HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

YING-LUN (GARY) CHEUNG APPELLANT

AND

THE QUEEN RESPONDENT

Cheung v The Queen
[2001] HCA 67
22 November 2001
S200/2000

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

A Scrivener QC with J I Doris for the appellant (instructed by Stephen Hodges)

J V Agius SC with S M McNaughton for the respondent (instructed by Director of Public Prosecutions (Commonwealth))

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth with C Traill, J S Stellios and S A Lovett intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor).

CATCHWORDS

Cheung v The Queen

Criminal law – Sentencing – Principles and practice – Division of functions between judge and jury – Suggested alternative factual bases for verdict and sentence – Appellant convicted of being knowingly concerned in the importation of a commercial quantity of heroin – Duty of sentencing judge to determine extent of appellant's culpability consistently with verdict of jury – Whether sentencing judge obliged to fix sentence on view of evidence most favourable to appellant – Relevance of manner in which charges framed in indictment – Relevance of right to trial by jury contained in s 80 of the Constitution.

Constitutional law (Cth) – Jury trial of indictable federal offence – Determination of factual basis for jury verdict of guilty – Whether s 80 of the Constitution relevant to the framing of charges in the indictment where alternative factual bases for the verdict exist – Whether right to trial by jury relevant to resolution of applicable basis of verdict for the purpose of sentencing the prisoner.

Constitution, s 80.
Customs Act 1901 (Cth), s 233B.

1 GLEESON CJ, GUMMOW AND HAYNE JJ. This appeal is said to raise a question of sentencing principle and practice, concerning the role and responsibilities of a sentencing judge following a conviction at a trial by jury.

2 The appellant was tried, in the Supreme Court of New South Wales, before Badgery-Parker J and a jury. The charge was that between 1 August 1988 and 12 May 1989 he was knowingly concerned in the importation into Australia of a quantity of heroin being not less than a commercial quantity contrary to s 233B of the *Customs Act* 1901 (Cth). He was found guilty by the jury on 19 May 1993. He came before Badgery-Parker J for sentence on 6 August 1993. The maximum penalty for the offence was imprisonment for life. The appellant was sentenced to imprisonment for life. A non-parole period of 21 years 11 months was fixed. An appeal against sentence to the Court of Criminal Appeal of New South Wales was dismissed[1]. There was also an unsuccessful appeal against conviction, but that is not presently material[2].

3 The importation of heroin, in which the appellant was found to have been knowingly concerned, occurred in May 1989. On 9 May 1989, the vessel *The Nimos* berthed at a container terminal in Sydney. Concealed in a freezer and a water heater were 148 blocks of high grade heroin with a total gross weight of almost 50 kilograms. The street value was about $75 million. The heroin had travelled to Australia from Hong Kong via Vanuatu, where it was re-packed and trans-shipped. The appellant was a senior Customs official in Hong Kong. He had formed an association with a man named Cheung Siu Wah. Cheung Siu Wah, who became an informer, pleaded guilty to a charge relating to his role in the matter. He was sentenced to imprisonment for five years. He gave evidence for the prosecution at the trial of the appellant. A number of other Chinese nationals, some based in Hong Kong, were also convicted of offences arising out of their part in the importation. It will be necessary, in due course, to make further reference to the evidence, and the nature of the case against the appellant. In view of the argument advanced on this appeal, it is necessary to begin by referring to some settled principles concerning the duties of a sentencing judge following conviction by a jury at a trial upon indictment.

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1 *R v Cheung* (1999) 154 FLR 259.

2 *R v Cheung*, unreported, Court of Criminal Appeal of New South Wales, 21 November 1997.

The duties of a sentencing judge

4 When an accused person is tried upon indictment before a judge and jury, the role of the jury is to decide whether the accused is guilty or not guilty of the charge or charges laid in the indictment. That involves determining the issue or issues joined between the prosecution and the accused. Such issue or issues are defined by the terms of the indictment, and by the plea. If the accused is found guilty, then it is the responsibility of the judge to determine the appropriate sentence. That will normally involve a discretionary decision, subject to any statutory constraints such as a specified maximum penalty.

5 The decision as to guilt of an offence is for the jury. The decision as to the degree of culpability of the offender's conduct, save to the extent to which it constitutes an element of the offence charged, is for the sentencing judge. If, and insofar as, the degree of culpability is itself an element of the offence charged, that will be reflected in an issue presented to the jury for decision by verdict. In such an event, the sentencing judge will be bound by the manner in which the jury, by verdict, expressly or by necessary implication, decided that issue. But the issues resolved by the jury's verdict may not include some matters of potential importance to an assessment of the offender's culpability. That is not unusual. It is commonplace.

6 The appellant was charged with being knowingly concerned in a large importation of heroin. Obviously, there were others involved as well. The nature and extent of the appellant's involvement, including the period of his participation in the enterprise, his relationship with the other participants, his contribution to the success of the scheme, the financial reward he might have expected, and the reasons for his involvement, were all matters which, if capable of being ascertained, were of possible relevance to an assessment of his culpability. The jury heard evidence bearing upon some or all of those matters. Such evidence might or might not have been of significance to some or all of the jurors, in the process by which they reasoned as to the guilt of the appellant. But they were not matters on which issue was joined, and which the jury, by verdict, decided. That does not mean that the jury's verdict was "ambiguous". It simply means that, on those subjects, the jury's verdict was silent. What the jury had to decide was whether, between two specified dates, the appellant was knowingly concerned in the importation of heroin that occurred on 9 May 1989. A variety of questions of potential relevance to the duration and extent of his involvement were raised by the evidence; but some of them, although potentially significant for sentencing purposes, were not questions which the jury had to decide in order to reach a conclusion that the appellant was guilty of the offence charged. They were questions which, if capable of resolution at all, were to be resolved by the sentencing judge.

7 It is necessary to distinguish, not only between questions of guilt and questions of degree of culpability, but also between issues, facts relevant to issues, and evidence. The jury's verdict decided the issues joined by the plea to the indictment. It did not decide, either expressly or by implication, all facts of possible relevance to sentencing. And although it is possible to infer that, at the least, certain parts of the evidence must have been accepted by the jury, it is impossible to know whether some or all of the jurors accepted all of the evidence relied upon by the prosecution. Jurors are normally instructed that they are entitled to choose between parts of the evidence. In order to convict they must find, beyond reasonable doubt, the constituent elements of the offence charged, but, provided they reason to such a conclusion in a manner consistent with properly framed judicial directions, their process of reasoning does not necessarily have to be unanimous. Unless a particular piece of evidence is logically crucial to the prosecution case, they do not have to accept, beyond reasonable doubt, any particular witness, or any particular evidence. These are familiar aspects of what is sometimes described as the inscrutability of a jury verdict.

8 On occasion, this may mean that a jury's verdict on the black and white issue of guilt may leave to a sentencing judge a difficult task of deciding questions of degree involved in assessing an offender's culpability, and the proper measure of punishment. There are many cases involving either a plea of guilty, or a conviction following a plea of not guilty, where the task of assessing an offender's culpability is more difficult than that of determining his or her guilt.

9 A simple example may be provided by a charge of murder against someone who has caused the death of an elderly, ill, person by administering a lethal injection. It may be the prosecution case that the accused was motivated by a desire to inherit the victim's estate. Another possible view of the facts may be that the accused was motivated by a desire to put an end to the victim's suffering. Both possibilities may be consistent with guilt. A jury would probably be instructed that, although the prosecution alleged a motive of greed, it was not essential that such motive be established. Some jurors may accept that there was such a motive. Others may not. The sentencing judge may need to address the question of motive. If the judge were unable to be satisfied beyond reasonable doubt as to the motive of personal gain, then the accused would be sentenced upon the more favourable basis. But that would be because the sentencing judge could not be satisfied of the prosecution's allegation. It would not be because the judge was obliged to sentence upon the view of the facts most favourable to the offender that was consistent with the jury's verdict.

10 The most obvious example of an offence where a guilty verdict may leave unresolved large questions as to the degree of culpability is manslaughter. Such

questions then fall to be decided by the sentencing judge, who may receive little assistance from the need for consistency with the jury's verdict.

11 In the present case the appellant's trial counsel advanced, as part of a plea in mitigation on sentencing, an explanation of the appellant's conduct, said to be supported by the appellant's unsworn statement at his trial. In brief, it was contended that the appellant, an honest Customs officer, learned of the proposed importation in the course of his official duties, and that, insofar as he acted at all, he acted only to protect his confidential sources of information, intending to report the matter to the authorities later. Badgery-Parker J rejected this benign explanation. There was evidence, including evidence of tape-recorded conversations to which the appellant was a party, which incontrovertibly connected the appellant with the importation. At the trial, the appellant had denied any intention to advance the importation. The jury's verdict resolved that issue against him. On sentencing, he argued that, even if he had intended to advance the importation, it was only in a technical sense, and in a possibly misguided pursuit of his official duties. Badgery-Parker J considered that explanation and rejected it, giving his reasons for so doing. Counsel for the appellant in this Court disclaimed any suggestion that Badgery-Parker J, in that respect, was acting outside his proper role. He acknowledged that the question of motive was for the sentencing judge, and that no finding as to motive was implicit in the jury's verdict.

12 An example of the practical application of the division of functions between judge and jury at a criminal trial, in a context not far removed from the present, is to be found in the decision of this Court in *Savvas v The Queen*[3]. In that case, the appellant had been convicted of conspiracy to import heroin, contrary to the *Customs Act*. He was also convicted of conspiracy to supply; a State offence. In sentencing for both offences, the trial judge made detailed findings as to the overt acts alleged by the prosecution, including the fact that heroin was imported and distributed pursuant to the conspiracy. This was for the purpose of assessing the degree of criminality involved in the appellant's participation in the conspiracy. The findings were not necessarily implicit in the jury's verdict. Nevertheless, the Court held that it was proper to make them, and take them into account on sentencing in accordance with "the … principle that a sentencing judge may form his or her own view of the facts, so long as it does not conflict with the jury's verdict"[4].

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3 (1995) 183 CLR 1.

4 (1995) 183 CLR 1 at 8 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

13 Recently, in *R v Olbrich*[5], a case concerning an importation of heroin, this Court considered the related question of fact-finding by a sentencing judge following a plea of guilty. Although what was involved was a Commonwealth offence, no question arose as to any findings of fact by a jury because there was a plea of guilty, and therefore no issue for a jury to try[6]. The majority[7] pointed out the difficulties that often exist in determining, for sentencing purposes, the exact role of a participant in an importation of prohibited drugs, and went on to refer to the principles governing the fact-finding role of the sentencing judge. A contention that a judge who is not satisfied of some matter urged in a plea in mitigation, must, nevertheless, sentence the offender on a basis that accepts that matter unless the prosecution proves to the contrary was rejected[8]. The majority also referred[9], with approval, to a number of authorities which dealt with the relevant principles, including *R v Isaacs*[10] a decision of the Court of Criminal Appeal of New South Wales.

14 In *Isaacs* the Court of Criminal Appeal summarized certain well-established principles concerning the law and practice of sentencing in New South Wales as follows[11] (omitting references to authority):

> "1. Where, following a trial by jury, a person has been convicted of a criminal offence, the power and responsibility of determining the punishment to be inflicted upon the offender rest with the judge, and not with the jury …
>
> 2. Subject to certain constraints, it is the duty of the judge to determine the facts relevant to sentencing. Some of these facts will have emerged in evidence at the trial; others may only emerge in the course of the sentencing proceedings. …

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5 (1999) 199 CLR 270.

6 See *Cheng v The Queen* (2000) 74 ALJR 1482; 175 ALR 338.

7 Gleeson CJ, Gaudron, Hayne and Callinan JJ.

8 (1999) 199 CLR 270 at 280 [22].

9 (1999) 199 CLR 270 at 280 [24].

10 (1997) 41 NSWLR 374.

11 (1997) 41 NSWLR 374 at 377-378 per Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ.

> 3. The primary constraint upon the power and duty of decision-making referred to above is that the view of the facts adopted by the judge for purposes of sentencing must be consistent with the verdict of the jury. …
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> 4. A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.
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> 5. There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender. … However, the practical effect of 4 above, in a given case, may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, then the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender. … "

15 Counsel for the appellant in the present case accepted the correctness of those propositions. However, as will appear, he contended for an additional proposition which would operate, in certain exceptional circumstances, of which the present case was said to be an example, as a qualification or rider to proposition 5. That suggested additional proposition will be examined below. To set the context for that examination, however, it is necessary to make further reference to principle.

16 Proposition 2 is established by an abundance of authority, both in this Court and in other Australian courts, in relation both to State and Commonwealth offences[12]. In relation to Commonwealth offences, it is perfectly consistent with s 80 of the Constitution. If it were otherwise, *Savvas* would have been wrongly decided. Section 80 mandates trial by jury in the case of trial on indictment of any offence against a law of the Commonwealth, but it does not alter the division of functions between judge and jury that is, and was in 1900, an aspect of the system of trial by jury. This is a subject to which it will be necessary to return. It suffices for the present to say that trial by jury in this country does not include sentencing by jury. In 1900, in Australia, as in England and the United States of America, the practice was that, after a verdict was given by the jury, the trial

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12 *R v De Simoni* (1981) 147 CLR 383 at 392; *Kingswell v The Queen* (1985) 159 CLR 264 at 276; *Savvas v The Queen* (1995) 183 CLR 1 at 8; *R v Morrison* [1999] 1 Qd R 397 at 421-422; *Emery v The Queen* (1999) 9 Tas R 120 at 121 [2], 136-137 [31] and 140 [44]; *R v Storey* [1998] 1 VR 359 at 366-369; *Hughes and Curtis* (1983) 10 A Crim R 125 at 135-136; *R v Martin* [1981] 2 NSWLR 640 at 642-643.

judge could hear evidence to determine the appropriate sentences. In *Williams v New York*[13] Black J, delivering the opinion of the Court, said that:

> " … both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."

17 As to proposition 3, the required consistency is with the verdict, ie the decision of the jury upon the issue or issues joined for trial. It is at this point that the distinction between issues, facts relevant to an issue, and evidence, is important. Failure to observe that distinction is apt to cause confusion and error. If, as in the present case, a jury returns a general verdict upon a single count in an indictment, the resolution of issues which is express, or necessarily implied, in that verdict, is binding upon the sentencing judge. But the judge does not know the approach taken by the jury, or individual members of the jury, to particular facts relevant to the issues, or to the evidence of particular witnesses, except to the extent to which, by necessary implication, that is revealed by the verdict.

18 In the course of oral argument, there was discussion about whether the trial judge could or should have questioned the jury about the process of reasoning by which they came to their verdict. For the reasons given in *Isaacs*[14] there will be very few cases in which it is appropriate or useful to do that. Counsel for the present appellant disclaimed any suggestion that Badgery-Parker J should have done that in the present case. The judge was not asked to do so by trial counsel. Indeed, Badgery-Parker J was requested by trial counsel to undertake the task of finding the facts relevant to sentencing, including, in particular, the facts relating to the appellant's role in the importation, and the motives with which he was acting.

19 Reference was also made in the course of oral argument to the possibility of taking a special verdict from the jury. Again it was not submitted on appeal, or at trial, that this should have been done in this matter. It is, therefore, not necessary to consider whether a jury can be required, as distinct from invited, to return such a verdict[15] or what it must contain[16].

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13 337 US 241 at 246 (1949).

14 (1997) 41 NSWLR 374 at 379-380.

15 cf *R v Allday* (1837) 8 C & P 136 [173 ER 431]; *R v Brown and Brian* [1949] VLR 177.

20 Bearing in mind that the principal matter relied upon by the appellant, in the sentencing proceedings, by way of mitigation, was his assertion as to the benign motive with which he became involved in the importation, and bearing also in mind that the presence or absence of that motive was not an element of the offence charged, and was not a matter upon which issue was joined for resolution by the jury, it is impossible to understand what course was open to the judge but to decide that question for himself. Not only were the sentencing proceedings conducted by both sides upon the basis that he should do so; no other course was available to him.

The findings of the sentencing judge

21 In order to explain the findings made by Badgery-Parker J for the purposes of sentencing, it is necessary to refer to certain features of the case against the appellant.

22 That a major importation of heroin, originating from Hong Kong, and trans-shipped in Vanuatu, occurred on 9 May 1989, was not in serious question. That the appellant engaged in some activity in connection with that importation was clearly established by irrefutable evidence. But there was an issue as to whether the appellant was knowingly concerned in the importation, and in particular, whether he acted with an intention to advance the purposes of others who were acting in Vanuatu and Sydney.

23 In this case, as frequently happens, the evidence relied upon by the prosecution was at different levels of contestability. There were three telephone conversations, in early May 1989, between the appellant and his associate, Cheung Siu Wah. They were in the Cantonese language. They involved discussions which the jury were entitled to conclude related to the heroin importation. The jury were also entitled to infer that they revealed the appellant giving information, advice and encouragement to Cheung Siu Wah, and acting as a principal participant in the enterprise involving the importation. The primary evidence was barely contestable. The inferences to be drawn from it were open to debate. The Crown called Cheung Siu Wah as a witness. He was an accomplice, but the Crown relied upon the recorded conversations, and other evidence, as corroboration. Another alleged co-offender was Ng Yun Choi, who pleaded guilty. He was not called as a witness for reasons that were explained to, and accepted by, Badgery-Parker J. The appellant made an unsworn statement at the trial. He did not give evidence in the sentencing proceedings. The appellant,

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16 *R v Dudley and Stephens* (1884) 14 QBD 273.

confronted with some potentially incriminating evidence which he could not deny, gave an account of the facts which admitted what he was forced to admit, denied what was contestable, and attempted to advance an exculpatory explanation. Badgery-Parker J, for reasons which he explained, concluded that the appellant's explanation was false.

24 In a passage which is material to the argument now advanced on behalf of the appellant, Badgery-Parker J said:

> "The Crown case was put to the jury in two ways. First, the Crown invited the jury to accept the evidence of Cheung Siu Wah and to find that it was corroborated in many respects by other evidence, particularly circumstantial evidence. Secondly, the jury was invited to find the prisoner guilty entirely independently of the evidence of Cheung Siu Wah, on the basis particularly of two bodies of evidence, namely admissions by the prisoner that although during April and early May 1989, he had become aware of the fact that the heroin importation was in progress and had accumulated a quantity of information about it, he made no report thereof to his superiors as was his duty; and evidence that during the first nine days of May, again being well aware that Cheung Siu Wah was actively engaged in furthering the importation of heroin into Australia, he made three telephone calls to Cheung Siu Wah from Hong Kong in which he gave him not merely advice and encouragement but instructions as to how he should deal with problems which were arising in relation to the importation at that time."

25 The reference to the Crown putting its case in two ways should not be misunderstood. A possible source of misunderstanding may be a failure to distinguish between the issues in a case and the evidence relied upon by a party. There was only one importation of heroin. It occurred on 9 May 1989. The charge was that the appellant was knowingly concerned in that importation between 1 August 1988 and 12 May 1989 (not from 1 August 1988 until 12 May 1989). If the evidence of Cheung Siu Wah were accepted, it proved that the transaction was originally proposed by the appellant to Cheung Siu Wah in September 1988, that he put Cheung Siu Wah in touch with other people who participated in the venture, and that he arranged the funding. But the prosecution contended that, even if the evidence of Cheung Siu Wah were not accepted, there was evidence which proved that the appellant was actively involved, as a principal, in the importation, even though such evidence left unclear some questions as to the precise nature and extent of his involvement: questions of the

kind said in *Olbrich* often to be unclear in cases of this kind, and questions which it may be unnecessary to resolve[17].

26 The prosecution case, from first to last, was that this was a major importation of heroin, that the appellant was an active participant, that he was a principal, that he was acting for motives of personal gain, and that his conduct merited the most severe punishment. That was so whether or not the evidence of Cheung Siu Wah was accepted; although acceptance of his evidence would make the conclusion even more obvious. The prosecution did not have two cases in the sense that it was alleging two offences, or two distinct forms of criminality. It had two lines of argument, based upon two bodies of evidence, which led to the one conclusion.

27 A red herring was deployed unintentionally in argument in this Court. A good deal of time was devoted to it, although it finally disappeared. Apparently misunderstanding what had occurred in the sentencing proceedings, counsel for the appellant attributed to the prosecution a concession that, on the second way the prosecution case was put, the appropriate sentence would be not more than about five years. This gave rise to a prolonged debate, in the course of which counsel for the respondent demonstrated that no such concession was made. Rather, the concession related to the result that would be appropriate if the appellant's plea in mitigation, concerning the motive with which he was acting, were to be accepted.

28 Another submission advanced in this Court may be noted at this point. It was submitted that, on the second way in which the prosecution argued its case, (that is, even if the evidence of Cheung were not accepted) the appellant would have had a "much more limited role in a much more limited period." That is not so. It would have left uncertain some aspects of the appellant's role that were answered by the evidence of Cheung Siu Wah, but, consistently with what was said in *Olbrich*, it is far from clear that it would have been of major significance in the sentencing exercise.

29 Badgery-Parker J reviewed the evidence in the case and, after giving himself the appropriate warnings as to the care to be exercised in evaluating the evidence of an accomplice, concluded that a substantial part, although not all, of the evidence of Cheung Siu Wah should be accepted beyond reasonable doubt. He reached that conclusion largely on the basis of a body of evidence that was corroborative of Cheung Siu Wah. It is unnecessary to set out his reasons in further detail because there is no challenge in this Court to that aspect of his

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17 *R v Olbrich* (1999) 199 CLR 270 at 277-279 [13]-[18].

factual reasoning. On the disputed assumption that he was entitled to undertake the course at all, it was accepted that his approach to the evidence could not be criticised. There is no ground of appeal which seeks to criticise it.

30 As well as dealing with the evidence of Cheung Siu Wah, Badgery-Parker J also considered, and rejected, what has been described above as the benign motivation claimed by the appellant. Once again, there is no ground of appeal which calls in question the judge's factual reasoning on the matter.

31 Badgery-Parker J concluded that, objectively, this was a case of the worst possible kind, having regard especially to the size of the importation. As to subjective matters, he accepted the prosecution contention that the appellant was motivated by greed. He sentenced accordingly.

The argument for the appellant

32 The notice of Appeal contains two grounds:

> a. The Court [of Criminal Appeal] erred in holding that the Judge at first instance had correctly applied the law in not asking the jury a question to attempt to understand which of two alternative Crown cases had been the basis of their verdict.
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> b. The Court [of Criminal Appeal] erred in rejecting a submission that the Judge at first instance had taken an approach to the factual basis for sentence which failed to ensure consistency with the verdict of the jury, and encroached upon his right to trial by jury.

33 The written and oral submissions on behalf of the appellant were all directed to ground (b). No argument was advanced in support of ground (a). There is in it, however, an expression which should be noted, because it assumed an importance in relation to the argument on ground (b). The reference to "two alternative Crown cases" must be understood in the light of what has been said above. There were two arguments advanced by the prosecution as to the evidentiary basis upon which the jury might reason to a conclusion that the appellant was knowingly concerned in the importation of 9 May 1989. They were not strictly alternatives. The jury could have accepted both. It would be more accurate to describe them as a broader and a narrower evidentiary foundation for concluding that the appellant was knowingly concerned in the importation.

34 The essence of the appellant's complaint is that, since it cannot be known whether the jury unanimously accepted the evidence of Cheung Siu Wah, and

therefore it cannot be known whether they convicted the appellant on the broader or narrower evidentiary basis relied upon by the prosecution, it is possible that Badgery-Parker J, who accepted for sentencing purposes a substantial part of the evidence of Cheung Siu Wah, sentenced upon a basis that was different from the evidentiary basis upon which the appellant was convicted.

35 Implicit in the suggestion that this gives cause for complaint is an assumption which the respondent disputes. The assumption is that an assessment of the degree of culpability of the appellant, for sentencing purposes, is materially affected by the difference between the two evidentiary bases upon which the prosecution case was argued. As has been mentioned, the decision of this Court in *Olbrich* at least casts doubt upon the validity of that assumption. It is far from clear that, if Badgery-Parker J had concluded that he was unable to rely upon the evidence of Cheung Siu Wah, and was therefore unable to decide when the appellant first became involved in the importation, or whether the appellant recruited, or was recruited by, Cheung Siu Wah, or who supplied the finance for the operation, he would have imposed a different sentence. The importation was very large. The conclusion that the appellant's involvement was that of a principal was available from the recorded conversations, as was the inference that the appellant's involvement was motivated by greed. The reasons given by Badgery-Parker J for rejecting the asserted benign motivation did not depend upon the evidence of Cheung Siu Wah. In evaluating the appellant's explanation, Badgery-Parker J said:

> "He impresses me as an extremely intelligent man who has done his best over the several years past to construct a story which takes account of each adverse piece of evidence against him and deals with it in the best way that he can invent. The resulting concoction was not convincing. I thought at the time that I listened to it in the course of the trial that it did not ring true and examining it in the light of the whole of the evidence, I have no doubt that it was false."

36 Even if the disputed assumption were to be accepted, there remains a large question as to whether anything follows from it. The necessary consequence of the principles accepted in *Savvas*, and summarized in *Isaacs*, is that, provided the facts found by a sentencing judge are not inconsistent with the jury's verdict, a sentencing judge may well make an assessment of an offender's degree of culpability which would not be supported by all, or perhaps any, members of the jury. The example given of the offender convicted of murder, whose motive might have been highly culpable, or whose motive might have been deserving of sympathy, illustrates the point. Motive would not be an issue for the jury to decide. It may well be necessary for the sentencing judge to decide it. And the sentencing judge's evaluation of the evidence bearing on that matter may or may

not coincide with that of the jury. That is a consequence of the division of functions between judge and jury at a trial on indictment.

37 It was submitted on behalf of the appellant that, for reasons to be mentioned shortly, Badgery-Parker J was "bound to adopt the view most favourable to the [a]ppellant arising from the issues left to the jury." But what exactly was that view? Motivation was not an issue left to the jury. It was acknowledged by counsel that motive was not for the jury to decide by way of verdict. If there be eliminated from the findings made by Badgery-Parker J everything that depended upon the evidence of Cheung Siu Wah there still remains the size of the importation, the appellant's involvement in it as a principal, the rejection of the benign motivation, and the influence of a motivation of greed. The argument for the appellant did not make clear the basis upon which the Court of Criminal Appeal should have re-sentenced the appellant or should do so if the matter were now to be remitted to that Court.

38 But why should Badgery-Parker J have sentenced upon the basis that the evidence of Cheung Siu Wah was not to be accepted? Why was he not entitled, and indeed bound, to make up his own mind about that evidence when performing his task of assessing the degree of culpability of the appellant for the crime of which the jury had found him guilty? The jury's verdict was certainly not inconsistent with the conclusion reached by the sentencing judge. Counsel acknowledged this, but argued that, because of the manner in which the charge was framed by the prosecution, justice imposes the suggested constraint upon decision-making for sentencing purposes.

39 There was no complaint at the trial as to the manner in which the charge was framed. It was a single charge. There was only one importation of heroin. There was only one offence allegedly committed by the appellant: that of being knowingly concerned in the importation. That offence was alleged to have been committed between a date in 1988 and a date in 1989.

40 It was argued that, if the prosecution had presented an indictment framed in such a way as to permit, or require, the jury, by their verdict, to distinguish between the two evidentiary bases upon which the prosecution case was argued, then the sentencing judge would have had the benefit of a jury finding on each of the two bases, and could have sentenced accordingly. It was the failure of the prosecution to do this, it was said, that produced the result that the sentencing judge might have sentenced on a basis that was not accepted by all, or perhaps any, of the jury, that is to say, an acceptance of the evidence of Cheung Siu Wah. In light of that failure, so the argument ran, justice required that Badgery-Parker J should have sentenced on the basis that the evidence of Cheung-Siu Wah was not accepted. As has been observed, it is far from clear that to have done so would have resulted in a different sentence; but that problem may be left to one side.

41 In seeking to make good this argument, counsel handed to the Court a suggested form of indictment containing two counts, which he said would have solved the problem. The counts were as follows:

> 1. That Cheung Ying Lun between the 1st day of August 1988 and the 24th day of April 1989 at Sydney in the [S]tate of New South Wales and elsewhere was knowingly concerned in the importation (which occurred on 9 May 1989) into Australia of prohibited imports to which section 233B of the *Customs Act* 1901 applied, to wit, narcotic goods consisting of a quantity of heroin being not less than the commercial quantity applicable to heroin.
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> 2. That Cheung Ying Lun between about the 25th day of April 1989 and the 12th day of May 1989 at Sydney in the State of New South Wales and elsewhere was knowingly concerned in the importation into Australia of prohibited imports to which section 233B of the *Customs Act* 1901 applied, to wit, narcotic goods consisting of a quantity of heroin being not less than the commercial quantity applicable to heroin.

A number of comments may be made as to this argument.

42 First, no such submission was made by trial counsel for the appellant. No objection was taken at trial to the form of the indictment. It was not argued that the appellant should have been charged with two offences instead of one. And it was not put to Badgery-Parker J, on sentencing that he was constrained, by the form of the indictment, to sentence upon a view of the facts most favourable to the appellant. On the contrary, it was submitted that he should form his own view of the facts, consistently with the jury's verdict. There was a good reason for that, from the appellant's point of view. The appellant was urging Badgery-Parker J to take into account, in his favour, an asserted motive which it could never have been for the jury to decide.

43 Secondly, there was no reason why the prosecution should, and every reason why the prosecution should not, have charged the appellant with two offences. On the prosecution case against the appellant, he only committed one offence of being knowingly concerned in an importation of heroin. There was only one importation. If the evidence of Cheung Siu Wah was accepted, the appellant was concerned over the whole period from September 1988 until May 1989. If only the narrower evidence was accepted, there was uncertainty as to when his concern began, but it certainly existed in April and May 1989. Either way, there was one offence. The logical alternative appears to be, not that the

appellant committed two offences, but that he committed a series of offences, day by day, over the period of his concern. Nobody suggests that.

44 Thirdly, there was no obligation on the prosecution to frame an indictment in such a manner as to elicit, in an artificial fashion, a jury verdict covering every possible view of the facts which might yield a conclusion of possible significance to sentencing. Suppose, for example, that the co-offender Ng had given evidence. He may have given a version of the facts according to which the appellant's involvement in the importation was in fact in January 1989. Would that call for three counts? At the commencement of the trial, the prosecution may well have been unsure about how the evidence as to the period of the appellant's involvement would emerge.

45 Fourthly, in the light of some reliance placed upon English authority, it should be observed that the submission for the appellant is inconsistent with the decision of the English Court of Appeal in *Dowdall and Smith*[18]. Dowdall had been charged with theft, the prosecution alleging that he had stolen a pension book from a woman's handbag at a supermarket. Dowdall was prepared to admit theft on the basis that he had found the pension book and not sought to return it. The prosecution then split the charges into two counts, one alleging that he had stolen the pension book and the other in the alternative alleging theft by finding. He was convicted on the first count. The Court of Appeal held that the indictment should not have been split, and quashed the conviction. Taylor LJ said[19]:

> "On a charge of burglary the Crown's case is that the defendant entered the house by night whilst an elderly occupier was asleep but the defendant asserts he entered by day when the house was empty. The *actus reus* was at different times in those two versions, but each version amounts to guilt of the offence charged. Likewise, where an indecent assault is alleged to have included digital penetration of a girl's vagina, an assertion by the appellant that he had only touched her breast would be taken as a plea of guilty despite the difference as to the *actus reus* between the two versions. In such cases, if sentence turns upon which version is right, a judge can either accept the defence account or try an issue as to the circumstances of the burglary or the nature of the assault. It would not be appropriate to proliferate alternative counts."

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18 (1991) 13 Cr App R (S) 441.

19 (1991) 13 Cr App R (S) 441 at 445.

46 Fifthly, in any event the splitting of the charges would not have produced a jury verdict on the critical aspect of the appellant's plea in mitigation, ie the motive with which he acted in becoming concerned in the importation. Motive was not an element of the offence charged, and there was no way, even by artificial contrivance, that it could have been made the subject of a jury verdict.

47 Sixthly, because it is for the prosecution to frame the charges that are to be preferred against an accused and because the decision that is made about how to frame the charges is, of its nature, insusceptible of judicial review[20], references to the prosecution being under a "duty" to frame charges in one way rather than another should not be misunderstood. Moreover, any statement of preferable practice in this regard must obviously take account of the fact that charges are framed before the course of events at trial is known. Often it is not until all the evidence has been led at trial that it will be possible to identify that there may be some alternative explanations of events that might reflect differently upon the accused's criminality. To attempt to anticipate such an outcome at the time charges are framed would not assist the efficient administration of justice. The charges that are laid should properly reflect the criminality of what has been done. That requires close attention to the elements of the offence or offences that are charged; it does not require the laying of a series of alternative charges intended to reflect only the fact that alternative particulars might be given of some of those elements.

48 Counsel for the appellant claimed support for his submission from two decisions of the English Court of Appeal: *Stosiek*[21] and *Efionayi*[22]. Those cases were said to establish the proposition that, if a jury's verdict is consistent with two views of the facts, and it would have been possible to amend the indictment to obtain the jury's view, then a sentencing judge is obliged to sentence upon the basis of the view more favourable to the offender. That proposition does not represent the law in Australia. Furthermore, its relevance to the present case, even if it were otherwise correct, is doubtful. The present is not a case where there were two neatly compartmentalised views of the facts, one more favourable

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20 *Maxwell v The Queen* (1996) 184 CLR 501 at 513-514 per Dawson and McHugh JJ, 534 per Gaudron and Gummow JJ; *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 579-580 [21] per Gaudron, Gummow and Hayne JJ.

21 (1982) 4 Cr App R (S) 205.

22 (1994) 16 Cr App R (S) 380.

to the appellant for sentencing purposes, upon which a jury's verdict could and should have been obtained. In particular, a jury's verdict could not have been obtained on the question of motive, which was not an element of the offence, however charged. And, as has been explained above, the two evidentiary bases on which the prosecution case was put, one broader and one narrower, do not lead to two distinctly different consequences for sentencing purposes. That having been said, the fundamental flaw in the proposition for which the appellant contends is that it appears to assume, contrary to principle, that there is an obligation upon the participants in a criminal trial to endeavour, if possible, to obtain the jury's view upon all matters of potential importance for sentencing.

49 Although *Efionayi* was decided after *Dowdall and Smith*, the judgment made no reference to the earlier case, perhaps because *Efionayi* (unlike *Dowdall and Smith*) was decided without the benefit of any argument for the prosecution. The judgment in *Efionayi* was delivered *ex tempore*, and the Court of Appeal acknowledged the lack of reference to authority[23]. It is unnecessary to express any view as to whether the ultimate decision in *Efionayi* was correct in the light of the circumstances of that particular case. It is sufficient to say that the principle for which it is said to stand is not the law in this country; it is *Dowdall and Smith* which is in line with Australian authority. In any event, the principle does not assist the appellant in this case.

50 The decision in *Stosiek* is not in point. In that case the prosecution sought to have the appellant sentenced for an offence different from that of which he had been convicted. The result of the case accords with the decision of this Court in *R v De Simoni*[24]. *Stosiek* was discussed in *Solomon and Triumph*[25] in which it was said:

> "In *Stosiek* … this Court again emphasised that juries should not, save in exceptional cases, be invited to explain their verdicts. If, as in that case, the Crown wished to charge an offence which involved different factual ingredients from that with which the accused was actually charged and which would render the offence more serious or deserving of greater punishment, it could always add a count to the indictment for that other offence."

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23 (1994) 16 Cr App R (S) 380 at 387.

24 (1981) 147 CLR 383.

25 (1984) 6 Cr App R (S) 120 at 127.

51 The present was not a case in which the appellant should have been charged with more than one offence. It is not the duty of the prosecution, when framing an indictment, to endeavour to construct the charges in such a way as to obtain a jury verdict upon all issues of significance to sentencing. And, because of the importance of motive to the plea in mitigation, it would not have served the appellant's purposes in any event.

Constitution, s 80

52 The appellant's argument sought to obtain assistance from s 80 of the Constitution, thereby attracting the intervention in the case of the Attorney-General of the Commonwealth. Upon analysis, however, it is difficult to see what that provision has to do with the present case. It is to be noted, once again, that there was no objection at the trial to the form of the indictment; that the present appeal is against sentence, not conviction; and that the relevant constitutional mandate that the appellant be tried by jury, was complied with.

53 As was pointed out in *Cheng v The Queen*[26], the constitutional command in s 80 is directed to jury trial of issues joined between prosecution and accused; the process of sentencing is for the trial judge. The present is not a case in which the maximum penalty was altered or affected by any uncertainty concerning the matters raised by the appellant. The statutory maximum penalty for the offence charged was imprisonment for life. That was unaffected by the duration of the appellant's involvement in the exercise, his role in relation to his co-offenders, or his motives for becoming concerned in the importation. The problem that arose in *Kingswell v The Queen*[27] does not arise in the present case.

54 This conclusion is in line with United States authority in relation to the Sixth Amendment, as exemplified in *Spaziano v Florida*[28]. In that case, there had been a conviction for first-degree murder in a State where the jury had the capacity to make advisory recommendations on sentence to the trial judge. Contrary to the jury's recommendations the judge imposed the death penalty. A question arose as to whether this violated the Sixth Amendment. Blackmun J, delivering the opinion of the Supreme Court, said:

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26 (2000) 74 ALJR 1482 at 1489-1490 [41]-[43]; 175 ALR 338 at 347 per Gleeson CJ, Gummow and Hayne JJ.

27 (1985) 159 CLR 264.

28 468 US 447 at 459 (1984).

> " … despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding - a determination of the appropriate punishment to be imposed on an individual … The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue[29]."

55 Reference has already been made to the decision of this Court in *Savvas*. One of the offences involved in that case was an offence against a law of the Commonwealth. It involved the same legislation as covers the present case. There was no suggestion that the procedure adopted by the sentencing judge, which was approved by this Court, was unconstitutional. As in the present case, that procedure involved the trial judge, following a jury verdict of guilty, reviewing the evidence for himself for the purpose of making findings on matters of fact which were necessary for sentencing, and which were not resolved by the jury's verdict. Such a procedure does not involve any infringement of a right to trial by jury. It involves the application of well-established principles as to the division of functions which are, and were in 1900, an aspect of trial by jury.

Conclusion

56 The course taken by Badgery-Parker J in relation to the sentences of the appellant was proper. The appeal should be dismissed.

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29 See also *McMillan v Pennsylvania* 477 US 79 at 93 (1986); *Apprendi v New Jersey* (2000) 68 USLW 4576 at 4582.

57 GAUDRON J. Following his conviction in the Supreme Court of New South Wales on a charge that, between 1 August 1988 and 12 May 1989, he was knowingly concerned in the importation of a commercial quantity of heroin into Australia, the appellant was sentenced to life imprisonment with a non-parole period of 21 years 11 months.

58 The sentence of life imprisonment was imposed by Badgery-Parker J on the basis that his Honour was satisfied beyond reasonable doubt that the appellant, a senior customs officer in Hong Kong, became aware of the availability of a large quantity of heroin and "became involved in the organization of the transportation of that heroin from Hong Kong via Vanuatu to Australia and its importation into Australia".

59 As will later appear, the appellant's conviction did not necessarily depend on the jury being satisfied that he was as deeply involved in the plan to import heroin into Australia as the sentencing judge found. A sentence appeal to the Court of Criminal Appeal, which, in essence, was based on the possibility that the jury may have found the appellant guilty on a basis involving significantly less criminality, was unsuccessful[30]. The appellant now appeals to this Court by reference to the same possibility, but calls in aid somewhat different legal arguments.

The trial and verdict

60 The main thrust of the prosecution case against the appellant was that he was involved in the planning of the importation from August 1988, when he became aware of the availability of heroin in Hong Kong, until 12 May 1989, three days after its arrival in Australia, and that, during that time, he "busied himself in the instigation, planning, co-ordination, financing and supervision of [the] scheme" for the transfer of the heroin from Hong Kong to Australia via Vanuatu.

61 The prosecution case that the appellant was engaged in the planning of the importation from the time he became aware of the heroin's availability in Hong Kong depended on the jury's acceptance of the evidence of an accomplice ("the accomplice"). The accomplice was involved in activities in Hong Kong, "travelled from Hong Kong to Vanuatu to oversee the unloading of the [heroin] and its repackaging" and, in April 1989, travelled to Australia and later contacted those to whom it was to be delivered.

62 Apart from the evidence of the accomplice, there was evidence that the appellant knew that the importation of the heroin into Australia was in progress

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30 *R v Cheung* (1999) 154 FLR 259.

in April 1989 but failed to report it to his superiors. Moreover, in the early days of May, the appellant made three telephone calls to the accomplice in Australia, instructing him how to deal with certain problems which he was then experiencing. At trial, the prosecution contended that, even if the evidence of the accomplice were to be rejected, the jury could convict the appellant on the basis of his involvement in the importation between April and May 1989.

63 In an unsworn statement, the appellant admitted that he knew that the importation was in progress in April 1989, but said that he failed to report it because he feared for the life of his informants, including the accomplice. He also made the telephone calls, he said, hoping to obtain more information which he could pass on to the Australian authorities. In this context, it should be noted that, if satisfied that the appellant intended to advance the importation, the jury could convict even if his motives were as he claimed.

64 It follows from the way in which the trial was conducted that there are three distinct bases on which the jury might have convicted the appellant. He might have been convicted on the basis that he was involved in organising the importation from or shortly after its inception; he might have been convicted on the basis that he was involved in the importation between April and May 1989; or he might have been convicted on the basis that he intended to and did advance the importation but did so only to protect his informants. Moreover, it is possible that different jurors decided the question of guilt on different bases.

The argument in this Court

65 It is not in issue that, if the appellant was involved in the importation between August 1988 and May 1989, as the evidence of the accomplice would indicate, a sentence of life imprisonment was appropriate. If he was only involved between April and May 1989, his criminality might well justify a lesser sentence. And it was conceded by the prosecution in the sentence proceedings that, if his involvement was motivated purely by his desire to protect his informants, a sentence of approximately five years was appropriate. Thus, if the appellant should have been sentenced on a different basis from that adopted by the sentencing judge, the sentence of life imprisonment should be quashed and the matter remitted for re-sentencing.

66 It was accepted by counsel for the appellant in this Court that it is ordinarily for the sentencing judge to determine the degree of criminality of a convicted person if it is not otherwise apparent from the jury's verdict. However, it was contended that that rule should not apply if the prosecution could have framed the indictment in a way that would have enabled the return of a verdict indicating the level of criminality involved. In such a case, according to the argument, the convicted person should be sentenced on the basis that is most favourable to him or her.

67 The argument for the appellant relied on the Constitution's guarantee, in s 80, of trial by jury. Alternatively, it was put that the common law should be developed in line with recent developments in the United Kingdom which, it was said, would require the consequence, in this case, that the appellant should have been sentenced on a more favourable basis.

Section 80 of the Constitution

68 It may at once be noted that I agree with Gleeson CJ, Gummow and Hayne JJ that, for the reasons their Honours give, s 80 of the Constitution does not advance the appellant's argument.

The indictment

69 Before turning to the question whether the common law should be developed along the lines for which the appellant contends, it is convenient to consider whether the indictment could have been framed in a way that would have resulted in a verdict which more accurately reflected the appellant's criminality. In this regard, it was contended for the appellant that he could have been charged with two counts of being knowingly concerned in the importation of heroin, the first alleging involvement between 1 August 1988 and 24 April 1989 and the second alleging involvement between 25 April 1989 and 12 May 1989.

70 The difficulties associated with an indictment charging two separate but cumulative counts specifying different periods for the one importation are exposed in the judgment of Gleeson CJ, Gummow and Hayne JJ. I agree with their Honours that that was not a course that might appropriately have been taken. However, that was not the only course which the prosecution could have adopted to ensure that the jury's verdict would more accurately reflect the appellant's criminality.

71 One course which was available to the prosecution was to charge the appellant with alternative counts of being knowingly concerned in the importation between August 1988 and May 1989 and of being knowingly concerned between April and May 1989, the latter count falling for consideration by the jury only in the event of an acquittal on the first.

72 Moreover, it is possible that the appellant could have been charged in the alternative with different offences relating to the one importation. In this regard, it should be noted that s 233B(1) of the *Customs Act* 1901 (Cth) creates several distinct offences with respect to the importation of narcotic goods. So far as is presently relevant, s 233B(1) provides, as it did at the time of the offence of which the appellant was convicted, that:

" Any person who–

...

(aa) without reasonable excuse ... causes to be brought, into Australia any prohibited imports to which this section applies;

...

(cb) conspires with another person or other persons to import, bring, or cause to be brought, into Australia any prohibited imports to which this section applies ...; or

(d) aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation, or bringing, into Australia of any prohibited imports to which this section applies ...

...

shall be guilty of an offence."

73 Consistent with the terms of s 233B(1) and with the prosecution's primary case at trial, the appellant could have been charged with conspiracy to import heroin into Australia, causing it to be brought into or procuring its importation into Australia and with an alternative count of being knowingly concerned in its importation between April and May 1989.

74 Had the indictment included alternative counts as indicated above, the jury's verdict would necessarily have disclosed the basis on which the appellant was convicted. A verdict of guilty on the first count would have revealed very substantial involvement in the planning and organisation of the importation. A verdict of not guilty on the first count but guilty on the second would have revealed less involvement.

The common law of sentencing

75 It is undoubtedly the case that in very many cases neither the jury's verdict of guilty nor a plea of guilty to a particular offence provides an accurate reflex of the criminality of the person to be sentenced. Such is usually the case if an accused person gives an account that differs from that of the prosecution. And of course, it will also usually be the case if motive is not an ingredient of the offence charged. In such cases, it is necessary for the trial judge to determine the facts in order to impose an appropriate sentence. However, that is a task to be performed within certain well recognised limits.

76 One of the limits imposed upon a sentencing judge is that the offender must be sentenced on a basis that is consistent with the verdict. There are two

elements to that requirement. First, the verdict must not be controverted. That has the consequence that a sentence must be imposed on the basis that the essential elements of the offence of which the offender has been convicted or to which he or she has entered a plea of guilty have been made out. The second requirement is that the offender must not be sentenced for an offence of which he or she has not been convicted or to which he or she has not entered a guilty plea.

77 The requirement that a sentence be consistent with the verdict or plea was explained by Wilson J in *R v De Simoni* in these terms:

> "The primary rule is that the judge must sentence the prisoner for the offence of which he has been convicted. He must not, even though the actual sentence may be within the range allowed for that offence, sentence for some other more serious offence which he is satisfied has been committed ... On the other hand, the judge is not only entitled but bound to take into consideration the circumstances surrounding the offence of which the prisoner has been convicted, so long as those circumstances are not inconsistent with the plea or verdict ... But he must not punish the prisoner for additional offences with which he has not been charged"[31].

In the same case, Brennan J said:

> "Ordinarily, a contest upon an issue of fact is resolved by the sentencing judge after hearing evidence relating to that fact if the fact has not been determined by a jury verdict and if the fact is of sufficient importance to justify a hearing. But where statute provides that a particular issue is susceptible of resolution by the verdict of a jury, a sentencing judge cannot deny an offender his right to a jury trial of that issue, and himself assume the function of finding the facts."[32]

78 The present case does not fall squarely within the principle stated by Brennan J in *De Simoni* but that principle is nonetheless relevant to the issue raised, namely, whether, if the law permits of charges upon which factual issues relevant to sentencing can be found by the jury, the trial judge is confined in his or her sentencing options. More precisely, is he or she entitled to sentence on the basis of a level of criminality as to which the jury might have been but was not necessarily satisfied?

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31 (1981) 147 CLR 383 at 395-396.

32 (1981) 147 CLR 383 at 406.

The United Kingdom position

79 As already indicated, the Court was invited in argument to resolve the issue posed in this case in accordance with recent United Kingdom decisions, namely, the decisions in *Stosiek*[33] and *Efionayi*[34].

80 In *Stosiek*, the defendant was charged with assault occasioning actual bodily harm. The victim of the assault was a police officer. The trial judge instructed the jury that there were a number of different bases upon which they could convict, including that the accused person knew that he was being detained by a police officer and, nevertheless, struck him or, alternatively, he did not appreciate that he was being detained by a police officer but thought that he was being accosted and overreacted[35].

81 It was held by the Court of Appeal in *Stosiek* that, in the circumstances, a court should be "extremely astute to give the benefit of any doubt to a defendant about the basis on which a jury has convicted."[36] Apart from the uncertainty as to the basis upon which the accused was convicted, the only relevant circumstance to which the Court of Appeal referred was that the prosecution could have charged him with assaulting a police officer in the execution of his duty but did not.

82 The decision in *Stosiek* was followed in *Efionayi*[37]. In that case, the Court of Appeal noted that:

> "from the outset [there] was an important, clearly defined issue, the existence of which was well known to the Crown. An amendment to the indictment could easily have been made so as to secure a finding of the jury on the point [in issue]."[38]

The Court noted the general rule, as stated in *Whittle*[39], that a judge is not bound to sentence on the version of facts most favourable to a defendant, but doubted

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33 (1982) 4 Cr App R (S) 205.

34 (1994) 16 Cr App R (S) 380.

35 (1982) 4 Cr App R (S) 205 at 207.

36 (1982) 4 Cr App R (S) 205 at 208.

37 (1994) 16 Cr App R (S) 380.

38 (1994) 16 Cr App R (S) 380 at 387.

39 [1974] CrimLR 487.

that there was any conflict between the decision in *Whittle* and that in *Stosiek*. Moreover, it expressed the view that, if there was a conflict, the approach in *Stosiek* was preferable in the circumstances.

83 It is true, as is pointed out in the joint judgment of Gleeson CJ, Gummow and Hayne JJ in this case, that in *Efionayi* the Court of Appeal did not have the benefit of argument from the Crown. It is also true, as their Honours point out, that reference was not made in that case to *Dowdall & Smith*[40]. However, the latter case, in my view, raises a different issue from that presently under consideration.

84 In *Dowdall & Smith*, Dowdall was originally charged with one count of stealing a pension book and jointly charged with Smith of attempting to steal from another person three days later. Dowdall offered a plea of guilty to the charge of stealing the pension book on the basis that he had found it. The prosecution contended that he had taken the book from the owner's bag and obtained leave to split the indictment to charge one count of stealing the book from the bag and another of stealing by finding, in addition to the joint charge of attempted stealing three days later. The accused pleaded guilty to the charge of stealing by finding, which fact was revealed to the jury in the course of the trial on the other two charges.

85 The question in *Dowdall & Smith* was whether the trial judge should have allowed the indictment to be split to charge counts of stealing by taking and stealing by finding when the accused had already offered a plea of guilty to the charge of stealing. It was held that he was in error in so doing because the "alternative averments added in each of the counts were immaterial to guilt"[41].

Development of the common law

86 So long as an indictment charges an offence, it is open to the prosecution to frame the indictment in any way it chooses. However, the efficient administration of justice depends on the prosecution charging offences which reflect the real criminality of the conduct involved. So, too, does confidence in the administration of criminal justice. And where the prosecution alleges guilt on alternative bases, the efficiency of and confidence in the administration of justice also depend on the charging of alternative counts, so long as the law permits of that course.

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40 (1991) 13 Cr App R (S) 441.

41 (1991) 13 Cr App R (S) 441 at 445.

87 In this Court, the prosecution resisted the suggestion that it was possible to charge the appellant with alternative counts. It was put that, if that course had been taken, some jurors may not have been satisfied of guilt on the first count whilst others might not have been satisfied on the second, thereby permitting of the possibility that the appellant would escape conviction. In a case such as the present, that possibility is likely to be more theoretical than real. Moreover, the argument reveals that the prosecution sought to achieve a forensic advantage by taking the course of charging a single and largely non-specific count. In fact, it sought a double advantage. Besides seeking to maximise the possibility of conviction, the prosecution sought to and, in fact, did persuade the sentencing judge that the appellant's criminality was greater than the jury necessarily found.

88 In my view, the course taken by the United Kingdom Court of Appeal in *Stosiek* and *Efionayi* is one that should be followed in this country. That course ensures a real measure of consistency with the jury's findings. Further, any other course undermines the role of the jury and, thereby, lessens confidence in the administration of criminal justice.

Conclusion and orders

89 Although the appellant did not at or before trial raise with the prosecution the possibility that the indictment might be amended to charge alternative counts, the prosecution must have been aware at all stages that the evidence permitted of a finding of guilty on alternative bases. And contrary to the view taken by Kirby J and Callinan J in this matter, the fact that the prosecution case clearly permitted of that outcome negates any possibility that the appellant secured a forensic advantage by not seeking an amendment to the indictment. That being so, the appellant should have been sentenced on the basis that he was not involved in the importation of heroin into Australia prior to April 1989.

90 To say that the appellant should have been sentenced on the basis that he was not involved in the importation of heroin into Australia prior to April 1989 is not to say that he should be sentenced on the basis that his motives were benign. Ordinary principles require that motive, so far as it bears on criminality, be determined by the sentencing judge. It was so determined and determined against the appellant. That being so, the appellant should have been sentenced on the basis that, although he became involved in the later stages of the importation, his criminality was of a very high order.

91 The appeal should be allowed, the order of the Court of Criminal Appeal set aside and, in lieu thereof, the appeal to that Court allowed. The matter should be remitted to the Court of Criminal Appeal to re-sentence the appellant in accordance with these reasons.

92 KIRBY J. The important point in this appeal[42] is one arising under s 80 of the Constitution. That is the provision which, in the case of certain federal offences, affords a "constitutional guarantee [of trial by jury] … for the benefit of the community as a whole"[43].

93 The question is whether that provision, or the common law governing the trial on indictment of a person accused of a federal offence, comforming to the constitutional requirement[44], obliges a different delineation in the functions of judge and jury in determining facts relevant to sentencing than has hitherto been accepted as applicable in this country. In answering that question, it is not, in my opinion, necessarily helpful, and still less determinative, to have resort to general principles stated in earlier cases where the precise point was not relevant[45] or where, although relevant, it was not argued[46].

94 The question falls to be decided within the Australian constitutional paradigm. The law and practice of criminal trials, as expounded in England and in respect of a trial on indictment in Australia involving purely State offences, can only be relevant as informing the notion of what "trial ... by jury" means where that phrase is used in the Constitution. As past decisions of this Court demonstrate, what can be freely done in Australia under State law governing jury trial of State offences may not be possible in respect of a trial of federal offences to which s 80 of the Constitution applies[47]. So much is simply the consequence of imposing upon such federal trials the superior norm of the Constitution.

95 In considering an appeal to the provisions of the Constitution, it is essential for the judicial decision-maker to shift mental gears. Not only is a different field of legal discourse entered, but, in giving meaning to a constitutional rule, the decision-maker must read a provision, such as s 80, as a

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42 From a judgment of the Court of Criminal Appeal of New South Wales: *R v Cheung* (1999) 154 FLR 259.

43 *Brown v The Queen* (1986) 160 CLR 171 at 201 per Deane J.

44 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567.

45 As in *R v Isaacs* (1997) 41 NSWLR 374 at 377-378.

46 As in *Savvas v The Queen* (1995) 183 CLR 1, *R v Olbrich* (1999) 199 CLR 270. See also *Savvas (No 2)* (1991) 58 A Crim R 174.

47 *Cheatle v The Queen* (1993) 177 CLR 541.

constitutional provision, meant to be a fundamental guarantee[48], protective of the accused and of the community alike.

The facts and course of the proceedings

96 The facts and the course of proceedings in this matter are described in the reasons of Gleeson CJ, Gummow and Hayne JJ ("the joint reasons")[49] and in the reasons of Callinan J[50]. I will not repeat what is there set out.

97 Save for the possible application of the Constitution, there is no merit in any of the points argued in this appeal. There was no challenge at trial to the indictment presented against the appellant containing, as it did, a single count alleging an offence against the *Customs Act* 1901 (Cth)[51]. As Callinan J has explained, with telling force, there were strong forensic reasons that would have explained a decision on the part of the appellant not to object to the single count of the indictment and not to propound the proposition that the offence should be split into two counts, as now urged before this Court[52]. The course adopted left it open to the appellant to mount a frontal attack on the prosecution evidence and in particular that of the self-confessed accomplice and co-conspirator, Cheung Siu Wah, who gave evidence against the appellant under immunities granted to him by prosecution authorities in Australia and Hong Kong. He was, by any account, a rather disreputable person. By his own story, he was in the thick of the conduct leading to the relevant importation. He recanted at a very late stage, implicated the appellant, a person of previous good character, and secured a relatively light sentence whilst offering the appellant up to detection, arrest, conviction and condign punishment. The possibility of separate counts in the indictment (even if it would have been helpful to the appellant's present purposes) could have deprived the appellant of the chance of having his exculpatory version of events wholly accepted by the jury, with the consequence that a verdict of not guilty would be entered.

98 Whether the constitutional point belatedly urged in this Court was consciously saved up for later or judged unlikely to succeed or simply

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48 *Cheatle v The Queen* (1993) 177 CLR 541 at 562 cf *R v Snow* (1915) 20 CLR 315 at 323; *Brown v The Queen* (1986) 160 CLR 171 at 215.

49 The joint reasons at [2]-[3].

50 Reasons of Callinan J at [138]-[151].

51 s 233B(1), of being knowingly concerned in the importation of a prohibited import.

52 Reasons of Callinan J at [152]-[171].

overlooked, the fact remains that it was not raised at any time during the trial. Nor was it raised during the sentencing phase of the proceedings before the primary judge (Badgery-Parker J). On the contrary, it was agreed that his Honour should approach the task of sentencing in the way that has hitherto been regarded as orthodox in Australia and applicable to sentencing of prisoners convicted of federal and non-federal offences alike.

99 According to this orthodoxy, the sentencing judge decides the facts relevant to sentencing for himself or herself[53]. This is done subject to four relevant constraints:

- The sentence must be within, and in accordance with, any applicable statutory provision;
- The prisoner must not be sentenced for an offence different from that of which he or she has been convicted[54] or for circumstances of aggravation that could have been the subject of a distinct charge, different from that founding the conviction[55];
- The findings of fact relevant to sentencing may not be incompatible with the jury's verdict[56] although, unconstrained by the verdict, the judge might have reached a different conclusion[57]; and
- Any disputed questions of fact upon which the prosecution relies must be proved beyond reasonable doubt[58].

100 None of these points was in contest during the lengthy sentencing proceedings involving the appellant. On the contrary, they were embraced by both sides. This is why, except for the constitutional dimension now injected, the points canvassed in this appeal are so unpromising. If it is for the sentencing judge in federal as well as State offences to find the facts relevant to sentencing, subject to one consideration that I will mention immediately, the possibility must necessarily be faced, as inherent in the procedure, that the judge may take a more serious view of the facts than the prisoner urges. Indeed, he or she may take a more serious view of the facts than the jury might have accepted and (for all the court knows) than the jury or a majority of the jury or even all members of the jury, accepted in returning their verdict.

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53 *Kingswell v The Queen* (1985) 159 CLR 264 at 283.

54 *R v De Simoni* (1981) 147 CLR 383; cf *Marshall* (1917) 12 Cr App R 208 at 209.

55 *Medcraft* (1992) 60 A Crim R 181; *R v Newman* [1997] 1 VR 146.

56 *Maxwell v The Queen* (1996) 184 CLR 501 at 514-515.

57 *R v Webb* [1971] VR 147; *R v Boyd* [1975] VR 168.

58 cf *R v Olbrich* (1999) 199 CLR 270 at 281 [27], 290-291 [52].

Sentencing on facts favourable to the accused

101 The qualification to the preceding expansive view as to the entitlement, and duty, of the sentencing judge to give effect to his or her own view of the facts appears in judicial dicta in this country. Authority exists to the effect that any difference as to the facts relevant to sentencing, not otherwise resolved during the trial or during the sentencing proceedings (eg by any special verdict or by answers to questions administered by the judge to the jury where that course is permissible) should be resolved "upon a basis which gives the accused person the benefit of the most favourable view of the facts where two available versions compete for acceptance"[59].

102 In the New South Wales Court of Criminal Appeal in *Savvas (No 2)*[60], I explained this approach, in dissent, as one arguably derived from:

> "[a] basic rule of fair procedure in a criminal matter ... from the primacy of the jury's role in deciding disputed facts; the limited role of the judge in fact-finding in the criminal trial [which trial continues during the sentencing phase]; the obligation of the judge to impose a sentence consistent with the jury's findings; and the impossibility of the sentencing judge, the accused, the prosecutor, the appellate court or anyone else of knowing precisely how the jury determined particular facts in the absence of a special verdict."

103 The crimes charged in *Savvas (No 2)* involved both State[61] and federal offences[62]. Although the differential requirements of State and federal legislation governing sentencing were mentioned in that decision[63], the requirements, if any, for sentencing, inherent in s 80 of the Constitution, were not raised. They were

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59 *Savvas (No 2)* (1991) 58 A Crim R 174 at 187; cf Case and Comment, "*Wilmott"* (1977) 1 *Crim LJ* 216.

60 (1991) 58 A Crim R 174 at 186; see also *R v Stehbens* (1976) 14 SASR 240 at 246.

61 Conspiracy to supply heroin contrary to the *Drug Misuse and Trafficking Act* 1985 (NSW). See *Savvas (No 2)* (1991) 58 A Crim R 174 at 175.

62 Conspiracy to import heroin contrary to the *Customs Act* 1901 (Cth), see *Savvas (No 2)* (1991) 58 A Crim R 174 at 175.

63 *Savvas (No 2)* (1991) 58 A Crim R 174 at 179, where reference is made to the applicability to the State sentence of the *Sentencing Act* 1989 (NSW) and, at 187, the special considerations required in sentencing convicted federal offenders.

not dealt with explicitly either in the Court of Criminal Appeal of New South Wales or in this Court[64]. Certainly, this Court did not accept as applicable a principle that sentencing must proceed on a view of the facts open to the jury, consistent with their verdict, most favourable to the prisoner. So far at least as the common law is expressed, that controversy must therefore be taken as settled by the decision of this Court in *Savvas*[65]. The common law of Australia knows no such principle.

104 Leaving the Constitution to one side for the moment, I have to concede that the arguments against the suggested principle of leniency, as a rule of the common law, seem stronger to me now than they did earlier[66]. Put shortly, those arguments rest on the basic proposition that the jury perform their function (relevantly that of determining the guilt of the accused of the offence(s) charged) and the judge performs, separately, the judicial function (relevantly that of imposing the sentence within the limits (if any) fixed by the law and in accordance with relevant sentencing principles).

105 This conclusion suggests that the course adopted by Badgery-Parker J in sentencing the appellant was conformable with the established Australian law as it stood at the time of sentencing. It may have been a disappointment to the appellant that his Honour did not give him the benefit of the doubt upon any of the arguments he advanced as to the view that should be taken of the evidence. But his Honour explained why he reached his conclusion. Clearly, on the evidence, that conclusion was open to him. If the procedures observed were not flawed for constitutional or other reasons, they were not flawed for any reasons of the common law. Indeed, they followed punctiliously the understanding of the sentencing judge's functions hitherto established in this country, as in England from where those functions were copied[67]. It was not suggested that they failed to conform with applicable statutory provisions governing the sentences of federal offences or any other rule[68]. So that leaves only the Constitution and, relevantly, any requirements that s 80 imposed on the sentencing of the appellant.

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64 *Savvas v The Queen* (1995) 183 CLR 1.

65 (1995) 183 CLR 1.

66 *R v Harris* [1961] VR 236 at 237; *R v Webb* [1971] VR 147 at 152; cf *R v Kane* [1974] VR 759 at 762; *R v Martin* [1981] 2 NSWLR 640 at 643; Joint reasons at [9]-[10], [37]-[38].

67 Thomas, *Principles of Sentencing*, 2nd ed (1979) 366.

68 *Crimes Act* 1914 (Cth) ss 16A, 17A: see *Director of Public Prosecutions (Cth) v Said Khodor El Karhani* (1990) 21 NSWLR 370 at 380.

The issue of waiver of any constitutional requirements

106 A threshold question then arises as to whether the course of conduct followed at his trial is such as to deprive the appellant of any entitlement he might otherwise have had to rely on s 80 of the Constitution. Can it be said that he waived any entitlement to rely on the constitutional provision? Was it open to him to waive any such requirement?

107 In *Brown v The Queen*[69] this Court, by a narrow majority, held that it was not open to an accused person to waive the requirements of s 80 of the Constitution given that, where that section applied, it operated not only for the benefit and protection of the person accused of the federal offence but also for the benefit of the whole community[70]. The correctness of this holding was recently challenged before this Court in *Brownlee v The Queen*[71]. In that appeal I concluded that, in this respect, *Brown* had been incorrectly decided, should be reopened and, if necessary, leave granted for that purpose so as to hold, in law, a person may waive "trial ... by jury" where otherwise that mode of trial would be required by the Constitution. By parity of reasoning, where the trial has been conducted in accordance with some or most of the requirements of jury trial, it would arguably be open to the accused to waive particular elements of that mode of trial, so long as the trial still answered to the constitutional description.

108 In the present matter, the trial of the guilt of the appellant was before a jury. To that extent the requirements of the Constitution were complied with. However, the appellant complains that facts relevant, indeed critical, to his culpability in the offence in question were determined not by the jury (as they should have been) but by the judge. Accordingly, so it was submitted, whilst the trial was *in form* a "trial ... by jury", *in substance* it failed to comply with the essential elements of that mode of trial and thus was a constitutional nullity, at least so far as the fact-finding for sentencing was concerned.

109 On three grounds, I would not deal with the appellant's constitutional argument on this basis.

110 First, *Brown* has not been overruled by this Court. No other member of the Court in *Brownlee*, other than myself, addressed the issue of waiver. Indeed, the other members of the Court declined leave to allow *Brown* to be reopened[72].

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69 (1986) 160 CLR 171.

70 (1986) 160 CLR 171 at 201, 208.

71 (2001) 75 ALJR 1180 at 1200-1203 [109]-[120]; 180 ALR 301 at 328-331.

72 *Brownlee v The Queen* (2001) 75 ALJR 1180 at 1199 [101]; 180 ALR 301 at 326.

They reached their conclusions in that case without having to address the point. For the time being it therefore seems proper to treat the issue of waiver as decided by *Brown*. This point helps the appellant because it emphasises the fact that, if the constitutional norm imports a special rule governing the respective functions of the jury and a judge in the sentencing phase of a trial on indictment of a federal offence, it is mandatory. Upon this footing the way the appellant's trial was conducted, including the sentencing stage, (and whether it was conducted in that way for perceived advantages before the jury or through oversight of the suggested constitutional point) would be irrelevant. Whatever the Constitution required would have to be obeyed by all concerned, including the judge.

111 Secondly, and in any case, waiver would normally require something more, in fact, than mere non insistence upon the point. To waive a constitutional entitlement, if such it be, would necessitate more than proof that the appellant and his then counsel omitted to mention the later constitutional arrangements at the trial before sentencing. More was proved in *Brownlee*, where the course followed occurred with the positive participation and encouragement of the appellant's trial counsel[73]. In the present case, trial counsel certainly acquiesced in the observance by the judge of the orthodox arguments for ascertaining facts for the purpose of sentencing. But, unlike *Brownlee*, there was nothing special or unusual in what was done that altered the normal course of proceedings.

112 Thirdly, it is my view that the appellant's argument fails on its merits. It is therefore desirable that it be dealt with on that basis rather than on a footing scarcely mentioned during argument in this Court.

The basis for the constitutional argument

113 The strength of the appellant's case for contending that s 80 of the Constitution requires, in the trial of federal offences to which it applies, a procedure of fact-finding for sentencing different from that hitherto observed in Australia, derives from a reflection on the purpose of the constitutional provision.

114 For those who view s 80 of the Constitution as a piece of tautological insignificance, a "withered 'guarantee' of no substantive use to those facing trial for federal offences in Australian courts"[74], there will be no more reason to delay over the appellant's arguments than over other past[75], and recent[76], cases where

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73 *Brownlee v The Queen* (2001) 75 ALJR 1180 at 1200-1201 [109]-[113] 180 ALR 301 at 328-329.

74 *Cheng v The Queen* (2000) 74 ALJR 1482 at 1513 [176]; 175 ALR 338 at 380.

75 *R v Bernasconi* (1915) 19 CLR 629 at 637; *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 139.

attempts have been made to persuade the Court to read the section as a true constitutional provision and not as one that might just as well not have been included[77]. I do not share the restrictive view of the section. Nor do I accept that approach to constitutional elucidation generally. I remain confident that, eventually, this Court will accord to s 80 – as it has selectively[78] – a meaning apt to its place in the Constitution, and specifically in Ch III.

115 Approaching the provision in that way, it is not difficult to see the basic purpose of providing for jury trial of serious federal offences as s 80 does. It is to ensure safeguards to the people of the Commonwealth, and others under the protection of the Constitution, against the risks of oppressive laws and supine judges which the participation of citizen decision-makers in criminal trials will help to avoid or prevent.

116 Such a view accords with the other evidence in Ch III of the creation of a Judicature which will diminish analogous risks – notably by reserving the judicial power of the Commonwealth to courts created after a particular model[79], assuring the Justices of those courts protections against legislative or executive interference[80] and providing guaranteed facilities for appeal[81]. However, as Scalia J has pointed out in the Supreme Court of the United States in analogous circumstances, the foregoing guarantees are not enough. Judges need to be reminded that they "are part of the State - and an increasingly bureaucratic part of it, at that"[82]. This observation is not irrelevant to the judiciary of this country[83]. The jury has long been described as a bulwark of liberty and as the

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76 *Katsuno v The Queen* (1999) 199 CLR 40 at 63-64 [49], 65 [52]; *Re Colina; Ex parte Torney* (1999) 200 CLR 386; *Cheng v The Queen* (2000) 74 ALJR 1482 at 1512-1513 [174]-[175]; 175 ALR 338 at 379-380.

77 *Cheng* (2000) 74 ALJR 1482 at 1513 [176]; 175 ALR 338 at 380.

78 *Brown v The Queen* (1986) 160 CLR 171; *Cheatle v The Queen* (1993) 177 CLR 541.

79 Constitution, ss 71, 72.

80 Constitution, s 72.

81 Constitution, ss 73, 74.

82 *Apprendi v New Jersey* 68 USLW 4576 at 4585 (2000).

83 cf Drummond "Towards a More Compliant Judiciary?" (2001) 75 *Australian Law Journal* 304 (Pt 1), 356 (Pt 2).

"constitutional tribunal" of fact in Australia[84]. But in the conduct of trials of specified federal offences, such expressions are more than rhetoric. Section 80 is a constitutional requirement that must be obeyed. And in my view it must be obeyed according to the constitutional spirit as well as the letter.

117 In other countries where jury trial is practised, advocates may urge its curtailment, modification or even abolition, including in criminal trials[85]. Indeed, in respect of State offences in Australian courts this may happen, as it has. But in respect of the trial of specified federal offences in Australia, we do not presently have that option. The Constitution must be complied with. So what, if anything, does it oblige concerning the ascertainment of facts relevant to sentencing convicted federal offenders?

The appellant's constitutional argument

118 The appellant's constitutional argument, as I understood it, suggested that the requirement in s 80 of trial of his offence "by jury", carried with it an implication that all important factual questions determinative of criminal punishment would be isolated and decided by the jury, not by the judge – by lay citizens not by a State official. The appellant pointed to what had happened in his case. If one version of the evidence were accepted, relevant to his exculpatory assertions and explanations, it had been conceded by the prosecutor that the proper punishment would be of the order of five years imprisonment[86]. This would have seen the appellant released from custody in a relatively short time. If, on the other hand, the appellant's exculpatory assertions were rejected, it was accepted that he was liable to the kind of punishment that was reflected in the sentence actually imposed on him – being life imprisonment: the maximum provided by the *Customs Act* upon conviction of the offence and the highest sentence known to Australian law. According to the appellant's argument, any system of "trial ... by jury" which deprived the jury of the opportunity to resolve such a question, so important for liberty, was only a "trial ... by jury" in form. A most important factual issue in the result had been resolved by the judge himself, alone. This Court, so it was said, should correct such an exercise of power. It would require that the jury, not the judge, resolve such crucial factual points in contest in such a case.

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84 *David Syme & Co v Canavan* (1918) 25 CLR 234 at 240; *Hocking v Bell* (1945) 71 CLR 430 at 440.

85 Blom-Cooper "Article 6 and Models of Criminal Trial" (2001) *European Human Rights Law Review* Issue 6 at 13.

86 See remarks on sentencing of Badgery-Parker J quoted in the reasons of Callinan J at [150].

119 For the appellant, it was irrelevant that the jury's verdict on the point had not been sought, or that the point has not been raised earlier[87], at trial, if the Constitution mandated what he said it did. It was equally irrelevant that the law in England did not provide in this way or that trial for State offences in Australia had not previously proceeded thus. Such jurisdictions were not subject to the discipline of the constitutional requirements of s 80. On the theory propounded by those who resisted the requirement to take the jury's verdict on such a critical factual dispute, it would be possible for the legislature to express an "offence" in a way that covered an extremely wide range of circumstances and a vast range of culpability, varying from the trivial to the most grave. Indeed, conspiracy and knowing concern in criminal conduct (not to say homicide itself[88]) had a capacity to do this. In such a case, the really important factual issues in the trial may not be decided by the jury of twelve citizens but by a single judge. In fact (as it was suggested might have occurred in the appellant's case) the jury could have reached a unanimous view on the facts favourable to the accused but, as here, still supported a guilty verdict in respect of the offence. The judge might have reached a view contrary to that formed by the jury.

120 According to the appellant the present procedures for sentencing convicted federal offenders like himself contradicted the fundamental purpose for which jury trial had been guaranteed by the Constitution, namely to allow a jury to resolve serious factual disputes. There are resonances in this argument with the recent decisions of the United States Supreme Court concerning the impermissibility of excluding the jury from deciding whether so-called "penalty enhancing factors" in legislation have been established by the prosecution[89]. In the most recent of these decisions, *Apprendi v New Jersey*, Stevens J, delivering the opinion of the Court, reviewed the attempts by legislation to enhance the role of the judge, and to diminish that of the jury, in determining questions critical to the criminal punishment of a convicted prisoner. He said:[90]

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring

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87 *Eastman v The Queen* (2000) 203 CLR 1 at 94-95 [282]; *Crampton v The Queen* (2000) 75 ALJR 133 at 135 [4]; 176 ALR 369 at 371.

88 Joint reasons at [10]. See Fox and Freiberg, *Sentencing – State and Federal Law in Victoria*, 2nd ed (1999) at 110-111.

89 *McMillan v Pennsylvania* 477 US 79 (1986); *Jones v United States* 526 US 227 (1999); *Apprendi v New Jersey* 68 USLW 4576 (2000).

90 *Apprendi v New Jersey* 68 USLW 4576 at 4583 (2000).

> opinions in [*Jones v United States*[91]]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'"

121 In *Cheng v The Queen*[92], I embraced this analysis as applicable to s 80 of the Constitution. Although mine was a minority view, I adhere to it. The appellant sought to extend my reasoning in *Cheng* a further step to include the jury's assessment of facts which have the consequence of exposing the accused to enhanced punishment within the penalty prescribed for a conviction of a single federal offence of variable culpability. According to the appellant, the logic was the same: important disputed factual questions affecting substantial loss of liberty of an accused had to be decided not by judges but by juries. Criminal procedure in Australia concerning federal offences should be adapted to reflect this constitutional obligation.

122 Of course, this argument, if accepted, would introduce a need to alter the procedures that, until now, have been followed in Australia in relation to the sentencing stage of the trials of federal offenders. But if the constitutional norm has the meaning attributed to it by the appellant, that fact could not provide an insuperable obstacle. It would be possible, for example, to secure obedience to such a constitutional requirement by obliging the judge, conducting such a trial, to obtain a special verdict from the jury or to ask the jurors to answer specified questions. General observations unfavourable to special verdicts in criminal trials made in other contexts and in other countries to meet other needs[93], would have to adapt to the requirements of s 80 of the Constitution. Thus, in the present case, it would not have been difficult for the judge to have framed a question to elucidate the jury's special verdict as the motivation of the appellant, so as to enable the judge to resolve the very important factual question consistent with the jury's determination, accepting that, decided one way, it had the practical consequence of increasing the appellant's period of likely incarceration by an approximate factor of four.

123 Alternatively, in some cases (although not perhaps in this) the jury's resolution of a critical factual difference could have been procured by a procedure of framing separate counts of the indictment to elicit a verdict on the

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91 526 US 227 at 252-253 (1999).

92 (2000) 74 ALJR 1482 at 1527 [247]; 175 ALR 338 at 400.

93 *Solomon and Triumph* (1984) 6 Cr App R (S) 120 at 127 noted in joint reasons at [50].

particular point in controversy[94]. Yet a further possibility would be to adopt some variant of the principle that factual questions, unresolved by the prosecutor's procedures and the jury's guilty verdict, should be determined in favour of the prisoner[95].

124 Ultimately, it can be no answer to a constitutional argument, if it be a good one, that changes in settled ways would be required or that things done in particular ways need to be reconsidered. If the Constitution speaks, trial procedures must obey. Even in the United Kingdom, under the stimulus of the European Convention on Human Rights and the *Human Rights Act* 1998 (UK), consideration is now being given to the possible need to modify jury trial of criminal cases to comply with the requirements of the Convention and Act that the administration of justice must be a reasoned process[96]. The foregoing arguments have some attractions from the standpoint of repairing the mockery that has been made of s 80 of the Constitution. However, it is my opinion that they do not prevail.

The constitutional argument fails

125 First, the section is concerned with the trial on indictment of any "offence against any law of the Commonwealth". This appears to mean an offence provided in a law enacted by the Parliament[97]. This, in turn, appears to contemplate a delineation between the respective functions of the Parliament and the courts in the contents of the "offence" in question. Subject perhaps to an extreme case, clearly designed to avoid the requirements of s 80, it is left to the legislature to specify the elements of the offence in question.

126 The elements of an offence may thus be broad or narrow. There is nothing unusual or irregular in an offence framed in terms of conspiracy or being "knowingly concerned" in an act of importation (any more than of homicide). It must therefore be accepted that, compatibly with s 80, if otherwise within power, it is open to the Parliament to provide for an "offence" in respect of which a guilty verdict of the jury will leave important factual issues outstanding and unresolved. In the past, the task of resolving such questions, in courts of our legal tradition, has fallen to the judge.

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94 *Efionayi* (1994) 16 Cr App R (S) 380.

95 As referred to by me in *Savvas (No 2)* (1991) 58 A Crim R 174 at 185.

96 Referring to European Convention on Human Rights, Art 6: Blom-Cooper, "Article 6 and Modes of Criminal Trial" [2001] EHRLR Issue 1, 1 at 10-14; cf *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377; [2000] 1 All ER 373.

97 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 415-416 [79]-[80].

127 Secondly, this reasoning provides a point of distinction from the question which was before this Court in *Cheng*[98]. There, the statute had itself enacted identified aggravating factors[99]. The question in issue was whether, viewed from the constitutional perspective of s 80, the aggravating factors were, or were not, part of the "offence", as mentioned in the sections. I was of the view that they were. The majority were of a different view. But no such question arises in this case. The "offence" does not contain in its statutory definition, differentiating elements that add to, or subtract from, the seriousness of the offence and, depending on factual determinations, affect the punishment to which the accused is exposed following conviction. Here, the offence is single and indivisible[100]. However, its content can embrace a "knowing concern" over a long or short period. It can include a "knowing concern" for motives of greed and criminal self-advantage or for motives of a foolish but understandable and less culpable character.

128 If it is the province of the Parliament to define the "offence" and that of the courts to conduct the trial of the person charged with such "offence", it is not part of the function of the courts to reject the "offence" in a case such as the present as insufficiently differentiated for the purpose of tendering factual decisions for determination by the jury. That logic would run into insuperable practical problems for criminal procedure. Such problems would arise, most obviously, in the standard count of an indictment changing murder or manslaughter which (as the joint reasons point out[101]) can cover an enormous range of culpability and give rise to the possibility of punishment ranging from the trivial to the condign.

129 Thirdly, s 80 of the Constitution talks of "trial ... by jury". Whilst that expression is not necessarily fixed for all time with every feature of the jury trial as it was conducted in England or in the Australian colonies in 1900[102], the essential features of that particular manner of resolving contested issues are not at large. What is described is a particular tribunal having a particular, important but limited function.

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98 (2000) 74 ALJR 1482; 175 ALR 338.

99 *Customs Act* 1901 (Cth), s 233B(1) (d) and s 235, set out in full in the reasons of Callinan J in *Cheng v The Queen* (2000) 74 ALJR 1482 at 1530-1531 [260]; 175 ALR 338 at 403-404.

100 *Customs Act* 1901 (Cth) s 233B.

101 Joint reasons at [9]-[10].

102 As to the exclusively male jurors and property qualifications, univeral in 1900, see *Cheatle v The Queen* (1993) 177 CLR 541 at 560.

130 Conventionally, in that mode of trial, the jury decided by its verdict whether or not the prosecutor has proved the accused guilty of the offence charged. The punishment that followed was then ordinarily determined by the judge who normally had discretionary powers. It is not incompatible with "trial ... by jury," as contemplated by s 80, that the judge will, after a guilty verdict, have to resolve factual questions relevant to sentencing but in a way consistent with the jury's verdict. That, indeed, has been the way the section has operated throughout the first century of the Constitution[103]. The delineation of their respective functions assigns different responsibilities to the legislature (which frames the offence for which the law provides), the executive (which frames the indictment and nominates the specific offence(s) charged), the jury (which decides whether the prosecution has proved the accused guilty of such offence(s)) and the judge (who instructs the jury on the law and, following a guilty verdict and conviction, passes the sentence according to law, subject to appeals provided by the Constitution against "all judgments … orders, and sentences"[104].)

131 Against the background of this delineation of functions, on the basis of which the mode of jury trial contemplated by s 80 of the Constitution was provided for, it would not be open to this Court now to hold (as a matter of constitutional requirement) that the jury's function was compulsorily enlarged. To require the jury to decide all important contested facts relevant to sentencing is to change the content of "trial ... by jury" as contemplated by s 80 of the Constitution. It is not to give effect to the constitutional prescription.

Prosecution procedures and enhancing jury findings

132 I agree with Callinan J that it is desirable, as a matter of prosecution practice, that counts of indictments charging federal (and I would add non-federal) offences should be framed with specificity so as, wherever practicable, to enable the judge to sentence an accused, convicted of an offence, "as near as may be upon the basis of the facts that must have been found by the jury in reaching the verdict"[105].

133 Consistently with that practice, and to the same end, at least where the potential difference for sentencing is as substantial as it was in this case, it is

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103 *Whittaker v The King* (1928) 41 CLR 230 at 240.

104 Constitution, s 73. As to "sentences" see *Crampton v The Queen* (2000) 75 ALJR 133 at 155-156 [121]; 176 ALR 369 at 399-400.

105 Reasons of Callinan J at [160].

desirable, and certainly permissible, to seek from the jury answers to questions (or a special verdict) concerning the basis upon which they have convicted the prisoner. Naturally, such a course must be undertaken with care[106] and possibly after the jury have returned their general verdict[107]. Doing so would uphold the general primacy of the jury in fact-finding. It would help avoid the sense of grievance that may otherwise arise when, as here, the accused ascribes his long imprisonment not to the verdict of the jury (who may or may not have agreed with the Judge's view of the evidence) but to the judge alone.

134 Appellate judges may have unbounded confidence in the capacity of sentencing judges, alone, to find all facts that determine criminal culpability and thus the sentence to be imposed. It is true that this is how sentencing has been performed for a long time – since before s 80 became part of Australian constitutional law. But, for resolving such questions, there is often wisdom in numbers. In the opinion of twelve lay jurors there may also be protection from official attitudes that judges are more likely to hold than most jurors. There is, as well, observance of a democratic principle in taking the opinion of jurors. Those of a hierarchical inclination may treat that course with disdain or consider it to be unnecessary. But ours is a constitution that, in some respects at least, upholds non-elitist values. The requirement of jury trials is one such respect. The common law must[108], and prosecution practice should, adapt to the presuppositions of the Constitution, including relevantly of criminal trial by jury. Even where it does not oblige a change in the functions of judge and jury, s 80 certainly favours procedures that tend to enhance the role of the jury in the finding of facts affecting criminal punishment.

135 I confess to understanding the essential complaint of the appellant in this appeal. He could not have suffered heavier punishment had the jury decided each and every issue of fact relating to his culpability for sentencing against him. Yet he might have secured a more favourable finding of at least some of the facts from the jury. A jury is undeniably well suited to deciding contested questions of criminal culpability. In criminal trials juries do that all the time. The appellant and the community will never know what the jury thought of the precise extent and duration of the appellant's culpability in the crime of which they found him guilty. The Constitution offers him no redress. But fair prosecution procedures

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106 *Veen v The Queen* (1979) 143 CLR 458 at 466 per Stephen J; Fox and O'Brien "Fact-Finding for Sentencers" (1975) 10 *Melbourne University Law Review* 163 at 172-175. In *Isaacs* (1997) 90 A Crim R 587 at 593, concerning a State offence, it was accepted that this course was available "in exceptional cases".

107 *R v Warner* [1967] 1 WLR 1209 at 1214 per Diplock LJ; [1967] 3 All ER 93 at 96.

108 cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567.

may properly avoid such grievances in the future. The endeavour to do so should, in my view, be encouraged, not discouraged.

136 No legal error is demonstrated that warrants disturbing the sentence that was imposed. The procedures observed in imposing that sentence complied with the law as it presently stands – including the law contained in s 80 of the Constitution. If, as a matter of law, the judge alone could make the decision on the facts necessary for sentencing, as I must hold, there was evidence to sustain the conclusion that he reached. This Court cannot interfere.

Order

137 The appeal should be dismissed.

CALLINAN J.

Facts

138 In 1993, the appellant was tried before Badgery-Parker J with a jury on a charge of being knowingly concerned in the importation of a prohibited import, a quantity of heroin, contrary to the provisions of s 233B of the *Customs Act* 1901 (Cth) ("the Act"). The jury brought in a verdict of guilty on 19 May 1993. After hearing lengthy submissions on sentence, his Honour sentenced the appellant pursuant to the provisions of the Act to a term of imprisonment for life, deemed to have commenced on 9 February 1990 and set a non-parole period commencing on the same date, and having a duration of twenty-one years and eleven months.

139 The count in the indictment alleged that, between 1 August 1988 and 12 May 1989, the appellant was knowingly concerned in the importation into Australia of a quantity of heroin being not less than the commercial quantity applicable to heroin.

140 For some years before, and in the years 1988 and 1989 the appellant was a senior inspector in the Hong Kong Customs Service. On 9 May 1989 a ship *The Nimos* berthed at the Glebe Island Container Terminal in Sydney. Its cargo included a freezer and water heater in which were concealed 148 blocks of high grade heroin with a total gross weight of approximately 50 kilograms of which approximately 38 kilograms were pure heroin. The drug had been shipped from Hong Kong to Vanuatu. There it had been transferred to the ship in which it was brought to this country. Vanuatu was selected as the place for the transfer of the heroin because those who conspired to ship it to Australia believed that the Australian Customs authorities did not regard Vanuatu as a likely source of heroin.

141 The imminent importation of the heroin had been notified to Australian Federal Police officers on 24 April 1989 by a man named Cheung Siu Wah who arrived in Australia on that date. Cheung Siu Wah had been a party to the conspiracy for the export of the drug from Hong Kong in December 1988, and had arranged for its shipment from Hong Kong to Vanuatu, and its repacking in Vanuatu for shipment to Australia. He was granted indemnities by the Directors of Public Prosecutions of Hong Kong and Australia and gave evidence for the Crown at the appellant's trial in New South Wales.

142 The appellant had first met Cheung Siu Wah in the former's role as a customs officer in Hong Kong. He had arrested Cheung Siu Wah for drug trafficking. Cheung Siu Wah subsequently became an informant for the appellant. There was evidence before the jury that the two men had become friends and had travelled to Mongolia together and contemplated going into business together.

143 The Crown case was that the appellant had become aware of the availability of a large quantity of heroin for export from Hong Kong and had involved himself in instigating, planning, coordinating, financing and supervising its movement from Hong Kong to Australia. It was not contested by the appellant that he had deliberately refrained from reporting to his superiors in the Hong Kong Customs Service any details of what was, by any standard, a wicked, large-scale conspiracy to bring a massive quantity of heroin into Australia. He was, not surprisingly, under a continuing duty to report intelligence of any significance which came to his attention in relation to drug transactions. It was also common ground that the possession and export of heroin from Hong Kong were serious offences in that colony.

144 Between 24 April 1989 and 9 May 1989, Australian Federal Police officers recorded, pursuant to a warrant, several telephone conversations with Cheung Siu Wah and others concerned in the drug importation. These included three telephone calls from the appellant to Cheung Siu Wah, which, on the Crown case, contained a series of instructions, directions and suggestions for the execution of the scheme for the importation, and requests for information consistent with a criminal participation in the importation. The conversations were conducted in the Cantonese language. There was much dispute at the trial as to the meaning of the words used by the appellant in these conversations, and whether, for example, certain phrases and sentences were used in a merely interrogative sense or were, in substance, directions given by the appellant. Persons fluent in the Cantonese language gave competing evidence and no suggestion has been made that the trial judge's instructions to the jury with respect to the interpretation and meaning of the appellant's words were other than impeccable. The appellant was arrested in Hong Kong on 12 May 1989. He was interviewed twice by Hong Kong Police officers. The records of those interviews became exhibits at his trial in New South Wales. He also gave sworn evidence during a hearing for his extradition from Hong Kong. The notes of this evidence became exhibits at his trial. His evidence at pre-trial proceedings in Australia in August 1992 was also read to the jury at the appellant's trial. The appellant claimed that he had not made any reports concerning the importation because he was anxious to protect the lives of his informants who were at risk of their lives until the delivery of the heroin to its consignees in Australia: he had always, he claimed, intended to report the fact and details of the conspiracy when the safety of his informants could be assured. At the trial the appellant made a statement from the dock which was consistent with the sworn evidence he had given during the extradition proceedings.

145 Cheung Siu Wah was obviously an important witness at the appellant's trial. He had a not insignificant criminal record himself. And he had of course been a conspirator and accomplice in the importation of the heroin into Australia. Accordingly the Crown sought to find evidence corroborative of his evidence. For this the Crown relied upon several matters: the appellant's failure to make any reports of the importation when he had a duty to do so; the appellant's own

words in the three telephone calls that he made to Cheung Siu Wah during the course of the importation; and lies told by the appellant in relation to a disputed meeting with another participant in the conspiracy in Hong Kong on 20 March 1989.

146 The Crown also contended, and put to the jury that the appellant could and should be found guilty as charged on all of the evidence apart from Cheung Siu Wah's evidence: that the evidence which had been advanced as corroborative evidence was directly probative, and, taken with the appellant's own statements also proved the case against him. It is relevant at this point to observe that no application was made at the trial for particulars of the count, and no challenge of any kind was made to the form of indictment presented against the appellant.

147 After the jury reached their verdict the trial judge reviewed all of the evidence given during the trial and found that the appellant had been culpable to the extent alleged, and sworn to by the accomplice, that is to say, that the appellant's involvement in the scheme for the importation dated from its inception, and that the appellant's motive was to profit greatly from its execution. His Honour clearly rejected the appellant's claim that his failure to make reports was motivated by his desire to protect the lives of his informants, Cheung Siu Wah and another person, Ng Yun Choi.

148 The trial judge also held that the jury had rejected, by its verdict, the appellant as a witness of truth, and, in particular, that the jury must have disbelieved the appellant's denial that he had any intention to advance or assist the importation.

149 In passing sentence the trial judge acknowledged, what he had already told the jury, that the prosecution had put the case against the appellant in two ways:

> "The Crown case was put to the jury in two ways. First, the Crown invited the jury to accept the evidence of Cheung Siu Wah and to find that it was corroborated in many respects by other evidence, particularly circumstantial evidence. Secondly, the jury was invited to find the prisoner guilty entirely independently of the evidence of Cheung Siu Wah, on the basis particularly of two bodies of evidence, namely admissions by the prisoner that although during April and early May 1989, he had become aware of the fact that the heroin importation was in progress and had accumulated a quantity of information about it, he made no report thereof to his superiors as was his duty; and evidence that during the first nine days of May, again being well aware that Cheung Siu Wah was actively engaged in furthering the importation of heroin into Australia, he made three telephone calls to Cheung Siu Wah from Hong Kong in which he gave him not merely advice and encouragement but instructions as to how he should deal with problems which were arising in relation to the importation at that time."

150 With respect to the appropriate sentence the learned trial judge said this:

> "In the sentencing proceedings, counsel for the prisoner conceded that should I be satisfied beyond reasonable doubt that the involvement of the prisoner in the heroin importation had been as described in the evidence of Cheung Siu Wah, I would be obliged to regard the case as one which objectively fell into a class described as the worst possible cases, a case of the kind for which the maximum penalty prescribed by the legislation might be appropriate." (footnotes omitted)

The trial judge then referred to the sentence which in all probability would have been appropriate if the appellant's claim that he was seeking to protect informants was true, and represented his sole motive for involvement in the transaction in this way:

> "On that view of the facts, it was submitted on behalf of the prisoner and conceded by the Crown that the appropriate sentence would be one which would see the release of the prisoner (who has been in custody for over three and a half years) within at most another two years."

I defer discussion of the concession made by the Crown until later.

151 The appellant applied for leave to appeal against sentence to the Court of Criminal Appeal of New South Wales[109] (Newman, Simpson and Hidden JJ). There the appellant submitted that the trial judge should have asked the jury whether they found the appellant guilty "on the Crown's primary case or in the alternative". As to that, after reviewing a number of New South Wales and other authorities, Newman J said this[110]:

> "Even if there is a discretionary power to ask a jury in a case involving this offence, a question, I am of the view that Badgery-Parker J did not err in not asking such a question. Accordingly this head of appeal must fail."

Simpson and Hidden JJ agreed with Newman J but added this[111]:

> "It may have been preferable for the indictment to have contained two counts, to reflect the significantly different bases upon which the Crown put its case. However, no such point was taken at the trial. Nor was it in

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109 *R v Cheung* (1999) 154 FLR 259.

110 *R v Cheung* (1999) 154 FLR 259 at 268.

111 *R v Cheung* (1999) 154 FLR 259 at 269.

> the conviction appeal … . Accordingly, it fell to the learned trial judge to find the facts for the purpose of sentence and it was open to his Honour to arrive at the conclusions he did."

The appeal to this Court

152 The appellant's first submission is that two counts, as alternatives, should have been preferred. If that had been done, the appellant submitted, it would have been discernible from the jury's verdict on these counts whether they regarded the appellant as totally implicated throughout, and for his own gain, or whether he became involved in the criminal enterprise and abstained from reporting it in order to protect his informants, as he claimed. The trial judge would then, it was submitted, have not had to make any findings about these matters and could have sentenced the appellant on the basis of a verdict of guilt in respect of either or both of them in a way which gave true effect to the jury's finding as to the extent and motive of the appellant's involvement in the importation.

153 The two counts that the appellant contended should have been preferred were as follows:

> "Count 1
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> That Cheung Ying Lun between the 1st day of August 1988 and the 24th day of April 1989 at Sydney in the State of New South Wales and elsewhere was knowingly concerned in the importation (which occurred on 9 May 1989) into Australia of prohibited imports to which section 233B of the Customs Act 1901 applied, to wit, narcotic goods consisting of a quantity of heroin being not less [than] the commercial quantity applicable to heroin.
>
> Count 2
>
> That Cheung Ying Lun between about the 25th day of April 1989 and the 12th day of May 1989 at Sydney in the State of New South Wales and elsewhere was knowingly concerned in the importation into Australia of Prohibited imports to which section 233B of the Customs Act 1901 applied, to wit, narcotic goods consisting of a quantity of heroin being no[t] less than the commercial quantity applicable to heroin."
>
> (The words in parentheses were added during argument)

154 Perhaps greater precision would have been provided if before the words "… between about the 25th day of April 1989 and the 12th day of May 1989 … was knowingly concerned in …" the words " … from time to time *throughout the period*" had been inserted, but no attention was drawn to this possibility by anyone at the trial.

155 The appellant accepts that a possible result of the charges being preferred against him in this manner is that he might have been convicted on two counts. The submission of the appellant was that, in effect, the prosecution should always, or at least generally, (absent good, if unspecified, reasons to the contrary) prefer a charge or charges in such a way as to make it as clear as it can possibly be made, which facts the jury must have found to reach a verdict of guilty, and that the respondent failed to do this in this case. I will return to this matter shortly.

156 It is relevant at this point to refer to the qualifications that the Crown attached to the concession made with respect to the possibility of a lesser sentence of five and a half years only and which the trial judge noted in a passage that I have quoted. These were that it would need to be first accepted that in acting and refraining from acting as he did the appellant:

1 was seeking to protect his informants;

2 wished to gather information for the purposes of a full investigation;

3 acted in the knowledge and the expectation that the heroin would be seized;

4 acted on the basis that the participants (apart from his informants) would be arrested;

5 always intended that the Federal authorities in Australia would be informed;

6 would remain involved only so long as was necessary to enable the informants to escape retribution from the other participants; and

7 was not motivated by personal gain.

157 Both the respondent and the appellant accepted that even if those matters were established the appellant could still have been convicted as charged, the different consequence being as to penalty only.

158 A question was raised during argument in this Court, why the appellant, at the trial, never sought to challenge the form of the count alleged against him. The respondent submits, contrary to the appellant's contention, that the appellant did seek to derive forensic advantage from the way in which the count was in fact framed. It is not difficult to see why this might be so. As the count was framed and covered the extended period that it did, it enabled the appellant to invite the jury to be sceptical about the appellant's alleged participation and the

unlikelihood of his being able to sustain the secrecy of his role for so long a period, to place innocent interpretations upon intercepted and taped telephone conversations that only occurred just before and about the time of the importation of the heroin, and to emphasise that the direct evidence from which guilt might be inferred was largely confined to a much shorter period. These matters, taken with a substantial body of evidence of the good character of the appellant provided a persuasive basis for the appellant to press his innocence upon the jury. The appellant also urged upon the jury that the accomplice was entirely unreliable, and should be rejected out of hand. The appellant made no application at the trial for any redirections about the trial judge's instructions with respect to the form and fairness of the count, or the way in which the jury should approach the evidence of Cheung Siu Wah.

159 The difficulty for the appellant is that the preferment of two counts in the form submitted in argument in this Court, is that a verdict of guilty on either or both of them would still not have resolved the issue which the appellant accepts presented itself and was critical on penalty, that is, of the appellant's motive: either as a compassionate, well intentioned but misguided customs officer, or, as a knowing, fully fledged participant as a senior customs officer in an act of gross criminality. All that the appellant was able to put on the relevance of the preferment of two counts to this question, is that, had the jury reached a verdict of guilty on a count alleging criminal conduct during the last 17 days of the conspiracy only, it might have been easier for the trial judge to conclude that the appellant's motive was to protect his informants and not otherwise.

160 No doubt it is desirable that a count be preferred in as unambiguous a form as possible. A count should be framed with all such specificity as to time, place, and circumstance as is possible and consistent with the purpose of an indictment, of alleging an offence but not of course the evidence in support of the count or counts contained in it. Specificity not only reduces the area of debate about what a jury has to decide and has decided, but also clearly identifies for the accused the charge or charges with which he or she has to deal. So too, if the criminal conduct, although of a kind, has taken place over discrete periods, or in discrete locations, and might be viewed quite differently by a trial judge for the purposes of fixing penalty depending upon the period or place of perpetration, the Crown should try to formulate a count or counts, if possible, so as to enable the judge to fix a penalty as near as may be, upon the basis of the facts that must have been found by the jury in reaching the verdict. This is not to detract from the separate function of the Crown, which is to bring and formulate the charge, functions with which a court is unlikely to interfere unless an abuse of process is involved[112].

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112 See *Connelly v Director of Public Prosecutions* [1964] AC 1254.

161 In *R v Isaacs*[113], to which I will refer in detail later, the Court of Criminal Appeal of New South Wales, constituted by five judges (Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ), held that the power and responsibility for determining the punishment to be inflicted upon an offender, convicted by a jury, rests with the judge and not with the jury[114].

162 It is the duty of the judge to determine the facts relevant to sentencing not found by the jury. Some of these facts will have emerged in evidence at the trial: others may only emerge in the course of the sentencing process. It is upon the basis of the offence proved, the factual elements of it necessarily found by the jury in reaching its verdict, and other relevant facts found by the trial judge that the trial judge will exercise his or her sentencing discretion[115].

163 The principal constraint upon the power and duty of a sentencing judge to find the "sentencing facts" is that the view of the facts taken by the judge cannot be inconsistent with the verdict of the jury. This may mean that the view of the facts which the judge is obliged to take on sentence might be different from the view which the judge would have taken if unconstrained by the verdict[116]. The fact that a judge may not agree with a jury's verdict and may be required to sentence on a basis different from his or her strongly held view of the case simply follows from the division of functions in a trial by jury.

164 A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.

165 There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender[117]. However, the practical effect of the matters to which I have referred may be that because the judge is required to resolve any reasonable doubt in favour of the accused, the judge will in practical terms often sentence an offender upon a view of the facts which is most favourable to that offender. When that occurs, it will be because of the

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113 (1997) 41 NSWLR 374.

114 (1997) 41 NSWLR 374 at 378-379 per the Court. See *R v Harris* [1961] VR 236 and *Kingswell v The Queen* (1985) 159 CLR 264 at 283 per Mason J.

115 *Savvas v The Queen* (1995) 183 CLR 1.

116 *Maxwell v The Queen* (1996) 184 CLR 501.

117 See *R v Harris* [1961] VR 236.

application of principle to the facts of the particular case, and not because of any principle requiring sentencing on the basis of leniency[118].

166 These principles, which permit the trial judge to form his or her own view of the facts for the purpose of sentencing, and deny that a trial judge must accept the version of the facts most favourable to the accused, have been applied and approved generally consistently by other Australian courts[119].

167 Without any reservations the appellant at the trial appears to have accepted the applicability of the principles that I have stated. In written submissions to the trial judge, the appellant's counsel said this:

> "There is a considerable need for your Honour to specify the individual facts your Honour finds proven beyond reasonable doubt as comprising the basis upon which your Honour will impose the sentence selected by your Honour. Your Honour is requested on behalf of Gary Cheung to undertake this task."

168 In the course of his oral submissions, the appellant assented to this statement by the trial judge:

> "It is not my function to decide what the jury decided. It is my function to see of what facts I am myself satisfied."

169 Furthermore, a ground of appeal in this Court also appears to reflect acceptance in part or at least of those principles which are summarised in *Isaacs* and with which I respectfully agree. The ground of appeal was as follows:

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118 *Lupoi* (1984) 15 A Crim R 183 at 184.

119 See *R v O'Neill* [1979] 2 NSWLR 582; *R v Martin* [1981] 2 NSWLR 640; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593; *R v Barry* [2000] NSWCCA 138; *R v Harris* [1961] VR 236; *R v Chamberlain* [1983] 2 VR 511; *R v Storey* [1998] 1 VR 359; *Law v Deed* [1970] SASR 374; *R v Stehbens* (1976) 14 SASR 240; *R v Haselich* [1967] Qd R 183; *R v Bedington* [1970] Qd R 353; *R v Gardiner* [1981] Qd R 394; *R v Morrison* [1999] 1 Qd R 397; *Laporte v The Queen* [1970] WAR 87; *Langridge v The Queen* (1996) 17 WAR 346; *Bresnehan v The Queen* (1992) 1 Tas R 234; *R v Turnbull* (1994) 4 Tas R 216; *Emery v The Queen* (1999) 9 Tas R 120; *Hughes and Curtis* (1983) 10 A Crim R 125; *Savvas (No 2)* (1991) 58 A Crim R 174; *Dally* (2000) 115 A Crim R 582. See in particular *R v De Simoni* (1981) 147 CLR 383 at 392 per Gibbs CJ (Mason J agreeing), 398-399 per Wilson J; *Kingswell v The Queen* (1985) 159 CLR 264 at 276 per Gibbs CJ, Wilson and Dawson JJ, 283 per Mason J; and *Savvas v The Queen* (1995) 183 CLR 1 at 8 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

"The Court erred in rejecting a submission that the Judge at first instance had taken an approach to the factual basis for sentence which failed to ensure consistency with the verdict of the jury, and encroached upon his right to trial by jury."

170 The relevant principles formulated in *Isaacs*[120] were stated in this way[121]:

"The following principles concerning the law and practice of sentencing in this State are well established:

1. Where, following a trial by jury, a person has been convicted of a criminal offence, the power and responsibility of determining the punishment to be inflicted upon the offender rest with the judge, and not with the jury[122].

2. Subject to certain constraints, it is the duty of the judge to determine the facts relevant to sentencing. Some of these facts will have emerged in evidence at the trial; others may only emerge in the course of the sentencing proceedings. The fixing of an appropriate sentence ordinarily involves an exercise of judicial discretion, and it is for the judge to find the facts which are material to that exercise of discretion[123].

3. The primary constraint upon the power and duty of decision-making referred to above is that the view of the facts adopted by the judge for purposes of sentencing must be consistent with the verdict of the jury. This may produce the result that, in a particular case, the view of the facts which the judge is obliged to take is different from the view which the judge would have taken if unconstrained by the verdict[124]. In the present case, for example, a trial judge might have considered that the facts supported a verdict of murder, not manslaughter; nevertheless, the judge would be obliged to sentence on the basis that the case was one of manslaughter. The fact that a judge may not agree with a jury's verdict, and thus may be required to sentence on a basis different from the judge's

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120 (1997) 41 NSWLR 374.

121 (1997) 41 NSWLR 374 at 377-378.

122 *R v Harris* [1961] VR 236. See also *Kingswell v The Queen* (1958) 159 CLR 264 at 283 per Mason J.

123 *Savvas v The Queen* (1995) 183 CLR 1.

124 cf *Maxwell v The Queen* (1995) 184 CLR 501.

personal view of the case, is an inevitable consequence of the division of functions inherent in trial by jury.

4. A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.

5. There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender[125]. However, the practical effect of 4 above, in a given case, may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, then the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender. When that occurs, it will be because of the application of the principle referred to in 4 to the facts of the particular case, and not because of some principle requiring sentencing on the basis of leniency[126]."

171 There is nothing novel about the proposition that matters of great importance on sentence will fall to be decided by a trial judge rather than by a jury. Motive, not an element of the offence will often be a very important sentencing factor. Whether an offender has been callous will usually be highly relevant. The extent of an offender's knowledge or belief can also be of significance in the sentencing process. An offender who breaks and enters what he genuinely believes to be vacant premises may be entitled to a degree of leniency not to be afforded to a like offender who believes, or knows, premises to be occupied by a vulnerable occupant, or who is indifferent whether they are so occupied. The elements of an offence will frequently be different from the facts and circumstances which will have a large impact upon penalty.

172 It follows that a verdict of guilty on one or both of the counts suggested by the appellant would not have obviated the need for the trial judge to find what was in this case the highly critical factor in the sentencing process, a factor which was not an element of the offence and could not appropriately have been alleged in the indictment: with what motive did the appellant concern himself in the importation of the heroin? The trial judge was properly invited to explore and decide that issue himself. Participation by the appellant for only a shorter and later period in the criminal scheme was by no means inconsistent with a motive of personal gain. The trial judge was always going to have the responsibility of deciding motive for himself in this case. That in doing so his Honour decided the period of the appellant's involvement as well, was a consequence of the way in

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125 *R v Harris* [1961] VR 236.

126 *Lupoi* (1984) 15 A Crim R 183 at 184.

which the count was framed, the case conducted, and, it may be observed, the parties' invitation that he decide this matter. But, in any event, motive was the real issue of substance for the trial judge at that stage. Whether, once motive was found, the appellant's implication was for some months or for a couple of weeks only, would not, in my opinion, have made a significant difference to the penalty in light of the large quantity of heroin imported into Australia. I would therefore reject the appellant's arguments that the count was defective because there were facts relevant to sentencing that could have been, but were not alleged in it, or because the count could have been drawn with more precision.

173 The appellant also submitted that the procedure, of deciding the facts that his Honour did decide, infringed s 80 of the Constitution. I agree with the reasons of the Chief Justice for rejecting that submission.

Order

174 The appeal should be dismissed.