# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, HAYNE, CALLINAN AND HEYDON JJ

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GRAHAM VICTOR TABE APPELLANT

AND

THE QUEEN RESPONDENT

*Tabe v The Queen*
[2005] HCA 59
*6 October 2005*
B67/2004

**ORDER**

*Appeal dismissed.*

On appeal from the Supreme Court of Queensland

**Representation:**

B W Walker SC with A W Moynihan for the appellant (instructed by Legal Aid Queensland)

L J Clare with M J Copley for the respondent (instructed by Director of Public Prosecutions (Queensland))

## CATCHWORDS

### Tabe v The Queen

Criminal law – Attempted possession of dangerous drug – Unopened parcel contained dangerous drug – Innocuous substance substituted by police for drug – Principal offender obtained custody of unopened parcel – Appellant charged with aiding, abetting or counselling attempted possession of dangerous drug – Whether possession of a dangerous drug pursuant to s 9 *Drugs Misuse Act* 1986 (Q) requires proof of a mental element – Whether attempting to possess a dangerous drug pursuant to s 4(1) of the *Criminal Code* (Q) requires proof of a mental element – Whether custody of a dangerous drug without knowledge of its contents is sufficient to establish possession or an attempt to possess – Whether requisite state of knowledge differs between principal offender and accessory alleged to have aided, counselled or procured custody of receptacle.

Criminal law – Onus of proof – Whether possession of a dangerous drug pursuant to s 9 *Drugs Misuse Act* requires Crown to prove a mental element – Whether s 57(d) *Drugs Misuse Act* requires accused to prove absence of a mental element.

*Criminal Code* (Q), ss 4(1), 7(1), 24, 36(1), 535, 536, 583
*Drugs Misuse Act* 1986 (Q), ss 9, 44, 44A, 57(c), 57(d), 117(1)

Words and Phrases – "possession", "[a]ttempts to commit offences".

1 GLEESON CJ. This appeal raises questions of the construction of Queensland legislation concerning unlawful possession of dangerous drugs. The appellant and a companion, Ms Briggs, went to a post office to collect an envelope which had been sent by mail. The envelope they wanted to collect contained methylamphetamine, a dangerous drug within the meaning of the legislation. There had been a police interception. A substitute envelope was handed to Ms Briggs, but it contained no drugs. The two were arrested. Ms Briggs pleaded guilty to an offence and was sentenced. The appellant was charged with possession of a dangerous drug. The case against the appellant was put on the basis that there was an attempt by Ms Briggs to possess the dangerous drug, and that the appellant counselled or procured Ms Briggs to make that attempt. If both of those allegations were sustained, then the appellant was guilty of the offence charged.

2 The detailed facts, and the relevant legislative provisions, are set out in the reasons of Hayne J and the joint reasons of Callinan and Heydon J. It is clear that Ms Briggs never obtained possession of the dangerous drug; hence the allegation of attempt to possess which, by statute, is the equivalent of possession. Neither the appellant nor Ms Briggs gave evidence. Witnesses were called in the defence case in an attempt to show that the envelope was being collected merely as a favour to a third party. This was treated as raising a defence that the appellant honestly and reasonably believed that the envelope did not contain a dangerous drug. By virtue of s 57(d) of the *Drugs Misuse Act* 1986 (Q)[1], and its operation in relation to s 24 of the *Criminal Code* (Q), the onus of making out a defence of honest and reasonable mistake was on the appellant[2]. The trial judge so directed the jury, and no objection was, or is, taken to that direction.

3 There was, however, another question, which may be identified more clearly in relation to the role of Ms Briggs. As the case against the appellant (counselling and procuring Ms Briggs to attempt to possess the dangerous drug) was put, it was necessary for the prosecution to show, against the appellant, that Ms Briggs was guilty of attempting to possess the drug. The trial judge told the jury that the charge against the appellant involved three elements: first, that Ms Briggs attempted to possess a dangerous drug; secondly, that the appellant did some act for the purpose of enabling her to commit that offence; thirdly, that the appellant knew that Ms Briggs intended to attempt to obtain possession of the envelope and its contents.

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**1** This Act has been amended and some provisions renumbered by the *Drugs Misuse Amendment Act* 2002 (Q). All references are made to the provisions as in force at the time of the alleged offence.

**2** *R v Clare* [1994] 2 Qd R 619.

4 The reference to possession of the envelope and its contents was related to what the trial judge said as to the elements of Ms Briggs' offence. The judge explained that, by statute, a person who attempts to commit a crime is deemed to be guilty of the intended crime. She said:

> "Now, there is actually one inference that you are going to have to draw in this case in order to accept the prosecution case and that would be that when Ms Briggs went to collect the envelope, which is exhibit 1, including its contents that she knew that the envelope had contents. That's an inference that I don't think is really in dispute but you can see that you've had no evidence of Ms Briggs' state of mind ... but I will be telling you that you need to be satisfied that when she went to collect that envelope she knew that she was going to get something inside the envelope. I'll just add here as a matter of law, the prosecution does not have to prove that Ms Briggs had knowledge that the contents of the envelope were methylamphetamine."

The trial judge also said:

> "There is evidence that Ms Briggs ... attempted to commit the offence of the possession of the dangerous drug ... You've heard the evidence about how she went to the Post Office ... and handed over the card and got the dummy envelope, and it probably won't trouble you to infer that she knew that when she was collecting the envelope that there would be something in it, and it's not an issue that that possession would have been unlawful and we know that the quantity exceeded 2 grams. So we have Ms Briggs guilty of the offence."

5 When it came to the role of the appellant, the trial judge referred briefly to evidence that made it obvious that the appellant had procured Ms Briggs to attempt to obtain the envelope, had intended that she would do so, and had assisted her. The substantial question for consideration by the jury was said to be the defence of honest and reasonable but mistaken belief, which was based on the evidence of the defence witnesses, and which raised an issue on which the appellant carried the onus of proof. The judge said:

> "If you were persuaded that Mr Tabe believed honestly and reasonably that the envelope did not contain the dangerous drug methylamphetamine then Mr Tabe is not guilty."

6 The primary issue raised in this appeal concerns the extent of the knowledge necessary for the offence of attempting to possess a dangerous drug where a person attempts to obtain custody or control of an envelope (or package, or suitcase, or other container) which in fact contains a dangerous drug. It is convenient to deal with that issue by reference to the position of Ms Briggs, because the position of the appellant is complicated by questions of accessorial

liability, and by the defence raised in his case. Ms Briggs was absent from the trial of the appellant. The jurors were presented with a discrete issue as to whether she was proved to have committed the principal offence of attempting to possess methylamphetamine. They were told that what the prosecution had to establish was that she attempted to obtain delivery of the envelope, exhibit 1, that she knew that the envelope contained something, and that what it in fact contained was methylamphetamine. All of those facts were clearly established.

Possession, knowledge and intention

7 Earl Jowitt said, in 1952, that "the English law has never worked out a completely logical and exhaustive definition of 'possession'"[3]. Lord Diplock said that in ordinary usage, "one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control"[4]. The concept of "knowledge", however, is imprecise. This, no doubt, is why Aickin J spoke of "sufficient knowledge of the presence of the drug" in *Williams v The Queen*[5]. The answer to a question as to what constitutes "sufficient knowledge" for possession depends upon the purpose for which, and the context in which, the question is asked. If the context is a dispute as to whether, for the purposes of the law of larceny, one person was in possession of goods when another allegedly stole them[6], or whether a person has possession of valuable articles buried in or hidden on land owned by that person[7], the extent of sufficient knowledge may be different from that necessary to reach a conclusion that a person has contravened a law making it a criminal offence to possess an article or substance of a certain kind.

8 It is not disputed that the trial judge was right to tell the jury that it was not necessary for the prosecution to show that Ms Briggs believed that the envelope of which she was attempting to obtain delivery contained methylamphetamine, as distinct from, for example, cannabis or cocaine. Was it sufficient for the prosecution to show that she believed it contained something?

9 This was not a case in which there was a possibility that some third party had slipped contraband into an article of clothing without the wearer knowing of

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**3** *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 at 605.

**4** *Director of Public Prosecutions v Brooks* [1974] AC 862 at 866.

**5** (1978) 140 CLR 591 at 610.

**6** eg *Hibbert v McKiernan* [1948] 2 KB 142; *Moors v Burke* (1919) 26 CLR 265.

**7** eg *South Staffordshire Water Company v Sharman* [1896] 2 QB 44.

its presence[8]. Nor was it a case where a container had a hidden compartment, with the possibility that the person in possession of the container might not have been aware of some of its contents[9]. Ms Briggs undoubtedly attempted to obtain delivery of the envelope, exhibit 1, and her evident purpose in doing so was related to the contents of the envelope. No one could have suggested seriously that she wanted the envelope for its own sake. In attempting to obtain the envelope, she was attempting to obtain its contents. The contents in fact consisted of a dangerous drug. Was it necessary to show that she knew that?

10 In the context of a criminal law that prohibits possession of an article of a certain kind, and leaving to one side any special statutory regime that might alter the case, the concept of knowledge requires further definition. What is it that amounts to knowledge? And what is it that must be known? In *He Kaw Teh v The Queen*[10], Gibbs CJ, after reviewing the authorities, concluded that:

> "[W]here a statute makes it an offence to have possession of particular goods, knowledge by the accused that those goods are in his custody will, in the absence of a sufficient indication of a contrary intention, be a necessary ingredient of the offence, because the words describing the offence ('in his possession') themselves necessarily import a mental element".

The fact in issue, knowledge, is not limited to knowledge gained from personal observation, or certainty based upon belief in information obtained from a third party, although those states of mind would suffice. The word "awareness" is sometimes used as a synonym. A belief in the likelihood, "in the sense that there was a significant or real chance", of the fact to be known, will suffice[11].

11 What is it, then, that must, in the relevant sense, be known? The judgments in *He Kaw Teh*, which concerned the meaning of the *Customs Act* 1901 (Cth), illustrate a range of different possible conclusions as to the extent of knowledge involved in the concept of possession[12]. One possibility is that, to be in possession of a drug of a particular kind, a person must know that he or she is

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**8** cf *Williams v The Queen* (1978) 140 CLR 591.

**9** cf *He Kaw Teh v The Queen* (1985) 157 CLR 523.

**10** (1985) 157 CLR 523 at 539.

**11** *Saad v The Queen* (1987) 61 ALJR 243 at 244; 70 ALR 667 at 668-669 per Mason CJ, Deane and Dawson JJ.

**12** Compare (1985) 157 CLR 523 at 545 per Gibbs CJ with 589 per Brennan J, and 602 per Dawson J.

in possession of the substance, and that the substance is a dangerous drug, without necessarily knowing that it is methylamphetamine, as distinct from, say, cocaine or heroin. Another possibility is that the person must know that he or she is in possession of a substance, (which is in fact a dangerous drug), and that knowledge that the substance is a dangerous drug is not something that need be shown. Other possibilities exist as well. Similar possibilities apply to attempting to possess.

12 The appellant submits that the first of the two possibilities mentioned in the preceding paragraph applies to the present case. On that approach, for the prosecution to establish (for the purposes of the case against the appellant) that Ms Briggs attempted to possess a dangerous drug, it was necessary to prove that, when Ms Briggs applied to the post office for delivery to her of the envelope, exhibit 1, she either knew or believed that it contained, or at least that there was a significant or real chance that it contained, some kind of dangerous drug. On the facts of the case, that might not have been a difficult inference. Even so, the case that was left to the jury was significantly different.

13 A similar process of reasoning, it is said, applies to the alleged accessorial liability of the appellant. Even assuming, as the Queensland Court of Appeal held, that his liability was "coordinate" with that of Ms Briggs, the prosecution would have to show a state of knowledge or belief in the appellant, concerning the contents of the envelope, of the same kind.

14 As the trial was conducted, these questions were subsumed in the defence case of honest and reasonable mistake of fact. The evidence about the request made by a third party that the appellant collect the envelope for him was relevant to the conduct of Ms Briggs as well as to the conduct of the appellant. Nevertheless, if the submissions for the appellant are correct, the defence argument about honest and reasonable mistake distracted everyone at trial, and caused them to overlook the full implication of the concepts of possession, and attempt to possess.

15 The respondent submits that, to the contrary, the defence reliance on honest and reasonable mistake reflected the Queensland statutory scheme, and the trial judge's directions were precisely in accordance with that scheme. According to the respondent, whether one was considering Ms Briggs' attempt to possess, or the appellant's procuring of that attempt, the statutory concept of possession required no proof of knowledge of the nature of the contents of the envelope. Any questions about that matter arose under the rubric of mistake, and were to be dealt with accordingly.

The Queensland legislation

16 The legislation is set out in the reasons of Hayne J and Callinan and Heydon JJ. The parliamentary history shows that what was intended was a

reversal of the onus of proof. That, however, does not conclude the matter. That the legislation places the onus of proof of certain matters upon an accused person, in certain circumstances, is not in doubt. It is clear that, if there had been no interception in this case, and the envelope, exhibit 1, had found its way into the appellant's car, with the methylamphetamine in it, then s 57(c) would have required the conclusion that the appellant was in possession of the drugs unless the appellant showed that he neither knew nor had reason to suspect that the envelope contained drugs. But that is not what occurred. One of the circumstances in which the legislation provided for a reversal of the onus of proof simply did not apply. Again, the case has been conducted upon an acceptance of the proposition that, if and insofar as the appellant wished to rely upon s 24 of the *Criminal Code*, and the defence of honest and reasonable mistake, he carried the onus of showing an honest and reasonable belief in the existence of any state of things material to the charge. The appellant argues, however, that there is an anterior question arising out of the meaning of the concept of possession.

17 The essential problem is whether the provisions of s 57, and, in particular, s 57(d), provide an indication of statutory intention which leads to a conclusion that the word "possession" in s 9 of the *Drugs Misuse Act* does not include the element of knowledge that the envelope, exhibit 1, contained a dangerous drug.

18 The decision of the Queensland Court of Appeal in *R v Clare*[13] was regarded by the Court of Appeal in this case as supporting the respondent. There, the accused was handed, by another person, packets of white powder, which he said he was requested to transport from the Gold Coast to Sydney. In fact, the packets contained heroin. The accused said that he believed that the white powder was a perfume base. The accused was aware of, and intended to possess, the white powder. His case was that he was mistaken as to the nature of the powder. The trial judge told the jury that, in order to convict the accused, they must be satisfied either that he knew the white powder was a dangerous drug, or that he knew the white powder was likely to be a dangerous drug, or that he had reason to suspect that it contained a dangerous drug. The argument in the Court of Appeal was that the second and third alternatives were insufficient, and that only the first would suffice. That argument was rejected. The Court of Appeal went further, and held that the directions were unduly favourable to the accused. Fitzgerald P concluded that all that the prosecution had to show was that the accused had, and knew that he had, a substance (the white powder), and that the substance was in fact a dangerous drug[14]. Davies JA said that the judge should have directed the jury that it was sufficient that the accused knew he had

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**13** [1994] 2 Qd R 619.

**14** [1994] 2 Qd R 619 at 639.

in his physical control the white powder, and that it was then for the accused, pursuant to s 24 of the *Criminal Code* as modified by s 57(d) of the *Drugs Misuse Act*, to show that he honestly and reasonably believed it was a perfume base[15]. Pincus JA said that there was no question but that the appellant knowingly had possession of the powder; the only issue was as to his knowledge of the nature of the powder, and that was to be resolved by reference to s 24 of the *Criminal Code* and s 57(d) of the *Drugs Misuse Act*[16].

19 In *Clare*, the accused squarely raised an issue of mistake of fact. He undoubtedly intended to possess the white powder. The question was whether, reading the *Drugs Misuse Act* as a whole, including s 57(d), the word "possession" in s 9 should be understood as requiring that he knew (in the sense earlier discussed) the nature of the powder. He said he thought he knew, but was mistaken. The Court of Appeal said that brought s 57(d) into play. What if he had said that he had no idea what the white powder was; that he did not know and did not care? Or what if he had said nothing? If the decision in *Clare* provides the answer to the present case, it must be because it goes further in its application than the particular facts, involving an assertion of a specific, but mistaken, belief. It must be because, on the true construction of the *Drugs Misuse Act*, where an accused person knowingly and intentionally has custody or control of a substance, to the exclusion of others except anyone with whom he or she is acting in concert, then a question as to belief in the nature of the substance can arise for consideration only under the rubric of mistake, and hence under s 24 of the *Criminal Code* as modified by s 57(d) of the *Drugs Misuse Act*.

20 Depending upon context, "possession" is undoubtedly capable of bearing the meaning given to it in *Clare*. The Court of Appeal's conclusion that it had that meaning in s 9 of the *Drugs Misuse Act* was influenced powerfully by the presence in the Act of s 57. The argument for the respondent in the present case, supporting that conclusion, may be summarised as follows. An honest and reasonable, but mistaken, belief in a state of things, for the purpose of the application of s 24 of the *Criminal Code*, as modified by s 57(d) of the *Drugs Misuse Act*, might involve a specific belief (such as that a white powder is a perfume base, whereas in truth it is heroin) or a more general belief (such as that a white powder is a harmless substance). The more general belief might even take the form (as evidently was claimed in the present case) of a negative assumption that an article is an unidentified, but unremarkable, item of personal property. In many cases, where a person is found to have custody or control of a substance, to the exclusion of others, being fully aware of its existence, and the substance is in fact a dangerous drug, then the person will claim to entertain an

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**15** [1994] 2 Qd R 619 at 646.

**16** [1994] 2 Qd R 619 at 643.

innocent belief, either of the specific or general nature considered above, as to the nature of the substance. That will not necessarily be so in all cases; there is a difference between not knowing that a substance is a drug and believing that it is not a drug. A person might entertain no belief at all, even of the general and negative kind earlier described. Even so, in practice, many people found to have custody of an illegal substance, of which they were aware, will seek to explain themselves by saying they were mistaken as to its nature, as the appellant did in this case, or as the accused did in *Clare*. How can it be consistent with s 57(d) of the *Drugs Misuse Act*, in such a common case, to require the prosecution to prove knowledge that the substance was a dangerous drug in order to establish possession? Such a construction of "possession" either nullifies the effect of s 57(d) or confines its operation to such a small number of cases (such as a mistaken belief in the existence of a licence to possess drugs of a certain kind) that it is difficult to understand why the legislature troubled itself to enact the provision. Counsel for the respondent argued that since, in a case where an accused person knows that he has a substance in his custody but says that he does not know its nature, (a case of the kind with which Gibbs CJ said he was not concerned in *He Kaw Teh*[17]), mistake and knowledge cannot co-exist, so that to put the onus of proof of mistake on the accused (as in s 57(d)) reflects a legislative contemplation that the prosecution need not prove knowledge of the nature of the substance in order to establish possession.

21 Although s 57(c) is not directly relevant to the present case, it also is relied upon by the respondent as an indication of the intention with which s 9 uses the word "possession". In particular, the concluding words negative the evidentiary effect of the provision only where it is shown that an accused did not know or have reason to suspect that the drug (that is, the substance) was in or on the place referred to. It does not have that operation where the accused knew that the drug was in or on a place but did not know its nature. Furthermore, in a case to which s 57(c) applies, presence of a substance is made conclusive evidence of possession, subject to demonstration by the accused of knowledge or reason to suspect such presence. This is not easy to reconcile with a concept of possession that requires knowledge of the nature of the substance possessed.

22 If the argument for the appellant is correct, the legislative scheme appears to involve some curious inconsistencies. If an accused person is the occupier of a place (as defined), and a dangerous drug is found on the place, then that is conclusive evidence that the drug was in the person's possession, unless the person shows absence of knowledge or reason to suspect the presence of the drug (s 57(c)). However, if a white powder which is in fact heroin is found in a person's suitcase, in order to establish possession, the prosecution must show not only that the person knew (in the sense earlier explained) that the substance was

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**17** (1985) 157 CLR 523 at 538.

there but also that the accused knew the nature of the substance. If the person who has custody and control of the suitcase, knowing that the white powder is in it, gives no innocent explanation, according to the appellant the prosecution must prove knowledge (in the relevant sense) that the white powder was a dangerous drug. If the person says: "I believed the white powder was a perfume base, because I was told that by a reliable informant", then there is a conundrum. On the face of it, s 57(d) appears to place on the accused person the burden of making out a defence of honest and reasonable mistake. Yet, on the appellant's argument, the prosecution must show that the accused knew that the powder was a dangerous drug, and the occasion to consider a defence of honest and reasonable mistake would thus not arise.

23 The appellant points out that, in a case where an accused person knows of the presence, in his or her custody and control, of the substance in question, the reasoning in *Clare* means that any question about knowledge of the nature of the substance will fall to be considered under the rubric of honest *and reasonable* mistake. On that approach, negligence or carelessness will be penalised. That is an important consideration, but it applies to a rather narrow issue. It assumes knowledge of the presence of the substance but ignorance of its true nature. When Gibbs CJ put this issue to one side in *He Kaw Teh*[18], he doubted its practical importance. (We know from the sentencing remarks in the present case that, in her plea of guilty, Ms Briggs said she thought the envelope contained cannabis – the kind of mistake that both sides agree is immaterial except perhaps on penalty).

24 The question is ultimately one of legislative intention. Like Fitzgerald P in *Clare* I have not found the task of construction easy, but I also would conclude that "the clear tenor of the evidentiary provisions in s 57 of the Act is to reverse the onus to oblige an accused person who is proved to knowingly have the custody or control of a thing or substance which is a dangerous drug to prove that his or her 'possession' is innocent"[19].

The subsidiary issue

25 Section 7 of the *Criminal Code* provides that, where an offence is committed (here, by Ms Briggs), every person who aids, counsels or procures the commission of the offence is deemed to be guilty of the offence. The material facts which made Ms Briggs liable were an attempt to obtain delivery of an envelope which in fact contained methylamphetamine. The appellant requested Ms Briggs to make the attempt to obtain delivery of the envelope, and assisted

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**18** (1985) 187 CLR 523 at 538.

**19** [1994] 2 Qd R 619 at 638-639.

her in that attempt. If, unlike Ms Briggs, his liability depended upon proof of his knowledge (in the relevant sense) of the nature of what was in the envelope she was attempting to obtain, that produces a disconformity which appears inconsistent with the legislative scheme. This disconformity is highlighted when it is remembered that in the case of drug offences the person who procures an act to be done is often more culpable than the person who does the act.

Conclusion

26 The appeal should be dismissed.

27 McHUGH J. The case concerns the conviction of the appellant of the offence of possession of a dangerous drug under s 9 of the *Drugs Misuse Act* 1986 (Q) ("the Act"). It arises in a context where a woman collected an envelope that had contained dangerous drugs but did not contain them at the time she collected the envelope. She pleaded guilty to attempting to possess those drugs. As a result, under Queensland law, she was "deemed to be guilty of the intended crime". The Crown contended that the appellant was an accessory to the woman's attempt to commit the crime and that, by reason of the combined operation of ss 9 and 117(1) of the Act and s 7 of the *Criminal Code* (Q) ("the Code"), he was also guilty of that offence. The Crown did not contend that the appellant or the woman ever possessed the dangerous drugs.

28 The issue in the appeal is whether the trial judge erred in law in directing the jury as to the mental element of the offence. The learned judge directed the jury that they could find the appellant guilty of the offence of possession of the dangerous drug, methylamphetamine in excess of two grams, only if:

(1) the woman had attempted to commit that same offence;

(2) the appellant in some way assisted her or did an act for the purpose of enabling her to attempt to commit the offence; and

(3) when the appellant assisted her to do that act, he knew that she intended to obtain possession of the envelope and its contents.

29 The learned trial judge directed the jury that the prosecution did not have to prove that the woman had knowledge that the contents of the envelope were methylamphetamine. This direction was erroneous for two reasons. First, the term "possession" in s 9 of the Act involves a mental element. There is no possession for the purpose of s 9 unless the person charged knows that he or she has custody of a substance that is or is likely to be a dangerous drug. Second, under Queensland law a person cannot be guilty of attempted possession of drugs unless that person *intends* to possess those drugs. That is because s 4(1) of the Code makes it an essential element of attempting to commit an offence that a person intends to commit the offence. Hence, the appellant could not be convicted under s 9 of the Act unless the woman he was aiding was "intending to commit an offence" of possessing dangerous drugs. In my view, she could not intend to commit that offence unless she intended to obtain possession of dangerous drugs. It was not sufficient that she intended to obtain possession of an envelope that had something inside it. Intending to collect an envelope that has something inside it is not intending to commit an offence under the law of Queensland. In this Court – and apparently in the courts below – the argument for the appellant paid no attention to the necessity to prove that the woman intended to commit the offence. But it was a fundamental element of the charge against the appellant.

The material facts

30 The appellant and Ms Nicole Janet Briggs were jointly charged in the Supreme Court of Queensland on an indictment that declared:

> "[T]hat on the nineteenth day of November, 2001 at Gold Coast in the State of Queensland, NICOLE JANET BRIGGS and GRAHAM VICTOR TABE unlawfully had possession of the dangerous drug methylamphetamine.
>
> And the quantity of the dangerous drug methylamphetamine exceeded 2.0 grams."

31 The indictment contained an additional count that charged Ms Briggs with unlawfully possessing the dangerous drug cannabis sativa.

32 The trial of the indictment took place before Mullins J and a jury. At the trial, the Crown contended that, on 19 November 2001, the appellant had driven Ms Briggs to the Gold Coast Mail Centre at Bundall. Ms Briggs picked up an envelope from a postal supervisor and then re-entered the passenger side of the vehicle that the appellant was driving. The envelope did not contain any dangerous drug. It would have done, though, but for the following course of events.

33 On Friday 16 November 2001, an envelope arrived at the Mail Centre that was addressed to a "Mr Tabler" at 1 Markeri Street, Mermaid Beach. Because that address is nonexistent, and the envelope did not contain a return address, the envelope was opened by a postal officer, in accordance with authorised procedures. The officer found that the envelope contained a jar, which contained white powder. The officer reported the matter to police, who collected the envelope that day. Before that officer reported the matter to police however, a person arrived at the Mail Centre and inquired about a parcel that the person said was addressed to "Mr Tabler, 1 Makeri Street". The officer told the person to return later that afternoon.

34 On Monday 19 November 2001, the same Australia Post officer received a phone call from a person who said that he had attended the Mail Centre on Friday and that a friend would come in to collect the parcel. The officer contacted the police who told the officer to prepare an envelope that resembled the original envelope. Soon after, the police arrived at the Mail Centre. And soon after that, Ms Briggs attended the Mail Centre, presented a card and requested and collected the envelope.

35 At the trial, but in the absence of the jury, Ms Briggs pleaded guilty to the charge of possession of methylamphetamine and possession of cannabis. Subsequently the jury convicted the appellant of the charge against him.

The relevant enactments

*The offence*

36 Section 9, which is in Pt 2 of the Act, enacts:

> "A person who unlawfully has possession of a dangerous drug is guilty of a crime."

37 While neither the appellant nor Ms Briggs ever had possession of a dangerous drug, the Crown contended that Ms Briggs had attempted to gain possession of the envelope that contained a dangerous drug. Section 4(1) of the Code defines the elements of the offence of attempting to commit an offence. It declares:

> "When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence."

38 By force of s 117(1) of the Act, upon pleading guilty to the offence of attempting to possess the dangerous drug, Ms Briggs was deemed guilty of an offence against s 9 of the Act. Section 117(1) declares:

> "In lieu of the Criminal Code, section 536 the following provision shall apply –
>
> > 'A person who attempts to commit a crime defined in part 2 is deemed to be guilty of the intended crime and is liable to the same punishment and forfeiture as a person who commits the intended crime.'"

39 The Crown contended that the appellant was also guilty of an offence against s 9 because of the operation of s 7 of the Code, which enacts:

> "(1)When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> > (a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

(2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission."

Mens rea *in respect of the s 9 offence*

40 Certain provisions of the Act and the Code bear upon the mental state of a person charged with an offence against s 9 of the Act. Section 57 of the Act, at that time (now s 129), declares:

"In respect of a charge against a person of having committed an offence defined in part 2 –

...

(c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place;

(d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge."

41 Section 24 of the Code, which is in Ch 5 of the Code and which s 57(d) of the Act excludes in respect of offences defined in Pt 2 of the Act, declares:

"(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

42 Section 36(1) of the Code enacts:

> "The provisions of this chapter [5] apply to all persons charged with any criminal offence against the statute law of Queensland."

*Directions of the trial judge*

43 The trial judge directed the jury:

> "[Y]ou may find [the appellant] guilty of the offence of possession of the dangerous drug, methylamphetamine in excess of 2 grams, only if you're satisfied beyond reasonable doubt of three things. The first is that Ms Briggs attempted to commit that same offence. The second is that [the appellant] in some way assisted Ms Briggs, or did an act for the purpose of enabling Ms Briggs to attempt to commit the offence. And the third is that when [the appellant] assisted Ms Briggs to do that act, [the appellant] knew that Ms Briggs intended to attempt to obtain possession of the envelope ..."

44 As to the first element of the offence, namely, that Ms Briggs attempted to commit the offence of possession of a dangerous drug, the trial judge told the jury:

> "There is evidence that Ms Briggs committed, or attempted to commit the offence of the possession of the dangerous drug, methylamphetamine in excess of 2 grams ... [I]t probably won't trouble you to infer that she knew that when she was collecting the envelope that there would be something in it, and it's not an issue that that possession would have been unlawful and we know that the quantity exceeded 2 grams. So we have Ms Briggs guilty of the offence."

45 Her Honour directed the jury as to the requisite state of mind of Ms Briggs as follows:

> "[Y]ou need to be satisfied that when [Ms Briggs] went to collect that envelope she knew that she was going to get something inside the envelope. I'll just add here as a matter of law, the prosecution does not have to prove that Ms Briggs had knowledge that the contents of the envelope were methylamphetamine."

46 As to the second element of the Crown case, the trial judge noted that:

> "the Crown's relying on the fact that [the appellant] drove Ms Briggs to the Bundall Post Office on the 19th of November, and that he gave her the card ... that was used to obtain, or attempt to obtain Exhibit 1 [the envelope] and its contents."

47 The trial judge then elaborated upon the third element of the offence, which concerned the appellant's state of mind:

> "[T]he last element wouldn't trouble you, I wouldn't think for very long because that's the one that you've got to be satisfied that when [the appellant] assisted Ms Briggs ... he knew that Ms Briggs intended to attempt to obtain possession of the envelope, and that's something that you probably infer from the fact that [the appellant] handed the card to Ms Briggs, or you would infer [the appellant] handed the card to Ms Briggs and infer from that he did so with a view to intending her to attempt to obtain possession of both the envelope and its contents.
>
> You would need to infer, as well, that [the appellant] knew that Ms Briggs was intending to obtain more than just an envelope, but she was intending to pick up the envelope and its contents. So you can only find [the appellant] guilty of the offence if you are satisfied beyond reasonable doubt that when he drove Ms Briggs to the Bundall Mail Centre and gave the card to her ... that he knew Ms Briggs was going to seek to obtain the parcel and its contents."

48 The trial judge left the defence of honest and reasonable mistake to the jury. She directed them that:

> "If you were persuaded that [the appellant] believed honestly and reasonably that the envelope did not contain the dangerous drug methylamphetamine then [the appellant] is not guilty."

49 As I have indicated, the jury convicted the appellant of the offence of possessing the dangerous drug methylamphetamine.

*Decision of the Court of Appeal*

50 The appellant appealed against his conviction to the Court of Appeal. He contended that the trial judge "erred in law in ruling that the Crown did not have to prove guilty knowledge on a charge of possession of a dangerous drug". He also contended that the judge "erred in law in directing the jury that all the Crown had to prove was knowledge by the accused that there was something in the relevant package." The Court of Appeal (de Jersey CJ, Davies JA and Mackenzie J) unanimously dismissed the appeal. After referring to a number of authorities including *R v Clare*[20], de Jersey CJ said[21]:

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**20** [1994] 2 Qd R 619 at 639.

**21** *R v Tabe* (2003) 139 A Crim R 417 at 420 [15].

> "In *Clare*, the Court considered whether a general law mental element should be imported into the offence of possession of a dangerous drug under the *Drugs Misuse Act* ... The Court took the view that the mental element was much more limited than would ordinarily apply under the general law, and was apparently influenced to that position both by the content of the concept of possession as ordinarily understood, and by the reversal of onus provision, now s 129, casting on to an accused the need to establish an honest and reasonable belief that the relevant material did not constitute dangerous drugs. Hence the need for the Crown to establish only conscious possession of something which is in fact dangerous drugs – in the case of a parcel, necessarily encompassing a belief that it is not empty but contains something."

51 The Chief Justice went on to say[22]:

> "If guilt of the principal offence may be established by proof of conscious possession of (only) something, being something which is in fact dangerous drugs, then the accessory will, in my view, likewise be guilty of possession if it is established that the accessory aided the principal offender to secure possession of that something, albeit the Crown cannot establish that the accessory believed it constituted dangerous drugs."

52 His Honour said that "[i]t would, as a matter of first impression, be odd if, in a case like this, proof of relevant elements of the offence to be established by the Crown differed as between principal offender and accessory."[23]

53 Davies JA agreed with the reasons of the Chief Justice.

54 In his judgment, Mackenzie J held[24] that the directions of the trial judge accorded with the construction placed on the Act in *Clare* where a majority of the Court of Appeal held that[25]:

> "all that the prosecution needs to show to establish possession is that an accused person has and knows that he or she has a thing or substance which is in fact a dangerous drug."

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**22** (2003) 139 A Crim R 417 at 420 [17].

**23** (2003) 139 A Crim R 417 at 420 [19].

**24** (2003) 139 A Crim R 417 at 425 [43].

**25** [1994] 2 Qd R 619 at 639.

55 On that basis, Mackenzie J held that[26]:

> "once physical possession of the drug is established a presumption of knowledge will in practice lead to the conclusion that the possession is unlawful unless there is something in the evidence raising some category of excuse."

The issue

56 As I have indicated, the decision of the Court of Appeal and the parties' argument on appeal to this Court focused on the "necessary mental element"[27] that is entailed in the offence of possession under s 9 of the Act. However, in my opinion, the mental element that is entailed in the offence of an *attempt to commit* the offence of possession under s 9 of the Act is equally important. In the context of this case, it covers much the same ground as the mental element in possession, the only distinction being between knowledge of the drugs and the intent to possess them. In the context of this case that is a distinction without a difference.

The mental element of possession in s 9 of the Act

57 Questions of statutory construction are notorious for generating divisions of opinion between courts and between members of the same court. The judgments of Gleeson CJ and Callinan and Heydon JJ and the judgments of the Court of Appeal in this case and in *Clare* show that persuasive arguments support the correctness of the trial judge's directions as to the elements of "possession" in s 9 of the Act. Like Hayne J, however, I am of opinion that the term "possession" in s 9 has its ordinary meaning and requires proof that a person charged under that section knows that he or she has custody of a substance that is or is likely to be a dangerous drug. I agree completely with his Honour's analysis of the issue, and there is nothing I can usefully add to the reasons that he gives for this conclusion.

Ms Briggs' attempt to commit the s 9 offence

58 The jury could only find that the appellant aided or abetted Ms Briggs' attempt to obtain possession of a dangerous drug if the jury were satisfied that Ms Briggs attempted to commit the offence of possession of a dangerous drug. Proof of the attempt required the jury to be satisfied of each of the elements contained in s 4(1) of the Code.

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**26** (2003) 139 A Crim R 417 at 425 [45].

**27** *Williams v The Queen* (1978) 140 CLR 591 at 610.

59 In *R v Barbeler*[28], the Court of Criminal Appeal outlined the four components of s 4(1). On a charge of attempting to possess a dangerous drug, those components required the prosecution to prove that Ms Briggs:

(i) intended to commit the offence of possession of a dangerous drug;

(ii) had begun to put her intention "into execution by means adapted to its fulfilment";

(iii) had manifested her intention "by some overt act"; and

(iv) did not fulfil her intention "to such an extent as to commit the offence" of possession of a dangerous drug.

60 The jury could have been satisfied that the prosecution had proved the second and third components of the s 4(1) definition of "attempt". As the trial judge noted in summing-up, the jury had "heard the evidence about how [Ms Briggs] went to the Post Office on the 19th and handed over the card and got the dummy envelope". The conduct of the police and the postal officer in replacing the parcel that contained the dangerous drug with a dummy envelope meant that Ms Briggs was unable to actually come into possession of the dangerous drug. Yet, s 4(2) of the Code makes clear that "[i]t is immaterial ... whether the complete fulfilment of the offender's intention is prevented by circumstances independent of his or her will".

61 The fourth component was also satisfied because the envelope of which she had possession did not contain a dangerous drug and so she did not commit the offence of possession of a dangerous drug. Section 117(1) of the Act deems a person who attempted to commit an offence to be guilty of the attempted offence. But the section is not relevant to the fourth component of the s 4(1) definition of "attempt" because s 117(1) only operates after the prosecution has shown that a person has "attempt[ed] to commit a crime" and so, only after the four components have been satisfied.

62 However, the trial judge erred in law in failing to direct the jury as to the first component of the Code's s 4(1) definition of "attempts to commit offences". Her Honour directed the jury that:

> "you need to be satisfied that when [Ms Briggs] went to collect that envelope she knew that she was going to get something inside the envelope. I'll just add here as a matter of law, the prosecution does not

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**28** [1977] Qd R 80 at 82.

have to prove that Ms Briggs had knowledge that the contents of the envelope were methylamphetamine."

63 However, the first component of the Code's s 4(1) definition of "attempt" required the prosecution to show that Ms Briggs "intend[ed] to commit an offence". In *Vallance v The Queen*[29], Windeyer J said that "a man, who *actually realizes* what must be, or very probably will be, the consequence of what he does, does it intending that consequence." Analogously, a person intends a consequence, even if the consequence is impossible, if he or she *believes* that that consequence must be, or very probably will be, the outcome of his or her act. As a result, a person may do an act "intending to commit an offence", for the purposes of s 4(1) of the Code, when the person believes that the very probable consequence of his or her action is the commission of an offence.

64 In this case, it was impossible for Ms Briggs to obtain possession of a dangerous drug because the police had removed the envelope that contained the methylamphetamine from the Mail Centre before she arrived to collect the envelope. Nonetheless, the jury could have found that Ms Briggs intended to obtain possession of a dangerous drug if they found that she believed that the very probable consequence of her attending "the Post Office on the 19th and hand[ing] over the card and [getting] the dummy envelope" was that she would thereby take possession of a dangerous drug.

65 But the prosecution had to do more than prove that she intended to possess an envelope with something in it. The prosecution had to prove that she intended to commit the offence. And that meant that the prosecution had to prove that Ms Briggs intended to possess a dangerous drug. A general intent to possess an envelope with something in it is not an intent "to commit an offence". In *English*[30], a decision under s 4 of the *Criminal Code* (WA) (which is in terms similar to s 4 of the Queensland Code), the Western Australian Court of Criminal Appeal held that "the act which constitutes the commission of [the] offence" of receiving stolen goods was the act of having the thing in his possession, so long as that act was "done with respect to property of a particular character, ie, in this case that it has been stolen." Similarly, the act that amounts to the s 9 offence of possession of a dangerous drug is an act of taking or retaining possession that is done with respect to a dangerous drug. Thus, the prosecution had to prove that Ms Briggs believed that, in taking possession of the envelope, she was taking possession of a dangerous drug.

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**29** (1961) 108 CLR 56 at 82 (emphasis added).

**30** (1993) 68 A Crim R 96 at 102.

66 Section 57(d) of the Act shifts the incidence of proving that an accused had "an honest and reasonable belief in the existence of any state of things material to the charge" from the prosecution onto the accused. However, that section has no effect on the incidence of the burden of proving that Ms Briggs "intend[ed] to commit an offence". The purpose of s 57(d) is to exclude the operation of s 24 of the Code. If the legislature intended s 57(d) to also affect the scope of s 4 of the Code, it would have said so. It is not relevant – but it is consistent with other provisions in the Code (eg, ss 306(a) and 302(c)) – that the mental element of an attempt under s 4(1) of the Code may be more substantial than the mental element of the principal offence of possession of a dangerous drug.

67 As a matter of law, then, the prosecution had to prove that Ms Briggs knew that the contents of the envelope of which she took possession were a dangerous drug. The prosecution had to do so for two reasons. First, proof of knowledge was necessary to prove the element of "possession" for the purpose of s 9 of the Act. Second, proof of knowledge was an indispensable step in proving, for the purpose of s 4(1) of the Code, that Ms Briggs was "intending to commit an offence". Consequently, the trial judge failed to give the jury the necessary directions from which they could conclude that Ms Briggs had attempted to possess a dangerous drug. Thus, the jury's finding that the appellant was guilty of possession of a dangerous drug – by reason of his aiding or abetting Ms Briggs' attempt to possess a dangerous drug – cannot stand.

Orders

68 The appeal must be allowed and orders made in the form proposed by Hayne J.

69 HAYNE J. Section 9 of the *Drugs Misuse Act* 1986 (Q) provided that "[a] person who unlawfully has possession of a dangerous drug is guilty of a crime". The appellant and Nicole Janet Briggs were presented in the Supreme Court of Queensland on an indictment charging that on 19 November 2001, at the Gold Coast, they "unlawfully had possession of the dangerous drug methylamphetamine … [a]nd the quantity of [that] dangerous drug … exceeded 2.0 grams". Ms Briggs was charged with a second count alleging unlawful possession of cannabis.

70 Ms Briggs pleaded guilty to both counts charged against her. The appellant pleaded not guilty to the one count charged against him.

71 The immediate question in the appeal to this Court is whether the trial judge (Mullins J) erred in directing the jury about what the prosecution had to establish to demonstrate possession of a dangerous drug. In order to define the question more precisely, and to understand what the trial judge said about that question, it is necessary to recognise some features of the facts and then notice two particular aspects of the prosecution's case against the appellant.

The relevant facts

72 The authorities had intercepted an envelope in which drugs had been sent through the post, before the envelope was delivered. The authorities removed the drugs from the envelope and substituted another envelope. The substitute envelope contained no drugs but bore the same delivery address as the original envelope. That delivery address did not exist. Ms Briggs collected the substituted envelope from the post office. To collect that envelope she produced a postal card which the appellant had given her. Having collected the envelope, Ms Briggs took it to a motor car in which the appellant was waiting and put the envelope on the floor of the car at her feet. Ms Briggs and the appellant were arrested at once, before the appellant touched the envelope. Other facts revealed in the evidence given at trial are described in the reasons of Callinan and Heydon JJ and I do not repeat them.

The prosecution case

73 The prosecution's case at the appellant's trial was that Ms Briggs had attempted to possess the drugs contained in the original envelope, and that the appellant had aided and abetted her. The prosecution did *not* argue that the appellant was the principal offender and Ms Briggs had aided and abetted him in his attempt to possess the drugs.

74 Thus the issues for the jury were more complicated than the single question of what must be shown to demonstrate possession of a dangerous drug

contrary to s 9 of the *Drugs Misuse Act*. That particular question is much affected by s 57 of that Act[31]. Identifying the relevant issues the jury had to deal with in this case requires consideration not only of questions about what must be proved to establish possession of a dangerous drug, but also requires consideration of issues about attempt and accessorial liability.

75 It is necessary to begin by examining the relevant statutory provisions.

The relevant statutory provisions

76 Section 44 of the *Drugs Misuse Act* provided that the *Criminal Code* (Q), "with all necessary adaptations" was to "be read and construed with this Act". Special provision was made for attempts to commit offences against Pt 2 of the *Drugs Misuse Act* (of which possessing dangerous drugs contrary to s 9 was one such offence). Section 44A provided that in lieu of s 536 of the *Criminal Code* the following provision should apply:

> "A person who attempts to commit a crime defined in part 2 is deemed to be guilty of the intended crime and is liable to the same punishment and forfeiture as a person who commits the intended crime."

77 What constituted an attempt to commit a crime defined in Pt 2 of the *Drugs Misuse Act* was identified by s 4 of the *Criminal Code*. In particular, s 4(1) of the Code provided that:

> "When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence."

78 Accessorial liability under the *Drugs Misuse Act* was regulated by Ch 2 of the *Criminal Code*. In particular, s 7(1) of the Code provided:

> "When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;

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**31** The provisions of the *Drugs Misuse Act* 1986 (Q) were amended, and some were renumbered, by the *Drugs Misuse Amendment Act* 2002 (Q). These reasons refer to provisions as they stood at the time of the alleged offence.

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence."

As noted earlier, when it is alleged that a person had possession of dangerous drugs, account must be taken of s 57 of the *Drugs Misuse Act*, provisions described as "Evidentiary provisions". That section provided, so far as now relevant, that:

> "In respect of a charge against a person of having committed an offence defined in part 2 –
>
> …
>
> (c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place;
>
> (d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge". (footnote omitted)

"Place" was defined in s 4 of the *Drugs Misuse Act* as including a vehicle.

79 Section 24 of the *Criminal Code* (the operation of which was affected by s 57(d) of the *Drugs Misuse Act*) dealt with mistakes of fact. Section 24(1) provided that a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of a state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist. The modification made by s 57(d) to that provision was to oblige the accused to show an honest and reasonable belief in the existence of some state of things material to the charge rather than, as would otherwise have been the case, require the prosecution to exclude such a belief beyond reasonable doubt.

The impugned directions

80 The trial judge directed the jury that to find the appellant guilty of possession of a dangerous drug three things must be established beyond reasonable doubt:

(a) Ms Briggs attempted to commit the offence;

(b) the appellant in some way assisted her, or did an act for the purpose of enabling her to commit that offence; and

(c) when the appellant assisted Ms Briggs to that act, he knew that Ms Briggs intended to attempt to obtain possession of the envelope and its contents.

Critically, the trial judge said that it was enough for the jury to be satisfied that when Ms Briggs went to collect the envelope "she knew that she was going to get something inside the envelope" and that "the prosecution does *not* have to prove that Ms Briggs had knowledge that the contents of the envelope were methylamphetamine" (emphasis added). It is this direction which the appellant challenged in the Court of Appeal and in the appeal to this Court.

The Court of Appeal

81 The appellant failed in his appeal to the Court of Appeal (de Jersey CJ, Davies JA, Mackenzie J) against conviction[32]. All members of the Court agreed in that order. The Chief Justice and MacKenzie J delivered separate reasons for judgment; Davies JA agreed in the reasons given by de Jersey CJ.

82 The central point in the reasoning of de Jersey CJ, about which his conclusion hinged, was[33] that the mental state to be established against an accessory "as to the nature of the thing to be secured, need not be more extensive than that which, as a minimum position, need be established by the Crown against the principal offender in those circumstances". His Honour concluded[34] that, "as a minimum position", all that need be established by the prosecution against a principal offender was that the principal knew that the parcel being collected contained *something*.

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**32** *Tabe* (2003) 139 A Crim R 417.

**33** (2003) 139 A Crim R 417 at 420 [18] per de Jersey CJ.

**34** (2003) 139 A Crim R 417 at 419 [8], 420 [18].

83 Reference was made[35] in this connection to earlier decisions of the Court of Appeal of Queensland in *R v Clare*[36] and *R v Myles*[37], as well as to a number of cases that had followed or applied *Clare*[38]. It is not necessary to trace this stream of authority in any detail. For present purposes, the point which the cases were understood to establish was the proposition stated by Fitzgerald P in *Clare* in the following terms[39]:

> "[T]he clear tenor of the evidentiary provisions in s 57 of the [Drugs Misuse] Act is to reverse the onus to oblige an accused person who is proved to knowingly have the custody or control of a thing or substance which is a dangerous drug to prove that his or her 'possession' is innocent.
>
> [Thus] subject to s 23 of the Code, *all that the prosecution needs to show to establish possession is that an accused person has and knows that he or she has a thing or substance which is in fact a dangerous drug*." (emphasis added)

84 It was this understanding of the operation of s 57 that underpinned the Court of Appeal's conclusion in the present case that the impugned directions of the trial judge were not erroneous. The Court concluded that, because the guilt of the principal offender could be established upon proof of knowledge that something was to be collected, which in fact was or contained dangerous drugs, the liability of an accessory would be sufficiently established upon proof of assistance directed towards obtaining that thing, even if there were no proof that either the principal or the accessory knew that the thing was or contained drugs[40]. In such a case, it would be for both the principal offender and the accessory to seek to prove an honest and reasonable belief of the kind described in s 57(d).

85 Examination of the accuracy of this reasoning must begin by construing s 57 of the *Drugs Misuse Act*.

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**35** (2003) 139 A Crim R 417 at 419 [8].

**36** [1994] 2 Qd R 619 at 639 per Fitzgerald P, 645 per Davies JA.

**37** [1997] 1 Qd R 199 at 210 per Pincus JA.

**38** *R v Nguyen and Truong* [1995] 2 Qd R 285; *Crosthwaite v Loader* (1995) 77 A Crim R 348; *Jenvey v Cook* (1997) 94 A Crim R 392; cf *R v Bellino* [2003] QCA 110.

**39** [1994] 2 Qd R 619 at 638-639.

**40** (2003) 139 A Crim R 417 at 419 [13] per de Jersey CJ.

*Drugs Misuse Act*, s 57

86 First, it is necessary to put s 57(c) to one side. It had no application in the present case.

87 Section 57(c) could be engaged only upon "proof that a dangerous drug was at the material time in or on a place of which [the accused] was the occupier or concerned in the management or control of". It was proof of *those* facts that the section provided was conclusive evidence of a further fact (possession by the accused) unless the accused showed that he or she at the relevant time neither knew nor had reason to suspect that the drug was in or on that place. At once it will be seen that it is not possible to apply s 57(c) to cases of attempt like the present, where the drug in question was never in or on a place of which the accused was occupier, or a place of which the accused was concerned in the management or control. At no time was a dangerous drug ever in a place of which either the appellant or Ms Briggs was occupier or in or on a place of which either was concerned in the management or control. The drug, having been identified in the post office, never left those premises.

88 But what of s 57(d)? That provision which, as noted earlier, reversed the burden of proving honest and reasonable belief in the existence of any state of things material to the charge, applied "[i]n respect of a charge against a person of having committed an offence defined in part 2" of the *Drugs Misuse Act*. Did it apply to the charge brought against the appellant?

89 In the present matter, the indictment preferred against the appellant charged him with an offence defined in Pt 2 of the *Drugs Misuse Act* – the offence of possession of a dangerous drug contrary to s 9. If attention is confined to the form of indictment it follows that s 57(d) was engaged in this matter. It is as well, however, to look beyond the form of the indictment.

90 In this connection due account must be taken of, first, the provisions of s 44A concerning attempts to commit offences under the *Drugs Misuse Act* and, secondly, s 7(1) of the *Criminal Code* concerning accessorial liability.

*Drugs Misuse Act*, s 44A

91 By excluding s 536 of the *Criminal Code*, s 44A altered the liability to punishment of a person who attempted a crime to which it applied. For present purposes, this aspect of the operation of s 44A may be put aside from consideration. Rather, attention must be given to another aspect of s 44A. Section 44A deemed a person who attempted to commit a crime defined in Pt 2 of the *Drugs Misuse Act* to be guilty of the intended crime. In this respect, s 44A departed from the model provided by Ch 55 of the *Criminal Code* where, by s 535, it is provided that an attempt to commit any indictable offence is an indictable offence distinct from the intended offence. Because s 44A had this

operation (deeming a person who attempted to commit a certain crime to be guilty of the intended crime) there would be no occasion in such a case either to frame the charge in an indictment as an attempt to commit the crime[41] or to consider questions of the availability of an alternative verdict of attempt as provided for by s 583 of the *Criminal Code*. (That is not to say, however, that an accused person may not be entitled to some particulars of the charge that is preferred.)

92 It follows that s 57(d) applied to cases where it was alleged that the accused had committed an offence defined in Pt 2 of the *Drugs Misuse Act* because the accused had attempted to commit that offence.

93 In the present case, however, the appellant was not alleged by the prosecution to himself have attempted to have possession of a dangerous drug. It was alleged that he had aided and abetted Ms Briggs in her attempt to do so. It is, therefore, necessary to take account of the operation of s 7(1) of the *Criminal Code*. It was that provision which was said to make the appellant criminally responsible.

*Criminal Code*, s 7(1)

94 Again it is to be noticed that s 7(1) deemed the persons identified in the provision "to have taken part in committing the offence and to be guilty of the offence". That deeming formed the foundation of the further provision in the sub-section that such a person "may be charged with actually committing" the relevant offence. But the further consequence of the deeming provision of s 7(1) was that s 57(d) of the *Drugs Misuse Act* applied to cases where a person was alleged to have aided[42] another to commit an offence under Pt 2 of the *Drugs Misuse Act*, or was alleged to have counselled or procured[43] another to commit such an offence. In each case the accessory was alleged to have committed an offence under Pt 2 of the *Drugs Misuse Act* and was to be charged with that offence, not some separate offence.

95 It is necessary then to consider whether, in the present case, s 57(d) had the effect which the Court of Appeal understood it to have. The appellant rightly contended, however, that it was necessary to begin at an anterior point: with the meaning of "possession" in s 9 of the *Drugs Misuse Act*.

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**41** cf Criminal Practice Rules 1999 (Q), Sched 3, Form 346.

**42** *Criminal Code* (Q), s 7(1)(c).

**43** *Criminal Code*, s 7(1)(d).

"Possession"

96 The appellant contended that, on its true construction, the word "possession" in s 9 of the *Drugs Misuse Act* required the prosecution to prove that the accused knew "at least of the existence of the drug in the unopened receptacle" and that "[i]t is not sufficient to know the receptacle is not empty or contains something". This conclusion was said to follow from, or at least be consistent with, what was decided in this Court in *Williams v The Queen*[44] and *He Kaw Teh v The Queen*[45], each of which was concerned with legislation other than the Act now in issue.

97 The appellant submitted that *Clare* did not stand for the proposition for which the Court of Appeal in the present matter took it to stand. The conclusion reached by Fitzgerald P in *Clare*[46] (that to establish possession the prosecution need show only that the accused had and knew that he or she had a thing or substance which was in fact a dangerous drug) was said to be unnecessary to the decision in *Clare*. Rather, so the appellant contended, s 57(d) "casts an evidential burden on the appellant to show an honest and reasonable belief in the existence of any state of things before s 24 [of the *Criminal Code*] applies".

98 Although it may be accepted that, in important respects, the legislation considered in *Williams* was similar to the provisions of the *Drugs Misuse Act* that are relevant in this matter, the factual circumstances under examination in *Williams* were radically different. There the central question was whether the accused had possession of a drug when a minute amount of that drug was found in the pockets of two of his coats, which were hanging in his room. It was in that context that Aickin J referred[47] to the need to establish "a necessary mental element of intention" in order to demonstrate possession of the drug.

99 Of more immediate relevance is the Court's decision in *He Kaw Teh* and, in particular, that part of the decision which concerned the offence under s 233B(1)(c) of the *Customs Act* 1901 (Cth). That provision of the *Customs Act* made it an offence for a person "without reasonable excuse (proof whereof shall lie upon him) [to have] in his possession" certain prohibited imports. In *He Kaw Teh* the accused had been found in possession of a suitcase in which heroin was

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**44** (1978) 140 CLR 591.

**45** (1985) 157 CLR 523. Reference was also made to *Bahri Kural v The Queen* (1987) 162 CLR 502 and *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1; 82 ALR 217.

**46** [1994] 2 Qd R 619 at 639.

**47** (1978) 140 CLR 591 at 610.

secreted in a compartment beneath a false bottom of the case. The accused did not admit that he knew that there was anything secreted in the suitcase.

100 The majority of the Court in *He Kaw Teh* concluded[48] that in the absence of a sufficient indication of contrary intention, knowledge of the accused that he or she had custody of the prohibited goods is a necessary ingredient of an offence of having possession of those goods; the word "possession" necessarily imports a mental element. Dawson J, who agreed in the result, went rather further than the other members of the Court who joined in the orders allowing the appellant's appeal. His Honour said that, for the purposes of s 233B(1)(c), a person could not possess something when unaware of its existence or presence. Dawson J continued[49]:

> "But he will, since possession is used in its barest sense, possess something if he has custody or control of the thing itself or of the receptacle or place in which it is to be found provided that he knows of its presence. He need not know what it is (other than to the extent necessary to know of its presence) nor its qualities."

101 His Honour's view of what will suffice to demonstrate the necessary mental element implicit in the use of the word "possession" did not command the assent of a majority of the Court. Rather, as is implicit in what was said in *Pereira v Director of Public Prosecutions*[50], a charge of possession of a prohibited import, contrary to s 233B(1)(c) of the *Customs Act*, requires proof of knowledge that the prohibited import was or was likely to be secreted in the article which contained it and which was shown to be in the custody of the accused. As *He Kaw Teh* and *Pereira* also demonstrate, proof of that knowledge may depend upon inference from primary facts but in some circumstances that inference may be irresistible[51].

102 A like construction of s 9 of the *Drugs Misuse Act* should be adopted. The construction adopted in the Court of Appeal in this case and by Fitzgerald P in *Clare* casts upon an accused a burden of proving innocence. That construction should not be adopted unless clearly required by the statutory text. "Possession" in s 9 should be understood as bearing its ordinary meaning, thus importing a mental element. And that mental element is to be related to the subject of

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**48** (1985) 157 CLR 523 at 542, 545 per Gibbs CJ (with whom Mason J agreed), 589 per Brennan J.

**49** (1985) 157 CLR 523 at 602.

**50** (1988) 63 ALJR 1 at 3; 82 ALR 217 at 219.

**51** cf *Bahri Kural* (1987) 162 CLR 502 at 505.

possession – a dangerous drug. That is, the accused must be shown to know that the substance in possession is or is likely to be a dangerous drug.

103 Contrary to what was said by Fitzgerald P in *Clare*, neither s 57(c) nor s 57(d) of the *Drugs Misuse Act* permits, let alone requires, construing "possession" in s 9 of the Act as meaning no more than physical custody of something which is in fact a dangerous drug.

104 As explained earlier in these reasons, s 57(c) works one considerable qualification to the proposition that to demonstrate possession of a dangerous drug the prosecution must prove that the accused knew that what he or she had in his or her custody was or was likely to be a dangerous drug. Proof of possession may be established by proving that at the relevant time the accused was in occupation of or concerned in the management or control of a place where the dangerous drug was. Having made this provision for proof of possession in cases where drugs are found in a place over which the accused has the degree of control specified in s 57(c), it would be a curious drafting device to use the reversal of onus of proving honest and reasonable belief to achieve a result similar to that achieved in s 57(c) in cases where an accused person has control of an article within which a drug is secreted. Yet that, essentially, is the understanding of s 57(d) which was adopted in *Clare* and in the present matter. That should be rejected.

105 Because s 57(d) is concerned with mistake of fact, not reasonable excuse, it may not provide for cases of the kind to which Gibbs CJ referred in *He Kaw Teh*[52] – cases such as where a person has a dangerous drug in possession because he or she has taken it from an addict but is about to destroy it, or where a finder of drugs is taking them to the police. Rather, s 57(d) should be understood as providing for a defence of honest and reasonable belief in the existence of a state of things material to the charge that would fall for consideration only if it was otherwise established that, but for the excusing provision, the offence of possession would be made out. In cases in which s 57(c) is not engaged, that will require proof that the accused knew that he or she had in possession a substance that was or was likely to be a dangerous drug. Section 57(d) should not be read as casting upon the accused the burden of demonstrating that he or she had a positive belief that a substance in his or her possession neither was nor was likely to be a dangerous drug.

106 It follows that the direction given by the trial judge about what must be shown to establish possession of a dangerous drug, although consonant with authority then binding upon her Honour, was erroneous.

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**52** (1985) 157 CLR 523 at 539.

107 The appeal to this Court must be allowed, the orders of the Court of Appeal set aside and in their place there should be orders:

(a) appeal allowed;

(b) quash the appellant's conviction and sentence.

Although the appellant contended that his conviction should be quashed, the point upon which he succeeds is not one which would require that result. Whether he is retried will be a matter for the prosecuting authorities but a further consequential order should have been made by the Court of Appeal, namely, (c) direct that a new trial be had.

108 CALLINAN AND HEYDON JJ. This appeal raises questions as to the nature and extent of the knowledge if any, that must be proved by the prosecution to establish the offences of possession and attempted possession of a dangerous drug under s 9 of the *Drugs Misuse Act* 1986 (Q) ("the Act")[53].

Facts

109 Shortly before 16 November 2001, a parcel addressed to "Mr Tabler" of "1 Makeri Street" containing methylamphetamine, a dangerous drug proscribed by the Act, arrived at the Bundall mail centre at the Gold Coast in Queensland. It was undeliverable because the address which it bore did not exist. In accordance with ordinary postal practice, an employee opened the parcel to try to discover the true address or the sender. He found a glass jar containing powder in it. Suspicious that the powder might be an unlawful drug, the employee contacted the police, who then collected it. Analysis proved the powder to be methylamphetamine.

110 On 16 November 2001, a man called at the Bundall mail centre to collect the parcel. Another employee told him that the parcel was not there and that it might be at the Robina delivery centre. The employee told the man that the parcel could however be collected after 2 pm at Bundall. The employee saw him leave the centre in a white car.

111 Three days later, a man telephoned the Bundall mail centre. He said that he had unsuccessfully attempted to collect a parcel on 16 November and he would now have a friend collect the parcel for him that day. He was told that some form of identification would be required before the parcel would be relinquished. Police officers were immediately informed of this conversation.

112 Later that day, the appellant and Ms Nicole Briggs called at the Bundall mail centre. While the appellant waited outside in a white car, Briggs went inside to collect the parcel. She spoke with an assistant there who asked her to wait while he retrieved it. The police, who were then present at the mail centre, provided a substitute parcel to be given to Briggs. Briggs produced a collection card signed in the name of Tabler authorising her to collect the parcel. After she was given the parcel she returned to the white car which the appellant entered on the driver's side. Briggs sat in the front passenger seat. At that point, they both alighted from the car as police officers came to arrest them. The parcel was lying

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**53** There has since the trial of the appellant been a consolidation of the Act and other Acts and a renumbering of some sections of it. In this judgment, we refer to the Act as it was in force at the time of the offence although the text is generally the same in the renumbered relevant provisions.

unopened on the floor of the car. The car was the same one as the caller at the mail centre had used three days earlier.

The trial

113 The prosecution put the case against the appellant on the basis that the appellant aided, counselled or procured Briggs to collect a parcel containing methylamphetamine from the Bundall mail centre, although the indictment alleged possession, and, on the evidence, a case of possession simpliciter could well have been made out as the appellant conceded in argument during the appeal. The appellant was charged jointly with Briggs. The prosecution also relied on s 44A of the Act, a provision equating an attempt with a completed offence. This was occasioned by the fact that at the time of the offence an innocuous substitute had been made for the dangerous drug. That fact, as will appear, has a further significance for the application to this case of the evidentiary provisions contained in s 57 of the Act. Briggs pleaded guilty before the hearing, and the trial proceeded against the appellant alone.

*The appellant's defence*

114 The appellant did not give evidence. But he did call evidence, first from Gavin McGuane who said that on 16 November 2001, he and the appellant had been drinking at a tavern on the Gold Coast when they were approached by an acquaintance of McGuane, Geoff Tabler. Tabler asked if he could obtain a lift to collect a parcel from the Gold Coast mail centre. The others agreed. As the appellant had been drinking and McGuane's vision was impaired, it was Tabler who drove the appellant's car to the mail centre. When they arrived, it was difficult to park, and so the appellant went into the centre to collect the parcel on Tabler's behalf. He returned empty handed. He told Tabler that the parcel was not there, but that it might be at the Robina delivery centre. They then drove to Robina, and again the appellant went in to collect the parcel, this time to be told that it was probably on its way to the "dead letter office" at Bundall, where it would be opened. The appellant suggested that Tabler telephone the Bundall mail centre on Monday, and gave Tabler a collection card for it. The three men returned to the tavern where Tabler bought each of them a drink before leaving. McGuane said that he had not seen Tabler since.

115 The appellant also called Matthew Eyers who gave evidence that he had met Tabler at the Miami hotel on the Gold Coast on a Saturday. Eyers had raffled a tray of meat there which Tabler won and then returned, as he was, he said, travelling to Sydney. Eyers bought Tabler a drink and when he returned from the bar, he overheard him asking the appellant to collect a parcel for him. He saw Tabler give the appellant a collection card.

The trial judge's directions

116 The trial judge (Mullins J) directed the jury that to establish that Briggs had unlawful possession of methylamphetamine, they needed only to be satisfied that when she collected the parcel, Briggs knew that there was something inside it. Her Honour said:

> "Now, there is actually one inference that you are going to have to draw in this case in order to accept the prosecution case and that would be that when Ms Briggs went to collect the envelope, which is Exhibit 1, including its contents that she knew that the envelope had contents. That's an inference that I don't think is really in dispute but you can see that you've had no evidence of Ms Briggs' state of mind, she was the one that actually collected the envelope, but I will be telling you that you need to be satisfied that when she went to collect that envelope she knew that she was going to get something inside the envelope. I'll just add here as a matter of law, the prosecution does not have to prove that Ms Briggs had knowledge that the contents of the envelope were methylamphetamine."

117 The jury were then directed that they could convict the appellant if they were satisfied that the appellant in some way assisted Briggs, or did an act for the purpose of enabling her to commit the offence, knowing that Briggs intended to obtain possession of the parcel and its contents. Her Honour said:

> "Now in a nutshell, the Crown's case was that [the appellant] was a party to the offence committed by Ms Briggs and that you would reject the defence of honest and reasonable mistaken belief that the package did not contain methylamphetamine. The defence contends that you would be satisfied on the balance of probabilities – that is, on balance or that it was more likely than not that [the appellant] had an honest and reasonable but mistaken belief that the package did not contain methylamphetamine.
>
> Now, at the outset I told you what the elements of the offence of possession of the dangerous drug methylamphetamine in excess of two grams were and those elements were that the prosecution had to prove beyond reasonable doubt that [the appellant] had possession of the dangerous drug methylamphetamine on 19 November 2001 at the Gold Coast, that that possession was unlawful and that the third element was that the quantity of the dangerous drug methylamphetamine exceeded two grams. Elements two and three are not in dispute. There's no question about the possibility of the lawfulness of the possession that's in issue and Exhibit 5 shows that the quantity of methylamphetamine involved in this matter was just over 13 grams and therefore exceeded two grams.

...

Ultimately, it seems what the Crown is relying on is not that [the appellant] obtained possession or attempted to obtain possession of the package containing the methylamphetamine, but that [the appellant] was aiding Ms Briggs or counselling or procuring her to do the act which amounted to the offence of possession of the dangerous drug methylamphetamine.

It's not only a person who actually does a criminal act, who maybe [is] found guilty of it. Anyone who aids, or assists, or helps that person to do the criminal act may also be guilty of the same offence. The Prosecution seems to contend that although it was Ms Briggs who actually attempted to obtain possession of Exhibit 1, including the drugs, and thus was guilty of the offence of the possession of the dangerous drug methylamphetamine in excess of 2 grams on the basis of attempting to obtain it, and on the basis that Ms Briggs knew that there was something in the package that she was collecting, the Prosecution says [the appellant] is also guilty of that offence because he aided Ms Briggs to attempt to commit the offence, or he did an act for the purpose of enabling Ms Briggs to attempt to commit the offence, or he urged her to go and commit the offence. And it seems that the Crown's relying on the fact that [the appellant] drove Ms Briggs to the Bundall Post Office on the 19th of November, and that he gave her the card which is Exhibit 2, and it's not in dispute on the evidence that certainly by Monday the 19th of November, [the appellant] was in possession of the card, that is Exhibit 2, and that was the card that was used to obtain, or attempt to obtain Exhibit 1 and its contents.

Now, you may find [the appellant] guilty of the offence of possession of the dangerous drug, methylamphetamine in excess of 2 grams, only if you're satisfied beyond reasonable doubt of three things. The first is that Ms Briggs attempted to commit that same offence. The second is that [the appellant] in some way assisted Ms Briggs, or did an act for the purpose of enabling Ms Briggs to attempt to commit the offence. And the third is that when [the appellant] assisted Ms Briggs to do that act, [the appellant] knew that Ms Briggs intended to attempt to obtain possession of the envelope which is part of Exhibit 1, and its contents.

There is evidence that Ms Briggs committed, or attempted to commit the offence of the possession of the dangerous drug, methylamphetamine in excess of 2 grams. You've heard the evidence about how she went to the Post Office on the 19th and handed over the card and got the dummy envelope, and it probably won't trouble you to infer that she knew that when she was collecting the envelope that there

> would be something in it, and it's not an issue that that possession would have been unlawful and we know that the quantity exceeded 2 grams. So we have Ms Briggs guilty of the offence.
>
> Now, I've mentioned the sorts of acts that the Crown is relying on to say that [the appellant] assisted Ms Briggs to attempt to obtain the envelope and its contents. And the last element wouldn't trouble you, I wouldn't think for very long because that's the one that you've got to be satisfied that when [the appellant] assisted Ms Briggs, if you're satisfied that he did so assist Ms Briggs, he knew that Ms Briggs intended to attempt to obtain possession of the envelope, and that's something that you probably infer from the fact that [the appellant] handed the card to Ms Briggs, or you would infer [the appellant] handed the card to Ms Briggs and infer from that he did so with a view to intending her to attempt to obtain possession of both the envelope and its contents."

118 The appellant was convicted and sentenced to two years' imprisonment.

The Court of Appeal

119 The appellant unsuccessfully appealed to the Court of Appeal (de Jersey CJ, Davies JA, Mackenzie J). As to what had to be proved against the principal offender, Briggs, de Jersey CJ, with whom Davies JA agreed, said[54]:

> "In this case, it would, as her Honour indicated, have been necessary only for the Crown to prove Ms Briggs was to collect a parcel, one presumably not empty of any contents."

120 With respect to what had to be proved against the appellant as an accessory, the Chief Justice said[55]:

> "If the guilt of the principal offender may in a case of possession of dangerous drugs be established simply upon proof of knowledge that – in a case like this – something was to be collected (which in fact was or contained dangerous drugs), then, in a coordinate sense, the liability of the accessory would, one would expect, be sufficiently established upon proof of assistance directed towards obtaining that thing, albeit there be no proof that the aider – as with the principal offender – knew that it was or contained drugs."

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**54** *R v Tabe* (2003) 139 A Crim R 417 at 419 [10].

**55** (2003) 139 A Crim R 417 at 419 [13].

His Honour said[56]:

> "Hence my view that the mental state to be established against the accessory, as to the nature of the thing to be secured, need not be more extensive than that which, as a minimum position, need be established by the Crown against the principal offender in those circumstances."

121 Mackenzie J put the matter this way[57]:

> "If the interpretation of s 7 implicit in *Barlow*[58] is applied, unlawfulness of possession on the part of the secondary party will depend on whether, having aided, counselled or procured the principal offender to have possession of the package that in fact contained a dangerous drug, some recognised form of excuse is raised on the evidence."

Legislative provisions

122 Section 9 which is in Pt 2 of the Act relevantly provides:

> "**9 Possessing dangerous drugs**
>
> A person who unlawfully has possession of a dangerous drug is guilty of a crime."

123 Section 44 provides that the *Criminal Code* (Q) ("the Code") is to be read and construed with the Act. Section 44A of the Act provides:

> "**44A Attempt to commit offence**
>
> **(1)** In lieu of the Criminal Code, section 536 the following provision shall apply –
>
> 'A person who attempts to commit a crime defined in part 2 is deemed to be guilty of the intended crime and is liable to the same punishment and forfeiture as a person who commits the intended crime.'.

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**56** (2003) 139 A Crim R 417 at 420 [18].

**57** (2003) 139 A Crim R 417 at 425-426 [45].

**58** *R v Barlow* (1997) 188 CLR 1.

**(2)** Where a person is charged summarily with a crime defined in part 2 that person may be convicted in those summary proceedings of attempting to commit that crime."

124 At the time of the offence, s 57 of the Act relevantly provided:

"**57 Evidentiary provisions**

**(1)** In respect of a charge against a person of having committed an offence defined in part 2 –

...

(b) that person shall be liable to be convicted as charged notwithstanding that the identity of the dangerous drug to which the charge relates is not proved to the satisfaction of the court that hears the charge if the court is satisfied that the thing to which the charge relates was at the material time a dangerous drug;

(c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place;

(d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge;

(e) the burden of proving any authorisation to do any act or make any omission lies on that person."

125 The term "possession" is not defined in the Act. Section 1 of the Code defines "possession" inclusively and without reference to knowledge as follows:

"includes having under control in any place whatever, whether for the use or benefit of the person of whom the term was used or of another person, and although another person has the actual possession or custody of the thing in question."

126 Section 7 of the Code provides that:

"**Principal offenders**

**7** (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

(2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission."

127 Section 24 of the Code provides:

"**Mistake of fact**

**24**(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

The appeal to this Court

128 The appellant points first to the fact that, although the indictment charged possession without more or qualification, the prosecution, from beginning to end, confined its case to one of aiding, counselling or procuring Briggs to do the act

which amounted to the offence committed by her, of attempted possession. In argument in this Court the respondent accepted that this was so.

129 The appellant then submitted that to make out "possession" within the meaning of s 9 of the Act, the prosecution must prove, as a minimum, that the principal, Briggs, knew of the presence of the drug in the unopened package. Mere knowledge that the package was not empty could not suffice.

130 The appellant sought to rely on *Williams v The Queen*[59] and *He Kaw Teh v The Queen*[60]. In the former, the appellant was convicted of possession of a dangerous drug, cannabis, in contravention of s 130(1)(a) of the *Health Act* 1937 (Q), the precursor of the Act, on the basis of the presence of a minute amount of the drug in the pocket of his coat. Section 130(1)(a) relevantly provided that:

> "**Possession of and trafficking in dangerous drugs restricted**
>
> (1) A person shall not –
>
> (a) have in his possession a dangerous drug, or a prohibited plant, or procure for himself a dangerous drug or a prohibited plant or attempt so to do, save under and in accordance with the authority of a licence or other authorization provided by or under this Act."

131 The expression "have in possession" was defined by s 5 of the *Health Act*, subject to any contrary intention, as including "having under control in any place whatever, whether for the use or benefit of the person of whom the term was used or of another person, and although another person has the actual possession or custody of the thing in question". It can be seen that the definition of possession in the Code is identical with the definition of "have in possession" in the *Health Act*.

132 The evidentiary provision in the *Health Act* at that time was s 130J[61]. Materially, it had much in common with s 57 of the Act but, contrary to the

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**59** (1978) 140 CLR 591.

**60** (1985) 157 CLR 523.

**61** Section 130J of the *Health Act* provided:

> "**130J Matters of proof respecting possession of drugs**

(Footnote continues on next page)

submissions of the appellant, was not identical with it in that it was in less expansive terms than s 57[62].

133 The appellant seeks to place particular weight upon the reasoning of Aickin J in *Williams* in the following passages[63]:

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(1) In a proceeding brought for an offence in relation to possession of a dangerous drug, a person who, contrary to section 130 of this Act, has in his possession –

(a) a quantity of that drug in excess of a quantity prescribed under this Act for the purposes of this paragraph (a) in respect of that drug; or

(b) a quantity of any substance containing that drug, which quantity exceeds the quantity prescribed under this Act for the purposes of this paragraph (b) in respect of that drug,

shall be deemed to have possession of that drug for a purpose specified in paragraph (c) of subsection (2) of section 130 of this Act unless he shows the contrary.

(2) In respect of a charge of an offence against any provision of section 130 of this Act,

(a) it is not necessary to particularize the dangerous drug in respect of which the offence is alleged to have been committed;

(b) proof that a dangerous drug was at the material time upon premises occupied by or under the control of any person is proof that the drug was then in his possession unless he shows that he then neither knew nor had reason to suspect that the drug was upon the premises;

(c) the burden of proving any licence or other authorization provided by or under this Act lies on the defendant who claims the authority of such licence or authorization;

(d) the operation of section 24 of *The Criminal Code* is excluded unless the defendant shows his honest and reasonable belief in the existence of any state of things material to the charge."

**62** For example, s 57 defines possession *conclusively* in terms of occupation or *concern* in the management or control of a place whereas s 130J(2)(b) of the *Health Act* makes no reference to conclusiveness, and defines possession in terms of occupation or control (and not mere concern in either of those) of premises.

**63** (1978) 140 CLR 591 at 610, 613.

> "The solution of the problem of minute quantities appears to me to lie in the proper application of what is involved in the concept of 'possession'. It is necessary to bear in mind that in possession there is a necessary mental element of intention, involving a sufficient knowledge of the presence of the drug by the accused. ...
>
> The critical question in the present case is, therefore, whether there was sufficient evidence of knowledge of the presence of cannabis sativa in the pockets of the coats to supply the necessary mental element to prove possession in the sense used in s 130(1)(a) or 'control' within the definition of 'have in possession' in s 5."

134 But his Honour was the only Justice in that case who decided the appeal by reference to the knowledge of the accused. In their joint judgment, Gibbs and Mason JJ (with whom Jacobs J agreed), upheld the accused's appeal upon a somewhat different basis[64]:

> "A consideration of these situations confirms us in thinking that when the Act creates the offence of having possession of a dangerous drug or a prohibited plant, without adverting to quantity, it contemplates possession, not of a minute quantity incapable of discernment by the naked eye and detectable only by scientific means, but a possession of such a quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug of which the person is presently in possession. Even though the statute is aimed at a social evil, if it is ambiguous or silent upon a particular point it is permissible to construe the statutory provision so as to avoid an unfair or unjust result. We prefer to express the concept of possession in the terms which we have used rather than in terms of 'measurable' or 'usable' quantities."

135 After pointing out that the drug consisted of some fragments of green leaf mixed with other matter, the other judge, Murphy J, said that the drug was trifling in quantity and that the law is not concerned with trifles[65].

136 Having regard to the fact that Aickin J was the only Justice in *Williams* who decided the case by reference to the presence or absence of knowledge, and the different language of s 57 of the Act from the provisions of the *Health Act* there under consideration, neither the reasoning of Aickin J, nor the decision in *Williams* itself, can be determinative of this case.

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**64** (1978) 140 CLR 591 at 600.

**65** (1978) 140 CLR 591 at 602.

137 In *He Kaw Teh* the appellant was convicted of both knowingly importing and possessing heroin in contravention of s 233B(1)(b) and (c) of the *Customs Act* 1901 (Cth) after he was apprehended at an airport with heroin concealed in the false bottom of his suitcase. In that case, in relation to the phrase "has in his possession" as used in the *Customs Act*, and the provision in it imposing an onus upon the accused to prove reasonable excuse, Gibbs CJ (with whom Mason J agreed) said this[66]:

> "For the reasons I have given I hold that in a proceeding under par (b) or par (c) of s 233B(1) the prosecution bears the onus of proving that the accused knew of the existence of the goods which he brought into Australia, or which were in a suitcase or other container over which he had exclusive physical control, as the case may be. The proper direction on the first charge was that the prosecution had to prove that the applicant brought the suitcase into Australia, knowing that the heroin was in the case."

Brennan J said this[67]:

> "I would therefore hold that *Bush*[68] was wrongly decided. On a count of possession under par (c) the onus is on the prosecution to prove that an accused, at the time when he had physical custody or control of narcotic goods, knew of the existence and nature, or of the likely existence and likely nature, of the narcotic goods in question and that onus is discharged only by proof beyond a reasonable doubt."

Dawson J was of this opinion[69]:

> "There may be a sense in which physical custody or control can be exercised over something in ignorance of its presence or existence, but this has never been considered sufficient to amount to possession in law. This is what Griffith CJ meant in *Irving v Nishimura*[70], when he said:

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**66** (1985) 157 CLR 523 at 545.

**67** (1985) 157 CLR 523 at 589.

**68** *R v Bush* [1975] 1 NSWLR 298.

**69** (1985) 157 CLR 523 at 599.

**70** (1907) 5 CLR 233 at 237.

> 'If a man has something put into his pocket without his knowledge, he cannot be charged with having it unlawfully in his possession, if that fact appears.'
>
> Although intent must be based upon knowledge, it is the degree of knowledge required which poses the difficult question."

His Honour went on to hold[71]:

> "In my view, it comes to this. A person cannot, within the meaning of par (c), possess something when he is unaware of its existence or presence. But he will, since possession is used in its barest sense, possess something if he has custody or control of the thing itself or of the receptacle or place in which it is to be found provided that he knows of its presence. He need not know what it is (other than to the extent necessary to know of its presence) nor its qualities."

138 The evidentiary provisions in the *Customs Act* with which the Court was concerned in *He Kaw Teh* were again however, in different terms from s 57 of the Act. One of the evidentiary provisions formed part of a section creating an offence, s 233B(1)(c), which provided that possession of prohibited imports, "without reasonable excuse (proof whereof shall lie upon [the accused])" shall be an offence. Another section, s 233B(1A), provided that it was not necessary for the prosecution to prove that the accused knew that the goods in his possession had been imported in contravention of the Act, but that it was a defence if the accused could prove that he did not know that.

139 Even though the statutory language considered in *He Kaw Teh* is different from s 57 of the Act, Wilson J in that case adopted an approach and construction not unlike that which in our opinion s 57 compels, but quite unlike the construction preferred by the other Justices there apart from Dawson J. Wilson J, after reviewing the authorities, said this[72]:

> "In my opinion, the omission of the words 'without reasonable excuse' from par (b) has the effect of removing mens rea as an element of the offence which is to be positively established by the prosecution in making out a prima facie case. But this is not to constitute the offence as one of absolute liability. It is to give with one qualification the same

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**71** (1985) 157 CLR 523 at 602.

**72** (1985) 157 CLR 523 at 557-558.

effect to the omission as Day J, in *Sherras v De Rutzen*[73], gave to the omission of the word 'knowingly' from the description of one offence in the Act there under consideration whilst the word appeared in another offence in the same section. His Lordship said[74]:

> '... the only effect of this is to shift the burden of proof. In cases under sub-s 1 it is for the prosecution to prove the knowledge, while in cases under sub-s 2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word "knowingly" in the one sub-section and its omission in the other.'

The qualification is that the word 'prove' in this passage should not in this context be understood to mean any more than to 'adduce evidence of'. In other words, the effect of the omission of the words 'without reasonable excuse' from par (b) is to transfer the evidential burden, the burden of adducing evidence, from the prosecution to the defence. It then remains on the prosecution to rebut that evidence to the satisfaction of the jury beyond a reasonable doubt."

140 Later his Honour said this[75]:

> "In my opinion, then, it should now be taken to be the law in Australia that in order to present a prima facie case of an offence under s 233B(1)(b) of the Act it is not necessary for the Crown to establish guilty knowledge on the part of the accused. In the absence of evidence to the contrary such knowledge will be presumed, but if there is some evidence that an accused person honestly believed on reasonable grounds that his act was innocent then he is entitled to be acquitted unless the jury is satisfied beyond reasonable doubt that this was not so."

141 The appellant also referred to *Bahri Kural v The Queen*[76] and *Pereira v Director of Public Prosecutions*[77]. In *Pereira* the Court (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) held that mens rea must be proved in a charge

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**73** [1895] 1 QB 918.

**74** [1895] 1 QB 918 at 921.

**75** (1985) 157 CLR 523 at 558-559.

**76** (1987) 162 CLR 502.

**77** (1988) 63 ALJR 1; 82 ALR 217.

of an offence under s 233B(1)(b). There the Court (speaking of charges under s 233B(1)(c) and (d) of the *Customs Act*) said[78]:

> "Even where, as with the present charges, actual knowledge is either a specified element of the offence charged or a necessary element of the guilty mind required for the offence, it may be established as a matter of inference from the circumstances surrounding the commission of the alleged offence."

142 The appellant submitted that the Court of Appeal made no reference to any of these cases. That omission, the appellant contends, was a serious one and led the Court into error. Had the Court of Appeal had regard to those cases, it would have realized that the prosecution was obliged to prove at least that Briggs was aware of the presence of the drug in the parcel. The appellant submitted that s 9 should be construed in the context of s 57(d) of the Act: accordingly, the prosecution was bound to prove that the accessory too knew of the presence and the nature of the drug.

Disposition of the appeal

143 It can be accepted, on the basis of the statements in this Court in *Williams* and *He Kaw Teh*, that the concept of "possession" in the criminal law, in the absence of statutory indications to the contrary, involves as an element, awareness, or at least constructive knowledge, in the sense that there would be an awareness, but for an abstention from inquiry, or the suspension of other human tendencies such as suspicion and ordinary curiosity, of the thing possessed.

144 The questions in this case therefore are whether there are legislative indications to the contrary, and the extent of knowledge, if any, of an aider, procurer or counsellor of a principal offender, that must be established to sustain a conviction of the former.

145 Neither s 9 of the Act nor the definition of "possession" in s 1 of the Code manifests a legislative intention to exclude knowledge as an element of possession. Section 57(b) of the Act however makes irrelevant to the question of guilt the actual identity of the dangerous drug. Section 57(c) needs further examination but for present purposes it suffices to say that it reverses the onus of proof, and also makes clear that "reason to suspect" is to be treated as if it were knowledge. Section 57(d) qualifies the operation of s 24 of the Code. Its practical effect is to require that an accused show, on the balance of probabilities only, that he or she is entitled to be acquitted on the basis of an honest and

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**78** (1988) 63 ALJR 1 at 3; 82 ALR 217 at 219.

reasonable belief in the existence of any state of things material to the charge, rather than that which the Code would otherwise require, that the prosecution negative such a belief beyond reasonable doubt.

*Section 57(c) of the Act*

146 Section 57(c) is concerned with possession and deals expressly with the relevance of knowledge. To be concerned in the management or control of a place where the drug is located is, pursuant to this section, to be in "possession" of the drug. So much appears in terms in the first part of par (c) which then goes on to provide that unless an accused show that he or she neither "knew nor had reason to suspect that the drug was in or on that place", he or she will be regarded as being in possession. If knowledge were a necessary element of the charge that the prosecution was bound to prove, then the qualification in s 57(c) requiring the accused to show that he or she lacked the relevant knowledge, or had no reason to suspect that the drug was in or on that place, would be unnecessary and anomalous. Section 57(c) relieves the prosecution of the burden of proving knowledge. It is not only to be presumed, it is also to be conclusively presumed unless the accused demonstrate absence of knowledge, or, of reason to suspect. If an obligation to prove knowledge on the part of the prosecution were to be implied, s 57(c) would need to be read as if it contained a qualification to that effect. It would need to have implied in it after the words "... in the person's possession" such words, for example, as "if the prosecution prove that the person knew that the drug was located at that place". The effect of such a qualification would be to render meaningless, or at least to make contradictory, the express words which actually appear there "unless the person shows that he or she then neither knew nor had reason to suspect ...". A further purpose of s 57(c) is no doubt to make it clear that the onus is reversed in those cases to which it applies, being cases in which the extended meaning of possession operates.

*Section 57(d) of the Act*

147 This construction of s 57(c) still leaves some room for the operation of s 57(d) in cases to which the extended meaning of possession applies. Section 57(d) is concerned with an honest and reasonable belief in the existence of *any state of things material to the charge*. "Any state of things material to the charge" goes beyond and is capable of embracing matters other than knowledge[79]. It is unnecessary to explore the limits of the expression, but it may be, for example, that an honest and reasonable belief in the existence of duress or of an extraordinary emergency (s 25 of the Criminal Code) could suffice to exculpate an accused if he or she could establish that it was held.

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**79** *Ostrowski v Palmer* (2004) 78 ALJR 957 at 973-974 [82]-[83]; 206 ALR 422 at 443-444.

148 If a person is charged with an *attempt* to possess, or of aiding, abetting or counselling an *attempt*, and the defence seeks to establish that the offender did not know, or had no reason to suspect that the object in respect of which possession was attempted was an unlawful drug, then s 57(d) of the Act and s 24 of the Code are the only excusatory provisions that can have a relevant operation. This was the case with the appellant, because neither the principal offender, Briggs, nor the appellant himself, ever had possession in fact of the drug. It had been removed by the police and replaced by an innocuous substitute. This appeared clearly from the prosecution case. Deeming a person who is guilty of only an attempt, to be guilty of a completed offence, as s 44A of the Act requires, does not mean that the presumptive provision contained in s 57(c), which is directed towards a principal offender, may apply to a person who attempts to commit an act of possession. On the ordinary construction of s 57(c) of the Act, it could not apply to the appellant, or indeed even to Briggs. The true facts would not satisfy the phrase in the opening words of that section "a dangerous drug was ... in or on a place". But s 57(d) can and does apply to both an attempt and an aiding, abetting or counselling of an attempt, both being offences within Pt 2 of the Act. The appellant clearly sought to obtain a parcel which did, until it was intercepted, contain the drug. It was the parcel with the contents before interception that the appellant tried to get and possess, and counselled Briggs to possess. Knowledge, or its absence, is a state of things within s 57(d) of the Act and s 24 of the Code. It was for the appellant to show a state of things, absence of knowledge, in order to be acquitted. This he tried to do and failed. Absence of knowledge is not to be singled out as the only state of things which the prosecution is obliged to negative and the appellant to prove. A state of things is a very broad expression. It should be given its ordinary meaning as such. If knowledge and absence of knowledge were intended to be excluded from its operation, s 57(d) should have in terms said so. It did not. If the prosecution were bound to prove even a slight degree of, or indeed any knowledge of a drug intended to be possessed, then there would be no occasion to require the accused to show absence of knowledge which is a state of things for the purpose of s 57(d). The construction is consonant with the balance of s 57. It is very unlikely that the legislature intended an aider to an attempt to be in a better position because of a fortuitous interception, than a person who has succeeded in gaining actual physical possession of a parcel with something in it. It may be that s 57(d) was inserted to cover cases of ordinary physical possession and not extended cases of possession to which s 57(c) is at least principally directed. Whether that is so does not matter. What is obvious is that the legislature clearly intended to reverse the onus in relation to mistake of fact comprehensively to offences under Pt 2 of the Act.

149 The construction that we prefer of s 57 of the Act accords generally with the construction and approach of Wilson J in *He Kaw Teh* even though the language there is not quite so explicit, and the structure of the relevant provisions

differ from those of the Act. The preferred construction also conforms with the legislative intention, in relation no doubt to both attempts and completed offences, expressed in the second reading speech for the Bill[80] introducing the amendments for the insertion of the evidentiary provision s 130J as it appeared in the *Health Act* with which the Court was concerned in *Williams*. The Minister said[81]:

> "Evidence to substantiate a charge of trafficking is difficult to obtain. For these reasons, other countries and some Australian States have adopted in their legislation a departure from the usual approach. The legislation allows for what is called the 'reverse onus' concept. The National Standing Control Committee on Drugs of Dependence strongly recommended this procedure, and it was adopted by a conference of Commonwealth and State Ministers. I realise fully that the existence of legislation in other States and countries does not automatically provide sufficient reason to adopt similar legislation in Queensland. In this case, however, the arguments for such legislation are so cogent that I recommend its adoption here also.
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> ...
>
> The situation in which the Bill provides for a 'reverse onus of proof' involves matters often exclusively within the knowledge of the person charged. They are factors on which independent evidence is unlikely to be available.
>
> The concept, dear to our law, that he who alleges an offence must prove it should not be used to deny protection to the community against those who prey upon the weakness of immature youngsters. Special cases demand special remedies, and this Bill deals with special cases. Therefore, these provisions are incorporated in the Bill.
>
> With the passage of time, some drugs may change their chemical composition. Recently a person was charged with being in unauthorized possession of the drug heroin, as this was the name on the container. When the analyst examined the substance it was found that the drug had changed to morphia. This is common with this drug. For this reason, it is proposed that the drug in such alleged offences should not be particularised, nor should it be necessary to identify the drug other than as

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**80** Health Act Amendment Bill 1971 (Q).

**81** Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 April 1971 at 3582-3583.

a dangerous drug. It will of course be necessary for the Crown to prove that the substance was indeed a dangerous drug."

150 The National Standing Control Committee on Drugs of Dependence referred to in the speech was convened in 1969 at the request of the relevant Commonwealth and State Ministers, and was required to prepare a report which, among other things, would make recommendations on legislation to "... combat all aspects of the present drug problem in Australia". The report stated[82]:

> "The Working Party examined recent case law in England re-defining the concept of 'possession' and considered deficiencies in Customs and State legislation. In broad terms, the Committee agreed that reverse onus of proof should be applied to drug offences.
>
> The specific recommendations of this Working Party are set out in Attachment 'A' of the summary record of the meeting of 11 April 1969."

Attachment A of the report relevantly provided[83]:

> "The following recommendations were made with respect to the amendment of legislation:
>
> (a) it should be provided specifically in relation to the possession of prescribed drugs that a drug is deemed to be in the possession of a person if it is upon land or premises occupied by him or is used, enjoyed or controlled by him in any place whatever unless the person proves that he neither knew nor had reason to suspect that he had a prescribed drug in his possession ...;
>
> (b) legislation should provide that an offence is committed by a person occupying or concerned with the management of premises where marihuana is smoked or otherwise used, unless the person proves that he neither knew nor had reason to suspect that marihuana was smoked or used in the premises;

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**82** National Standing Control Committee on Drugs of Dependence, *Report to Ministers*, 1969 at 2.

**83** National Standing Control Committee on Drugs of Dependence, *Report to Ministers*, 1969, Attachment A.

(c) a similar, but separate, offence to that set out above in paragraph (b) should be provided in respect of other prescribed drugs.

..."

The consequences for accused persons are heavy ones but as Wilson J pointed out, they flow from a legislative response to what is seen as a very serious crime, hard to prevent and difficult to prosecute[84].

151 In our opinion therefore, s 57, including s 57(d), does manifest an intention to alter the common law with respect to knowledge as a necessary component of possession. The appellant's submission was that the prosecution was obliged to prove, as an element of the case against the appellant as an aider, abetter or counsellor, that the principal Briggs knew of the presence of the drug in the unopened parcel. The submission fails to pay due regard to the whole of s 57. Let it be assumed, for present purposes, that the innocuous substitute for the dangerous drug had not been made and that Briggs collected a parcel containing the latter and could have been charged as if she had committed a completed offence. There is no doubt that Briggs was a possessor of the parcel and its contents. She held the parcel in her hands and was, at the very least, concerned in the control or management of the place, the floor of the car, where the parcel was at the material time. To the extent then that Briggs' knowledge or reason to suspect the presence of a drug would have been, which we do not think it was, an element of the offence of the appellant as an aider, the prosecution would have had the benefit of the presumption raised by either or both of s 57(c) or s 57(d) of the Act. Such a presumption could only be displaced by evidence in the trial of the appellant showing an absence of the relevant knowledge, or reason to suspect, on the part of Briggs. If the evidence adduced on behalf of the appellant did go so far as to raise a question of absence of knowledge or reason to suspect, on the part of Briggs, it is likely that it was rejected, or would in the case of a completed offence equally have been rejected, having regard to the jury's rejection generally of the appellant's defence. It is hardly likely that the appellant would have conducted the defence on that basis. If he had, it may have been open for the prosecution to prove Briggs' knowledge, by proving her plea of guilty, embracing, as it must have, all elements of the offence including knowledge. The trial judge would have been right in those circumstances to tell the jury that the prosecution did not have to prove that Briggs knew that the parcel contained methylamphetamine.

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**84** *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 562.

152 In the circumstances of this case, however, of an attempt (on the part of both Briggs and the appellant), s 57(c) has no operation for the reasons that we have stated. But s 57(d) can and does have an operation. It left open the opportunity for the appellant to prove that he acted under an honest and reasonable, but mistaken, belief in a state of things (s 24 of the Code), that there was a parcel to be collected that he did not know had contained the, or a dangerous drug. The trial judge was right to tell the jury, as her Honour did, that the prosecution did not have to prove that Briggs had [ever] known that the parcel contained methlyamphetamine. It was for the appellant to disprove that if he could.

153 Contrary to the appellant's submissions however, Briggs' knowledge, whether presumed or actual, was not a necessary element of the case against the appellant. He was charged with possession. Section 7 of the Code deems him to be a principal offender. It was the appellant's knowledge that was relevant, and not Briggs'. The appellant, in calling the evidence that he did, assumed the burden imposed on him by s 57(d) of the Act of proving a relevant excusatory state of things, ignorance of the presence of the drug before interception. In this endeavour, as the verdict demonstrates, he failed.

154 The Chief Justice therefore did no injustice to the appellant when he said in the Court of Appeal that the mental state to be established against the accessory need not be more extensive than that which need be established against the principal offender[85].

155 The criticism made in submissions by the appellant that the Court of Appeal fell into error in not referring to and closely examining the reasons of this Court in *He Kaw Teh*, is not well founded. In considering, as they did, the reasoning of the Court of Appeal in *Clare v The Queen*[86], they necessarily had regard to *He Kaw Teh* which was discussed at some length in that case. We are unable to accept that in a case to which s 57(c) applies (which is not this case) the prosecution must prove that a principal offender knows that he or she possesses the thing which is in fact a dangerous drug. Section 57(c) does not require that. Once evidence is adduced that a dangerous drug was in fact at a place occupied by him or her, or in the management or control of that person, regardless of the state of the accused's knowledge, possession is presumed and the onus to disprove knowledge falls upon the accused. Neither *He Kaw Teh*, *Williams*, nor any of the other cases upon which the appellant seeks to rely is however determinative of this one.

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**85** *R v Tabe* (2003) 139 A Crim R 417 at 420 [18].

**86** [1994] 2 Qd R 619.

156 There was no deficiency in proof of the prosecution case and no misdirection on the part of the trial judge. We would dismiss the appeal.