



HIGH COURT OF AUSTRALIA

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

The King

Appellant

and

TSZ CHEUNG HERMAN KO

Respondent

RESPONDENT'S**OUTLINE OF ORAL SUBMISSIONS****Part I:** This outline is in a form suitable for publication on the internet.**Part II: Outline**

1. This Court in *Smith v The Queen; The Queen v Afford* (2017) 259 CLR 291 (*Smith and Afford*) [58]-[59], [63], [65], [67] and [68] **JBA Vol 2 88, 90-91, 92** has already decided that in order to draw an inference of 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 contained a substance (Respondent's Submissions (**RS**) [18], [22]; cf. Appellant's Submissions (**AS**) [2] and [3]).
2. The Court of Criminal Appeal (**CCA**) was correct to conclude that the directions on intention 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" as they must "go on to consider whether ... he meant to import the consignment notwithstanding that significant or real chance" (CCA [122], [125] Core Appeal Book (**CAB**) **105-107**; RS [20]-[21], [24]-[25], [26]-[27]).
3. The CCA's conclusion accords with the *Criminal Code 1995* (Cth) and *Smith and Afford*. Under the *Criminal Code*, intention applies to the physical element of importing

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a substance (ss 307.1(1), 5.6(1) and 11.1(3) **JBA Vol 1 19, 10, 11**; RS [13]). Intention with respect to conduct is defined in s 5.2(1) as the person “means to engage in that conduct” (**JBA Vol 1 9**). *Smith and Afford* at [1], [7] [10]-[12], [57]-[65] **JBA Vol 2 65-66, 69-71, 87-91** confirmed that the inferential reasoning outlined in *Kural v The Queen* (1987) 162 CLR 502 (*Kural*) at 504-505 **JBA Vol 2 26-27** continues to apply to proof of an intention to import a substance in offences contrary to s307.1 of the *Criminal Code* (RS [16]). Recklessness as defined in s5.4(1) **JBA Vol 1 9** does not apply to this physical element.

4. The CCA correctly concluded (particularly having regard to how the appeal was argued below by the appellant) that when compared against the (sufficient) directions in the trials of *Smith and Afford* and the guidance directions, the directions in the respondent’s case were deficient (CCA [116], [125] **CAB 103-104, 106-107**; RS [11], [20]-[21]). The CCA were not being proscriptive about the content of appropriate directions as to intention generally (RS [24]; cf. Appellant’s Reply (**AR**) [14]).
5. Issue was squarely joined at trial on element 2 in relation to intention and was not confined in the manner suggested in the Reply at [5] (Appellant’s Supplementary Book of Further Materials (**ASBFM**) **80.19-22, 81.6-.13, 86.12-.13, 102.4-.25**; SU 28-30 **CAB 34-36**; CCA [65] **CAB 85**; RS [6], [7], [13]). Defence counsel repeatedly addressed on the failure to prove intention.
6. This was not a case where the respondent physically brought the substance into Australia or had any physical contact with the consignment or container (CCA [50] **CAB 81-82**; CCA [15] **CAB 73**; RS [5]), unlike *Kural* at 505-506 **JBA Vol 2 27-28**, *Smith and Afford* at [17]-[20], [40]-[41], [58]-[59] **JBA Vol 2 72-73, 80-81, 88** and *R v Saengsai-Or* (2004) 61 NSWLR 135 (RS [23]-[24]; cf. AR [14]).
7. The prosecution relied on the extended definition of import in s300.2 of the *Criminal Code*, of dealing with the substance in connection with its importation, through distinct acts between about 6 September 2021 and about 20 October 2021 (**JBA Vol 1 14; CAB 5**; SU 25-26 **CAB 31-32**; CCA [49]-[51] **CAB 81-82**; RS [5]). However, the Crown nevertheless accepted that the respondent’s knowledge developed over time and “it was not necessarily the case that the [respondent] ‘was aware of the substantial risks of the

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presence of border-controlled drugs in the dough mixer' back in September or the start of October 2021" (CCA [62] **CAB 85**).

8. The directions did not adequately address the need for the particular act of dealing to temporally coincide with proof of the fault element in circumstances where the prosecution relied on developing awareness (CCA [62] **CAB 85**; SU 28-29 **CAB 34-35**; SU 24 **CAB 30**; RS [10], [13], [23], [26]; cf. AR [3], [13]). The specific oral and written direction on element 2 referred to proof of intention "at the time of the alleged offence" – which encompassed the entire period on the indictment (SU 20 **CAB 26**; see also Appellant's Book of Further Materials (**ABFM**) 5).
9. The directions in this case as to intention were deficient and material, particularly given [3], [5]-[8] above, and did not accord with *Smith and Afford* tailored to issues in the case (SU 20-24 **CAB 26-30**; SU 26-27 **CAB 32-33**; **ABSFM 50.26-51.4**; *MDP v The King* (2025) 99 ALJR 969 [107]; RS [17]-[18], [21], [23]-[24], [28]-[29]; cf. AS [33], [36]-[39] and AR [8]).

Dated: 13 March 2026



Gabrielle Bashir



Georgia Huxley