HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No S249/2016

MALTIMORE SMITH APPELLANT

AND

THE QUEEN RESPONDENT

Matter No M144/2016

THE QUEEN APPELLANT

AND

STEVEN LAKAMU SIOSIUA AFFORD RESPONDENT

Smith v The Queen
The Queen v Afford
[2017] HCA 19
10 May 2017
S249/2016 & M144/2016

ORDER

Matter No S249/2016

Appeal dismissed.

Matter No M144/2016

1. *Appeal allowed.*

2. *Set aside orders 2 and 3 of the Court of Appeal of the Supreme Court of Victoria made on 4 March 2016 with respect to the appeal against conviction and in their place order that the appeal against conviction be dismissed.*

3. *Set aside order 1 of the Court of Appeal of the Supreme Court of Victoria made on 4 March 2016 with respect to the appeal against sentence.*

4. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria to determine the appeal against sentence.*

Matter No S249/2016: on appeal from the Supreme Court of New South Wales

Matter No M144/2016: on appeal from the Supreme Court of Victoria

Representation

S J Odgers SC with S J Buchen for the appellant in S249/2016 (instructed by Legal Aid NSW)

W J Abraham QC with K M J Breckweg for the respondent in S249/2016 and the appellant in M144/2016 (instructed by Commonwealth Director of Public Prosecutions)

T Kassimatis SC with A I Burchill and C K Wareham for the respondent in M144/2016 (instructed by James Dowsley & Associates)

CATCHWORDS

Smith v The Queen
The Queen v Afford

Criminal law – Fault element – Intent – Inferential reasoning – Importation of commercial quantity of border controlled drug – Where accused persons brought substance into Australia – Where substance concealed in items – Where accused persons denied intent to import substance – Where accused persons perceived real or significant chance of presence of substance when entering Australia – Whether permissible to infer intent for purposes of *Criminal Code* (Cth) from awareness of real or significant chance of presence of substance – Whether process of inferential reasoning identified in *Bahri Kural v The Queen* (1987) 162 CLR 502; [1987] HCA 16 applicable – Whether jury directions conflated intent with recklessness.

Words and phrases – "inferential reasoning", "intent to import", "intention", "jury directions", "real or significant chance", "reckless", "unsafe verdict".

Criminal Code (Cth), ss 5.2, 5.4, 5.6, 307.1.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. These two appeals were heard together. Each involves a question of whether the process of inferential reasoning posited in *Bahri Kural v The Queen*[1] is applicable to proof of an intention to import a commercial quantity of a border controlled drug contrary to s 307.1 of the *Criminal Code* (Cth) ("the Code"). The appeal in *Afford* also involves a question of whether the verdict in that case was unsafe. For the reasons which follow, it should be held, in respect of both appeals, that the process of reasoning posited in *Kural* is applicable to proof of an intention to import a commercial quantity of a border controlled drug under the Code. In relation to the appeal in *Afford* it should be held that the verdict was not unsafe.

Relevant statutory provisions

2 At the time *Kural* was decided, s 233B(1)(b) of the *Customs Act* 1901 (Cth), which was the predecessor to s 307.1 of the Code, made it an offence to import any "prohibited imports" to which the section applied. "Prohibited imports" included narcotic substances[2].

3 Section 307.1 of the Code, enacted in 2005[3], provides that:

> "(1) A person commits an offence if:
>
> (a) the person imports or exports a substance; and
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> (b) the substance is a border controlled drug or border controlled plant; and
>
> (c) the quantity imported or exported is a commercial quantity.
>
> Penalty: Imprisonment for life or 7,500 penalty units, or both.
>
> (2) The fault element for paragraph (1)(b) is recklessness.

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1 (1987) 162 CLR 502; [1987] HCA 16.

2 *Customs Act*, ss 4(1) definition of "narcotic goods", 233B(2).

3 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth), Sched 1, Item 1.

(3) Absolute liability applies to paragraph (1)(c)."

4 A "border controlled drug" is defined in s 301.4 of the Code to mean:

"a substance, other than a growing plant, that is:

(a) listed by a regulation as a border controlled drug; or

(b) a drug analogue of a listed border controlled drug; or

(c) determined by the Minister as a border controlled drug under section 301.13 (which deals with emergency determinations of serious drugs)."

5 So far as is relevant, Div 5 of Ch 2 of the Code provides:

"**5.1 Fault elements**

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

...

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness."

6 By operation of s 5.6(1), the fault element applicable to s 307.1(1)(a) is intention, as defined in s 5.2(1), and, as such, a person cannot be convicted of importing a border controlled drug unless he or she meant to import the substance.

The reasoning in *Kural*

7 In *Kural*, this Court held[4] that it was open to infer intent to import a narcotic drug contrary to s 233B(1)(b) of the *Customs Act* where it was established that the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance, that what was being imported was a narcotic drug. As the majority stated[5]:

> "The problem then is one of proof. How does one prove the existence of the requisite intention? Sometimes there is direct evidence in the form of an admission by the accused that he intended his conduct to involve the forbidden act. More often, the existence of the requisite intention is a matter of inference from what the accused has actually done. The intention may be inferred from the doing of the proscribed act and the circumstances in which it was done.
>
> Where, as here, it is necessary to show an intention on the part of the accused to import a narcotic drug, that intent is established if the accused knew or was aware that an article which he intentionally brought into Australia comprised or contained narcotic drugs. But that is not to say that actual knowledge or awareness is an essential element in the guilty mind required for the commission of the offence. It is only to say that knowledge or awareness is relevant to the existence of the necessary intent. Belief, falling short of actual knowledge, that the article comprised or contained narcotic drugs would obviously sustain an inference of intention. So also would proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved that act and nevertheless persisted in that conduct. As a practical matter, the inference of mens rea or a

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4 (1987) 162 CLR 502 at 505 per Mason CJ, Deane and Dawson JJ. See also at 512 per Toohey and Gaudron JJ.

5 (1987) 162 CLR 502 at 504-505 per Mason CJ, Deane and Dawson JJ.

> guilty mind will ordinarily be irresistible in cases involving the importation of narcotic drugs if it is proved beyond reasonable doubt that the accused actually imported the drugs and that he was aware, at the time of the alleged commission of the offence, of the likelihood of the existence of the substance in question in what he was importing and of the likelihood that it was a narcotic drug. What we have said is designed to emphasize that the existence of the requisite intention is a question of fact and that in most cases the outcome will depend on an inference to be drawn from primary facts found by the tribunal of fact. In this, as in other areas of the law, it is important not to succumb to the temptation of transforming matters of fact into propositions of law. In that regard, we would emphasize that the foregoing comments are not designed as a direction or instruction to be read by trial judges to juries. They are intended to give guidance to trial judges in order to enable them to formulate such directions as may be appropriate to the facts and circumstances of particular cases."

Subsequent developments

8 The reasoning in *Kural* was later affirmed by this Court in *Saad v The Queen*[6] and *Pereira v Director of Public Prosecutions*[7]. On each occasion, the Court emphasised that the existence of intent is a question of fact and that, although the process of reasoning posited in *Kural* may provide guidance, it is not intended to be a formula applicable to all circumstances.

9 Subsequently, with effect from 15 December 2001[8], Ch 2 of the Code was made to apply to offences under s 233B(1)(b) of the *Customs Act*[9]. As was earlier noted, Ch 2 of the Code provides, *inter alia*, the "fault elements" for Commonwealth criminal offences. Relevantly, s 5.2(1) of the Code provides that

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6 (1987) 61 ALJR 243 at 244 per Mason CJ, Deane and Dawson JJ; 70 ALR 667 at 668-669; [1987] HCA 14.

7 (1988) 63 ALJR 1 at 3; 82 ALR 217 at 219-220; [1988] HCA 57.

8 *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth), s 2(3); *Criminal Code* (Cth), s 2.2(2).

9 *Law and Justice Legislation Amendment (Application of Criminal Code) Act*, Sched 21, Item 3.

"[a] person has intention with respect to conduct if he or she means to engage in that conduct". The effect of the application of Ch 2 of the Code to offences under s 233B(1)(b) of the *Customs Act* was thus to substitute the definition of intent in s 5.2 of the Code for the common law notion of intent.

10 In *R v Saengsai-Or*, the Court of Criminal Appeal of New South Wales held[10] that, notwithstanding the application of Ch 2 of the Code, the process of inferential reasoning identified in *Kural* continued to apply to proof of offences under s 233B(1)(b) of the *Customs Act*. Bell J, with whom Wood CJ at CL and Simpson J agreed, said[11]:

> "It is appropriate for a judge in directing a jury on proof of intention under the *Criminal Code* (Cth) to provide assistance as to how (in the absence of an admission) the Crown may establish intention by inferential reasoning in the same way as intention may be proved at common law. Intention to import narcotic goods into Australia may be the inference to be drawn from circumstances that include the person's awareness of the likelihood that the thing imported contained narcotic goods."

11 Bell J also rejected an argument that directions of the kind suggested in *Kural* were prone to confuse intent with the concept of recklessness under the Code[12]:

> "The distinction between proof that an accused person intended to import narcotic goods and proof that he or she was reckless as to the circumstance that the thing imported contained narcotic goods is to my mind a real one. The joint judgment in *Kural* contains discussion of how the Crown might prove the existence of the intention to import the prohibited imports by a process of inferential reasoning. The inquiry remains one of proof of intention. Their Honours emphasised that their comments were not designed as a direction to be given to juries but rather as guidance for trial judges in formulating directions appropriate to a given case to assist the jury in determining this factual question."

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10 (2004) 61 NSWLR 135 at 148 [74] per Bell J (Wood CJ at CL and Simpson J agreeing at 136 [1], [2]).

11 *Saengsai-Or* (2004) 61 NSWLR 135 at 148 [74].

12 *Saengsai-Or* (2004) 61 NSWLR 135 at 147 [69].

12 In *R v Cao*[13], the New South Wales Court of Criminal Appeal affirmed the reasoning in *Saengsai-Or*. Howie J, with whom Spigelman CJ and Barr J agreed, said[14]:

> "In my opinion, the decisions of the High Court to which I have referred [*Kural*, *Saad* and *Pereira*] are still applicable, notwithstanding that this was a prosecution to which the Code applied. They simply set out a process of reasoning that the jury might follow in order to find the mental, or fault, element of the offence proved. That process of reasoning seems to me to be as applicable to proof of intention under the Code as to proof of intention under the Common Law. I have already pointed out that this Court in *R v Saengsai-Or* accepted that this line of authority was applicable to an offence of importation to which the Code applied. There is no reason in logic or law, that I can see, why it should not also apply to a case of possession or attempted possession of imported goods.
>
> The fact that the Code defines recklessness in terms of a circumstance as 'an awareness of a substantial risk that the circumstance will exist' is not to the point. As was acknowledged in *R v Saengsai-Or*, proof of intention is more difficult for the prosecution than proof of recklessness. In a case where there is some other inference open from a finding of a belief in the likelihood of drugs being present other than that the accused intended to possess the drugs, the Crown will have to negative that inference beyond reasonable doubt before the jury can convict the accused. The fact that in the usual case there will be no other inference available, does not mean that the process of reasoning should not apply under the Code simply because it may have some superficial similarity to how the Code defines recklessness."

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13 (2006) 65 NSWLR 552.

14 *Cao* (2006) 65 NSWLR 552 at 569 [53]-[54] (Spigelman CJ and Barr J agreeing at 553 [1], [2]).

13 Similar reasoning to that in *Saengsai-Or* and *Cao* was later adopted by the Court of Appeal of the Supreme Court of Victoria in *Luong v Director of Public Prosecutions (Cth)*[15] and *Weng v The Queen*[16].

The *Afford* appeal

(i) The facts

14 On 14 March 2014, the respondent, Steven Afford ("Afford"), arrived at Tullamarine Airport in Melbourne on a flight from Manila with two suitcases, a laptop bag and a computer bag. He declared on his incoming passenger card that he was not bringing into Australia "[g]oods that may be prohibited or subject to restrictions", such as illicit drugs, and, on arrival, he informed Customs officers that all the bags in his possession were his own; that he had packed them himself; that he was fully aware of their contents; and that he was not carrying any items for anyone else except for an item of jewellery for his wife. When queried by Customs officers about the details of his travel, he said that he had been to Manila on his business partner's recommendation for a "business trip" to see "hotel infrastructure" and "to experience the customer service" because he and his business partner were planning to build a five-star hotel in Perth. He stated that his business partner was located in the "UAE" and had paid for the trip because he was an investor in the hotel's construction, which was a $150 million contract. Afford produced a document headed "Memorandum of Understanding (MOU), Partnership Agreement Deed" and a business card.

15 When Customs officers searched Afford's luggage, they found a total of 2,415.4 grams of pure heroin contained in packages stitched inside the lining of one of the suitcases and inside the lining of the laptop bag that was within that suitcase. They also found four printed emails from a sender, "H E Dr Anwar Mohammed Qargash" ("Anwar").

16 Subsequent examination of Afford's computer revealed that the four emails were part of a series of emails between Anwar and Afford that had commenced in late 2013. As appeared from the emails, Anwar claimed to be the

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15 (2013) 46 VR 780 at 795 [74] per Coghlan JA (Redlich JA and Williams AJA agreeing at 781 [1], 802 [110]).

16 (2013) 236 A Crim R 299 at 315-316 [63]-[64] per Osborn JA (Buchanan JA and Neave JA agreeing at 301 [1], [2]).

"Minister of State for Foreign Affairs, UAE" and to be seeking to engage Afford in a building project for a hotel that would be worth many millions of dollars. One email recorded Anwar introducing Afford, via email, to a man called Hamza Badijo ("Hamza"), who was represented to be Anwar's lawyer in the United Kingdom. In a later email, dated 15 January 2014, Hamza proposed that Afford should undertake a trip to India. Hamza reiterated that proposal in an email, dated 30 January 2014, thus:

> "Further to my email dated 14th January, 2014, I have been able to discussed with our clientele also, have duly being permitted to grant you the access to the funds deposited in Australia on behalf of our clientele Mr Anwar Mohammed Qargash.
>
> These funds is in the total sum of USD205Million also, is right and solidly kept by a security firm in Australia. Secondly, these funds were defaced before taken it to Australia due to security checks at the airport therefore, will require a thorough cleaning with a separation oil which will be provided to you through their agent in India.
>
> Be informed that you will be duly sponsored to go to India to collect this separation oil both your air ticket, Hotel lodge and BTA of USD1,000 will be provided to you by my chambers as soon as you send to us your traveling passport which will enable the flight ticket to you."

17 Afford replied the same day, with evident scepticism as to the legitimacy of the trip:

> "Thank you for your ph call and e mail, how ever after viewing an earlier e mail with the same content, we have found it very suspicious indeed.
>
> We have never heard of such matter, for once currency are defaced it cannot be repaired for reason of tempering with currency which is against International Law.
>
> Further more which city of India am I to visit to pick up this magic oil?"

On 31 January 2014, Hamza assured Afford via email that, although the proposal might seem suspicious, the currency was not defaced or damaged but required the application of "separation oil"; "only the currency experts [know] how it works".

18 A further series of emails followed, concluding with one from Afford in which he stated that he was still not convinced but that he agreed to travel to India to collect the oil. Then, on 4 March 2014, the travel destination was changed from India to Manila. Afford remained sceptical about the legitimacy of the trip. He was still expressing his scepticism in emails as late as two days before his departure for Manila.

19 After Customs officers detected the border controlled drugs in his suitcase and laptop bag, Afford was interviewed by police. During the interview, he stated that he had made the trip to Manila "with a high expectation of half a billion dollar building contract" for a five-star hotel for a client and investor who had approached him online and who had paid for the trip. He said that the plan was that he would build the hotel and in return receive 20 per cent of the profits. Referring to the separation oil, Afford said he told the client "I hope those are not friggin' drugs", to which the client replied they were not. He admitted that he had initially thought the proposal was a scam and he said that it had taken him five months of negotiations with the client to make sure it was legitimate. He stated, however, that he had accepted the legitimacy of the proposal when "they" paid for his travel to Manila. He claimed that the purpose of the trip "was to pick up couple bottles of oil, removable oil or something to that nature".

20 Afford stated that, when he arrived in Manila, he met a person called "Jenna" who gave him a suitcase containing what he believed to be the bottles of oil for him to take to Adelaide and give to the investor's contact. He claimed that he did not know the identity of the investor's contact in Adelaide. He said that Jenna told him that the suitcase contained the bottles of oil and presents for Afford's wife. At one point in the interview, he also claimed that he thought he saw two bottles of water in the suitcase that could be "presented as evidence, that's what I went there for to get". At another point, however, he said that he had never handled the bottles and that he had not opened the suitcase. Afford told police that he was hoping that there was nothing illegal in what he was given, and that the only thing he was thinking about was the half billion dollar contract to build the five-star hotel. But he admitted that he still had concerns as to whether there was "anything illegal" in what he was asked to carry; and so, when stopped by Customs officers at Tullamarine Airport, he "thought of the bottles and said, 'Damn, those bottles'".

21 Seemingly, Afford had been obsessed with the idea of becoming wealthy. There were almost daily entries in his diary in which he had written asking God to grant him his wish of becoming a billionaire and to bless him with wealth and riches. When searched, he was also found to have a cheque in his wallet which

he had drawn in his own name in the amount of $1 million, as he told police, so that he could visualise his wealth. There were, too, photographs that Afford had taken in Manila of Filipino pesos and US dollars protruding from his wallet and spread out across his hotel bed.

(ii) The trial

22 Afford was tried in the County Court of Victoria at Melbourne on one charge of importing a commercial quantity of a border controlled drug, namely heroin, contrary to s 307.1(1) of the Code. The Crown called only two witnesses to give evidence as to the nature and amount of the drugs found in Afford's possession and to verify what Afford had said to Customs officers and police. The trial proceeded substantially on the basis of agreed facts and exhibits. The agreed facts included that Afford was a self-employed builder who operated a business called "Afford Property". He was asked to travel to Manila by a person calling himself Hamza, and Hamza had made the arrangements and paid for the travel. Afford flew to Manila, arriving there on 9 March 2014, and left on 13 March 2014 on a return flight to Australia. He arrived in Melbourne on 14 March 2014 en route to Adelaide and Perth. In effect, the only issue at trial was whether the Crown had established beyond reasonable doubt that Afford intended to import the substance that was concealed in the lining of the suitcase and laptop bag and, if so, whether he knew or believed or was reckless as to whether the substance was a border controlled drug.

23 The Crown presented a circumstantial case that Afford's intent to import the substance was to be inferred from all the facts and circumstances of the matter, including the fact that Afford brought the substance into Australia in a suitcase; the email exchanges in which he had expressed grave scepticism about what he was being asked to do; the inherent implausibility of his story that the purpose of his trip to Manila was to collect two bottles of "separation oil" for cleaning defaced currency and then to return to Australia to deliver the bottles to an unidentified person in Adelaide; and the inconsistencies between the answers he gave to Customs officers and the answers he later gave to police. The Crown prosecutor emphasised that the inherent implausibility of Afford's story was apparent from the fact that Afford knew that notes, once defaced, ceased to be legal tender and the assurance he received to the contrary was plainly unconvincing; that it was self-evident that the "separation oil" was not connected with the supposed hotel construction project; that there was no written contract for what was claimed to be a multimillion dollar building project; that, at the time of the trip, no building site had been selected; that the diary found in Afford's possession on his arrival in Melbourne showed that he had only ever been

involved in modest construction jobs and was realistically not in a position to undertake a project of the kind alleged; and that Afford had admitted to police that his concerns about the legality of the contents of the suitcase were not allayed. It was submitted that Afford was obsessed with what appeared to him to be the prospect of untold riches and he had persisted with the trip to Manila, despite having active suspicions about the legality of what he was doing, because he wanted the money which he believed he would derive from doing so. He considered it was possible that he had been enlisted to import drugs and he was worried about that possibility, but he believed that the task of collecting the separation oil in Manila and transporting it to Adelaide was a precondition to his being granted the building contract. So, despite his concerns about the legitimacy of the transaction, he was prepared to complete it to ensure that the contract went ahead.

24 Afford did not give evidence. The defence case was that the Crown had not established beyond reasonable doubt that Afford intended to import the substance found in the concealed packages. Defence counsel contended that the fact that Afford intended to import two bottles of "separation oil" said nothing as to whether Afford intended to import the substance in the packages in the lining of the suitcase and laptop bag. It followed, defence counsel argued, that, even if the jury considered that Afford had been suspicious that there might be drugs in the suitcase, it was not established beyond reasonable doubt that Afford intended to import the substance in the concealed packages for the purposes of s 307.1(1)(a). For the same reason, it was said, the jury could not be satisfied beyond reasonable doubt that Afford knew, believed or was reckless as to whether the substance in the concealed packages was a border controlled drug for the purposes of s 307.1(1)(b).

(iii) Jury directions

25 The trial judge began the substance of his Honour's directions to the jury by emphasising that the central issue in the case was Afford's state of mind and that, because there was no direct evidence of Afford's state of mind other than his statements to Customs officers and police, his intention could only be determined by drawing inferences from the facts established by the direct evidence. His Honour then proceeded to a comprehensive exposition of the process of drawing inferences from circumstantial evidence, emphasising, among other things, that before the jury could draw any inference as to Afford's state of mind, the jury had to be satisfied beyond reasonable doubt of the facts from which they drew the inference and satisfied that the inference drawn was the only inference reasonably open to be drawn from those facts.

26 The trial judge thereafter identified the elements of the offence charged as being: (1) importation of the substance; (2) intent to import the substance; (3) the substance being a border controlled drug; and (4) recklessness as to whether the substance was a border controlled drug. His Honour explained that the first and third elements were not disputed but that the second and fourth were in issue. As to the second element, his Honour stated that, in order to find that Afford intended to import the substance, the jury had to be satisfied beyond reasonable doubt that he knew or believed that the substance was in the suitcase, although it was not incumbent upon the Crown to establish that he knew or believed how or in what way the substance had been concealed in the suitcase:

> "The second element is much more important. The second element the prosecution must prove is that the accused intended to import the substance. This means that the accused meant to import the substance. For this element you are not required to consider if the accused knew the nature of the substance - that is considered later on. Now intention is a state of mind and to determine the accused's state of mind, the prosecution invites you to draw an inference as to his state of mind from certain facts and you will remember what I have told you just a moment earlier about drawing of inferences.
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> ... you must find intention - that the accused meant to import the substance, that is either he knew, that is he had knowledge or he was aware or he believed that his conduct involved the importation of the substance or believed in the likelihood of importation of the substance and by likelihood I mean a real or significant chance.
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> ... If you are satisfied beyond reasonable doubt that the accused believed that the suitcase [contained] the substance that would sustain an inference, that would sustain an inference as to intention. So also if you were satisfied beyond reasonable doubt that he was aware of a real and significant chance that his conduct involved the importation of the substance and he nevertheless persisted with that conduct. That would suffice to infer an intention to import.
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> A suspicion, members of the jury, on the part of the accused, a mere suspicion falling short of the required belief or awareness necessary to establish his guilt is not sufficient to prove guilt. A suspicion is not sufficient. Nothing less than the requisite knowledge, belief or awareness on his part must be proved beyond reasonable doubt by the prosecution."

27 His Honour later said in a re-direction:

> "Mr Afford does not need to know how the substance was concealed or what it looked like, but he needs to have a knowledge, awareness or belief of the substance in the package. It is not an intent therefore merely to import the bottles of oil. He has to have a knowledge, awareness or belief as to the substance in the packages, even though he does not know how they are concealed in the suitcase or what their appearance might be like."

28 Finally, the trial judge explained to the jury that the fourth element looked to what Afford knew or believed about the substance he was alleged to have imported and that it could only be proved by proof of knowledge, belief or recklessness as to the nature of the substance:

> "The prosecution will prove this element if you are satisfied that Mr Afford knew or believed that the substance imported was a border control[led] drug such as heroin.
>
> This element will also be established, members of the jury if the prosecution has proven that Mr Afford was aware of a substantial risk that the substance imported was a border control[led] drug such as heroin. And apart from being aware of the substantial risk, in the circumstances as he knew them to be, it was unjustifiable to risk importing the substance."

29 Afford was convicted and sentenced to three years and two months' imprisonment with a non-parole period of two years.

(iv) The proceedings in the Court of Appeal

30 Afford appealed against conviction to the Court of Appeal of the Supreme Court of Victoria[17] on two grounds: (1) that the verdict was unreasonable in that it was not open on the whole of the evidence for the jury to be satisfied of guilt beyond reasonable doubt; and (2) that a substantial miscarriage of justice occurred by reason of the trial judge directing the jury on intention in a manner that undermined the requirements of s 5.2(1) of the Code and in effect obscured that the fault element of recklessness in s 5.4 of the Code was more readily

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17 *Afford v The Queen* (2016) 308 FLR 1.

susceptible of proof than the fault element of intention in s 5.2(1). The Crown appealed against what it alleged was the manifest inadequacy of the sentence.

31 The Court of Appeal (Priest and Beach JJA, Maxwell P dissenting) allowed the appeal against conviction on both grounds. It was ordered that the conviction and sentence be set aside and a judgment and verdict of acquittal be entered.

32 Priest and Beach JJA dealt first with the second ground of appeal. After referring to the decision in *Kural* and the way in which it had been applied to the fault element of intent under the Code by the New South Wales Court of Criminal Appeal in *Saengsai-Or* and *Cao*, and in Victoria in *Luong* and *Weng*[18], their Honours stated that, although the reasoning in *Kural* applied to proof of intention to import a narcotic drug under s 233B(1)(b) of the *Customs Act*, it was "not easily translatable" to proof of intention to import a substance under the Code[19]. They declared themselves unable to see how, without more, it could be said that "in all cases" involving any conceivable type of substance a jury could infer to the requisite standard an intention to import the substance from an awareness of the likelihood of the presence of the substance alone. Ultimately, however, their Honours rested their conclusion as to the inapplication of *Kural* on the more limited basis that, in the way in which the trial judge had directed the jury, the jury might have been left with the impression that the establishment of Afford's awareness of a likelihood of the substance being in his suitcase was equivalent to establishing intent, rather than being part of the circumstances from which the jury could, but were not bound to, infer intent[20].

33 Priest and Beach JJA then dealt, but only very briefly, with the first ground of appeal, stating[21], without development, that all of the evidence called at trial ran counter to the Crown's contention that Afford knew that the suitcase and laptop bag contained the substance concealed in the lining and that, since the Crown had not disputed the genuineness of the documents said to illustrate the background to the transaction, there was no basis for finding that Afford intended

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18 *Afford* (2016) 308 FLR 1 at 24-27 [126]-[136].

19 *Afford* (2016) 308 FLR 1 at 28 [141].

20 *Afford* (2016) 308 FLR 1 at 29 [143].

21 *Afford* (2016) 308 FLR 1 at 30 [149].

to import a prohibited substance, much less that he intended to import the substance that was found in the suitcase and laptop bag. Their Honours concluded that the jury should have had a reasonable doubt about Afford's intent to import the substance.

34 Maxwell P reached the opposite conclusion on both grounds. His Honour considered[22] that the issue raised in *Kural* was essentially the same as the issue raised by the second ground of appeal, namely "what state of mind had to be proved, with respect to the existence of the substance (as distinct from its being a drug), in order to infer intent to commit the offence". As his Honour observed[23], the application of *Kural* to Code offences was supported by the decisions in *Saengsai-Or*, *Cao* and *Weng*. Maxwell P also found[24] no error in the trial judge's directions. His Honour considered[25] that the trial judge had made clear to the jury that the case was one about drawing inferences from the direct evidence; that the trial judge had given the jury extensive directions on drawing inferences from all the circumstances of the case; and that the trial judge had explained to the jury, and emphasised in a way which the jury would plainly have understood, that what was required was "an intention to import [a substance] by way of knowledge *or other inferential reasoning*" (emphasis in original).

35 Maxwell P then dealt in detail with the unsound verdict ground of appeal. Based on a comprehensive analysis of the evidence[26], his Honour concluded[27] that it had been open to the jury to be satisfied beyond reasonable doubt that, at the time Afford brought the suitcase into Australia, he was aware that there was a real or significant chance that the substance was in the suitcase, and, therefore, that it had been open to the jury to infer that his intention was to import the substance.

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22 *Afford* (2016) 308 FLR 1 at 5 [20].

23 *Afford* (2016) 308 FLR 1 at 7-8 [28]-[37].

24 *Afford* (2016) 308 FLR 1 at 9 [41].

25 *Afford* (2016) 308 FLR 1 at 9-10 [41]-[43], 11-12 [59].

26 *Afford* (2016) 308 FLR 1 at 12-16 [62]-[76].

27 *Afford* (2016) 308 FLR 1 at 17-18 [81], [86]-[87].

The *Smith* appeal

(i) The facts

36 Maltimore Smith ("Smith") is a citizen of the United States of America who arrived at Sydney International Airport on 29 October 2013 on a Singapore Airlines flight from India. On his arrival, Customs officers examined his luggage and found traces of methamphetamine. On further examination, they discovered 1,945.5 grams of methamphetamine in packages concealed inside items in the luggage. The packages were secreted in two golf sets, a pair of shoes, two containers of vitamins and various cakes of soap.

37 Smith was interviewed by Customs officers and subsequently by police. He said that he had come to Australia from India as the result of an all-expenses-paid trip from the United States. He claimed that the trip had been organised for him by someone named "Reverend James Ukaegbu" ("the Reverend"), whom he had never met but with whom he had had email and telephone contact over the prior two years. He said that he and the Reverend mainly discussed spiritual and religious matters. By contrast, documents found in Smith's briefcase suggested that there was some kind of financial relationship between Smith and the Reverend. For example, at the top of one document was written "From Rev James Ukaegbu" and directly below that were details for a Deutsche Bank account and what appeared to be a mobile phone number. On the second page of the document appeared "Receiver for Rev James Ukaegbu" and what appeared to be the same mobile phone number, and then a reference to Nigeria, an amount of money, some questions and answers and the words "send cash to". There were similar entries on the last page of the document.

38 Smith told police that the Reverend had offered to arrange and pay for the trip because of their friendship. According to Smith, the Reverend had said to him: "I have some friends ... in Delhi, in India and others ... in Australia. You like to go there and meet them and so forth", and Smith had agreed. There were no conditions attached to the trip; the Reverend told Smith just to go and enjoy himself. By contrast, it appeared from documents found in Smith's possession that Smith's original travel itinerary had been for travel from New York to Delhi, where it was planned that he would stay from 23 October to 11 November 2013, and then return directly to New York. The itinerary was not changed to include Australia until 26 October 2013, when Smith was already in Delhi.

39 Smith said that the Reverend told him that, when he arrived in Delhi, he should call the Reverend and that the Reverend's friends would come and see

Smith. Smith claimed that he had no pre-planned arrangements to meet anyone in particular. He stated that when he arrived in Delhi he was visited by a friend named "John", whose surname Smith did not know and whose contact details he did not have, despite asking for them "nine times". By contrast, upon examination of documents in Smith's possession, police found an email from "James Ukaegbu" informing Smith of the hotel reservation in Delhi. There was also a diary in which were written contact details for a person that Smith was to meet at the All is Well Hotel and a document entitled "Memorandum from the desk of Maltimore Smith" containing handwritten entries: "Central Bank of India"; "Name of A/C"; "Mr"; "Vishay Karran"; "Yaday" and "phone", and, beneath that, a telephone number the same as the number listed in the diary as the contact to be met at the All is Well Hotel. Further documents were indicative of financial dealings, listing two names and indicating cash sent to those people via Western Union.

40 Smith told police that, when it was time for him to leave Delhi, John collected him from his hotel and took him to John's home. Smith said that, once there, John told him that he, Smith, needed to deliver some things to John's friend, "Vernon", in Sydney. John then opened Smith's suitcase and put some items in it. Smith said that the suitcase felt very heavy after the items were placed inside and that he had concerns about the contents. He told police:

> "So I said, What are those? He [John] said, Soap ... Said, Okay. I then had sick feeling in my stomach when he said those were soap ... for the reason that, why would he need to send soap to - to Australia? But I didn't voice my thought to him".

41 Later in the interview Smith remarked: "Maybe if I had spoken up then ... I would've avoided [this]". He admitted that: "I said to myself - I rationalise it by saying that if this man [the Reverend] is a Minister, well, he - he wouldn't be recommend me ... to go". Smith continued:

> "When I got on the aircraft I begin to think about the whole matter. Okay. And then was really, really sick feeling came across me because I know people that ... pretend to disguise contrabands in soaps and all kind of stuff. And there were two bags of them which were heavy. ...
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> But the thing that jarred a little bit and I'm being honest here, was in the jar and the soap. ...

> I asked myself, Have I made a gigantic error? That's what I asked myself, you know. Had my hand on my head and I prayed about it, you know. I said, I hope everything is on the up - up - up and up, you know, especially when - when I got there this - yesterday evening and with all those things in my bag."

42 Smith nonetheless claimed that he had "absolutely no intent" and that he would never agree to carry drugs. He said that he was "an ordained Minister ... through the Masonic organisation", and believed in obeying the law, but had "allowed [himself] to be misled by not being probative enough". And in answer to further questions by police, Smith stated that: "You know ... you trust someone. ... You wouldn't think that people would do these things. ... [B]elieving the man [John] was an honest man ... I really believed only to be ... used." Smith emphasised that he did not receive anything for agreeing to carry the "gifts" to give to Vernon and that he "had no intention of breaking the law [and] would not do it".

(ii) The trial

43 Smith was tried in the District Court of New South Wales on one count of importing a commercial quantity of a border controlled drug, namely methamphetamine, contrary to s 307.1(1) of the Code. The only issue at trial was whether Smith intended to import the substance. The Crown case was that Smith knew that there were concealed packages in his luggage and either knew that they contained border controlled drugs or at least was reckless as to whether they contained border controlled drugs. The Crown contended that Smith's intent to import the substance was to be inferred from all the facts and circumstances of the case, including that there was no dispute that Smith brought the substance into Australia in items in his possession; the sheer implausibility of Smith's version of events; the circumstances surrounding his importation of the items; and the incredibility of Smith's denial of wrongdoing, in view of the many inconsistencies in what he told Customs and police.

44 The Crown also adduced evidence that, at the time of the alleged offending, Smith was significantly indebted to the United States Department of Education in an amount of more than US$80,000 and under apparent financial pressure, and submitted that in the circumstances it was implausible that Smith did not expect to be paid for his involvement in bringing the substance into Australia. The Crown further argued that, given that Smith claimed to have tertiary degrees in finance and development, and told police that he worked as a consultant for the finance industry, he was not the sort of person that would have

been easily tricked or duped. Documents found in Smith's possession and tendered at the trial were indicative of his involvement in some form of financial or business dealings. They included a document displaying a letterhead of "Busa Enterprises and Financial Trust Services Inc", which appeared to be Smith's financial services company, in which he described himself as having a PhD, and other documents in which he represented himself as having an MBA and as being the CEO of the company. The Crown also contended that, because the value of the border controlled drugs was over $2 million, it was unlikely that they would have been entrusted to a person who was unaware that they were in his possession.

45 Smith did not give evidence. His defence was based on what he had said to Customs officers and police, and in particular his statements that he had "absolutely no intent" and that he would never agree to carry drugs. Defence counsel argued that there was evidence upon which the jury would reasonably conclude that Smith had been tricked and that he did not know that there were drugs in the items which he brought into Australia to give to Vernon.

(iii) Jury directions

46 The trial judge directed the jury on the critical issue of intention as follows:

> "That takes me back to Question 2 [whether he intended to import the substance]. First of all, 'Are you satisfied beyond reasonable doubt that the accused intended, that is, he meant to import a substance?' This, as you know, is disputed by the accused. This element, this second question, does not require that the Crown prove that the accused knew or was even aware what was in those packages concealed in the various items, the golf sets, the orange containers and the like, but the Crown must prove that he intended to import those packages whatever they contained.
>
> ...
>
> [I]t might be helpful for you to start by looking at what you find the accused knew or believed about the contents of his suitcase and the other items. Has the Crown proved to you that the accused knew or believed that there were those extra packages in the items, the golf sets et cetera, which he admits he imported? If so, you then go on to consider whether the accused intended to import these packages that are the subject of the charge.

When you are looking at the question of what the accused intended and when looking at what he knew or believed about the contents of his luggage the question is what did the accused know, what did the accused believe, what did the accused intend, not what a hypothetical person in his position would have known or intended. In other words, it is the state of mind of the accused, this accused, which is relevant. *When you are considering whether you are satisfied beyond reasonable doubt that the accused intended to import the substance ... you might also consider whether he was aware of the likelihood that those packages were in the items in his suitcase or the briefcase ... in the sense that he recognised there was a significant or real chance that the orange containers, the soaps, the golf sets, contained those extra packages in which the substance was located.*

If you find that he had that state of mind you would go on to consider whether that was sufficient to satisfy you beyond reasonable doubt he intended to import the extra packages which contained the substance in the sense that he meant that those packages would be imported.

...

A person's intention can often be determined from their actions, that is, their conduct and also you are able to draw a conclusion about what a person intended from what he says as well both at the time of the alleged offence and sometimes after the alleged offence.

As I have said, the Crown has to prove beyond reasonable doubt that the accused intended to import the substance. In this case the Crown relies on the accused's actions and also what he said in asking you to conclude that he had the intention to import the substance which was in the extra packages. You can only draw the conclusion the Crown asks you to draw if it is the only reasonable conclusion that you can come to. I repeat, that conclusion cannot be drawn by you unless it is the only reasonable conclusion which you can draw from all the circumstances in the case." (emphasis added)

47 Smith was convicted and sentenced therefor to 10 years' imprisonment with a non-parole period of five years.

(iv) The proceedings in the Court of Criminal Appeal

48 Smith appealed against conviction to the New South Wales Court of Criminal Appeal[28] on the sole ground that the trial judge misdirected the jury with respect to the fault element of intent for the purposes of s 307.1(1)(a) of the Code. He contended that the section of the trial judge's directions which is emphasised above was erroneous in that it wrongly suggested that the *Kural* process of reasoning is applicable to proof of intent to import a substance contrary to the Code[29]. Smith argued by reference to the majority's reasoning in the Victorian Court of Appeal in *Afford* that the introduction of the Code, and the consequent bifurcation of the mental element of the offence of importing a border controlled drug into: (1) intent to import (s 307.1(1)(a)); and (2) recklessness as to whether what was imported was a border controlled drug (s 307.1(1)(b)), rendered the *Kural* process of reasoning inapplicable[30]. It was submitted that the jury should have been directed that, in order for Smith to be found guilty of the offence charged, the Crown had to establish beyond reasonable doubt that Smith knew or believed that the substance was concealed in the items in his luggage[31].

49 The Court of Criminal Appeal (Beazley P, Harrison and R A Hulme JJ) rejected that submission and also the majority's reasoning in *Afford* on which it was based[32]. Their Honours re-affirmed the view taken in *Saengsai-Or* and *Cao* that the *Kural* process of reasoning remains applicable to proof of offences to which Ch 2 of the Code applies. Their Honours observed that[33]:

> "The fact that the elements which were conflated under the *Customs Act* were separated under the Criminal Code did not bring about any change in content of the mental element(s) required to be proved by the Crown. We have earlier ... referred to the Explanatory Memorandum

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28 *Smith v The Queen* (2016) 309 FLR 258.

29 *Smith* (2016) 309 FLR 258 at 263-264 [21]-[22].

30 *Smith* (2016) 309 FLR 258 at 263-264 [21]-[22].

31 *Smith* (2016) 309 FLR 258 at 263 [17].

32 *Smith* (2016) 309 FLR 258 at 274 [69]-[70].

33 *Smith* (2016) 309 FLR 258 at 274 [69].

in which it was indicated that the Code offences were designed to accord as closely as possible with the offences in the *Customs Act* they replaced."

The appeals to this Court

50 By grants of special leave, the Crown appealed to this Court against the decision of the majority of the Victorian Court of Appeal to quash Afford's conviction and Smith appealed against the decision of the New South Wales Court of Criminal Appeal to uphold his conviction. As was earlier observed, the appeals were heard together because each raises the question of the application of the process of inferential reasoning posited in *Kural* to the offence of importing a border controlled drug under the Code.

(i) Kural reasoning – contentions on behalf of Smith and Afford

51 Approaches to the application of *Kural* reasoning to the provisions of the Code differed between counsel for Afford and counsel for Smith, with the latter accepting in this Court that *Kural* reasoning had not been completely ousted by the terms or structure of s 307.1 of the Code.

52 Counsel for Afford argued that, although *Kural* reasoning may have been of assistance in proof of intent at common law, the Code had so changed the meaning of intent that *Kural* ceased to be applicable. In counsel's submission, in order to show that an accused intends to import a substance within the meaning of the Code, it is necessary to show that the accused "means" to import the substance; and, it was said, an accused does not mean to import a substance unless the accused knows, believes or is aware that he or she is importing the substance. Counsel for Afford submitted that, although an accused's knowledge or belief that he or she is importing the substance can sustain an inference that the accused "means" to import the substance, recklessness as to the fact of the substance being imported cannot. So much necessarily followed, it was submitted, from the separation of the elements in s 307.1(1)(a) and (b).

53 As support for his argument, counsel for Afford invoked the *obiter dicta* observations of McLure P in *Karamitsios v The Queen*[34] that it is "open to challenge" the view taken in the Victorian Court of Appeal in *Luong* that the *Kural* process of reasoning for inferring intent is applicable under the Code, and her Honour's conclusion in *Karamitsios* that, on the facts of that case, proof of

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34 [2015] WASCA 214 at [15]-[17].

the accused's intent to possess a marketable quantity of methylamphetamine required proof that the accused knew that the drug was in a backpack of which the accused had obtained possession or control. Her Honour stated that[35]: "an awareness of the likelihood that drugs were in the backpack [was] outside the scope of the definitions of intention and knowledge for the purpose of s 11.1(3) of the Code".

54 Counsel for Smith argued, differently, that the trial judge should have directed the jury that it was not open to find that Smith meant to import the substance, and therefore not open to find that he intended to import the substance, unless the jury were satisfied beyond reasonable doubt that it was Smith's *purpose* or *object* to import the substance. Counsel explained that he based that formulation on the recommendations of what became known as the Model Criminal Code Officers Committee ("the MCCOC"), who drafted what became s 5.2 of the Code. After referring to *Kural*, the MCCOC observed that they had rejected the earlier Gibbs Committee's recommendation that "intention" should be defined to include advertence to probability[36]. The MCCOC stated that their definition of intention in relation to conduct was derived from the Canadian Draft Code[37]. The Law Reform Commission of Canada had stated that they preferred a concept of "purpose" in place of "intent" because of a "blurring in the case-law of the distinction" between the common law concepts of intention and recklessness[38], and had recommended that: "As applied to conduct, that is, the initiating act, the definition of 'purposely' is straightforward: the accused must do the act on purpose, or mean to do it"[39]. Counsel submitted that the Code's

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35 [2015] WASCA 214 at [15].

36 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2 – General Principles of Criminal Responsibility: Report*, (1992) at 21 [203], 25 [203.1].

37 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2 – General Principles of Criminal Responsibility: Report*, (1992) at 25 [203.1].

38 Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31, (1987) at 22.

39 Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31, (1987) at 24.

conception of "means to" should thus be seen as informed by the idea of purpose or object. Counsel added that the Court of Criminal Appeal's reliance[40] on the statement in the Explanatory Memorandum that offences under the Code were not intended to be any more difficult to prove than those under the *Customs Act* was misplaced. The comparison drawn in the Explanatory Memorandum was to offences under the *Customs Act* at the point at which Ch 2 of the Code applied, and not to those offences at the time of *Kural*.

55 Counsel for Smith rightly accepted that there can be occasions where intent to import a substance under the Code may be inferred from an accused's knowledge or belief of a significant chance of the presence of a substance in his or her possession. But, in counsel's submission, that can only ever occur in cases where an accused affirmatively resolves to proceed notwithstanding his or her perception of the existence of that chance. More precisely, as counsel put it, it can only ever be so where an accused proceeds with the state of mind that he or she is aware that there is a real or significant chance of the presence of the substance being in his or her possession, and is prepared to proceed even if the substance is present. In that event, it was said, it might properly be concluded that it is the accused's object or purpose to import the substance and therefore that the accused intends to do so. But, it was contended, it must be otherwise where an accused, having animadverted the existence of a significant chance of the presence of the substance, proceeds with the state of mind that, although he or she is aware that there is a real or significant chance of the presence of the substance, he or she would not be prepared to proceed if he or she knew that the substance were present. For, in the latter event, counsel submitted, the accused's state of mind would be one of no more than recklessness within the meaning of s 5.4 of the Code, and, therefore, less than intent. Accordingly, it was said, it would only ever be appropriate for a jury to be invited to reason from an awareness of a real chance of the presence of the substance to an intention to import the substance in relatively unusual circumstances; and, on the facts of this case, it was dangerous even to suggest that inferential reasoning process. It was tantamount to directing the jury that they could find intent on a basis that might not even amount to recklessness under the Code – since proof of recklessness would require that it be shown that it was unreasonable for the accused to take the risk.

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40 *Smith* (2016) 309 FLR 258 at 264 [25], 274 [69].

56 Lastly, counsel for Smith invoked observations of Lord Steyn, with whom the other members of the House of Lords agreed, in *R v Woollin*[41] that it is seldom beneficial to invite a jury when determining whether an accused intended to commit murder to ask whether the accused appreciated that death or serious injury was likely to result from his conduct, or to direct the jury that if the accused recognised that death or serious harm was virtually certain to result from his voluntary act, the jury may find it easy to infer that the accused intended to inflict death or serious harm. Counsel also invoked the wider proposition advanced by Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen*[42] that to attempt to instruct a jury about how they may reason towards a verdict of guilt may lead to difficulties.

(ii) The application of Kural reasoning to Code offences

57 None of the submissions of counsel for Afford or counsel for Smith can be accepted in the broad terms in which they were stated. Granted, an accused cannot be taken to have intended to import a substance unless the accused meant to import the substance. That is the inevitable consequence of the way in which the Code defines intent in s 5.2(1). In some cases it may also be that a person does not mean to do something unless it is the person's object or purpose to do that thing. But it will not be so in all cases – for the reason that, where a person foresees that the inevitable consequence of what he or she is doing is that it will produce a particular result, the person may sometimes be taken to mean to produce that result[43].

58 It may be accepted that, where a person takes an object into Australia, despite being aware of a real or significant chance that the object has a substance in it, the person cannot be regarded as meaning to take the substance into Australia unless the person's state of mind at the time of taking the object into Australia is that: "even if the substance is in the object, I am prepared to take the object into Australia". By contrast, if at the time of taking the object into Australia, the person's state of mind were: "although there is a real or significant

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41 [1999] 1 AC 82 at 96 (Lord Browne-Wilkinson, Lord Nolan, Lord Hoffmann and Lord Hope of Craighead agreeing at 87, 97).

42 (2000) 199 CLR 620 at 637-638 [43]; [2000] HCA 3.

43 *Peters v The Queen* (1998) 192 CLR 493 at 521-522 [68] per McHugh J (Gummow J agreeing at 533 [93]); [1998] HCA 7.

chance of the presence of the substance in the object, I would not be prepared to take the object into Australia if I knew or believed that the substance is in the object", the person's mental state in terms of the Code would rise no higher than recklessness. But it must be emphasised that, although the latter is a theoretical possibility, in most cases it is most unlikely to occur.

59 Recklessness may be the right conclusion, for example, in the case of an honest tourist who, although being aware of the risk known to us all that strangers may sometimes slip a foreign substance into a tourist's luggage, does not have any particular reason to be concerned about the chance of the presence of a substance in his or her luggage, and, in that state of mind, brings his or her luggage into Australia without declaring any concerns. But, in cases like those the subject of these appeals, a mental state short of intent is highly unlikely because, if someone is aware of a real or significant chance that there is an extraneous substance in his or her luggage, and the person's state of mind is truly that he or she would not be prepared to take the substance into Australia if it were within the luggage, it is to be expected that the person would inspect the luggage to ensure that there is no substance in it, or at the very least declare his or her concerns to Customs upon arrival. Where, therefore, as in these appeals, a person is aware of a real or significant chance of the presence of an extraneous substance in an object which the person brings into Australia, and does nothing by way of inspection or declaration to avoid the risk of its presence, the circumstances of the case strongly suggest that the person's state of mind is, in truth, that he or she is prepared to proceed with bringing the object into Australia even if the substance is in the object; and thus that the person means and intends to import the substance.

60 Consequently, as was determined in *Saengsai-Or* and *Cao*, and accepted in *Luong* and *Weng*, where it is established in cases like this that an accused perceived there to be a real or significant chance of a substance being present in an object which the accused brought into Australia, it is open to infer on the basis of all the facts and circumstances of the case that the accused intended to import the substance.

61 Nor should there be any doubt that it is correct for a trial judge so to direct the jury. Although attempts to direct a jury about how they may reason to guilt are sometimes productive of difficulties, it all depends on the nature of the offence and on the terms of the direction. The directions in *Woollin* were problematic because of what was there perceived to be a vexed question of whether foresight of a virtual certainty, or some high probability, of death is tantamount to an intention to kill. The directions in *RPS* were problematic

because, by introducing the idea of the rule in *Jones v Dunkel*[44], the directions were prone to suggest a reversal of the burden of proof[45]. But such difficulties do not attend directions as to how to infer intent to import a border controlled drug. To the contrary, as was stated by Bell J in *Saengsai-Or*[46], it is likely to be of considerable assistance to the jury for the judge to direct them as to how, in the absence of an admission, the Crown may establish intent by inferential reasoning, and to identify for the jury the evidence on which the Crown relies to establish the inference. Bearing in mind always that it is a question of fact for the jury to decide by a process of inferential reasoning on the basis of all the facts and circumstances of the case, and that the jury must be so directed, it is therefore entirely appropriate in cases like this for a trial judge to tell the jury that, if they consider it to be established beyond reasonable doubt that the accused perceived there to be a real or significant chance of the presence of a substance in an object which the accused brought into Australia, it is open to infer that the accused intended to import the substance.

(iii) The application of Kural reasoning to Afford

62 It follows that Maxwell P's acceptance of the applicability of *Kural* reasoning to the offence charged in *Afford* was correct. Admittedly, as Priest and Beach JJA observed[47], the issue in *Kural* was proof of intent to import a "narcotic drug" – that is, proof of intent to import a substance of a particular identified kind – whereas what is in issue under s 307.1(1)(a) of the Code, and so was in issue in *Afford*, is proof of intent to import a substance simpliciter. Presumably, it is that difference to which Priest and Beach JJA addressed their observation that, although *Kural* reasoning was apt to prove intent to import a narcotic drug, it is "not easily translatable" to proof of intent to import a substance. But, as

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44 (1959) 101 CLR 298 at 308 per Kitto J, 312 per Menzies J, 320-321 per Windeyer J; [1959] HCA 8.

45 (2000) 199 CLR 620 at 633 [28] per Gaudron ACJ, Gummow, Kirby and Hayne JJ. See also *Dyers v The Queen* (2002) 210 CLR 285 at 291-293 [7]-[13] per Gaudron and Hayne JJ, 328 [121] per Callinan J (Kirby J agreeing at 305-306 [52]); [2002] HCA 45.

46 (2004) 61 NSWLR 135 at 148 [74] (Wood CJ at CL and Simpson J agreeing at 136 [1], [2]).

47 *Afford* (2016) 308 FLR 1 at 28 [141].

Maxwell P recognised[48], inferring intent to import a narcotic drug from the fact that an accused was shown to have known or believed there to be a real or significant chance that what he or she was carrying into Australia was or included a narcotic drug necessarily involved a process of inferential reasoning which in essential respects was logically identical to inferring intent to import a substance simpliciter from the fact that an accused is shown to have known or believed there to be a real or significant chance that what he or she was carrying into the country was or included the substance simpliciter.

63 Of course, in order for an accused to have known or believed there to be a real or significant chance that an object which he or she was bringing into Australia was or included a substance, the accused would need to have had some conception of the presence or possible presence of the substance within the object. But, as the trial judge in *Afford* and the trial judge in *Smith* each correctly directed the jury, it does not follow that the accused must be shown to have known or believed what the substance was or what it looked like, or how it was wrapped or otherwise contained, or where it was located or concealed in the suitcase that the accused carried into Australia. It means no more than that, for the purposes of establishing the fault element for s 307.1(1)(a) of intending to import a substance, the accused must be shown to have known or believed there to be a significant chance that there was a substance within an object that the accused was carrying into the country and, knowing or believing that to be so, meant to carry it in.

(iv) The application of Kural reasoning to Smith

64 Likewise, the Court of Criminal Appeal were correct in holding that *Kural* reasoning was capable of application to the offence with which Smith was charged. Their Honours were right to follow *Saengsai-Or* and *Cao*, and *Luong* and *Weng*, and, for the reasons given, were correct to reject the reasoning of the majority in *Afford*.

(v) The trial judge's Kural direction in Afford

65 It should also be observed that, contrary to McLure P's observations in *Karamitsios*[49], the application of *Kural* reasoning to offences of the kind in issue

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48 *Afford* (2016) 308 FLR 1 at 7 [31].

49 [2015] WASCA 214 at [15].

does not mean that juries are to be directed that it is sufficient to find intent that the accused foresaw a real or significant chance that he or she was importing the substance. As was stressed in *Kural*, and has been stressed repeatedly in other cases since[50], directions given in accordance with *Kural* are required to make clear to the jury that the process of reasoning in which they are engaged is one of inferring intent from the facts and circumstances of the case and, consequently, that, before they may convict the accused, the jury must be persuaded by that process of reasoning, beyond reasonable doubt, that the accused meant to import the substance.

66 There is a passage in the trial judge's directions in *Afford* which, if read alone, could be read as conveying that, if the jury were satisfied that Afford believed or was aware of a real and significant chance that his conduct involved the importation of a substance, "[t]hat would suffice to infer an intention to import". Possibly, it was that part of the directions which provoked Priest and Beach JJA's concern that the jury may have thought that an accused's knowledge or belief as to a real or significant chance of something being so is necessarily the same as the accused intending it to be so. But, as can be seen from the whole of the trial judge's directions[51], his Honour had previously explained to the jury that the primary issue in the case was one of inferring Afford's intent from all the facts and circumstances of the case, and had explained to the jury that they had to consider all of the evidence and could only draw an inference if it appeared to them that it was the only inference reasonably open on the facts. As Maxwell P concluded, therefore, taken as a whole the directions were adequate to convey to the jury that the process of inferring intent was one that involved them drawing an inference from all the facts and circumstances of the case and that, if they found that Afford knew or believed there was a significant chance that his luggage contained the substance, it was then for them to decide whether that, in combination with all the other facts and circumstances of the case, persuaded them beyond reasonable doubt that Afford intended to import the substance.

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50 See for example *R v Su* [1997] 1 VR 1 at 27-28; *Saengsai-Or* (2004) 61 NSWLR 135 at 148 [74]-[75] per Bell J (Wood CJ at CL and Simpson J agreeing at 136 [1], [2]); *Director of Public Prosecutions Reference No 1 of 2004; R v Nguyen* (2005) 12 VR 299 at 308-309 [23]; *Cao* (2006) 65 NSWLR 552 at 571 [63], 572 [67] per Howie J (Spigelman CJ and Barr J agreeing at 553 [1], [2]).

51 See [25]-[28] above.

(vi) The trial judge's Kural direction in Smith

67 Although accepting the validity of *Kural* reasoning in principle, counsel for Smith contended that the trial judge's directions occasioned a miscarriage of justice in the circumstances of the case. That submission should be rejected. Once it is accepted that the *Kural* process of reasoning is applicable to the offence charged, and does not have the limited application for which counsel contended, there can be no complaint about the directions as given. As may be seen from so much of the directions as were earlier set out[52], the trial judge in *Smith* made it abundantly clear to the jury that, while it was relevant for them to consider whether Smith knew or believed there to be a real or significant chance that there was a substance in the items which he brought into Australia, they would then need to go on to consider whether that was sufficient to satisfy them beyond reasonable doubt that Smith intended to import the concealed packages which contained the substance, in the sense that he meant that those packages would be imported, and that they could only reach that conclusion having regard to all the evidence if they considered that that inference was the only reasonable conclusion to be drawn from all the circumstances of the case. Contrary to counsel's submission, this was not a case where a direction in terms of the reasoning in *Kural* would have misled the jury to equate recklessness with intent regardless of other evidence.

Directions in future cases

68 Despite the sufficiency of the directions in *Afford* and *Smith*, looking to the future it might be preferable if directions given in cases like these were made to align more closely to the language of the Code, and in particular to the statutory definition of intent in s 5.2, while continuing to stress the importance of keeping consideration of the fault element of intent which applies under the Code to the physical element of the offence (the importation of a substance) separate and distinct from consideration of the fault element of recklessness which applies to the circumstance element of the offence (that the substance is a border controlled drug).

69 It goes without saying that directions must always be tailored to the issues in the case at hand and to the facts and circumstances which are relevant to the determination of the issues. It is not practicable or desirable to suggest anything

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52 See [46] above.

in the nature of a template. In terms of principle, however, in cases like this, where it is not disputed that the accused brought a substance into Australia and not disputed that it was a border controlled drug, in addition to giving the usual ineluctable directions and directions as to drawing inferences from and dealing with circumstantial evidence, it may be advantageous to proceed along the following lines:

(1) The accused is charged with importing a border controlled drug. Importing something into Australia means bringing that thing into Australia.

(2) What is in dispute is whether the accused intended to import the substance and whether he or she knew, or was reckless as to whether, the substance was a border controlled drug.

(3) The accused cannot be convicted of importing a border controlled drug unless it is established beyond reasonable doubt that:

(i) he or she intended to import a substance; and

(ii) he or she knew, or was reckless as to whether, the substance was a border controlled drug.

(4) Each of those mental elements must be considered separately.

(5) The accused cannot be regarded as having intended to do something unless it is established beyond reasonable doubt that he or she meant to do that thing.

(6) To decide whether the accused meant to bring the substance into Australia, it is permissible to draw an inference as to the accused's state of mind at the time of bringing the substance into Australia.

(7) In order to draw an inference of intent, it is necessary to be satisfied beyond reasonable doubt of the facts and circumstances from which the inference of intent is drawn and that the inference of intent is the only reasonable inference open to be drawn from those facts and circumstances.

(8) Where, as here, the accused brought into Australia a case, object or other thing ("the container") which has a substance in it, and it is open to infer that the accused meant to bring the container into Australia, it is open to

infer that the accused meant to bring the substance into Australia if, at the time of bringing the container into Australia:

(i) the accused knew that the substance was in the container; or

(ii) the accused knew or believed there was a real or significant chance that the substance was in the container.

(9) It is not necessary that the accused knew or had a belief as to where, or in what fashion, or in what form, the substance existed or was secreted in the container. It is enough if the accused knew or believed there was a real or significant chance that the substance was somehow, somewhere, in some form within the container.

(10) It must be stressed once again, however, that it is not permissible to draw an inference that the accused meant to bring the substance into Australia unless that is the only inference reasonably open on the established facts and circumstances of the case.

(11) If it is established beyond reasonable doubt that the accused meant to bring the substance into Australia, it will then be necessary to decide whether the accused knew, or was reckless as to whether, the substance was a border controlled drug.

(12) The accused cannot be taken to have been reckless as to whether the substance was a border controlled drug unless it is established beyond reasonable doubt that:

(i) the accused was aware of a substantial risk that the substance was a border controlled drug; and

(ii) having regard to the circumstances which were known to the accused, it was unjustifiable for him or her to take the risk.

The unsafe verdict ground in *Afford*

70 It remains only to deal with the unsafe verdict ground of appeal in *Afford*. It is not possible to discern from Priest and Beach JJA's very brief reasoning on the point why their Honours considered that it was not open to the jury to be satisfied beyond reasonable doubt of Afford's guilt. One may only suppose that what their Honours had in mind was that the jury could not have excluded beyond reasonable doubt the possibility that Afford was telling the truth when he

said that, by the time he came to bring the suitcase into Australia, he did not believe that the suitcase contained any drugs. But, as Maxwell P demonstrated convincingly[53], given the circumstances of the case, there can be no doubt that the jury were entitled to conclude beyond reasonable doubt that that was a lie and thus that Afford did believe that there was a real or significant chance that his conduct involved the importation of a substance, and was prepared to proceed even if the substance were present. Apart from anything else, there was no dispute that Afford went to Manila to collect something to be brought back to Australia. There was no dispute that, having gone to Manila for that purpose, he was given the suitcase and laptop bag by Jenna. There was no dispute that, both before and after that occurred, Afford gave active, repeated consideration to the possibility that what he was collecting in Manila and bringing back to Australia contained prohibited drugs. Despite his protestations to the contrary, his emails with Anwar and Hamza were powerful evidence that ultimately he concluded that there was a significant chance that what he was being asked to import was drugs. The absurdity of the account which he offered police reinforces the probability that he believed there to be a real or significant chance that what he was bringing back to Australia contained prohibited drugs. It is next to impossible to suppose that a rational human being could believe anything else. And, although the test of intent is undoubtedly subjective, an objective assessment of the situation was plainly relevant to the jury's assessment of Afford's subjective state of mind.

71 In the end, the only dispute on the facts was, in effect, as to whether Afford had changed his view about the likelihood that he was carrying drugs before he brought the drugs into Australia. And, as the Crown prosecutor submitted to the jury, there was any amount of evidence from which to infer beyond reasonable doubt that, although Afford may have hoped there were not drugs in the suitcase he was given, he remained throughout of the mindset that there was a real or significant chance that there were. Contrary to Afford's written submissions, it is in no way to the point that the Crown did not contest the genuineness of the email exchange, at least in the sense of not suggesting that the emails were not sent and received as they purported to have been. The Crown's case was always that it was to be inferred that Afford's state of mind was that he considered it was likely that he had been recruited to carry drugs to Australia in the objects given to him by Jenna and, although he was worried

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53 *Afford* (2016) 308 FLR 1 at 16-18 [77]-[87].

about that prospect, he was prepared to carry them in in the hope of profiting from a scheme that would make him rich.

Conclusion and orders

72 In the result:

(a) In *Smith* (Matter No S249/2016), the appeal to this Court should be dismissed.

(b) In *Afford* (Matter No M144/2016), the appeal to this Court should be allowed. Orders 2 and 3 of the Court of Appeal of the Supreme Court of Victoria made on 4 March 2016 with respect to the appeal against conviction should be set aside and Afford's appeal against conviction to that Court dismissed. Order 1 of the Court of Appeal made on 4 March 2016 with respect to the Crown's appeal against sentence should be set aside and the Crown's appeal against sentence remitted to the Court of Appeal for determination.

73 EDELMAN J. The joint judgment comprehensively sets out the relevant provisions of the *Criminal Code* (Cth) ("the Code"), the facts, and the decisions below. The essential issue in these two appeals concerns whether the juries were misdirected in relation to assessing intention for the purposes of the element of the offence in s 307.1(1)(a) of the Code, read with s 5.2.

74 Section 5.2 of the Code defines "intention" in three ways. The relevant definition of intention in this case is in s 5.2(1), in that it is "with respect to conduct". An accused has intention with respect to the conduct of importing a substance if he or she "means to" import the substance. In the absence of an admission by direct evidence from the accused that he or she had the relevant intention, proof of intention will be by inference.

75 These two appeals present the question of whether juries should be directed about how intention can be proved by inference and, if so, whether the trial judge in each case erred in the directions given. In each case, the jury was told to consider whether the accused believed that there was a real or significant chance that the article which the accused knew he was importing contained the substance. In the *Afford* case, the jury was effectively told that a real or significant chance was *sufficient* to infer intention. In the *Smith* case, the trial judge directed the jury that a real or significant chance was a matter that the jury might consider but that they still had to be satisfied that the accused meant to import the substance. As I explain below, the directions in the *Afford* case involved an error. The directions in the *Smith* case did not.

The *Kural* decision

76 In *Bahri Kural v The Queen*[54], this Court considered how intention could be proved in a prosecution for an offence against s 233B(1)(b) of the *Customs Act* 1901 (Cth). The offence of importing a prohibited import in s 233B(1)(b) did not expressly provide for any requirement of knowledge or intention by the person importing the prohibited import. However, a majority of the High Court had previously held in *He Kaw Teh v The Queen*[55] that it was necessary for the prosecution to prove that the accused had acted with mens rea, ie a guilty mind. There were different views among the majority in *He Kaw Teh* about the requirement of mens rea. This was the issue that arose in *Kural*.

77 In a joint judgment in *Kural*, the majority (Mason CJ, Deane and Dawson JJ) explained that, depending upon the nature of a particular offence, the requirement for a guilty mind may involve "intention, foresight, knowledge or

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54 (1987) 162 CLR 502; [1987] HCA 16.

55 (1985) 157 CLR 523; [1985] HCA 43.

awareness with respect to some act, circumstance or consequence"[56]. Their Honours did not mention recklessness, a requirement which does not have any stable usage[57], and which has sometimes been treated as intention by the fiction of "constructive intention"[58]. Their Honours said that the requirement for a guilty mind in s 233B(1)(b) of the *Customs Act* was one of intention. The question was how intention would be inferred. The majority described two ways in which intention might be inferred.

78 The first method of inferring intention to which their Honours referred was that an intention to import a narcotic drug "is established if the accused knew or was aware that an article which he intentionally brought into Australia comprised or contained narcotic drugs"[59]. The inference of intention in these circumstances is made because the accused's knowledge of the presence of the drugs in the container, and the accused's intention to import the container, require the inference that the accused also intended to import the drugs.

79 The second method of inferring intention is more controversial. Their Honours said[60]:

> "Belief, falling short of actual knowledge, that the article comprised or contained narcotic drugs would obviously sustain an inference of intention. So also would proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved that act and nevertheless persisted in that conduct. As a practical matter, the inference of mens rea or a guilty mind will ordinarily be irresistible in cases involving the importation of narcotic drugs if it is proved beyond reasonable doubt that the accused actually imported the drugs and that he was aware, at the time of the alleged commission of the offence, of the likelihood of the existence of the substance in question in what he was importing and of the likelihood that it was a narcotic drug. What we have said is designed to emphasize that the existence of the requisite intention is a question of fact and that in most cases the outcome will depend on an inference to be

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56 *Bahri Kural v The Queen* (1987) 162 CLR 502 at 504.

57 *Banditt v The Queen* (2005) 224 CLR 262 at 265 [1]; [2005] HCA 80.

58 *R v Pembliton* (1874) LR 2 CCR 119 at 123; Kenny, *Outlines of Criminal Law*, (1902) at 136, 164-165.

59 *Bahri Kural v The Queen* (1987) 162 CLR 502 at 504.

60 *Bahri Kural v The Queen* (1987) 162 CLR 502 at 505.

> drawn from primary facts found by the tribunal of fact. In this, as in other areas of the law, it is important not to succumb to the temptation of transforming matters of fact into propositions of law."

80 These remarks have led to some difficulty. They have commonly been understood to suggest that intention to import a narcotic drug will ordinarily be irresistible where, for example, (i) an accused imported a suitcase with a hidden compartment containing a substance, and (ii) at the time of importing the suitcase the accused was aware of a real or significant chance that there was a substance in the suitcase, and of a real or significant chance that it was a narcotic drug.

81 Three points must be made about this passage to emphasise the caution that is needed before applying the reasoning in *Kural* to the process of drawing an inference of intention as defined in s 5.2(1) of the Code. I do not include within these points the submission of Mr Afford that the majority in *Kural* conflated two issues when considering the requirement of a guilty mind: (i) whether the accused intended to import the substance, and (ii) whether the accused intended to import the substance knowing that it was a narcotic drug. These two issues were necessarily conflated because the offence considered in *Kural* involved an intention to import a narcotic drug. In contrast, under the Code the mental element required for proof of whether a substance has been imported (intention) is different from the mental element for proof of whether the substance is a border controlled drug (recklessness). Nevertheless, this point can be put to one side because the process of drawing an inference that an accused intended to import a narcotic drug should not be materially different from the process of drawing an inference that the accused intended to import a substance.

82 First, one reason for caution in applying *Kural* to the Code is that it is unclear whether the majority in *Kural* were using "intention" in a sense which included any of the species of recklessness falling short of genuine subjective intention. In the majority in *He Kaw Teh*[61], Gibbs CJ (with whom Mason J agreed) referred to the classification by Dickson J in the Supreme Court of Canada[62] of three types of offences: (i) offences of mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, (ii) offences where it is a defence for the accused to prove that he or she was not negligent, and (iii) offences of absolute liability. In *He Kaw Teh*, Gibbs CJ also said that the offence would always be committed, and did not suggest any further inference of intention that needed to be drawn, if "the suspicions of an incoming traveller are aroused, and he deliberately refrains from making any inquiries for

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61 (1985) 157 CLR 523 at 533-534.

62 *R v Sault Ste Marie* [1978] 2 SCR 1299 at 1325-1326.

fear that he may learn the truth"[63]. Although the common law has had a difficult history of intermingling the concepts of intention and recklessness, the two are separate fault elements in ss 307.1(1)(a) and 307.1(1)(b) of the Code (by ss 5.2 and 5.4 of the Code).

83 The second reason is that the extrinsic materials in relation to the drafting of the Code's definition of intention suggest that the omission of any reference to awareness of a chance was a conscious decision of the Model Criminal Code Officers Committee, as it became known, which produced the report that recommended the provision that became s 5.2. The Committee noted the decision in *Kural*[64], but gave a number of reasons for declining a suggestion from the Gibbs Committee to include within the definition of intention a reference to "advertence to probability"[65]. One of those reasons was avoiding the confusion of intention and recklessness[66]. There is, of course, a difference between the inclusion of awareness of a chance in the definition of intention, and the role of the same concept in the process of proof of intention. But the rejection of awareness of a chance from the definition emphasises the importance of the point that the process of proof must ultimately be to prove intention, not to prove a real or significant chance.

84 The third, and most fundamental, reason is that the majority in *Kural* emphasised that directions must be tailored to the particular circumstances of the case. In that regard, their remarks about intention were "not designed as a direction or instruction to be read by trial judges to juries"[67]. Instead, their remarks were only intended to give guidance to trial judges in order to enable them to formulate appropriate directions. In that light, the majority in *Kural* were not suggesting that the irresistible inference would always be drawn merely from the conclusions that (i) the accused imported the suitcase, and (ii) the accused was aware of a real or significant chance that the suitcase contained a

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63 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 536.

64 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2 – General Principles of Criminal Responsibility: Report*, (1992) at 21 [203].

65 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2 – General Principles of Criminal Responsibility: Report*, (1992) at 25 [203.1].

66 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapters 1 and 2 – General Principles of Criminal Responsibility: Report*, (1992) at 25 [203.1].

67 *Bahri Kural v The Queen* (1987) 162 CLR 502 at 505.

prohibited import. One example might be an honest tourist travelling alone overseas, in a crowded airport without much security. In that circumstance, it is arguable that awareness of a small but nevertheless real risk that something might have been inserted into the tourist's luggage might not even permit an inference of any species of recklessness, much less an inference of intention. The circumstances which the majority in *Kural* would seem to have had in mind when they spoke of the inference *ordinarily* being irresistible may have been those similar to the case itself, not uncommon in criminal cases, where a stranger asks the accused to bring a container into Australia.

85 For these three reasons, there should be no automatic translation of the reasoning in *Kural* to formulate directions concerning the proof of intention under the Code. Nevertheless, as the joint judgment explains, and as Bell J said in *R v Saengsai-Or*[68], it is appropriate in cases such as this for trial judges to provide a jury with assistance to determine how intention can be proved by inferential reasoning.

Directions concerning inferring intention to import a substance

86 At first blush, it might be thought inconsistent to infer one state of mind (intention) from another, different, state of mind (belief in a real or significant chance). But there would only be an inconsistency if intention required actual knowledge. It does not. The terms of s 5.2(1) of the Code include both an immediate intention and a conditional intention. A conditional intention would arise where the accused intends to import the substance *if* it is present in the container. A belief that there is a real or significant chance that the substance is being imported can be an important step in inferring this conditional intention. Counsel for Mr Smith gave an example which neatly illustrates this point. The example was where three couriers carried containers into Australia and each of them believed that it was certain that one of them was carrying the substance. Each would have intended to import the substance if it was in the container that he or she imported.

87 A belief in a real or significant chance that the substance is being imported can be an important step in inferring conditional intention. But this will not always be the case. Everything will depend on the circumstances, particularly the extent of the chance which is believed to be present. Two extremes can be usefully contrasted. At one extreme, as I have mentioned, a tourist travelling overseas might be aware that there is a chance that a stranger could have hidden a prohibited item in his or her baggage. The chance might be small if the baggage has never been left unattended. But, nevertheless, in the circumstances, it might

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68 (2004) 61 NSWLR 135 at 148 [74] per Bell J, Wood CJ at CL and Simpson J agreeing.

still be a real chance. At the other extreme, a real or significant chance would also include a circumstance of high probability where, for instance, a stranger offers payment in exchange for delivery of a suitcase at the terminus of the tourist's travel. There will be a large range of circumstances, with differing degrees of chance, in between these two extremes.

88 One difficulty with the expression "real or significant chance" is that it is an "imprecise standard"[69] which, in law as in ordinary parlance, encompasses a variety of possible circumstances including remote but real chances. For example, in one context it has been said that a real chance will exist unless the chance is "of no real value at all"[70]. In another, it has been said that the expression "real possibility" includes an event which is "highly improbable"[71]. A change in the facts of *Kural* can further illustrate this point. Suppose that the applicant in *Kural* had been a businessman in the business of importing samovars into Australia, and that the stranger in Turkey had been the applicant's supplier from whom he had imported samovars over the course of many years. In those circumstances, the inference that the applicant intended to import the drugs hidden in the samovar might be more easily "resistible" (to use the language of the majority in that case) even if the applicant were aware of a small risk that drugs might be hidden in the samovar.

89 In summary, the conclusions from the discussion above are twofold. Each conclusion concerns the circumstance where a trial judge chooses to direct a jury about the process of drawing inferences of intention under s 5.2 of the Code.

90 First, it is not an error for the jury to be directed to consider, as one of the circumstances in drawing an inference of intention to import a substance, whether the accused believed that there was a real or significant chance that the substance was in the container.

91 Secondly, if a trial judge directs a jury to consider this in the process of assessing whether to draw the inference of intention to import the substance, then care should be taken to ensure that the jury does not substitute the required

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69 *Eades v Gunestepe* (2012) 61 MVR 328 at 332 [10] per Basten JA; [2012] NSWCA 204.

70 *Coudert Brothers v Normans Bay Ltd* [2004] EWCA Civ 215 at [34] per Waller LJ, Laws and Carnwath LJJ agreeing.

71 *Australian Securities and Investments Commission v Carey (No 6)* (2006) 153 FCR 509 at 520 [35] per French J, quoting *Inland Revenue Commissioners v Trustees of Sir John Aird's Settlement* [1982] 1 WLR 270 at 276-277; [1982] 2 All ER 929 at 940.

finding of intention for a finding of a belief of a real or significant chance. That substitution can be avoided by directions as to both of the following matters:

(1) The jury could be told that it would be open to them to infer that the accused meant to bring the substance into Australia if the accused knew that the substance was in a container that the accused meant to bring into Australia.

(2) The jury could be told that even if the accused did not know that the substance was in the container, it would still be open to them to infer that the accused meant to bring the substance into Australia if he or she meant to bring the substance into Australia *if* it were in the container. In assessing whether the accused meant to bring the substance into Australia if it were in the container, all of the circumstances should be considered including whether the accused believed there was a real or significant chance that the substance was in the container. It might be more difficult to conclude beyond reasonable doubt that the accused meant to import the substance, the presence of which he or she was unaware of, if the accused's belief was that there was only a very small chance that the substance was in the container. In contrast, it might be easier to reach this conclusion if the accused believed that there was a strong chance that the substance was in the container.

The *Afford* appeal

92 The passage in the trial judge's directions in *Afford* upon which counsel for Mr Afford focused was the central direction that the trial judge gave on the issue of intention. In that passage, the trial judge told the jury that they could conclude that Mr Afford intended to import the substance if he was aware of a real or significant chance that his conduct involved the importation of the substance and he nevertheless persisted with that conduct. That was not an isolated direction. It was reinforced by a checklist which the trial judge gave to the jury and it was reiterated later in his directions. The context can be taken in three stages as follows.

93 First, the jury was given a two-page written checklist. The jury was told that the checklist they were given "encompasses what it is, what the task is that you have to perform". In that checklist, the jury was directed as follows in relation to the second element of the charge, namely the intention to import in s 307.1(1)(a) of the Code, read with s 5.2, with the emphasis as contained in the checklist:

"**Intention to import**

2. Has the prosecution proved that the accused intended to import the substance?

Consider: this may be proved by **knowledge** that the suitcase contained the substance or **awareness or belief** that his conduct involved the importation of the substance or the likelihood of the importation of the substance. 'Likelihood' here means a real or significant chance."

94 Secondly, during the trial judge's directions, and after giving the jury the checklist, the trial judge directed the jury in some detail as to each element of the offence. As to the second element, intention to import the substance, the trial judge said this:

"The second element that the prosecution must prove is that the accused - I repeat intended to import the substance. This means that the accused meant to import the substance. This element doesn't look at whether the accused was aware that the substance was a border controlled drug even. All that is required to establish the intention is proof that the accused intended to import the package whatever it contained. To determine the accused's state of mind you will [be] asked to draw [an] inference and you will remember what I told you so the prosecution must prove and this is very important for you to note that at the time of entering - at the time at which the importation crystalises in to [sic] Australia - that is the relevant time at which intention has to be proved. Not at an earlier time or not even at a later time, really. It is at that time that you must find intention - that the accused meant to import the substance, that is either he knew, that is he had knowledge or he was aware *or he believed that his conduct involved the importation of the substance or believed in the likelihood of importation of the substance and by likelihood I mean a real or significant chance.*

So the issue of intention does not only rest on actual knowledge, that is the prosecution does not have to prove the accused actually knew that there was the substance in the suitcase. If you are satisfied beyond reasonable doubt that the accused believed that the suitcase believed [sic] the substance that would sustain an inference, that would sustain an inference as to intention. *So also if you were satisfied beyond reasonable doubt that he was aware of a real and significant chance that his conduct involved the importation of the substance and he nevertheless persisted with that conduct. That would suffice to infer an intention to import*." (emphasis added)

95 The italicised passages are important. They reinforced that which was plain from the checklist: the jury could find that Mr Afford was guilty if they

were satisfied beyond reasonable doubt that he believed there was a real or significant chance that he was importing the substance. The point was reinforced by telling the jury that a finding of a real or significant chance "would suffice" to infer an intention to import. There was no suggestion that an intention to import might not be found in any circumstances involving awareness of a real or significant chance. Rather, the awareness of a real or significant chance was equated as a means of proof with the inevitable inference of intention that would come with the conclusion that Mr Afford knew that the substance was in his luggage.

96 Thirdly, the trial judge returned to this issue again at the conclusion of the directions. In his summary of the second element he said:

> "The second: Has the prosecution proved that the accused intended to import the substance and what you would ask yourself is that this may be proved by knowledge that the suitcase contained the substance or awareness on his part or belief on his part that his conduct involved the importation of a substance *or awareness or belief of the likelihood of the importation of the substance and in this context likelihood here means a real or significant chance. If the answer to that is 'yes', that is he intended then you move on to the next element.* If it is 'no' then you find him not guilty." (emphasis added)

97 The combination of the checklist which the jury took into the jury room, the detailed oral directions by the trial judge on intention, and the summary that the trial judge gave on intention must have left the jury with the impression that it was sufficient to prove an intention to import the substance if the jury concluded that Mr Afford believed that there was a real or significant chance that his conduct involved the importation of the substance. For the reasons I have explained above, this was a significant error causing a miscarriage of justice. The Court of Appeal, by majority, was correct to make Orders 1 and 2, granting leave to appeal, and allowing the appeal against conviction.

98 Although I consider that the majority of the Court of Appeal were correct to allow the appeal against conviction, I agree with the reasons given in the joint judgment in this Court that it was open to the jury to conclude that Mr Afford was guilty of the offence. A retrial should have been ordered rather than entry of a judgment of acquittal. The order that I would have made would have been to allow the appeal on this ground, set aside Order 3 of the orders of the Court of Appeal, and in its place order that the matter be remitted for a retrial according to law.

The *Smith* appeal

99 The directions which the trial judge gave to the jury in *Smith* contrast starkly with those given to the jury in *Afford*. In *Smith*, the trial judge directed

the jury that the question of intention was whether they were satisfied beyond reasonable doubt that Mr Smith "meant to import a substance". The trial judge directed the jury that the Crown "must prove that he intended to import those packages whatever they contained". The jury was not told that it was sufficient for proof of intention to conclude that Mr Smith believed that there was a real or significant chance that the various articles contained the substance.

100 The passage of the trial judge's directions upon which counsel for Mr Smith relied followed the trial judge's reiteration that the question to be answered was the intention of Mr Smith. In that passage the trial judge said:

> "When you are considering whether you are satisfied beyond reasonable doubt that the accused intended to import the substance ... you might also consider whether he was aware of the likelihood that those packages were in the items in his suitcase or the briefcase ... in the sense that he recognised there was a significant or real chance that the orange containers, the soaps, the golf sets, contained those extra packages in which the substance was located.
>
> If you find that he had that state of mind you would go on to consider whether that was sufficient to satisfy you beyond reasonable doubt he intended to import the extra packages which contained the substance in the sense that he meant that those packages would be imported."

101 Later, the trial judge explained, for a third time, that the question was whether Mr Smith intended to import the substance, and the trial judge reiterated that the jury was required to consider all of the circumstances.

102 As discussed above, it might have assisted the jury further if the trial judge had also directed the jury in the terms discussed above and told them to consider the extent or magnitude of the chance as Mr Smith believed it to be. But, in the circumstances of this case, there was no error in the direction given by the trial judge. In the manner in which the reference to "real or significant chance" was made by the trial judge, there was no prospect that the jury could have substituted a finding of intention for a finding, instead, that Mr Smith believed that there was a real or significant chance that the substance was in the containers.

103 The appeal in *Smith* must be dismissed.