HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No B26/2011

DALE CHRISTOPHER HANDLEN — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No B27/2011

DENNIS PAUL PADDISON — APPELLANT

AND

THE QUEEN — RESPONDENT

Handlen v The Queen
Paddison v The Queen
[2011] HCA 51
8 December 2011
B26/2011 & B27/2011

ORDER

In each matter:

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 23 December 2010 and in lieu thereof order that:*

   (a) the appeal to that Court be allowed;

   (b) the appellant's convictions be quashed and sentences set aside; and

   (c) a new trial be had.

On appeal from the Supreme Court of Queensland

Representation

P J Davis SC with G J D del Villar for the appellant in B26/2011 (instructed by Legal Aid (Qld))

M J Byrne QC with C L Morgan for the appellant in B27/2011 (instructed by Legal Aid (Qld))

W J Abraham QC with J G Renwick for the respondent in both matters (instructed by Commonwealth Director of Public Prosecutions)

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with G A Hill and R J Orr intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J K Kirk intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with A D Scott and A D Anderson intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

M K Moshinsky SC with C J Horan intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Handlen v The Queen
Paddison v The Queen

Criminal law – Appeal – Jury misdirection – Application of proviso – Appellants in joint trial each convicted of multiple drug-related offences under *Criminal Code* (Cth) ("Code"), including two counts of importing commercial quantity of border controlled drugs into Australia contrary to s 307.1 of Code ("importation offences") – Trial conducted on mistaken assumption that guilt of importation offences could be established by proof that appellants parties to joint criminal enterprise – Whether prosecution upon basis not known to law denied application of proviso under s 668E(1A) of *Criminal Code* (Q) – Whether directions to jury on "group exercise" distracted from real issues in trial of each count in indictment.

Words and phrases – "aids, abets, counsels or procures", "joint criminal enterprise", "proper conduct of trial", "proviso".

Criminal Code (Cth), Ch 2, ss 11.2, 307.1.
Criminal Code (Q), s 668E(1A).

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. These appeals were heard together. The appellants were convicted, following their joint trial before the Supreme Court of Queensland (Applegarth J and a jury), of offences under the *Criminal Code* (Cth) ("the Code"), including two counts of importing a commercial quantity of border controlled drugs into Australia, contrary to s 307.1 of the Code ("the importation offences"). The trial was conducted on the mistaken assumption, shared by the parties and the trial judge, that guilt of the importation offences could be established by proof that the appellants were parties to a joint criminal enterprise to import the drugs into Australia. At the date of the appellants' trial, participation in a joint criminal enterprise was not a basis for the attachment of criminal responsibility respecting a substantive offence under the laws of the Commonwealth[1].

2 The appellants appealed against their convictions to the Court of Appeal of the Supreme Court of Queensland (Holmes JA, Fraser and White JJA concurring). The Court of Appeal found that the jury had been directed "in terms alien to the forms of criminal responsibility then recognised by the *Criminal Code*"[2] and that the appellants' liability was accessorial[3]. Nonetheless, the Court of Appeal was satisfied that the appellants' guilt had been established beyond reasonable doubt. The Court of Appeal considered that the failure to direct the jury correctly as to the basis of the appellants' liability for the importation offences had not involved a fundamental departure from a trial according to law[4]. The appeals were dismissed under the proviso[5].

3 The appellants appeal by special leave upon a single ground that challenges the application of the proviso. One aspect of the ground raised a constitutional issue. The appellants submitted that the requirement of "trial by

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1 Code, Ch 2.

2 *R v Handlen* (2010) 247 FLR 261 at 282 [72].

3 *R v Handlen* (2010) 247 FLR 261 at 281-282 [70]-[71].

4 *R v Handlen* (2010) 247 FLR 261 at 284-285 [82].

5 Section 668E(1A) of the *Criminal Code* (Q) provides: "However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

jury" for Commonwealth offences tried on indictment[6] is inconsistent with the exercise of the power to dismiss an appeal under the proviso, at least in a case in which there has been a misdirection as to the elements of liability[7]. As these reasons will show, the prosecution of the appellants upon a basis that was not known to law was a departure from the proper conduct of the trial. The departure was fundamental. It denied the application of the proviso. This conclusion makes it unnecessary to address the appellants' constitutional arguments. The appeals should be allowed, the appellants' convictions quashed and a new trial ordered.

Joint criminal enterprise and criminal responsibility under the Code

4 At common law, two or more persons may be jointly criminally responsible for the commission of an offence which, tacitly or otherwise, they have agreed to commit and which is committed while the agreement is on foot[8]. As McHugh J explained in *Osland v The Queen*, the criminal responsibility of each participant in such an enterprise is direct, each being equally responsible for the acts constituting the actus reus of the crime[9]. Commonly, proof of the offence and the accused's participation in the joint enterprise is facilitated by the evidentiary rule sometimes inaccurately described as "the co-conspirator's rule"[10]. The rule is not confined to the prosecution of conspiracy offences. It applies in the prosecution of substantive offences in which it is alleged that two or more persons acted in preconcert to commit an offence[11]. The acts and declarations of all the participants to the joint criminal enterprise are admissible to prove the

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6 Constitution, s 80.

7 See *Weiss v The Queen* (2005) 224 CLR 300 at 317-318 [46]; [2005] HCA 81; *Cesan v The Queen* (2008) 236 CLR 358 at 389 [99] per Gummow J; [2008] HCA 52.

8 *R v Lowery and King (No 2)* [1972] VR 560; Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 349.

9 (1998) 197 CLR 316 at 343 [73]; [1998] HCA 75.

10 Gillies, *The Law of Criminal Complicity*, (1980) at 259-266.

11 *Tripodi v The Queen* (1961) 104 CLR 1 at 6-7; [1961] HCA 22. See also *Cross on Evidence*, 8th Aust ed (2010) at [33565].

offence and the accused's participation in its commission[12]. The agreement or preconcert implies that each participant has authority to act in furtherance of the common purpose on behalf of all of the other participants[13].

5 In 1995, the Parliament codified all of the general principles of criminal responsibility applying to offences against the laws of the Commonwealth. The legislative history is discussed in *R v LK*[14]. The general principles are found in Ch 2 of the Code. The statement of them is exhaustive[15]. The Code has been amended since the date of the appellants' trial by the insertion of s 11.2A, providing for criminal responsibility in circumstances involving the joint commission of a substantive offence[16].

6 At the date of the appellants' trial, guilt of a substantive Commonwealth offence might have been established in one of three ways. First, by proof of the existence of the physical and any fault elements of the offence[17]. Secondly, by proof that the accused, while possessed of any fault element(s) of the offence, procured an innocent agent to engage in conduct constituting the physical element(s) of the offence[18]. Thirdly, by proof that the accused aided, abetted, counselled or procured another person to commit an offence[19]. The words "aids", "abets", "counsels" and "procures" are not defined in the Code. They have a long

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12 The admission of the evidence is subject to reasonable evidence being adduced of the preconcert: *Ahern v The Queen* (1988) 165 CLR 87 at 99; [1988] HCA 39. See also *Tripodi v The Queen* (1961) 104 CLR 1 at 7.

13 *Tripodi v The Queen* (1961) 104 CLR 1 at 7; *Ahern v The Queen* (1988) 165 CLR 87 at 94-95.

14 (2010) 241 CLR 177 at 203-206 [51]-[57] per French CJ, 220-224 [99]-[107] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 17.

15 Code, s 2.1.

16 *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth).

17 Code, s 3.2.

18 Code, s 11.3.

19 Code, s 11.2(1).

history in the law of complicity and are to be understood as having their established legal meaning[20]. Each is used to convey the concept of conduct that brings about or makes more likely the commission of an offence[21]. At no time has the Code adopted the distinction made by the common law in the case of felonies between the accessory before the fact, who counsels and procures the commission of the offence, and the accessory at the fact, who aids and abets the commission of the offence[22]. All who aid, abet, counsel or procure the commission of an offence against a law of the Commonwealth are taken to have committed that offence and to be punishable accordingly.

The importation offences

7 A person commits an offence contrary to s 307.1 of the Code if the person (i) intentionally imports or exports a substance; (ii) the substance is a border controlled drug and the person is reckless as to that circumstance; and (iii) the quantity of the substance imported or exported is a commercial quantity.

8 The first importation offence took place in May 2006. A commercial quantity of border controlled drugs concealed in the cathode ray tubes of computer monitors was shipped from Vancouver to Brisbane. The second importation offence took place in September 2006. A commercial quantity of border controlled drugs concealed in the cathode ray tubes of computer monitors was again shipped from Vancouver to Brisbane. The drugs in each shipment consisted of cocaine, ecstasy[23] and methamphetamine. Each is a border controlled drug[24]. The combined quantity of the drugs in each shipment was a

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20 *R v LK* (2010) 241 CLR 177.

21 *Giorgianni v The Queen* (1985) 156 CLR 473 at 493 per Mason J; [1985] HCA 29, citing Cussen ACJ in *R v Russell* [1933] VLR 59 at 67. See also J C Smith, "Aid, Abet, Counsel, or Procure", in Glazebrook (ed), *Reshaping the Criminal Law*, (1978) 120.

22 See Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 353, 362.

23 3,4-methylenedioxymethamphetamine (MDMA).

24 Section 300.2 of the Code defines "border controlled drug" to include a drug listed or described as a border controlled drug in s 314.4.

commercial quantity. At the time of these events, "import" was defined in the Code inclusively to mean "bring into Australia"[25]. It was not in issue in the Court of Appeal, or in this Court, that the importations were complete, at the latest, when the consignments were cleared through Customs and delivered to the consignee's warehouse[26].

9 Matthew Reed imported the drugs on both occasions[27]. The only basis upon which criminal responsibility could be fixed on the appellants for the importations was for aiding, abetting, counselling or procuring the commission of the offences by Reed[28]. Proof of guilt was dependent upon establishing, in the case of each appellant, that his conduct in fact aided, abetted, counselled or procured the commission of the offence by Reed[29] and that he intended that his conduct would facilitate the commission of an offence of the type that Reed committed[30].

The indictment

10 Following his arrest, Reed cooperated with the authorities and pleaded guilty to charges arising out of his role in the two drug importations. He gave evidence for the prosecution at the appellants' trial. An account of that evidence

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25 Code, s 300.2, definition of "import". The definition has since been amended and now includes dealing with the substance in connection with its importation.

26 *R v Handlen* (2010) 247 FLR 261 at 273-274 [46]-[47], 281 [69], citing *Campbell v The Queen* (2008) 73 NSWLR 272 at 293-294 [124] per Spigelman CJ; *R v Toe* (2010) 106 SASR 203 at 224-225 [73]-[74], [77] per Bleby J; *Bell v The Queen* [1983] 2 SCR 471; *R v Hancox* [1989] 3 NZLR 60.

27 *R v Handlen* (2010) 247 FLR 261 at 276 [52].

28 Code, s 11.2.

29 *R v Handlen* (2010) 247 FLR 261 at 281-282 [70]-[71].

30 Provision is made in the Code for accessorial liability for the commission of a substantive offence in circumstances in which the person's conduct in fact aided, abetted, counselled or procured the commission of the offence by another and the person was reckless about the commission of the offence (including its fault elements) that the other person in fact committed: s 11.2(3)(b).

and the other evidence given at the trial, as summarised by the Court of Appeal, is set out below. Before turning to that summary, reference should be made to the remainder of the counts in the indictment. The appellant in the first appeal, Dale Handlen, was convicted of the possession of a commercial quantity of border controlled drugs that had been unlawfully imported into Australia[31]. This offence related to the possession of the drugs imported in the May shipment. Each of the appellants was also convicted of attempting to possess a commercial quantity of border controlled drugs that had been unlawfully imported into Australia[32]. These counts concerned the appellants' conduct in attempting to gain possession of the drugs that were imported in the September shipment. A third man, Kelsey Nerbas, was jointly charged with the same four counts as Handlen. Nerbas entered pleas of guilty to each count during the course of the trial.

The evidence

11 Reed, a Canadian citizen, worked for a computer recycling company in Vancouver. He said that he was introduced to Handlen in August 2005 by a colleague known as "TJ" and that the three of them discussed the possibility of exporting drugs to Australia, concealed inside computer monitors. Reed prepared costings for the warehousing and freight of a consignment of computer monitors at Handlen's request. Thereafter, he arranged for the purchase of 480 monitors using funds provided by Handlen. In January 2006, Reed, Handlen and TJ leased a warehouse in the name of Cyberdesk, a legitimate business that was operated by TJ ("the Cyberdesk warehouse"). The monitors were delivered to the warehouse and, in March 2006, Reed, Handlen and TJ met there to pack the drugs inside the cathode ray tubes of selected monitors. The appellant in the second appeal, Dennis Paddison, and his father-in-law assisted in this task.

12 In early April 2006, Reed and Handlen flew to Brisbane. The tickets were booked by Reed with money given to him by Handlen. Reed was on friendly terms with Nerbas, a Brisbane resident. At Reed and Handlen's instigation, Nerbas arranged for the registration of a company, Reliable Computer Conversions Pty Ltd ("Reliable"), of which he and Reed became directors. Reliable was to be the consignee of the shipment of monitors. Nerbas and Reed were each signatories to Reliable's bank account. They signed a lease for a

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31 Code, s 307.5.

32 Code, ss 11.1, 307.5.

warehouse located in Geebung ("the Geebung warehouse"). Nerbas paid the security deposit and rent for the warehouse. There was evidence that moneys had been transferred from accounts associated with Paddison to an account operated by Nerbas in May 2006.

13 Reed organised to have the monitors collected in Vancouver, placed in a container and shipped to Brisbane. He engaged customs brokers in Brisbane, providing them with the bill of lading and an invoice from Cyberdesk addressed to Reliable for the consignment. Handlen gave Reed the name of a union official, who he said might facilitate the process of clearing the consignment through Customs. Reed made contact with this individual. In due course, the consignment was cleared and delivered to the Geebung warehouse.

14 Handlen, Reed and Nerbas removed the monitors from the container and stored them in the Geebung warehouse. About a week later, they returned and removed the drugs from the monitors. Handlen placed some samples of the drugs in a shopping bag and took it back to the unit in which he and Reed were staying. Handlen later gave a sample of the drugs to a man named John. Handlen told Reed that he had another client who would collect the remaining samples. These were collected by a man named David Shen. A few days later, Reed, Handlen and Nerbas returned to the warehouse, collected the remaining drugs and hid them in an apartment rented by Reed. Handlen arranged for most of these drugs to be picked up by certain men, including two of Shen's employees, and disposed of the remainder himself over time.

15 Evidence of the unpacking of the drugs and the subsequent dealings with them was relevant to the possession count against Handlen. As the Court of Appeal noted, this evidence does not appear to have been relevant to the case against Paddison[33]. Its admission was the subject of complaint in the Court of Appeal. The ground of challenge was dismissed since Paddison's counsel had not objected to the evidence and the trial judge summed-up on the evidence only as it related to the count of possession against Handlen[34].

16 Handlen and Reed returned to Vancouver in mid-June 2006. At Handlen's suggestion, in late July 2006, a second shipment of monitors was sent to

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33 *R v Handlen* (2010) 247 FLR 261 at 287 [94].

34 *R v Handlen* (2010) 247 FLR 261 at 287 [94].

Brisbane. There were no drugs concealed in this shipment. The purpose of sending an untainted consignment of monitors was to deflect any suspicions entertained by Customs officers.

17 Reed arranged for a third consignment of monitors to be shipped to Brisbane in early August 2006. On this occasion, the monitors were stored in the garage at Paddison's home before being transported to the Cyberdesk warehouse. Reed saw Handlen opening a package that appeared to contain cocaine at Paddison's home. He next saw the monitors loaded and taken from Paddison's home to the Cyberdesk warehouse. Reed, Paddison and a friend of Paddison's unloaded the monitors at the warehouse, stacking them on pallets.

18 On 10 August 2006, Reed flew to Brisbane, using money given to him by Handlen. At Handlen's suggestion, he and Nerbas rented premises in which to store the monitors that had been used to hide the drugs in the first shipment. Also at Handlen's suggestion, Reed and Nerbas met Shen, from whom they collected money. Paddison flew to Brisbane on 4 September 2006. He helped Reed unload the monitors from the second "dummy run" shipment. Handlen arrived in Brisbane on 6 September 2006 and attended a meeting with Shen.

19 On 8 September 2006, Customs officers examined the third shipment and found drugs concealed in one of the monitors. They contacted the Australian Federal Police, who examined the entire consignment, removed the drugs and replaced them with packages containing a harmless substance. The police commenced a surveillance operation, which included intercepting and recording telephone calls made by Reed, Nerbas and the appellants.

20 Reed retained customs brokers to secure the clearance of the third consignment and its delivery to the Geebung warehouse. Handlen supplied him with the money to pay the brokers. The container was delivered to the Geebung warehouse on the morning of 18 September 2006. Around midday that day, Reed and Paddison went to the warehouse, opened the container and observed that its contents were disordered. Reed telephoned Handlen, saying that they were "just in the middle of work here … I don't like it". That evening, Shen rang Handlen. Handlen told Shen that "they" had gone "through it with a … fine tooth comb" but that it was a "clean bill of health".

21 On 20 September 2006, Reed and Paddison returned to the Geebung warehouse to unpack the drugs. Their activities inside the warehouse were recorded by a surveillance camera. The recording was of poor quality, but tended to confirm Reed's account that they had unscrewed the casing of one of

the monitors, and that Paddison had looked inside it and shaken his head. They left the warehouse immediately and were arrested shortly after. Handlen was arrested later that evening. Handlen had an email in his pocket from Reed advising details of the ship and the container.

22 The police took possession of the monitors from the first shipment. Paddison's fingerprint was found inside the outer casing of one of the monitors. A packet of tablets, apparently overlooked, was found in another monitor.

23 Handlen did not give evidence. Paddison gave evidence denying that he knew that drugs were concealed in the monitors. He claimed that the bank records purporting to relate to his account were false and that the recordings of telephone conversations to which he was a party were edited. He said that he had accompanied Handlen on the trip to Australia for a holiday at a time when he was attempting to overcome his addiction to heroin.

The conduct of the trial

24 The prosecution case was opened on the basis that guilt was to be established by proof that each appellant was a party to a joint criminal enterprise in which each was responsible for the acts which together constituted the physical elements of the importation offences. The Crown Prosecutor told the jury[35]:

> "In cases such as the present where the importations are large, no one person can do all that is necessary to achieve the importation. Here there were many tasks directed towards the importation of the drugs, and the performance of the tasks was divided amongst the participants. In short, each importation was a group exercise with each participant sharing the common objective of bringing drugs into the country."

25 The characterisation of the prosecution case as involving proof of a "group exercise" appears to have raised a question in the mind of at least one member of the jury. During the Crown case, the jury asked a question[36]:

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35 *R v Handlen* (2010) 247 FLR 261 at 270 [32].

36 *R v Handlen* (2010) 247 FLR 261 at 270 [33].

> "Can you please clarify the defendants are linked by association; do we take this into account?"

26 The jury's question did not prompt consideration by the Crown Prosecutor or defence counsel of the significance, if any, of the association between the appellants to proof of their liability for the importation offences. The Crown Prosecutor proposed that the question be answered in this way[37]:

> "The Crown case is, and has always been, one of joint enterprise, so that evidence which tends to associate all defendants with the matters charged is evidence that they can take into account."

27 When the jury returned, the trial judge answered their question consistently with his acceptance of the Crown Prosecutor's submission. He said[38]:

> "[T]he Crown's case is that there was an association between the defendants and that association is relevant to the offences with which they've been charged. The Crown's case is that each importation was a group exercise with each defendant sharing a common objective of bringing drugs into the country. As was opened by the prosecutor, the Crown's case is that tasks were divided, but there was a common objective of bringing drugs into the country, and so to answer your question, evidence of association is something that you do take into account."

28 The appellants were each represented by counsel throughout the Crown case. Neither counsel objected to the form of the direction given in answer to the jury's question. Evidence was admitted, without objection, of the acts and declarations of persons occurring outside the presence and hearing of the appellant against whom they were tendered in order to prove the existence and scope of the group exercise.

29 Handlen withdrew his instructions to his counsel following the close of the Crown case on the 11th day of the trial. Paddison withdrew his instructions to his counsel when he was under cross-examination by the Crown Prosecutor on

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37 *R v Handlen* (2010) 247 FLR 261 at 270 [33].

38 *R v Handlen* (2010) 247 FLR 261 at 270 [33].

the 15th day of the trial. Thereafter, the appellants were unrepresented for the remainder of the trial.

30 In his closing address, the Crown Prosecutor invited the jury to find that the appellants had imported the drugs on each occasion "in partnership with each other, with Reed and others such as the man TJ and perhaps Tom, the other man from Canada whose name you've heard mentioned"[39].

The directions

31 In summing up the prosecution case, the trial judge explained to the jury:

> "The prosecution alleges that the defendants and others were part of a group exercise with each participant sharing the common objective of bringing drugs into the country."

32 His Honour directed that the prosecution was required to prove that each appellant "imported the substance and that he intended to import the substance".

33 With respect to the first importation, his Honour directed:

> "[W]as there an importation of a commercial quantity of border controlled drugs in May 2006? There seems to be no dispute about that. If there was, *was it the result of a group exercise?* Again, there is a lot of evidence to that effect. *Critically, if it was a group exercise, who were the participants in that group exercise?* Has the prosecution proven that Mr Handlen, with others, imported the drugs that arrived in May and intended to do so? Has the prosecution proved that Mr Paddison, with others, imported the drugs that arrived in May because he packed them and transferred moneys to assist with expenses and therefore intended to import the drugs?" (emphasis added)

34 With respect to the second importation, his Honour directed:

> "Was there an importation of commercial quantities of border controlled drugs in September 2006? Clearly the evidence is that there was. *Was it the result of a group exercise?* Well, you would readily conclude that it

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39 *R v Handlen* (2010) 247 FLR 261 at 270 [34].

was. *Critically, who were the participants in that group exercise?* Has the prosecution proven that Mr Handlen, with others, imported the drugs that arrived in September and intended to do so? Has the prosecution proved that Mr Paddison, with others, imported the drugs that arrived in September because he helped pack them and intended them to be brought into Australia?" (emphasis added)

35 With respect to the use to be made of the evidence led to prove the existence of the group exercise, his Honour directed:

"You have heard evidence of acts done and things said by people, such as Mr Reed and Mr Nerbas, out of the presence and hearing of one or both of the defendants. The prosecution says that *the acts and the statements of Mr Reed and Mr Nerbas were in furtherance of the agreed common purpose and go to establish the existence of the group exercise* that is alleged and each defendant's guilt of the offences with which they have been charged.

…

If you are satisfied the acts and things alleged were done or said by other participants in such a plan *and were done or said in furtherance of the agreed common purpose*, you may use this evidence in deciding whether the prosecution has proved beyond reasonable doubt that the defendant committed the offence with which he has been charged. *You must be satisfied of the existence of the group exercise in which each participant shared the common objective and that the defendant was a participant in it*.

…

The prosecution relies on acts done and statements made by people such as Mr Reed and Mr Nerbas out of the presence and hearing of one or both of the defendants. *That evidence can be relied upon by the prosecution to persuade you of its case, about the nature of the enterprise, and that, as part of that enterprise, an importation of drugs took place. … It may, along with other evidence, prove that there was a group exercise to import drugs and take possession of them after they had been imported* but not prove the participation of the defendant. However, *it may prove both the fact of the group exercise and the participation of the defendant.*" (emphasis added)

36 With respect to the recordings of telephone conversations, his Honour directed:

> "If the defendant was not a participant to the conversation, then *you need to consider whether the conversation was in furtherance of the agreed common purpose that the prosecution alleges*, and thereby establishes the existence of the group exercise and whether it, along with other evidence, proves the defendant's guilt of one or more of the offences with which he has been charged.
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> *So consider the contents of each of the statements that the prosecution relies on to prove the case against the defendants; namely that the defendants and others were part of a group exercise, and decide whether it proves the group exercise* and whether it proves that the defendant was a participant in that group exercise." (emphasis added)

37 Evidence that Nerbas conducted internet searches on topics including "Australian Customs drug bust", "drug bust in screens" and "Customs drug bust monitors" was left as capable of proving "the group exercise". So, too, was evidence that Nerbas and Reed visited a spyware shop, where they inquired about anti-surveillance equipment.

38 Proof of the existence of the group exercise to import drugs into Australia was irrelevant to proof of the appellants' guilt. No directions respecting proof of accessorial liability under s 11.2 of the Code were given.

The Court of Appeal

39 It was not in issue in the Court of Appeal that the common law doctrine of joint criminal enterprise had no analogue in the Code at the time[40]. The Court of Appeal rejected the respondent's submission that the appellants were each principals having performed part of the conduct involved in the importation offences[41]. That contention was not advanced in this Court.

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40 *R v Handlen* (2010) 247 FLR 261 at 277-281 [55]-[67].

41 *R v Handlen* (2010) 247 FLR 261 at 277 [55], 280-281 [65]-[66].

40 The Court of Appeal concluded that the case against the appellants was "extremely strong"[42]. It observed that Reed's evidence had been "amply supported" by other evidence, including of travel arrangements, transfer of moneys, recordings of telephone conversations, surveillance evidence and, in the case of Paddison, fingerprint evidence[43]. The Court of Appeal was mindful that satisfaction that the case against the appellants was established beyond reasonable doubt was a necessary, but not sufficient, condition for the application of the proviso[44].

41 The Court of Appeal approached consideration of the proviso by observing, correctly, that not every misdirection relating to the elements of the offence will necessarily amount to a fundamental flaw in the trial[45]. It characterised the misdirection as the trial judge's "failure to frame the question of criminal responsibility in terms of aiding under s 11.2"[46]. The Court of Appeal reasoned that[47]:

> "As the case was put on the basis of a group exercise in which each appellant performed tasks, the jury could not have understood the necessary intention to import as an intention to single-handedly bring the drugs into the country; they can only have understood the requisite intent as being the intention of each appellant to perform his allotted tasks in the exercise with the understanding that he was doing so in order to accomplish the importation of drugs. The intention which must have been found by the jury was, in this context, equally capable of being characterised as an intention to aid in the importation, even if it was not described as that by his Honour."

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42 *R v Handlen* (2010) 247 FLR 261 at 282 [72].

43 *R v Handlen* (2010) 247 FLR 261 at 282 [72].

44 *R v Handlen* (2010) 247 FLR 261 at 282 [72].

45 *R v Handlen* (2010) 247 FLR 261 at 283 [77], citing *Krakouer v The Queen* (1998) 194 CLR 202; [1998] HCA 43 and *Darkan v The Queen* (2006) 227 CLR 373; [2006] HCA 34.

46 *R v Handlen* (2010) 247 FLR 261 at 282 [72].

47 *R v Handlen* (2010) 247 FLR 261 at 284 [81].

Discussion

42 The vice in the trial was not that the trial judge failed to direct the jury that the requisite intention was an intention to aid as distinct from an intention to single-handedly import the drugs. The vice was in prosecuting the case against the appellants as one of joint criminal enterprise and in framing the issue for determination as whether the prosecution had proved that the appellants were parties to the group exercise to import the drugs.

43 The Court of Appeal's analysis proceeded on the assumption that the "evidentiary content of the Crown case" was unaffected by the misconception as to the basis of the appellants' criminal responsibility. The Court of Appeal said that the Crown Prosecutor was "entitled to lead evidence of the acts and statements of all accused in furtherance of the common purpose of importation on the *Tripodi* principle"[48].

44 The evidence that the Crown Prosecutor was entitled to lead in the case against each appellant was evidence tending to establish (i) the commission of the importation offences by Reed; (ii) the conduct of the appellant that aided, abetted, counselled or procured the commission of the offences; and (iii) any fact or circumstance from which it was open to infer that the appellant had the intention, in engaging in the conduct, to assist Reed in the commission of offences of this type.

45 There was no objection to the admission of evidence of the acts and statements of persons taking place outside the presence and hearing of the appellant against whom they were tendered to prove the existence of the group exercise. This may be explained by the circumstance that defence counsel shared the Crown Prosecutor's mistaken understanding as to the basis of criminal responsibility for the importation offences. An appreciation of the true basis of any criminal responsibility might be expected to have prompted consideration of the admissibility of evidence of matters such as the internet searches carried out by Nerbas and his and Reed's visit to the spyware shop. It is not correct to say that the Crown Prosecutor was "entitled" to lead evidence to prove the existence of the group exercise. However, given the lack of objection, the appellants' complaint is not with the admission of the evidence but with the directions that are set out above as to the use that the jury might make of it.

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48 *R v Handlen* (2010) 247 FLR 261 at 282 [72].

46 The question of whether the appellants were parties to the group exercise obscured the requirement to prove that each appellant engaged in conduct that in fact facilitated the commission of the importation offences by Reed. The case against Paddison for the September importation illustrates the point. Paddison's conduct that might be relied upon as aiding in the commission of the offence was his assistance in packing the drugs in the monitors, knowing that they were border controlled drugs and knowing that Reed was intending to import them into Australia. Proof of this conduct depended upon acceptance of Reed's evidence. Although the trial judge did refer in terms to Paddison's help in packing the drugs in his directions relating to the September importation, he did not direct that satisfaction that Paddison engaged in this conduct was essential to proof of guilt. In the way the matter was left, Paddison's guilt depended upon proof that he was a party to the group exercise to import the September shipment. The jury might have reasoned from the evidence of his visit to the warehouse on 20 September 2006 and from the things that he said in telephone conversations that he was a party to the group exercise. That evidence was capable of supporting acceptance of Reed's account; however, it was not evidence of conduct that aided, abetted, counselled or procured the importation of the drugs by Reed. The importation was complete by the time the surveillance of the members of the group commenced. It cannot be assumed that the jury's verdict reflected satisfaction beyond reasonable doubt that Paddison engaged in conduct that facilitated the commission of the offence.

47 As this Court explained in *Weiss v The Queen*, there is no single universally applicable description of what constitutes a "*substantial* miscarriage of justice"[49]. The appellants were convicted of serious criminal offences[50] following a trial at which the prosecution case was conducted, and left to the jury, on a basis for which the law did not provide. The conduct of the trial on

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49 (2005) 224 CLR 300 at 317 [44] (emphasis in original). See also *Cesan v The Queen* (2008) 236 CLR 358 at 386 [89] per French CJ, 391 [107] per Gummow J, 393-395 [123]-[129] per Hayne, Crennan and Kiefel JJ.

50 The offence of importing a commercial quantity of border controlled drugs into Australia under s 307.1 of the Code has a maximum penalty of imprisonment for life or 7,500 penalty units or both. Handlen was sentenced to life imprisonment with a non-parole period of 22 years. Paddison was sentenced to 22 years' imprisonment with a non-parole period of 14 and a half years.

this basis conferred an evidentiary advantage on the prosecution, leading to the admission of evidence to prove the existence and scope of the group exercise. Ultimately, the issue posed for the jury was whether the prosecution had proved that the appellants were parties to the group exercise when this was irrelevant to proof of their complicity in Reed's offences. The verdicts on the importation counts reflect the jury's satisfaction that each appellant was a party to the group exercise but it does not follow that the jury must have been satisfied of the facts necessary to establish the appellants' guilt of the importation offences in the only way for which the law allowed. It was not open to the Court of Appeal to apply the proviso in the circumstances of these appeals.

The remaining counts

48 The appellants submitted that the repeated references to proof of the group exercise affected the fairness of their trial on the other counts. As noted above[51], these were, in the case of both appellants, a count of attempted possession contrary to s 307.5 of the Code and, in the case of Handlen, a further count of possession, also contrary to s 307.5. The respondent submitted that, since the elements of the offences of possession and attempted possession of border controlled drugs had been correctly explained to the jury, no basis for setting aside the convictions for these offences was demonstrated.

49 The directions concerning proof of the "group exercise" did not discriminate between proof of guilt of the importation offences and the other counts in the indictment. The direction respecting the use to be made of the evidence of the acts and statements of Reed and Nerbas in furtherance of the "agreed common purpose", set out above, was expressed to be with respect to proof of each appellant's guilt of the offences with which he was charged. His Honour characterised the group exercise as "to import drugs and take possession of them after they had been imported". The direction as to the use that might be made of the recordings of conversations of other participants in the group exercise, also set out above, was with respect to proof of guilt of "one or more of the offences" with which the appellants were charged. His Honour referred to five telephone conversations by way of example and went on to say:

> "What I've done by taking you just to the first five of those transcripts is to identify conversations in which either one or both of the defendants wasn't

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51 See [10] of these reasons.

> a participant. As I've indicated, the prosecution says that the acts and statements of Mr Reed and Mr Nerbas were in furtherance of the agreed common purpose, and go to establish *the existence of the group exercise that it alleges and also goes to each defendant's guilt of the offences with which they have been charged.*" (emphasis added)

50 The jury were directed that it was the prosecution case that Nerbas' internet searches were carried out "to further the alleged common purpose of gaining possession of the drugs". His Honour explained that it was open to infer that Nerbas was a party to a plan which had the common purpose of taking possession of the drugs.

51 The directions which focused on the irrelevant issue of proof of the existence of, and the appellants' participation in, the "group exercise" distracted from the real issues in the trial of each count in the indictment. The appeals should be allowed and the appellants' convictions for each offence quashed. The appellants accepted that the appropriate consequential order is to direct a new trial[52].

Orders

52 The following orders should be made in each appeal:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 23 December 2010 and in lieu thereof order that:

   (a) the appeal to that Court be allowed;

   (b) the appellant's convictions be quashed and sentences set aside; and

   (c) a new trial be had.

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52 Cf *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11.

53 HEYDON J. In these ill-starred proceedings, the first matter to consider relates to the convictions of each appellant on two charges of importing drugs. The Court of Appeal of the Supreme Court of Queensland decided that "the case was advanced and left to the jury in terms alien to the forms of criminal responsibility then recognised by the *Criminal Code* [(Cth) ("the Code")]."[53] By that the Court of Appeal meant that the case on the importation charges had been put by the prosecution without protest from the defence or the trial judge as if the common law doctrine of "joint criminal enterprise" applied. In fact it did not. The Court of Appeal held that in May and September 2006, when the two importations of drugs took place, the only law which could result in the conviction of the appellants was s 11.2 of the Code. That meant that neither appellant could be convicted unless there was proof that he had aided, abetted, counselled or procured the commission by Reed of the offence of importing drugs contrary to s 307.1 of the Code. These reasons proceed on the assumption that the Court of Appeal's holding is correct. The appellant in the first appeal will be called "the first appellant", and the appellant in the second appeal will be called "the second appellant".

Inadmissible evidence?

54 One point must be put aside at the outset. No ground of appeal was advanced to the Court of Appeal or to this Court contending that evidence was admitted against the appellants in defiance of the principles stated in *Ahern v The Queen*[54]. Nor was any objection of that kind taken at trial.

55 Any objection and any ground of that kind would have failed, because the principle on which the acts and declarations of others outside the presence of an accused person may be received extends beyond cases of conspiracy[55]. Thus in *Tripodi v The Queen*, a larceny case not involving any charge of conspiracy, Dixon CJ, Fullagar and Windeyer JJ said[56]:

> "When the case for the prosecution is that in the commission of the crime a number of men acted in preconcert, reasonable evidence of the preconcert must be adduced before evidence of acts or words of one of the parties in furtherance of the common purpose which constitutes or forms an element of the crime becomes admissible against the other or others".

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53 *R v Handlen* (2010) 247 FLR 261 at 282 [72].

54 (1988) 165 CLR 87; [1988] HCA 39.

55 *Ahern v The Queen* (1988) 165 CLR 87 at 99.

56 (1961) 104 CLR 1 at 7; [1961] HCA 22.

This case does not involve a conspiracy, but s 11.2 when applied to the factual allegations in these proceedings does mean that the case for the prosecution in relation to the importation charges was that "a number of men acted in preconcert". That is, if there were aiding, abetting, counselling or procuring, it can only have arisen by reason of preconcert.

56 But even if the last paragraph is incorrect, these appeals can justly turn only on issues to do with misdirection, in view of the failure to object to evidence at trial and the absence of the necessary grounds of appeal.

Jury direction

57 *The terms of s 11.2.* The relevant parts of s 11.2 are as follows:

> "(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
>
> (2) For the person to be guilty:
>
> (a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
>
> (b) the offence must have been committed by the other person.
>
> (3) For the person to be guilty, the person must have intended that:
>
> (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
>
> …"

58 *The issues raised by s 11.2.* The jury had to be satisfied that, and had to be directed in language turning their minds to the question whether, three conditions existed. The first is that provided for in s 11.2(2)(a). The second is that provided for in s 11.2(2)(b). The third is that provided for in s 11.2(3)(a). It was not in issue that the second condition (s 11.2(2)(b)) was satisfied: the appellants did not cross-examine Reed to suggest that his evidence of having committed offences was wrong. Further, the Court of Appeal concluded that the jury findings must have rested on a conclusion that the intention of each appellant answered s 11.2(3)(a), and this is not in issue. So the third condition is not controversial. What is controversial is the first condition – whether the judge's directions made it clear that the jury had to be satisfied beyond reasonable doubt that each appellant had aided, abetted, counselled or procured the commission of Reed's offence – that is, had brought that offence about or made it

more likely. The Court of Appeal described this issue as being whether each appellant "did things to advance the importation of drugs into Australia"[57]. That description, as a description, was not attacked as erroneous.

59 It is noteworthy that the appellants did not submit that, if the jury had been directed in terms of s 11.2, the evidence was insufficient to support the convictions on the importing charges.

60 The submissions advanced on behalf of the appellants tended to obscure the simplicity of the problem by saying that the jury was wrongly directed about every factual ingredient and that "the jury was never asked to determine the facts that would establish [accessorial] liability."

61 Was it correct for the appellants to submit that the jury was never asked to determine the facts described in s 11.2(2)(a)? No.

62 *The case against the second appellant.* The prosecution case against the second appellant was that he packed drugs in Canada by cutting into cathode ray tubes in computer monitors, placing packages of drugs in them, and resealing them; that he had unloaded the monitors in Australia; that he examined them with a view to removing the contents; and that in April and May 2006 he made payments to assist the first appellant and Reed while they were in Australia.

63 *The directions about the second appellant.* The trial judge directed the jury in a manner conforming to that case. The trial judge said that the prosecution case in relation to each importation was that "no one person can do all that is necessary to achieve the importation, [and] there were many tasks that had to be performed and divided between the various participants." Although the judge was not thinking in s 11.2 terms, that remark told the jury that each appellant's conduct had to be examined to see how it advanced the importation – had brought it about or made it more likely – and thus how it aided, abetted, counselled or procured it. Then the trial judge said a question for the jury in relation to the May 2006 importation was:

> "Has the prosecution proved that [the second appellant], with others, imported the drugs that arrived in May because he packed them and transferred moneys to assist with expenses and therefore intended to import the drugs?"

To pack the drugs and to transfer the monies were acts bringing about the commission of Reed's offence or making it more likely – they were acts capable of supporting the conclusion of aiding, abetting, counselling or procuring.

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57 *R v Handlen* (2010) 247 FLR 261 at 284 [82].

64 Similarly, the trial judge said that a question for the jury in relation to the September 2006 importation was:

> "Has the prosecution proved that [the second appellant], with others, imported the drugs that arrived in September because he helped pack them and intended them to be brought into Australia?"

65 In relation to the second appellant, the trial judge also said:

> "Are you satisfied that [the second appellant] packed drugs inside the monitors in Canada? Are you satisfied of that on the basis of Mr Reed's evidence? Are you satisfied that [the second appellant] sent money to Mr Nerbas in April and May 2006?"

66 The trial judge further said:

> "If you are satisfied that there was a transfer of funds because there is evidence from, for example, Mr Reed about those arrangements, and if you are satisfied of the authenticity of [certain] documents, then you can reach a conclusion about the transfer of those funds. If you are satisfied that there was the transfer of funds …, then you still have to consider whether you are satisfied that that transfer was for the purpose of facilitating the importation of drugs by funding Customs clearances or warehouse expenses or other expenses in circumstances in which [the second appellant] knew and intended that drugs be imported.
>
> You have to consider: might that transfer of funds, if you are satisfied it occurred, have occurred for some innocent purpose with [the second appellant] not knowing that the money was to be used to import monitors containing drugs.
>
> So the first issue on the first count against [the second appellant] is whether he, along with others, engaged in conduct which brought the drugs into Australia. The second issue is intent. Did he intend to import the substances that were concealed inside the monitors? In other words, did he mean to import those substances? You also have to be satisfied that he knew the substances were border controlled drugs.
>
> If it was part of a joint enterprise that caused the monitors to be imported in May 2006, and if you are satisfied beyond reasonable doubt that he knew or believed that the monitors contained drugs, then you may infer that he intended to import the substances knowing that they were border controlled drugs."

67 As to the September 2006 importation, the trial judge said:

> "You must be satisfied beyond reasonable doubt that [the second appellant] imported and intended to import the substances that were imported in September 2006 and he knew them to be border controlled drugs. You consider whether he had a role in packing the drugs into the monitors knowing they were to be sent to Australia. If it was part of a joint enterprise that caused the drugs to be imported in September 2006 and if you are satisfied beyond reasonable doubt that he knew or believed that the monitors contained the drugs, and he was part of that joint enterprise, then you can infer that he intended to import them."

68 To some degree these directions are framed in terms of the joint criminal enterprise case. But the direction about the transfer of funds raised for the jury's consideration the issue of whether the transfer was for the purpose of facilitating the importation of drugs; and if the transfer took place it obviously did facilitate the importation. The jury was also asked to consider whether the second appellant "along with others" engaged in conduct which brought the drugs into Australia. To engage in that conduct with others is to bring about or make more likely the importation by Reed, and thus to aid, abet, counsel or procure it.

69 *The case against the first appellant.* The case against the first appellant was that he had discussed with Reed the possibility of sending drugs concealed in computer monitors by shipping container to Australia. He arranged for Reed to prepare a list of costs in relation to freight and warehousing. He gave Reed money to place a deposit on an order for 480 computer monitors. He, Reed and another located a warehouse to use in their activities. He provided money to Reed to pay for the balance owing on the computer monitors. With Reed and another he began packing the computer monitors with drugs, assisted by the second appellant and the second appellant's father-in-law. The first appellant and Reed travelled to Australia in order to rent a warehouse where the consignment of drugs could be received. The first appellant paid for his and Reed's tickets to Australia. He also arranged for the taking of other steps in relation to the importing of drugs. He arranged through a union official to have the relevant container cleared quickly through customs in Brisbane. He, Reed and another used a borrowed forklift to transfer the pallets containing the drugs into a warehouse. He handled some of the drugs and supplied them to particular individuals. His activities in relation to the September 2006 shipment of drugs were similar.

70 *The directions about the first appellant.* The directions in relation to the first appellant were similar to those in relation to the second appellant.

71 Thus the trial judge said in relation to the May 2006 importation:

> "Has the prosecution proven that [the first appellant], with others, imported the drugs that arrived in May and intended to do so?"

He also said:

> "In order to have imported the drugs in May … [the first appellant], along with others, must have brought the drugs into Australia when they came into the port in May 2006 and were cleared through the port.
>
> The question is did he intend to import the substances that were concealed inside the monitors? In other words, did he mean to import those substances? If he did, did he know they were border controlled drugs?
>
> If it was part of the joint exercise that caused the monitors to be imported in May 2006, are you satisfied beyond reasonable doubt that he knew or believed that the monitors contained the drugs? Do you infer that he intended to import the drugs on the basis of the things that were put to you by the [prosecution] or other things that you draw by way of inference from the evidence?"

72 In relation to the September 2006 importation the trial judge said:

> "In order to have imported the drugs in September 2006 [the first appellant], along with others, must have engaged in conduct which brought the drugs into Australia in September 2006. You consider the direct evidence and the circumstantial evidence and decide if you are satisfied beyond reasonable doubt that he imported the drugs and intended to import the drugs that were concealed inside the monitors. In other words, did he mean to import those substances knowing that they were border controlled drugs?"

73 To ask whether the first appellant "brought the drugs into Australia" in May or "engaged in conduct which brought the drugs into Australia" in September is to ask whether the primary factual allegations about the first appellant's conduct in relation to the entry of the drugs into Australia were to be accepted. Those primary factual allegations were that the first appellant brought about the importation or made it more likely. If they were accepted, the first appellant's conduct fell within s 11.2.

74 *Conclusion.* Hence the Court of Appeal was correct to say:

> "The jury was … directed to the question of whether each appellant had performed tasks aimed at achieving the importation and, with others, imported the drugs. The positive finding which the jury must have made would equally have founded a conclusion that each appellant had aided

> others to commit the offence of importing. Although that characterisation of the conduct was not used, the necessary factual finding for it existed."[58]

The appellants did not directly confront and challenge that conclusion. The Court of Appeal was also correct to deny that the "absence of reference to aiding deflected the jury from the true issue between the Crown and the appellants; that is, whether the latter did things to advance the importation of drugs into Australia"[59].

75 A complaint is made that there was no direction that it was essential to the proof of the second appellant's guilt that the jury be satisfied that he helped to pack the drugs imported in September 2006. That complaint is not soundly based. The direction that the prosecution had to prove that the second appellant "helped pack" the drugs, quoted above[60], answers the complaint. Helping to pack the drugs was evidence of aiding, abetting, counselling or procuring their importation – of bringing it about or making it more likely – for if they were not packed in Canada they would never have entered Australia.

76 The directions, then, though framed with an eye to a joint criminal enterprise case, were in their references to the relevant primary facts sufficiently adapted to a s 11.2 case. The appellants were not able to point to any prejudice to their interests flowing from the erroneous references to a joint criminal enterprise case. That is not surprising, for that type of case is likely to be harder to establish than a s 11.2 case.

77 Form is important in criminal law. Sometimes form prevails over substance. Sometimes form can be substance. But the appellants' complaints about the importation directions were entirely form-based and wholly removed from substantive considerations. The jury direction was erroneous. But the error of the trial judge lay in referring to a joint criminal enterprise case. It did not lie in a failure to give directions about the facts underlying a s 11.2 case.

Errors too fundamental to permit application of proviso?

78 The Court of Appeal applied the proviso: it held that the appellants were correct in complaining of a misdirection, but found that the appeals should be dismissed because no substantial miscarriage of justice had actually occurred.

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58 *R v Handlen* (2010) 247 FLR 261 at 284 [79].

59 *R v Handlen* (2010) 247 FLR 261 at 284 [82].

60 At [63]-[67].

79 The appellants submitted that the proviso could not be applied where "there has been a failure to observe the conditions which are essential to a satisfactory trial"[61]. The equivalent submission by the appellants in the Court of Appeal was that the erroneous summing up prevented the proviso from being applied because it was "such a departure from the essential requirements of the law that it [went] to the root of the proceedings"[62] and "such a serious breach of the presuppositions of the trial"[63].

80 The appellants' submission is not without force. It is obviously highly undesirable for juries to be directed in terms of crimes which do not exist or not to be directed with reference to the precise language of the crimes charged. But a failure to give full directions about the elements of an offence does not necessarily amount to a miscarriage of justice[64] and does not necessarily mean that the trial is "fundamentally flawed or '… so far miscarried as hardly to be a trial at all'."[65] Here the misdirection, although not framed in terms of s 11.2, did contain language directing the jury's attention to the factual issues thrown up by s 11.2. The case is not of the kind which prevents the proviso from being applied at all.

Section 80 of the Constitution

81 The appellants argued that the jury had not been directed to return a verdict on the elements listed in s 11.2 of the Code, and hence the proviso could not apply because there had been no trial by jury as required by s 80 of the Constitution. It relevantly provides: "The trial on indictment of any offence against any law of the Commonwealth shall be by jury". The appellants cited numerous Australian, English and American authorities. With respect, they do not support the submission. If the appellants' submission were correct, it would

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61 Quoting *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [6]; 225 ALR 161 at 163; [2006] HCA 9.

62 *Wilde v The Queen* (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ; [1988] HCA 6.

63 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2005] HCA 81.

64 *Holland v The Queen* (1993) 67 ALJR 946 at 951; 117 ALR 193 at 200; [1993] HCA 43.

65 *Krakouer v The Queen* (1998) 194 CLR 202 at 212 [23] per Gaudron, Gummow, Kirby and Hayne JJ; [1998] HCA 43, quoting *Wilde v The Queen* (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ. See also *Darkan v The Queen* (2006) 227 CLR 373 at 402 [96] and 405 [107]; [2006] HCA 34.

mean that any jury misdirection on the elements of an offence would make the trial not one complying with s 80 and would prevent the proviso from applying. That outcome is inconsistent with the cases referred to above in which jury misdirections have not prevented the proviso from being applied[66]. The appellants did not contend that those cases should be overruled.

82 The appellants' submission is not correct. The trial was imperfect, but it was a trial by jury. Section 80 does not require that the actual conduct of jury trials be flawless. Section 80 is directed to structural questions about the rules for selecting the jury and governing its deliberations – at least primarily, and it is difficult to think of instances where s 80 would not be complied with merely because a trial before a jury subject to satisfactory rules of selection and deliberation which had been complied with had miscarried in some other way falling short of the fundamental deficiencies discussed above[67]. The interveners advanced very detailed arguments in refutation of the appellants' submission on s 80. In view of the dissenting nature of this judgment there is no point in dealing with them or with the appellants' submission further.

The counts of possession and attempted possession

83 The first appellant was convicted on one count of possession of drugs. Both appellants were convicted on a count of attempted possession of drugs. In each appellant's written submissions the following paragraph appeared:

> "Here there was no error of law in the way the counts of possession and attempted possession were was put to the jury and the evidence of Reed provided a basis upon which to return verdicts of guilty if the jury accepted Reed's evidence."

The words "possession and" and "were" were crossed out. Both appellants thus submitted that there was no error of law in the way the attempted possession charge was put to the jury. It was also true, as the deleted words said, that there was no error of law in the way the possession charge was put to the jury either.

84 However, despite his admission, the first appellant submitted as follows:

> "The Crown case on the counts of possession and attempted possession of border controlled drugs was intrinsically bound up with the narrative supporting the counts of importing border controlled drugs. The count of possession of border controlled drugs concerned drugs which Reed said

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66 See above at [80].

67 At [78]-[80].

> were actually imported and the importation was the subject of a count on the indictment. The count of attempted possession related to the intercepted drugs which Reed said were being imported.
>
> Reed was, in law, the principal offender on the importation counts. He was also a *very* active party. …
>
> The Crown was faced then with forensic issues. Reed was the Crown's crucial witness. His evidence had to be accepted if convictions were to be achieved. However, not only had Reed actually taken most of the physical steps to effect the importations and made most of the arrangements, but in law, he was the principal offender, with the co-accused as parties to his offending.
>
> This awkward situation was avoided by the Crown by having the importation counts put on an improper basis. The Crown witness Reed was not put as the principal, but was put with the others as several participants in the '*joint criminal enterprise*'. The appellant was therefore badly disadvantaged in his defence of all counts including those of possession and attempted possession of a border controlled drug.
>
> This constituted a miscarriage of justice." (emphasis in original)

And the second appellant, despite his admission, put a similar submission limited to the charge of attempted possession.

85 Although the second appellant played a lesser role than Reed, these submissions exaggerate Reed's role. Reed's role was major, but not greater than the first appellant's role.

86 Another criticism which must be made of the submissions is that they suggest that the prosecution deliberately chose to put a joint criminal enterprise case knowing that it was wrong, instead of putting a s 11.2 case. There is no reason to suppose that the prosecution tactics flowed from anything other than an innocent mistake.

87 Putting those criticisms aside, the difficulty with the submissions is that they do not explain why the "situation" was "awkward"; or, if it was, how the prosecution's mistake in putting its case, not complained of by the defence, removed the awkwardness; or how the appellants were badly disadvantaged in relation to the possession and attempted possession counts. Nor was it explained how the submissions would work if it were held, as stated above, that the directions were appropriate to a s 11.2 case.

88 In oral argument the second appellant submitted that the deliberations of the jury on attempted possession were "necessarily infected" by the presentation of the case as one of joint criminal enterprise. It was submitted that once the jury

concluded that Reed and the appellants were all principals in a joint criminal enterprise it was a short but wrong step to conclude that attempted possession was caught up in the joint criminal enterprise approach. This does not explain why the joint criminal enterprise approach made it likelier that the second appellant would be found guilty of attempted possession than an approach centring on whether he had aided, abetted, counselled or procured Reed's crime. The submission continued:

> "it is not surprising that the jury were not directed to consider the case in respect of the attempted possession in any separate fashion to that involving a joint criminal enterprise. They were not asked to quarantine the evidence of the importation. They were not asked to put that aside and approach the knowledge and intention involved for possession … separately; they would simply say to look at all the surrounding circumstances and those surrounding circumstances necessarily involved, by the way the case was litigated, a joint criminal enterprise both to import and to possess."

89 At the trial the second appellant never asked for these specific directions. Indeed it would probably have been wrong to have given them. Further, counsel for the prosecution responded to the oral submission advanced for the second appellant thus:

> "The attempted possession counts are based on evidence of the appellants literally attempting to get the drugs out of the containers and the monitors, which has absolutely nothing to do whatsoever with any joint enterprise, it has nothing to do with anything being put about aiding or abetting or not being put about aiding or abetting and it is in no way tainted by that. [The second appellant] cannot point to anything that indicates that a finding in relation to the correct elements and verdict in relation to possession, or attempted possession, has in any way been infected by what occurred in the earlier counts. The facts remain the same throughout. The allegations remain the same throughout and that is that they each played certain roles and the like but, at the end of the day, they were, in effect, caught with the goods."

That blunt submission is correct.

Orders

90 The appeals should be dismissed.