HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND GORDON JJ

THE QUEEN APPELLANT

AND

ROMANO FALZON RESPONDENT

The Queen v Falzon
[2018] HCA 29
Date of Order: 19 April 2018
Date of Publication of Reasons: 8 August 2018
M161/2017

ORDER

1. *The appeal be allowed.*

2. *The order of the Court of Appeal made on 5 April 2017 allowing the respondent's appeal to that Court be set aside and in place of that order the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Victoria

Representation

C B Boyce SC with J B B Lewis for the appellant (instructed by Solicitor for Public Prosecutions)

T Kassimatis QC with C T Carr for the respondent (instructed by James Dowsley & Associates)

CATCHWORDS

The Queen v Falzon

Criminal law – Appeal against conviction – Where cannabis and drug paraphernalia found at four properties including respondent's home – Where $120,800 in cash found at respondent's home – Where respondent charged with cultivation and trafficking of cannabis found at three properties not including his home – Where Crown alleged offences of trafficking constituted of possession of cannabis on particular date for purpose of sale – Where evidence of cash led as evidence respondent engaged in business of cultivating cannabis for sale – Whether evidence of cash wrongly admitted at trial.

Words and phrases – "accoutrements of drug trafficking", "business of trafficking", "cash", "drug trafficking", "indicia of trafficking", "intermediate appellate court", "possession", "profit making enterprise", "propensity", "purpose of sale", "tendency".

Drugs, Poisons and Controlled Substances Act 1981 (Vic), ss 4, 5, 70(1), 71AC, 72A.
Evidence Act 2008 (Vic), ss 55, 56, 136, 137.
Jury Directions Act 2015 (Vic), ss 12, 15, 16.

1 KIEFEL CJ, BELL, KEANE, NETTLE AND GORDON JJ. Where an accused is found in possession of a prohibited drug and is charged with its possession with intent to sell, proof that the accused was, at the time of possession, engaged in a business of selling drugs or drug trafficking is evidence logically probative of the fact that the accused's purpose in possessing the drug on that occasion was the purpose of sale. Accordingly, as has been established by a succession of Australian intermediate appellate court decisions[1], evidence that an accused who is found in possession of a prohibited drug is also found in possession of the accoutrements of a drug trafficking business, such as scales, re-sealable plastic bags, firearms, a multiplicity of mobile telephones or significant quantities of cash, is admissible in proof of the charge. As Gleeson CJ explained in *Sultana*[2], it is circumstantial evidence which, in conjunction with the fact of possession and, possibly, other evidence, may found an inference that the accused was engaged in the business of selling drugs. And that is so notwithstanding that such evidence may also be indicative of a tendency towards crime.

2 In this matter, the Crown was granted special leave to appeal from the decision of the Court of Appeal of the Supreme Court of Victoria (Priest and Beach JJA, Whelan JA dissenting)[3] which set aside the respondent's convictions of cultivating a narcotic plant, namely, Cannabis L, in not less than a commercial quantity, and trafficking in a drug of dependence, namely, Cannabis L. In allowing the respondent's appeal against his convictions, Priest and Beach JJA substantially departed from previous authority relevant to the admissibility of evidence of a significant quantity of cash in the respondent's possession.

---

1 See for example *Sultana* (1994) 74 A Crim R 27 at 28-29 per Gleeson CJ (Handley JA agreeing at 32), 36-37 per Sully J; *Blackwell* (1996) 87 A Crim R 289 at 290 per Duggan J (Prior J and Debelle J agreeing at 294); *R v Edwards* [1998] 2 VR 354 at 367-370 per Eames AJA (Hayne JA and Batt JA agreeing at 356); *Evans v The Queen* [1999] WASCA 252 at [31], [38] per Malcolm CJ (White J agreeing at [66]), [65] per Anderson J; *Radi v The Queen* [2010] NSWCCA 265 at [39] per Hoeben J (Simpson J and R A Hulme J agreeing at [1], [58]); *Tasmania v Roland* (2015) 252 A Crim R 399 at 401-402 [4]; cf *Lewis* (1989) 46 A Crim R 365. See also *R v McGhee* (1993) 61 SASR 208 at 210-211; *R v O'Driscoll* (2003) 57 NSWLR 416 at 432 [77] per Spigelman CJ (Carruthers AJ agreeing at 443 [149]).

2 (1994) 74 A Crim R 27 at 28-29.

3 *Falzon v The Queen* [2017] VSCA 74.

3 At the conclusion of oral argument before this Court we announced that the Court was unanimously of the view that, for reasons to be published, the appeal should be allowed and that the order of the Court of Appeal allowing the appeal should be set aside, and, in its place, it be ordered that the respondent's appeal to the Court of Appeal be dismissed. These are our reasons for so ordering.

Relevant statutory provisions

4 Section 72A of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act") provides in substance, and so far as is relevant, that a person who without proper authority cultivates a narcotic plant in a quantity not less than the commercial quantity applicable to that narcotic plant is guilty of an indictable offence punishable by a maximum penalty of 25 years' imprisonment.

5 "Cultivate" is defined in s 70(1) of the Drugs Act as including to plant, grow, tend, nurture or harvest a narcotic plant. "Narcotic plant" is defined to include Cannabis L[4], and a commercial quantity of Cannabis L is 25 kilograms or 100 plants.

6 Section 71AC of the Drugs Act provides[5] in substance, and so far as is relevant, that a person who without proper authority trafficks in a drug of dependence is guilty of an indictable offence punishable by a maximum penalty of 15 years' imprisonment.

7 Section 70(1) of the Drugs Act provides in substance, and so far as is relevant, that "traffick" in relation to a drug of dependence includes have in possession for sale. "Drug of dependence" is defined to include the fresh or dried parts of the Cannabis L plant[6]. Section 5 provides that a substance shall be deemed to be in the possession of a person so long as it is upon any land or premises occupied by him or her or is used, enjoyed or controlled by him or her in any place whatsoever, unless the person satisfies the court to the contrary.

---

4 Section 70(1) together with Col 1 of Pt 2 of Sched 11.

5 While s 71AC has been amended since the events that formed the basis of the respondent's convictions, the substance of s 71AC is preserved in the current s 71AC(1).

6 Section 4(1) together with Col 1 of Pt 2 of Sched 11.

The Crown case at trial

8 On 17 December 2013 police executed search warrants at properties: 10A and 10B Mansfield Avenue, Sunshine North, Victoria; 8 Bryson Court, Sydenham, Victoria; and 5 Kendall Street, Essendon, Victoria.

9 The search of the dwelling at 10A Mansfield Avenue, Sunshine North revealed 37 cannabis plants of varying maturity and size growing in four rooms, weighing a total of approximately 17.72 kilograms; an electricity bypass in the roof space; 15 shrouds, 28 globes, 12 electrical transformers, one carbon filter, three power boards, two shrouds with globes in boxes, six shrouds containing built-in electrical transformers, and one box containing a grow tent; and a wall chart timetable and copies of a feed programme relating to the cultivation of cannabis.

10 The search of the dwelling at 10B Mansfield Avenue, Sunshine North revealed 55 cannabis plants of varying maturity and size, growing in three rooms, with a combined weight of 17.039 kilograms; an electricity bypass in the roof space; a number of shrouds, globes, transformers, electrical timers, a carbon filter and wall charts relating to the growing of cannabis; assorted vacuum-sealed bags, a set of scales and a sealer device; a tray containing dried cannabis weighing 28.5 grams; and a vacuum-sealed bag containing dried cannabis weighing 21.1 grams.

11 In total, 92 cannabis plants were located at the Sunshine North properties with a combined weight of 34.781 kilograms. There was also an additional 49.6 grams of dried cannabis.

12 The two properties at Sunshine North were jointly owned by one of the respondent's associates and the associate's wife. Police surveillance from July 2013 disclosed the respondent's occasional attendance at those properties.

13 The search of the dwelling at Sydenham revealed 10 immature cannabis plants weighing 1.76 kilograms; eight harvested cannabis plant stumps weighing 657.9 grams; an electricity bypass; a number of light shrouds, light globes, electrical transformers, power boards and charcoal filters, together with feed programme charts setting out the timetable for nutrients to be fed to cannabis plants; two plastic bags containing a mixture of dried cannabis and unidentified plant material weighing a total of 4.1 grams; and a zip lock bag containing dried cannabis weighing 3.3 grams.

14 The property at Sydenham had been purchased by the respondent jointly with another person in early 2013 and the respondent admitted that the respondent and the other joint owner cultivated cannabis there.

15 The search of the respondent's home at Essendon revealed, amongst other things, a plastic container of dried cannabis that weighed 220 grams; three snap-lock bags and a sealed bag (either heat-sealed or vacuum-sealed) containing dried cannabis and unidentified plant material, one snap-lock bag weighing 113.8 grams and the other two snap-lock bags with the sealed bag weighing a total of 172.3 grams, located inside a locked cabinet in the garage (the sealed bag containing dried cannabis could be connected to the presence of a sealing machine at 10B Mansfield Avenue, Sunshine North, there being no sealing machine found at either Sydenham or Essendon); a number of sets of keys that were identical to the ones used to open doors of the dwellings at 10A and 10B Mansfield Avenue, Sunshine North; hard copy documents relating to cannabis cultivation the same as hard copy and electronic documentation found at the premises at Sunshine North; two black garbage bags containing black water pipe tubing of the same type as was in use at the properties at Sunshine North; and $120,800 in cash secreted in various locations throughout the house including the storage area under the stairs inside the house (in a black plastic bag), the upstairs en-suite bathroom (in a "shortbread" tin inside a side bottom drawer), and the work bench in the garage (in a top drawer).

16 Evidence as to the value of the cannabis grown at Sydenham was that it was between $16,000 and $32,000 for the cannabis already harvested, and between $20,000 and $40,000 for the growing cannabis plants.

17 Evidence as to the value of the cannabis located and seized at Essendon in the plastic container, the snap-lock bags and the heat-sealed or vacuum-sealed bag was that it was between $4,500 and $8,100, although a much higher value was suggested if the assumption were made that the cannabis was to be sold in "gram quantities".

18 The respondent was arrested on 17 December 2013 and, during the course of interview, made a number of admissions. He said that he smoked cannabis and claimed that the cannabis found at Essendon was his own and was for his personal use. When asked where he had obtained the cannabis, he said that he had grown it. When asked where he had grown the cannabis, he answered: "you know where". He admitted that he was a joint owner of the Sydenham property and had purchased it about a year before, and he said that he had grown 19 cannabis plants there of which nine had been harvested. When asked what his purpose was for the plants found at Sydenham, he answered: "personal use". He

said that there had been a harvest at that property some two weeks before 17 December 2013, and, when asked what had become of that material, he said: "smoke most of it, youse got the rest". He admitted that he visited Sydenham and tended the cannabis plants there, and that he had been cultivating cannabis plants there for about six months. When asked what he did with the cannabis that he did not smoke himself, he said: "give it to me mates and that. Mates come around, with the car club".

The trial judge's ruling regarding the evidence of the cash

19 Prior to the empanelment of the jury, the respondent objected to admission of the evidence of the $120,800 in cash found at Essendon, on the basis that it was irrelevant or alternatively that its prejudicial effect outweighed its probative value. The trial judge ruled that the evidence was admissible "in the same way as the finding of other indicia of trafficking is admissible", as part of the Crown's circumstantial case, and that the probative value of the evidence was not outweighed by its prejudicial effect:

> "Such evidence is capable, in my opinion, of having probative value when looked at alongside other evidence, including that of the organised and systematic cultivation of significant quantities of cannabis and the indicia of trafficking that I have previously referred to. I do not consider that the probative value of such evidence is outweighed by the danger of unfair prejudice to [the respondent]."

The course of the trial

20 The respondent was indicted on four charges: (1) at Sunshine North, trafficking in a drug of dependence, namely, Cannabis L, in a quantity that was not less than the commercial quantity applicable to that drug contrary to s 71AA of the Drugs Act (Charge 1); (2) alternatively to Charge 1, at Sunshine North, cultivating a drug of dependence, namely, Cannabis L, in a quantity not less than the commercial quantity applicable to that narcotic plant contrary to s 72A of the Drugs Act (Charge 2); (3) at Sydenham, trafficking in a drug of dependence, namely, Cannabis L, contrary to s 71AC of the Drugs Act (Charge 3); (4) alternatively to Charge 3, at Sydenham, cultivating a drug of dependence, namely, Cannabis L, contrary to s 72B of the Drugs Act (Charge 4). The respondent pleaded guilty to Charge 4 but not guilty to the other charges.

21 The Crown alleged that the offences of trafficking at each of the properties at Sunshine North (Charge 1) and Sydenham (Charge 3) were constituted of possession of cannabis on 17 December 2013 at each location for the purpose of

sale. In relation to proof of intent in respect of both locations, the Crown relied on the number and quantity of the plants found and their value, as well as the scale and extent of the cultivation operations. Additionally, the Crown emphasised documentation relating to cannabis cultivation and other paraphernalia found at the Sunshine North properties.

22 Evidence of the cannabis and other materials found at Essendon was led in proof of each trafficking charge, as evidence of the "indicia of trafficking" and as showing that the respondent was conducting "a professional enterprise, a business enterprise, a profit making enterprise", or "an ongoing commercial profit making enterprise", "in relation to both the cultivating of cannabis, not for personal use but for the purposes of sale, for making a profit", and that that was indicative of the fact that the respondent's purpose in possessing the cannabis found at the Sunshine North and Sydenham properties was the purpose of sale.

23 The Crown drew attention to the sheer amount of cash found at Essendon and adduced expert evidence that drug transactions are often conducted in cash so that purchasers and sellers do not leave a trail of evidence behind them. The prosecutor also tendered tax records as establishing that the respondent had not declared the cash as assessable income, and that that was because the money represented income from dealing in drugs.

24 The Crown also relied on the quantities of the cannabis found at Essendon and argued that it had been packaged in a fashion that was common for cannabis packaged for sale, and, in addition, drew attention to the plastic snap-lock bags and the heat-sealed or vacuum-sealed bag found at Essendon and the similar bags found at the 10B Mansfield Avenue, Sunshine North and Sydenham properties.

25 The respondent was acquitted of Charge 1 and convicted of Charges 2 and 3 and was sentenced therefor to a total effective sentence of three years and nine months' imprisonment with a non-parole period of two and a half years.

The appeal to the Court of Appeal

26 The respondent appealed against conviction to the Court of Appeal, on two grounds. Relevantly, ground two was as follows:

> "A substantial miscarriage of justice occurred as a result of the learned trial Judge wrongly admitting evidence that $128,000[7] cash was found secreted at the [respondent's] home."

27 The majority, Priest and Beach JJA, allowed the appeal on that ground. Their Honours held that, insofar as the evidence of the possession of the cash was admitted on the basis that it was evidence of past trafficking, it was irrelevant because[8]:

> "the cultivation and trafficking of which the [respondent] was convicted related to Sunshine North and Sydenham respectively on one day. And … with respect to the trafficking, the prosecution eschewed reliance on a *Giretti*[9] charge, or on a case that involved an allegation of an ongoing drug trafficking business. Thus, as a matter of logic, it is impossible to say that the evidence of cash at the [respondent's] home – from which it was not said that he conducted any ongoing illicit business – could have gone in proof of his having possession of cannabis for sale at Sunshine North (charge 1, of which he was acquitted) or Sydenham (charge 3, of which he was convicted) on a single day in December 2013."

The majority also observed that[10]:

> "the prosecutor closed, at length, on the basis that the cash demonstrated that the [respondent] had engaged in extensive past trafficking. We accept the submissions of the [respondent's] counsel that the relevance of that conclusion was either to invite some improper 'rank propensity' reasoning in the manner discussed in *Lewis*[11], or to invite the jury to reason that the [respondent] was more likely to have acted in accordance with the tendency established by that past conduct, and thus that he was more likely to be in possession of the cannabis for the purposes of selling it. Thus, it seems to us that the reasoning relied upon by the prosecution was

---

7 In fact, the amount seized was $120,800.

8 *Falzon* [2017] VSCA 74 at [146].

9 (1986) 24 A Crim R 112.

10 *Falzon* [2017] VSCA 74 at [147].

11 (1989) 46 A Crim R 365.

> either rank propensity reasoning, or tendency reasoning. No matter which, the evidence was inadmissible. Indeed, if the evidence is properly to be characterised as tendency evidence, it was wrongly admitted without any consideration of the relevant statutory criteria."

28 As is apparent from their reasons, their Honours drew support for their conclusion from the decision in *Lewis*[12] and purported to distinguish other cases[13], which decided to the contrary, on the basis that, ordinarily, it is the finding of cash contiguously with other incriminating articles that are themselves the accoutrements of drug trafficking which is relevant to proof of the accused person's participation in such activity, whereas, in this case, the prosecution failed to show a relationship between the sum of cash found at Essendon and the trafficking at the Sunshine North and Sydenham properties[14].

29 Their Honours added that if their conclusion were incorrect, the probative value of the evidence was low and was outweighed by the risk of unfair prejudice to the respondent, such that it should have been excluded pursuant to s 137 of the *Evidence Act* 2008 (Vic)[15].

30 The majority concluded that the admission of the evidence had infected both the conviction of cultivation at the Sunshine North properties and the conviction of trafficking at Sydenham. Accordingly, the convictions on Charges 2 and 3 were set aside[16].

31 Whelan JA, in dissent, reasoned to the contrary[17] that the evidence of the respondent's possession of the cash was evidence of a circumstantial fact properly to be considered by the jury in conjunction with other evidence in determining whether the respondent was, as at 17 December 2013, conducting a

---

12 (1989) 46 A Crim R 365.

13 *McGhee* (1993) 61 SASR 208; *Sultana* (1994) 74 A Crim R 27; *Blackwell* (1996) 87 A Crim R 289; *Edwards* [1998] 2 VR 354; *Evans* [1999] WASCA 252.

14 *Falzon* [2017] VSCA 74 at [145].

15 *Falzon* [2017] VSCA 74 at [148].

16 *Falzon* [2017] VSCA 74 at [149], [152].

17 *Falzon* [2017] VSCA 74 at [66].

drug trafficking business: because, if that were established, it made it the more probable that the respondent's purpose in possessing the cannabis of which he was found in possession was the purpose of sale and not for his own use. His Honour added[18] that the fact that the respondent was charged with possession for the purpose of sale on a particular date rather than with trafficking over a period of time on the so-called *Giretti*[19] basis was immaterial. His Honour observed that the offenders in *R v McGhee*[20], *Sultana*[21], *Blackwell*[22], *R v Edwards*[23] and *Evans v The Queen*[24] were similarly charged with possession for the purpose of sale on a particular date rather than trafficking over a period of time. Equally, in his Honour's view, the relevance of the evidence of possession of the cash was not lessened by the lack of physical proximity or propinquity between the respondent's home at Essendon, where the cash was found, and the properties at Sunshine North and Sydenham, where the cannabis was located: because there was evidence connecting the items found at each location. In addition to the connections already mentioned, Whelan JA noted that, on the respondent's own version of events, the packaged cannabis found at his home at Essendon, where the cash was located, was harvested from the plants which he admitted cultivating at Sydenham[25].

32 Whelan JA was also of opinion that the probative value of the evidence of the cash was such as compared to its prejudicial effect that the trial judge was not in error in refusing to exclude the evidence under s 137 of the *Evidence Act*[26].

---

18 *Falzon* [2017] VSCA 74 at [68].

19 (1986) 24 A Crim R 112.

20 (1993) 61 SASR 208.

21 (1994) 74 A Crim R 27.

22 (1996) 87 A Crim R 289.

23 [1998] 2 VR 354.

24 [1999] WASCA 252.

25 *Falzon* [2017] VSCA 74 at [69].

26 *Falzon* [2017] VSCA 74 at [72].

The appeal to this Court

33 The Crown appealed from the Court of Appeal's judgment on one ground only, namely, that the majority erred in concluding that a substantial miscarriage of justice had occurred as a result of the trial judge admitting evidence at trial of the $120,800 that was found at Essendon.

Intermediate appellate court decisions in respect of the admissibility of cash

34 In *Lewis*[27], police attended the appellant's flat and found him in possession of 118 grams of cannabis as well as $750 in $50 notes under his mattress and $2,000 in $100 and $50 notes in the pocket of his jacket. They seized the cash, along with an envelope on which there were a number of figures and calculations and the first names of three people. The appellant was charged with possession of cannabis for the purpose of supply. Before the trial, defence counsel objected to the tender of the cash. The trial judge ruled that the cash was relevant to whether the appellant's purpose in having the cannabis was for the purpose of supply[28]. The appellant was subsequently convicted of the charge and appealed on the basis that the cash was wrongly admitted into evidence. That ground of appeal was upheld by a majority of the Court of Criminal Appeal of the Supreme Court of the Northern Territory[29]. But it is the decision of Rice J in dissent which has ultimately prevailed in subsequent authority. Rice J held that the evidence of the cash was admissible as it had probative value as evidence of a business in the sale of drugs and, in turn, evidence of the purpose for which the appellant had the cannabis in his possession in relation to the charge against him[30].

35 The reasoning of Rice J was followed by Cox J in *McGhee*[31]. In that case, police raided a house occupied by the accused in which they found amphetamine and cannabis, and, amongst other things, two sets of scales, a pistol and holster and ammunition, a wallet containing $900 in cash and a packet of amphetamine,

---

27 (1989) 46 A Crim R 365 at 369 per Martin J.

28 (1989) 46 A Crim R 365 at 370-371.

29 (1989) 46 A Crim R 365 at 373 per Martin J, 376 per Angel J.

30 (1989) 46 A Crim R 365 at 367.

31 (1993) 61 SASR 208 at 210-211.

and $110 in cash in a pair of jeans apparently belonging to the accused[32]. The accused was charged with two offences of possessing methylamphetamine for sale and possessing cannabis for sale. Defence counsel objected to the tender of the money in the wallet. Cox J held that it was admissible as tending to prove the existence of an ongoing business, and, therefore, as tending to prove that the accused's possession of illegal drugs on the particular occasion was for the purpose of sale[33]. His Honour added that, if the accused were running a drug business at the time of the offence, it would be reasonable, in the absence of any plausible alternative explanation, to regard the $900 cash, or at least part of it, as "working capital" or a "cash float" for expected sales[34].

36 The Full Court of the Supreme Court of South Australia sitting as the Court of Criminal Appeal followed the decision of Cox J in *Blackwell*[35]. In that case, police found the appellant in possession of heroin and a can of tear gas or mace on the footpath outside his house. They then searched his house and found, amongst other things, a set of scales, a pen pistol and a quantity of ammunition capable of being fired in the pen pistol[36]. The appellant was convicted for possession of heroin for the purposes of sale. The Court of Criminal Appeal rejected the appellant's argument that the trial judge erred in admitting the pen pistol and the can of tear gas or mace into evidence, holding that it is "well accepted that if, in addition to being found in possession of drugs, a person is found also to have items commonly associated with drug dealing, then the finding of such items usually will be relevant as part of the circumstantial material to establish the purpose for which the drug was in that person's possession"[37].

---

32 (1993) 61 SASR 208 at 208-209.

33 (1993) 61 SASR 208 at 210-211.

34 (1993) 61 SASR 208 at 209-210.

35 (1996) 87 A Crim R 289 at 290-291 per Duggan J (Prior J and Debelle J agreeing at 294).

36 (1996) 87 A Crim R 289 at 289-290 per Duggan J (Prior J and Debelle J agreeing at 294).

37 (1996) 87 A Crim R 289 at 290 per Duggan J (Prior J and Debelle J agreeing at 294).

37 In *Sultana*[38], the appellant was convicted of supplying a prohibited drug, namely, heroin, on 30 January 1992. On that day, police intercepted the appellant while driving and found heroin in his wallet in his pocket. Police subsequently searched his residence and found several items including almost $30,000 in cash in various denominations[39]. On appeal, the appellant complained of the admission of evidence of the finding of those items. The Court of Criminal Appeal of the Supreme Court of New South Wales rejected that argument[40]. Gleeson CJ explained that evidence of that kind was frequently received on the basis that the Crown is entitled to show that the accused was possessed of the implements or accoutrements of trade of a drug dealer[41]. His Honour summarised the position thus[42]:

> "Where the issues are whether a person was found in possession of [a prohibited drug], and whether he or she possessed it for supply, the fact that the person is currently in the business of a drug-dealer is a fact relevant to the issues in the case. It is not mere evidence of propensity to commit crime, or bad character … Evidence that tends to show that a person is in the business of dealing in [a prohibited drug] also tends to show a propensity towards crime, but in a case such as the present it is admissible on the former account, not the latter. Moreover, subject to discretionary considerations … the fact that it bears the latter character does not detract from its relevance or render it inadmissible."

38 In *Edwards*, the Court of Appeal of the Supreme Court of Victoria relied[43] on *Sultana* in dismissing an application for leave to appeal against a conviction for trafficking in amphetamines. Police found $3,020 cash and a firearm on the

---

38 (1994) 74 A Crim R 27.

39 (1994) 74 A Crim R 27 at 32-33 per Sully J.

40 (1994) 74 A Crim R 27 at 28-30 per Gleeson CJ (Handley JA agreeing at 32), 36-37 per Sully J.

41 (1994) 74 A Crim R 27 at 28.

42 (1994) 74 A Crim R 27 at 29.

43 [1998] 2 VR 354 at 368-369 per Eames AJA (Hayne JA and Batt JA agreeing at 356).

applicant, and drugs and ammunition for the firearm in his car[44]. The applicant sought leave to appeal on the basis, inter alia, that the trial judge had wrongly admitted evidence of the finding of the cash. Eames AJA (with whom Hayne JA and Batt JA agreed) rejected[45] the proposed ground of appeal and emphasised that the evidence of the finding of the cash gained its force, and was admissible, by virtue of it not being taken in isolation but combined with the other incriminating items.

39 The Court of Criminal Appeal of the Supreme Court of Western Australia canvassed these cases in *Evans*[46]. In *Evans*, the appellant sought to appeal against his conviction for possession of a quantity of 3,4 methylenedioxy-n alpha-dimethylphenylethylamine (MDMA) with intent to sell or supply it to another. The MDMA had been found in the appellant's car and on his person along with a sum of $895 in cash[47]. He argued that the trial judge erred in admitting the evidence of the cash. At trial, the purpose of possession was not a fact in issue on the defence case because the appellant denied knowledge of the presence of the drug in his car. The Court of Criminal Appeal held, however, in accordance with *Sultana*, *McGhee* and Rice J's dissent in *Lewis* that the evidence of the cash was relevant and therefore admissible both in support of the Crown's case that the appellant was in possession of the drugs and to rebut any defence that he was in possession of the drugs for his own use[48].

Relevance of the evidence of the cash

40 Whelan JA was plainly correct that the evidence of the cash found at the respondent's home at Essendon was admissible[49] as an item of circumstantial

---

44 [1998] 2 VR 354 at 357-358 per Eames AJA (Hayne JA and Batt JA agreeing at 356).

45 [1998] 2 VR 354 at 369-370 (Hayne JA and Batt JA agreeing at 356).

46 [1999] WASCA 252 at [31]-[35] per Malcolm CJ (White J agreeing at [66]), [65] per Anderson J.

47 [1999] WASCA 252 at [1]-[3] per Malcolm CJ (White J agreeing at [66]).

48 [1999] WASCA 252 at [31]-[38] per Malcolm CJ (White J agreeing at [66]), [65] per Anderson J.

49 *Evidence Act*, ss 55 and 56.

evidence that, in conjunction with evidence of other indicia of drug trafficking, was capable of founding the inference that, as at 17 December 2013, the respondent was carrying on a business of trafficking in cannabis, and thus that the respondent's purpose in possessing the quantities of cannabis found at the Sunshine North and Sydenham properties was the purpose of sale.

41 Contrary to the majority's apparent process of reasoning, the fact that, if the cash came from trafficking, it must have come from trafficking in cannabis other than the cannabis found on 17 December 2013, does not detract from the strength of the inference that the cash was part and parcel of the business of drug trafficking which the respondent was carrying on as at 17 December 2013. To the contrary, the fact that the cash was likely to have come from previous sales of cannabis – a conclusion strengthened by the expert evidence of drug traffickers' inclinations to transact drug deals in cash and the tax return evidence of the respondent's failure to declare the cash as part of his assessable income – fortified the probability of the respondent making regular and recurring sales of cannabis, and thus that, as at 17 December 2013, the respondent had been carrying on a continuing business of trafficking in cannabis. More specifically, the fact that the cash was likely to have come from previous sales of cannabis logically bespoke the probability that the respondent kept the cash on hand on 17 December 2013 as an asset of a continuing business of trafficking in cannabis in the course of which he intended to sell the cannabis that he possessed on 17 December 2013. The significance which the majority attributed to the fact that the prosecution had eschewed reliance on a *Giretti* count was, as Whelan JA observed, misplaced.

42 For the same reason, the majority were wrong in holding that the only relevance of the evidence of the respondent's possession of the cash was "rank propensity reasoning, or tendency reasoning"; by which their Honours are taken to have meant reasoning to the effect that, because the respondent was shown to have committed past acts of trafficking in cannabis, he could be perceived as the sort of person who was likely or more likely to commit the acts of trafficking with which he was charged[50]. Granted, the evidence of the respondent's possession of the cash implied that the respondent had committed previous acts of trafficking, but the purpose of its admission was not to establish that the respondent was the sort of person who was disposed to commit acts of trafficking. Rather, as the trial judge made clear in his ruling, and Whelan JA

---

50 *BBH v The Queen* (2012) 245 CLR 499 at 525 [70]-[71] per Hayne J; [2012] HCA 9.

correctly recognised in his judgment, the purpose for which the evidence was admitted, and the way in which the Crown relied upon it, was to establish that the respondent was in fact carrying on a business of trafficking and, therefore, that the respondent's purpose in possessing the cannabis of which he was found to be in possession on 17 December 2013 was the purpose of sale.

43 Nor did the fact that that evidence tended to show the commission of other offences of trafficking render it inadmissible. As Lord Herschell LC said in *Makin v Attorney-General for New South Wales*[51], the mere fact that evidence tends to show the commission of other crimes does not of itself render it inadmissible if it is relevant to an issue before the jury, and it may be so, among other circumstances, to establish the elements of the offence charged or to rebut a defence which would otherwise have been open to the accused. Here, the evidence was relevant to establish the element of intent to sell and to counter the respondent's claim that the cannabis was possessed for personal consumption. And, as has been noticed, the fact that such evidence is admissible in relation to the proof of drug trafficking offences despite disclosing previous offences is plainly established by the authorities *McGhee*, *Sultana*, *Blackwell*, *Edwards* and *Evans*. As those decisions make clear, subject to exclusion under s 137 of the *Evidence Act* or in exercise of the *Christie*[52] discretion in those jurisdictions where common law rules of evidence still apply, where an accused is charged with possession of a prohibited drug with intent to sell, circumstantial evidence that the accused was at that time carrying on a business of drug trafficking is relevant and admissible to establish the purpose for which the accused possessed the drug in issue.

44 As Whelan JA also observed, the facts of this matter are relevantly indistinguishable from those of *McGhee*, *Sultana*, *Blackwell*, *Edwards* and *Evans*. The lack of physical proximity or propinquity between the cash at Essendon and the cannabis located at the Sunshine North and Sydenham properties is beside the point. Given the evidence of interconnection between the Essendon property and the cultivation operations at the Sunshine North and Sydenham properties, and the cannabis and other drug trafficking paraphernalia found at Essendon, it was well open to the jury to infer that the cash at Essendon

---

51 [1894] AC 57 at 65. See also *Martin v Osborne* (1936) 55 CLR 367 at 375 per Dixon J; [1936] HCA 23; *Markby v The Queen* (1978) 140 CLR 108 at 116 per Gibbs ACJ; [1978] HCA 29.

52 *R v Christie* [1914] AC 545.

was sourced in the sales of the cannabis grown at the Sunshine North and Sydenham properties. Indeed, before this Court, so much was not disputed. Almost from the outset of oral argument, counsel for the respondent entirely abandoned reliance on physical separation of the cash from the cannabis as a point of relevant distinction.

Exclusion of the evidence of the cash under s 137 of the *Evidence Act*

45 The majority in the Court of Appeal were further in error in their approach to s 137 of the *Evidence Act*. The probative value of the evidence of the cash found at Essendon was not low. It was high. Combined with the other circumstantial evidence of the respondent's carrying on of a business of drug trafficking, including the respondent's admission as to having cultivated the cannabis at Sydenham, the physical paraphernalia of drug trafficking and the large quantities of cannabis found at the Sunshine North and Sydenham properties, the evidence of the cash found at Essendon constituted a powerful circumstantial case that the respondent was engaged in a business of cultivating and selling cannabis and, therefore, that his purpose for being in possession of the cannabis found at the Sunshine North and Sydenham properties on 17 December 2013 was the purpose of sale. Admittedly, the evidence of the cash was prejudicial to the respondent in the sense of assisting to demonstrate that the respondent's purpose in possessing the cannabis found on 17 December 2013 was the purpose of sale. That is why it was admissible. But it was not to any significant extent unfairly prejudicial. By comparison to the probative value of the evidence of the respondent's possession of the cash as circumstantial evidence that the respondent was, as at 17 December 2013, carrying on a business of selling cannabis, the likelihood of the jury improperly reasoning from the evidence of the respondent's possession of the cash that, because the respondent had committed past acts of trafficking, he was the sort of person who was more likely to commit those charged, was minimal; especially given that the trial judge specifically directed the jury that they were not to think that because a person breaks the law in one instance, he is likely to break the law in another.

46 Views might differ as to whether defence counsel should have applied under s 12 of the *Jury Directions Act* 2015 (Vic)[53] for a more specific or detailed anti-propensity reasoning direction. But, as Whelan JA observed[54] and counsel

---

53 See also *Jury Directions Act* 2015 (Vic), s 29.

54 *Falzon* [2017] VSCA 74 at [76].

for the respondent effectively acknowledged before this Court, it is apparent that defence counsel had good forensic reason not to seek such a direction. Making a larger issue of propensity reasoning could well have been more detrimental to the respondent than saying nothing further about it. The same is true of any application that might have been made under s 136 of the *Evidence Act* for an order limiting the use which could be made of the evidence of the cash. The trial judge was not required to make such an order unless defence counsel applied for it[55], and, for the reasons already given, it is readily understandable why defence counsel did not do so.

Further direction under s 16 of the *Jury Directions Act*

47 Having abandoned physical separation of the cash from the cannabis as a point of relevant distinction from previous authority, and despite conceding that defence counsel had good forensic reason not to apply for a further anti-propensity reasoning direction, counsel for the respondent nevertheless submitted before this Court that the trial judge should have given a further and more detailed anti-propensity reasoning direction of his Honour's own motion, pursuant to s 16 of the *Jury Directions Act*, and that his Honour's failure to do so was productive of a substantial miscarriage of justice.

48 Quite apart from the fact that no such argument was communicated in a Notice of Contention or mentioned in the respondent's written submissions or outline of oral argument, the submission is entirely without merit. In the absence of an application for such a direction under s 12 of the *Jury Directions Act*, the trial judge was precluded by ss 15 and 16 of that Act from giving any such direction unless his Honour considered that there were substantial and compelling reasons to do so. And given, as is conceded, that such a direction had the potential to be more detrimental to the respondent than saying nothing further about the subject, the trial judge could not properly have concluded that there were substantial and compelling reasons to override defence counsel's judgment.

---

55 See and compare *Mulcahy v The Queen* [2012] ACTCA 3 at [82]; *Poniris v The Queen* [2014] NSWCCA 100 at [50] per Macfarlan JA (Adamson J and Bellew J agreeing at [83], [84]).

Adherence to authority

49 It remains to mention one further matter. As this Court has emphasised on several occasions[56], Australian intermediate appellate courts are bound to follow the decisions of other Australian intermediate appellate courts in both matters of statutory interpretation and matters of common law unless persuaded that those decisions are plainly wrong. In this case, as has been explained, the admissibility of the evidence of the cash found at Essendon, as circumstantial evidence of drug trafficking and, therefore, as probative of intent to sell, was supported by a succession of decisions of other Australian intermediate appellate courts including an important previous decision of the Court of Appeal of the Supreme Court of Victoria[57] which has been followed in other States[58]. The majority in the Court of Appeal in this matter did not suggest that those decisions were plainly wrong and could not properly have considered them to be so. Rather, the majority purported to distinguish those previous decisions on the now concededly untenable basis of physical separation of the cash from the cannabis and the patent misconception that the evidence was unfairly prejudicial to the respondent. So to hold was in effect to refuse to follow those earlier decisions while purporting to observe them. That was not a course properly open to the majority and it should not be repeated.

---

56 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; [1993] HCA 15; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135]; [2007] HCA 22; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 411-412 [49] per Gummow, Heydon and Crennan JJ; [2009] HCA 47; *Hili v The Queen* (2010) 242 CLR 520 at 538 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 45.

57 *Edwards* [1998] 2 VR 354.

58 See for example *O'Driscoll* (2003) 57 NSWLR 416 at 432 [77] per Spigelman CJ (Carruthers AJ agreeing at 443 [149]); *Roland* (2015) 252 A Crim R 399 at 401 [4].