HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, CALLINAN AND HEYDON JJ

PAUL STEVEN MARONEY APPELLANT

AND

THE QUEEN RESPONDENT

Maroney v The Queen
[2003] HCA 63
11 November 2003
B101/2002

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation:

P J Callaghan for the appellant (instructed by Legal Aid Queensland)

L J Clare with S G Bain for the respondent (instructed by Director of Public Prosecutions Queensland))

CATCHWORDS

Maroney v The Queen

Criminal Law – Supply of dangerous drug – Counselling – Procuring – Where appellant was inmate at correctional facility and arranged for person outside facility to supply him with heroin – Whether criminally liable for the offence of supplying a dangerous drug within *Drugs Misuse Act* 1986 (Q), s 4 and *Criminal Code* (Q), s 7.

Statutes – Construction of statutes – Intersecting statutes of general and particular application – Criminal law – Whether provision enacting substantive offence is incompatible with deeming provision in statute of general application – Provisions for primary and secondary liability for criminal offences – Application of deeming provisions – Approach to statutory intersection – Whether history and suggested policy of the substantive legislation relevant to resolution of the intersection – Whether context determinative of contested statutory construction.

Words and Phrases: "deemed supply", "supplies a dangerous drug to another".

Criminal Code (Q), s 7.
Drugs Misuse Act 1986 (Q), ss 4 and 6.

1 GLEESON CJ, McHUGH, CALLINAN AND HEYDON JJ. The appellant was convicted by a jury after a trial presided over by Chesterman J in the Supreme Court of Queensland. The count on which he was convicted was that he, Nadene Rae Miller and Leslie Anthony Watson "being adults unlawfully supplied a dangerous drug heroin to another who was within a correctional institution". There were similar counts against Miller and Watson. Like the appellant, Watson was convicted, and Miller pleaded guilty.

2 The appellant was an inmate at a gaol. The jury verdict is inconsistent with any conclusion other than that in the course of telephone conversations with Watson the appellant arranged for Watson to supply Miller with heroin with a view to Miller on-supplying it to the appellant in gaol. Watson did supply Miller. However, before Miller effected any on-supply, she discarded a packet containing two syringes, a balloon and the heroin in question, which weighed 0.084 grams.

3 The count on which the appellant was convicted charged him with an offence of "aggravated supply" contrary to s 6 of the *Drugs Misuse Act* 1986 (Q) ("the Act"). Section 6 relevantly provided:

> "(1) A person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime …
>
> (2) For the purposes of this section, an offence is one of aggravated supply if the offender is an adult and –
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> …
>
> (d) the person to whom the thing is supplied is within a correctional institution …"

It was not in contest that the heroin in question was a dangerous drug, that the appellant was within a correctional institution, or that the appellant, Miller and Watson were adults.

4 "Supply" was defined in s 4 of the Act as meaning:

> "(a) give, distribute, sell, administer, transport or supply;
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> (b) offering to do any act specified in paragraph (a);
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> (c) doing or offering to do any act preparatory to, in furtherance of, or for the purpose of, any act specified in paragraph (a)".

5 On the Crown case, the person to whom the drug was supplied within a correctional institution was the appellant. The Crown case thus characterised the appellant as both the person who unlawfully supplied the dangerous drug and as the person to whom it was supplied. The Crown endeavoured to overcome the difficulties which this characterisation created by relying on s 7 of the *Criminal Code* (Q) ("the Code"). Section 7 relevantly provided:

> "(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
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> …
>
> (d) any person who counsels or procures any other person to commit the offence."

There was no dispute, in the light of the jury verdict, that the appellant had counselled and procured the supply of the drug to himself.

6 When the appellant and his co-accused were arraigned, Miller pleaded guilty and Watson pleaded not guilty. The appellant, however, demurred on the ground that the indictment did not disclose any offence. After hearing argument, Chesterman J overruled the demurrer.

7 The appellant appealed to the Court of Appeal against conviction. By majority, the Court of Appeal dismissed the appeal[1].

8 The argument which was advanced by the Crown was as follows. The Crown pointed out that the appellant had conceded that he had counselled and procured Watson to supply the drug to Miller with a view to her supplying the appellant, a person in a correctional institution within the meaning of s 6(2)(d) of the Act. Watson actually supplied Miller with a view to her on-supplying the drug for consumption by the appellant. Watson's supply to Miller was "doing or offering to do any act preparatory to, in furtherance of, or for the purpose of" supply by Miller to the appellant within the meaning of par (c) of the definition of supply in s 4 of the Act. By reason of that extended definition, Watson committed the offence of unlawfully supplying a dangerous drug to the appellant contrary to s 6(1) of the Act. Since the appellant was guilty of counselling or procuring Watson to commit that offence within the meaning of s 7(1)(d) of the

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1 *R v Maroney* [2002] 1 Qd R 285.

Code, the appellant was deemed to have taken part in committing Watson's offence of supplying a dangerous drug to the appellant, and was deemed to have been guilty of that offence.

9 The appellant contended that the Crown argument was flawed, in that s 6 of the Act and s 7 of the Code should not be construed so as to permit the appellant to be convicted of supplying the drug to himself. The appellant stressed the fact that s 6 of the Act required the supply by the offender to be to "another" – not to "any person". It was contended that s 6 of the Act by its terms, which employed the word "another", had "impliedly excluded" the application of s 7 of the Code. Another version of the argument was that s 7 of the Code did not "fit together" with s 6 of the Act and hence "misfired": s 7(1)(d) of the Code dealt with counselling or procuring "any other person to commit the offence", the only relevant offence was the s 6(1) offence of supplying a dangerous drug "to another", and hence s 7(1)(d) of the Code could only apply if the accused was someone other than the person supplied. While the word "supply" had been given an extended meaning, the word "another" had not been given any extended meaning. The legislature had not, in plain terms, made it an offence to acquire or receive a drug, yet it would have been easy to do so. The structure of the penalties created by the Act revealed a milder approach to consumers and possessors of dangerous drugs than it did towards suppliers and traffickers. Had the planned venture been fully implemented, the appellant could have been charged with possession: since the quantity was less than 2 grams, there would not have been a circumstance of aggravation on that ground (s 9(b) of the Act), and the offence would probably have been dealt with summarily. Had the appellant been dealt with summarily, he would have been liable, on conviction, to not more than two years imprisonment by reason of ss 9(d) and 13 of the Act. On the other hand, the offence of supplying heroin was one which could not be dealt with summarily, and the offence of aggravated supply was punishable by a maximum of 25 years imprisonment. Even if the appellant had been charged with possession and tried on indictment, the maximum penalty would have been 15 years imprisonment. In fact he received two years imprisonment and, but for the application of the totality principle, would have received two and a half years imprisonment. Imprisonment for two and a half years was more than he could have received after conviction on summary prosecution if he had actually received the drug and been prosecuted summarily. Finally, the appellant submitted that it was wrong to construe the legislation so widely that it produced the result of convicting the appellant of supplying heroin to himself, as this was artificial and against reason.

10 The arguments of the appellant, which were to some degree accepted by Thomas JA in his dissenting judgment in the Court of Appeal, might have had greater force if the legislation were ambiguous. But it is not ambiguous. The

relevant "offence" for the purpose of s 7(1)(d) of the Code was Watson's conduct in supplying Miller. That conduct was not only the supply of a dangerous drug "to another", it was the doing of an act preparatory to, in furtherance of, or for the purpose of supply to the appellant. It was thus a supply of "a dangerous drug to another", namely the appellant. Watson committed that offence because the appellant had counselled or procured him to do so. The appellant was thus deemed to be guilty of Watson's offence of supplying the appellant. The contention that s 6 of the Act "impliedly" excluded s 7 of the Code, or did not "fit" with it, overlooks or gives insufficient weight to the extended meanings given to "supply" in s 4 of the Act.

11 The fact that this result does not accord with the ordinary meaning of "supply", which requires the supplier to be a different person from the person supplied, is not a reason for not arriving at it. The effect of statutory deeming provisions is often to arrive at results quite different from those which the ordinary meanings of words would produce. One of those results is that a person can be convicted of aiding, abetting, counselling or procuring the commission of a statutory offence even though the statute creating the offence deals only with the liability of the principal offender, and even if the offence is of such a nature that the person convicted of aiding, abetting, counselling or procuring, could not have committed the offence as a principal offender[2]. While the appellant could not, in the circumstances alleged in the Crown case and accepted by the jury, have committed an offence against s 6(1) of the Act considered by itself, since that requires the supplier to be different from the person supplied, he was validly convicted of an offence against s 6(1) of the Act read both with the definition of "supply" in s 4 of the Act and with s 7(1)(d) of the Code.

12 Further, the validity of the Crown's construction is not negated by the fact that the appellant may have received a lesser sentence if the charge had been one of possession rather than supply. (The contention that the appellant would have been given a lesser sentence depends on several highly questionable assumptions about whether or not he would have been tried summarily and what the approach of the sentencing judge would have been if he had, but it is not necessary to debate their validity.) It is common for criminal offences to overlap and for very different sentencing outcomes to be possible within the area of overlap depending on how the Crown chooses to proceed. These differences are not, at least in the present statutory context, determinative of any particular construction. So far as the appellant suggested that the Crown approach had operated harshly against him, or that the Crown construction operated so severely as to indicate

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2 *Giorgianni v The Queen* (1985) 156 CLR 473 at 491-492 per Mason J.

that it was flawed in some way, the suggestion must be rejected. It was probable that Parliament perceived the introduction of drugs into prisons as something that called for wide-ranging prohibitions and serious punishments. That perception supports the Crown construction rather than negating it.

13 That the conclusion for which the appellant contended is unsound is supported by the following consideration. The case advanced to the jury rested on the idea that the appellant persuaded Watson to give Miller heroin which Miller was to give to the appellant once she had entered the gaol as a visitor and encountered him there. On the evidence as described by Davies JA and Thomas JA, an alternative view of the facts was that the appellant agreed with Watson to give Miller heroin; she was to enter the gaol as a visitor, bring the heroin in and give it to another inmate; in turn, that inmate was to give it to the appellant[3]. If that alternative view of the facts were correct, it would have been open to the Crown to outflank the appellant's construction arguments, because on that view of the facts there would have been no identity between the person supplying the drug and the person being supplied. Watson would have supplied Miller; that would be an act preparatory to Miller supplying it to the inmate, and hence would have constituted an act of supply to the inmate; and the appellant would have counselled and procured Watson's act of supply to the inmate, with the result that he was guilty of the crime constituted by that act. The fact that the inmate was to on-supply the drug to the appellant would have been immaterial. In view of the way in which the proceedings had been conducted at first instance, the Crown in this Court declined to adopt this view of the facts, and thus it chose to forgo this method of sustaining the conviction. However, this alternative view of the facts suggests a flaw in the position advanced by the appellant. A contention that s 6 of the Act "impliedly" excluded s 7 of the Code, or that s 6 of the Act did not "fit" with s 7 of the Code, is not attractive when it rests on a process of analysis which treats as decisive the issue whether the person who brings the drug from the outside world into the gaol gives it directly to the accused in gaol or gives it to an inmate in gaol for onwards transmission to the accused in gaol.

14 The appeal should be dismissed.

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3 *R v Maroney* [2002] 1 Qd R 285 at 286 [2] and 291-292 [30].

15 KIRBY J. On the face of things, where an indictment alleges that an accused "unlawfully supplied [a] dangerous drug … *to another*", it is absurd to suggest that the accused might be found guilty of the offence upon proof that he supplied a dangerous drug *to himself*. In the words of Mantell LJ in *R v Barker*[4], in a somewhat similar circumstance[5], such an outcome would "do violence to the English language and be an affront to common sense".

16 Mr Paul Maroney (the appellant) complains that his conviction of an offence against s 6 of the *Drugs Misuse Act* 1986 (Q) ("the Act") involves such violence to the language of the Act, and an affront to the basic principles of the criminal law. The Court of Appeal of the Supreme Court of Queensland[6], by majority, rejected his complaint[7]. Special leave to appeal to this Court was granted by Gaudron and Gummow JJ and myself. Now, a majority of this Court upholds the appellant's conviction.

17 I disagree. Like Thomas JA[8] in the Court of Appeal, I am of the view that, although the appellant was liable to prosecution for other offences, he could not lawfully be found guilty of the offence of which he was convicted. His conviction should therefore be quashed.

The facts, legislation and issues

18 *The background facts*: The indictment found against the appellant and his co-accused, Ms Nadene Miller and Mr Leslie Watson, alleged that, on 2 January 1999, at Brisbane they "being adults, unlawfully supplied the dangerous drug heroin to another who was within a correctional institution"[9]. It was proved that,

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4 Unreported, Court of Appeal (England and Wales), 27 March 1998 cited *R v Drew* [2001] 1 Cr App R 91 at 94 per Waller JA.

5 There the appellant and another man, by a combined effort, obtained indecent photographs of children from the internet and were charged with having "conspired together to distribute indecent photographs of children" contrary to s 1 of the *Criminal Law Act* 1977 (UK) and the substantive offence of conspiring contrary to the *Protection of Children Act* 1978 (UK), which provided "a person is to be regarded as distributing an indecent [photograph] … if he … exposes or offers it for acquisition by *another person*".

6 Davies and McPherson JJA; Thomas JA dissenting.

7 *R v Maroney* [2002] 1 Qd R 285.

8 *Maroney* [2002] 1 Qd R 285 at 298 [52].

9 The Act, s 6. The terms of the Act are set out in the reasons of Gleeson CJ, McHugh, Callinan and Heydon JJ ("the joint reasons") at [3]-[4]. Section 6(2)(b)

(Footnote continues on next page)

at the relevant time, the appellant was an inmate of the Moreton Correctional Centre near Brisbane and that he had telephone conversations with Mr Watson, a former inmate of the prison, with a view to his arranging for Ms Miller to bring some heroin into the prison for the appellant's use. To this end, Mr Watson provided Ms Miller with 0.084 grams of heroin. As the charge was presented, the prosecution's case was that Ms Miller entered the prison as a visitor, intending to supply the drug to another inmate for on-supply to the appellant. However, she was intercepted. The drug did not reach the appellant.

19 *The relevant legislation*: The three accused were charged jointly with the offence of "aggravated supply"[10]. Ms Miller pleaded guilty to the offence. Mr Watson pleaded not guilty but was found guilty by the jury, convicted and sentenced. The appellant demurred to the count[11]. He did so on the basis that the indictment did not disclose any offence recognisable by law concerning him.

20 In support of the demurrer, the appellant's counsel did not dispute that heroin was a dangerous drug; or that the appellant was a person to whom it was to be supplied; or that the appellant was within a correctional institution. Thus, the contest was confined to the suggested impossibility of the appellant's being guilty of an offence expressed in terms of unlawful supply of a dangerous drug *to another*. Because the appellant fell within the section "the person to whom the thing is supplied"[12], he could not, so it was argued, be "a person who unlawfully supplies [it] to another".

21 In answer to the demurrer, the prosecution relied on s 7(1)(d) of the *Criminal Code* (Q) ("the Code") to bring the appellant, by a form of statutory fiction, within the offence with which he was charged[13]. Because (in the case of the appellant) it could be established (and was admitted in the case of Ms Miller) that that "offence [was] committed", the prosecution argued that, by the provisions of the Code, the "parties to offences"[14] extended to include the appellant himself. He was therefore "deemed to have taken part in committing

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has since been amended by the *Justice and Other Legislation (Miscellaneous Provisions) Act* 2002 (Q), Sched 6. The amendment is immaterial.

10 The Act, ss 6(1)(a) and 6(2)(d).

11 *Criminal Code* (Q), s 598.

12 The Act, s 6(2)(d).

13 The terms of s 7 of the Code, so far as applicable, are set out in the joint reasons at [5].

14 This is the heading to Ch 2 of the Code.

the offence". He was deemed "to be guilty of the offence" and could be "charged with actually committing" it because, relevantly, he was a "person who counsels or procures any other person to commit the offence". For the prosecution, this was a simple case of a statutory extension of liability for the substantive offence.

22 *Issues and outcome*: Although it was open to the prosecution to charge the appellant with other offences, the prosecution said that, by the terms of s 7(1)(d) of the Code, it was also open to them to charge him "with actually committing it" and that was what the prosecution did. Any apparent disjuncture between the facts of the case, the identity of the intended recipient of the drug and the charge laid was cured (so it was argued) by the deeming provision extending the liability of parties under the Code[15].

23 This argument convinced the trial judge. He overruled the demurrer. The trial proceeded. The appellant was found guilty, convicted and sentenced for the offence. The majority in the Court of Appeal supported the judge's ruling. It has now gained the support of a majority in this Court. It does not convince me. I must state why.

The primacy of definitions of crimes

24 *Focussing on the definitions of crimes*: The starting point is a reminder of the primacy, in our criminal law and procedure, of the definition of the crime with which an accused is charged. Where, as in this case, the offence specified in the indictment is stated in an Act of Parliament, every word of the statutory prescription is important. That elementary point was the basis of this Court's decision in *Crampton v The Queen*[16]. There, the accused had been convicted of the offence of committing an act of indecency "*with*" another male person[17]. Another person, the victim, was present at the time of the conduct alleged. However, he was not involved in it except as a witness. This Court unanimously held that the offence of committing an act of indecency "with" another required the participation of that other. Accordingly, the evidence relied on to sustain the conviction of the appellant was incapable in law of doing so. His conviction was quashed.

25 Words therefore matter greatly in specifying the elements of criminal offences. They are vital to the identification of the components of statutory offences, such as the offence set out in s 6(1) of the Act. The offence concerned

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15 The Code, s 7(1)(d).

16 (2000) 206 CLR 161.

17 *Crimes Act* 1900 (NSW), s 81A.

is not simply that of unlawful supply of a dangerous drug (without more). Nor is it that of unlawful supply "to a person" (as the section might have been worded). The words of the legislation are plain. "Supply" is not enough. The person accused, who is then "guilty of a crime", must supply the dangerous drug "*to another*". The evidence in the present case was clear. Not only did the appellant not supply the drug in question to another; it was never intended that he would. On the contrary, on the prosecution case (accepted by the jury), he himself was the intended *recipient* of the supply of the drug by others. The crime as charged, particularised and presented at trial did not suggest on-supply by him. That is why, on the face of things, whatever the position of his two co-accused, the appellant could not be a person who "supplies" the drug as well as "the person to whom the thing [was to be] supplied … within a correctional institution". He was the intended *recipient* of the "supply", not the *supplier*.

26 *Supply and aggravated supply*: The text and structure of s 6 of the Act make the foregoing clear. So does the extended definition of "supply" in s 4 of the Act. By that section, "supply" means, amongst other things, to:

> "(a) give, distribute, sell, administer, transport or supply;
>
> (b) offering to do any act specified in paragraph (a);
>
> (c) doing or offering to do any act preparatory to … any act specified in paragraph (a)".

27 Just as "supply" in its ordinary sense postulates a distinction between the person who *supplies* and the person to whom the *supply is made*, it would, in normal parlance, be impossible to talk of a person giving, distributing, selling or transporting a drug to himself. Although a person could "administer" a drug to himself, this would not ordinarily be considered a form of "supplying" a drug[18]. Therefore, the central postulate of the offence specified in s 6(1) of the Act appears inconsistent with rendering the appellant liable for the offence as defined.

28 This view of the offence is given added significance in a case of "aggravated supply" such as the present where an element in the offence is the existence of the recipient "within a correctional institution". The description of that person as one "to whom the thing is supplied" expressly juxtaposes the recipient and the supplier. It distinguishes the recipient from "a person who unlawfully supplies" the drug. In short, it is crucial to the definition of the crime provided by s 6(1) of the Act (and particularly the aggravated version in s 6(2)(d)) that the supplier and the person supplied must be different persons.

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18 *Maroney* [2002] 1 Qd R 285 at 290 [22] per McPherson JA.

29 *Policy of the legislation*: The policy of the Act, apparent from its terms, is relevantly to target people *outside* correctional institutions and to punish them severely for attempting to breach the security of such institutions with dangerous drugs. Breaches of prison regulations, disciplinary offences and other crimes will be committed by prisoners within a correctional institution who receive, or attempt to obtain, for their own or other purposes, dangerous drugs. But that is not the purpose of s 6 of the Act. That section is addressed to suppliers and specifically, in aggravated cases, to suppliers from outside to persons within a correctional institution.

Secondary participation in the offence is excluded

30 *Old cases on secondary liability*: In the Court of Appeal, and in this Court, the prosecution sought to outflank these arguments by relying on s 7(1)(d) of the Code which provides for the liability of secondary offenders. It was accepted that the Act was to be read and construed with the Code. On that basis, it was open to the prosecution to attempt to enlist s 7 of the Code. The question in this appeal is whether that attempt succeeded.

31 It is fundamental to the interrelationship of a statutory provision creating a particular offence, and a provision such as s 7 of the Code, that a question is presented in each case as to whether the language, nature or policy behind the relevant offence is compatible with the attempt to enlarge the operation of that offence so that it applies to secondary parties who do not, as such, fall within the primary definition of the offence.

32 In *Mallan v Lee*[19], Dixon J pointed out that, in each case where a person is alleged to be liable under a statutory provision which in general terms expands the parties to a criminal offence, it is a question of construction as to whether the provision can achieve that result, having regard to the definition of the offence. In *Mallan*, a company had been charged with contravening s 230 of the *Income Tax Assessment Act* 1936 (Cth) ("the Tax Act"). The appellant, as its public officer, had been charged with knowingly and wilfully understating the amount of the company's income. As the secondary offender, he was said to be liable by virtue of s 5 of the *Crimes Act* 1914 (Cth). Such liability was alleged on the basis that he "by act [was] directly … knowingly concerned in … the commission of [the] offence".

33 As Dixon J pointed out in *Mallan*, the starting point for analysis is the one that I have insisted upon in this case. It involves close attention to the exact provisions of the offence in question. In that case, Dixon J (and the other members of the Court) did not consider that there was an incompatibility

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19 (1949) 80 CLR 198.

between the offence imposed on the company under the Tax Act and the secondary offence alleged against Mr Mallan. The company had to act by its officers. There was therefore no contradiction between the offence and the statutory extension. But Dixon J, in oft-repeated words, identified the problem that has to be resolved in cases of this kind[20]:

> "[I]f the interpretation were placed on s 230(1) [of the Tax Act] opposed to that which I have adopted, I should think it would equally follow that s 5 of the *Crimes Act* could not be applied to make the public officer liable under that provision. For it would mean that by s 230(1) the legislature had made the company responsible as an offender for the knowing and wilful understatement of income by the public officer to the exclusion of any such liability of the public officer. If that conclusion were reached it would be impossible to make him liable for the same conduct under a provision dealing with accessories. There is a number of cases which show that the application of sections dealing with aiding and abetting may be excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created: cf *R v Tyrrell*[21]; *Morris v Tolman*[22]; *Ellis v Guerin*[23]."

34 In *Tyrrell*, the Court of Crown Cases Reserved held that it was not an offence for a girl, less than sixteen years of age, to aid and abet a male person to commit, or to incite him to commit, the misdemeanour of having unlawful carnal knowledge of her contrary to the criminal law[24]. Lord Coleridge CJ (with the concurrence of the other judges) said that it was impossible that the Act, which was itself silent about aiding or abetting, soliciting or inciting, could have intended "that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves"[25]. The conviction in *Tyrrell* was therefore quashed.

35 However, *Morris* concerned an offence against traffic law stated to be one committed by a person in respect of whom a licence for the use of a vehicle had been issued. It was held that such an offence could not be extended so as to

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20 (1949) 80 CLR 198 at 216.

21 [1894] 1 QB 710.

22 [1923] 1 KB 166.

23 [1925] SASR 282.

24 *Criminal Law Amendment Act* 1885 (UK) (48 & 49 Vict c 69), s 5.

25 [1894] 1 QB 710 at 712.

apply to another person for aiding and abetting the licensee where that other person was not himself the holder of a licence.

36 Lord Hewart CJ and the other judges of the King's Bench Division emphasised that the resolution of the point was not to be found in any general rule that acquittal of a principal rendered it impossible for another person to be convicted of aiding and abetting[26]. Each case was to be decided by analysis of the intersection of the propounded statutes: the one creating the offence and the other extending liability to secondary persons for aiding and abetting. The answer to the question depends on whether the words of the former were wide enough to cover the liability of the latter, and was primarily to be found in an analysis of (and by inference of the specificity in) the provision creating the primary offence[27]. In what terms is it created? Upon whom, by its language, does liability for the offence fall? Are its terms apt for extension to a person said to be guilty of aiding and abetting?

37 *Intersecting statutes – the principle*: The foregoing line of authority is well known. In truth, it reflects nothing more than an approach to the construction of intersecting statutes that are respectively of particular and general operation. The emerging principles were reconsidered by this Court in *Giorgianni v The Queen*[28]. That case concerned the scope of the liability of the lessor of a truck for the offence of culpable driving by his employee that caused death to a third party on the alleged basis that the lessor had aided, abetted, counselled or procured the employee in question to drive the truck in a dangerous manner. It was claimed that the lessor was liable because he knew, when he procured the use of the truck by the driver, that its brakes were defective, could fail and might then involve driving in a manner dangerous to the public.

38 A preliminary question arose in *Giorgianni* as to whether the offence under the *Crimes Act* 1900 (NSW) ("the Crimes Act"), being expressed in terms of *driving* at a speed or in a manner dangerous to the public, was apt to extend to another person, such as the lessor of the truck, who was not actually the driver at any relevant time. That question fell to be decided by the intersection of the provisions of the Crimes Act expressing the offence of culpable driving[29], and the rules of the common law as to aiding and abetting given effect by another

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26 *Morris* [1923] 1 KB 166 at 169.

27 [1923] 1 KB 166 at 171-172 per Avory J.

28 (1985) 156 CLR 473.

29 s 52A. See *Giorgianni* (1985) 156 CLR 473 at 477-478.

provision of the Crimes Act[30]. The latter provision represented a less elaborate statement of secondary liability than that contained in s 7 of the Queensland Code in issue in this appeal.

39 In *Giorgianni*, this Court concluded that there was no incompatibility between the two provisions. It held that the provision of s 351 of the Crimes Act could extend liability under s 52A of that Act to persons who were guilty of aiding and abetting the offence created by the former. In examining the arguments that had been addressed to the point, Mason J explained the issue in a way that is useful to the resolution of the problem arising in the present appeal. His Honour said[31]:

> "It has been recognized that provisions such as s 351 do not themselves create substantive offences but are declaratory of the common law and procedural in nature …
>
> In *Mallan v Lee*, Dixon J observed that 'the application of sections dealing with aiding and abetting may be excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created'. A similar approach must be taken to apply to the exclusion of the doctrine of secondary participation at common law. It may, therefore, be inapplicable to a person of a class whom the substantive offence is designed to protect[32] or in respect of whose participation some lesser punishment is imposed[33]. It may also be inapplicable where the substantive offence itself involves some element of secondary participation[34]. And in *McAteer v Lester*[35], a legislative intent to exclude responsibility for secondary participation was found."

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30 s 351 which stated: "Any person who aids, abets, counsels, or procures, the commission of any misdemeanour, whether the same is a misdemeanour at Common Law or by any statute, may be indicted, convicted, and punished as a principal offender." See *Giorgianni* (1985) 156 CLR 473 at 475.

31 *Giorgianni* (1985) 156 CLR 473 at 490-491 (citations omitted).

32 Citing *Tyrrell* [1894] 1 QB 710; *R v Whitehouse* [1977] QB 868; cf *United States v Annunziato* 293 F (2d) 373 at 379 (1961).

33 Citing *Guerin* [1925] SASR 282; cf *People v Pangelina* 117 Cal App (3d) 414 at 420-421 (1981).

34 Citing *Jenks v Turpin* (1884) 13 QBD 505 at 526; *Carmichael & Sons (Worcester) Ltd v Cottle* [1971] RTR 11 at 14.

35 [1962] NZLR 485.

40 It is inherent in the concept of secondary liability, so explained, that a person may be convicted on the basis of aiding, abetting, counselling or procuring the commission of a statutory offence although the statute creating the offence "deals only with the liability of the principal offender" and although the offence is "of such a nature that the person could not have committed it as a principal offender"[36]. It follows that what is required, in each case, is a judgment concerning the interaction of the law creating the primary offence and the law giving rise to secondary liability. The problem inherent in resolving such an issue is one of longstanding[37]. As the decisions show, the resolution of the problem in each case depends upon a close analysis of the law creating the principal offence. It is not to be resolved mechanically, formalistically or by a purely verbal approach. It is one that requires an evaluation of the relationship between what is typically a *special* and *particular* legal offence and *general* provisions, deliberately cast in *broad* language, so as to expand, in appropriate cases, the liability of secondary parties.

41 *Limits to fictions – legislative consistency*: In the old days, the resolution of such problems was explained in terms of the fiction of the imputed "intention" of the legislature. Nowadays, we realise that the task is somewhat more complex. Piling fiction upon fiction is hardly a sensible way to resolve questions of this kind.

42 Against the background of this review of authority, it must be accepted that s 7 of the Code is to be given a large and ample interpretation. This will pay regard to the language of s 7 itself and to the social purpose that it serves, namely to expand the liability of secondary parties rendered criminally liable for their conduct in enabling, aiding, counselling or procuring other offenders to commit the principal offence. However, in applying the facultative provisions of s 7 of the Code, it is always necessary to start with the act or omission that constitutes the "offence" in question, to see whether, as expressed, these are apt to render the secondary party "guilty of the offence". If there is a relevant incompatibility between the primary offence, as it is expressed, and the attempted expansion of liability to additional parties by a general formula, the particularity of the primary offence will exclude the fiction enacted by the provision for the liability of other persons. This will be so because "the nature of the substantive offence or the general tenor or policy of the provisions by which it is created" indicate, with sufficient clarity, that, in the given circumstances, the fiction cannot apply to the primary offence.

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36 *Giorgianni* (1985) 156 CLR 473 at 491-492.

37 Going back to Coke 3 *Co Inst* 59 and Hale 1 *Pleas of the Crown* 613, 614, 704 cited *Giorgianni* (1985) 156 CLR 473 at 492.

43 When, therefore, I start with the essential character of the primary offence in question in this case as being that of "supply" of a dangerous drug "to another" (and in the particular form of aggravated offence charged against the appellant, namely supply to that other "person [who] is within a correctional institution") the attempt to render the *recipient* who is within that institution the person actually committing the offence of *supply* cannot succeed. This is so because of the way in which the offence is defined in the Act. In textual terms, the appellant cannot be deemed "to have taken part in committing the offence" and to be "guilty of the offence" because an essential element of "the offence" is that the offender must be the *supplier* and not the *recipient* of the dangerous drug. By the terms of the offence, the offender cannot be placed on both sides of the equation. In accordance with the Act, he cannot at once be the person who "supplies" and "the person to whom the thing is supplied" within the institution. No general aiding and abetting provision can change this fundamental character and expression of the offence. The *particularity* of s 6 of the Act excludes the engagement, in the appellant's case, of the *general* provisions of s 7 of the Code.

The Act's distinction of offences of supply and possession

44 *Differentiating offences of supply and possession*: The view of the legislation that I favour is further reinforced by a consideration of the history and purposes of the Act, which only Thomas JA considered in the Court of Appeal[38]. As his Honour there pointed out, the provisions of the Act must be understood against the background of the legislative progenitors dealing with offences involving illegal drugs.

45 Under s 130 of the *Health Act* 1937 (Q) the Queensland Parliament prohibited the possession of identified drugs without a licence. Later, a separate offence was introduced to punish supply of such drugs. Originally, the same maximum penalty was provided both for *possession* and *supply*. However, by 1971, the Queensland Parliament began to draw a distinction between supply and possession. As Thomas JA pointed out, the purpose of that distinction (reflected at the same time in other Australian jurisdictions) was to treat more severely the act of *supply* to other persons when compared to the *possession* and *use* of illegal drugs by persons who were, as one Queensland Minister put it, "the little people in this problem [to be regarded] as being socially ill"[39].

46 The distinction so drawn survived when, in 1986, the Queensland *Health Act* was replaced as the vehicle for such offences, by the Act in question in this

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38 *Maroney* [2002] 1 Qd R 285 at 296-297 [46]-[49].

39 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1971 at 3036 (Hon J Melloy).

case. A sharp differentiation was then drawn between traffickers and suppliers (on the one hand) and consumers or possessors (on the other)[40].

47 *Verbal and purposive construction*: It is, of course, possible to read the legislation under consideration in this appeal as nothing more than lines of words on a statute book. But when the Act is read against the background of this deliberate, and expressed, legislative purpose, the word "supplies" in s 6(1) and the aggravated offence of "supply" to a person within a correctional institution in s 6(2), take on quite a different complexion. The target and purpose of Parliament, in enacting the provisions, is to address particular sanctions against those in society who are proved responsible for *supplying* drugs to other (mostly dependent) persons and especially where such persons are within a correctional institution. There are other laws, dealing with possession or attempted possession, that are designed to address the criminal liability of those people in the community who are not guilty of *supply* as such, that is, not guilty of supplying a dangerous drug *to another*.

The heavy differential in punishments for supply

48 *Punishment for possession offences*: An indication that this is how the laws on dangerous drugs were intended to operate in Queensland, in the case of a person in the position of the appellant, is made clearer by considering his position on the hypothesis that Ms Miller had been able (or allowed) to complete her mission to deliver the heroin to him. In such a case, the appellant could, and as the Court was informed would, ordinarily have been charged with the offence of *possession* of 0.084 grams of heroin. That offence is not an "aggravated" one under the Act. There is no offence that renders possession *within* a correctional institution an "aggravated" offence. Nor would that quantity of the drug have been sufficient to attract the circumstances of aggravation that attach to the possession of more than two grams of heroin[41]. On this footing, the appellant would not have been dealt with for an indictable offence of possession. He would, instead, have been exposed to an offence punishable on summary prosecution, liable on conviction to imprisonment for no more than two years[42]. Because of the sterner view taken of *supplying* heroin to *another* person, the Queensland Parliament has provided that such an offence could not be dealt with summarily. In the case of "aggravated *supply*", it renders the accused liable, upon conviction, to a maximum punishment of 25 years imprisonment. This grave penalty is to be compared with the maximum penalty available for

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40 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 August 1986 at 280 (Hon W Gunn), 354 (Hon T M Mackenroth).

41 The Act, s 9(b).

42 The Act, ss 9(d) and 13.

possession of the given quantity of heroin under any circumstance, namely 15 years imprisonment.

49 *Punishment for supply offences*: In the result, the appellant, upon his conviction, received a sentence of two years imprisonment. However, the comparative modesty of that sentence is irrelevant to the present point. As the judge said in sentencing the appellant, but for the totality principle, he would have imposed a sentence of two and a half years imprisonment. This is more than the appellant could have received, on summary prosecution, if he had actually obtained *possession* of the heroin carried by Ms Miller and was prosecuted for that offence. It should not depend on the vicissitudes of a sentencing judge's discretion to impose a sentence such as was imposed in this case. The maximum is fixed by law.

50 It is true, as the joint reasons in this Court observe[43] that criminal offences often overlap and that different sentencing outcomes are possible, depending on the offences that the prosecution elects to charge[44]. But, with respect, this misses the appellant's point. He relies on the scheme and structure of the Act, and the differential penalties for offences provided by its terms, to demonstrate the clear distinction drawn by the Queensland Parliament (as by others within Australia) between offences of *possession* (or acts ancillary to possession for the offender's own use) and of *supply to others*, aggravated where such supply is to another person who is in a custodial institution.

51 *Discerning the legislative scheme*: It is a flaw of reasoning to allow purely textual and verbal considerations to overwhelm the critical distinction that flows through the whole approach of the Act and of the offences that it creates and the punishments for which it provides. To the extent that there is ambiguity, this Court should prefer the construction that upholds such a distinction. It should do so because the distinction is basic to the scheme of the Act and the imputed purpose of the Parliament in enacting it. It is also an approach more conducive to human freedom and individual human dignity, which is doubtless why the Queensland Parliament drew the distinction between possession and supply in the first place. This is not to fall into the error of treating the Act as legislation designed, as such, solely for the protection of persons such as the appellant (by analogy to the consideration voiced about the offence of carnal knowledge in *Tyrrell*[45]). It is true to say that the overall objective of the Act is to

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43 Joint reasons at [12].

44 A recent instance is *King v The Queen* (2003) 199 ALR 568.

45 [1894] 1 QB 710 at 712. See above at [34].

protect the public[46]. Nevertheless, the Act does this in a sharply differentiated fashion. To interpret its provisions, by enlisting the fiction in s 7 of the Code (as the majority favour), ignores an important textual distinction repeatedly drawn in the Act. It does so in a way that is unnecessary. In my view, it is contrary to the statutory language, legal principle and the policy embraced by the legislature which we should uphold, not override.

Decided cases on offences involving bilateral transactions

52 The foregoing approach is also consistent with that adopted by other courts in a number of cases involving a suggested liability for offences concerned with bilateral transactions expressed, in terms, as relating to another party. In his reasons in the Court of Appeal, Thomas JA listed these cases[47]. They include *Guerin*[48], a case cited with apparent approval by Dixon J in *Mallan*[49] and by Mason J in *Giorgianni*[50]. A fair review of these cases confirms that the conclusion that I favour is one that is more conformable to the approach of courts dealing with analogous problems than that now adopted by the majority of this Court which, with respect, simply looks at the text of the intersecting statutes without considering the wider context of the way in which the Act was intended to operate differentially as between *supply* and *possession* offences.

Distinguishing the inapplicable case of on-supply

53 The suggested point of differentiation based on the hint that Ms Miller would supply the dangerous drugs to an inmate as an intermediary (with a view to on-supply to the appellant) is unpersuasive. It is not the way the indictment against the appellant was framed. It is not the way the prosecution case was particularised. It is not the way the case was presented at trial. It envisages a different type of offence which should be dealt with when it arises. The offences committed by an inmate in a correctional institution, who is a "mastermind" of a drug chain within the institution, is quite different from the offence found against the appellant and which the evidence supported. He wanted the drug for his own possession and use. What the offence would be in completely different evidentiary circumstances should await such a case. It was not this one.

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46 *Maroney* [2002] 1 Qd R 285 at 287 [7] per Davies JA.

47 *Maroney* [2002] 1 Qd R 285 at 294-296 [38]-[45].

48 [1925] SASR 282.

49 (1949) 80 CLR 198 at 216.

50 (1985) 156 CLR 473 at 491.

Ambiguity and penal statutes

54 *Giving effect to lawful fictions*: The foregoing represents the essential reasons why the provisions of s 7 of the Code do not assist the prosecution to overcome the apparent absurdity of rendering the appellant liable for actually committing the offence of supplying a dangerous drug to another person, namely himself. However, there is one final argument that should be mentioned. It reinforces my conclusion.

55 Section 7 of the Code contains a fiction. So much is indicated by the fact that it is expressed in terms that "deem" specified persons to have "taken part in committing the offence and to be guilty of the offence". Subject to any constitutional inhibition (and none was relied upon in this appeal) it is competent for a Parliament of a State to create fictions and to render persons liable in accordance with their terms.

56 Section 7 of the Code is a true fiction. It is not a statement of factual equivalence or conclusions[51]. In *Muller v Dalgety & Co Ltd*[52], Griffith CJ pointed out that there was little point in complaining that a "statutory fiction" expanded the meaning of a term beyond that which the term ordinarily designated[53]. When "deemed" is used in such a way, that is the very purpose of the fiction and courts must give effect to it, as frequently they do[54].

57 Nevertheless, it is one thing for a legislature to create statutory fictions in matters of civil law or to adopt them so as to resolve incongruities that would arise whichever way the legislation provided[55]. It is quite another to attempt to do so in legislation, the effect of which is to impose serious criminal liability with large penal consequences. In such a case, it is conventional for the courts to demand that the fiction be clear and unambiguous. Of course, legislation can so provide. Professors Pearce and Geddes cite the case of s 2 of the *Poultry Act* 1968 (NZ) which stated that: "For the purposes of this Act, 'day old poultry' shall

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51 cf *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65.

52 (1909) 9 CLR 693 at 696.

53 *Ex parte Walton; In re Levy* (1881) 17 Ch D 746 at 756-757; *Hill v East and West India Dock Co* (1884) 9 App Cas 448 at 456.

54 *Coates v Commissioner for Railways* (1960) 78 WN (NSW) 377 at 384; *Ex parte Armstrong; Re Hughes* (1962) 80 WN (NSW) 566 at 568 per Walsh J; *Carson v Department of Environment and Planning* (1985) 3 NSWLR 99 at 111-112.

55 *Bullock v Kennedy* (1988) 12 NSWLR 200 at 206.

be deemed to be any poultry of an age of seventy-two hours or less"[56]. There are many such clear fictions. Courts will give effect to them, despite any apparent absurdity.

58 *Ambiguity and penal statutes*: However, in the present case there is an ambiguity because the "offence" of which the appellant is said to be "guilty", by force of the "deeming" provision in the Code, is one which, in its precise terms, he could not himself actually commit. Upon this view, it is open to interpret s 7(1) of the Code, in so far as it extends liability to other persons, as meaning all other persons who could, in law, be guilty of the offence, being all persons other than "the person to whom the thing is supplied".

59 Such an interpretation would still leave s 7(1) of the Code with plenty of work to do. As the courts well know, it is in the nature of the chain for the supply of dangerous drugs that commonly, even typically, several persons may be involved in enabling, aiding, counselling or procuring the commission of the offence provided for in s 6 of the Act. It is not, therefore, as if the interpretation urged by the appellant renders s 7(1) of the Code inapplicable to expand the ambit of operation of s 6 of the Act in proper cases. All that it does, on the appellant's construction, is to prevent the expansion to a case which is fundamentally inconsistent with the nature of the offence of "supply to another" and even more so with the offence of "aggravated supply" where that other must be a person, like the appellant, within the correctional institution in order for the aggravating element to be established.

60 Because there is an ambiguity, I agree with Thomas JA in the Court of Appeal that "[i]t is not the court's function to stretch the net of penal statutes to their widest arguable limits so as to produce so artificial a result"[57]. With his Honour, "I do not think it appropriate to apply the legal fiction of s 7 of the Code to the legal fiction of deemed supply under ss 4 and 6 of the [Act] in order to arrive at the curiously convoluted charge that is formulated" in the indictment presented against the appellant[58].

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56 Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) at 116 [4.34].

57 *Maroney* [2002] 1 Qd R 285 at 298 [50].

58 *Maroney* [2002] 1 Qd R 285 at 298 [50].

Different perspectives in statutory interpretation

61 *Arguability of statutory constructions*: In *News Ltd v South Sydney District Rugby League Football Club Ltd*[59], McHugh J said, correctly in my view:

> "Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong. Frequently, there is simply no 'right' answer to a question of construction."

62 The fundamental difference between the view taken by the majority in the Court of Appeal and in this Court and that favoured by the dissentients in both courts can, I think, be rationally explained. Ultimately, it arises out of a different approach to the task of statutory construction. Differences of approach on such matters may be affected by social, cultural, psychological, and even physiological differences. It is a commonplace in science that different observers view precisely the same subject matter and perceive the same external phenomena in different ways. There have been celebrated instances where different capacities in this regard have had important consequences[60].

63 *Ultimately, context is all*: However that may be, different judicial approaches to statutory construction appear to be influenced by differing attitudes to the perception of context. As Lord Steyn said in *R (Daly) v Secretary of State for the Home Department*[61]: "In law context is everything". Where the lens of interpretation is narrowed to particular words, so as to derive meaning from those words, the result will often be different from that which follows where the lens is broadened and the words are seen in a wider field of perception. Generally speaking, the trend of courts in recent times has been away from purely textual interpretation, towards contextual or purposive interpretation. Each of these approaches, at different stages of legal history, has enjoyed judicial favour.

64 With respect to those of a differing view, I favour the contextual approach. I do so because I regard it as the way that the human mind normally unravels problems expressed in language. In statutory interpretation (which is in issue in this appeal) this approach can invoke additional support. It is an approach more likely to achieve the overall legislative and social purposes of the lawmaker than one that confines the judicial interpreter to words and text. Moreover, it is one

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59 (2003) 77 ALJR 1515 at 1524 [42]; 200 ALR 157 at 168.

60 Hodges, *Alan Turing: The Enigma*, (2000).

61 [2001] 2 AC 532 at 548 [28].

more likely to lead to clearer and simpler laws – generally a desirable objective for judicial activity[62].

Conclusions and orders

65 It follows that the appellant was not guilty of the offence of unlawfully supplying a dangerous drug to another, namely himself. In particular, he was not guilty of "aggravated supply", as that offence is defined in s 6 of the Act. The provisions of s 7 of the Code do not accomplish the prosecution's objective, by the fiction expressed in that section. That section cannot overcome the statutory impossibility of rendering the appellant at once the "supplier" and the "person to whom the thing is supplied".

66 Any suggestion that such an odd result can be achieved by verbal dexterity applied to s 7 of the Code should be resisted. It is contrary to the fundamental postulates of the offence charged as defined by the Act. It is contrary to the established approach to the interaction of such an offence and the aiding and abetting provisions of the Code. It is contrary to the structure and policy of the Act and the differentiation which the Act draws between supply and possession offences. It is contrary to the trend of authority on like questions in this and other courts. It is inconsistent with the principle requiring clarity for the assignment of criminal liability where, on the face of things, liability does not attach.

67 The appellant has served the sentence imposed upon him in respect of the subject offence. However, that leaves his conviction for the present offence standing. It is a conviction for an offence rendering the appellant liable to a penalty appropriate to a very serious case of "aggravated supply". It is unlikely, in the circumstances, that the appellant would be retried for any of the offences that he might have committed. Subject to any remedies that might be available to the appellant, that would be a matter for the Director of Public Prosecutions (Q) to decide.

68 The orders that I favour are that the appeal be allowed; the judgment of the Court of Appeal of the Supreme Court of Queensland be set aside; and in lieu thereof, it be ordered that the appeal to that Court be allowed, the appellant's conviction quashed and a verdict of acquittal entered.

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62 Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95 at 110.