HIGH COURT OF AUSTRALIA

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

POUYAN KALBASI APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Kalbasi v Western Australia
[2018] HCA 7
14 March 2018
P21/2017

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

T A Game SC with P McQueen and G E L Huxley for the appellant (instructed by Lavan)

A L Forrester SC with K C Cook for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Kalbasi v Western Australia

Criminal law – Appeal against conviction – Application of proviso – Where appellant indicted for attempting to possess prohibited drug with intent to sell or supply to another – Where police replaced prohibited drug with another substance – Where trial judge and counsel erroneously assumed s 11 of *Misuse of Drugs Act* 1981 (WA) applied deeming possession of quantity of drugs sufficient to prove possession for purpose of sale or supply to another – Where jury erroneously directed that proof of possession of substitute "drugs" would suffice to prove intention to sell or supply to another – Where intention not otherwise live issue at trial – Where sole issue at trial was appellant's possession of substitute "drugs" – Where prosecution concedes erroneous direction as to intention but contends "no substantial miscarriage of justice has occurred" – Whether "no substantial miscarriage of justice has occurred" – Whether misdirection precluded application of proviso.

Words and phrases – "deemed intent", "error of outcome", "error of process", "fundamental defect", "fundamental error", "fundamentally flawed", "inevitability of result", "intention", "loss of a fair or real chance of acquittal", "miscarriage of justice", "negative proposition", "proviso", "reasonable jury", "substantial miscarriage of justice", "this jury".

Criminal Appeals Act 2004 (WA), s 30.
Misuse of Drugs Act 1981 (WA), ss 6(1)(a), 11, 33(1), 34.

KIEFEL CJ, BELL, KEANE AND GORDON JJ.

Introduction

1 Section 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA) ("the MDA") makes it an offence to be in possession of prohibited drugs with intent to sell or supply them to another. Section 11 of the MDA operates to deem a person who is in possession of a specified quantity of a prohibited drug, subject to proof to the contrary, to have it in possession with intent to sell or supply to another. In the case of methylamphetamine, a prohibited drug, the quantity which enlivens the operation of s 11 is two grams. In *Krakouer v The Queen*[1] it was held that s 11 has no application on the prosecution of a charge of attempted possession of a prohibited drug.

2 The appellant was tried in the District Court of Western Australia (Stevenson DCJ and a jury) on an indictment that charged him with attempting to supply a prohibited drug, methylamphetamine, with intent to sell or supply it to another[2]. This was a re-trial following an earlier successful conviction appeal[3]. It was the State's case that the appellant attempted to possess a consignment of 4.981 kg of methylamphetamine. Notwithstanding the decision in *Krakouer*, it appears that the judge, the prosecutor and senior and junior counsel for the defence all assumed that s 11 of the MDA applied to the trial of the charge of attempted possession. The jury was directed as to the s 11 presumption and instructed that in the event it was satisfied that the appellant was in possession of the "drugs", his intention to sell or supply them to another was proved beyond reasonable doubt.

3 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Western Australia (McLure P, Mazza and Mitchell JJA). The determination of the appeal was governed by s 30 of the *Criminal Appeals Act* 2004 (WA) ("the CAA"), which relevantly provides:

> "(2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.

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1 (1998) 194 CLR 202; [1998] HCA 43.

2 *Misuse of Drugs Act*, ss 6(1)(a) and 33(1).

3 *Kalbasi v Western Australia* (2013) 235 A Crim R 541.

(3) The Court of Appeal must allow the appeal if in its opinion –

(a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or

(b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or

(c) there was a miscarriage of justice.

(4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."

4 The provision closely mirrors the common form criminal appeal statute[4] but adopts a contemporary style of drafting, which separates its component parts. The qualifier "actually" is omitted from the requirement that no substantial miscarriage of justice has occurred in sub-s (4) ("the proviso"). The omission is not suggested to be material to the appellant's argument.

5 The State conceded that the direction concerning proof of intention was wrong. It submitted that the appeal should nonetheless be dismissed under s 30(4), contending that, in light of the conduct of the trial, the error did not occasion a substantial miscarriage of justice.

6 In their joint reasons, Mazza and Mitchell JJA considered the application of the proviso by reference to whether the error was of "process" or "outcome": errors of the first kind not being susceptible to its engagement[5]. Their Honours rejected that the misdirection was an error of process[6]. This conclusion took into account the observations of the plurality in *Krakouer*[7]. Their Honours moved to a consideration of the "outcome" aspect of the proviso. They concluded that, in light of the appellant's proven possession of nearly 5 kg of

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4 *Criminal Appeal Act* 1907 (UK), s 4(1).

5 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [179].

6 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [213].

7 (1998) 194 CLR 202 at 215 [32] per Gaudron, Gummow, Kirby and Hayne JJ.

"methylamphetamine", his conviction for the offence of attempted possession with the intention of selling or supplying the drug to another was inevitable[8]. McLure P, in separate reasons, also concluded that the jury's finding that the appellant had attempted to possess such a large quantity of high purity drug made his conviction for the offence with which he was charged inevitable[9]. The appeal was dismissed.

7 On 12 May 2017, Gageler, Nettle and Edelman JJ gave the appellant special leave to appeal on the sole ground that the Court of Appeal erred in finding that there was no substantial miscarriage of justice and in dismissing his appeal.

Weiss v The Queen

8 Before turning to the evidence and the course of the trial, it is convenient to deal with one aspect of the appellant's challenge which is directed to the application of *Weiss v The Queen*[10]. The appellant contends that a vice in the approach taken in the joint reasons is that Mazza and Mitchell JJA confined their analysis of errors of "process" to "fundamental" errors "go[ing] to the root of the proceedings"[11] and, having determined that the misdirection was not an error of that kind, dismissed the appeal on satisfaction that guilt was proved beyond reasonable doubt without further examination of the nature and possible effect of the error. The appellant submits that either the approach misapplies the principles explained in *Weiss* or, if it does not, *Weiss* should be qualified or overruled. He argues that *Weiss* has left uncertain the principles that engage the proviso and that the uncertainty has not been resolved in more recent decisions of the Court[12]. The high point of the submission is the invitation to return to a test

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8 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [214].

9 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [30].

10 (2005) 224 CLR 300; [2005] HCA 81.

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

12 *Darkan v The Queen* (2006) 227 CLR 373; [2006] HCA 34; *Bounds v The Queen* (2006) 80 ALJR 1380; 228 ALR 190; [2006] HCA 39; *Cesan v The Queen* (2008) 236 CLR 358; [2008] HCA 52; *AK v Western Australia* (2008) 232 CLR 438; [2008] HCA 8; *Pollock v The Queen* (2010) 242 CLR 233; [2010] HCA 35; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; [2012] HCA 14; *Reeves v The Queen* (2013) 88 ALJR 215 at 223-224 [50]-[51]; 304 ALR 251 at 261-262; [2013]

(Footnote continues on next page)

for the determination of a substantial miscarriage of justice which asks whether the accused has lost a chance of acquittal fairly open[13] or whether there has been some substantial departure from a trial according to law[14].

9 *Weiss* is a unanimous decision and the appellant's careful argument does not provide a principled reason to depart from it[15]. In light of the argument, it is as well to recall the notorious difficulties associated with the "lost chance of acquittal"[16] formulation when applied as the criterion of a substantial miscarriage of justice[17]. Chief among these was the question of how the appellate court is to assess the lost chance. Courts were divided between the view that it was to be assessed from the standpoint of the jury at the trial ("this jury")[18] and the view that it was to be assessed from the standpoint of the reasonable jury, properly instructed, and acting on admissible evidence (the "reasonable jury")[19].

HCA 57; *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16; *Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29; *Castle v The Queen* (2016) 259 CLR 449; [2016] HCA 46.

13 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; [1955] HCA 59.

14 *Wilde v The Queen* (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ.

15 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

16 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

17 *Report of the Interdepartmental Committee on the Court of Criminal Appeal* ("the Donovan Committee"), August 1965, Cmnd 2755 at 35-37; *R v Gallagher* [1998] 2 VR 671 at 676 per Brooking JA; *Festa v The Queen* (2001) 208 CLR 593 at 632; [2001] HCA 72; Thompson and Wollaston, *Court of Appeal Criminal Division*, (1969) at 123-125; Pattenden, *English Criminal Appeals: 1844–1994*, (1996) at 182-184.

18 *Woolmington v The Director of Public Prosecutions* [1935] AC 462; *R v Konstandopoulos* [1998] 4 VR 381 at 391-392 per Callaway JA; *R v McLachlan* [1999] 2 VR 553 at 569-570 [51]-[53] per Callaway JA; *R v Weiss* (2004) 8 VR 388 at 399 [66] per Callaway JA.

19 *R v Haddy* [1944] KB 442; *Driscoll v The Queen* (1977) 137 CLR 517 at 524 per Barwick CJ; [1977] HCA 43; *R v Storey* (1978) 140 CLR 364 at 376-377 per Barwick CJ; [1978] HCA 39.

Assessment by reference to "this jury" was thought to give work to the proviso in a case in which the appeal succeeded under the third limb of the common form provision (that on any ground there was a miscarriage of justice (here s 30(3)(c)))[20], whereas assessment by reference to the "reasonable jury" was thought not to[21].

10 In England the debate was ultimately resolved in favour of assessment from the standpoint of the "reasonable jury"[22]. As Professor Pattenden has observed, it was probably the only realistic approach to take given that the appellate court has no way of knowing what the particular jury might have thought had the trial been conducted properly[23], whereas the "reasonable jury" test turned on the appellate court's own assessment of the facts[24]. As the Donovan Committee explained, the application of the "reasonable jury" test in practice had involved the appellate court coming to a conclusion of fact: whether the evidence established guilt beyond reasonable doubt[25].

11 The two approaches remained alive in the Australian jurisdictions and the difference in their application was the issue starkly raised in *Weiss*. It will be recalled that the Victorian Court of Appeal dismissed Weiss' appeal applying the "this jury" test while stating that the appeal would have been allowed had the test been the inevitability of conviction assessed from the standpoint of the "reasonable jury"[26]. The conclusion highlighted a perceived difficulty in determining, at least in the case of wrongly admitted evidence, that conviction by a hypothetical jury can ever be said to be "inevitable".

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20 *R v Weiss* (2004) 8 VR 388 at 399 [66] per Callaway JA.

21 *Festa v The Queen* (2001) 208 CLR 593 at 605 [31] per McHugh J.

22 *Stirland v Director of Public Prosecutions* [1944] AC 315 at 321.

23 Pattenden, *English Criminal Appeals: 1844–1994*, (1996) at 183.

24 *Festa v The Queen* (2001) 208 CLR 593 at 631-632 [120]-[122]. See also at 629 [115] citing *R v Storey* (1978) 140 CLR 364 at 376; and at 630 [116] citing *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525.

25 *Report of the Interdepartmental Committee on the Court of Criminal Appeal*, August 1965, Cmnd 2755 at 37 [166].

26 *R v Weiss* (2004) 8 VR 388 at 400-401 [70].

12 *Weiss* settled the debate in an analysis that is grounded in the text of the common form provision. The apparent tension between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, subject to the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, is resolved by reference to history and legislative purpose. Consistently with the long tradition of the criminal law[27], any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision (here s 30(3)(c)). The determination of whether, notwithstanding the error, there has been no substantial miscarriage of justice is committed to the appellate court. The appellate court's assessment does not turn on its estimate of the verdict that a hypothetical jury, whether "this jury" or a "reasonable jury", might have returned had the error not occurred[28]. The concepts of a "lost chance of acquittal" and its converse the "inevitability of conviction" do not serve as tests because the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had.

13 The influence of an error on the deliberations of a jury can never be known. The stipulation of the negative proposition[29] as a condition of the engagement of the proviso recognises that the conviction of a person whose guilt has not been proved, beyond reasonable doubt, on admissible evidence, will always be a substantial miscarriage of justice. On the other hand, the appellate court's satisfaction that guilt has been proved to the criminal standard on the admissible evidence will in many instances support the conclusion that there has been no substantial miscarriage of justice notwithstanding a wrong decision on a question of law (under the second limb, here s 30(3)(b)) or a miscarriage of justice (under the third limb, here s 30(3)(c))[30]. This is to recognise and give

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27 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J.

28 *Weiss v The Queen* (2005) 224 CLR 300 at 314 [35].

29 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]: "It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."

30 See, eg, *Darkan v The Queen* (2006) 227 CLR 373; *Bounds v The Queen* (2006) 80 ALJR 1380; 228 ALR 190.

effect to the evident purpose of the enactment of the proviso to do away with the formalism of the Exchequer rule[31].

14 In the course of argument in *Weiss*[32], Gleeson CJ put the case in which inadmissible evidence is wrongly admitted to prove a fact against an accused who later gives evidence admitting the fact. His Honour identified that case as one where the proviso would be rightly applied even though it could not be said that a conviction was inevitable. Gleeson CJ's example is of a case in which the appellate court may readily conclude for itself from the record – including the admission and the jury's verdict of guilty – that guilt was proved beyond reasonable doubt. As Gleeson CJ said, in concluding his intervention in argument in *Weiss*: "I suggest that the appropriate test is the statutory test."[33]

15 Contrary to the appellant's submission, *Weiss* requires the appellate court to consider the nature and effect of the error in every case[34]. This is because some errors will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard. These may include, but are not limited to, cases which turn on issues of contested credibility[35], cases in which there has been a failure to leave a defence or partial defence for the jury's consideration[36] and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence[37]. In such cases *Weiss* does not disavow the utility of the concepts of the lost chance of acquittal or inevitability of

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31 The rule required a new trial in the case of every departure from a trial according to law.

32 (2005) 224 CLR 300 at 302.

33 *Weiss v The Queen* (2005) 224 CLR 300 at 302.

34 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; *AK v Western Australia* (2008) 232 CLR 438 at 455-456 [53]-[55] per Gummow and Hayne JJ.

35 *Castle v The Queen* (2016) 259 CLR 449.

36 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92; *Lindsay v The Queen* (2015) 255 CLR 272. See also *Filippou v The Queen* (2015) 256 CLR 47.

37 *Pollock v The Queen* (2010) 242 CLR 233; and see *Reeves v The Queen* (2013) 88 ALJR 215 at 223-224 [50] per French CJ, Crennan, Bell and Keane JJ; 304 ALR 251 at 261.

conviction[38]: regardless of the apparent strength of the prosecution case, the appellate court cannot be satisfied that guilt has been proved. Assessing the application of the proviso by reference to considerations of "process" and "outcome" may or may not be helpful provided always that the former takes into account the capacity of the error to deprive the appellate court of the ability to justly assess the latter[39].

16 The appellant's invitation to elaborate on the categories of case in which satisfaction of the negative condition will not suffice to enliven the proviso is to be resisted. It is not possible to describe the metes and bounds of those wrong decisions of law or failures of trial process that will occasion a substantial miscarriage of justice notwithstanding the cogency of proof of the accused's guilt[40]. As was established in *Weiss*, the fundamental question remains whether there has been a substantial miscarriage of justice. That question is not answered by trying to identify some classes of case in which the proviso can be or cannot be applied. Classifications of that kind are distracting and apt to mislead.

17 For the reasons to be given, the misdirection at the appellant's trial was not an error of that kind, nor was it an error that denied the Court of Appeal the capacity to assess that his guilt of the offence with which he was charged was proved beyond reasonable doubt.

The scheme of the MDA

18 Relevantly, s 6(1)(a) of the MDA makes it an offence for a person to possess a prohibited drug with intent to sell or supply it to another. The offence is punishable by a fine not exceeding $100,000 or imprisonment for a term not exceeding 25 years, or both[41]. Section 6(2) makes the possession of a prohibited drug simpliciter an offence. A s 6(2) offence is punishable by a fine not exceeding $2,000 or imprisonment not exceeding two years, or both[42]. On the

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38 *Weiss v The Queen* (2005) 224 CLR 300 at 315-316 [40].

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

40 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45]; *Cesan v The Queen* (2008) 236 CLR 358 at 394 [126] per Hayne, Crennan and Kiefel JJ.

41 *Misuse of Drugs Act*, s 34(1)(a).

42 *Misuse of Drugs Act*, s 34(1)(e).

trial of a count under s 6(1) the jury may return a verdict for the simple s 6(2) offence if it is not satisfied that the accused's possession of the prohibited drug was accompanied by the requisite intention[43]. A person who attempts to commit an offence under the MDA is liable on conviction to the same penalty to which a person who commits the principal offence is liable[44]. A person has possession of prohibited drugs in circumstances that include the exercise of control or dominion over them[45].

The evidence

19 On 12 November 2010, officers of the New South Wales Police Force, acting at the request of their Western Australian counterparts, executed a search warrant on a freight company's premises in Sydney. They were shown a cardboard box which had been received for consignment to Western Australia. The consignment note contained an instruction to call for collection "James Walker" on a mobile telephone number which ended with the numbers 731 ("the 731 number"). Inside the cardboard box were two padlocked plastic toolboxes each containing five plastic bags of methylamphetamine. The total quantity of methylamphetamine was 4.981 kg. The purity of the drug was 84% and was indicative that it was "from the point of manufacture". Expert evidence established that 4.981 kg of methylamphetamine was a highly valuable commodity.

20 The contents of the plastic bags were replaced with rock salt and the cardboard box was reconstructed. A listening device was concealed inside the packaging. A man named Matthew Lothian attempted to collect the cardboard box from the freight company's premises in Perth on 15 November. He was told to return the following day. He did so. His car ran out of fuel on the way and he completed the journey to the freight company's premises by taxi. After collecting the cardboard box Lothian re-fuelled his car and returned to his home in Falstaff Crescent, Spearwood. As the result of his attendance at the freight company on 15 November, the police were maintaining surveillance on Lothian's movements. He entered the Falstaff Crescent premises with the cardboard box at about 3:16pm. At about 3:20pm, the appellant arrived at the premises by bicycle.

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43 *Misuse of Drugs Act*, s 10.

44 *Misuse of Drugs Act*, s 33(1).

45 *Misuse of Drugs Act*, s 3(1) definition of "to possess".

21 The listening device recording was in evidence. It was of poor quality but three voices were audible on it. These belonged to Lothian; his girlfriend, Venetia Tilbrook; and the appellant. The cardboard box was opened after the appellant's arrival. Sounds consistent with its opening and with the padlocks on the toolboxes being cut were audible. So, too, was Lothian's account of having run out of fuel. Significantly, that account commenced with Lothian saying "when I first text ya, yeah, from there, mate, anyway, everything went to shit", suggesting on the prosecution case that he had made contact with the appellant shortly before collecting the consignment.

22 At 3:36pm, Lothian left the house for a short period. At 3:38pm, Tilbrook left the house. At about 3:40pm the appellant asked Lothian for a pipe. About 10 minutes later, the appellant said "[d]on't move. I'll come back". At about 3:57pm the appellant left the premises. He rode his bicycle into the park located opposite the Falstaff Crescent premises. He appeared to make a telephone call. Police in an unmarked vehicle pursued him and called on him to stop. After a short pursuit he was apprehended. He did not have a mobile telephone on him. His attempt to flee after the police identified themselves was relied on as evincing his consciousness of guilt.

23 At 4:00pm the police executed a search warrant at the Falstaff Crescent premises. Lothian was the only occupant. The opened cardboard box was in the lounge room and the open toolboxes were in the kitchen. One bag of rock salt, plastic clipseal bags and two broken padlocks were found in a beer carton, which was being used as a makeshift bin. The other nine bags of rock salt were on the bottom shelf of a kitchen cupboard. On the kitchen sink were mixing bowls, three sets of digital scales, a box of disposable gloves and two pairs of used disposable gloves. MSM, a substance used to cut methylamphetamine, was in a baking dish on the stove. A third pair of disposable gloves was found on the table in the hallway.

24 The mixed DNA profile on the gloves found in the hallway matched the profiles of Lothian and Tilbrook and excluded the appellant as a contributor. The appellant was also excluded as a contributor to the DNA profile detected on one of the pairs of gloves in the kitchen. The mixed DNA profile on this pair of gloves matched the profiles of Lothian and Tilbrook. A mixed DNA profile on the inside of a glove from the other pair of gloves in the kitchen matched the appellant's DNA profile. Lothian and Tilbrook were excluded as contributors to the DNA found on this glove.

25 The appellant told the police that he lived at an address in East Perth. A search warrant was executed on these premises. Despite the appellant's insistence that this was where he lived, when he was taken to the address the

appellant had to telephone somebody to let him in and identification belonging to other men was found in each bedroom.

26 A white BlackBerry mobile telephone was found in a storeroom at the Falstaff Crescent premises. The mobile telephone had a PIN lock on it and the information could not be downloaded. Lothian had been seen using what appeared to be a white mobile telephone at the freight carrier's premises. Quantities of methylamphetamine said to belong to Lothian were found in the kitchen and the bedroom drawer of the Falstaff Crescent premises. Documents found at those premises established that Lothian had flown from Perth to Sydney on 11 November 2010.

27 Documents seized from the appellant's residence in Applecross indicated that he had flown from Perth to Sydney on 3 November 2010, returning to Perth on 13 November 2010. A BlackBerry telephone charger was found in the search of the appellant's home but no BlackBerry telephone was located. Telephone records linked the appellant to the 731 number.

28 The appellant did not give or call any evidence at the trial.

The course of the trial

The parties' cases

29 The prosecution sought to establish that the appellant had attempted to possess the consignment of methylamphetamine contained in the cardboard box by circumstantial proof that he was exercising control over the "drugs" while he was present in the Falstaff Crescent premises. The prosecutor opened her case identifying proof of the appellant's attempt to possess the "drugs", "knowing" that they were prohibited drugs, as the "real issue". She invited the jury to find that the appellant and Lothian were adding MSM to the "drugs", with a view to distribution of the same, when the appellant realised after testing a sample that it was not what he was expecting. Shortly after this he instructed Lothian, "[d]on't move. I'll come back".

30 Senior counsel for the appellant opened his case explaining that much of the evidence was not in dispute, and suggesting "[i]f there's one thing I ask you to remember, it's the word 'control'". He continued:

> "The prosecution have to prove control of it. … What the defence is saying is he wasn't in control. That's the dispute between the parties, and I won't seek to persuade you one way or another now, because you just haven't heard the evidence. But just keep your mind on that. The defence is saying he's not in control."

31 The focus of senior counsel's closing submission was that the appellant's presence in the Falstaff Crescent premises did not establish his control over the "drugs":

> "Mere presence isn't enough and you can't convict someone merely because they might have known some, perhaps quite a lot of what was going on. Mere presence isn't enough and mere knowledge isn't enough. What needs to be shown is control."

32 Prominent to the determination of the appeal in the Court of Appeal and in this Court was the following submission put on the appellant's behalf ("the Nissan submission"):

> "If a person turns up somewhere where something bad is happening, you don't assume that they are bought into it completely. Take it out of criminal context for a second. You go down to your Nissan dealership, go in the door, and you look at the Nissans, and you say, 'Look, there's 10 beautiful – 10 Nissans that I like – I want. I'll get one for myself, and if I like it, I'll get one for my daughter if I like it'. You know. 'Show me the Nissans'. You don't control those Nissans just by looking at them.
>
> The State didn't prove what [the appellant] had in mind when he went down there. But what they certainly didn't prove is that he had any ownership, any control, knowledge, possession of those drugs before he got there."

The discussion concerning the directions

33 After the close of the prosecution case, and before the addresses, there was discussion concerning the directions to be given to the jury. Counsel were supplied with a copy of a "jury aide" which was later distributed to the jury. There was no objection to its contents. In material terms it provided as follows:

> "To prove the offence was committed by the accused at the time and place alleged the State must prove each of the following elements beyond reasonable doubt:
>
> **Attempted possession of a prohibited drug with intent to sell or supply**
>
> 1. The offender was the accused (identity);
>
> 2. The substance with which the charge is concerned is a prohibited drug;

3. The accused attempted to possess that prohibited drug; and

4. The accused intended to sell or supply the prohibited drug, or any part of it, to another.

'to possess' - includes to control or have dominion over, and to have the order or disposition of, and inflections and derivatives of the verb 'to possess' have correlative meanings."

34 The judge raised with defence counsel the question of the directions to be given on the element of intention:

"[TRIAL JUDGE]: So what do we say about the fourth element?

[DEFENCE COUNSEL]: Well, if my client is found to be in possession, as I've put – if he's in possession of it, he's not in possession of it – the inference would be that he's in possession of it, intending to sell or supply the prohibited drug, given the volume. If he's found to be in possession, there's no - - -

[TRIAL JUDGE]: Can I tell the jury, [counsel], that I can go to presumptions, if you wish, but that there is no contest, there is no issue in this trial. If they are satisfied beyond reasonable doubt that your client was in possession in the legal sense of the drugs at the relevant time in the relevant place, then they need not concern themselves with element 4.

There's no contest about that because your client doesn't seek to prove otherwise, given the deeming provision. The issue for the jury is to be found in relation to the third element.

[DEFENCE COUNSEL]: Yes, that's correct, your Honour."

The summing-up

35 The jury was instructed, conformably with the "jury aide", that the offence contained four elements, the fourth of which required proof of the appellant's intention to sell or supply the prohibited drug, or part of it, to another. The jury was directed that each was a separate element and that, in respect of each element, it must be satisfied beyond reasonable doubt before a verdict of guilty could be returned.

36 The directions concerning proof of possession in law were lengthy. The judge explained that possession may be established by proof of actual physical custody or by proof that the appellant exercised control and dominion over the

"intended drugs" to the exclusion of others, except those with whom he might have been acting jointly. In this connection, the jury was instructed that it is possible, in law, to possess something temporarily and for a limited purpose. His Honour illustrated the point saying:

> "[I]f I borrow a book from the local library, obviously I do not own the book but while I have taken it out of the library, it is under my control and is therefore in my possession.
>
> The notion of possession is wide enough to include the case of where I might lend that book to my best friend because they want to read it too."

37 His Honour concluded the directions on proof of the element of possession by telling the jury that:

> "So members of the jury, with respect to possession, you must be satisfied that in the way I have described [the appellant] had some control over the drugs in [the Falstaff Crescent premises] at the relevant time even though Mr Lothian may also have had control or possession of the same drugs at the same time.
>
> You must be satisfied that the [appellant] knew that the drugs were in fact prohibited drugs in the way I have already directed you. You must be satisfied that he did something with respect to those drugs to indicate control over the drugs at the relevant point in time, and you must be satisfied that it was his intention in doing what he did to in fact have control or at least exercise control or dominion over the drugs at that point in time."

38 Turning to proof of the fourth element, his Honour said this:

> "Very briefly, the law is that if you are found in possession of more than two grams of methylamphetamine then you are presumed to be in possession with intent to sell or supply it to another and the onus is on you to remove that presumption.
>
> There is no issue in this trial about the fourth element and as I've said it will not delay your deliberations. You must be satisfied beyond reasonable doubt about the fourth element. You do not need to concern yourself with where the drugs might have gone, how they might have got there, when they might have been moved or whatever. It's simply not relevant to your deliberations for the purpose of this trial. The fourth element is proved beyond reasonable doubt and you should give it a tick."

The appellant's first contention: the misdirection in the context of the directions on possession

39 One way in which the appellant puts his case in this Court is to direct attention to the breadth of the directions on proof of the element of possession. He argues that the effect of the misdirection is to be assessed in the context of directions that the State was not required to prove that he knew the quantity or purity of the methylamphetamine and which did not suggest that the State must prove his possession of the whole of the substituted "drugs". He points to the trial judge's use of expressions such as "doing something with" in explaining the concept of control. He submits that the jury may have found he attempted to possess the drugs based on satisfaction that he was exercising control over some part of the substitute "drugs". In this connection, he also points to the direction that a person may possess a thing for a temporary, limited purpose, as in the example of borrowing a book from the library.

40 The appellant's argument is that had his trial not been conducted on the understanding that the s 11 presumption was enlivened, it would have been necessary for the prosecution to exclude the reasonable possibility that he was in possession of a small quantity of the "drugs" as a sample with a view to purchase for his own use. He challenges the Court of Appeal's conclusion that it was open to reason from the verdict that he was proved to have been in possession of the whole of the "drugs" and to reason from this that his intention to sell or supply some 4.981 kg of methylamphetamine to another was established beyond reasonable doubt. In the alternative, by analogy with cases in which there has been a failure to leave a defence or partial defence, the appellant submits that, regardless of the apparent strength of the prosecution case, he has been deprived of the jury's consideration of a hypothesis consistent with innocence.

41 The first way in which the argument is put requires reference to the appellant's unsuccessful challenge to the directions on possession in the Court of Appeal. His second ground of appeal in that Court contended that "the learned trial judge erred in his directions regarding possession". The appellant was refused special leave to challenge the Court of Appeal's rejection of this ground. The appellant submits that his argument does not canvass that refusal because in this Court he is not asserting legal error in the directions on possession. The submission is apt to downplay the nature of the error for which he contended in the Court of Appeal. That error was particularised by reference to the judge's use of the expressions "'dealing with', 'involved with' and 'doing [something] with' the drugs", all of which were said to be apt to mislead in that a person may deal with a drug in ways falling short of control. The argument referenced the judge's illustration of the possession of a library book and the on-lending of the book to a friend. It was submitted on the appellant's behalf that his counsel had invited the

jury's consideration of the possibility that the appellant may have possessed a small quantity of the "drug" for the purpose of sampling it with a view to perhaps buying some of it later[46]. The submission appears to have been based on the Nissan submission.

42 The Court of Appeal rejected the challenge that the directions on possession were misleading. Their Honours were satisfied that, when read as a whole, the directions focussed on proof of the appellant's possession of the "intended drugs" and not some part of the whole. Their Honours also rejected that the appellant's case at trial had been advanced even faintly on the footing that he may have been in possession of a sample of the "drug" with a view to the purchase of a small quantity for his own use. As McLure P observed, the purpose and effect of the Nissan submission was that a person does not "control" a thing merely by being present and looking at the thing[47].

43 The appeal in this Court is confined to the determination of whether the Court of Appeal was wrong to dismiss the appeal under the proviso. The correctness of the Court of Appeal's assessment that the error did not occasion a substantial miscarriage of justice is to be determined upon acceptance of their Honours' rejection of the contention that the directions on possession were misleading.

44 To the extent that the appellant's argument in this Court – that the directions on possession, while correct in law, were apt to mislead – differs from his challenge below, it must be rejected. The trial judge's illustration of the loan of a library book served to explain that possession is less than ownership and need not be exclusive. It is difficult to see how the direction was apt to mislead given the evidence and the conduct of the trial. There was nothing in the evidence to raise as a possibility that the appellant may have been inspecting the "drug" with a view to deciding whether or not to purchase some part of it.

45 There was nothing in the evidence to suggest that the control over the "drug" exercised by the appellant differed in scope or purpose from that exercised by Lothian. Indeed, the relationship between the appellant and Lothian was, on the evidence, one in which the appellant gave, and Lothian accepted, directions relating to their activities. The case was fought on the sole basis that the appellant's involvement in dealing with the "drug" in the Falstaff Crescent premises was eloquent of his joint possession with Lothian of the whole. It is

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46 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [182].

47 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [28].

simply wrong to argue, as the appellant does in this Court, that the trial judge's direction to the jury contemplated a finding of possession of only part of the "intended drug": in directing the jury "that the accused intended to sell or supply the prohibited drug or any part of it to another", the trial judge was referring to the element of intention to sell or supply.

The appellant's second contention: the misdirection precluded the application of the proviso

Krakouer

46 As earlier explained, in the Court of Appeal the State conceded that the instruction as to the operation of the s 11 presumption was wrong in law. It relied on *Krakouer* for the submission that the error did not exclude the proper application of the proviso and it pointed to senior counsel's concession that if possession was proved there was no issue as to proof of intention. It is necessary to refer to *Krakouer* in some detail to explain the State's reliance on it and the appellant's response to that reliance.

47 Krakouer and a man named Calder were charged with conspiring to possess a quantity of methylamphetamine with intent to sell or supply it to another and with the attempted possession of a quantity of methylamphetamine with that intention[48]. A car was consigned from Victoria to a depot in Western Australia. The police examined the car and found a cavity in each front door containing packages of methylamphetamine having a total weight of 5.3 kg. The police substituted flour for the drugs and replaced the packages in the door cavities along with a listening device. Calder collected the car from the depot and Krakouer followed him as he drove to their destination. Shortly after their arrival, the police raided the premises and arrested Krakouer and Calder. At the time one of the packages had been removed from the door cavity[49]. Krakouer did not give or call evidence at the trial[50].

48 The prosecution did not rely on s 11 of the MDA at Krakouer's trial. Nonetheless, the jury was instructed of the presumption that a person in possession of more than two grams of methylamphetamine is presumed to intend

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48 *Krakouer v The Queen* (1998) 194 CLR 202 at 206 [2].

49 *Krakouer v The Queen* (1998) 194 CLR 202 at 206-207 [3]-[6].

50 *Krakouer v The Queen* (1998) 194 CLR 202 at 208 [9].

to sell or supply it to another. The prosecutor and defence counsel each asked the judge to withdraw the direction but he declined to do so[51].

49 *Krakouer* was decided before *Weiss*. At the time, the determination of the appeal was subject to the common form provision then found in s 689(1) of the *Criminal Code* (WA). In their joint reasons, Gaudron, Gummow, Kirby and Hayne JJ rejected the contention that the misdirection involved a fundamental flaw of the kind discussed in *Wilde v The Queen*[52]. Their Honours were persuaded, however, that the misdirection did occasion a substantial miscarriage of justice in the circumstances of the case. This conclusion took into account the necessity for the prosecution to prove that the conspiratorial agreement encompassed the intention to sell or supply: foresight that another might sell or supply the drugs to others would not suffice to establish liability for conspiracy[53].

50 Significantly, in light of the issues in this appeal, their Honours considered that had the charge of attempt to possess methylamphetamine with intent to sell or supply stood alone, and had the jury been satisfied to the criminal standard that Krakouer had attempted to possess the drugs, it may have been possible to conclude that the evidence was consistent only with an attempt to possess with the requisite intention[54]. A further consideration which told against dismissal under the proviso was that the misdirection had not been considered unimportant by trial counsel. Their Honours cautioned that "[o]ther considerations may well have arisen if no exception had been taken at trial"[55].

51 Here the appellant adduced evidence in the Court of Appeal in answer to the State's submission that the misdirection had not occasioned a substantial miscarriage of justice in light of the conduct of the trial. Senior and junior counsel who appeared on the appellant's behalf at the trial deposed to having been unaware that s 11 of the MDA did not apply to a charge of attempting to possess prohibited drugs contrary to s 6(1)(a) of the MDA. In his affidavit, senior counsel stated:

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51 *Krakouer v The Queen* (1998) 194 CLR 202 at 210 [14].

52 *Krakouer v The Queen* (1998) 194 CLR 202 at 212 [23] citing (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ.

53 *Krakouer v The Queen* (1998) 194 CLR 202 at 215 [32], 216-217 [37].

54 *Krakouer v The Queen* (1998) 194 CLR 202 at 215 [32].

55 *Krakouer v The Queen* (1998) 194 CLR 202 at 216 [36].

> "I believe this was an oversight on my part. Had I recognised that section 11 did not apply to the charge, I believe I would not have acceded to the direction to the jury that intention was not in issue."

52 The desirability of receiving evidence of counsel's reasons for forensic decisions does not appear to have been debated in the Court of Appeal and was not addressed in this Court[56]. The evidence is unchallenged. The appellant relies on it to distinguish his trial from the trial postulated by the plurality in *Krakouer*: at the appellant's trial the judge, the prosecutor and defence counsel all were acting under the same mistaken assumption. In the result, he submits that as a matter of substance, he was tried for the lesser, simple offence under s 6(2), which does not require proof of an intention to sell or supply the drugs possessed to another. He argues that the misdirection is an error of the kind in *Handlen v The Queen*[57]. Alternatively, he argues it is an error of the kind in *Quartermaine v The Queen*[58].

Handlen and Quartermaine

53 In *Handlen* the accuseds' trial was conducted upon the common, mistaken, assumption that liability would be established on proof that each was a party to a joint criminal enterprise to import a commercial quantity of border-controlled drugs. At the date of the trial, however, the general principles of criminal responsibility for offences against Commonwealth law made no provision for liability as a participant in a joint criminal enterprise[59]. It was held that the intermediate appellate court erred in dismissing the accuseds' appeals against their convictions under the proviso. The holding took into account that the trial had been conducted on a basis for which the law did not allow, on evidence which should not have been adduced, and the verdicts did not establish that the jury must have been satisfied of the facts necessary to establish guilt[60].

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56 *TKWJ v The Queen* (2002) 212 CLR 124 at 128 [8] per Gleeson CJ; [2002] HCA 46.

57 (2011) 245 CLR 282; [2011] HCA 51.

58 (1980) 143 CLR 595; [1980] HCA 29.

59 *Handlen v The Queen* (2011) 245 CLR 282 at 286 [1]-[2].

60 *Handlen v The Queen* (2011) 245 CLR 282 at 298 [47].

54 In *Quartermaine* the accused was charged with discharging a firearm with intent to kill a man named Wynne contrary to s 283(2) of the *Criminal Code* (WA). An element of liability for the offence required proof that the accused's act was of such a nature as to be likely to endanger human life. The trial judge omitted to direct the jury of this requirement[61]. Gibbs J, writing for the majority, observed that the jury must have found that the accused discharged the rifle, probably at Wynne, and that it was a short step to hold that in so doing he had done an act of such a nature as to be likely to endanger human life. Indeed, his Honour considered that there was much to be said for the view that the jury could not reasonably have made any other finding[62]. Nonetheless, his Honour reasoned that the jury had not been asked to consider whether the accused committed the offence with which he was charged: it had returned a verdict of guilty of a particular crime without having considered whether that crime was committed. His Honour held that the verdict could not be sustained by concluding that the jury would or should have returned the same verdict if it had considered the proper question[63].

55 None of the factors which were critical to the decision in *Handlen* are present in this case. The appellant was tried for an attempt to commit an offence contrary to s 6(1)(a) of the MDA. The jury was correctly instructed of the four elements which together make up liability for that offence. The error was in instructing the jury of the s 11 presumption on the trial of a charge of attempted possession of prohibited drugs with intent to sell or supply to another. It is less clear the extent to which if at all the balance of the direction, including that the jury should give the fourth element a tick, involved legal error. The omission to direct on an element of liability as in *Quartermaine*, or a direction which effectively removes proof of an element from the jury's consideration, may not amount to legal error, much less occasion a substantial miscarriage of justice, if proof of the element was not a live issue in the trial[64].

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61 *Quartermaine v The Queen* (1980) 143 CLR 595 at 598-599.

62 *Quartermaine v The Queen* (1980) 143 CLR 595 at 600.

63 *Quartermaine v The Queen* (1980) 143 CLR 595 at 601.

64 *R v Getachew* (2012) 248 CLR 22 at 36 [35]-[36]; [2012] HCA 10; *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31]-[32]; 295 ALR 624 at 631-632; [2013] HCA 6 citing *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3; *Reeves v The Queen* (2013) 88 ALJR 215 at 224 [51] per French CJ, Crennan, Bell and Keane JJ; 304 ALR 251 at 262.

56 It may be accepted that in any case in which an appellate court concludes that an accused was "not in reality tried for the offences for which he was indicted"[65] there will have been a substantial miscarriage of justice within the meaning of the proviso. And it may also be expected that in such a case there will be a contest as to whether that conclusion is appropriate: to say that an accused has not in reality been tried for the offence for which he or she has been indicted is a vivid way of expressing the conclusion that a misdirection as to the elements of an offence amounts to a substantial miscarriage of justice for the purposes of the proviso, but it does not aid the analysis of whether the error is of such gravity as to warrant that conclusion.

57 A misdirection upon a matter of law is always contrary to law, and it is always a departure from the requirements of a fair trial according to law. But sometimes a misdirection on a matter of law will prevent the application of the proviso; and sometimes it will not. *Krakouer* was a case of a misdirection on a matter of law which reversed the onus of proof in relation to the intent with which the "drugs" were possessed, effectively requiring the jury to find that element established; and yet, were it not for other circumstances of the case, the proviso may have been applied[66]. The question is always whether there has been a substantial miscarriage of justice, and the resolution of that question depends on the particular misdirection and the context in which it occurred.

58 In a trial where no issue arises as to proof of a particular element of the offence charged, and the accused through his or her counsel consents to the removal of that element from the jury's consideration, then it may be that no miscarriage of justice at all will have occurred because of that removal.

Conclusion

59 Senior counsel's evidence is that he would not have consented to a direction that intention was not in issue had he appreciated that s 11 of the MDA did not apply to a charge of attempted possession. Senior counsel did not say that he would have conducted the appellant's case differently in any other respect had he understood the correct position. It is to be observed that the conduct of the appellant's defence at his re-trial was not a tabula rasa: McLure P noted that at the first trial the appellant gave evidence that he went to the Falstaff Crescent

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65 Cf *Quartermaine v The Queen* (1980) 143 CLR 595 at 601.

66 *Krakouer v The Queen* (1998) 194 CLR 202 at 212-213 [23]-[24] per Gaudron, Gummow, Kirby and Hayne JJ.

premises to purchase drugs for personal use[67]. McLure P, rightly, concluded that against this background the inference to be drawn is that a considered and justifiable forensic decision was made not to run a case that the appellant's conduct was consistent with an attempt to possess a small quantity of the drug for his own use. The forensic decision was to squarely focus the jury's attention on the capacity of the State's case to rise above admitted circumstances of suspicion and prove beyond reasonable doubt that the appellant was exercising control and dominion over the "drugs" during the 37 minutes that he spent inside Lothian's home.

60 In the circumstances, it was not wrong for the Court of Appeal to reject the submission that the misdirection was an error of a kind that precluded the application of the proviso by analogy with *Quartermaine* or with cases in which there has been a failure to leave a defence for the jury's consideration. Their Honours were right to hold, consistently with the plurality's analysis in *Krakouer*, that the misdirection was not in any other respect an error of a kind which precludes the application of the proviso. There was no basis in the evidence or in the way the appellant's case was advanced which left open that he may have been in possession of some lesser part of the substitute "drugs" with a view to purchase for his own use. The sole issue in the way the trial was run was proof that the appellant was in possession of, in that he was exercising control (by himself or with Lothian and, perhaps, Tilbrook) over, the substitute "drugs" in the cardboard box. The Court of Appeal was correct to reason that proof beyond reasonable doubt that the appellant attempted to possess nearly 5 kg of 84% pure methylamphetamine compelled the conclusion that it was his intention to sell or supply it to another. And their Honours were correct to hold that the misdirection did not occasion a substantial miscarriage of justice.

Order

61 For these reasons there should be the following order:

Appeal dismissed.

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67 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [27].

62 GAGELER J. In *AK v Western Australia*[68], Gummow and Hayne JJ said:

> "When there has been a trial by jury, and an appellate court concludes that the trial judge made a wrong decision on a question of law or that there was some other miscarriage of justice, deciding whether there has been no substantial miscarriage of justice necessarily invites attention to whether the jury's verdict might have been different if the identified error had not occurred. That is why, if the appellate court is not persuaded beyond reasonable doubt of the appellant's guilt it cannot be said that there was no substantial miscarriage of justice."

63 That explanation puts critical and far too readily misunderstood aspects of the reasoning in *Weiss v The Queen*[69] in perspective. Against the background of the admonition in *Weiss* that "[n]o single universally applicable description of what constitutes 'no substantial miscarriage of justice' can be given"[70], the explanation isolates and prioritises two considerations ordinarily bearing on the application of the proviso to a common form criminal appeal statute in the ordinary case of an appeal against conviction after a trial by jury.

64 First, the explanation acknowledges that the ultimate question ordinarily to be addressed in the application of the proviso is whether the jury's verdict might have been different if the identified error had not occurred. That identification of the ultimate question stems from the foundational principle that "[i]n a trial by jury the jury is the constitutional tribunal for deciding issues of fact"[71]. The identification accords with the pre-*Weiss* explanation in *Wilde v The Queen*[72] that "[u]nless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused … the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled" and that "[t]he loss of such a chance of acquittal cannot be anything but a substantial miscarriage of justice".

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68 (2008) 232 CLR 438 at 457 [59]; [2008] HCA 8.

69 (2005) 224 CLR 300; [2005] HCA 81.

70 (2005) 224 CLR 300 at 317 [44] (emphasis omitted).

71 *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16.

72 (1988) 164 CLR 365 at 372; [1988] HCA 6.

65 The same identification of the ultimate question is reflected in the post-*Weiss* observation in *Filippou v The Queen*[73] that "[b]y 'substantial miscarriage of justice' what is meant is that the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him or her or that there was some other departure from a trial according to law that warrants that description".

66 Second, the explanation provides the context for and identifies the purpose of the "negative proposition", which according to *Weiss* "may safely be offered", that "[i]t cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty"[74]. The negative proposition does not point to some separate appellate inquiry to be pursued without reference to the verdict that has in fact been returned. The jury is at trial, and remains throughout the appellate process, the constitutional tribunal for deciding the criminal guilt of the accused.

67 The negative proposition points instead to an appellate factual assessment to be made by reference to the totality of the record of the trial, mindful of "the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record"[75] and taking into account such inferences of fact as might appropriately be drawn from the fact that the jury returned a verdict of guilty in the blemished trial which in fact occurred[76]. The reason that the appellate court makes its own factual assessment is not that the court substitutes for a reasonable and properly instructed jury as the arbiter of criminal guilt. The reason is that, in the same way as the appellate court is entitled and required to assume that ordinarily "a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced" in determining whether a verdict of guilty was open[77], the appellate court is entitled and required to

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73 (2015) 256 CLR 47 at 55 [15]; [2015] HCA 29 (footnote omitted).

74 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

75 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [40], quoting *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]; [2003] HCA 22.

76 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43]. See also *Cesan v The Queen* (2008) 236 CLR 358 at 395 [128]-[129]; [2008] HCA 52; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [27]-[28]; [2012] HCA 14.

77 *M v The Queen* (1994) 181 CLR 487 at 494; [1994] HCA 63, cited in *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41], fn 64.

"assume that ordinarily if it thinks that the accused must be convicted, so would a reasonable jury" in determining whether a verdict of guilty was inevitable[78].

68 The negative proposition amounts to an acknowledgment that the appellate court's own persuasion of the appellant's guilt will often form a necessary step in the appellate court's reasoning if the appellate court is to reach the conclusion that the jury's verdict of guilty would not have been different had the identified error not occurred. The proposition proceeds on the understanding that the appellate court will often not be able to conclude that the appellant has not been denied a chance of acquittal fairly open other than through a process of reasoning which includes the appellate court's own persuasion of the appellant's guilt.

69 My use of the word "often" is in deliberate contradistinction to "always". Despite the unqualified terms in which the negative proposition was formulated in *Weiss*, that proposition would contradict the admonition in that case and would itself become a source of error were that formulation ever to be "treated as a complete and sufficient paraphrase of the statute"[79]. Because "[i]t is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice"[80], "demonstration that a chain of reasoning can be articulated that would require the verdict reached at trial does not always permit, let alone require, the conclusion that no substantial miscarriage of justice actually occurred"[81]. The appellate court's pursuit of its own chain of reasoning to its own conclusion of guilt, for that reason, cannot be treated as a sufficient condition for the statutory conclusion that no substantial miscarriage of justice has occurred.

70 Nor, despite occasional post-*Weiss* statements which might be interpreted as so suggesting, can an appellate court's own persuasion of guilt always be a necessary condition for the conclusion that no substantial miscarriage of justice has occurred. That the appellate court's own persuasion of guilt will not in every case constitute a necessary step in reasoning to a conclusion that the jury's verdict would not have been different had the identified error not occurred must follow in practical terms from the premise of the reasoning in *Weiss* that the qualifier "substantial" was added to the phrase "miscarriage of justice" for the purpose of overcoming the inconvenience and undue technicality of the prior rule which had

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78 *Festa v The Queen* (2001) 208 CLR 593 at 632 [123]; [2001] HCA 72, cited in *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41], fn 64.

79 *Gassy v The Queen* (2008) 236 CLR 293 at 301 [18]; [2008] HCA 18.

80 *Baini v The Queen* (2012) 246 CLR 469 at 481 [33]; [2012] HCA 59.

81 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [29].

treated "*any* departure from trial according to law, regardless of the nature or importance of that departure" as a "miscarriage of justice"[82]. If any departure from a trial according to law would have the potential to be characterised as a miscarriage of justice, then to meet the mischief to which the addition of the qualifier is directed a threshold of materiality needs sensibly to be introduced into the analysis before any question of the appellate court's persuasion of guilt is reached. There will be cases in which the departure was plainly "innocuous" in that it could have "occasioned no real forensic disadvantage to the appellant"[83].

71 Where the appellate court considers that a wrong decision on a question of law or some other irregularity was material and where the appellate court goes on to consider whether the appellate court can itself be persuaded of guilt, however, what is important to recognise is that the appellate court is engaged throughout in a process of analysis directed to the same ultimate question of whether the identified error denied the appellant a chance of acquittal which was fairly open. The ultimate question remains throughout whether the appellate court can be satisfied that the jury's verdict of guilty would not have been different if the identified error had not occurred or, in other words, that the verdict of guilty was "inevitable" in the sense that, "assuming the error had not been made, the result was bound not to have been any different for the jury if acting reasonably on the evidence properly before them and applying the correct onus and standard of proof"[84].

72 The problem that I think has crept into the application of the proviso to the common form criminal appeal statute in Western Australia as a result of the decision of the Court of Appeal in *Hughes v The State of Western Australia*[85] is that the *Weiss* negative proposition has been elevated to such a level that sight has been lost of that ultimate question. The Court of Appeal's own assessment that an accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty has come to be treated as determining that "no substantial miscarriage of justice has occurred" in the

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82 *Weiss v The Queen* (2005) 224 CLR 300 at 308-309 [18]-[19] (emphasis in original).

83 *Jones v The Queen* (2009) 83 ALJR 671 at 678 [30], [33]; 254 ALR 626 at 634; [2009] HCA 17. Cf *R v Matenga* [2009] 3 NZLR 145 at 157 [30]; *Lundy v The Queen* [2014] 2 NZLR 273 at 291-292 [150].

84 *Lindsay v The Queen* (2015) 255 CLR 272 at 302 [86]; [2015] HCA 16. See also *Castle v The Queen* (2016) 259 CLR 449 at 471-472 [64], 477 [81]; [2016] HCA 46; *R v Dickman* (2017) 91 ALJR 686 at 688 [4]-[5], 697 [63]; 344 ALR 474 at 476, 488; [2017] HCA 24.

85 (2015) 299 FLR 197.

"outcome" of the trial, leaving only for further consideration a separate and distinct question of whether the error was nevertheless one of "process" sufficient in magnitude to warrant the description of a substantial miscarriage of justice[86].

73 Losing sight of the ultimate question to which the Court of Appeal's own persuasion of guilt was directed was, I think, the source of the problem in the present case.

74 Having found that the trial judge made a wrong decision on a question of law in failing to direct the jury that the jury needed to be satisfied beyond reasonable doubt on the evidence adduced at trial that Mr Kalbasi intended to sell or supply what he believed to be a prohibited drug in order to return a verdict of guilty of the offence of attempting to possess the prohibited drug with intent to sell or supply it to another, and accepting the view of the majority in *Krakouer v The Queen*[87] that the fact that there had been a misdirection about one element of the offence did not mean that the trial was so fundamentally flawed as in itself to amount to a substantial miscarriage of justice, the ultimate question which the Court of Appeal was required to address in the application of the proviso became whether it could be satisfied that the jury would have returned a verdict of guilty even if the proper direction had been given. For the purpose of addressing that ultimate question, the Court of Appeal was required to examine the whole of the record of the trial and was entitled to draw from the fact that the jury returned a verdict of guilty on the evidence that had been adduced such inferences as were available in light of the manner in which the prosecution and defence cases had been conducted and the directions that the jury had been given.

75 Although the jury was not directed that it had to be satisfied that Mr Kalbasi had possession of the entire quantity, the all-or-nothing manner in which the prosecution and the defence had conducted their respective cases at trial entitled the Court of Appeal to infer from the jury's verdict that the jury was satisfied beyond reasonable doubt that Mr Kalbasi was in possession of the whole of nearly five kilograms of what Mr Kalbasi believed to be methylamphetamine. What I do not think that the Court of Appeal was entitled to do was to reason from the jury's satisfaction that Mr Kalbasi was in possession of that obviously commercial quantity of what he believed to be methylamphetamine to the conclusion that the jury acting reasonably on the evidence that had been adduced and applying the correct onus and standard of proof would inevitably also have been satisfied that Mr Kalbasi intended to sell or supply it to some other person.

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86 See *Hughes v The State of Western Australia* (2015) 299 FLR 197 at 208-209 [60]-[68].

87 (1998) 194 CLR 202 at 212 [23]; [1998] HCA 43.

76 The reason that I do not think that the Court of Appeal was entitled to reach that conclusion lies in the content of the instructions which the jury had been given as to the meaning of possession. The point is not that those instructions were wrong insofar as they addressed that other element of the offence. The point is that those instructions left the jury with a pathway of reasoning in relation to one element of the offence which allowed the jury to be satisfied that Mr Kalbasi was in possession of the obviously commercial quantity of what he believed to be methylamphetamine, which pathway of reasoning was inconsistent with the inevitability of the jury, if properly instructed in relation to the omitted element of the offence, also being satisfied that Mr Kalbasi intended to sell or supply it.

77 What is significant in that respect is that the trial judge instructed the jury that possession was different from ownership and that the prosecution case was not that Mr Kalbasi was the owner of what he believed to be the methylamphetamine. The trial judge instructed the jury that the prosecution case was limited to a case that Mr Kalbasi was in possession of what he believed to be the methylamphetamine only during the 37-minute period in which Mr Kalbasi remained at Mr Lothian's house at Falstaff Crescent, Spearwood. The prosecution case was that the possession was constituted by Mr Kalbasi then and there exercising control over the substance to the exclusion of everyone else except perhaps Mr Lothian, who may have jointly exercised control over it at the same place during the same period.

78 What is even more significant in that respect is the nature of the control which the trial judge instructed the jury was sufficient to constitute possession during that 37-minute period. After explaining that a person can possess something without having physical custody of that thing, the trial judge explained:

> "Members of the jury, you can also possess something temporarily and even for a limited purpose. As I've said, you can possess something without owning it. For example, if I borrow a book from the local library, obviously I do not own the book but while I have taken it out of the library, it is under my control and is therefore in my possession.
>
> The notion of possession is wide enough to include the case of where I might lend that book to my best friend because they want to read it too.
>
> So the fact that I have taken the book out of the library and have given it to my best friend on the basis that I need to return it to the library is sufficient for me to say that my best friend also has possession of that book while he or she has it in their physical custody or control."

79 The trial judge relevantly continued:

> "Members of the jury, as I've said, the possession need not be exclusive possession in the hands of only one person. It follows that one or more people can be in joint possession of a prohibited drug and I've given you an example of how my best friend is in possession of my library book in that regard.
>
> The question for you is whether or not you are satisfied beyond reasonable doubt that while the accused was in [the house at Falstaff Crescent, Spearwood], he exercised control and dominion over the intended drugs even though, and it's entirely a matter [for] you, it would appear that Mr Lothian was also in possession at the same time."

80 Those directions left the jury with a pathway of reasoning which allowed the jury to be satisfied beyond reasonable doubt that Mr Kalbasi was in possession of the obviously commercial quantity of what he believed to be methylamphetamine simply on the basis that Mr Lothian permitted Mr Kalbasi to have joint control over it during the 37-minute period in which Mr Kalbasi remained at Mr Lothian's house, before which period Mr Kalbasi need have had no control over it and at the end of which period Mr Kalbasi may have relinquished control over it to Mr Lothian. And if the jury as so instructed was able to follow that pathway of reasoning in reaching the state of satisfaction as to possession which the jury must have reached, it does not follow from the jury's satisfaction that Mr Kalbasi was in possession of the substance that if the jury had also been properly instructed as to intention the jury acting reasonably on the evidence and applying the correct onus and standard of proof would also have been satisfied that Mr Kalbasi intended to sell or supply that substance.

81 Indeed, had the jury embraced the library book analogy proffered by the trial judge to be satisfied of Mr Kalbasi's possession, it is difficult to see how the jury acting reasonably on the evidence and applying the correct onus and standard of proof could also have been satisfied that Mr Kalbasi intended to sell or supply what he believed to be the methylamphetamine. The possession involved in borrowing a book from a friend for a short period and in circumstances where the mutual expectation is that the book will be returned to the friend so that the friend can return it to the library is possession of a materially different character from the possession involved in holding a book with the intention of selling it to some other person. The two forms of possession are mutually exclusive. A person cannot possess a book with the intention of returning it to a friend so that the friend can do something else with it and at the same time possess the same book with the intention of selling it to someone else.

82 The Court of Appeal's own satisfaction that the evidence adduced at the trial established beyond a reasonable doubt that Mr Kalbasi exercised control

over the whole of what he believed to be the methylamphetamine with the intention to sell or supply it to another[88], expressed in the context of considering the effect of the erroneous direction on the "outcome" of the trial, was insufficient to allow the Court of Appeal to be satisfied that the jury would have returned a verdict of guilty if the proper direction had been given. And contrary to the view which the Court of Appeal went on to express in the context of its separate consideration of the effect of the erroneous direction on the "process" of the trial[89], once Mr Kalbasi was found to have possessed the obviously commercial quantity of what he believed to be methylamphetamine, it was not "inconceivable" that the jury could not have been satisfied beyond reasonable doubt that he possessed that substance with an intention to sell or supply it to another. Had the jury been properly instructed in relation to the omitted element of the offence, it would have been open to the jury not to have been so satisfied. The conviction was not inevitable.

83 The Court of Appeal was wrong to conclude that no substantial miscarriage of justice occurred as a result of the trial judge's failure to direct the jury as to the need to be satisfied beyond reasonable doubt of Mr Kalbasi's intention to sell or supply what he believed to be methylamphetamine. The appeal should be allowed.

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88 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [206].

89 *Kalbasi v The State of Western Australia* [2016] WASCA 144 at [214].

84 NETTLE J. Following a retrial before a judge and jury in the District Court of Western Australia, the appellant ("Kalbasi") was convicted of one count of attempting to possess a prohibited drug (methylamphetamine) with intent to sell or supply it to another contrary to ss 6(1)(a) and 33(1) of the *Misuse of Drugs Act* 1981 (WA). The offence was one of attempting to possess with intent to sell or supply, rather than possession with intent to sell or supply, because, unknown to Kalbasi, the package containing the prohibited drug had been intercepted by police and replaced with rock salt before delivery. Kalbasi appealed against conviction to the Court of Appeal of the Supreme Court of Western Australia but his appeal was dismissed. By grant of special leave, he now appeals to this Court. The issue is whether the Court of Appeal erred in holding that, although the trial judge misdirected the jury as to the application of s 11 of the *Misuse of Drugs Act*, there was no substantial miscarriage of justice within the meaning of s 30(4) of the *Criminal Appeals Act* 2004 (WA). For the reasons which follow, the misdirection was productive of a substantial miscarriage of justice and the appeal should be allowed.

Relevant statutory provisions

85 Section 6(1)(a) of the *Misuse of Drugs Act* relevantly provides that a person who has in his or her possession a prohibited drug with intent to sell or supply it to another commits a crime.

86 Section 11 of the *Misuse of Drugs Act* provides that, unless the contrary is proved, a person shall be deemed to have in his or her possession a prohibited drug with intent to sell or supply it to another if the person has in his or her possession a quantity of the prohibited drug which is not less than the quantity specified in Sched V in relation to the prohibited drug. In the case of methylamphetamine, the quantity specified in Sched V is two grams[90].

87 Section 34(1)(a) of the *Misuse of Drugs Act* provides that a person who is convicted of a crime under s 6(1) is liable to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 25 years or both.

88 Section 30(3) of the *Criminal Appeals Act* relevantly provides that the Court of Appeal must allow an appeal against conviction if in its opinion the conviction should be set aside because of a wrong decision on a question of law by the judge or if in its opinion there was a miscarriage of justice.

89 Section 30(4) of the *Criminal Appeals Act* provides that, despite s 30(3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage

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90 *Misuse of Drugs Act* 1981 (WA), Sched V, item 82.

of justice has occurred. Section 30(4) is the Western Australian statutory form of the common form proviso.

The facts

90 On 12 November 2010, police executed a search warrant at a freight company's premises in Sydney. Therein they located a cardboard box for consignment to the freight company's office in Perth, with a delivery instruction endorsed on the consignment note to call "James Walker" on telephone number 0403-717-731 ("the 731 number"). Inside the cardboard box were two padlocked yellow plastic toolboxes, each containing five sealed plastic bags of methylamphetamine. Subsequent analysis revealed that the total weight of the methylamphetamine was 4.981 kilograms with a purity of 84 percent and a potential street value of up to $5 million. On 14 November 2010, police took the cardboard box to Perth and replaced the packages of methylamphetamine with packages of rock salt. The box was then reconstructed with a listening device concealed inside it.

91 On 15 November 2010, police observed one Matthew David Lothian ("Lothian") attempt to collect the cardboard box from the freight company's premises in Perth. By arrangement with police, the freight company told Lothian that he should return the following day. Police later followed Lothian and watched him enter a house in Falstaff Crescent, Spearwood ("the Falstaff Crescent premises"). They also observed him making two telephone calls from a public telephone box.

92 On 16 November 2010, police observed Lothian driving a car towards the freight company's premises. On his way there, the car ran out of petrol and so he took a taxi for the remainder of the journey. He arrived at the freight company's premises by taxi at about 2:15 pm, and was there seen to be using a white mobile telephone. He took delivery of the cardboard box and placed it in the back of the taxi. From there, he travelled in the taxi to a petrol station, where he purchased a jerry can of fuel, and then back to the car to refuel it. At about 3:09 pm, Lothian arrived in the car at the Falstaff Crescent premises and, at around 3:16 pm, he was seen by undercover police carrying the cardboard box inside the premises.

93 At approximately 3:20 pm, Kalbasi arrived at the Falstaff Crescent premises on a bicycle. About 18 minutes later, Lothian's girlfriend, Tilbrook, was seen leaving the premises, and, at the same time, Lothian was seen outside the premises for a short period of time. During that time, Kalbasi remained inside the premises alone.

94 When Lothian and Kalbasi were inside the Falstaff Crescent premises, the listening device picked up sounds consistent with the cardboard box being opened and the locks on the toolboxes being cut. It also recorded Lothian recounting to Kalbasi how Lothian's car had run out of petrol and stopped about

50 metres short of "the servo". Lothian told Kalbasi that it had happened after Lothian first texted Kalbasi. After some time, at approximately 3:40 pm, Kalbasi asked Lothian for a pipe. About 10 minutes later, Kalbasi was heard to say to Lothian "Don't move. I'll come back".

95 At approximately 3:57 pm, Kalbasi was seen leaving the Falstaff Crescent premises and riding his bicycle into a large park. He appeared to make a mobile telephone call. Two police officers in an unmarked police vehicle pursued him as he rode through the park. One of the officers said that Kalbasi looked in his direction, stopped pedalling for a second, and then continued to ride away. The other officer shouted out "Police, stop", but Kalbasi did not stop. As the police vehicle got closer to Kalbasi, the officer yelled out again "Police, stop", at which point Kalbasi fell off his bicycle. The police vehicle then collided with the bicycle and the officer yelled out for a third time "Police, stop". Kalbasi ran off with both police officers in pursuit and was eventually caught and arrested.

96 At 4:00 pm, police entered the Falstaff Crescent premises. Lothian was alone inside the premises. The living room of the premises was in close proximity to the kitchen and it was possible to see the living room from the kitchen and vice versa. The opened cardboard box was in the living room and the opened toolboxes were in the kitchen. A pair of bolt cutters was close by. One bag of rock salt was found in a beer carton that was used as a makeshift bin. There were also plastic clip-seal bags and two broken padlocks in the box. The other nine bags of rock salt were found on the bottom shelf of a kitchen cupboard. The plastic outer wrapping of the 10 bags of rock salt was in the kitchen sink. There were four clean bowls, three sets of digital scales and a box of disposable gloves on the kitchen sink. A substance commonly used to cut methylamphetamine was in a baking dish on the stove.

97 Police found two pairs of worn disposable gloves on the kitchen sink – in the case of one pair, one glove was inside the other – and a third pair on a table in the hallway. Each glove was subjected to DNA testing. A mixed DNA profile was detected on both of the gloves found in the hallway. It matched Tilbrook and Lothian, and Kalbasi could be excluded as a contributor. Likewise, a mixed DNA profile was detected on one of the pairs of gloves found on the kitchen sink. It matched Tilbrook and Lothian, and Kalbasi could be excluded as a contributor. The inside of one of the gloves of the other pair found on the kitchen sink yielded a mixed DNA profile, but the contributors could not be determined. The outside of that glove, however, yielded a mixed DNA profile, and it was 100 billion times more likely than not that Kalbasi was a contributor. Tilbrook and Lothian were excluded as contributors. The inside of the other glove of that pair also yielded a mixed DNA profile, and it was 100 billion times more likely than not that Kalbasi was one of the contributors. Tilbrook could not be excluded as a contributor, although it was likely that she was not one, and the testing was inconclusive with respect to Lothian. A mixed DNA profile was

recovered from the outside of that glove but the number of contributors could not be determined.

98 A white BlackBerry mobile telephone was found in a room used to store tools. It had a PIN lock that prevented the stored information from being downloaded but it appeared to be similar to the white mobile telephone that Lothian was seen using at the freight company's premises. Police also found documents at the Falstaff Crescent premises that showed that Lothian had flown from Perth to Sydney on 11 November 2010.

99 On 18 November 2010, Kalbasi was released on bail. He was collected from Hakea Prison by one Tassone and taken to Kalbasi's home in Kintail Road, Applecross. Later that day, police executed a search warrant at those premises. Kalbasi, Tassone and a woman believed to be Kalbasi's wife were present. A number of mobile telephones and a BlackBerry mobile telephone charger were seized, although no BlackBerry mobile telephone was found. Travel documents found at the premises indicated that Kalbasi had flown from Perth to Sydney on 3 November 2010 and returned to Perth on 13 November 2010.

100 Police examined the mobile telephones seized from Tilbrook and Tassone. Examination of Tilbrook's mobile telephone showed that there were three calls from the 731 number: two on 10 November 2010 and one on 17 November 2010. There was also a message received on 10 November 2010 saying "Hey mate, this is the number you can get me on". It was apparent that Lothian had used Tilbrook's mobile telephone. Examination of Tassone's mobile telephone showed that it included the contact details of Kalbasi and Kalbasi's wife and also a record of an incoming call from the 731 number on 9 November 2010. There was, too, a record of a text message between Tassone's mobile telephone and Kalbasi's wife's mobile telephone on 17 November 2010, the day after Kalbasi was arrested.

Prosecution case at trial

101 The prosecution's case at trial was that, during the period that Kalbasi was in the Falstaff Crescent premises on 16 November 2010, he attempted to possess the whole quantity of methylamphetamine in the cardboard box, either as sole possessor or jointly with, at least, Lothian. The case presented was largely circumstantial and comprised of evidence of the facts that have been referred to, the DNA evidence, and evidence of what was said to be consciousness of guilt by reason of Kalbasi's flight from police. The prosecution contended that the methylamphetamine found in the cardboard box in Sydney had been destined to go to Kalbasi or to a group of persons of whom Kalbasi was one. The prosecution argued that it was to be inferred from the evidence that Kalbasi and Lothian were in the process of cutting what they believed to be methylamphetamine when Kalbasi sampled the substance with a pipe borrowed from Lothian and discovered that it was not what he had been expecting. Kalbasi

then left the house in a hurry to go and sort out what he perceived to be a problem, with the intention of later returning. That was said to be evidenced by Kalbasi's instruction to Lothian "Don't move" followed by the statement "I'll come back". It was further contended that it was apparent that Kalbasi had fled from the police in the park after the police identified themselves as such and told Kalbasi to stop, because Kalbasi knew that he was guilty of attempting to possess the methylamphetamine and wanted to escape the consequences.

Defence case at trial

102 Kalbasi did not give or call evidence or advance a positive defence. His case was limited to putting the prosecution to proof. That included referring to evidence given by the prosecution's DNA expert as to the possibility of secondary transfer of DNA from a source to an object by way of an intermediary. Defence counsel submitted to the jury that, although Kalbasi was at the Falstaff Crescent premises, the jury could not be satisfied beyond reasonable doubt that he was involved in Lothian's possession of the "drug".

The impugned direction

103 As was earlier noticed, s 11 of the *Misuse of Drugs Act* provides that, for the purposes of s 6(1)(a), if a person has in his or her possession a quantity of a prohibited drug no less than the quantity specified in Sched V (in this case, two grams) the person shall be deemed to have the drug in his or her possession with intent to sell or supply it to another. The decision of this Court in *Krakouer v The Queen*[91] established, however, that such a provision does not apply to an offence of attempting to possess a drug with intent to sell or supply it to another. Nonetheless, in this case, the prosecutor, defence counsel and the trial judge all proceeded upon the mistaken view that s 11 did apply. As a consequence of the error, the trial judge misdirected the jury with respect to the element of intent as follows:

> "I'm now going to deal with the fourth element upon the jury aid[e], that [Kalbasi] intended to sell or supply the prohibited drug or any part of it to another. Members of the jury, you can give that element a tick. It is not an issue for you in this trial.
>
> Very briefly, the law is that if you are found in possession of more than two grams of [methylamphetamine] then you are presumed to be in

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91 (1998) 194 CLR 202 at 210-211 [17]-[18] per Gaudron, Gummow, Kirby and Hayne JJ, 221 [53]-[56] per McHugh J; [1998] HCA 43. See also *Do v The State of Western Australia* [2014] WASCA 218 at [28] per Mazza JA (McLure P and Hall J agreeing at [1], [103]).

possession with intent to sell or supply it to another and the onus is on you to remove that presumption.

There is no issue in this trial about the fourth element and as I've said it will not delay your deliberations. You must be satisfied beyond reasonable doubt about the fourth element. You do not need to concern yourself with where the drugs might have gone, how they might have got there, when they might have been moved or whatever. It's simply not relevant to your deliberations for the purpose of this trial. The fourth element is proved beyond reasonable doubt and you should give it a tick."

104 The "jury aide" was a document handed to the jury to assist them in following the trial judge's oral directions. It was as follows:

"**JURY AIDE**

The elements outlined below are generic and you must consider the terms of the particular count on the indictment that you are considering.

To prove the offence was committed by the accused at the time and place alleged the State must prove each of the following elements beyond reasonable doubt:

Attempted possession of a prohibited drug with intent to sell or supply

1. The offender was the accused (identity);

2. The substance with which the charge is concerned is a prohibited drug;

3. The accused attempted to possess that prohibited drug; and

4. The accused intended to sell or supply the prohibited drug, or any part of it, to another.

'to possess' - includes to control or have dominion over, and to have the order or disposition of, and inflections and derivatives of the verb 'to possess' have correlative meanings."

Proceedings before the Court of Appeal

105 Kalbasi appealed to the Court of Appeal on six grounds, all but one of which were rejected[92]. Relevantly, ground 1 was that the trial judge misdirected

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92 *Kalbasi v The State of Western Australia* [2016] WASCA 144.

the jury as to the application of s 11 of the *Misuse of Drugs Act*. The Court of Appeal (McLure P, Mazza and Mitchell JJA) accepted[93] that the direction was contrary to law but held that it was not productive of a substantial miscarriage of justice.

106 McLure P reasoned that the sole live issue between the parties at trial was whether Kalbasi was in control of the intended drugs (jointly with Lothian)[94], and emphasised that[95]:

> "[I]t was no part of the defence case in opening (or thereafter) that [Kalbasi's] conduct in going to Lothian's house and his activities therein were consistent with an intention to purchase a small quantity of methylamphetamine for his own use, subject to satisfying himself (by testing or sampling) as to its quality."

Her Honour concluded[96]:

> "[O]nce the jury found that [Kalbasi] was in possession of the intended drugs, a finding that he was in possession with an intention to sell or supply to another was, having regard to the very large quantity of high purity drugs, inevitable. I am satisfied that the jury verdict of guilty is correct, that the s 11 error and [Kalbasi's] concession [that s 11 applied] could and should have no effect on the verdict and that the retrial was fair in all respects. Accordingly, there has been no substantial miscarriage of justice."

107 In a separate joint judgment, Mazza and Mitchell JJA reasoned differently but to the same conclusion. Their Honours began[97] with the observation that *Weiss v The Queen*[98] remains the leading authority on the proviso and that, as *Weiss* had been interpreted by the Court of Appeal in *Hughes v The State of Western Australia*[99], it requires consideration of two aspects: "the outcome

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93 See *Kalbasi v WA* [2016] WASCA 144 at [9]-[10], [30] per McLure P, [98], [217] per Mazza and Mitchell JJA.

94 *Kalbasi v WA* [2016] WASCA 144 at [15].

95 *Kalbasi v WA* [2016] WASCA 144 at [27].

96 *Kalbasi v WA* [2016] WASCA 144 at [30].

97 *Kalbasi v WA* [2016] WASCA 144 at [179].

98 (2005) 224 CLR 300; [2005] HCA 81.

99 (2015) 299 FLR 197 at 208 [61].

aspect" and "the process aspect". In *Hughes*, the outcome aspect was said to involve the appellate court deciding for itself on the basis of the whole of the record of the trial whether, apart from the error, the accused was proved guilty beyond reasonable doubt, and "whether the error ... would, or at least should, have had no significance in determining the verdict that was returned by the trial jury"[100]. The process aspect was said to direct attention to whether there had been such a departure from the prerequisites of a fair trial as to constitute a substantial miscarriage of justice[101].

108 Dealing first with the outcome aspect, Mazza and Mitchell JJA stated[102] that, upon an examination of the whole of the evidence, they were "satisfied beyond reasonable doubt of [Kalbasi's] guilt of the offence with which he was charged". They summarised their conclusions in that regard thus[103]:

> "[I]n the 37 minutes that [Kalbasi] was in the premises at Falstaff Crescent, the cardboard box containing a very large and valuable consignment of 'drug' was opened, the bags were removed from the toolboxes, preparations were made to cut the drug, [Kalbasi] sampled it and, when he saw that there was a problem, he undertook to deal with it.
>
> ... We are satisfied that the evidence [of flight] established that [Kalbasi] did flee from [the police], and that he did so out of a consciousness of guilt for the offence with which he was charged.
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> ...
>
> While it is the case that [Lothian], and perhaps [Tilbrook], exercised control over the drug, we are satisfied beyond reasonable doubt that [Kalbasi] also exercised control. We are further satisfied beyond reasonable doubt that he exercised control over the entire 4.981 kg of 'methylamphetamine' and not over some much smaller quantity consistent with a mere sample. Given the quantity and value of the drug, it is inconceivable that [Kalbasi] would possess them without an intention to sell or supply them to another."

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100 (2015) 299 FLR 197 at 209 [64]-[65].

101 (2015) 299 FLR 197 at 209 [67]-[68].

102 *Kalbasi v WA* [2016] WASCA 144 at [206].

103 *Kalbasi v WA* [2016] WASCA 144 at [203]-[204], [206].

109 Turning then to the process aspect, the plurality observed[104] that, in contradistinction to *Krakouer*, in this case the charge of attempting to possess the drug with intent to sell or supply stood alone and the sole issue at trial was possession and, in particular, whether Kalbasi controlled the "drug" in the cardboard box. It followed, their Honours reasoned[105], that, although the misdirection as to the application of s 11 was a misdirection as to an element of the offence charged, it was not analogous to a failure to leave a defence to the jury, and the trial was not flawed in such a way as to preclude the application of the proviso. Their Honours concluded[106]:

> "Once [Kalbasi] was found to have possessed the 4.981 kg of 'methylamphetamine' it was inconceivable that the jury could not have been satisfied beyond reasonable doubt that [Kalbasi] possessed the substance with an intent to sell or supply it to another."

The parties' contentions

110 Before this Court, Kalbasi contended that the Court of Appeal erred in its application of *Weiss*. Counsel for Kalbasi submitted that the central consideration in the application of the proviso is the nature of the error, misdirection or complaint in issue, and that the Court of Appeal erred by failing sufficiently to take the nature of the error into account. In particular, by dividing consideration of the application of the proviso into outcome and process aspects, and dealing with the outcome aspect separately, the plurality determined the outcome aspect solely on the basis that they were satisfied beyond reasonable doubt that Kalbasi was guilty. By so proceeding, the plurality failed to take into account that the misdirection denied Kalbasi procedural fairness or at least deprived him of the right of having a substantial part of his case decided by the jury, namely, the possibility that he may have attended the Falstaff Crescent premises merely to sample the "methylamphetamine" and so possessed no more than a small quantity of the substance for that limited purpose. Counsel for Kalbasi accepted that the trial judge's directions were adequate in relation to possession as such. But counsel contended that they were of such breadth that there could be no certainty as to what the jury may have concluded regarding the amount possessed or, therefore, as to whether the jury would have been satisfied of Kalbasi's intent to sell or supply it.

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104 *Kalbasi v WA* [2016] WASCA 144 at [212]-[213].

105 *Kalbasi v WA* [2016] WASCA 144 at [213]-[214].

106 *Kalbasi v WA* [2016] WASCA 144 at [214].

111 In response, the State of Western Australia as respondent to the appeal contended that the plurality were correct in following the *Hughes* two-part approach to the application of the proviso and correct in their application of the proviso for the reasons which the plurality gave. The sole issue at trial was whether Kalbasi attempted to possess the whole of the quantity of the prohibited drug. It was not suggested that Kalbasi may have possessed some part of the "drug" and not the remainder. His defence was that he had not possessed any. Consistently with that being so, it was said that the effect of the trial judge's directions was that the jury were to consider whether they were satisfied beyond reasonable doubt that Kalbasi had control or dominion, and intended to have control or dominion, over the whole of the "drug". In those circumstances, the s 11 misdirection was irrelevant. It did not bear on the jury's consideration of whether or not Kalbasi had possessed the whole of the "drug". It went only to the question of whether he possessed the whole of the "drug" for the purposes of sale or supply to another. And, given the large quantity of "drug" involved, it was impossible to suppose that Kalbasi had possessed it for any purpose other than sale or supply to another.

The meaning of *Weiss*

112 *Weiss* laid down three fundamental propositions[107]. First, in applying the proviso, an appellate court must itself decide whether a substantial miscarriage of justice has occurred. Secondly, the task is not an exercise in speculation or prediction: it is an objective inquiry not materially different from other appellate tasks and it is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial. Thirdly, the standard of proof is proof beyond reasonable doubt. Those three fundamental propositions are well known and well understood.

113 *Weiss* also provided a detailed explication of those three fundamental propositions which, however, it sometimes appears is not as well known or understood. For present purposes, it may be summarised thus:

(1) There is no single universally applicable description of what constitutes a substantial miscarriage of justice[108].

(2) In each case, it is a necessary, but not a sufficient, condition of the application of the proviso that the appellate court be satisfied beyond reasonable doubt on the whole of the record that the

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107 (2005) 224 CLR 300 at 315 [39].

108 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

accused was proved guilty of the offence of which he or she was convicted[109].

(3) The fact that a jury has returned a verdict of guilty is relevant, but it is necessary to keep in mind the burden and standard of proof[110].

(4) References to inevitability of result or the loss of a fair or real chance of acquittal are useful in emphasising the high standard of proof of criminal guilt. They are also useful as pointers to the natural limitations that attach to proceeding wholly or substantially on the record[111].

(5) There are cases where it is possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the jury[112].

(6) Equally, there are cases, perhaps many cases, where the natural limitations of proceeding wholly or substantially on the record require the appellate court to conclude that it cannot be satisfied that a substantial miscarriage of justice has not occurred[113].

(7) There may also be cases where, although the appellate court is satisfied on the whole of the record that the accused has been proved guilty beyond reasonable doubt, it is not proper to dismiss the appeal[114].

Subsequent cases

114 Decisions of this Court since *Weiss* have affirmed and elucidated those insights. For example, in *AK v Western Australia*[115], Gummow and Hayne JJ observed that *Weiss* identified one circumstance in which the proviso cannot be

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109 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

110 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

111 *Weiss v The Queen* (2005) 224 CLR 300 at 315-316 [40].

112 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

113 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41].

114 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45].

115 (2008) 232 CLR 438 at 455 [53]; [2008] HCA 8.

engaged: where the appellate court is not persuaded that the evidence properly admitted at trial proved the accused guilty beyond reasonable doubt of the offence of which he or she was convicted. Their Honours emphasised that that negative proposition must not be treated as if it were a positive statement of what suffices to show that no substantial miscarriage of justice has occurred.

115 Similarly, in *Baiada Poultry Pty Ltd v The Queen*[116], the plurality made the point that what *Weiss* laid down was a negative proposition that the proviso cannot be engaged unless the appellate court is persuaded that the evidence properly admitted at trial established the guilt of the accused beyond reasonable doubt. It is not a sufficient condition of the application of the proviso. Hence, the fact that it is possible to articulate a chain of reasoning which would require the verdict reached at trial does not always permit, let alone require, the conclusion that no substantial miscarriage of justice occurred.

116 In *Pollock v The Queen*[117], the Court took up the point made in *Weiss* that references to the loss of a fair or real chance of acquittal are sometimes useful in emphasising the high standard of proof of criminal guilt and as pointers to the natural limitations that attach to proceeding wholly or substantially on the record. The Court resolved the appeal accordingly, in light of the way in which the parties had put their cases at trial, on the basis that "it [could not] be said that the misdirection did not deprive the appellant of a chance fairly open to him of being acquitted".

117 In *Castle v The Queen*[118], the Court rejected the application of the proviso in accordance with the recognition in *Weiss* that, in some cases, the natural limitations of proceeding on the record preclude a conclusion that guilt was proved beyond reasonable doubt.

118 In *Baini v The Queen*[119], the Court emphasised the significance that *Weiss* attributed to notions of inevitability of result and loss of a fair or real chance of acquittal in drawing attention to the high standard of proof of criminal guilt and as pointers to the natural limitations that attach to proceeding wholly or substantially on the record. As the majority said in *Baini*, to ask whether an error

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116 (2012) 246 CLR 92 at 104 [29] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

117 (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35.

118 (2016) 259 CLR 449 at 473 [68] per Kiefel, Bell, Keane and Nettle JJ (Gageler J agreeing at 477 [82]); [2016] HCA 46.

119 (2012) 246 CLR 469 at 480-482 [30]-[35] per French CJ, Hayne, Crennan, Kiefel and Bell JJ, 493 [65]-[66] per Gageler J; [2012] HCA 59.

"could have reasonably made a difference" or to ask whether an error or irregularity is "fundamental" is simply to ask in different language the statutory question which must be answered: whether there has been a "substantial miscarriage of justice"[120]. Another way to express the same question is to ask[121]:

> "[w]hether, having regard to the whole of the evidence at trial, the [appellate court] could conclude that the verdicts the jury returned ... were inevitable (because the jury could not have entertained a reasonable doubt)".

119 By contrast, in *Reeves v The Queen*[122], the Court reiterated the point made in *Weiss* that there are cases where, upon a consideration of the whole of the record, it is possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the jury. Hence, where a legal error made at trial consists of a misdirection relating to an element of liability, the significance of the verdict is to be assessed in light of the capacity of the misdirection to have led the jury wrongly to reason to guilt. In *Reeves*, it was concluded[123] that the misdirection could not, in that case, have distracted the jury from properly determining the one issue that was presented for consideration.

120 More generally, since *Weiss* each of this Court's decisions regarding the proviso has confirmed and reinforced the essential significance of *Weiss* that there is no single universally applicable description of what constitutes a substantial miscarriage of justice.

121 Counsel for Kalbasi submitted that some of the decisions of this Court since *Weiss* have significantly departed from the approach to the proviso dictated by *Weiss* – substituting pre-*Weiss* conceptions of whether it was open to a jury to acquit or whether conviction was inevitable – with the result that the present status of *Weiss* is unclear or at least not easy to reconcile with those subsequent decisions.

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120 (2012) 246 CLR 469 at 482 [35].

121 *Baini v The Queen* (2012) 246 CLR 469 at 484 [40].

122 (2013) 88 ALJR 215 at 223-224 [50] per French CJ, Crennan, Bell and Keane JJ (Gageler J relevantly agreeing at 226 [63]); 304 ALR 251 at 261, 264; [2013] HCA 57.

123 (2013) 88 ALJR 215 at 225 [58] per French CJ, Crennan, Bell and Keane JJ (Gageler J relevantly agreeing at 226 [63]); 304 ALR 251 at 263, 264.

122 That submission should be rejected. Of course, *Weiss* must be applied in light of what this Court has said about it in subsequent decisions. But there has not been anything said in subsequent decisions that was not grounded in *Weiss*. By and large, where difficulties have arisen in the application of *Weiss* they have been the result of intermediate appellate courts mistreating the "negative proposition" that the proviso cannot be applied unless the appellate court is satisfied beyond reasonable doubt upon the whole of the record that an accused was proved guilty as if it were a positive, sufficient condition of the application of the proviso.

The application of *Weiss* in light of subsequent cases

123 As was held in *Weiss*[124], it remains that the starting point for an appellate court's consideration of the application of the proviso is for the appellate court to undertake the task of deciding for itself upon the whole of the record whether the accused was proved guilty beyond reasonable doubt of the offence of which he or she was convicted. And as was stressed in *Weiss*, that requires the appellate court to undertake an objective consideration of the evidence in light of the issues presented at trial in order to determine whether the evidence adduced at trial did or did not establish guilt beyond reasonable doubt.

124 It also remains that, in some cases, it will emerge as a result of that exercise that the error made at trial would, or at least should, have been of no significance in determining the verdict that was returned by the jury. In other cases, the natural limitations of proceeding wholly or substantially on the record will, or at least should, lead the appellate court to conclude that it cannot be satisfied that a substantial miscarriage of justice has not occurred. Hence, as was observed in *Weiss*, conceptions of inevitability of result and loss of a fair or real chance of acquittal are likely to assist in emphasising the high standard of proof of criminal guilt and pointing to the natural limitations that attach to an appellate court proceeding wholly or substantially on the record. *Baini* and *Castle* are recent examples.

125 In *Evans v The Queen*[125], Gummow and Hayne JJ characterised cases in the latter category as those in which the proviso cannot be engaged because the processes designed to allow the jury's fair assessment of the issues have not been followed at trial. In *Evans*, that was so because errors made by the trial judge undermined the accused's defence and, in an important respect, prevented the accused fully putting his defence[126]. Other examples have consisted of a trial

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124 (2005) 224 CLR 300 at 316-317 [41], [43]-[44].

125 (2007) 235 CLR 521 at 534 [42]; [2007] HCA 59.

126 (2007) 235 CLR 521 at 536 [51] per Gummow and Hayne JJ (Kirby J relevantly agreeing at 536 [54]).

judge improperly foreclosing a jury's fair consideration of an available defence[127]; a trial judge failing to alert a jury as to an available defence[128]; a trial judge failing to sever an indictment[129]; and a trial judge failing sufficiently to direct a jury as to the need to be satisfied beyond reasonable doubt of an element of the offence charged[130]. Accordingly, as was emphasised in *AK*[131] and *Baiada*[132], where an error has been made at trial, the process of an appellate court deciding whether it is satisfied beyond reasonable doubt on the whole of the record that the accused was proved guilty of the offence charged must begin with the identification of the nature of the error[133].

126 Additionally, as was recognised in *Weiss*, there will also be cases where it emerges that, although the appellate court is satisfied that the accused was proved guilty beyond reasonable doubt, there has been such a departure from the requirements of a fair trial that it is not proper to dismiss the appeal. *Weiss* posited a denial of procedural fairness by way of example[134]. *Cesan v The*

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127 See *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; *Lindsay v The Queen* (2015) 255 CLR 272 at 276 [4] per French CJ, Kiefel, Bell and Keane JJ, 302 [87]-[88] per Nettle J; [2015] HCA 16. See and compare *Filippou v The Queen* (2015) 256 CLR 47 at 68 [60] per French CJ, Bell, Keane and Nettle JJ, 81-82 [99] per Gageler J; [2015] HCA 29.

128 See *Quartermaine v The Queen* (1980) 143 CLR 595 at 601-602 per Gibbs J (Stephen J and Murphy J agreeing at 602, 613); [1980] HCA 29; *Gilbert v The Queen* (2000) 201 CLR 414 at 422-423 [21] per Gleeson CJ and Gummow J, 439-440 [93] per Callinan J (McHugh J and Hayne J dissenting at 424-425 [28], 430-431 [49]); [2000] HCA 15; *Gillard v The Queen* (2003) 219 CLR 1 at 15 [29] per Gleeson CJ and Callinan J, 16 [34] per Gummow J, 33 [95]-[97] per Kirby J, 42 [134] per Hayne J; [2003] HCA 64.

129 See *Baini v The Queen* (2012) 246 CLR 469 at 483-484 [39]-[40] per French CJ, Hayne, Crennan, Kiefel and Bell JJ (Gageler J dissenting at 496-497 [78]).

130 See *Quartermaine v The Queen* (1980) 143 CLR 595 at 601-602 per Gibbs J (Stephen J and Murphy J agreeing at 602, 613); *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 107 [38]-[39] per French CJ, Gummow, Hayne and Crennan JJ, 115 [71] per Heydon J.

131 (2008) 232 CLR 438 at 452 [42] per Gummow and Hayne JJ.

132 (2012) 246 CLR 92 at 105 [30] per French CJ, Gummow, Hayne and Crennan JJ.

133 See and compare *Carney v The Queen* (2011) 217 A Crim R 201 at 223 [102].

134 (2005) 224 CLR 300 at 317 [45].

Queen[135] is a more recent example, where the departure from the requirements of a fair trial was a trial judge going to sleep on the job.

127 In summary, the test is not whether the appellate court is satisfied that the evidence was sufficient to establish the accused's guilt beyond reasonable doubt, or whether there has been a fundamental departure from the requirements of a fair trial. It is whether there has been no substantial miscarriage of justice[136]. The appellate court's satisfaction of guilt beyond reasonable doubt is a necessary condition of the engagement of the proviso but, depending on the circumstances of a given case, it may not be open to an appellate court to be satisfied of guilt beyond reasonable doubt if the processes designed to allow the jury's fair assessment of the issues have not been followed[137]. The exercise is not, however, constrained by a rigid taxonomy or bright line distinctions. As was recognised in *Weiss*[138], and emphasised in *AK*[139] and *Evans*[140], a failure to follow trial processes may preclude an appellate court being satisfied of guilt beyond reasonable doubt whether or not the failure is perceived as so extreme as to warrant description as a "serious breach of the presuppositions of the trial"[141], as a "radical departure from the requirements of a fair trial"[142], or as rendering the proceeding

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135 (2008) 236 CLR 358 at 388-389 [97] per French CJ, 395 [127], [130] per Hayne, Crennan and Kiefel JJ (Gummow J and Heydon J agreeing at 391 [107], 396 [133]); [2008] HCA 52.

136 See and compare *AK v Western Australia* (2008) 232 CLR 438 at 452 [42], 457 [59] per Gummow and Hayne JJ.

137 See *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]-[45].

138 (2005) 224 CLR 300 at 317-318 [45]-[46].

139 (2008) 232 CLR 438 at 452 [42], 455-456 [54] per Gummow and Hayne JJ.

140 (2007) 235 CLR 521 at 533 [39] per Gummow and Hayne JJ.

141 See *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46]. See and compare *Darkan v The Queen* (2006) 227 CLR 373 at 399 [84], 401-402 [94] per Gleeson CJ, Gummow, Heydon and Crennan JJ; [2006] HCA 34.

142 See *Evans v The Queen* (2007) 235 CLR 521 at 534 [42] per Gummow and Hayne JJ.

"fundamentally flawed" and going to "the root of the proceedings"[143]. In each case it is a question of degree. As Gummow and Hayne JJ stated in *Evans*[144]:

> "The graver the departure from the requirements of a fair trial, the harder it is for an appellate court to conclude that guilt is established beyond reasonable doubt. It is harder because the relevant premise for the debate about the proviso's application is that the processes designed to allow a fair assessment of the issues have not been followed at trial."

The application of the proviso in this case

128 Kalbasi's criticism of the *Hughes* two-part approach to the application of the proviso is warranted. Although reflective of the reality that there are both outcome and process aspects involved in any determination of whether an error or other miscarriage has been productive of a substantial miscarriage of justice[145], the two-part approach suggests that, unless the error or other miscarriage constitutes a "radical" or "fundamental" departure from the requirements of a fair trial, it is sufficient to engage the proviso that the appellate court is able to say on the basis of the record that the evidence was sufficient to prove the accused guilty beyond reasonable doubt. As has been seen, that is not the case.

129 Further, as Kalbasi submitted, the problem with the way in which the plurality applied the *Hughes* two-part approach in this case is that it excluded consideration of the nature of the error from the determination of the outcome aspect of the analysis. Instead of starting with identification of the nature of the error and considering that as part of the outcome aspect of the exercise, the plurality moved straight to consideration of the evidence and concluded, on that basis alone, that they were satisfied beyond reasonable doubt of Kalbasi's guilt of the offence of which he was convicted. So to approach the task was in effect to make the same kind of error as was identified in *AK*[146] and *Baiada*[147].

130 Admittedly, when the plurality turned to consider the process aspect of the exercise, their Honours referred to the nature of the error and undertook an

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

144 (2007) 235 CLR 521 at 534 [42].

145 See *Nudd v The Queen* (2006) 80 ALJR 614 at 617-618 [3], [5]-[6] per Gleeson CJ; 225 ALR 161 at 162-163; [2006] HCA 9.

146 (2008) 232 CLR 438 at 452 [42] per Gummow and Hayne JJ.

147 (2012) 246 CLR 92 at 104 [29] per French CJ, Gummow, Hayne and Crennan JJ.

assessment of its significance. But because they confined the assessment to the process aspect of the exercise, they did not pause to consider whether the error was of such significance as to preclude them being satisfied of guilt beyond reasonable doubt. Instead, they reasoned that the error was not analogous to a failure to leave a defence to a jury – and hence that the trial was not fundamentally flawed in such a way as to preclude the application of the proviso – because[148]:

> "There was no arguable defence on the question of intention [to sell or supply]. Once [Kalbasi] was found to have possessed the 4.981 kg of 'methylamphetamine' it was inconceivable that the jury could not have been satisfied beyond reasonable doubt that [Kalbasi] possessed the substance with an intent to sell or supply it to another."

131 Expressing the inquiry in terms of whether the trial was "flawed in such a way as to preclude the application of the proviso"[149] did not assist. The question was whether the trial judge's error in failing properly to direct the jury as to an element of the offence charged meant that the processes designed to allow the jury's fair assessment of the issues had not been followed[150]. And as has been seen, depending upon circumstances, failure to follow process may preclude an appellate court being satisfied of guilt beyond reasonable doubt whether or not the failure is perceived as so extreme as to render the proceeding "fundamentally flawed".

132 Comparison of the trial judge's error with a failure to leave a defence to the jury was also misplaced. The fundamental task of a trial judge is to ensure that the accused receives a fair trial according to law. It necessitates that the trial judge direct the jury according to law[151]. Here, the trial judge failed to do so. The error consisted of failing to bring home to the jury the need to be satisfied beyond reasonable doubt of the essential element of intent to sell or supply to

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148 *Kalbasi v WA* [2016] WASCA 144 at [214].

149 *Kalbasi v WA* [2016] WASCA 144 at [213].

150 Cf *Evans v The Queen* (2007) 235 CLR 521 at 534 [43] per Gummow and Hayne JJ.

151 See generally *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3; *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ; [1971] HCA 20; *BRS v The Queen* (1997) 191 CLR 275 at 306 per McHugh J; [1997] HCA 47; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; [2000] HCA 3.

another[152], and, as such, it represented a serious departure from the processes designed to allow the jury's fair assessment of the issues[153]. Consequently, to assess the error in terms simply of whether it was analogous to failing to leave a defence to the jury, and then dismiss it as insignificant on the basis that there was no arguable defence, materially understated the extent to which the processes designed to allow the jury's fair assessment of the issues had not been followed.

133 Granted, as the State submitted, a trial judge is not required to direct a jury on an element of an offence that is not in issue[154], and, in one sense, the element of intent to sell or supply was not in issue in this case due to defence counsel's erroneous "concession" that the s 11 presumption applied. But here that is no answer. Counsel cannot concede a matter of law disadvantageous to the accused[155], especially when the "concession" is the consequence of error[156]. Saying that a trial judge is required to direct a jury on only those elements of an offence that are in issue does not mean that defence counsel's mistaken view of

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152 See and compare *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 105 [32] per French CJ, Gummow, Hayne and Crennan JJ.

153 See *Quartermaine v The Queen* (1980) 143 CLR 595 at 601-602 per Gibbs J (Stephen J and Murphy J agreeing at 602, 613); *Handlen v The Queen* (2011) 245 CLR 282 at 298 [47] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ (Heydon J dissenting at 306 [80]); [2011] HCA 51.

154 See *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 104 [28] per French CJ, Gummow, Hayne and Crennan JJ. See also *Holland v The Queen* (1993) 67 ALJR 946 at 951 per Mason CJ, Brennan, Deane and Toohey JJ; 117 ALR 193 at 200; [1993] HCA 43.

155 See *Stokes & Difford* (1990) 51 A Crim R 25 at 32 per Hunt J (Wood J and McInerney J agreeing at 45); *BRS v The Queen* (1997) 191 CLR 275 at 305 per McHugh J; *KBT v The Queen* (1997) 191 CLR 417 at 423-424 per Brennan CJ, Toohey, Gaudron and Gummow JJ, 431 per Kirby J; [1997] HCA 54; *Fingleton v The Queen* (2005) 227 CLR 166 at 198-199 [81]-[84] per McHugh J; [2005] HCA 34.

156 See and compare *Gilbert v The Queen* (2000) 201 CLR 414 at 422-423 [21] per Gleeson CJ and Gummow J, 441-442 [102]-[103] per Callinan J; *Handlen v The Queen* (2011) 245 CLR 282 at 297-298 [45]-[47] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Re Knowles* [1984] VR 751 at 770; *TKWJ v The Queen* (2002) 212 CLR 124 at 151-152 [84] per McHugh J; [2002] HCA 46.

the law relieves the judge of his or her responsibility to direct the jury correctly[157]. Rather, as the plurality stated in *KBT v The Queen*[158]:

> "There are occasions when [the proviso] is properly applied where a point was not taken at the trial because, for example, it was not in issue or there was some forensic advantage to be gained by not raising it. In cases of that kind, [the proviso] is applied because, having regard to the defence case, the accused was not deprived of a chance of acquittal that was fairly open, that being the accepted test for the application of [the proviso]. [But], if the appellant was deprived of a chance of that kind, the fact that no complaint was made at trial is irrelevant."

134 Of course, *KBT* preceded *Weiss* and, as was stated in *Weiss*, there is no single universally applicable description of what constitutes a substantial miscarriage of justice. But to repeat *Weiss*, references to inevitability of result and to the loss of a fair or real chance of acquittal are useful in emphasising the high standard of proof of criminal guilt and as pointers to the natural limitations that attach to proceeding wholly or substantially on the record. Accordingly, as the point was later amplified in *AK*[159]:

> "When there has been a trial by jury, and an appellate court concludes that the trial judge made a wrong decision on a question of law or that there was some other miscarriage of justice, deciding whether there has been no substantial miscarriage of justice necessarily invites attention to whether the jury's verdict might have been different if the identified error had not occurred."

135 If a jury is not sufficiently directed as to the need to be satisfied beyond reasonable doubt of an essential element of the offence charged, the fact that the appellate court may consider that the evidence adduced at trial would have permitted the jury to be satisfied of guilt beyond reasonable doubt will not of itself suffice to engage the proviso. In such a case, the appellate court cannot be satisfied that the element was proved beyond reasonable doubt unless it appears

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157 See and compare *Andrews v The Queen* (1968) 126 CLR 198 at 207-210; [1968] HCA 84; *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601 per Gibbs J (Stephen J and Murphy J agreeing at 602, 613).

158 (1997) 191 CLR 417 at 423-424 per Brennan CJ, Toohey, Gaudron and Gummow JJ. See and compare *Simic v The Queen* (1980) 144 CLR 319 at 330-333; [1980] HCA 25.

159 (2008) 232 CLR 438 at 457 [59] per Gummow and Hayne JJ.

that it would not have been open to the jury to conclude the contrary[160]. And, as was explained in *Baiada*, that is so because if it were open to the jury to conclude that the element was not proved beyond reasonable doubt, it was open to the jury to acquit[161].

136 The question here, therefore, is whether, if the jury had been properly directed as to the necessity to be satisfied beyond reasonable doubt that Kalbasi possessed the "drug" with intent to sell or supply it to another, it would have been open to the jury to acquit.

137 As it appears, the Court of Appeal reasoned[162] that, because the verdict signalled that the jury were satisfied beyond reasonable doubt that Kalbasi possessed 4.981 kilograms of "methylamphetamine", the jury could not rationally have resisted the conclusion that Kalbasi possessed that quantity of "drug" with intent to sell or supply it to another. So to reason, however, assumed too much about what the jury may have found to be the nature of Kalbasi's possession of the "drug". In point of fact, the jury were given broad-ranging directions as to various ways in which a person may possess a thing, and, although some of those were consistent with the possessor having the intention to sell or supply the thing to another, others were plainly inconsistent with the possessor having an intention of selling or supplying the thing to another. After explaining to the jury that the first aspect of the element of possession required the prosecution to prove that Kalbasi had knowledge that "the thing he was in possession of was a prohibited drug of some kind", the trial judge directed as follows:

> "The second aspect of possession is that [Kalbasi] must have had either actual physical custody of the drugs or what is referred to as control in the sense that [Kalbasi] can be said to have exercised control and dominion over the drugs to the exclusion of all other people, except those people with whom he might have been acting jointly.
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> Members of the jury ... you do not need to own something to be in possession of it. You can possess something by physically holding it. You can also possess something without physically holding it or touching it.

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160 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106 [35] per French CJ, Gummow, Hayne and Crennan JJ.

161 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106 [35] per French CJ, Gummow, Hayne and Crennan JJ.

162 *Kalbasi v WA* [2016] WASCA 144 at [30] per McLure P, [214] per Mazza and Mitchell JJA.

The concept of possession does not require that the object be in your hand or on your person, but it does require that you have either physical custody of it or that it be under your control either solely or jointly with others at the relevant time of the alleged possession.

...

So a person can possess something without physically holding it or without having physical custody of it. An example of that could be when I come to work I park my car in the car bay, I take the keys with me upstairs, even though obviously I'm no longer with the vehicle.

...

... [Y]ou can also possess something temporarily and even for a limited purpose. As I've said, you can possess something without owning it. For example, if I borrow a book from the local library, obviously I do not own the book but while I have taken it out of the library, it is under my control and is therefore in my possession.

The notion of possession is wide enough to include the case of where I might lend that book to my best friend because they want to read it too.

So the fact that I have taken the book out of the library and have given it to my best friend on the basis that I need to return it to the library is sufficient for me to say that my best friend also has possession of that book while he or she has it in their physical custody or control.

...

The issue is whether or not [Kalbasi] was in possession of the intended drugs by reason of his control or having done something to them while they were in [the Falstaff Crescent premises].

... [T]he possession need not be exclusive possession in the hands of only one person. It follows that one or more people can be in joint possession of a prohibited drug and I've give[n] you an example of how my best friend is in possession of my library book in that regard.

...

The third requirement for possession is that the State must prove that [Kalbasi] had the intention to exercise control or dominion over the intended drugs ...

... [A]wareness on its own of the existence of the intended drugs in [the Falstaff Crescent premises] is not sufficient ...

> ... [Y]ou must be satisfied that in the way I have described [Kalbasi] had some control over the drugs in [the Falstaff Crescent premises] at the relevant time even though [Lothian] may also have had control or possession of the same drugs at the same time.
>
> ...
>
> [Kalbasi] says that [Lothian] was in control of the intended drugs on his own at all times and that even though he was inside [Lothian's] place ... for about 37 minutes, he did not exercise any control over those drugs. In other words, he was not involved in doing anything with them."

138 As was earlier noticed, Kalbasi makes no complaint about the adequacy of those directions as such. The prosecution did not invoke the extended definition of possession[163]. The case which Kalbasi had to meet at trial was limited to possession in its natural and ordinary sense, and, if there were a case to be made on the basis of the extended definition, it was never articulated. But, as was submitted on behalf of Kalbasi, because the jury were directed as they were, it is possible that they found that Kalbasi had possession of the "drug" on the basis of being satisfied of no more than that he had "done something" to the "drug" while he was in the Falstaff Crescent premises "for a limited purpose". More specifically, given that the evidence implied that the thing Kalbasi most likely did to the "drug" while he was in the Falstaff Crescent premises was assist Lothian in cutting it, and given the trial judge's direction that Kalbasi did not need to own the "drug" in order to possess it (coupled with the trial judge's borrowed library book example of what may amount to possession), it is possible that the jury convicted Kalbasi of attempted possession on the basis of being satisfied of no more than that Kalbasi assisted Lothian to cut a "drug" that belonged to Lothian or perhaps to a third person.

139 It may be accepted that it would have been possible for Kalbasi to possess the "drug" by doing no more than lending a hand to Lothian in its cutting. But the question for the jury was not, or at least it should not have been, simply whether Kalbasi possessed the "drug". The question should have been whether Kalbasi possessed the "drug" with intent to sell or supply it to another. And the kind of possession of which the jury would need to have been satisfied in order to conclude beyond reasonable doubt that Kalbasi attempted to possess the drug with intent to sell or supply it to another would have been different from, and substantially more than, the kind of possession that may have sufficed to satisfy them of possession simpliciter. If the jury were satisfied of no more than that Kalbasi helped Lothian cut the "drug", the jury could not logically have been

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163 See *Misuse of Drugs Act*, s 3(1) definition of "to possess".

satisfied beyond reasonable doubt that Kalbasi possessed the "drug" with intent to sell or supply it to another.

140 Furthermore, the problem is not just that the trial judge failed to direct the jury that they had to be satisfied beyond reasonable doubt that Kalbasi intended to sell or supply the drug to another, but also that the judge positively misdirected the jury that it was proved beyond reasonable doubt that Kalbasi did intend to sell or supply to another. As the judge put it:

> "I'm now going to deal with the fourth element upon the jury aid[e], that [Kalbasi] intended to sell or supply the prohibited drug or any part of it to another. Members of the jury, you can give that element a tick. It is not an issue for you in this trial.
>
> Very briefly, the law is that if you are found in possession of more than two grams of [methylamphetamine] then you are presumed to be in possession with intent to sell or supply it to another and the onus is on you to remove that presumption.
>
> There is no issue in this trial about the fourth element and as I've said it will not delay your deliberations. You must be satisfied beyond reasonable doubt about the fourth element. You do not need to concern yourself with where the drugs might have gone, how they might have got there, when they might have been moved or whatever. It's simply not relevant to your deliberations for the purpose of this trial. The fourth element is proved beyond reasonable doubt and you should give it a tick."

141 So to misdirect the jury was adverse to Kalbasi's defence in at least two further ways. First, it positively implied that it was incumbent on Kalbasi to demonstrate that he did not have possession with intent to sell or supply – and, since he had called no evidence, thereby conveyed to the jury, in effect, that there was nothing which he could have said in opposition to the allegation that he had had possession of the "drug"[164]. Secondly, it misinformed the jury that it was proved beyond reasonable doubt that Kalbasi intended to sell or supply the drug to another, which of itself logically tended to imply that Kalbasi must have had possession of the "drug".

142 The State contended that, even if that were so, there had been nothing to prevent defence counsel calling evidence or making submissions to the jury to the effect, for example, that if Kalbasi did have possession of any part of the "drug" it was not possession with intent to sell or supply it to another but

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164 Compare *RPS v The Queen* (2000) 199 CLR 620 at 632-633 [26]-[28] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; *Dyers v The Queen* (2002) 210 CLR 285 at 292 [9]-[10] per Gaudron and Hayne JJ; [2002] HCA 45.

possession only for the limited purpose of sampling it with a view to purchasing part of it for personal consumption. It followed, in the State's submission, that it should not be accepted that the misdirection deprived Kalbasi of a defence that might otherwise have been open to him. The only issue was possession, and the quantity possessed was so great that the jury could not rationally have concluded anything other than that it was possession with intent to sell or supply to another. So much was made clear, it was submitted, by the obiter dictum observation in *Krakouer*[165] that, if there had been only one offence of attempt to possess in issue in that case, the conviction might have been upheld despite the mistake as to the application of the s 11 presumption.

143 Those contentions should also be rejected. Kalbasi was entitled to put the prosecution to proof not only as to whether he possessed the "drug" but also as to whether his possession of it was of a kind that implied beyond reasonable doubt that he possessed it with intent to sell or supply it to another. As has been explained, the fact that defence counsel, the prosecutor and the trial judge were mistaken as to the application of s 11 is beside the point. It was the trial judge's responsibility to ensure that Kalbasi received a fair trial according to law, and, accordingly, it was incumbent on the trial judge to direct the jury according to law. For the trial judge to direct the jury in effect that it was up to Kalbasi to rebut a presumption which "proved [intent to sell or supply the drug to another] beyond reasonable doubt" was contrary to law and constituted a serious departure from the requirements of a fair trial. It both reversed the burden of proof as to the essential element of intent to sell or supply to another and aided in undermining Kalbasi's argument that it was not proved beyond reasonable doubt that he had possession.

144 That is not to say that, if the jury had been correctly directed, it would not have been open to them to be satisfied of Kalbasi's guilt. The large quantity of the drug in question and the other circumstances of the alleged offending represented a powerful circumstantial case of guilt. But, as was emphasised in *AK*[166] and reiterated in *Baiada*[167], demonstration that a chain of reasoning can be articulated that would require the verdict reached at trial does not always permit, let alone require, the conclusion that no substantial miscarriage of justice has occurred. It is not open to an appellate court to be satisfied that an accused was proved guilty beyond reasonable doubt if it was open to the jury to reach the contrary conclusion. And here, for the reasons already stated, if the jury had been properly directed, it would have been open to them to reach a contrary conclusion.

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165 (1998) 194 CLR 202 at 215 [32] per Gaudron, Gummow, Kirby and Hayne JJ.

166 (2008) 232 CLR 438 at 457 [58] per Gummow and Hayne JJ.

167 (2012) 246 CLR 92 at 104 [29] per French CJ, Gummow, Hayne and Crennan JJ.

Conclusion and orders

145 In the result, the appeal should be allowed. The order of the Court of Appeal dismissing the appeal should be set aside. In its place, it should be ordered that the appeal to the Court of Appeal be allowed, the conviction the subject of the appeal be quashed, the sentence passed below be set aside, and a new trial be had.

146 EDELMAN J. There will always be a "substantial miscarriage of justice"[168] where a person is "not in reality tried for the offences for which he was indicted"[169]. That is what occurred in this case. As the respondent properly conceded, the trial judge removed from the jury's consideration an element of the offence. The remaining elements considered by the jury constituted a different offence. For the reasons below, I agree with the conclusion of Nettle J that the directions of the trial judge were contrary to law and constituted a serious departure from the requirements of a fair trial[170]. This is why the appeal should be allowed and orders made as proposed by Nettle J.

The removal of an element of the offence from the jury

147 As Nettle J explains, Mr Kalbasi was charged with an offence of attempted possession of a prohibited drug with intent to sell or supply contrary to ss 6(1)(a) and 33(1) of the *Misuse of Drugs Act* 1981 (WA). The trial judge directed the jury that there were four elements that had to be proved by the prosecution:

(1) the offender was the accused (identity);

(2) the substance with which the charge is concerned is a prohibited drug;

(3) the accused attempted to possess that prohibited drug; and

(4) the accused intended to sell or supply the prohibited drug, or any part of it, to another.

148 The trial judge directed the jury, as a matter of law, that the fourth element – the intention to sell or supply – "is proved beyond reasonable doubt". The trial judge told the jury that "you should give it a tick". An element of the offence in s 6(1)(a) was therefore taken away from the jury. The reason why the trial judge chose to take that element away from the jury was that the trial judge erroneously said, and all counsel incorrectly assumed, that the onus lay upon Mr Kalbasi to "remove that presumption" of an intention to sell or supply. The trial judge therefore told the jury that since Mr Kalbasi had not raised the issue of a lack of intention to sell or supply it "must be satisfied [of that element] beyond reasonable doubt".

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168 *Criminal Appeals Act* 2004 (WA), s 30(4).

169 *Quartermaine v The Queen* (1980) 143 CLR 595 at 601; [1980] HCA 29, quoting *Andrews v The Queen* (1968) 126 CLR 198 at 207; [1968] HCA 84.

170 At [143].

The effect of removing an element of the offence from the jury

149 The trial judge's direction that an intention to sell or supply had been proved beyond reasonable doubt did not involve, in effect, telling the jury that it might be easily, or immediately, satisfied of an element of the offence because no evidence had been led about that element. That was the direction properly given in relation to the first element – identity – where the jury was told that there was no issue that the relevant person was Mr Kalbasi. Such directions are common, efficient, and proper. They reflect the manner in which the trial was run. The element of the offence remains for the jury to determine but the jury is encouraged not to waste any time discussing an element which is not in issue. The same is true of failures by a trial judge to direct on an element of an offence which is not in dispute. It will rarely, if ever, be a miscarriage of justice for a trial judge not to direct a jury about an element of an offence that is not in dispute in the trial[171].

150 Nor was the direction concerning the element of an intention to sell or supply a misdirection about the content or application of an element of an offence. An example of such a misdirection can be seen in *Krakouer v The Queen*[172], where the misdirection reversed the onus of proof in relation to s 6(1)(a) of the *Misuse of Drugs Act*. The joint judgment of Gaudron, Gummow, Kirby and Hayne JJ, after giving the "most careful attention"[173] to the proviso, concluded that the trial was not fundamentally flawed for this reason. Importantly, no matter how likely conviction might have been thought to be as a consequence of the reversal of the onus of proof, it remained a matter for the jury to decide. However, their Honours accepted that the line may be crossed where the misdirection had "depriv[ed] an accused person of the right to have some substantial part of his or her case decided by the jury"[174].

151 In contrast with the misdirection about onus of proof in *Krakouer*, the jury in this case was directed on two occasions in the summing up that a crucial element of the offence, to which the prosecution had been put to proof, had been proved beyond reasonable doubt. The jury was required to follow the judge's direction of law. Unlike *Krakouer*, the direction in this case was not merely reversing an onus and thereby substantially diminishing the accused's prospects

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171 *R v Getachew* (2012) 248 CLR 22 at 36 [35]-[36]; [2012] HCA 10; *Huynh v The Queen* (2013) 87 ALJR 434 at 441 [31]-[32]; 295 ALR 624 at 631-632; [2013] HCA 6.

172 (1998) 194 CLR 202 at 212 [22]; [1998] HCA 43.

173 *Krakouer v The Queen* (1998) 194 CLR 202 at 212 [23].

174 *Krakouer v The Queen* (1998) 194 CLR 202 at 212 [24].

of acquittal. In *Krakouer* the issue was still for the jury to decide. In contrast, the direction of law given to the jury in the present case denied Mr Kalbasi his right to have an element of the offence considered by the jury. As senior counsel for the respondent properly conceded in oral submissions in this Court, the direction of law to the jury about intention to sell or supply could be seen as taking that element of the offence away from the jury. The effect of the trial judge's direction was that the jury was directed to consider only whether Mr Kalbasi had committed the offence of attempting to possess a prohibited drug. That was not the offence provided by ss 6(1)(a) and 33(1), namely attempted possession of a prohibited drug with intent to sell or supply. It was, instead, the simple offence of attempted possession contrary to ss 6(2) and 33(1) of the *Misuse of Drugs Act*. Offences against s 6(1) and s 6(2) carry, unsurprisingly, markedly different maximum penalties[175].

A substantial miscarriage of justice and the "negative proposition"

152 In 2005, in a unanimous judgment in *Weiss v The Queen*[176], this Court considered the meaning of the proviso to the common form criminal appeal provision. Over more than a decade since *Weiss*, this Court has handed down many judgments concerning similar provisions. Not all of those decisions are easy to reconcile. One point is, however, clear. As this Court emphasised in *Weiss*[177], there is "[n]o single universally applicable description of what constitutes 'no *substantial* miscarriage of justice'".

153 A focus of Mr Kalbasi's submissions in this appeal was the "negative proposition" enunciated by this Court in *Weiss* that[178]:

> "[i]t cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."

154 This statement, expressed as a qualified double negative proposition, has sometimes been said to propose a test to be satisfied in every case before the proviso can be applied and a conclusion of substantial miscarriage of justice reached. But, as Mr Kalbasi submitted in this appeal, if the statement is expressed in those absolute terms then the statement cannot be correct. There are

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175 *Misuse of Drugs Act* 1981 (WA), ss 34(1)(a), 34(1)(e).

176 (2005) 224 CLR 300; [2005] HCA 81.

177 (2005) 224 CLR 300 at 317 [44] (emphasis in original).

178 (2005) 224 CLR 300 at 317 [44].

two reasons why the negative proposition cannot be understood in absolute terms.

155 First, as the Court recognised in *Weiss*[179], the negative proposition is not always sufficient for the proviso to apply. It is well recognised that there are cases, although infrequent[180], where an appellate court will conclude, without more, that an error in the trial process caused a substantial miscarriage of justice. Although there can be no fixed, predefined formula to describe these cases[181], the category of such radical errors can be generally described as involving circumstances where there is a fundamental defect amounting to a serious breach of the presuppositions of the trial[182]. In *Weiss*[183], the Court suggested that a denial of procedural fairness may be such an example.

156 Although it has been common to speak of the proviso "not applying" in such circumstances, this does not mean that an appellate court ignores its statutory duty to consider whether a substantial miscarriage of justice has occurred. The point being made, instead, is that where such a fundamental defect occurs in the trial then that defect will be sufficient, in and of itself, for a conclusion that there has been a substantial miscarriage of justice. It will not matter whether the appellate court considers, from the record, that the accused is guilty beyond reasonable doubt. The same reasoning can be seen in relation to the usual proviso in appeals and applications for judicial review where an error of law "could not possibly have produced a different result"[184]. For instance, if there is a fundamental defect, such as where no required hearing is given on a relevant issue, it is not for the reviewing court "to attempt to provide the hearing that the [applicant or] appellant has not had, or to attempt to give any judgment such as might be thought to have been appropriate"[185]. Similarly, in

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179 (2005) 224 CLR 300 at 317 [46].

180 *Green v The Queen* (1997) 191 CLR 334 at 346-347; [1997] HCA 50.

181 *AK v Western Australia* (2008) 232 CLR 438 at 455-456 [54]; [2008] HCA 8; *Cesan v The Queen* (2008) 236 CLR 358 at 394 [126]; [2008] HCA 52.

182 *Wilde v The Queen* (1988) 164 CLR 365 at 373; [1988] HCA 6.

183 (2005) 224 CLR 300 at 317 [45].

184 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; [1986] HCA 54; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 116-117 [80], 122 [104], 130-131 [131]-[132]; [2000] HCA 57.

185 *DWN042 v Republic of Nauru* (2017) 92 ALJR 146 at 151 [21]; [2017] HCA 56.

Commonwealth Bank of Australia v Quade[186], where the misconduct by a successful party involved the suppression of evidence but there was no real possibility of a different result, this Court said that it was "almost" inevitable that the appeal would be dismissed. The qualification, "almost", was a recognition that the interests of justice are not always served by utilitarian considerations of whether the error or wrongdoing could have made a difference[187].

157 Secondly, there are difficulties with treating the "negative proposition" as a necessary condition for the application of the proviso. As the Court recognised in *Weiss*[188], circumstances might arise where an error, amounting to a basis to allow the appeal subject to the proviso, would "have had no significance in determining the verdict that was returned by the trial jury". In such circumstances an appellate court might conclude that there was no substantial miscarriage of justice even if the appellate court, without the advantage of seeing and hearing the witnesses, is unable to be persuaded from the entire record that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence. The conclusion that there is no substantial miscarriage of justice in such cases cannot easily be reconciled with the negative proposition in *Weiss* being a necessary condition.

158 An example that illustrates this difficulty in seeing the negative proposition as a necessary condition was given by Gleeson CJ during oral argument in *Weiss*[189]. That example was the situation in which inadmissible evidence is erroneously admitted to prove a fact but during the evidence of the accused that fact is admitted. In that example, there is an error of law or, in the words of the applicable Western Australian legislation in this case, "a wrong decision on a question of law by the judge"[190]. But if the proviso[191] fell for consideration, there would be no substantial miscarriage of justice even if the appellant is

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186 (1991) 178 CLR 134 at 143; [1991] HCA 61.

187 See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 131 [132].

188 (2005) 224 CLR 300 at 317 [43]. See also *Jones v The Queen* (2009) 83 ALJR 671 at 678 [30]; 254 ALR 626 at 634; [2009] HCA 17; *Reeves v The Queen* (2013) 88 ALJR 215 at 223-224 [50], 225 [58], 226 [63]; 304 ALR 251 at 261, 263, 264; [2013] HCA 57.

189 (2005) 224 CLR 300 at 302.

190 *Criminal Appeals Act* 2004 (WA), s 30(3)(b).

191 *Criminal Appeals Act* 2004 (WA), s 30(4).

guilty beyond reasonable doubt. In such a case, the negative proposition in *Weiss* cannot mean that the appellate court is *itself* satisfied of the guilt of the accused. It can only mean that the appellate court is satisfied that the verdict of guilt by the jury was unaffected by the error[192]. In other words, the appellate court considers that there is no substantial miscarriage of justice because conviction by the jury was inevitable[193].

159 There may be other circumstances where the negative proposition formulated in *Weiss* requires careful consideration. The negative proposition suggests that it must be "the appellate court" that is persuaded beyond reasonable doubt of the accused's guilt of the offence based on the evidence properly admitted at trial. As the respondent in this case accepted, it may be that a judge who would otherwise be in the majority of a divided appellate court could reason as follows: "I am persuaded beyond reasonable doubt of the guilt of the accused but I accept that others might reasonably not be so persuaded. I am thus satisfied that conviction was not inevitable."

160 Ultimately, the ambiguities in the negative proposition should not detract from the basic question of whether there is a substantial miscarriage of justice. In the language of the cases after *Weiss*, other than in cases of fundamental error the focus for the existence of a substantial miscarriage of justice will commonly, although not always, be upon whether conviction was "inevitable"[194] or whether the accused was deprived of a "chance fairly open to him of being acquitted"[195].

Conclusion: a substantial miscarriage of justice

161 In *Quartermaine v The Queen*[196], this Court held that there was a substantial miscarriage of justice although it might have been thought that conviction was inevitable. In *Quartermaine*, no element of the offence was

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192 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

193 See *Lindsay v The Queen* (2015) 255 CLR 272 at 301-302 [86]; [2015] HCA 16.

194 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 106-107 [35]-[38]; [2012] HCA 14; *Baini v The Queen* (2012) 246 CLR 469 at 481-482 [33], 484 [40]; [2012] HCA 59; *Lindsay v The Queen* (2015) 255 CLR 272 at 276 [4], 301-302 [86]; *Castle v The Queen* (2016) 259 CLR 449 at 472 [65], 477 [82]; [2016] HCA 46; *R v Dickman* (2017) 91 ALJR 686 at 688 [4]-[5], 697 [63]; 344 ALR 474 at 476, 488; [2017] HCA 24.

195 *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35. See also *Filippou v The Queen* (2015) 256 CLR 47 at 55 [15]; [2015] HCA 29.

196 (1980) 143 CLR 595.

removed from the consideration of the jury but "the jury were not instructed as to the essential elements of the charge in fact laid"[197]. A fortiori, the withdrawal from the jury of an element of the offence in this case demonstrates a fundamental defect. This case also presents a stronger reason to find a substantial miscarriage of justice than *Cesan v The Queen*[198], where the jury was seized of consideration of the offence but was distracted by the trial judge falling asleep at times during the trial.

162 There will be many cases where an appellate judge's assessment of whether a substantial miscarriage of justice has occurred will require him or her to be persuaded from the entirety of the record that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty. However, this will not always be the case. In this case, the direction that removed the fourth element of the offence from the jury was a fundamental defect, amounting to a serious breach of the presuppositions of the trial[199]. This was a substantial miscarriage of justice. It is neither necessary, nor appropriate, in such a case for an appellate court to attempt to determine from the record whether the accused is guilty beyond reasonable doubt. To conclude otherwise would be to replace a trial by jury with a trial by appellate judges.

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197 *Quartermaine v The Queen* (1980) 143 CLR 595 at 601, 602, 613. See also *Andrews v The Queen* (1968) 126 CLR 198.

198 (2008) 236 CLR 358.

199 *Wilde v The Queen* (1988) 164 CLR 365 at 373.