HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

JAMES GORDON KRAKOUER APPELLANT

AND

THE QUEEN RESPONDENT

Krakouer v The Queen (P40-1997) [1998] HCA 43
Date of Order: 18 June 1998
Date of Publication of Reasons: 6 August 1998

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of Western Australia and, in lieu thereof, order that the appeal to that Court be allowed, the convictions quashed and a new trial ordered.*

On appeal from the Supreme Court of Western Australia

Representation:

R F Redlich QC with M E Dean for the appellant (instructed by Galbally Fraser & Rolfe)

J R McKechnie QC with J MacTaggart for the respondent (instructed by Director of Public Prosecutions (Western Australia))

CATCHWORDS

Krakouer v The Queen

Criminal law – Attempt to possess drugs with intent to sell or supply – Conspiracy to possess drugs with intent to sell or supply – Misdirection reversing onus of proof for an element of offences – Substantial miscarriage of justice – Whether misdirection went to the root of proceedings – Whether appellant lost a real chance of acquittal – Whether foresight of sale or supply sufficient to constitute intent to sell or supply.

Misuse of Drugs Act 1981 (WA), ss 11, 33.

Criminal Code (WA), s 689.

1 GAUDRON, GUMMOW, KIRBY AND HAYNE JJ. On 18 June 1998, the Court pronounced orders in this matter. By those orders, the appeal to this Court was allowed, the orders of the Court of Criminal Appeal of Western Australia set aside, the appeal to that Court allowed, the convictions quashed and a new trial ordered. The following are our reasons for participating in those orders.

2 The appellant, James Gordon Krakouer, and another man, Ross Phillip Calder, were charged on an indictment in the District Court of Western Australia with two counts of offences against the *Misuse of Drugs Act* 1981 (WA). Count 1 alleged that between 1 January 1994 and 1 February 1994 the accused conspired together to possess a quantity of methylamphetamine with intent to sell or supply it to another. Count 2 alleged that on 31 January 1994 the accused attempted to possess a quantity of methylamphetamine with intent to sell or supply it to another. Calder pleaded guilty and was dealt with separately. The appellant pleaded not guilty but was convicted on both counts. He appealed against conviction and sentence to the Court of Criminal Appeal in Western Australia but his appeals were dismissed[1]. He now appeals to this Court by special leave. That leave was limited to the ground alleging that the Court of Criminal Appeal ought to have found that the primary judge erred in his direction to the jury concerning the application of ss 11 and 33 of the *Misuse of Drugs Act*.

3 Before turning to those sections and the alleged misdirection, it is necessary to say something of the facts. On 31 January 1994, police went to a transport depot in Welshpool, Western Australia, and searched a white Datsun Bluebird sedan. The car had just arrived on a truck from Victoria. Police took the car away and found in the cavity of each front door a green garbage bag containing six packages. These packages were found to contain a total of 5.3 kilograms of methylamphetamine.

4 The police made up substitute bags containing packages of flour and put them back in the door cavities together with a listening device. The car was then taken to the warehouse of a company called Bohaul Express where it was kept under surveillance.

5 Later that day the appellant and Calder came to the warehouse in a panel van that was driven by Calder. A police officer, posing as an employee of Bohaul Express, obtained Calder's signature to a delivery docket acknowledging receipt of the car, gave him the keys to it, together with a copy of the delivery docket, and watched Calder drive the car out of the yard.

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1 *Krakouer v The Queen* (1996) 16 WAR 1.

6 Calder drove the car to an address in Hilton. The appellant followed immediately behind him, driving the panel van in which they had arrived at the premises of Bohaul Express. The property in Hilton was occupied by one of the appellant's brothers, Andrew. The car and, later, the panel van were driven into the backyard of the house. After a short time, police drove through the closed gates into the yard to find the panel van and the car parked beside each other and the appellant, Calder and the appellant's brother, Andrew, in the yard near the vehicles. All three men were arrested. When the police arrived in the yard the door handle was off the inside of the front passenger door of the car and on the ground beside the door was one of the bags of flour. Calder was searched and found to have in his possession both the original Bohaul Express freight receipt which had been issued at the point of consignment in Victoria and the copy delivery docket which Calder had signed that morning at the warehouse.

7 Apart from the appellant being present when the car was collected from the transport company warehouse, and when the substitute powder was being removed from the car doors at the property in Hilton, there was other evidence which connected him with the drugs that had originally been secreted in the car. Pursuant to a warrant, police had intercepted telephone calls from the house where the three men were arrested and at which Andrew Krakouer lived. Those conversations included conversations between the appellant and a man called Foster in which the appellant nominated Calder as the person to whom Foster should consign the car - a car which Foster said he had "got new speakers in both front doors" for the appellant. Phone calls made by Foster from a mobile telephone were also intercepted (again pursuant to a warrant) and those conversations included Foster arranging for the dispatch of the Datsun Bluebird car to Perth and then telling the appellant of the arrangements which he had made. In one of these conversations, the appellant asked Foster whether he had to pay for the transporting of the car, to be told by Foster that he, Foster, had paid and would send the appellant the receipt.

8 In addition, by means of the listening device which police had put in the car when they took the drugs from it and replaced them with bags of flour, police recorded the conversation between two men (presumably Andrew Krakouer and Calder) while they were working on the car to gain access to the door cavities. In the course of that conversation there was an exchange in which one man asked for "the bag" to receive the answer "Why, I got to get this lot out" to which the first man replied "Jimmy wants it now". In the context this could only have referred to the appellant.

9 Evidence was given at the trial that very soon after the appellant was arrested, a police officer asked him whether he was a user of amphetamines, to which the appellant answered no. No other evidence was given of any statement by the

appellant to police and the appellant did not give evidence or call any other evidence at trial.

10 Section 33 of the *Misuse of Drugs Act* provides:

"(1) A person who attempts or incites another to commit, or becomes an accessory after the fact to, an offence (in this subsection called **'the principal offence'**) commits -

(a) if the principal offence is an indictable offence, the indictable offence; or

(b) if the principal offence is a simple offence, the simple offence,

but is liable on conviction -

(c) to a fine not exceeding half of the fine; and, additionally or alternatively,

(d) to imprisonment for a term not exceeding half of the term,

to which a person who commits the principal offence is liable.

(2) A person who conspires with another to commit an offence (in this subsection called **'the principal offence'**) commits -

(a) if the principal offence is an indictable offence under section 6 (1) or 7 (1) the indictable offence, but is liable on conviction to the penalty referred to in section 34 (1) (b); or

(b) if the principal offence is a simple offence or an indictable offence, other than an indictable offence referred to in paragraph (a), the simple offence or that indictable offence, as the case requires, and is liable on conviction to the same penalty to which a person who commits the principal offence is liable."

11 Section 6(1) provides that subject to an exception which is not presently relevant, "a person who ... with intent to sell or supply it to another, has in his possession ... a prohibited drug commits an indictable offence ...". Thus, the conspiracy alleged in count 1 of the indictment was a conspiracy to commit an offence contrary to s 6(1). Similarly, the attempt alleged in count 2 of the indictment was an attempt to commit an offence contrary to s 6(1).

12 So far as presently relevant, s 11 of the Act provides:

"For the purposes of -

(a) section 6 (1) (a), a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V in relation to the prohibited drug;

..."

Schedule V of the Act specifies two grams of methylamphetamine as the amount of prohibited drug giving rise to the presumption of intention to sell or supply.

13 In the course of his summing up, the primary judge read count 1 of the indictment to the jury and instructed the jury that all of the elements that the Crown had to prove were contained in the count. He then took each of those elements and, having defined conspiracy as an agreement to do an unlawful act, identified the relevant unlawful act as being to possess a quantity of methylamphetamine with intent to sell or supply it to another. The primary judge then went on to say to the jury:

"To possess a quantity of methylamphetamine - of course, methylamphetamine is an unlawful drug and I can tell you that it is unlawful to possess that. Of course, that is not in dispute and has not even been raised by the defence, but you may be wondering what it goes on 'with intent to sell or supply it to another'. That simply means this: under our Misuse of Drugs Act under which both charges are laid section 6 of that act says:

> A person who with intent to sell or supply it to another has in his possession a prohibited drug commits an indictable offence.

As you would well and truly expect. So that is the indictable offence referred to; possessing a quantity of methylamphetamine with intent to sell or supply it to another. You might think why 'intent to sell or supply it to another'? Intent to sell or supply it to another of course is a serious charge. To possess the drug alone, of course, is an offence but with intent to sell or supply it to another is a very serious charge and that arises this way because under our section, 'A person shall, unless the contrary is proved be deemed to have in his possession a prohibited drug' - deemed to have in his possession - 'with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified.'

> The quantity specified of methylamphetamine is 2 grams, so that if you have in your possession more than 2 grams the law deems that you have it in your possession - namely, he had 12 pounds - with intent to sell or supply. Of course the defence have not even mentioned it because it is not suggested for a second that if you had that amount of drug in your possession you would be deemed to have it with intent to sell or supply unless the contrary is proved and there has been no attempt to prove the contrary.
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> So that is why in the indictment it is 'with intent to sell or supply it to another'."

The judge then returned to give further directions about the question of conspiracy. A little later in his summing up, when dealing with the second count of attempt he said:

> "To possess a quantity of methylamphetamine with intent to sell or supply it to another - of course, that just goes on because the intent to sell or supply it to another is deemed exactly the same way as I have explained to you with respect to count 1 because it is certainly in excess of the 2 grams. It is an attempt to possess an amount of 12 pounds, so it is an attempt to possess with intent to sell or supply it to another and, as I say, the defence do not argue that point at all."

14 At the conclusion of the summing up, counsel for the appellant took a number of exceptions to the judge's charge including, in particular, exception to the reference to the deeming provisions of s 11. Counsel for the Crown supported that exception submitting that the Crown did not rely upon the deeming provisions of s 11 and did not contend that there was any reversal of onus of proof. Nevertheless the primary judge declined to redirect the jury on this matter.

15 Although, in this Court, the respondent submitted that there was no misdirection in this respect, there is, in our view, no doubt that the primary judge's reference to s 11 was wrong and amounted to a misdirection of the jury.

16 The factual premise from which s 11 proceeds is that the accused "has in his possession a quantity of the prohibited drug" not less than the specified quantity. If that is established the accused is deemed to have the drug in possession with intent to sell or supply unless the contrary is proved. But that factual premise was never established in this case. It was not contended at trial that the appellant had possession of the drugs when they were dispatched from Melbourne or while they were in transit between Melbourne and Perth. Although the respondent submitted that such a case could have been made at trial, no such case was attempted and the respondent should not now be permitted to do so. The Crown case was that the

appellant had conspired to possess methylamphetamines and had attempted to possess the drugs, not that he had ever succeeded in possessing them.

17 The respondent submitted that s 11 should be read as applying to cases of attempting or conspiring to possess drugs for sale or supply because s 33 made a person who attempted to commit or conspired to commit an offence under s 6(1) guilty not of an offence under s 33 but of the principal offence under s 6(1). It was submitted that if s 11 did not apply to cases of attempt and conspiracy, there was no point in s 33 making the person who attempted or conspired to commit the principal offence guilty of the principal offence rather than a separate ancillary offence. In this respect, the *Misuse of Drugs Act* differs from the Criminal Code (WA) where a person attempting to commit a principal offence is guilty not of the principal offence but of a separate offence of attempt[2] and a person conspiring to commit a principal offence is, likewise, guilty not of the principal offence but of a separate offence[3].

18 We do not accept that s 33 takes the form which it does in order to make s 11 apply to cases of attempt and conspiracy to commit an offence under s 6(1). First, s 11 could apply to cases of attempt or conspiracy to possess for sale or supply only if words were added to it. It is only by expanding what we have described as the factual premise of the section (actual possession of the drugs) that it could apply to a case of an attempt to possess drugs or (except in most unusual circumstances) a case of conspiracy to possess drugs. Secondly, s 11 is a deeming provision in a penal statute and it is a provision which reverses the onus of proof in relation to an element of the offence. Any of these considerations would be powerful and sufficient reason to reject the construction of s 11 now put forward on behalf of the respondent. Taken together they permit no other conclusion. It is not necessary, then, to consider whether the respondent should be permitted to raise the contention about construction which it did in this Court when it did not do so at trial or on appeal to the Court of Criminal Appeal.

19 It follows that the judge's reference to s 11 in his summing up to the jury was a misdirection.

20 There having been a misdirection of law, the question then becomes whether the proviso to s 689(1) of the Criminal Code applies. Section 689(1) states:

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2 s 552.

3 s 558.

"The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

21 The appellant made two submissions: first that the misdirection amounts to "such a departure from the essential requirements of the law that it goes to the root of the proceedings"[4] and secondly, that if that were not so, the appellant had nevertheless lost "a chance which was fairly open to him of being acquitted"[5] or "a real chance of acquittal"[6].

22 Reduced to its essentials, the first branch of the appellant's argument concerning the proviso was that because the misdirection concerned proof of an element of each of the offences with which the appellant was charged, and because the misdirection occurred at a point when the appellant had no opportunity to address the jury about it, the appellant had been denied a proper trial. Especially was this so, so the argument ran, when the misdirection included a reversal of the onus of proof.

23 We do not accept that the proceedings against the appellant were fundamentally flawed or "have so far miscarried as hardly to be a trial at all"[7]. Each of the matters which we have mentioned (the fact that the misdirection concerned an element of the offence, occurred at the end of the trial and reversed the onus of proof) may invite the most careful attention to whether the proviso can be applied; each of these matters may be said to suggest that the jury may have been led into a false or unsafe chain of reasoning. But we are not persuaded that the fact that there has been a misdirection about one element of the offence with

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

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

6 *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

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

which an accused is charged means that the trial was necessarily fundamentally flawed. After all, most cases of misdirection will concern directions about matters relevant to the jury's deliberations and yet the proviso requires that not every "wrong decision of any question of law"[8] lead to the quashing of the conviction or a new trial. As was said in *Wilde v The Queen*[9] "[t]here is no rigid formula to determine what constitutes such a radical or fundamental error" as to preclude the application of the proviso. Simply demonstrating that there was a misdirection on a matter relevant to the jury's consideration is not sufficient.

24 It may be that a misdirection which has the effect of denying procedural fairness and depriving an accused person of the right to have some substantial part of his or her case decided by the jury would result in a trial that is fundamentally flawed. It may also be that a misdirection about burden of proof invites closer scrutiny of the question whether the trial was fundamentally flawed but in this case it is important to put the particular misdirection into the whole context of the trial. It is convenient to do that at the same time as considering the second branch of the appellant's argument about the proviso, that the appellant lost a real chance of acquittal[10].

25 At his trial, the appellant, as he was entitled to do, put the Crown to its proof. He offered no explanation, whether in court or out of court, for his connection with the events that were described in evidence. The thrust of the final address to the jury by counsel for the appellant was that although the evidence that had been led at trial might excite suspicion, it was not sufficient to show that the appellant knew there would be amphetamines in the car sent from Melbourne to Perth and that there was insufficient evidence to demonstrate to the requisite standard that the appellant had agreed with Calder to bring amphetamines from Melbourne to Perth.

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8 s 689(1). We do not think it necessary in this case to attempt to resolve what have been seen as tensions implicit in sections such as s 689(1) of the Criminal Code, as to which see *R v Gallagher* unreported, Supreme Court of Victoria, Court of Appeal, 28 August 1997.

9 (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ.

10 We adopt the phrase "real chance of acquittal" simply for brevity, not because we think it offers some different or better description of the test which is to be applied and which is considered in cases such as *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Driscoll v The Queen* (1977) 137 CLR 517 at 524; *R v Storey* (1978) 140 CLR 364 at 376; *Gallagher v The Queen* (1986) 160 CLR 392 at 412-413; *Wilde v The Queen* (1988) 164 CLR 365 at 371-372; *Glennon v The Queen* (1994) 179 CLR 1 at 9.

At no time did counsel for the appellant suggest at trial that the appellant may have made some more limited agreement with Calder, whether to mind the drugs for Calder or to some other effect. The contention was that the Crown had failed to prove beyond reasonable doubt the making of any agreement between Calder and the appellant about amphetamines.

26 Thus, the primary judge was right to tell the jury, as he did, that the appellant had made no point about intention to sell or supply. The defence appeared to be directed, and directed only, to the anterior point of whether the Crown had proved that the appellant knew and agreed that drugs should be hidden in the car.

27 That there was no debate at trial about the intention which the appellant or Calder had in conspiring or attempting to possess the drugs is, perhaps, not surprising. The amount that was seized was very large - 5.3 kilograms. The notion that someone may wish to possess that quantity of illegal drugs for a purpose other than the purpose of supply or sale to others appears to have been treated at trial as not being worthy of consideration. Certainly, no reference was made to that possibility in an otherwise comprehensive attack made on behalf of the appellant on alleged deficiencies in the Crown's proofs.

28 For the first time, however, in the course of the hearing of the appeal to this Court, it was submitted on behalf of the appellant that the evidence led at trial could be consistent with an agreement between the appellant and Calder to possess the drugs for some purpose other than sale or supply and an attempt by the appellant to possess the drugs for some purpose other than sale or supply. In particular, it was submitted that there may have been no agreement between the appellant and Calder other than an agreement that they, or one of them, would obtain possession of the drugs. Even if one or both of them may have expected that there may later be a sale or supply of the drugs the agreement may, so the argument went, have extended no further than an agreement to gain possession of the drugs. It was suggested that some similar analysis of the facts might be made in relation to the offence of attempt.

29 The argument was founded largely on what was said by the Court of Criminal Appeal in New South Wales in *Trudgeon*[11]. Trudgeon was charged with conspiracy to supply a prohibited drug contrary to the *Poisons Act* 1966 (NSW). That Act gave an extended meaning to the word "supply" but particulars that were

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11 (1988) 39 A Crim R 252. See also *R v Carey* (1990) 20 NSWLR 292; *Manisco v The Queen* (1995) 14 WAR 303; cf *R v Maginnis* [1987] AC 303.

given of the charge did not make clear exactly what form of "supply" was said to be the subject of the conspiracy. The particulars alleged that[12]:

> "The object of the conspiracy was the obtaining of some heroin by Cheung in order to sell heroin to Trudgeon for the purpose of Trudgeon supplying a person or persons unknown with that heroin."

In *Trudgeon* it was contended, on appeal, that the gravamen of the charge against the accused was that it was part of the agreement between Cheung and Trudgeon that Trudgeon would supply to others the material that was to be sold by Cheung to Trudgeon. Gleeson CJ held that the evidence showed that Cheung had sold and delivered material to Trudgeon and was paid in full for it. He went on[13]:

> "There is ample basis for the inference that he [Cheung] would have expected that [Trudgeon] would on-sell it. However, it is consistent with the facts that Cheung really could not have cared less what [Trudgeon] did with the material, and was not party to any agreement with [Trudgeon] about that matter."

Accordingly, Gleeson CJ considered that Trudgeon's conviction should be quashed. Lee CJ at CL and Loveday J agreed[14].

30 Unlike this case, *Trudgeon* concerned successive transactions - a sale from Cheung to Trudgeon and the possible sale by Trudgeon to others. In those circumstances, it is clear that the agreement between Cheung and Trudgeon may have extended no further than an agreement for sale and purchase, with no meeting of minds about the future fate of the drugs[15].

31 In the present case there was no evidence suggesting that Calder and the appellant stood in the relationship of vendor and purchaser, and the charges were different. Trudgeon was charged with conspiracy to supply; the appellant was charged with conspiracy to possess and the attempt to possess. But the conspiracy alleged here was an agreement to possess the goods with a particular intention - to sell or supply - and the attempt charged was an attempt to possess with that same

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12 (1988) 39 A Crim R 252 at 254.

13 (1988) 39 A Crim R 252 at 257.

14 (1988) 39 A Crim R 252 at 264-265 per Lee CJ at CL, 265 per Loveday J.

15 See also *R v Carey* (1990) 20 NSWLR 292; *Marinovich, Romeo & Ricciardello* (1990) 46 A Crim R 282; *Manisco v The Queen* (1995) 14 WAR 303.

intention. Given the quantity of drugs concerned, it may be readily accepted that those who conspired or attempted to possess them may well have contemplated that the drugs would be sold or supplied to another. But to prove conspiracy or attempt to commit the crime of possessing the drugs with intent to sell or supply, it would not be sufficient to show that the accused foresaw that someone would sell or supply the drugs to others. It was necessary to show that the accused agreed or attempted to possess the drugs with that intent[16]. That is, to amount to an attempt, the acts of the accused must be intentionally aimed at the commission of the acts which amounted to an offence *by the accused* under s 6(1) of the *Misuse of Drugs Act*. To amount to a conspiracy to commit an offence under s 6(1) the alleged conspirators had to be shown to have agreed that the possession of the drugs would be with that intent.

32 If the charge of attempt had stood alone, and the jury had been satisfied to the requisite standard that the appellant had attempted to possess the drugs, it might have been possible to say that the evidence at the trial was consistent only with an attempt to possess with intent to sell or supply. But the charge of attempt did not stand alone - there was the charge of conspiracy. For that charge, it was not enough to show only that the appellant foresaw that someone would sell or supply. Had the jury not been misdirected, they may well have come to the conclusion that, so far as concerns the charge of conspiracy, that was all that was established. In that event, the appellant would have been entitled to an acquittal. The proviso could not then apply.

33 The question of intent aside, the elements of the offence of conspiracy to possess drugs with intent to sell or supply are different from those of attempt to possess with intent to sell or supply. In this case the different offences charged arose from the one set of facts. It may well be that the jury first considered the charge of conspiracy and, having found that offence proved, reasoned that, as the appellant conspired to possess the drugs in question with intent to sell or supply, he must have attempted to possess them with the same intent. More to the point, in the event that the jury had first considered whether the appellant conspired to possess the drugs in question with intent to sell or supply and concluded that that was not established, they may not have then been satisfied beyond reasonable doubt that he even attempted to possess them. For this reason, the proviso cannot be applied with respect to the appellant's conviction on the charge of attempt to possess amphetamines.

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16 *Giorgianni v The Queen* (1985) 156 CLR 473 at 506-507 per Wilson, Deane and Dawson JJ.

34 It has frequently been pointed out that "it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed."[17] That is because the "addition of a charge of conspiracy ... 'tend[s] to prolong and complicate the trial'."[18] It may not be strictly accurate to describe an attempt to commit an offence as a substantive offence. However, it may be undesirable, for the reasons that apply where a substantive charge is available, to charge a conspiracy to commit a crime and an attempt to commit the same crime in the same indictment if both offences arise out of the one set of facts.

35 Is it now too late to raise the point that the appellant may not have intended that the drugs which he attempted to possess would be sold or supplied to others and may not have agreed with Calder that the drugs to be obtained would be dealt with in that way? Did the appellant lose a real chance of acquittal at his trial when he did not raise the point upon which he now relies? May a refusal to apply the proviso be seen as some encouragement of the notion that points can be nursed for use on appeal if the trial does not have the outcome desired by the accused?

36 Putting questions in this way may distract attention from some fundamental considerations. First, the appellant put the prosecution to its proof and that means that he put the prosecution to proof of *every* element of the offences with which he was charged. To say that the point now relied on was not raised at trial denies the generality of a plea of not guilty. Secondly, the misdirection was not seen as irrelevant or unimportant by counsel engaged at the trial. Both counsel for the accused and the prosecution took exception to the judge's direction about this issue. It is clear, therefore, that both counsel at trial saw the misdirection as being significant. That being so, and the misdirection concerning proof of an element of the offence, we do not consider that it can be said that the proviso applies - it cannot now be said that the appellant did not lose a real chance of acquittal. Other considerations may well have arisen if no exception had been taken at trial. Then it might be suggested that the point had been kept back for appeal and we express no view on whether the proviso would have applied in such circumstances.

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17 *R v Hoar* (1981) 148 CLR 32 at 38 per Gibbs CJ, Mason, Aickin and Brennan JJ, referred to in *Mickelberg v The Queen* (1989) 167 CLR 259 at 309 per Toohey and Gaudron JJ. See also *Jones* (1974) 59 Cr App R 120 at 124; *Moore* (1987) 25 A Crim R 302 at 302-303 per Macrossan J, 311-313 per McPherson J.

18 *R v Hoar* (1981) 148 CLR 32 at 38, referring to *Verrier v Director of Public Prosecutions* [1967] 2 AC 195 at 223-224.

37 In the present case there was a clear misdirection of law about proof of one element of each of the offences that were charged. It is regrettable that the error was not corrected at trial. Strong as the case against the appellant may otherwise have been, it cannot be said that conviction was inevitable.

38 McHUGH J. James Krakouer ("the accused") was convicted in the District Court of Western Australia on two counts concerned with amphetamine trafficking. His appeal to the Court of Criminal Appeal of the Supreme Court of Western Australia was dismissed[19]. Pursuant to the grant of special leave, he now appeals to this Court alleging that the trial judge misdirected the jury concerning the application of certain provisions of the *Misuse of Drugs Act* 1981 (WA) ("the Act") and that the error was a miscarriage of justice.

39 The first question in the appeal is whether s 11(a) of the Act - which deems a person who has possession of a prescribed quantity of a drug to have possession with the intent to sell or supply the drug when charged under s 6(1) of the Act - also applies to charges of attempting or conspiring to commit an offence against s 6(1)(a). The trial judge directed the jury that it did. If he erred, a second question arises in the appeal. It is whether the misdirection constituted a miscarriage of justice having regard to the strength of the evidence against the accused.

The factual background

40 At the trial of the accused, the Crown alleged that on the afternoon of 31 January 1994 members of the Western Australian drug squad apprehended the accused, his brother and a third man, Ross Phillip Calder, while they were removing 5.3 kilograms of what they thought was methylamphetamine from a Datsun Bluebird vehicle. The substance was packed inside a garbage bag and concealed within the door of the Bluebird which was parked in the backyard of the brother's home in suburban Perth.

41 Evidence called by the Crown showed that the accused had flown to Melbourne with Mr Calder in early January 1994 and had arranged for the Bluebird to be transported to Western Australia on a truck. The Western Australian police drug squad monitored the transportation of the vehicle. When the Bluebird arrived at a depot in Perth on the morning of 31 January, members of the squad removed the doors, replaced the methylamphetamine packages with packages of flour and installed a listening device.

42 Later that day, the accused and Mr Calder drove to the truck depot to take delivery of the car. Mr Calder signed for delivery as the consignee of the vehicle which was then driven to the home of the accused's brother. Shortly afterwards, police officers executed a search warrant and apprehended the three men in the backyard of the home.

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19 (1996) 16 WAR 1.

The statutory framework

43 The Crown, relying on ss 6 and 33 of the Act, charged the accused with two separate offences:

(1) conspiring to possess a quantity of methylamphetamine with intent to sell or supply it to another; and

(2) attempting to possess a quantity of methylamphetamine with intent to sell or supply it to another.

Section 6 relevantly provides:

> (1) Subject to subsection (3), a person who -
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> (a) with intent to sell or supply it to another, has in his possession;
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> (b) manufactures or prepares; or
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> (c) sells or supplies, or offers to sell or supply, to another,
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> a prohibited drug commits an indictable offence".

Section 33 provides as follows:

> "(1) A person who attempts or incites another to commit, or becomes an accessory after the fact to, an offence (in this subsection called 'the principal offence') commits -
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> (a) if the principal offence is an indictable offence, the indictable offence; or
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> (b) if the principal offence is a simple offence, the simple offence,
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> but is liable on conviction -
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> (c) to a fine not exceeding half of the fine; and, additionally or alternatively,
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> (d) to imprisonment for a term not exceeding half of the term,
>
> to which a person who commits the principal offence is liable.
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> (2) A person who conspires with another to commit an offence (in this subsection called 'the principal offence') commits -

(a) if the principal offence is an indictable offence under section 6(1) or 7(1) the indictable offence, but is liable on conviction to the penalty referred to in section 34(1)(b); or

(b) if the principal offence is a simple offence or an indictable offence, other than an indictable offence referred to in paragraph (a), the simple offence or that indictable offence, as the case requires, and is liable on conviction to the same penalty to which a person who commits the principal offence is liable."

Section 11 of the Act relevantly provides that:

"For the purposes of -

(a) section 6(1)(a), a person shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V in relation to the prohibited drug;"

The quantity of methylamphetamine specified in Sched V is two grams.

History of the proceedings

44 The accused was tried in the District Court of Western Australia before Gunning DCJ and a jury of 12. The jury convicted the accused on both charges. He was sentenced to a total of 16 years imprisonment.

45 In the course of his summing up, Gunning DCJ told the jury:

"To possess the drug alone, of course, is an offence but with intent to sell or supply it to another is a very serious charge and that arises this way because under our section, 'A person shall, unless the contrary is proved be deemed to have in his possession a prohibited drug' - deemed to have in his possession - 'with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified.'

The quantity specified of methylamphetamine is 2 grams, so that if you have in your possession more than 2 grams the law deems that you have it in your possession - namely, he had 12 pounds - with intent to sell or supply."

Later, when dealing with the attempt charge, his Honour said:

> "To possess a quantity of methylamphetamine with intent to sell or supply it to another - of course, that just goes on because the intent to sell or supply it to another is deemed exactly the same way as I have explained to you with respect to count 1 because it is certainly in excess of the 2 grams. It is an attempt to possess an amount of 12 pounds, so it is an attempt to possess with intent to sell or supply it to another and … the defence do not argue that point at all."

46 The learned Crown prosecutor objected to these directions. He insisted that the "deeming" provision contained in s 11(a) did not apply to the evidence because the essential precondition to the paragraph's application - "possession" of the relevant drug - had not occurred. Because flour had been substituted for the drug, the Crown prosecutor accepted that the accused had not had possession of the methylamphetamine. Accordingly, the prosecutor conceded that the Crown bore the onus of demonstrating the necessary intent to sell or supply and could not rely on the deeming provision in s 11(a). Not surprisingly, counsel for the accused agreed with this submission. However, the learned trial judge refused to withdraw his direction concerning the application of s 11(a) to the charges.

47 After the accused was convicted, he appealed to the Court of Criminal Appeal on the ground, among others, that the trial judge had misdirected the jury on the question of intent to sell or supply. Anderson J, with whom Franklyn and Rowland JJ agreed, delivered the principal judgment dismissing the appeal. His Honour said[20]:

> "The error complained of … is that the trial judge directed the jury in terms of the deeming provision and in that way impermissibly withdrew from the jury an essential function which they had to perform, namely to make a finding of fact as to the relevant intent; and that his Honour thereby reversed the onus of proof on this issue."

48 Anderson J held that no misdirection had occurred. His Honour said that he had "no difficulty in holding that in virtue of s 11(a) an attempt or conspiracy to possess not less than a Sch V quantity is an attempt or conspiracy to possess with intent."[21]

49 His Honour said that s 33 of the Act has the effect that a person attempting or conspiring to commit an offence under the Act actually commits the relevant offence. Accordingly, his Honour concluded that an attempt or a conspiracy to

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20 (1996) 16 WAR 1 at 11.

21 (1996) 16 WAR 1 at 11.

commit an offence under s 6(1)(a) results in the accused being tried as if the principal offence were committed successfully.

50 Given this procedural framework, Anderson J saw the application of s 11(a) of the Act to the charge in this case as logical and appropriate. His Honour said that, if the accused's attempt to possess had succeeded, s 11(a) would have deemed him to have possessed the drug with intent to sell or supply to another. Similarly, if the object of the conspiracy had been achieved and the accused had obtained possession, s 11(a) would have deemed him to have conspired to possess the drug with intent to sell or supply. Given that this would have been the result had the desired possession eventuated, his Honour concluded that ss 33 and 6(1)(a) activated the deeming provision contained in s 11(a).

51 Having concluded that the s 11(a) deeming provision did apply to the charges against the accused and that the trial judge's direction was not in error, Anderson J then examined whether any miscarriage of justice had occurred even if his construction of the relevant provisions was wrong. Section 689(1) of the *Criminal Code* (WA) ("the Code") enacts that the Court of Criminal Appeal may dismiss an appeal notwithstanding that it finds that there has been some error or irregularity in a criminal trial provided that it appears that "no substantial miscarriage of justice has actually occurred".

52 Anderson J held that, even if the trial judge had misdirected the jury on the onus of proof in relation to intent to sell or supply, it was a case for applying the "proviso". His Honour said[22]:

> "Quite apart from the deeming provision, having regard for the quantity of drug involved and the circumstances including the involvement of several others in the criminal activity there was no other conceivable purpose than to sell or supply to others."

In other words, his Honour held that, on the evidence, a reasonable jury could have come to no other conclusion than that the accused intended to sell or supply the drug once it came into his possession. That being so, any misdirection as to intent could not have affected the jury's verdict and there had been no miscarriage of justice in convicting the accused.

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22 (1996) 16 WAR 1 at 12.

Operation of the statutory deeming provision

53 In my opinion, s 11(a) of the Act has neither express nor implicit application where the accused is charged with attempting or conspiring to possess with intent to sell or supply[23].

54 It is true, as the learned judges in the Court of Criminal Appeal held, that the effect of s 33 is that a person who is found guilty of attempt or conspiracy by reason of the interaction of ss 6(1)(a) and 33 is guilty of committing the s 6(1)(a) offence. But that is the result of the verdict of guilty. Section 33 says nothing as to how that verdict is to be reached. Furthermore, nothing in ss 6(1)(a), 11(a) or 33 provides any support for the conclusion that s 11(a) operates procedurally in respect of an attempt or conspiracy to commit an offence under s 6(1)(a). By its terms, s 11(a) operates procedurally only in respect of a charge under s 6(1)(a). When an accused is found guilty of an attempt or conspiracy, s 33 makes him or her guilty of a s 6(1)(a) offence, but at that stage s 11(a) is irrelevant: the accused person has already been found to have the necessary intent.

55 Moreover, s 11(a) only deems a person to have the relevant intent when that person "has in his possession" a prescribed quantity of a drug. Possession of a drug is a precondition to the operation of s 11(a). Absent possession by the accused of a drug, s 11(a) has no work to do. By hypothesis, a person charged with attempt under s 33(1) does not have possession. That sub-section does not deem the accused to have possession of the drug. Under no circumstances can s 11(a) have any operation in respect of a charge of attempt under s 33.

56 A person who is charged with conspiracy under s 33 may or may not have possessed the relevant drug. But that person only commits an offence under s 6(1)(a) when found guilty of the conspiracy to possess with intent to sell or supply. At verdict, s 11(a) is irrelevant, for the jury has already found as a fact that he or she has conspired to possess the drug with intent to sell or supply.

57 In this Court, the respondent submitted that, despite the prosecutor's concession at the trial, the accused had "possession"[24] because he had dominion or control over the methylamphetamine during its journey from Melbourne to Perth.

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23 cf *Davis v The Queen* (1991) 66 ALJR 22 at 24; 103 ALR 417 at 420-421 where I expressed the view that it had no application to a person charged with aiding and abetting an offence under s 6(1)(a).

24 Section 3 of the Act defines the concept of possession as follows:

> "'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."

The decisive answer to this contention is that s 11(a) does not apply to an offence based on ss 6(1)(a) and 33.

58 In any event, the evidence is by no means conclusive as to whether the accused had dominion or control over the drug. The jury would not have been acting unreasonably if it refused to conclude that the accused had dominion and control over the methylamphetamine during the journey from Melbourne to Perth. Moreover, as the respondent conceded during argument, this reasoning bears no resemblance to the prosecution case put at trial. Before the jury could apply the deeming provision in s 11(a), it would have had to find that the accused had possession of the drug. Yet it was never part of the prosecution case that he obtained possession of the drug.

59 The respondent also submitted that, notwithstanding the text of ss 6(1)(a) and 33, the deeming provision in s 11 inferentially applies in cases of attempts and conspiracies to possess. The respondent contended that it would be artificial to deny s 11(a) an operation in the context of attempts and conspiracies where the intervention of police officers was the only reason that an attempt to possess a large quantity of illicit drugs had not been completed.

60 The respondent contended that inferring that s 11(a) applied to attempts and conspiracies charged under s 33 would explain a unique feature of the procedural framework created by the Act. Under the Code, attempts and conspiracies to commit an indictable offence are themselves discrete indictable offences[25]. However, under s 33 of the Act, a person attempting or conspiring to commit an offence does not commit the offence of attempt or conspiracy but is treated as having committed the principal offence. The respondent submits that the object of this approach is to equate attempts and conspiracies with the principal offence for procedural purposes with the result that provisions such as s 11(a) are activated and apply to attempts and conspiracies.

61 If the respondent is correct in contending that the legislature intends s 11(a) to apply to attempts and conspiracies charged under s 33, it is surprising that the legislature did not achieve its purpose more directly. It would have been a simple matter to make the provisions of s 11(a) apply to all offences involving possession or to attempts and conspiracies charged under s 33 as well as to an offence under s 6(1)(a). Instead, apart from omitting words such as "and for no other purpose" the legislature has said as plainly as it could that the deeming provision of s 11(a) only applies to an offence under s 6(1)(a).

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25 Code Ch 57, ss 552-557; Code Ch 58, ss 558-560.

62 A court should not disregard clear words and interpret a legislative provision so as to extend the scope of criminal liability even if it thinks that, by inadvertence, the legislature has failed to deal with a matter. That is so even if the court thinks that the legislature would probably have dealt with the matter if it had been drawn to the legislature's attention. Jordan CJ put the relevant principle succinctly in delivering the judgment of the Full Court of the New South Wales Supreme Court in *Ex parte Fitzgerald; Re Gordon*[26]:

> "If conduct of a particular kind stands outside the language of a penal section, the fact that a Court takes the view that it is through inadvertence of the Legislature that it has not been included does not authorise it to assume to remedy the omission by giving the penal provision a wider scope than its language admits."

63 Still less should a court ignore the clear words of a provision so as to give it a meaning that would or might make it easier to convict an accused if the intention of the legislature is at best a matter of contestable opinion, as it is in this case. Nothing in the Act supports the respondent's contention that s 11(a) applies to attempts and conspiracies under s 33. Moreover, the respondent did not refer us to any material outside the text of the Act that would provide a foundation for concluding that the legislature intended s 11(a) to apply to offences derived from the operation of s 33.

64 Furthermore, where an issue of statutory interpretation concerns proof of criminal intent, only clear words will defeat the presumption that the relevant intent must be proved against the accused. So much was made clear by this Court in *He Kaw Teh v The Queen*[27]. The respondent has failed to give any convincing reason why this presumption should be displaced in relation to charges of conspiracy and attempt based on s 33 of the Act.

65 For these reasons, the deeming provision contained in s 11(a) of the Act has no express, implied or inferential operation in relation to charges of attempt and conspiracy to possess a drug with intent to sell or supply. Accordingly, the trial judge misdirected the jury.

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26 (1945) 45 SR(NSW) 182 at 186; see also *Rowlands v Hamilton* [1971] 1 WLR 647 at 650 per Lord Reid, at 655 per Viscount Dilhorne; [1971] 1 All ER 1089 at 1090, 1094.

27 (1985) 157 CLR 523.

Application of the Code proviso

66 Section 689(1) of the Code provides that:

> "The Court of Criminal Appeal … shall allow [an] appeal, if they think that … the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law".

67 As in other Australian jurisdictions, however, this provision is qualified. Section 689(1) goes on to say that:

> "[T]he Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

68 A prima facie miscarriage of justice occurs whenever a jury has convicted a person after the trial judge has given or failed to give the jury a direction that constitutes legal error. This is because a trial marred by such an imperfection is prima facie an affront to the rule of law, as Fullagar J famously explained in *Mraz v The Queen*[28] when he said:

> "It is very well established that the proviso to s 6(1) [*Criminal Appeal Act* 1912 (NSW)] does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice."

69 The question as to what circumstances might justify judicial reliance on the "proviso" typically requires the Court of Criminal Appeal to evaluate the evidence given at the trial from the perspective of a reasonable jury, properly instructed. Given the obvious potential for the proviso to subvert the fundamental right of an accused person to a trial according to law, the threshold for its application is high. In *Wilde v The Queen*[29] Brennan, Dawson and Toohey JJ summarised the test as follows:

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28 (1955) 93 CLR 493 at 514.

29 (1988) 164 CLR 365 at 372.

> "Unless 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 conviction must be set aside."

Having stated the test, however, their Honours continued[30]:

> "The question whether the jury would inevitably have convicted falls to be determined by the Court of Criminal Appeal. It is a question which the Court of Criminal Appeal must answer according to its assessment of the facts of the case. In this case the Court of Criminal Appeal answered it adversely to the applicant, and there is nothing to show that the answer was wrong."

70 Anderson J examined the evidence and concluded that on that evidence "there was no other conceivable purpose than to sell or supply to others." Once his Honour reached that conclusion, it was inevitable that his Honour would also conclude that the trial judge's erroneous direction had not resulted in any miscarriage of justice.

71 It would be a rare case in which, absent legal error on the part of a court of criminal appeal, this Court would grant special leave to examine the correctness of a finding that a misdirection had or had not resulted in a miscarriage of justice. Only where it is reasonably arguable that the Court of Criminal Appeal has misdirected itself on an issue of legal principle in applying the proviso is the case sufficiently "special" to warrant the grant of leave to appeal against the factual finding that an error did or did not constitute a miscarriage of justice.

72 In the present case, the accused contended that the Court of Criminal Appeal misdirected itself because it failed to examine whether the error complained of was so fundamental that it went to the root of the trial. In making this submission, the accused relied on the following passage from the judgment of Brennan, Dawson and Toohey JJ in *Wilde*[31]:

> "[T]he proviso was not intended to provide, in effect, a retrial before the Court of Criminal Appeal when the proceedings before the primary court have so far miscarried as hardly to be a trial at all. It is one thing to apply the proviso to prevent the administration of the criminal law from being 'plunged into outworn technicality' … it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court

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30 (1988) 164 CLR 365 at 372.

31 (1988) 164 CLR 365 at 372-373; see also *Quartermaine v The Queen* (1980) 143 CLR 595 at 600-601 per Gibbs J; *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148.

> is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso".

Their Honours went on to say that the application of this counter-balancing principle depends entirely on the circumstances of each case and is unsuited to the development of guiding principles or formulas.

73 In my opinion, the trial of the accused miscarried. The offences created by sub-ss 6(1)(a) and (2) of the Act both relate to the possession of prohibited drugs. Section 6(2), which is concerned with possession, creates a simple offence. Section 6(1)(a) creates a more complex offence involving possession *with intent to sell or supply to another*, and the offence is triable on indictment. The latter offence is the more serious of the two, a difference that is reflected in the penalties that may be imposed on conviction[32]. A finding that the accused had an intent to sell or supply increases the gravity of the offence and exacerbates the consequences for the accused if convicted. The question of intent is therefore critical in the trial of an accused charged under s 6(1)(a).

74 In this case, the trial judge's misdirection took this critical issue out of the jury's hands. It substituted trial by judicial direction for trial by jury by instructing the jury that the law deemed the relevant intent to be present by virtue of the quantity of methylamphetamine at issue. Misdirections of law in a criminal trial can take many forms. Of few of them can it be said that, at all times and in all circumstances, they constitute a miscarriage of justice. Legal error must often give way to cogent evidence of guilt. But on such matters as the standard or onus of proof or the functions of the jury, the position is different. These matters go to the root of a criminal trial according to law. It is difficult to see how the weight of evidence can have any relevance as to whether or not a misdirection on such matters is a miscarriage of justice.

75 That is not to say that a misdirection as to one of those matters is always a miscarriage of justice. The error may be so trivial that a Court of Criminal Appeal can properly conclude that there has been a trial according to law, notwithstanding the misdirection. But if a direction on the standard or onus of proof or the function of the jury is substantially wrong, I cannot presently conceive of a case where the weight of evidence against the accused could affect the conclusion that a miscarriage of justice has occurred. An accused person is entitled to a trial

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32 s 34(1) of the Act.

according to law. Where the law requires that an issue be tried by a jury, the accused does not have a trial in any meaningful sense where the jury is prevented by judicial direction from determining the issue. It is of no relevance in my opinion that a court of criminal appeal thinks that the evidence of guilt is overwhelming. An accused is entitled to be tried by the jury. That is the tribunal that is given the responsibility for determining the guilt of an accused person.

76 In the present case, the misdirection took away from the jury the issue of intent to sell or supply, an issue which the criminal law of Western Australia required them to determine. It was their function to decide that issue just as it was their function to decide whether there had been an attempt or a conspiracy. The misdirection prevented the constitutional tribunal from determining whether on the evidence the Crown had proved beyond a reasonable doubt one of the elements of the offence. The judge did not even leave to the jury the issue of whether on the evidence and within the meaning of s 11(a) the accused had proved to "the contrary". His directions effectively instructed the jury that, if they found an attempt or conspiracy to possess, the accused had an intent to sell or supply the drug. That being so, the accused did not have a trial according to law. His conviction constituted a substantial miscarriage of justice. The learned judges of the Court of Criminal Appeal erred therefore in holding that this was a case for applying the "proviso" to s 689(1) of the Code.

77 The accused also contended that, in the context of this trial, the misdirection went to the root of the trial because the misdirection gave rise to a breach of the rules of natural justice. In this Court, his counsel asserted that throughout the trial the accused had assumed, as had the Crown, that the burden of proof with respect to intent to sell or supply lay on the Crown. Counsel contended that the accused had presented his case on this basis and had been greatly prejudiced by the trial judge's direction, which effectively reversed the burden of proof when the accused had no further opportunity to give evidence or address the jury.

78 Because the misdirection went to the root of the trial, it is unnecessary to determine whether the misdirection was also a miscarriage of justice because it involved procedural unfairness to the accused. It is enough to say that the accused's argument on this point had merit.

79 The appeal must be allowed, the accused's convictions quashed and a new trial ordered.