance of a substance being present in whatever is being imported, it will be open to infer that the accused meant to import that substance. In terms of the application of this process of reasoning, there is no difference as a matter of principle in the factual difference between physically importing a container on the one hand and taking steps in its importation on the other.

Dated: 24 February 2026

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[6] That is also how the trial judge summarised the Crown's case: **SU 26** (**CAB 32**).