HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27E—Appellant's reply

Note: See rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **ADRIAN HILARY BARBER**

Appellant

and

THE KING

Respondent

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APPELLANT'S REPLY

PART I: CERTIFICATION

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

PART II: REPLY

2. The respondent advances a variety of arguments to defend the holding of the CCA and the consequences of that holding, which the respondent accepts are potentially "harsh" (RS [43], [47]) and may, "from the perspective of an accused person, be regarded as 'unfair'" (RS [44]), without identifying those consequences. They should be identified, in order that one can answer the question whether this construction of s 29 was intended by the NSW Parliament. The consequence is that where a court is satisfied that a person did *not* possess a commercial quantity of prohibited drugs for the purpose of supply, the person must still be convicted of the offence of supply a commercial quantity of prohibited drugs (because the person has failed to prove that all of the drugs were possessed for a purpose other than supply). There is no issue that s 29 shifts the onus of proof, so that where the quantity possessed is not less than the traffickable quantity, it is presumed that the person in possession intended to supply those drugs and that person must prove a different state of mind. However, the holding of the CCA, supported by the respondent, is that s 29 also serves another function whereby the onus can only be satisfied where the person proves that the entire quantity of prohibited drugs was possessed otherwise than for supply to avoid being deemed to have possessed the entire amount for supply.

3. The respondent engages in a textual analysis and contends at RS [38]-[39] that there is "no rational reason" to read the words "the prohibited drug" in s 29(a) "to refer to anything other than the quantity that was sufficient to trigger the rule in the first place", with the suggested consequence that the person must prove that the entire amount was in possession otherwise than for supply. However, the text of the provision is ambiguous. The CCA's construction is not clearly manifested by unmistakable and unambiguous language. Section 29(a) contains no word of quantity. The definite article identifies the subject matter of the proof, but it does not make the proof all or nothing. As contended by the appellant at AS [33]-[38] there are alternative constructions of s 29 which do not have that consequence.

4. The respondent refers at RS [40] to s 25(2) as statutory context supporting the CCA's construction. That provision states:

> (2) A person who supplies, or who knowingly takes part in the supply of, an amount of a prohibited drug which is not less than the commercial quantity applicable to the prohibited drug is guilty of an offence.

However, the holding of the CCA in the present case is a very different proposition to construing the words "the prohibited drug" in s 25(2) to mean the same drug as the drug referred to in the words "a prohibited drug".

5. The respondent contends at RS [41] that the textual analysis "is supported by the evident purpose of the provision as revealed by the text and legislative history, namely to combat illicit drug use by facilitating the prosecution of those who supply drugs". As regards the legislative history, the respondent has provided various extracts from parliamentary speeches made in respect of the predecessor to s 29 in the *Poisons Act 1966* (NSW). It is noteworthy that, when s 45A(4) was introduced by the *Poisons (Amendment) Act 1970* (NSW), the Minister explained that this "drastic procedure" (see RS [22]), which "will at first sight appear repugnant to fair-minded people" (see RS [23]), was one which "shifts the onus of proof from the accuser to the accused". It was the shifting of the onus of proof that was perceived to be a "desperate measure" demanded by the "problem of drug peddling". There was nothing said at all about what would be, if intended, the much more potentially "repugnant" consequence that the CCA has endorsed. Even the words said to "directly support" (RS [42]) the CCA construction, those of the Minister extracted at RS [25], were said in the context of explaining "provisions of the bill relating to the reversal of onus of proof". It is the respondent who construes a parliamentary intention to respond to "[t]he problem of drug peddling" by the "desperate measure" of reversing the onus of proof as thereby indicating an entirely different intention to require a court to convict a person of possessing a commercial quantity of prohibited drugs for the purpose of supply even when it is satisfied that the person did not possess that quantity of prohibited drugs for the purpose of supply. That this was unlikely to be the parliamentary intention behind s 45A(4) in the absence of clear words is made even more apparent by the fact that the *Poisons Act*, unlike the DMTA, did not create offences graded by quantity and alternative verdicts where the issue might arise.

6. The respondent contends at RS [43]-[44] that the "statutory policy of the DMTA is to deter the drug trade even at the expense of potentially 'harsh' consequences in individual cases" and that the CCA's construction of s 29 "is in harmony" with that statutory policy even though it "might, from the perspective of an accused person, be regarded as unfair"

(see also RS [47]). The first proposition is correct. The DMTA does adopt some measures (defining "supply" to include "having in possession for supply", reversing the onus of proof) which could be described as potentially harsh, no doubt with one purpose being to deter the drug trade. However, it is a large step to contend that the CCA's construction of s 29 is "in harmony" with that statutory policy. It can be accepted that, for the purposes of deterring the commercial supply of prohibited drugs, possessing a commercial quantity of prohibited drugs for the purpose of supply is appropriately deemed to constitute "supply" of a commercial quantity under s 25(2) DMTA. However, it is not apparent how convicting a person of a "commercial supply of prohibited drugs" under s 25(2) when that person has proved that he did not possess such a quantity for supply would deter the commercial supply of prohibited drugs.

7. The respondent at RS [50] draws an analogy to the common law doctrine of honest and reasonable mistake of fact where it has been established since the 19th century that, to avoid conviction, the mistake must render the conduct entirely "innocent". It should be noted that this exculpatory doctrine developed because, as Cave J observed in *R v Tolson*:[1]

> Now it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right … But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the Act.

8. That is, the doctrine resulted from an approach to statutory construction of penal provisions which considers it implausible that Parliament intended the provisions to bear a meaning productive of manifest injustice unless clearly demonstrated by unmistakable and unambiguous language. It is true that the doctrine, as developed in the 19th century, requires that the mistake must render the conduct entirely "innocent", but that provides poor support for the CCA's construction of s 29. Important distinctions are apparent:

(a) Section 29 is concerned with an element of the offence (possession "for supply") while the common law doctrine of honest and reasonable mistake of fact creates

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1 (1889) 23 QBD 168 at 181-182.

an exculpatory defence for intentional conduct that would otherwise constitute an offence.

(b) The CCA's construction is supported by no authority (in fact there is contrary authority[2]). By contrast, the limitation of the common law doctrine of honest and reasonable mistake of fact to a mistake that would have rendered the conduct entirely innocent was developed in the 19th century and has provided a foundation of common law interpretative principle by reference to which legislatures throughout Australia have formulated and explicated myriad statutory offences.

(c) Section 29 is ambiguous whereas the ordinary and natural reading of the statutory provisions that have incorporated the common law doctrine (for example, s 14 of the Tasmanian Criminal Code: "…the existence of any state of facts the existence of which would excuse such act or omission") convey that the person is excused "from any and all criminal responsibility"[3], thereby clearly manifesting the requirement that the mistake must render the conduct entirely innocent.

9. The respondent also draws an analogy (RS [45]) to the construction of the admixture provision. However, that provision is unambiguous and it is noteworthy that in the second reading speech it was expressly stated that "[d]rugs which have been 'cut down' or mixed with other substances are treated for all purposes and provisions under the Bill, as if the drug was pure".[4] The parliamentary intention was clear.

10. The respondent submits at RS [48] that the observations of King CJ in *R v Bilick & Starke*[5] are "apt". The appellant agrees. However, they do not support the CCA's construction of s 29. The issue was whether a provision similar to s 29 had application beyond offences of possession of drugs for supply. King CJ reasoned, in the passage extracted by the respondent, that a "court should be slow to attribute to the legislature an intention" that a rebuttable presumption of fact which reverses the onus of proof in

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2 See *Alliston v R* (2011) 217 A Crim R 323, McClellan CJ at CL at [33]-[36], Fullerton J at [153]. No member of the NSW Court of Criminal Appeal suggested that s 29(a) could be satisfied only as to the whole: see also Simpson J at [138]-[139].

3 *Bell v Tasmania* (2021) 274 CLR 414, Kiefel CJ and Keane J at [14].

4 NSW Parliamentary Debates, 26 November 1985, 10616. See *R v R2* (1990) 19 NSWLR 513 at 517B.

5 (1984) 36 SASR 321.

respect of an ingredient of a particular offence should be applied more generally.[6] King CJ concluded, in a part not extracted by the respondent, that "[a] construction leading to that result is to be adopted only if there is no reasonable alternative construction".[7] While King CJ was discussing a provision that (only) reversed the onus of proof, the reasoning is apt with respect to the CCA's construction of s 29.

11. As regards the alternative constructions advanced by the appellant, the respondent's answer to the first construction (AS [34]) misidentifies the expression to which s 8(b) of the *Interpretation Act 1987* (NSW) is applied. AS [34] proceeds on the express assumption that the "amount" in the chapeau is the total amount possessed. Section 8(b) is applied not to that word, which s 29(a) does not use (RS [57]), but to "the prohibited drug", which it does. "The prohibited drug" in the person's possession then includes the several amounts of it which the person possesses, and para (a) is satisfied as to those amounts which the person proves were held otherwise than for supply. There is no "disaggregation" (RS [58]) of the amount in the chapeau: the total engages the section, and the balance remains deemed. The same analysis applies to s 29(b).

12. The criticism of the second construction at RS [59] is also misconceived. It would not allow a person who proves that "even a tiny portion" of the drug was for personal use to have "the presumption being disengaged for the balance" since s 29(a) is satisfied only to the extent of the proof, and the balance remains deemed to be possessed for supply: AS [38], [39], [41]. The street-level supplier of RS [59] who proves that some of the drug was for his own use is convicted of supplying the rest.

13. The appellant accepts that an order for a new trial would be more appropriate than remitting the appeal to the CCA.

Dated: 4 November 2026

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[6] (1984) 36 SASR 321 at 329.
[7] (1984) 36 SASR 321 at 330.