HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HEYDON JJ

ANTHONY JOHN PINKSTONE APPELLANT

AND

THE QUEEN RESPONDENT

Pinkstone v The Queen
[2004] HCA 23
20 May 2004
P47/2003

ORDER

Appeal dismissed.

On appeal from Supreme Court of Western Australia

Representation:

S A Shirrefs SC with G W Massey for the appellant (instructed by Gary Massey & Associates)

R E Cock QC for the respondent (instructed by Director of Public Prosecutions for Western Australia)

CATCHWORDS

Pinkstone v The Queen

Criminal law – Supply of prohibited drug – Where appellant sent prohibited drug by air courier from Sydney to Perth – Where package intercepted by police in Perth – Where police agent handed package to intended recipient – Whether supply under *Misuse of Drugs Act* 1981 (WA).

Criminal law – Innocent agency – Whether acts of courier attributable to appellant – Whether acts of police agent attributable to appellant – Whether actual receipt by intended recipient necessary for "supply" under *Misuse of Drugs Act* 1981 (WA).

Constitutional law – State Supreme Court exercising federal jurisdiction – Offence committed in Commonwealth place – Trial in Western Australia – "Trial on indictment of any offence against any law of the Commonwealth … shall be held in the State where the offence was committed" – Whether offence committed in Western Australia for the purposes of s 80 of the Constitution.

Constitution, s 80.
Commonwealth Places (Application of Laws) Act 1970 (Cth).
Criminal Code (WA), s 12.
Misuse of Drugs Act 1981 (WA), ss 3(1), 6(1)(c).

1 GLEESON CJ AND HEYDON J. Following a lengthy trial in the Supreme Court of Western Australia before Roberts-Smith J and a jury, the appellant was convicted of two offences against the *Misuse of Drugs Act* 1981 (WA) ("the Drugs Act") as applied by the *Commonwealth Places (Application of Laws) Act* 1970 (Cth). It is only the first of those offences that is presently relevant. The offence, as charged, was that, on 7 October 1999 at a Commonwealth place, namely Perth airport, the appellant supplied a prohibited drug, methylamphetamine, to another. The other person referred to in the charge was a co-accused, Yanko, who was also convicted. The appellant appealed against his conviction to the Court of Criminal Appeal of Western Australia. The appeal was, by majority (Murray and Wheeler JJ, Rolfe AJ dissenting), dismissed[1]. The appellant now appeals to this Court. His contention in this Court appears to be more modest than that in the Court of Criminal Appeal, where the dissenting judge would simply have quashed the conviction. The appellant now argues that, properly understood, his offence, on the jury's findings, was one, not of supply, but of attempted supply. The corollary appears to be that the attempt occurred in Perth. That is implicit in the suggestion that there should be substituted a verdict of guilty of attempt to supply, which carries a lesser penalty.

2 The argument on which the appellant relies was not raised at the trial. The legal point in issue, therefore, is not reflected in the trial judge's directions to the jury, and there is no analysis by the trial judge of the detail of the evidence forming the factual basis for the point. No such analysis was requested by trial counsel. In brief, the point is that, by reason of certain actions of the police at Perth airport on 7 October 1999, the methylamphetamine was delivered to Yanko by the police and not by or on behalf of the appellant, and that there was no act of supply at Perth airport on 7 October 1999 for which the appellant was criminally responsible as a principal offender.

3 The relevant facts, and legislative provisions, are set out in the reasons of McHugh and Gummow JJ. We shall refer to them only to the extent necessary to explain our reasons. As will appear, we regard it as relevant to add to what McHugh and Gummow JJ have said of the facts in certain respects.

4 The trial judge's remarks on sentence record that, before 1999, the appellant had a substantial criminal history, including a history of drug offences. That probably explains why his conduct the subject of present concern, some of which occurred in Perth, and some of which occurred in Sydney, was the subject of extensive police surveillance.

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1 *Pinkstone v The Queen* [2003] WASCA 66.

5 The evidence established beyond any question that on 7 October 1999, the appellant, who was then in Sydney, consigned at Sydney airport, for transport to Perth as air cargo, by Ansett Australia, two boxes. One box, which arrived at Perth airport on the same evening, and was collected by Yanko, was found to contain methylamphetamine. The substantial issue at the trial was whether the appellant knew that the box contained drugs. The defence case was that the appellant believed it contained jewellery. That being the way the case was fought, it is not surprising that the trial judge, without any complaint from counsel, dealt in a somewhat cursory manner with the question of what constituted an act of supply for statutory purposes. He said:

> "The word 'supply' here has a very broad meaning. 'Supply' includes to deliver, dispense, distribute, forward, furnish, make available, provide, return or send. In ordinary language, it means to give or provide to someone something that they need or they want. Let us say I see an advertisement for something being marketed by a person in Queensland and I ring him up and order the product ...
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> The person sends the product to me by air cargo. He packages it up and hands it to an airline cargo clerk for delivery to me. That is not a supply to the airline clerk because it is not being given to the airline clerk to do with it either what he wants or what someone else has instructed him to do with it. It is being given to him so he can have it delivered in accordance with the seller's purpose in having it delivered to me ...
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> When the item arrives in Perth it is either delivered to my address or I collect it. As a matter of law, once I have received it, that is a supply of the item to me by the seller in Queensland because I have physically received it and he has sent it to me because I wanted it or needed it.
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> In this case, to prove this element the Crown would have to satisfy you beyond reasonable doubt that Pinkstone sent the methylamphetamine to Yanko because Yanko wanted it and that Yanko actually physically received it."

6 The trial judge went on to refer briefly to the evidence, not disputed, that the appellant consigned the box in question by air cargo in Sydney, and that it was collected at Perth airport by Yanko.

7 The appellant now submits that the question of what constituted the act of supply, and the appellant's criminal responsibility for the act, was more complicated, both factually and legally, than recognised in those brief directions. The appellant is entitled to rely on the technical point he now raises; but he must be prepared to be comprehensively technical. He may find himself out of the frying pan into the fire.

8 The argument for the appellant begins with the premise that, in order to establish a supply by the appellant to Yanko at Perth airport on 7 October 1999 of the box and its contents, it was necessary for the prosecution to prove that Ansett delivered the box to Yanko. It is accepted that such delivery, if it occurred, would make the appellant criminally responsible as a principal for the act of supply, for the reason that Ansett was acting in all respects as what is sometimes termed an "innocent agent"[2]. Ansett, in what it did in receiving the air cargo, transporting it to Perth airport, unloading it, processing it, and (let it be assumed) handing it over to Yanko, was acting as the instrument of the appellant. It was not in any respect complicit in the criminal conduct. "[I]f an offence is committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal".[3] Such an approach would be broadly consistent with the way in which the trial judge left the case to the jury, although he did not put it so precisely. Indeed, the trial judge, having told the jury of the various kinds of conduct that might constitute supply, did not specify the particular kind that was relied upon. Although he did not mention s 3(1) of the Drugs Act, clearly he was referring to it when he told the jury of the "very broad meaning" of "supply". What he said simply assumed, correctly, that the appellant as consignor was responsible for the acts of Ansett engaged in innocently, and pursuant to its contract with the appellant. The judge's statement that the prosecution had to prove that Yanko actually physically received the box containing the drugs did not specifically address the question of the identity of the person or corporation from whom it was received, but what preceded that statement assumed that an article of air cargo was being delivered to the consignee on behalf of the consignor.

9 The next step in the appellant's argument is that the cargo was not delivered by Ansett to Yanko; it was delivered by the police officers, who had intercepted the delivery at Perth airport, taken possession and control of the cargo, and handed it over to Yanko, acting independently of Ansett and as a matter of their own volition. The police, it is said, were not "innocent agents". It was their voluntary intervening act that brought about what the trial judge described as the actual physical receipt of the cargo by Yanko[4].

10 If it had been necessary for the prosecution to prove actual delivery of the cargo to Yanko by someone for whose conduct the appellant was criminally

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2 *White v Ridley* (1978) 140 CLR 342; *R v Franklin* (2001) 3 VR 9.

3 Archbold, *Criminal Pleading, Evidence and Practice*, (2004), § 18.7.

4 cf *White v Ridley* (1978) 140 CLR 342 at 353-355 per Stephen J; *R v Hewitt* [1997] 1 VR 301; Smith (ed), *Smith & Hogan Criminal Law*, 10th ed (2002) at 143.

responsible as a principal, and if it were correct to say that the police had taken exclusive possession and control of the cargo from Ansett, and that it was the police and not Ansett who transferred possession to Yanko, then we would accept that the appellant has a good point, so far as it goes. In that case, an element of the offence with which the appellant was charged would be missing. He did not deliver the cargo to Yanko personally, and the act of delivery would have been completed by persons who were acting independently of him even though, in one respect, they were fulfilling his intention that Yanko should receive the cargo. We would not consider it necessary, in order to reach such a conclusion, to invoke any principle of public policy relating to the conduct of police officers[5]. Rather, we would rest the conclusion on the basis that, upon the above hypotheses, the conduct of the police officers is not to be imputed to the appellant because they were acting independently of him, and therefore there is a missing element of the offence charged.

11 There is, however, more to it than that, both factually and legally.

12 What went on between Ansett and the police at Perth airport on 7 October 1999 was not as simple as the contention summarised above would suggest. In particular, and notwithstanding the acceptance in cross-examination by the police officers of the language of cross-examining counsel, who put to them that they intercepted the cargo, and took control of it, after it was unloaded at Perth airport, it is far from clear that Ansett ceased to have possession of the cargo before it was handed over to Yanko. At the very least, there would have been a real issue to be decided about that, if the point had been taken. That of itself does not mean that the appellant's point lacks legal merit; but at least it means that he is not simply entitled to have his conviction quashed, and a verdict of attempt substituted. Subject to the alternative basis on which the case against the appellant can be put, considered below, the proper order would be for a new trial.

13 There is nothing in the evidence to show that the police officers who went to Perth airport on 7 October 1999 exercised, or purported to exercise, any statutory power of seizure of the cargo. No coercive powers appear to have been either authorised or employed. The police did what they did by agreement with the Ansett management. It may be that the potential capacity of the police to employ coercive powers if necessary encouraged Ansett to make the agreement, but the fact appears to be that the occasion to exercise such powers did not arise. The Duty Manager for Ansett, Mr Turton, offered to assist the police in their surveillance, but he told the police he did not want his employees physically involved. As a result, it was agreed that the police would disguise themselves as Ansett staff. They were provided with Ansett uniforms. They followed Ansett's

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5 cf Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 777.

procedures for the delivery and collection of cargo. The only departure from the regular Ansett procedures was that the cargo, after arrival in the despatch area, was videotaped, and marked for later identification. The handing over to Yanko was done by a police officer wearing an Ansett uniform, and following Ansett's documentary and other procedures.

14 In the Court of Criminal Appeal, Rolfe AJ attached importance to the evidence of the police to the effect that they had not originally committed themselves to a decision as to whether the cargo should be handed over to the person who turned up to collect it, and that this was ultimately an operational decision. Rolfe AJ took that as indicating that the police had assumed possession and control of the cargo to the exclusion of Ansett. With respect, that is not necessarily so. The ultimate operational decision was essentially negative: to do nothing to prevent the flow of the ordinary delivery procedures. The police participated in those procedures, representing themselves as Ansett employees, with the agreement of Ansett. The occasion for the exercise of a police power of seizure, in order to remove possession of the goods from Ansett, never arose. The police had no need to take possession away from Ansett. If a decision had been made to prevent the delivery of the goods to Yanko, then it might have been necessary for the police to invoke their formal powers. So far as appears from the evidence, they never did so. It is not clear to us exactly when, and how, on the appellant's argument, Ansett ceased to have possession of the cargo. There does not appear to be evidence of voluntary transfer of possession by Ansett; and, as noted, there is no evidence of seizure by the police. In fact, the argument seems largely to be based upon police witnesses' acceptance of cross-examining counsel's assertion that they were in control of the goods. What exactly the witnesses took that concept to mean was never explored. As between the police and Ansett, no question as to who was in control of the goods arose. In the context of the police operation, and the agreement between the police and Ansett, the evidence provides an insecure foundation for a conclusion that Ansett no longer had possession of the box at the time it was handed over to Yanko. If the police, for their own operational purposes, decided not to exercise their powers of seizure, and to leave the ordinary delivery procedures to proceed unimpeded, then even though the police themselves participated in those procedures, that is consistent with delivery being made by Ansett.

15 Of course, as the trial was conducted, the question whether Ansett ceased to have possession of the cargo before it was handed over to Yanko, and the related question whether Ansett delivered the cargo to Yanko, never arose for argument. Subject to what follows, if those questions had been raised, it would have been necessary for the jury to be instructed on the matters of fact and law relevant to their resolution.

16 All that having been said, if the issue had been raised at trial the most likely outcome would have been to direct attention to the consideration that, as a

matter of law, it was unnecessary for the prosecution to establish actual delivery of the cargo to Yanko, whether by Ansett or anybody else. This is explained in the reasons of McHugh and Gummow JJ. Having regard to the extended meaning of "supply" in s 3(1) of the Drugs Act, and to the matters clearly established by the evidence, obviously found by the jury, and not in dispute in this appeal, there was conduct on the part of the appellant, and Ansett acting pursuant to its contract with the appellant, that fell within the definition of supply, even before the cargo had been handed over to Yanko, or handled by the police. Furthermore, at least one of the acts making up the elements of that conduct occurred in Western Australia, and s 12(1)(b) of the *Criminal Code* (WA) applied. In this respect, it may be noted that the appellant's submission that a verdict of guilty of attempt should be substituted for a verdict of guilty of supply assumes that an attempt occurred at Perth. This must be on the assumption that s 12(1)(b) applies, and that some act of Ansett in Perth was an element of the attempt.

17 The decision of trial counsel not to make an issue of the intervention of the police in relation to the statutory definition of "supply" might have been deliberate or it might have been inadvertent. Either way, it was right. Ultimately, there was nothing to the appellant's advantage in the point.

18 There was an error of law at the trial, in that the directions on "supply" were over-simplified, and in some respects unduly favourable to the appellant. This was mainly the result of the way the trial was fought. There was no miscarriage of justice.

19 The appeal should be dismissed.

20 McHUGH AND GUMMOW JJ. This is an appeal from the orders of the Court of Criminal Appeal of Western Australia[6] dismissing an appeal against conviction after a trial in the Supreme Court. As will appear, the Supreme Court was exercising federal jurisdiction and it is from that circumstance that there arise various of the issues now before this Court. Other issues concern the so-called doctrine of "innocent agency" in criminal law.

The facts

21 At approximately 12.30 pm (Eastern Standard Time) on 7 October 1999, the appellant, Pinkstone, attended at the Ansett Australia ("Ansett") air cargo counter at Sydney Airport with two boxes for consignment to Perth. The first box was addressed to "One on One Security" for the attention of Mr John White. The second box was addressed to "Innaloo Plasterers and Security" for the attention of Mr Michael Brazier. The appellant handed the boxes to Ansett staff at the counter and departed.

22 At approximately 2.00 pm on the same day, officers of the National Crime Authority attended at the cargo counter and requested access to the boxes. Upon that request being granted, the officers inspected and photographed the boxes and kept them under surveillance until they were loaded onto Ansett flight AN85 for Perth by Ansett cargo staff. The flight left Sydney at 4.45 pm.

23 Prior to the arrival of flight AN85 in Perth, two members of the Western Australian Police, officers Kanawati and Wellstead, attended the Ansett air cargo area at Perth Airport. Both officers were dressed as Ansett cargo staff. With the prior approval of Ansett, officer Kanawati assumed control of the cargo counter and officer Wellstead remained in the cargo area.

24 At approximately 9.20 pm (Western Standard Time), Mr Paul Brazier (Mr Michael Brazier's brother) attended at the Ansett air cargo counter at Perth Airport in order to collect the box addressed to "Innaloo Plasterers and Security". Officer Kanawati informed him that flight AN85 had not arrived, at which point Mr Brazier departed. On returning shortly thereafter, Mr Brazier was again informed that the box was unavailable. He departed and did not return. The box requested by Mr Brazier was, at a later date, found to contain a safe within which was a cash box containing 449 g of cocaine.

25 At around the same time, flight AN85 arrived at Perth Airport. All cargo on the plane was taken from the plane to the cargo area by Ansett staff. The importance of these circumstances will be emphasised later in these reasons

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6 *Pinkstone v The Queen* [2003] WASCA 66.

when considering the role of Ansett as an "innocent agent" of the appellant in Western Australia as well as in New South Wales. Once the cargo had arrived in the cargo area, officers Kanawati and Wellstead entered the cargo area and located the two boxes sent by the appellant. They then removed the boxes to a separate location within the cargo area. There, the boxes were videotaped and marked.

26 At approximately 10.10 pm, Mr Wayne Yanko attended the Ansett air cargo counter and requested the box addressed to "One on One Security". Officer Kanawati obtained the box from the cargo area and handed it to Mr Yanko, who signed for it in the name of "John White". Mr Yanko left Perth Airport with the box and was followed to a residence where the box was recovered. It was subsequently found to contain a safe within which was a cash box containing 725 g of methylamphetamine.

The proceedings

27 On 13 October 1999, the appellant was arrested in Perth by officers of the Western Australian Police. On 16 October, a joint indictment in the Supreme Court was issued against the appellant, Mr Yanko and Mr Brazier. The indictment contained, among others, the following two counts:

> "On 7 October 1999 at a Commonwealth Place, namely Perth Airport, ANTHONY JOHN PINKSTONE supplied a prohibited drug, namely methylamphetamine, to another. …
>
> AND FURTHER that on the same date and at the same place, ANTHONY JOHN PINKSTONE attempted to supply a prohibited drug, namely cocaine, to another."

For the purposes of this appeal, only the first count is relevant. That count was expressed to be contrary to s 6(1)(c) of the *Misuse of Drugs Act* 1981 (WA) ("the Drugs Act") as in force pursuant to the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the Commonwealth Places Act"). It will be necessary to consider further the interrelation of the Commonwealth Places Act and the Drugs Act later in these reasons.

28 Soon after being charged, the appellant applied to the Supreme Court to quash the indictment. The appellant, who appeared in person during the application, submitted that the Court lacked jurisdiction to try count one in the indictment because, among other things, the offence was a federal offence that

had "occurred in New South Wales and so by virtue of s 80 of the *Constitution* the trial must be held in New South Wales"[7]. Section 80 states:

> "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

29 On 29 June 2001, Roberts-Smith J dismissed the application[8]. He acknowledged that the offence with which the appellant had been charged was federal in nature but went on to hold that[9]:

> "all the elements necessary to constitute the offence exist and … at least one of the acts making up the element of supply – namely the actual delivery of physical custody and control of the drug to Yanko – occurred in Western Australia."

Accordingly, due to the operation of s 12 of the *Criminal Code* (WA) ("the Criminal Code"), as picked up by the Commonwealth Places Act, the offence with which the appellant was charged was deemed to have occurred at Perth Airport and a trial of the appellant in Western Australia would, as a result, not contravene s 80 of the Constitution. The decision of Roberts-Smith J is not the subject of an appeal to this Court. It will, however, be necessary to consider further his Honour's decision, and the premises upon which it is based, later in these reasons.

30 On 14 December 2001, the appellant was convicted on both counts in the indictment. Following a plea in mitigation, he was sentenced to terms of 10 and six years imprisonment respectively. The aggregate sentence imposed was 12 years and 3½ months, to commence from 13 October 1999. Eligibility for parole was denied.

31 The appellant appealed to the Court of Criminal Appeal against his convictions and sought leave to appeal against sentence. On 28 March 2003, the Court of Criminal Appeal (Murray and Wheeler JJ; Rolfe AJ dissenting) dismissed the appellant's appeal against conviction[10]. However, their Honours

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7 *R v Pinkstone* (2001) 24 WAR 406 at 410.

8 (2001) 24 WAR 406 at 437.

9 (2001) 24 WAR 406 at 420-421.

10 *Pinkstone v The Queen* [2003] WASCA 66.

unanimously granted the application for leave to appeal against sentence. The appellant was granted parole eligibility and re-sentenced to an aggregate term of 12 years imprisonment. The appellant now appeals to this Court against the dismissal of his appeal against conviction in respect of count one in the indictment.

32 The primary issue in this appeal concerns the extent to which the conduct of the appellant amounted to the "supply" of a prohibited drug within the meaning of s 6(1)(c) of the Drugs Act. Put shortly, the appellant submits that the intervention of the Western Australian Police at Perth Airport severed the "chain of causation" between the appellant's consignment of the box at Sydney Airport and the ultimate receipt of that box by Mr Yanko at Perth Airport. As will appear from these reasons, that submission is premised upon a mistaken construction of s 6(1)(c) of the Drugs Act and should, therefore, be rejected with the result that the appeal should be dismissed. However, before turning to explain why this is so, it is necessary first to consider the significance of the circumstance that the offence contained in count one of the indictment was alleged to have occurred at Perth Airport.

A Commonwealth place

33 There is no dispute in this appeal that Perth Airport is a place acquired by the Commonwealth for public purposes within the meaning of s 52(i) of the Constitution. Accordingly, by operation of that sub-section, State laws such as the Drugs Act have no operation within the territory of Perth Airport in the absence of enabling Commonwealth legislation[11].

34 The relevant enabling legislation is found in the Commonwealth Places Act. Section 4(1) of that Act provides:

> "The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time."

"Commonwealth place" is defined in s 3(1) as a place (not being the seat of government) with respect to which the Commonwealth Parliament, by virtue of s 52 of the Constitution, has exclusive power to make laws for the peace, order, and good government of the Commonwealth. Perth Airport clearly falls within

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11 See *R v Phillips* (1970) 125 CLR 93; *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2003) 78 ALJR 87 at 94-97 [37]-[46]; 202 ALR 376 at 386-390.

that description. Accordingly, the Drugs Act (read with the Criminal Code as later explained) is picked up by s 4(1) and given effect to within the boundaries of Perth Airport[12]. In this way, the Drugs Act, as applied by the Commonwealth Places Act, operates as a surrogate federal law.

35 Section 8(2) of the Commonwealth Places Act excludes what otherwise would have been the investment of federal jurisdiction by ss 39 and 68 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Rather, special provision[13] is made by s 7 of the Commonwealth Places Act. That section invests Western Australian courts with federal jurisdiction in all matters arising under applied legislation such as the Drugs Act. Sub-section (1) provides:

> "The several courts of a State are, within the limits of their several jurisdictions, whether those limits are as to subject matter or otherwise, but disregarding any limitation that exists by reason of a place being a Commonwealth place, invested with federal jurisdiction in all matters arising under the applied provisions as having, or as having had, effect in or in relation to a Commonwealth place."

36 It will be noted that s 7(1) only invests State courts with federal jurisdiction in respect of applied laws "within the limits of [the courts'] several jurisdictions". In the present case, it was the Supreme Court of Western Australia which purported to exercise jurisdiction pursuant to s 7(1). Accordingly, it is necessary to determine the limits, territorial or otherwise, of the jurisdiction conferred upon that Court.

37 Section 16 of the *Supreme Court Act* 1935 (WA) ("the Supreme Court Act") is headed "General jurisdiction". Sub-section (1) relevantly provides that:

> "(1) Subject as otherwise provided in this Act, and to any other enactment in force in this State, the Supreme Court –
>
> (a) is invested with and shall exercise such and the like jurisdiction, powers, and authority *within Western Australia and its dependencies* as the Courts of Queen's Bench, Common Pleas, and Exchequer, or either of them, and the Judges thereof, had and exercised in England at the commencement of the *Supreme Court Ordinance 1861*". (emphasis added)

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12 *Cameron v The Queen* (2002) 209 CLR 339 at 341 [2].

13 Rose, "The Commonwealth Places (Application of Laws) Act 1970", (1971) 4 *Federal Law Review* 263 at 276-277.

Pursuant to s 16(1)(a), and in the absence of a relevant statutory provision to the contrary, the jurisdiction conferred upon the Supreme Court is therefore limited in application to the geographical confines of Western Australia and its dependencies[14]. Section 16(1)(a) may be contrasted with s 19(1) of the *Federal Court of Australia Act* 1976 (Cth) which contains no territorial limitation on the exercise of the original jurisdiction invested in the Federal Court under the laws of the Commonwealth.

38 One further point should be made. As noted earlier in these reasons, the Drugs Act operated in the present case as a surrogate federal criminal statute. As a result, the trial of an indictable offence under that Act must accord with s 80 of the Constitution. That section is set out earlier in these reasons. Section 80 speaks of "the State where the offence was committed" and of offences "not committed within any State". Where the offence in question was committed at a Commonwealth place located within the geographic area of a State, the judgments in *R v Phillips*[15] indicate that the offence was committed in that State for the purposes of a provision such as s 80.

39 Section 80 directs attention both to the procedure utilised at trial in order to determine the guilt of the accused and to the geographic location of the trial in which that determination takes place. The former obligation is reflected in s 12(3) of the Commonwealth Places Act, which provides that the trial on indictment of an offence against any part of a statute applied by virtue of that Act shall be by jury. The final limb of the latter obligation is given effect in ss 70 and 70A of the Judiciary Act. Section 70 provides that when an offence against a law of the Commonwealth is begun in one State or part of the Commonwealth and completed in another, the offender may be tried in either State or part in the same manner as if the offence had been actually and wholly committed therein. Section 70A provides that the trial on indictment of an offence against a law of the Commonwealth not committed within any State, and not being an offence to which s 70 applies, may be held in any State or Territory of the Commonwealth.

40 Section 4G of the *Crimes Act* 1914 (Cth) defines an indictable offence against a law of the Commonwealth as an offence punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears. In the present case, a contrary intention is evident in s 5(2) of the Commonwealth Places Act. That sub-section provides that s 4G does not apply in relation to, or in relation to matters arising under, provisions of a statute in force by virtue of

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14 See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 23 [10], 37 [59], 74 [176].

15 (1970) 125 CLR 93 at 100-101, 105, 111, 112, 120-121, 124, 131-132.

s 4(1) of the Commonwealth Places Act. The effect of s 5(2) is to leave the characterisation of an offence under a statute applied by virtue of s 4(1) to the Parliament of the State in which the Commonwealth place is located.

41 In the present case, the offence with which the appellant was charged is described as an "indictable offence" in s 6(1)(c) of the Drugs Act. Accordingly, and by the legislative route outlined above, the requirements contained in s 80 of the Constitution applied to the trial of the appellant on that charge. However, neither party submits before this Court that the trial of the appellant contravened either of the obligations contained in s 80. That circumstance in turn makes it unnecessary to determine whether either s 70 or s 70A of the Judiciary Act applied to the trial of the appellant. It is now convenient to proceed to a consideration of the Drugs Act and, in particular, s 6(1)(c) of that statute.

The Drugs Act

42 The application of the criminal law in circumstances where one or more elements of an offence is alleged to have occurred outside the forum raises considerations not otherwise relevant in respect of criminal acts committed wholly inside the forum. In *Thompson v The Queen*[16], Brennan J, in a passage subsequently adopted by three members of this Court in *Lipohar v The Queen*[17], said:

> "The jurisdiction of a court to hear and determine a charge of a criminal offence and the territorial ambit of a law which creates or defines the offence charged are two distinct questions."

His Honour referred[18] with approval to the observation of Devlin J in *R v Martin*[19]. There, his Lordship had said:

> "There is a distinction, in my judgment, between what I may call the nature of an offence and the ingredients which have to be present before an offence is committed at all on the one hand, and, on the other hand, the

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16 (1989) 169 CLR 1 at 19.

17 (1999) 200 CLR 485 at 520 [87].

18 (1989) 169 CLR 1 at 19.

19 [1956] 2 QB 272 at 285. See also *R v Treacy* [1971] AC 537 at 559; *Lipohar v The Queen* (1999) 200 CLR 485 at 520 [87]; Hinton and Lind, "The Territorial Application of the Criminal Law – When Crime is not Local", (1999) 23 *Criminal Law Journal* 285 at 297.

question of what courts are to assume or are to be given jurisdiction when the offence has been committed."

It is convenient to adopt that approach in the present case. Reference has been made above to the complex of federal and State law which provided the jurisdiction of the Supreme Court. Accordingly, it is appropriate to turn to a consideration of the elements of the offence with which the appellant was charged, and their territorial ambit.

43 Section 6(1) of the Drugs Act provides that:

"[A] person who –

(a) with intent to sell or supply it to another, has in his possession;

(b) manufactures or prepares; or

(c) *sells or supplies, or offers to sell or supply, to another,*

a prohibited drug commits an indictable offence, except when he is authorised by or under this Act or by or under the *Poisons Act 1964* to do so and does so in accordance with that authority." (emphasis added)

Methylamphetamine is a prohibited drug within the meaning of the Drugs Act. In the present case, there is no suggestion that the appellant sold or offered to sell methylamphetamine to another person within the meaning of par (c). Accordingly, consideration may be given wholly to the proper meaning in par (c) of "supply ... to another".

44 The appellant submits that his actions in attending at the Ansett air cargo counter in Sydney and arranging for the delivery of the box containing the prohibited drug to Mr Yanko in Perth did not amount to the supply of that drug to another, notwithstanding the ultimate receipt of that drug by Mr Yanko at Perth Airport. The appellant's acts are said to fall outside the scope of s 6(1)(c) of the Drugs Act because it was an officer of the Western Australian Police, rather than a member of the Ansett cargo staff, who at Perth Airport handed over to Mr Yanko the box containing the drug. Because the police officer was not acting as an "innocent agent" of the appellant, it is said to follow that the drug was not supplied to Mr Yanko on behalf of the appellant and that, as a result, the appellant was merely guilty of an attempted supply. Significantly for the appellant, attempted supply carries a maximum sentence of imprisonment half that of supply in contravention of s 6(1)(c)[20].

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20 s 33(1)(d), *Misuse of Drugs Act* 1981 (WA).

45 The submission of the appellant depends for its accuracy upon several premises: first, that "supply" within the meaning of s 6(1)(c) requires the actual receipt of a prohibited drug by the intended recipient; secondly, that such receipt may only occur through the conduct of the appellant or his "innocent agents" if liability is to arise; and thirdly, that it is only through the acts of "innocent agents" in Western Australia that the appellant could be held criminally liable in that State.

46 In several respects, the premises upon which the appellant's submission depends find support in the reasons of the Court of Criminal Appeal. Each member of the Court proceeded on the basis that the offence contained in s 6(1)(c) of the Drugs Act was only completed once Mr Yanko took possession of the drug "intending to receive it as a thing which he wanted for his own purposes of sale or supply to others". As a result, it was necessary for the Court to consider the impact of the activities of the Western Australian Police on the ultimate liability of the appellant by reference to the doctrine sometimes termed "innocent agency". The issue was identified in the reasons of Murray J, with whom Wheeler J agreed, as follows:

> "[T]he question which arises in this case may be stated as being whether the *act of supply initiated by the [appellant] when the drug was delivered to Ansett air cargo in Sydney and completed when the drug was delivered to Yanko* by the police officer Kanawati was the act of supply willed or intended by the [appellant], or whether it was merely an act of supply by Kanawati whose involvement with the drug is to be regarded as severing the process of completing the act of supply by the [appellant] with the result that he could be convicted of no greater offence than an attempt to supply the drug to Yanko." (emphasis added)

47 The Court of Criminal Appeal's understanding of the issue reflected that of Roberts-Smith J in his decision on jurisdiction prior to the commencement of the trial. It will be remembered that his Honour had there determined that the offence defined by s 6(1)(c) was completed upon receipt of the drug by Mr Yanko at Perth Airport[21].

48 The approach taken in the reasoning of each member of the Court of Criminal Appeal with respect to the construction of s 6(1)(c) of the Drugs Act should not be accepted. Although the decision of Roberts-Smith J is not the subject of an appeal to this Court, the same is true of the reasoning of his Honour on this point.

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21 (2001) 24 WAR 406 at 425.

49 Section 6(1) of the Drugs Act has been set out above. However, reference must also be made to s 3. That section is headed "Interpretation". Section 3(1) defines "to supply" as including:

> "to *deliver*, dispense, distribute, *forward*, furnish, make available, provide, return or *send*, and it does not matter that something is supplied on behalf of another or on whose behalf it is supplied." (emphasis added)

The definition of "to supply" contained in s 3(1) significantly expands the meaning otherwise to be attributed to that phrase in the context of s 6(1)(c). It follows that, among other things, the forwarding or sending of a prohibited drug to another will, by operation of s 3(1), amount to the supply of that drug to another in contravention of s 6(1)(c). That such a result may, in the eyes of some, appear unduly burdensome is not a reason for denying the plain words of the statute their proper meaning and effect[22].

50 In the present case, there is no dispute that the appellant arranged with Ansett cargo staff at Sydney Airport for the delivery of a prohibited drug to Mr Yanko. Nor is it disputed that the appellant intended that the box containing the drug would ultimately be received by Mr Yanko. Nor is the sequence of events beginning with the arrival of the Ansett flight at Perth Airport in dispute. In such circumstances, the respondent now submits that the appellant "sent" the box to another person within the extended definition of "supply". That submission should be accepted.

51 The Drugs Act does not define "to send". As a result, and in the absence of any indication to the contrary, the verb must be given its ordinary meaning. The *New Oxford Dictionary of English* relevantly defines to "send" as to "arrange for the delivery of, especially by post"[23]. The *New Shorter Oxford English Dictionary* speaks of ordering or causing a thing to be conveyed, transported or transmitted by an intermediary to a person or place for a particular purpose[24]. The *Macquarie Dictionary* speaks in similar terms[25]. The definitions focus upon acts initiating, and contributing to, the process of transmission of an object to a particular destination, with a view to the ultimate receipt of the object by a particular person at that destination. None of the definitions suggest that actual

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22 *Maroney v The Queen* (2003) 78 ALJR 51 at 53-54 [11]; 202 ALR 405 at 408.

23 (1998) at 1691.

24 3rd ed (rev) (1993), vol 2 at 2773.

25 3rd ed (1997) at 1932.

receipt of the object by its intended recipient, at the end of the process of transmission, is a necessary element of the expression.

52 That circumstance accords with common experience. The mere fact that a parcel, upon reaching its intended destination, may not thereafter reach its intended recipient does not mean that the parcel was not sent to another or that it has no sender. In *The Petrofina*, the House of Lords, in discussing the finding of an arbitrator that the accepted method of payment under a charterparty involved the "sending" of a cheque by post, reached a similar conclusion[26]. The ordinary meaning of "to send" may thus be distinguished from the expression "to *deliver* to another"; the latter expression connotes a completed transaction, ending in receipt of the object in question[27]. Although "to send" may, in some contexts, be construed as incorporating an element of "deemed delivery", such a construction does not assist in the present case[28].

53 It follows that a person is liable under s 6(1)(c) for sending a prohibited drug to another person once he or she has knowingly placed the drug in a mail delivery system with the intention that it be received by that person at a particular place. Whether or not the drug in question ultimately reaches the intended recipient once it has arrived at its intended destination is, for this purpose, irrelevant. For these reasons, the actions of the appellant in arranging for the delivery of a prohibited drug with the intention that the drug would be received by Mr Yanko at Perth Airport, when combined with the actions of Ansett in causing the drug to reach, and be unloaded at, Perth Airport, amounted to the "supply" of that drug to another within the meaning of s 6(1)(c) of the Drugs Act. As will appear later in these reasons, it was accepted by each party before this Court that the actions of Ansett may be imputed to the appellant by virtue of the doctrine sometimes termed "innocent agency".

54 However, this conclusion does not dispose of the present appeal. Rather, having determined that the appellant's actual and imputed conduct amounted to the "supply" of a prohibited drug to another in contravention of s 6(1)(c), it is

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26 [1949] AC 76 at 101, 104-106, 107.

27 The *New Shorter Oxford English Dictionary* relevantly defines "deliver" as to "bring and *hand over* (a letter, a parcel, ordered goods, etc) to the proper recipient" (emphasis added): 3rd ed (rev) (1993), vol 1 at 626.

28 *Lewes Nominees Pty Ltd v Strang* (1983) 57 ALJR 823 at 824-825; 49 ALR 328 at 330.

necessary to consider the territorial ambit of the Drugs Act and the extent to which it applies in relation to that conduct[29].

The Criminal Code

55 In this context, s 12 of the Criminal Code is of first importance. That section is headed "Territorial application of the criminal law" and provides in part:

> "(1) An offence under this Code or any other law of Western Australia is committed if –
>
> (a) all elements necessary to constitute the offence exist; and
>
> (b) *at least one of the acts*, omissions, *events, circumstances or states of affairs* that make up those elements occurs in Western Australia.
>
> (2) Without limiting the general operation of subsection (1), that subsection applies *even if the only thing that occurs in Western Australia is an event, circumstance or state of affairs caused by an act or omission that occurs outside Western Australia*." (emphasis added)

56 The Drugs Act is a law of Western Australia and, as a result, is to be read with, and its operation benefits from, s 12 of the Criminal Code. In the present case, the appellant engaged Ansett to transfer a prohibited drug from Sydney Airport to Perth Airport, where it was intended that the drug would be received by Mr Yanko. The drug subsequently reached Perth Airport as a result of the conduct of Ansett. The arrival of the drug at Perth Airport, on a flight in which it necessarily had been in the custody of Ansett as the "innocent agent" of the appellant, and the unloading of the cargo from the aircraft by Ansett staff, were necessary elements in the process by which the drug was sent there for collection by Mr Yanko. Thus, at least one of the acts, events, circumstances or states of affairs making up the element of "sending", and thus of "supply ... to another", occurred "in Western Australia" within the meaning of par (b) of s 12(1) of the Criminal Code. Accordingly, the offence of supply to another as charged in the first count under s 6(1)(c) of the Drugs Act was, by operation of s 12 of the Criminal Code, committed within the State. It is convenient at this stage further to consider the character of Ansett as the "innocent agent" or "instrument" of the appellant.

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29 See *Thompson v The Queen* (1989) 169 CLR 1 at 23.

Innocent instrumentality

57 It will be remembered that the construction of s 6(1)(c) of the Drugs Act adopted at the trial of the appellant, and in the Court of Criminal Appeal, necessitated recourse in two respects to the doctrine sometimes termed "innocent agency". First, reliance was placed upon the doctrine in order to link the conduct of the appellant at Sydney Airport with the actions of Ansett in transferring the box to Perth Airport. Secondly, the doctrine was utilised in order to link the conduct of the appellant at Sydney Airport with the ultimate receipt of the prohibited drug by Mr Yanko. It was in the latter context that the actions of the Western Australian Police were said by the appellant to have prevented the proper application of the doctrine.

58 In this appeal, the appellant does not dispute the first use of the doctrine made at trial and by the Court of Criminal Appeal. As indicated earlier in these reasons, once the conduct of Ansett in transporting the drug to Perth Airport is imputed to the appellant, all elements necessary to constitute the offence with which the appellant was charged were in existence. Accordingly, it was unnecessary to connect the conduct of the appellant with the receipt of the drug by Mr Yanko through reliance on the doctrine of "innocent agency". However, it is as well to say something further regarding the application of the doctrine in that context, given the disagreement as to the scope of the principle in the Court of Criminal Appeal.

59 The doctrine of "innocent agency" is a means by which the common law attaches criminal liability to a person who does not physically undertake some or all of the elements of the offence with which he is charged[30]. The doctrine was developed, as a "rule of necessity"[31]. This was to solve the logical difficulty that the liability of a secondary party was ordinarily dependent upon that of the principal in the first degree. In circumstances where the act of an "offender" was prohibited, but liability did not arise due to a lack of mens rea or some other excuse, application of strict logic would have led to the result that a person who procured that act escaped liability. The Law Commission for England and Wales has usefully described the doctrine as follows[32]:

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30 See, generally, *R v Hewitt* [1997] 1 VR 301 at 321; *R v Franklin* (2001) 3 VR 9 at 21-27.

31 Foster, *Crown Law*, (1762) at 349.

32 *Parties, Complicity and Liability for the Acts of Another*, Law Commission, 1972, Working Paper No 43 at 11.

> "A person acts through an innocent agent when he intentionally causes the external elements of the offence to be committed by (or partly by) a person who is himself innocent of the offence charged by reason of lack of a required fault element, or lack of capacity."

60 The use of the term "agent" in this context serves no purpose other than to confuse. Recourse to the term demonstrates the force of Lord Herschell's observation in *Kennedy v De Trafford*[33] (repeated more than once in this Court[34]) that "[n]o word is more commonly and constantly abused than the word 'agent.'" The term "agency" is most appropriately used to "connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties"[35]. Such a concept, which has its foundations in private law, is inherently unsuited to what is in truth the imposition of criminal responsibility on one person for the acts of another. It is therefore preferable to speak, as Stephen J did in *White v Ridley*[36], of an "innocent instrument" rather than an "innocent agent". His Honour there observed:

> "[I]t may be noted that the term 'instrument', used as early as the beginning of last century in East's *Pleas of the Crown*[37] is, I think, to be preferred in this context to that of 'agent', which rather suggests some relationship of principal and agent between consignor and carrier: here the

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33 [1897] AC 180 at 188.

34 See *Jones v Bouffier* (1911) 12 CLR 579 at 587; *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50; *Australian Boot Trade Employees' Federation v The Commonwealth* (1954) 90 CLR 24 at 42; *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652; *Scott v Davis* (2000) 204 CLR 333 at 408 [227], 435 [299].

35 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652. See also *Fowler v St Stephens College* [1991] 3 NZLR 304 at 306; *Scott v Davis* (2000) 204 CLR 333 at 367 [101], 408 [227], 433 [299]; Fridman, *The Law of Agency*, 7th ed (1996) at 11. More broadly, that authority or capacity includes "power to make contracts, to grant and receive titles, to make statements and admissions, to create obligations against and confer rights upon the principal by the doing of acts or the receipt of knowledge or notice": Seavey, "The Rationale of Agency", (1920) 29 *Yale Law Journal* 859 at 868.

36 (1978) 140 CLR 342 at 353-354.

37 vol 1, (1803) at 228.

> relationship was contractual but was not that of principal and agent and the doctrine of the criminal law sometimes styled that of the 'innocent agent' likewise involves no notion of a necessary relationship of principal and agent[38]."

The passage in East's *Pleas of the Crown* (published in 1803) referred to by Stephen J reads as follows:

> "Malice may be exerted against a party in his absence; as where A lays poison for B in his victuals, which B afterwards takes and dies. So where A procures an idiot or lunatic to kill B, which he does. *In both instances A is guilty of the murder as principal, and B is merely an instrument*." (emphasis added)

In the same year, in *R v Brisac and Scott*[39], Grose J held that an information for a conspiracy to fabricate false payment vouchers and so to cheat the Crown had been well triable in Middlesex upon proof of receipt there by the Commissioners for Victualling the Navy of the vouchers after transmission by post from elsewhere. Grose J rejected an objection as to jurisdiction; whilst those who had innocently delivered the vouchers were "mere instruments in [the conspirators'] hands for that purpose"[40], the conspirators were answerable as much as if the delivery in Middlesex had been by their own hands. The objection as to venue was taken before the changes made to the rules of venue by legislation such as the *Juries Act* 1825 (UK)[41].

61 Those rules of venue played an important part in the reasoning in decisions such as *Brisac and Scott*. The common law generally required that any indictable offence, be it treason, felony or misdemeanour, be tried in the county in which the relevant acts were alleged to have occurred, and by a jury drawn from the residents of that county. It recently has been said[42]:

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38 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 352.

39 (1803) 4 East 164 [102 ER 792].

40 (1803) 4 East 164 at 172 [102 ER 792 at 796]. See also *R v Girdwood* (1776) 1 Leach 142 [168 ER 173].

41 6 Geo IV, c 50. See Halsbury, *Laws of England*, (1911), vol 18 at 230, fn (a); *Lipohar v The Queen* (1999) 200 CLR 485 at 517-518 [81]-[83].

42 Hirst, *Jurisdiction and the Ambit of the Criminal Law*, (2003) at 29.

> "This doctrine of 'venue' made it difficult for English criminal law to have any extraterritorial application, and thus caused it to adopt the narrow principle of territoriality that (despite many modern developments) still lies at its core today."

62 In the present case, it will be remembered that the appellant submitted before the Court of Criminal Appeal, and before this Court, that the doctrine of innocent instrumentality could not apply to the actions of the Western Australian Police in taking possession of the drug at Perth Airport and handing it to Mr Yanko at the Ansett cargo counter. Murray J, with whom Wheeler J agreed, rejected that submission. His Honour observed:

> "The [appellant] performed in NSW deliberate or willed acts intended to result in the delivery of the drug to Yanko at Perth Airport. The process of supply to Yanko was always to be completed by using others as the instruments to effect that purpose. … The participation of the police did not alter the character of the supply. What occurred was precisely what the [appellant] intended should occur. It was always his purpose that, having consigned the goods in Sydney, others would be involved as the instruments by which the drug was ultimately conveyed to Yanko, its intended recipient."

Rolfe AJ reached the opposite conclusion. His Honour said:

> "The fact that the course taken [by the police] was to deliver the parcel to Mr Yanko, as part of their operation, was not, in any causal sense, nor in accord with the intention of the parties, a supply by the appellant to Mr Yanko of the parcel. It was a supply by the police. Thus, it was not a supply by the appellant and it could not, in the circumstances, be argued that the police were acting as the appellant's agent to make the delivery and, thereby, complete the supply".

63 The doctrine of innocent instrumentality necessarily depends for its operation upon the innocence of the instrument used by the perpetrator to commit the offence. If the instrument is not innocent but at the time of the commission of the offence has a consciousness of guilt, the instrument may be accountable as the perpetrator and the would-be principal as an accessory before the fact[43]. As Alderson B observed in *R v Bull and Schmidt*[44]:

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43 *R v Williams and Rees* (1844) 1 Den 39; 1 Car & K 589 [169 ER 141; 174 ER 950]; *R v Bull and Schmidt* (1845) 1 Cox CC 281. See also Foster, *Crown Law*, (1762) at 349; Smith and Hogan, *Criminal Law*, 10th ed (2002) at 143.

44 (1845) 1 Cox CC 281 at 282.

> "If a person does an act of this kind with a guilty intent, he is not the agent of any one. If he does it innocently, he is the agent of some person or persons".

64 This reasoning has particular relevance where an individual purports to act as the innocent instrument of a person with the undisclosed aim of seeking to arrest that person. Will the criminal law impose liability on that person for the conduct of the apparent confederate in committing the necessary elements of an offence? The case of *R v Johnson* is instructive[45]. There, the accused met the servant of a landlord and suggested stealing from the landlord's residence. The servant pretended to agree and, in the landlord's absence, informed the police. The police asked the servant to co-operate and, accordingly, the servant opened the doors of the residence for the accused, who was then arrested. At the trial at bar before Maule J and Rolfe B, Maule J ruled that the accused was not guilty of the crime of burglary because he had entered a house that had lawfully been opened by the servant on instructions from the police. *Johnson* demonstrates that the acts of an instrument cannot be imputed to a defendant where the instrument was acting solely for the purpose of incriminating the defendant[46].

65 The result in *Johnson* is supported by American authority. In *State v Jansen*, Brewer J, prior to his elevation to the Supreme Court of the United States, summarised the law as follows[47]:

> "[W]here each of the overt acts going to make up the crime charged, is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts be done by the party who is with and apparently assisting him. Counsel have cited and commented upon several cases in which detectives figured, and in which the defendants were adjudged guiltless of the crimes charged. But this feature distinguishes them, that some act essential to the crime charged, was in fact done by the detective, and not by the defendant; and this act not being imputable to the defendant, the latter's guilt was not made out. Intent alone does not make crime. The intent and the act must combine; and all the elements of the act must exist and be imputable to the defendant."

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45 (1841) Car & M 218 [174 ER 479]. See also *R v Egginton* (1801) 2 Bos & Pul 508 at 513 [126 ER 1410 at 1413] and cf *R v Chandler* [1913] 1 KB 125 at 127-128.

46 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 776-777.

47 22 Kan 498 at 505 (1879).

That statement of the law was described by the Eighth Circuit Court of Appeals in *De Mayo v United States* as "supported by the great weight of authority"[48]. In *De Mayo*, the Court of Appeals held that the appellant could not properly be convicted of introducing "intoxicating liquor" into Oklahoma from a place outside the State where the overt act of importation was carried out by undercover government officers purporting to act as instruments of the appellant, but whose real aim was to secure the appellant's conviction.

66 It was on the basis of the reasoning evident in the English and American case law that the English Law Commission observed[49]:

> "A person is not guilty of committing an offence through an innocent agent when … the innocent agent acts with the purpose of preventing the commission of the offence or of nullifying its effects."

That observation was said to be declaratory of the existing law[50]. The act of officer Kanawati in handing over the prohibited drug to Mr Yanko could not be imputed to the appellant, notwithstanding that the appellant intended Mr Yanko to receive the drug. However, given the proper construction of s 6(1)(c) of the Drugs Act in conjunction with s 12 of the Criminal Code as outlined earlier in these reasons, and the role of Ansett as the innocent instrument of the appellant, that other circumstance does not affect the outcome to the favour of the appellant.

Application of the proviso

67 During his summing up to the jury, Roberts-Smith J observed:

> "In this case, to prove [the element of 'supply'] the Crown would have to satisfy you beyond reasonable doubt that Pinkstone sent the methylamphetamine to Yanko because Yanko wanted it and *that Yanko actually physically received it*." (emphasis added)

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48 *De Mayo v United States* 32 F 2d 472 at 474 (1929). See also *Shouquette v State* 219 P 727 (1923); *Stanley v State* 219 P 734 (1923); *People v Lanni* 406 NYS 2d 1011 (1978).

49 *Parties, Complicity and Liability for the Acts of Another*, Law Commission, 1972, Working Paper No 43, at 11.

50 *Parties, Complicity and Liability for the Acts of Another*, Law Commission, 1972, Working Paper No 43, at 15.

It is sufficient to refer to the phrase italicised above in order to demonstrate the error made by the trial judge. However, the identification of error by a trial judge on a question of law does not automatically result in the allowance of an appeal[51]. The proviso contained in s 689(1) of the Criminal Code so provides[52].

68 In the present case, the appellant admitted critical matters of fact, there was no relevant issue of credibility, and no alleged erroneous admission or rejection of evidence. There is no doubt that each element of the offence charged on the first count was either committed by the appellant, or may be imputed to him. At no stage in this appeal has the appellant sought to deny that the box sent to Mr Yanko contained a prohibited drug and that the appellant was aware of that circumstance. In addition, counsel for the appellant conceded in this Court that the appellant had arranged at Sydney Airport for the consignment of that box to Mr Yanko. Nor was there any doubt at trial regarding this aspect of the appellant's conduct. Roberts-Smith J remarked in his summing-up that:

> "[T]here is evidence that the person who went to Ansett Air Cargo office on 7 October and consigned the Sanpax box to John White of One on One Security was in fact Anthony Pinkstone, and I probably don't need to canvass at any particular length because you will recall not only did [counsel] at the very beginning of this case make that admission on behalf of Mr Pinkstone – that is to say, that he consigned the Sanpax box – but Mr Pinkstone himself said that in evidence, as you will recall. There is no dispute about that."

69 Moreover, the jury's determination of guilt, on the premise that actual receipt of the drug by Mr Yanko was an essential element of the offence,

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51 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Wilde v The Queen* (1988) 164 CLR 365 at 372.

52 Section 689(1) provides that:

> "(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

necessitated its satisfaction that the appellant had consigned the drug to Mr Yanko. Given the appellant's own evidence at trial, the jury could have reached no other conclusion. Further, the conduct of Ansett in transporting the box to Perth Airport for collection by Mr Yanko may be imputed to the appellant by virtue of the doctrine of innocent instrumentality. In such circumstances, it is clear that the error in law committed by the trial judge did not result in a substantial miscarriage of justice to the appellant. For the same reasons, there can be no injustice in permitting the respondent now to rely on s 12 of the Criminal Code and the extended meaning of "supply" contained in s 3(1) of the Drugs Act, as properly construed in these reasons, rather than limiting the respondent to the construction of s 6(1)(c) upon which the trial proceeded. This is a case in which, on the evidence properly admitted, a jury acting reasonably and properly directed as to the elements of the offence would inevitably have convicted the appellant[53].

Conclusion

70 The appeal should be dismissed.

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53 *Festa v The Queen* (2001) 208 CLR 593 at 604 [28], 633 [126]-[127], 657 [212]-[213], 662 [229]-[230], 671 [263].

71 KIRBY J. This appeal, from the Court of Criminal Appeal of Western Australia[54] concerns the lawfulness of the conviction of Mr Anthony Pinkstone ("the appellant"). He was convicted on a count of an indictment charging him with having supplied a prohibited drug (methylamphetamine) on 7 October 1999 at Perth Airport to a person identified in the particulars as Mr Wayne Yanko.

72 As a result of police interception of the drug at the airport, it was handed to Mr Yanko, not by an employee of the airline (as the appellant had authorised and intended) but by an officer of the Western Australia Police in the course, and for the purposes, of his official duties. The issue is whether the prosecution proved that the appellant "supplied" the drug, as charged, or whether (as the appellant submits) the act of "supply" was performed by the officer of police.

73 The point raised is a technical one concerning the requirements of the law. It is not, as such, one involving arguments of criminal innocence. The appellant accepts that he was guilty of attempted supply of the prohibited drug to Mr Yanko. A conviction of such an offence would ordinarily carry a lesser sentence. In fact, the appellant submits that it would require re-sentencing with the result that he might be entitled to immediate, or near immediate, release on parole. Special leave was granted to permit the appellant's point of law to be determined by this Court.

The facts and earlier proceedings

74 *The facts and issues at trial*: The facts were uncontested. I accept as sufficient the summary contained in the reasons of McHugh and Gummow JJ[55]. I have deleted from these reasons my own earlier statement of the facts as I disagree with needless repetition of such matters.

75 The appellant pleaded not guilty to the counts of the indictment[56]. He was tried in the Supreme Court of Western Australia before Roberts-Smith J and a jury. At the end of the trial, he was found guilty by the jury, convicted on both counts and sentenced to ten years imprisonment for the offence of "supply" to Mr Yanko and six years for "attempted supply" to another person, Mr Brazier. An aggregate sentence of twelve years three and a half months imprisonment was imposed. Eligibility for parole was denied.

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54 *Pinkstone v The Queen* [2003] WASCA 66.

55 Reasons of McHugh and Gummow JJ at [21]-[26]; see also reasons of Gleeson CJ and Heydon J at [3]-[6], [12]-[13].

56 Reasons of McHugh and Gummow JJ at [27].

76 Before the trial began, the appellant had applied to quash the indictment on the ground that the Western Australian court had no jurisdiction to try the offences alleged against him because they amounted to federal offences which had occurred wholly within New South Wales[57]. That allegation was rejected, the trial judge concluding that there was a sufficient territorial nexus for the offences to be tried in Western Australia. This was so because, it was held, the provisions of the *Misuse of Drugs Act* 1981 (WA), ("the Drugs Act") founding the offences, were applied to the Perth Airport by force of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth), ("the Commonwealth Places Act") s 4(1)[58]. That ruling is not contested in this appeal.

77 *The disagreement on appeal*: The appellant appealed against his conviction and sought leave to appeal against his sentence. He did so on a number of grounds. One ground was that the prohibited drug had been "supplied" to Mr Yanko by officers of the Western Australia Police, and not by the appellant. The appeal and the application for leave to appeal were heard by the Court of Criminal Appeal. By majority[59], that Court dismissed the challenge to the convictions[60].

78 The point of disagreement in the court below concerns only the count relating to the alleged "supply" of a prohibited drug to Mr Yanko. It is this point alone that attracted the grant of special leave to appeal to this Court.

79 The majority opinion in the Court of Criminal Appeal was given by Murray J (with whom Wheeler J agreed). His Honour concluded that the intervention of the police did not alter the character of the "supply" of the prohibited drug by the appellant. He held that this was so because the appellant intended the drug to be supplied to Mr Yanko and always envisaged that the act of supply would be completed by others[61]. Murray J concluded that it made no difference that the police took possession of the drug. Doing so, he decided, did not involve them in the commission of an offence and "it would not have

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57 *R v Pinkstone* (2001) 24 WAR 406 at 410 [4].

58 *R v Pinkstone* (2001) 24 WAR 406 at 425 [66].

59 *Pinkstone v The Queen* [2003] WASCA 66; Murray J (Wheeler J concurring), Rolfe AJ dissenting.

60 The majority gave leave to the appellant to appeal against sentence, and resentenced him to an aggregate term of twelve years imprisonment with parole: *Pinkstone v The Queen* [2003] WASCA 66 at [108]-[111], [112].

61 *Pinkstone v The Queen* [2003] WASCA 66 at [34]-[35].

mattered had they become accomplices implicated in the act of supply"[62]. Because their conduct did not alter the "character of the supply", they simply fulfilled the purpose of the appellant, namely delivery of the drug to the intended recipient. On this footing, the direction to the jury of the trial judge, assimilating the conduct of the police in the supply of the drug to Mr Yanko, was accurate. No further direction had been required.

80 The dissenting judge (Rolfe AJ) concluded that the intervention of the police broke the chain of intention and causation linking the appellant to the "supply" of the prohibited drug to Mr Yanko[63]. Once the police officers, pursuant to a police purpose, took possession and control of the drug, the subsequent "supply" of the drug to Mr Yanko was by police for operational purposes. It was not pursuant to any arrangement made by the appellant with Ansett, acting as his servant or agent[64]. It was on that footing that Rolfe AJ would have quashed the appellant's conviction of "supply".

The applicable legislation

81 *A Commonwealth place and federal law*: Because Perth Airport is a "Commonwealth place", by virtue of the Constitution[65], State law (including the provisions of State criminal statutes) does not apply of its own force. As a place "acquired by the Commonwealth for public purposes" the airport is a place where the Federal Parliament has "exclusive power to make laws". It is pursuant to such powers that s 4(1) of the Commonwealth Places Act was enacted. That sub-section is extracted in the reasons of McHugh and Gummow JJ[66].

82 By force of s 4(11) of the same Act, a reference to a conviction or punishment under the applied provisions "shall be deemed to include a reference to a conviction [or] punishment … under the law of a State that corresponds …".

83 The relevant offence alleged against the appellant was that provided in s 6(1) of the Drugs Act as applied at Perth Airport, pursuant to the foregoing federal law. That sub-section is also extracted elsewhere[67].

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62 *Pinkstone v The Queen* [2003] WASCA 66 at [35].

63 *Pinkstone v The Queen* [2003] WASCA 66 at [116].

64 *Pinkstone v The Queen* [2003] WASCA 66 at [114].

65 Constitution, s 52.

66 Reasons of McHugh and Gummow JJ at [34].

67 Reasons of McHugh and Gummow JJ at [43].

84 *Applicable State law*: In s 6(2), an additional exception is provided in respect of possession of a prohibited drug where the same is "sold or supplied, or requested to be sold or supplied … by a medical practitioner or veterinary surgeon in the lawful practice of his profession; or on and in accordance with an authorised prescription". By s 6(3) an exception is afforded, relevantly, where the person in possession of a prohibited drug proves that he was delivering the drug to a person in ways permitted by the *Poisons Act* 1964 (WA) or was analysing, examining or otherwise dealing with it for the purposes of the Drugs Act in his capacity "as an analyst, botanist or other expert"[68]. The high particularity of these exceptions must be noted. Obviously, they were intended to restrict cases of lawful possession or supply of prohibited drugs to very special and defined circumstances. None of the exceptions was applicable to the police conduct in the present case.

85 By s 31 of the Drugs Act, still further provision is made for the Commissioner of Police to "authorise in writing a person to act as an undercover officer". By virtue of such authorisation, such a person, whilst acting as an undercover officer, is (subject to further conditions)[69] authorised to acquire and have in his or her possession a prohibited drug for the purpose of detecting the commission of an offence. In the specified circumstances, the undercover officer is deemed not to be an accomplice in respect of, and not to commit, any offence[70]. This exceptional provision was likewise inapplicable to the present case. There was no evidence of any such authorisation. In any event, the provisions do not authorise the "supply" of a prohibited drug to another person contrary to the provisions of the Drugs Act. The particularity of the provisions governing the conduct of undercover officers, and the strict regime to which they are subjected by the Act[71], afford still further evidence of the prohibition imposed by the Act upon the "supply" of prohibited drugs, including by police officers.

86 Three other provisions of State law must be mentioned as relevant to the count of "supply" alleged against the appellant. By s 3 of the Drugs Act an extended definition of "supply" is provided[72]. By that definition "to supply" includes "to deliver, dispense, distribute, forward, furnish, make available,

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68 s 6(3)(b).

69 As provided by the Drugs Act, ss 26(2) and 31(4).

70 s 31(3).

71 See esp s 31(5).

72 The extended definition was inserted by the *Misuse of Drugs Amendment Act* 1998 (WA), s 3.

provide, return or send, and it does not matter that something is supplied on behalf of another or on whose behalf it is supplied". By s 33(1) of the same Act, provision is made for an offence to be committed by a person who "attempts or incites another to commit, or becomes an accessory after the fact to, an offence". It was pursuant to this provision that the appellant was charged with "attempted supply" of the prohibited drug to Mr Brazier[73]. Finally, by s 12 of the *Criminal Code* (WA) ("Criminal Code") provision is made for offences having an extraterritorial element[74].

87 In the appellant's trial, the prosecution argued that the act of "supply" of the prohibited drug to Mr Yanko was not complete until Mr Yanko received the drug at Perth Airport. It was that receipt that was found by the trial judge to constitute the concluding conduct making up the final element of the offence. In an interlocutory ruling, the trial judge found that, because the last element of the offence occurred in Western Australia, by force of s 12 of the Criminal Code (given effect at the Perth Airport by the Commonwealth Places Act) the offence against the Drugs Act sufficiently took place in Western Australia so as to sustain the jurisdiction of the Supreme Court of Western Australia[75].

The issues

88 *Issues that fell away*: A number of potential issues concerning the appellant's conviction of the offence of "supply" fell away during the litigation. This Court is only concerned with the point upon which the Court of Criminal Appeal divided. Although that point was not reserved during the trial, it was not suggested in this appeal that this failure occasioned any legal impediment to its determination[76]. Nor was it argued that any additional evidence was relevant to the resolution of the question. The proceedings being accusatorial in character, it was for the prosecution to present at the trial all of the evidence upon which it relied to establish the offence alleged in the first count.

89 The appellant did not seek an order for a new trial based on the misdirection of the jury concerning the ingredient of "supply". He accepted that the proper outcome of his appeal was the substitution of a conviction of

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73 Mr Brazier's involvement is explained in the facts set out by McHugh and Gummow JJ at [21], [24].

74 This section is extracted in the reasons of McHugh and Gummow JJ at [55].

75 *R v Pinkstone* (2001) 24 WAR 406 at 420-421 [47]-[51].

76 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 154-155 [138]; *Crampton v The Queen* (2000) 206 CLR 161 at 171 [10], 182 [47], 205 [117].

attempting to supply a prohibited drug[77]. Under the Criminal Code, such substitution is available where "on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of [the] other offence"[78]. In the exercise of its appellate jurisdiction, this Court is empowered to "give such judgment as ought to have been given in the first instance"[79]. The Court would therefore be entitled to substitute conviction of the offence of "attempted supply" if that were otherwise appropriate. That would call for resentencing of the appellant according to provisions of the Drugs Act that envisage, upon conviction of "attempted supply", the imposition of a shorter custodial sentence than for "supply"[80].

90 It was not suggested that the case was one for the application of "the proviso"[81]. Nor could it be so. If the appellant's arguments were correct, he was not liable to be found guilty of the offence of "supply". He was, however, liable to be found guilty of "attempted supply".

91 *The extended definition of "supply"*: During argument in this Court, it was suggested at one stage that the appellant's contentions about the meaning of "supply" were met by the extended definition of that word introduced into the Drugs Act. Specifically, it was suggested that he was guilty of "supply" in the sense of "forward" or "send", because he had "forwarded" or "sent" the drug to Mr Yanko thereby completing the offence when he delivered the cargo to the Ansett counter at Sydney Airport. The extended definition of "supply" was introduced into the Drugs Act in 1998 to overcome a decision of the Court of Criminal Appeal of Western Australia in *Manisco v The Queen*[82]. That was a case where the prisoner had successfully contended that the Drugs Act was not applicable because he had been handed the drug by persons with a view to its being returned to them at a later date and was thus merely a bailee for the owner. In Manisco it was held that that case of bailment did not fall within the meaning of the word "supply" in its general sense. That holding produced the enactment of the wider definition[83].

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77 Pursuant to the Drugs Act, ss 6(1)(c) and 33(1).

78 Criminal Code (WA), s 693(2).

79 *Judiciary Act* 1903 (Cth), s 37.

80 s 33(1).

81 Criminal Code (WA), s 689(1). See *Krakouer v The Queen* (1998) 194 CLR 202.

82 (1995) 14 WAR 303.

83 Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 20 November 1997 at 8341-8342.

92 There are two difficulties in treating the appellant's act of "supply" as constituted by his action in "forwarding" or "sending" the drug to Mr Yanko. First, it is not the way the prosecution presented its case at trial. Clearly, it relied on the meaning of "supply" in its ordinary sense. According to established authority, this was a course open to it[84]. Thus, the issue in this case is not the theoretical one of whether the appellant "supplied" the drug to a recipient in Western Australia in terms of the extended definition of that word in the Drugs Act. It is whether, in terms of the count of the indictment as particularised, he was proved to have "supplied" the drug *to Mr Yanko*, the intended recipient.

93 Secondly, in the particular circumstances of the case, had the prosecution sought to prove its accusation by reference to the appellant's act of "forwarding" or "sending" the drug from Sydney to Perth, it is arguable that, notwithstanding s 12 of the Criminal Code, the offence was complete in New South Wales and insusceptible to trial in Western Australia. It is unnecessary to decide finally whether that was so. It is sufficient to say that, in this Court, it would be too late for the prosecution to withdraw from its reliance upon the acts of Officer Kanawati in handing the drug to Mr Yanko as completion of the act of "supply" charged and so identifying the "supply" relied upon in the case.

94 *The essential issue: interrupted "supply"*: In this way, the issue in the appeal is reduced to that identified by Rolfe AJ. Where the method of "supply" intended by the supplier (through an "innocent agent") is interrupted by the intervention of a third party (police officers) who neither the supplier nor the recipient ever intended to have possession of the goods, does this mean that the "supply" is not the act of the would-be supplier (the accused) but the act of the third party (police) for their own separate and different (police) purposes[85]?

95 For the reasons severally given by the judges in the Court of Criminal Appeal, it is clear enough that either view of the meaning of "supply" might theoretically be adopted. Upon the view of the relevantly uncontested facts urged by the appellant, the act of "supply" of the prohibited drug was that of Officer Kanawati, not of the appellant or his agent Ansett. On the view of those facts adopted by the majority of the Court of Criminal Appeal, the intervention of the police was legally irrelevant. They were mere conduits for the act of "supply" intended by the appellant. They intervened with the agreement of Ansett. They did so in the fulfilment of official duties by police and to protect civilians from dangers inherent in such an enterprise.

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84 *R v Carey* (1990) 20 NSWLR 292 at 294 per Hunt J (Wood and Finlay JJ concurring).

85 *Pinkstone v The Queen* [2003] WASCA 66 at [126] per Rolfe AJ.

96 Because each view of the facts is arguable, it is necessary to resolve the issue in this appeal by legal analysis conducted in the usual way: by reference to legal authority, principle and policy[86]. It must be firmly said that the appellant's "substantial" criminal history, including a history of drug offences[87] is wholly irrelevant to the issue before this Court. There are countries where criminal trials begin with this information and it colours all that follows. Australia is not such a place. The appellant's record was, properly, only referred to in sentencing after he was convicted. It is not relevant to the issue of whether he was liable in law to be convicted of the offence charged in the first place. In our legal system, convicted criminals and secular saints approach the judgment seat as equals for the accurate application of the law.

97 Approached in the correct manner, I consider that the appellant's submissions are correct and should be preferred. The appeal should be allowed.

The meaning of "supply"

98 *"Supply" in drug offences*: The ultimate question in the appeal is whether the evidence called by the prosecution proved beyond reasonable doubt the offence alleged against the appellant in the first count of the indictment. In accordance with the way in which the case against the appellant was presented at trial, the issue was whether he was guilty of "supply" of the drug to Mr Yanko in the ordinary meaning of that term.

99 As was pointed out in *R v Carey*[88], in the context of supplying drugs, the word "supply" has received considerable attention from the courts. Dictionary meanings of the word "supply" reinforce that it is "generally agreed" that the word extends to furnishing or providing something to another which is needed or wanted or required by that other to whom it is given[89]. However, "such acts of providing, furnishing or making available [take] place only when the physical control of the drugs was transferred to a person who was not their owner or who was not reasonably believed to be such"[90].

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86 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

87 Reasons of Gleeson CJ and Heydon J at [4].

88 (1990) 20 NSWLR 292 at 295.

89 (1990) 20 NSWLR 292 at 294. See also *R v Coles* [1984] 1 NSWLR 726 at 733.

90 (1990) 20 NSWLR 292 at 295.

100 It is from the context of the Act, that "supply" of prohibited drugs, in its ordinary sense, has generally attracted a meaning proper for the supply of a thing for use or sale as drugs. This is why the mere transfer of physical control over drugs does not, as such, constitute "supply"[91], within the Drugs Act[92]. Any sense of impatience with the point raised by the appellant must be assuaged by consideration of the large number of cases in which similar disputes have arisen and been resolved by the courts. In these cases, concerning whether the passage amounted to "supply" within the statute or not, drugs have undoubtedly passed hands. In a number of cases points no more "technical" than the appellant's argument, have been upheld[93]. Those cases teach that it is necessary to approach the question, as others of a similar kind, without preconceptions, addressing solely the legal issue of whether the proved facts are susceptible to constitute the "supply" as charged and whether the directions of law on the meaning of that word, given in the trial, were adequate in the circumstances of the case.

101 In some of the cases concerned with the meaning of "supply", attention has been paid to the question whether the alleged supplier owned, or had physical possession and control of, the goods in question[94]. Whilst this is an understandable inquiry in circumstances where the act said to constitute "supply" is claimed to be nothing more than a transfer pursuant to an arrangement of bailment, the word "supply" does not necessarily say anything about the interest of the alleged supplier in the goods "supplied". It is sufficient for the offence if the supplier has control over the goods for the purpose of the "supply" in question. In some cases, control will derive from ownership or the right to possession. In other cases it will involve nothing more than temporary custody. In the present case, there is no doubt that the police officers at Perth Airport who took control of the drugs in question had, and exercised, control over them sufficient to "supply" them to a recipient. The appellant may have owned the drugs. However, after he consigned them by Ansett cargo, he lost physical control over them. That control was entrusted to Ansett cargo. They constituted the appellant's agent for the purpose of supplying the drugs to the named recipient. They were not his agent for the purpose of supplying the drugs to police officers. Still less were the police officers the appellant's agents to take control of the drug and to "supply" it to Mr Yanko.

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91 *R v Maginnis* [1987] AC 303 at 309.

92 s 6(1)(c).

93 eg *R v Carey* (1990) 20 NSWLR 292; see the remarks of Hunt J at 296 preferring the dissenting opinion of Lord Goff of Chieveley in *R v Maginnis* [1987] AC 303 at 315; *Manisco v The Queen* (1995) 14 WAR 303.

94 eg *R v Coles* [1984] 1 NSWLR 726 at 733; *Trudgeon* (1988) 39 A Crim R 252 at 254; *R v Carey* (1990) 20 NSWLR 292 at 295.

102 *The doctrine of innocent agency*: The problem of the interposition of third parties in the performance of the acts that constitute essential elements to a criminal offence is not new to the law. As Brooking JA pointed out in his helpful analysis in *R v Franklin*[95], the question of whether, and in what circumstances, someone who does not physically perpetrate a crime will be regarded in law as the actual perpetrator, on the basis of action performed through the agency of another, is one that has been considered by courts since the sixteenth century[96]. To meet the problem so arising, a doctrine of "innocent agency" has been recognised for the dual purposes of (1) excusing from criminal liability actors without culpability who play some part in the criminal acts constituting the offence and (2) rendering liable those who were criminally responsible for such acts but only in accordance with the elements of the offence charged. As Brooking JA explained[97]:

> "So one who procured a third person to give poison to the victim in the procurer's absence was liable only as an accessory before the fact if the intermediary knew it to be poison, but liable as the actual perpetrator if the intermediary knew nothing of the poison, 'or else a man should be murdered and there should be no principal'[98]. The doctrine was 'a rule of necessity', founded in 'that justice which is due to the publick'[99]. The innocent agent has been described for the last two or three hundred years as a mere instrument[100], although other expressions have been used[101].

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95 (2001) 3 VR 9 at 21 [35].

96 Referring to *R v Saunders* (1576) 2 Plowden 473 [75 ER 706].

97 *R v Franklin* (2001) 3 VR 9 at 21 [35].

98 Kelyng J 52-53 [84 ER 1079] (mentioning a charge to a jury given in 1633). Compare what had been said in *R v Saunders* (1576) 2 Plowden 473 at 474 [75 ER 706 at 708] several decades earlier: "and if such death should not be punished in him, it would go unpunished".

99 Foster's *Crown Law* (1762) at 349.

100 As in *R v Brisac and Scott* (1803) 4 East 164 at 172 [102 ER 792 at 796]: "And in the present case, the delivering the vouchers, and the presenting the bill of exchange to the Commissioners … were the acts of both the defendants, done in the county of Middlesex: I say it was their acts, done by them both; for the persons who innocently delivered the vouchers were mere instruments in their hands for that purpose …" (Grose J, delivering the judgment of the Court of King's Bench).

101 For example, Glanville Williams speaks of "a mere machine whose movements are regulated by the offender" (*Criminal Law, The General Part*, 2nd ed (1961) at 350)

(Footnote continues on next page)

> The law regards the puppet-master as causing the mischief done by the puppet. 'Innocent agency' has been considered a number of times in recent years[102]."

103 The doctrine of innocent agency in the criminal law was considered by this Court in *White v Ridley*[103], a case bearing some similarities to the present. There, the accused dispatched a box by air carrier from Singapore on consignment to Australia. The carrier was innocent, being ignorant of the fact that the box contained a concealed prohibited drug. When the accused arrived in Australia and became suspicious of surveillance he endeavoured to stop the dispatch of the box from Singapore but without success. Upon its arrival in Australia, the accused was charged with importing a prohibited import and convicted under the *Customs Act* 1901 (Cth). The decision in the case turned, in the view of the majority, upon whether the accused had done all that was reasonably necessary to stop the importation. In this sense, the case is clearly distinguishable from the facts of the present. But in the course of the reasons of the majority the doctrine of "innocent agency"[104] or "innocent instrument"[105] was explained. It was pointed out that the criminal offence of illegal importation was performed wholly by the accused because the acts of importation were carried out by the airline as his "agent" or "instrument" without being aware in any way that it was committing an offence. As Gibbs J put it[106]:

> "The applicant did not himself bring the cannabis into Australia; it was brought in by the airline. However it is well settled at common law that a

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and "a cat's paw" (*Textbook of Criminal Law*, 2nd ed (1983) at 330). McHugh J prefers "non-responsible agent" to "innocent agent" (*Osland v The Queen* (1998) 197 CLR 316 at 347-348 [85]-[86]), while Stephen J would not speak of an "agent" (*White v Ridley* (1978) 140 CLR 342 at 353-354), but I have continued to use the old and familiar expression.

102 Examples will be found in *R v Paterson* [1976] 2 NZLR 394; *White v Ridley* (1978) 140 CLR 342 at 346-347 per Gibbs J, 353-354 per Stephen J; *R v Demirian* [1989] VR 97 at 118 per McGarvie and O'Bryan JJ and *Osland v The Queen* (1998) 197 CLR 316 at 326 [19] per Gaudron and Gummow JJ, 347-349 [85]-[90] per McHugh J. There is an extensive discussion in *R v Hewitt* [1997] 1 VR 301.

103 (1978) 140 CLR 342 at 346-347 per Gibbs J, 353-354 per Stephen J (Aickin J at 363 concurring).

104 (1978) 140 CLR 342 at 346-347 per Gibbs J.

105 (1978) 140 CLR 342 at 353 per Stephen J.

106 (1978) 140 CLR 342 at 346.

> person who commits a crime by the use of an innocent agent is himself liable as a principal offender. That is so not only where the agent lacks criminal responsibility, as, for example, when he is insane or too young to know what he is doing, but also where the agent, although of sound mind and full understanding, is ignorant of the true facts and believes that what he is doing is lawful."

104 Clearly, neither Officer Kanawati nor any other police officer was an "innocent agent", "instrument" or "non-responsible agent"[107] of the appellant in this sense for the purposes of the "supply" of the illegal drug to Mr Yanko. They were not "supplying" the drug to Mr Yanko *for the appellant* but solely for the purposes of the pre-arranged police plan to complete the offence and, if the cargo contained a prohibited drug (as police believed) to secure the conviction of the appellant, Mr Yanko and any others who were implicated.

105 The Western Australia Police did not know for certain that the cargo delivered to Mr Yanko contained a prohibited drug. However, they believed that it did. In my view, the only realistic interpretation of what the police did was that they took over exclusive control of the cargo from Ansett[108]. They had physical possession and asserted control over it. It is not to be believed that, from the moment the police arrived, they would have allowed the employees of Ansett to interfere in any way in their operation. Ansett's private interests had been replaced by the public purposes of the police.

106 On the other hand, until the time of the police intervention, Ansett was the "innocent agent" of the appellant. Had Ansett delivered the consignment to Mr Yanko as the appellant intended, it would have had no criminal liability for the "supply", any more than the airline involved in *White v Ridley*. It would have concluded the appellant's act on his behalf. The offence of "supply" would have been completed. It would have been the appellant's act of "supply". However, the police were not in the same position as the airline. Their purposes were not those of the appellant. The appellant was not liable for what the police did. The police assumed their own responsibility for what they did.

107 *Specific law on police operations*: As the highly particular provisions of the State legislation demonstrate[109], there was no blanket exemption of the conduct of police from observance of the criminal law in respect of the supply of prohibited drugs[110]. On the contrary, such exemptions as were provided by the

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107 *Osland v The Queen* (1998) 197 CLR 316 at 347-348 [85]-[86] per McHugh J.

108 cf reasons of Gleeson CJ and Heydon J at [12]-[14].

109 Above at [84]-[85].

110 cf *Ridgeway v The Queen* (1995) 184 CLR 19 at 43-44, 54, 64, 67-69.

Drugs Act were strictly limited and irrelevant to the circumstances of the "supply" of the prohibited drug to Mr Yanko. Prosecution of the police in such circumstances for "supply" of the drug to Mr Yanko would be unlikely, not least because of the absence of any criminal intention. However, the established doctrine of innocent agency was irrelevant in this case to render the appellant criminally liable as principal for the acts of an intermediary. There is no broader principle of vicarious liability to render the appellant liable for the independent and deliberate actions of the police for their own purposes. Therefore, on the face of things, as the act of "supply" of the prohibited drug to Mr Yanko was ultimately not that of Ansett, the innocent agent, but that of the police, a necessary ingredient of the offence was not performed by the appellant or someone for whom the appellant was liable. It was performed, instead, by police officers who were on no account the appellant's agent or instrument.

108 But can it be said that, even if Officer Kanawati "supplied" the prohibited drug to Mr Yanko, the appellant also did so through the intended delivery of the cargo to Mr Yanko at the Ansett counter at Perth Airport? It is true that there is nothing in the offence with which the appellant was charged[111] that suggests that only one person may be guilty of a relevant act of "supply". In some circumstances, where there is a chain of supply, depending on the evidence, a number of persons might be liable for the same offence of "supply".

109 In the present case, however, two considerations make it impossible to attribute to the appellant the eventual "supply" of the drug to Mr Yanko. The first is that the physical acts constituting the "supply" were ultimately those of Officer Kanawati, who interposed himself between the appellant and Mr Yanko and was not an innocent agent of the appellant. Secondly, that interposition broke the chain of causation between the appellant's consignment of the cargo to Mr Yanko and the latter's receipt of it. It introduced a "new cause" in the effectuation of the "supply"[112]. It was one performed without the request or authority of the appellant[113]. It was wholly performed as a voluntary act on the part of police for their own purposes[114].

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111 Under the Drugs Act, s 6(1)(c).

112 *White v Ridley* (1978) 140 CLR 342 at 354.

113 *White v Ridley* (1978) 140 CLR 342 at 351.

114 *R v Franklin* (2001) 3 VR 9 at 26 [49] citing Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine", (1985) 73 *California Law Review* 323, reprinted in Kadish, *Blame and Punishment - Essays in the Criminal Law* (1987).

110 *Police supply is not appellant's supply*: To say the least, the police action of "supply" to Mr Yanko for their purposes was not intended, or authorised, by the appellant. It involved a new operative cause of the "supply". This meant that the act of "supply", as it occurred, did not coincide with the "supply" as arranged and intended by or on behalf of the appellant. In these circumstances the contemporaneity between the relevant criminal act and the criminal intention required in this case to establish the offence of "supply" was missing[115]. Although doubtless well intended in the circumstances, the intervention of Officer Kanawati meant that, as a matter of law, the "supply" was solely that of the police. Neither by innocent agency nor otherwise could it be attributed in law to the appellant.

The other supporting reasons

111 *Specificity of criminal offences*: To the complaint that this conclusion is unreasonable and that the law should uphold the responsible intervention of Officer Kanawati and his colleagues, there are several answers.

112 It is a fundamental principle of the criminal law that accused persons may only be convicted where every lawful element of the offence charged against him or her is established by the prosecution to the requisite standard. There are many instances, old and new, where, in the case of a "socially-harmful occurrence"[116], even one performed with *mens rea*, the accused has escaped criminal liability for a given offence because close attention to the language of the law creating the offence demonstrates that one element of it has not been proved.

113 As clear an example of this proposition as one could hope to get appears in *Crampton v The Queen*[117]. There the accused's conviction was set aside because of apparent oversight, or misunderstanding, of the meaning of the word "with" in the offence involving an act of indecency *with* another male person. It is basic to the proper approach to the proof of criminal offences to attach importance to every word[118]. So it is with the word "supply". The fact that the appellant did not "supply" the prohibited drug does not excuse him of all criminal liability. Potentially, he was guilty of a number of different offences. He accepts

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115 cf *White v Ridley* (1978) 140 CLR 342 at 359.

116 Perkins, *Criminal Law* (1957) at 557 cited by Brooking JA in *R v Franklin* (2001) 3 VR 9 at 25 [46].

117 (2000) 206 CLR 161.

118 The rule that a court "must strive to give meaning to every word of the provision" is more basic and general: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

his liability for the offence of "attempted supply". But an inability to prove "supply" does excuse the appellant from liability for the offence with which he was charged in the first count of the indictment.

114 *Statute and police "supply"*: Whilst there are operational explanations for the conduct of Officer Kanawati and his colleagues, acting as they did, the fact remains that such conduct falls outside the apparently carefully designed scheme of the Drugs Act. It did not fall within any of the exemptions provided by that Act, including the exemption applicable to undercover police activities. Officers of police, like those of customs, have no blanket authority to ignore the prescriptions of the law[119]. In the case of a statute which contains closely defined exceptions and exemptions, it is not for the courts to create new and additional occasions for departure from the requirements of the written law.

115 *Availability of proper "supply"*: It would have been open to the police to adopt a different procedure that would have avoided the difficulties that were presented by the procedure which they followed. Thus, if the concerns of Ansett had been allayed by the nearby presence of disguised police officers, but without interrupting the supply of the cargo to Mr Yanko, the appellant would have remained responsible for the acts of the airline as his innocent agent. Alternatively, if a larger exemption was thought necessary for police operations of this kind, it would be open to police to seek it from Parliament. The earlier amendment of the Drugs Act, enacted to overcome earlier decisions on the meaning of "supply", suggests that changes to the Act can be secured promptly enough where they are considered necessary. If enacted, the provisions specifying exemptions from criminal liability (including for police undercover operations) suggest that additional exemptions for a police operation, such as that undertaken in the present case, would be subjected, properly, to strict legislative requirements and conditions[120].

116 *Ambiguity and penal offences*: Although a different view of the applicable legislation was arguable in the present case (as demonstrated by the majority opinion in the Court of Criminal Appeal) it was not the preferable view. Where there is doubt as to the ambit of a criminal offence, in the instant case the meaning of "supply", it is conventional for the judiciary to prefer the ambit which is least penal in respect of the impugned conduct and least punitive in consequences. Especially is this so where, as here, the offence involved attracts, where proved, very high custodial and other punishment. Even more is this so where, as here, the ambit of the word in question has been enlarged by a statutory

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119 cf *Ridgeway v The Queen* (1995) 184 CLR 19.

120 Amendments to the *Customs Act* 1901 (Cth), s 233B were introduced following the decision of this Court in *Ridgeway v The Queen* (1995) 184 CLR 19.

definition which is particularly broad but was not, as such, invoked in the way the prosecution case was particularised and presented at trial.

Conclusion and orders

117 It follows that the appellant has made good his submission. The dissenting view of Rolfe AJ in the Court of Criminal Appeal should be preferred. The appeal should be allowed. The orders of the Court of Criminal Appeal of Western Australia should be set aside. In lieu thereof, the appellant's conviction on the first count of the indictment should be quashed. In its place, there should be substituted a conviction for the offence of attempting to supply a prohibited drug contrary to s 6(1)(c) and s 33(1) of the *Misuse of Drugs Act* 1981 (WA). The proceedings should be remitted to the Court of Criminal Appeal to resentence the appellant in respect of that conviction.