# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, KIRBY, HAYNE AND CALLINAN JJ

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THE QUEEN APPELLANT

AND

REINHOLD ERHARD OLBRICH RESPONDENT

*The Queen v Olbrich* [1999] HCA 54
*7 October 1999*
S189/1998

**ORDER**

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of New South Wales entered on 6 July 1998.*

3. *Remit the matter to the Court of Criminal Appeal of New South Wales to deal with the appeal to that Court conformably with the reasons of this Court.*

On appeal from the Supreme Court of New South Wales

**Representation:**

D F Jackson QC with M M Cinque for the appellant (instructed by Commonwealth Director of Public Prosecutions)

P Byrne SC with R W Burgess and J R Clarke for the respondent (instructed by T A Murphy, Legal Aid Commission of New South Wales)

## CATCHWORDS

## The Queen v Olbrich

Criminal law – Sentencing – Fact finding for the purpose of sentencing – Onus and standard of proof – Importation of prohibited import – Whether trial judge obliged to determine precise role of accused – Distinction between "courier" and "principal".

Words and phrases – "courier" – "principal".

*Crimes Act* 1914 (Cth), s 16A(2)(a).
*Customs Act* 1901 (Cth), s 233B.

1 GLEESON CJ, GAUDRON, HAYNE AND CALLINAN JJ. The process by which a court arrives at the sentence to be imposed on an offender has just as much significance for the offender as the process by which guilt or innocence is determined. Unless the legislature has limited the sentencing discretion, a judge passing sentence on an offender must decide not only what type of penalty will be exacted but also how large that penalty should be. Those decisions will be very much affected by the factual basis from which the judge proceeds. In particular, the judge's conclusions about what the offender did and about the history and other personal circumstances of the offender will be very important. This appeal raises some questions about fact finding for the purposes of sentencing an offender.

2 The respondent to the appeal, Reinhold Erhard Olbrich, pleaded guilty to one charge of importing into Australia a prohibited import to which s 233B of the *Customs Act* 1901 (Cth) applied, namely heroin. The charge alleged, and by his plea the respondent admitted, that the amount of heroin he imported was not less than the amount specified in the *Customs Act* as a "trafficable quantity" of heroin - that is, that the amount he imported was not less than 2 grams[1]. In fact, the respondent brought into Australia much more than 2 grams of heroin; he brought in more than 1.6 kilograms of powder which, on analysis, was found to contain 1.184 kilograms of pure heroin. The powder was secreted in some bottles and a plastic design board contained in the respondent's luggage and it was found when his luggage was searched by customs officers after his arrival at Sydney (Kingsford-Smith) Airport, Mascot, on a flight from Bangkok via Singapore.

3 In the District Court of New South Wales, the respondent was sentenced to 8½ years imprisonment and a non-parole period of 6 years was fixed. He appealed to the Court of Criminal Appeal of New South Wales against that sentence, alleging, in effect, that the primary judge had erred in making findings of fact about the nature or degree of his involvement in the importation. The Court of Criminal Appeal allowed his appeal, quashed the sentence passed in the District Court, and remitted the matter to that Court for resentencing[2]. By special leave, the Crown now appeals to this Court.

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**1** *Customs Act* 1901 (Cth), Sched VI. That Schedule specified a commercial quantity of heroin as 1.5 kilograms.

**2** *R v Olbrich* (1998) 45 NSWLR 538.

Proceedings in the District Court

4 By his plea of guilty the respondent admitted all of the elements of the offence with which he was charged. He admitted, therefore, that on 16 August 1996 at Mascot in New South Wales he imported into Australia prohibited imports to which s 233B of the *Customs Act* applied; he admitted that the prohibited imports were narcotic goods consisting of a quantity of heroin; and he admitted that the quantity imported was not less than the trafficable quantity applicable to heroin.

5 Some other facts were placed before the judge in the form of a Statement of Facts that either was agreed to by the respondent or, at the least, was not disputed by him. The following facts were set out in that statement. On arrival at Sydney (Kingsford-Smith) Airport the respondent's luggage was searched by the Australian Customs Service. The luggage was found to include some bottles containing white powder. That powder reacted positively to a test for heroin. When asked whether he had any more heroin in his bag the respondent replied "Yes I have one more piece. I know there is some more because someone pays me $15,000." The respondent then removed a plastic design board from his briefcase and it was found that that board contained heroin secreted in it.

6 The Statement of Facts gave details of further conversations the respondent had with Customs officers and with members of the Australian Federal Police in which he named a man in Perth to whom he intended to deliver the drugs. It recorded that at the airport the respondent "indicated his willingness to participate in a controlled delivery of the bottles and design board". In fact, however, due to what were described in the Statement of Facts as "operational factors and considerations", a controlled delivery from Sydney to the intended destination of the drugs (Perth) was not permitted to proceed.

7 The Statement of Facts set out how much white powder was removed from the bottles and design board and the results of the analysis of that powder: that it contained 1.184 kilograms of pure heroin. The Statement of Facts concluded by recording that the respondent "is married with three children. He is a German citizen residing in Singapore with his family where, he claims, he is an opal dealer. The [respondent] has no previous convictions in Australia."

8 On the hearing of the plea, the respondent sought to put further facts before the primary judge. In particular, he tendered an affidavit in which he stated that he had been offered drug courier jobs previously but had refused because he

disliked that activity and had no need for the money. According to the respondent's affidavit, he learned, in about August 1996, that his son had been arrested and sentenced to detention in a boys' home in Singapore. When in Thailand at about that time he used heroin for the first time because of the pressure and distress he was feeling. Being desperate for money he agreed to deliver the drug. But he said, in his affidavit, that at the time he agreed to do this he was not aware of the harm that using heroin would cause and that he had only realised its destructive nature after being imprisoned in Australia pending sentence.

9 Prosecuting counsel cross-examined the respondent. In his sentencing remarks the primary judge said of the respondent's evidence, "I do not believe any of the evidence given by the [respondent] surrounding the circumstances of this offence by which he has sought to mitigate his involvement. His evidence was riddled with inconsistencies, prevarications, and assertions of fact which were themselves inherently unbelievable."

10 Much of the argument advanced in the plea on the respondent's behalf was directed to persuading the judge that the respondent was a "courier" not a "principal" in the importation. It will be necessary to return to consider what was meant by these terms. For the moment, however, the intended meaning may appear sufficiently from the fact that it was submitted on the respondent's behalf that it was for the Crown to satisfy the primary judge beyond reasonable doubt that the respondent was not a "courier" and that there was no evidence to indicate that the respondent "was importing the drug as a principal, *that is on his own account*"[3].

11 The primary judge rejected these contentions, saying that "[t]o the degree that a courier is given some mitigation by being less culpable for that offence than if he were a principal, it seems to me that the [respondent] must prove that he is less culpable than the objective facts would otherwise indicate." Not being satisfied that the respondent was bringing the drug into Australia as a courier, the primary judge said that he was not prepared to mitigate his sentence on that basis. Accordingly, so the primary judge said, "[i]f I dismiss his account of the facts surrounding his importation then for the purposes of assessing his culpability for the offence I should treat him as if he had told the police or this Court nothing about the circumstances of the event at all. I should simply apply normal sentencing principles, taking into account the nature of the offence, the maximum penalty and such other matters which are relevant to an assessment of the objective features of a criminal offence."

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**3** Emphasis added.

Proceedings in the Court of Criminal Appeal

12 As we have noted, the respondent contended, and the Court of Criminal Appeal accepted, that the trial judge had erred in dealing with the nature and degree of the respondent's involvement in the importation. The Court of Criminal Appeal held[4] that "[t]he identification of the precise nature of the involvement of an accused in an act of importation of drugs is an essential aspect of the sentencing process." What the Court meant by this is to be understood in light of its conclusions, first, that[5]:

> "In this case ... a plea of guilty to a charge involving only the act of importation carries no implication of any character with respect to the degree of involvement of the accused in any overall scheme for importing drugs into Australia. The authorities which indicate that the existence of a commercial purpose for offences expressed in terms of supply or production is a matter of aggravation are applicable to an offence expressed in terms of importation. The involvement of the importer in the course of events prior to, or subsequent to, the actual act of importation itself is a matter which the Crown must prove beyond reasonable doubt",

and, second, that[6]:

> "In the absence of relevant evidence, an accused is entitled to be sentenced on the basis most favourable to him."

The Court of Criminal Appeal concluded that the primary judge had failed to apply correct principles by not accepting that the Crown bore the onus of proof beyond reasonable doubt on the issue of the applicant's degree of involvement in the importation[7]. It therefore made the orders we have mentioned above.

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**4** (1998) 45 NSWLR 538 at 544 per Spigelman CJ (Newman and Sperling JJ concurring).

**5** (1998) 45 NSWLR 538 at 544 per Spigelman CJ.

**6** (1998) 45 NSWLR 538 at 545 per Spigelman CJ.

**7** (1998) 45 NSWLR 538 at 545 per Spigelman CJ.

The significance of the circumstances of the offence

13 We do not accept that the identification of the precise nature of the accused's involvement in an act of importation of prohibited imports is an essential aspect of the sentencing process.

14 It is understandable that, in order to promote consistency in sentencing, appellate courts, when expressing views about sentences for drug offences, have sometimes categorised the role of an offender, where that is known, in a scheme of importation or distribution. Similarly, sentencing judges who are dealing with several co-offenders may consider such categorisation relevant in differentiating between individuals. However, the utility of such an exercise is necessarily limited by the extent to which the material facts are known. What may be a convenient shorthand method of describing the facts of particular cases should not be elevated to an essential task to be undertaken in every case, regardless of whether that is possible or appropriate.

15 In the present case, the precise nature of the involvement of the respondent in the act of importation was known: at least in the sense that it was known that he had brought the drugs into Australia. He *was* the importer. But if, as the Court of Criminal Appeal said, the course of events prior to or subsequent to the actual act of importation is relevant and necessary information, it may be accepted that little was known to the primary judge of those matters apart from what the respondent said in evidence. Was the primary judge obliged to inquire about them? If there was no evidence about those events, was the primary judge bound to make some assumptions about them that were favourable to the accused?

16 There is a very practical reason for concluding that a sentencing judge is not obliged to inquire about the course of events before or after an importation of drugs. Very often prosecuting authorities (and a sentencing judge) will have only the most limited and imperfect information about how it was that the accused person came to commit an offence for which he or she stands for sentence. Especially is that so where the accused has pleaded guilty and where the offence which the offender admits is one which had its genesis outside this country. Very often then it will not be possible to say, with any certainty, what exactly was done or intended by a person apprehended in the act of importing narcotics into Australia.

17 Further, there is no statutory requirement that a trial judge make such inquiries. Because the offence to which the respondent pleaded guilty was a

"federal offence"[8], the primary judge was bound, in sentencing the respondent, to apply the relevant provisions of the *Crimes Act* 1914 (Cth). Section 16A(2)(a) of that Act requires a sentencing judge to take into account, so far as "known to the court", the nature and circumstances of the offence. The reference to what is "known to the court" is very important and mirrors what would be the position in the absence of statutory provision.

18 Finally, inquiring about what was done or intended by a person who imported drugs into Australia (apart, that is, from the acts which constitute the importation) will not always be relevant to sentencing that offender for the crime of importation. The offender may have conspired with others to import the drugs; the offender may very well have intended to deal with the drugs in Australia in ways that amount to the commission of other offences in this country. But it would be quite wrong to sentence an offender for crimes with which that offender is not charged[9]. It seems, however, that the intended purpose of the inquiries which the Court of Criminal Appeal had in mind was to determine the involvement of the respondent "in any overall scheme for importing drugs into Australia"[10]. It is desirable to turn, in this connection, to the distinction between "couriers" and "principals" that was relied on at first instance.

The distinction between "couriers" and "principals"

19 Sometimes, when drugs are imported into this country, more than one person connected with the importation of those drugs (or subsequent dealings with them) is prosecuted. Sometimes, those persons will be charged with different offences under the *Customs Act*. One may be charged with importing the drugs; others may be charged with conspiracy to import prohibited imports[11], or being knowingly concerned in the importation of such imports[12]. If several of those persons are convicted of, or plead guilty to, the offences with which they are charged, it will, of course, be necessary to identify any feature that should lead to imposing a different sentence on one from that imposed on another. In that context, a distinction between "couriers" and "principals" may prove a useful shorthand description of different kinds of participation in a single enterprise. And it may be

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**8** An offence against a law of the Commonwealth: *Crimes Act* 1914 (Cth), s 16(1).

**9** *R v De Simoni* (1981) 147 CLR 383.

**10** (1998) 45 NSWLR 538 at 544 per Spigelman CJ.

**11** Contrary to *Customs Act*, s 233B(1)(cb).

**12** Contrary to *Customs Act*, s 233B(1)(d).

that in the circumstances of a particular case, different levels of culpability might be identified by adopting those terms. But this was not such a case. Further, it is always necessary, whether one or several offenders are to be dealt with in connection with a single importation of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a "courier" or a "principal" must not obscure the assessment of what the offender did.

20 There are, of course, cases in which only one offender is prosecuted but it is clear that the importation is part of a business venture that is organised hierarchically. In such a case a distinction between courier and principal might be useful to indicate where an offender fitted into the hierarchy of the organisation. And that, in turn, might assist in identifying the nature of that offender's criminality. But there was no evidence, one way or the other, to suggest that this was such a case. There was nothing before the primary judge which revealed that the respondent was part of any business venture of that kind. All that was known was that the respondent asserted that he was to be paid $15,000 for importing the heroin. That is, the respondent asserted that the importation of such a large quantity of heroin was for his financial gain rather than for some other purpose such as his own use.

21 Whether others stood to gain from the respondent's conduct does not, it seems to us, affect what sentence should have been passed on him. That depended on what *he* had done and who *he* was, not on what others may have hoped to gain from his activity. But even if this were thought to be a useful inquiry, it was one that could not be pursued in this matter because there was no evidence about it.

22 It would have been wrong for the primary judge to sentence the respondent on the basis that he was the mastermind (or even an important member) of some larger criminal enterprise. But the primary judge did not do so. He sentenced the respondent as if the respondent had told the police and the court nothing about the circumstances of the event at all.

23 In this Court it was submitted on behalf of the respondent that despite the primary judge's rejection of the evidence given by the respondent (and his disbelief of that evidence) the primary judge should nevertheless have sentenced

the respondent as a "courier" because the Crown had not established beyond reasonable doubt that the respondent was not a courier. For the reasons we have given earlier, the distinction between courier and principal was not a distinction of assistance to the primary judge in determining what sentence should be passed on the respondent. It is, however, as well to say something about the onus and standard of proof in sentencing.

Onus and standard of proof in sentencing

24 Courts of Criminal Appeal in Australia have considered the subject of fact finding for sentencing many times in the last 30 years[13]. Not all of the questions that have been examined in those decisions must be considered now. For present purposes, it is enough to say that we reject the contention that a judge who is not satisfied of some matter urged in a plea on behalf of an offender must, nevertheless, sentence the offender on a basis that accepts the accuracy of that contention unless the prosecution proves the contrary beyond reasonable doubt. The incongruities that would result if this submission were accepted are well illustrated by the present case. The respondent swore that he was a courier but the judge disbelieved him. To require the judge to sentence the respondent on the basis that he *was* a courier is incongruous.

25 Much of the discussion of fact finding for the purposes of sentencing addresses questions of onus and standard of proof[14]. References to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution and offender in sentencing proceedings; there is no such joinder of issue. Nonetheless, it may be accepted that if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention

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**13** *R v O'Neill* [1979] 2 NSWLR 582; *R v Martin* [1981] 2 NSWLR 640; *Savvas (No 2)* (1991) 58 A Crim R 174; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593; *R v Isaacs* (1997) 41 NSWLR 374; *R v Chamberlain* [1983] 2 VR 511; *R v Storey* [1998] 1 VR 359; *Law v Deed* [1970] SASR 374; *R v Stehbens* (1976) 14 SASR 240; *R v Jobson* [1989] 2 Qd R 464; *R v Nardozzi* [1995] 2 Qd R 87; *R v Morrison* [1999] 1 Qd R 397; *R v Aloia* [1983] WAR 133; *Salisbury v The Queen* (1994) 12 WAR 452; *Langridge v The Queen* (1996) 17 WAR 346; *R v Turnbull* (1994) 4 Tas R 216. See also in England *Newton* (1982) 77 Cr App R 13; *Palmer* (1993) 15 Cr App R (S) 123; *Guppy and Marsh* (1994) 16 Cr App R (S) 25 and in Canada *R v Gardiner* [1982] 2 SCR 368.

**14** Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999) at 100-107.

of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it. (We say "if necessary" because the calling of evidence would be required only if the asserted fact was controverted or if the judge was not prepared to act on the assertion.)

26 In the proceedings before the primary judge in this case, the prosecution did not submit that the sentence to be imposed on the respondent (a 58 year old first offender who pleaded guilty to importing more than 1.1 kilograms of heroin) should be increased beyond what otherwise would be called for by those facts because the appellation "principal" could be attached to him. Rather, the respondent submitted that the sentence otherwise to be imposed on him should be mitigated because he was "a courier". The respondent bore the burden of proving this fact. The judge was not persuaded of it.

27 As to the standard of proof that should be applied, we would adopt what was said by the majority in *R v Storey*[15] - that a sentencing judge

> "may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities."

28 As we have said, the primary judge did not take facts into account in a way that was adverse to the accused (other than those established by the plea and the Statement of Facts). He was not persuaded of circumstances which the respondent contends should have been taken into account in his favour.

29 The appeal should be allowed. The appellant contended (and the respondent did not dispute) that it was appropriate to remit the matter to the Court of Criminal Appeal to deal with the appeal to that Court conformably with the reasons of this Court. We would therefore order:

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**15** [1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell AJA.

*Gleeson CJ*
*Gaudron J*
*Hayne J*
*Callinan J*



1. Appeal allowed.

2. Set aside the order of the Court of Criminal Appeal entered on 6 July 1998.

3. Remit the matter to the Court of Criminal Appeal to deal with the appeal to that Court conformably with the reasons of this Court.

30 KIRBY J. In *R v Storey*[16], the Court of Appeal of Victoria examined the process in which a judge is engaged, after conviction of the accused, in finding the facts upon which to base the sentence. In a footnote which closes discussion in that Court of the onus and burden of proof and the process of fact-finding appears a perceptive but unelaborated comment of Callaway JA[17]: "Lawyers", he says, "understandably tend to concentrate on words and reify the concepts they represent. A psychologist might tell us that the choice between the competing views discussed in this judgment is really between the height of the speed bumps designed to induce appropriate caution as the judge motors towards the sentence he or she thinks just."

31 Like the Court of Appeal in *Storey*, this Court cannot explore the psychology of judicial decision making when it comes to fact-finding for sentencing purposes. But it can insist that the process engaged in is a vital part of the unconcluded criminal trial[18]. That, as a matter of principle, specifying the facts which justify the sanction is no less important a judicial task than identifying the facts which justify the conviction[19]. And that, if the Crown wishes to rely upon a contested factual circumstance as aggravating an offence, an onus lies on the Crown to establish beyond reasonable doubt the existence of that circumstance[20]. These are established principles. In this Crown appeal, this Court should uphold and apply them.

The conviction, sentence and reasons of the primary judge

32 The facts surrounding the offences and apprehension of the respondent, Mr Reinhold Olbrich, are set out in the reasons of the majority. I will not unnecessarily repeat them.

33 The respondent was charged with importing a prohibited import contrary to the *Customs Act* 1901 (Cth), s 233B. The quantity of the prohibited import specified was 1.184 kilograms of heroin. Under the scheme of the *Customs Act,* this quantity constitutes a "trafficable quantity" for the purposes of the *Customs Act*, an amount of 1.5 kilograms or more being a "commercial quantity"[21]. The Parliament has fixed different maximum penalties by reference to the quantity

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**16** [1998] 1 VR 359.

**17** [1998] 1 VR 359 at 380, fn 87.

**18** *R v Gardiner* [1982] 2 SCR 368 at 415.

**19** *R v Gardiner* [1982] 2 SCR 368 at 415.

**20** *Anderson v The Queen* (1993) 177 CLR 520 at 536.

**21** *Customs Act* 1901 (Cth), Sched VI.

of the import in question. In the case of the offence of which the respondent was convicted, the maximum penalty is 25 years imprisonment or a fine of $100,000 or both[22].

34 The respondent pleaded guilty to the charge. He adhered to that plea when he stood for sentence before Howie DCJ in the District Court of New South Wales. The facts upon which the sentencing judge was obliged to determine the penalty appropriate to the case were, in accordance with the usual practice, substantially contained in a statement of facts handed to the court. The respondent had prior notice of that statement. It contained many of the bare facts, subsequently recounted in Howie DCJ's reasons and set out by the majority. However, presumably in order to endeavour to mitigate the seriousness of his involvement in the act of importation and to convince the sentencing judge that he was a "mere courier", the respondent swore an affidavit concerning his involvement in the offence. This Court has not seen the transcript of his evidence. However, Howie DCJ records[23] that the respondent was "extensively cross-examined about his involvement in this offence and the version contained in his affidavit".

35 Howie DCJ concluded that he did "not believe any of the evidence given by the prisoner surrounding the circumstances of this offence by which he has sought to mitigate his involvement. His evidence was riddled with inconsistencies, prevarications, and assertions of fact which were themselves inherently unbelievable."[24] His Honour stated, as examples, the respondent's evidence as to how he had received the name and telephone numbers of his contact in Perth and the manner in which the drug was delivered to him and packaged was "simply quite unbelievable"[25]. He remarked that the respondent's "evidence raised grave suspicions in my mind about his other trips to this country and the purpose of those trips."[26] He put these suspicions to counsel for the respondent, it being "obvious that I hold them". However, he continued that "they will play no part at all in my assessment of the appropriate sentence for the crime with which I am concerned. And I now put them completely out of my mind when determining the sentence to impose upon the prisoner."[27]

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**22** *Customs Act*, s 235(2)(d)(i).

**23** *R v Olbrich* unreported, District Court of New South Wales, 20 December 1996 at 3 ("Sentence").

**24** Sentence at 3.

**25** Sentence at 4.

**26** Sentence at 4.

**27** Sentence at 4.

36 Howie DCJ then reached the passages in his reasons critical to this appeal. It is necessary, in the view which I take, to set out in some detail his Honour's reasoning. He noted the submission for the respondent that "the onus is upon the Crown to satisfy me beyond reasonable doubt that he was not a courier and that there was no evidence to indicate that he was importing the drug as a principal, that is on his own account."[28] Howie DCJ rejected this submission, saying[29]:

> "I do not believe that that is the correct approach to take. The offence is one of importing narcotic goods. To the degree that a *courier* is given some mitigation by being less culpable for that offence than if he were a *principal*, it seems to me that the prisoner must prove that he is less culpable than the objective facts would otherwise indicate. Otherwise every importer of drugs would have to be treated as a *courier* by the Courts and by the Crown, unless the Crown could establish that he was not a *courier*. I do not think that that can be correct as a matter of legal principle or logic."

37 Having expressed this opinion, his Honour proceeded to the consequences[30]:

> "Therefore, I am not satisfied that he was bringing this drug into Australia as a *courier* and I am not prepared to mitigate his sentence on that basis. How do I then proceed to sentence him? [Counsel] submits that I cannot sentence him on the basis that he was a *principle* [sic]. But that seems to me to be the only alternative, having decided that I cannot treat him as a *courier*. If I dismiss his account of the facts surrounding his importation then for the purposes of assessing his culpability for the offence I should treat him as if he had told the police or this Court nothing about the circumstances of the event at all."

38 Howie DCJ turned to what he described as the "objective facts of this case". He expressed the opinion that the importation was "a very professional attempt"; that the prisoner was an intelligent businessman; and that he knew how to try to avoid attention from customs officers. In his view, the importation was "a business venture by him for considerable profit commensurate with the risk involved and the professionalism of the operation. It is in my view a serious example of this type of offence and not simply because of the amount involved."[31]

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**28** Sentence at 5.

**29** Sentence at 5. The submission was made by reference to *Anderson v The Queen* (1993) 177 CLR 520. Emphasis added.

**30** Sentence at 5-6. Emphasis added.

**31** Sentence at 6-7.

39 His Honour noted various other considerations, relevant both to the offence and to the offender. Most of these do not invite comment. In the course of describing the benefit which the respondent was entitled to receive for the assistance he had given to the authorities in naming his contact in Perth, Howie DCJ added[32]:

> "Although I am not satisfied that the prisoner was *merely a courier*, I am prepared to accept that the person [in Perth] was to be the recipient of the drug in this country or at least was involved in its importation."

40 After indicating that he had taken into account "all the matters" contained in s 16A of the *Crimes Act* 1914 (Cth) and adjusted the sentence to recognise the unavailability of remissions[33], Howie DCJ sentenced the respondent to eight and a half years imprisonment to date from his original arrest and detention. He fixed a non-parole period of six years. Against this sentence, the respondent sought leave to appeal to the Court of Criminal Appeal.

Decision of the Court of Criminal Appeal

41 That Court granted leave to appeal and made orders, allowing the appeal, quashing the sentence and remitting the matter to the District Court for resentencing. The opinion of the Court[34] was given by Spigelman CJ. After setting out the facts and a number of the foregoing extracts from Howie DCJ's reasons for sentence, Spigelman CJ noted that the "simple duality"[35], observed in the reasons of the sentencing judge between importation as a "courier" or as a "principal", found support in New South Wales sentencing practice in remarks made by Hunt CJ at CL in *R v Raz*[36] to which it will be necessary to return. After recording that the respondent's plea of guilty established only "the essential legal ingredients of the offence" and that nothing in that plea had established "anything about the degree of involvement of the [respondent] in the whole process from the acquisition of the heroin abroad to its supply to Australian users"[37], Spigelman CJ stated that, as had apparently been the case at trial, the "submissions in this Court were put in terms of whether the alleged status of the applicant as a 'principal' was a matter of aggravation, or whether the alleged status as a 'courier' was a matter of

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**32** Sentence at 9. Emphasis added.

**33** *Crimes Act* 1914 (Cth), s 16G. Sentence at 10.

**34** *R v Olbrich* (1998) 45 NSWLR 538 (Spigelman CJ, Newman and Sperling JJ).

**35** (1998) 45 NSWLR 538 at 541.

**36** Unreported, Court of Criminal Appeal (NSW), 17 December 1992 at 6-7.

**37** (1998) 45 NSWLR 538 at 542.

mitigation."[38] The Chief Justice accepted that the onus of proof of matters going to aggravation for the purpose of sentence was upon the Crown[39] to a standard of proof beyond reasonable doubt[40]. He also accepted that the burden of proof of contested matters going to mitigation for the purpose of sentencing was upon the accused, who had to establish such matters on the balance of probabilities[41]. Spigelman CJ concluded that the respondent's plea of guilty to a charge involving only the act of importation of the prohibited substance carried "no implication of any character with respect to the degree of involvement of the accused in any overall scheme for importing drugs into Australia."[42] He went on[43]:

> "The authorities which indicate that the existence of a commercial purpose for offences expressed in terms of supply or production is a matter of aggravation are applicable to an offence expressed in terms of importation. The involvement of the importer in the course of events prior to, or subsequent to, the actual act of importation itself is a matter which the Crown must prove beyond reasonable doubt. …
>
> The identification of the precise nature of the involvement of an accused in an act of importation of drugs is an essential aspect of the sentencing process. It is because acts of importation differ so much in their quality and nature that the legislature has given such a wide range of penalties …
>
> For the purposes of sentencing, it is the particular role of the person in the scheme by which drugs become available to users in Australia, which must be proven beyond reasonable doubt. It is convenient to describe this role by a general label such as 'courier' or 'principal'. In the absence of relevant

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**38** (1998) 45 NSWLR 538 at 542.

**39** (1998) 45 NSWLR 538 at 543 citing *R v Martin* [1981] 2 NSWLR 640 at 642; *Traiconi* (1990) 49 A Crim R 417 at 418-419; *R v Blanchard* unreported, Court of Criminal Appeal (NSW), 10 September 1991; *Pilley* (1991) 56 A Crim R 202 at 204.

**40** (1998) 45 NSWLR 538 at 543 citing *Langridge* (1996) 87 A Crim R 1; *R v Storey* [1996] 1 VR 359 at 362-367, 369, 370-371.

**41** (1998) 45 NSWLR 538 at 543 citing *R v Cartwright* (1989) 17 NSWLR 243 at 253-254; *Pilley* (1991) 56 A Crim R 202 at 204; *Yenice* (1994) 72 A Crim R 234 at 236-237; *R v Ali* [1996] 2 VR 49 at 59-60; cf *R v Storey* [1996] 1 VR 359 at 369, 379-380.

**42** (1998) 45 NSWLR 538 at 544.

**43** (1998) 45 NSWLR 538 at 544-545.

evidence, an accused is entitled to be sentenced on the basis most favourable to him."

42 The Crown was granted special leave to appeal to this Court. In my opinion, the Crown's appeal should be dismissed.

Couriers and principals

43 The *Customs Act*, in the section under which the respondent was charged and convicted, differentiates in nine separate paragraphs between "special provisions with respect to narcotic goods"[44]. These offences are, in turn, graded (as relevant) by reference to the quantity of the narcotic substance, the subject of the offence[45]. However, no reference is made in the Act to a further criterion depending on a distinction between "principals" and "couriers" or "mere couriers" to which reference is repeatedly made in the reasons of Howie DCJ. This is therefore a common law distinction which has been grafted onto the Act by judges. Judges have not invented the distinction to introduce a difference in the culpability of the conduct of offenders inconsistent with the Act. They have done so, in numerous cases heard before this one, out of a recognition of repeated patterns of behaviour noticed in this kind of offence both by trial and appellate courts.

44 This Court has said that inconsistency in the punishment of like offenders can be a badge of unfairness[46]. Whilst sentencing responds to a variety of objectives which sometimes overlap and not infrequently prove incompatible[47] and whilst it cannot be reduced to the precision of mathematical formulae[48], it is highly desirable that a measure of uniformity in the treatment of like cases should be observed in order to avoid the justifiable sense of grievance which can arise from unexplained differentiation in the treatment of like offences and like offenders. Given the recurring patterns of conduct which exist in cases of this kind it was therefore both natural and desirable first that Courts of Criminal Appeal should endeavour to give guidance to sentencing judges on how they should treat cases the facts of which manifest identifiable recurring features and secondly that

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**44** The heading of s 233B *Customs Act*.

**45** *Customs Act*, Sched VI.

**46** *Lowe v The Queen* (1984) 154 CLR 606 at 610-611; *Postiglione v The Queen* (1997) 189 CLR 295 at 335.

**47** cf *Griffiths v The Queen* (1977) 137 CLR 293 at 310, 326-327. See also *R v Storey* [1998] 1 VR 359 at 366-367; *Inge v The Queen* [1999] HCA 55 at [54].

**48** *Mill v The Queen* (1988) 166 CLR 59 at 63; *Postiglione v The Queen* (1997) 189 CLR 295 at 339; *Inge v The Queen* [1999] HCA 55 at [59].

sentencing judges should conform, to the extent that the evidence or other material placed before them warranted that course.

45 In a number of decisions of the Court of Criminal Appeal of New South Wales, patterns of sentencing for "couriers" of substantial quantities of both heroin and cocaine have been noticed and explained. The decision of that Court in *Ferrer-Esis*[49] is one such case. The opinion of the Court was given by Hunt J, with whom Gleeson CJ and Lee CJ at CL concurred. In the course of his reasons, Hunt J noted the way in which the sentencing judge had dealt with the offender as "no more than a courier"[50]. His Honour concluded that the finding was open on the evidence and would not be disturbed on appeal. He then referred to what he described as the "recognised pattern of sentencing for *couriers* of substantial quantities of *heroin*"[51] and identified the range of head sentences of imprisonment which cases of that description attracted. He referred to the developed case law in the Court of Criminal Appeal concerning couriers[52]. He then concluded that the sentence imposed in that case was manifestly inadequate, requiring correction.

46 In several later cases Hunt J returned to the sub-classification of the seriousness of offences of the kind in question in these proceedings, namely by reference to whether the offender was a *courier* or a *principal.* In *Raz* Hunt CJ at CL (as he had by then become) examined a finding by the sentencing judge that the prisoner was not "a bare or mere courier" and that, therefore, he was "fully aware of the circumstances of the organisation for which he was bringing the drugs into Australia" and "involved in that organisation in a more substantial way than being a mere courier"[53]. Because that conclusion rested upon a statement provided to police on a promise that it would not be used against him, and because the conclusion that the applicant was more than "a bare or mere courier" was based upon that material and fundamental to the sentence imposed, the Court upheld the prisoner's appeal by majority and resentenced him. It was central to the reasoning of the Court of Criminal Appeal in that case that the Court recognised as well established the differentiation between a *courier* or *mere courier*, on the one hand, and a person involved in the act of importation of narcotic goods in a way more closely concerned with an organisation that provided the chain through which the

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**49** (1991) 55 A Crim R 231 referred to in *Pereira v The Queen* (1992) 66 ALJR 791.

**50** (1991) 55 A Crim R 231 at 236.

**51** (1991) 55 A Crim R 231 at 236. Emphasis of "couriers" added.

**52** (1991) 55 A Crim R 231 at 238 referring to *R v Leroy* [1984] 2 NSWLR 441 at 446-447; *Poyner* (1986) 17 A Crim R 162 at 164; *Thiagarajah* (1989) 41 A Crim R 45 at 49.

**53** Unreported, Court of Criminal Appeal (NSW), 17 December 1992 at 4 per Hunt CJ at CL (with the concurrence of Badgery-Parker J, Mahoney JA dissenting).

goods would pass from their initial cultivation and preparation to their destination in the Australian market (a *principal*), on the other.

47 The experienced judges in the Courts of Criminal Appeal who regularly apply the foregoing differentiation in the treatment for sentencing purposes of "couriers" and others in an organisational chain may be taken to be as aware as this Court is of the imperfections of such categories. Human conduct is not susceptible to easy classification. In particular, the differentiation between a "courier" or "mere courier" and a "principal" involves a gradation of the facts as they may be known to the sentencing judge which can vary from a detailed elaboration by the prisoner about his or her part to silence on the part of the prisoner - whether from ignorance, fear or simply as an assertion of legal rights. Nonetheless, the cases to which this Court was taken demonstrate clearly the differentiation long observed in New South Wales sentencing law and practice between the punishment of a "courier" and the punishment of persons classified as "principals" or described as "involved in [the] organisation in a more substantial way than being a mere courier"[54].

48 One may be critical of the foregoing classifications. However, a review of the case law leaves no doubt whatever that they have been regularly invoked in New South Wales courts at least for the purpose of differentiating the levels of punishment to be imposed. For two reasons it is unhelpful to attempt to divorce the present respondent's case from the line of authority just mentioned on the footing that other cases did involve evidence of an "organisation", whereas his case did not. First, common experience of trial courts, sentencing judges and Courts of Criminal Appeal teaches that acts of importation of drugs of the quantity with which the respondent was apprehended are rarely, if ever, foolhardy, spontaneous actions of an unaided individual. They commonly require contact, usually covert, with a vendor in the place of supply and, for large quantities, a distributing organisation or contact within Australia. Secondly, in the present case, the sentencing judge found as a fact that the person in Perth whom the respondent nominated, "was to be the recipient of the drug in this country or at least was involved in its importation"[55]. To that extent, Howie DCJ found the existence of an "organisation" of some kind. Given the quantity of the drug involved, this was scarcely a surprising conclusion.

49 When Howie DCJ referred throughout his reasons to the "courier" and "principal" dichotomy, it may safely be assumed that his Honour was referring to the cases, such as *Ferrer-Esis* and *Raz*, which I have mentioned. As his Honour pointed out in his reasons (for another purpose), before appointment as a judge, he

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**54** *Raz* unreported, Court of Criminal Appeal (NSW), 17 December 1992 at 4 per Hunt CJ at CL.

**55** Sentence at 9.

had long been involved in appellate advocacy[56]. It may be inferred that he would have argued many cases before the Court of Criminal Appeal in which the "courier" and "principal" distinction was considered for sentencing purposes. Therefore, Howie DCJ's use of the distinction in this case should not be taken as a slip or as an unconscious, idiosyncratic reference to terms of art without giving the words any particular meaning. In the present context it was in the interests of a convicted prisoner standing for sentence to have the sentencing judge accept that he was a "courier" or "mere courier". Acceptance of that fact would tend to mitigate the seriousness of the prisoner's involvement in the act of importation. On the other hand, it was distinctly contrary to the prisoner's interests to have the judge conclude that he was a "principal". That was undoubtedly an aggravating circumstance. It tended to render much more serious the prisoner's part in the act of importation. It tied him more closely into a significant role within an organisational chain which invariably, or usually, is taken to exist in large-scale importation of a drug of the present character into Australia.

50 The finding that a prisoner is a "courier" or "mere courier" will tend to result (so far as the offence is concerned) in a lesser sentence, ie one lower in the scale to the maximum sentence fixed for the particular act of importation of the specified quantity of the drug in question. The finding that the prisoner is a "principal" will have the opposite consequence.

Principles of fact-finding

51 Subject to any requirements of s 80 of the Constitution, the task of finding the facts relevant to sentencing is a judicial one. It must be performed by the sentencing judge. Like any other judicial function it must be performed by the application of the applicable law to the facts as found. The law may be the common law or statute. Where there are applicable statutory provisions, either as to the substance and gradation of the offence[57] or as to the approach to be taken to the sentencing function[58], the judge must obey the statute. Where the sentencing judge conducts the entire proceedings sitting alone (whether following the outcome of the trial and conviction of the accused person or in consequence of a plea of guilty) it is for the judge to resolve any disputed questions about the evidence for himself or herself.

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**56** Sentence at 3.

**57** As in s 233B(1) and Sched VI of the *Customs Act*.

**58** As *Crimes Act*, s 16A. In some Australian jurisdictions particular provisions lay down requirements concerning the use of evidence received by a judge relevant to sentencing. See eg *Criminal Code* (Tasmania), s 386(7), (8) and (10). See also *Thompson v The Queen* (1999) 165 ALR 219 at 223, 224.

52 In Australia, upon a plea of guilty, a degree of informality has ordinarily marked sentencing procedures[59]. Usually, an agreed statement of facts, sometimes negotiated between the accused and the prosecution, will be placed before the sentencing judge. Sometimes an amount of material, representing the prosecution brief (or parts of it) will be given to the judge, together with victim impact statements[60] and other documentary material which may not conform to the ordinary rules of evidence. However, sentencing proceedings remain part of the criminal trial. They do not cease to be so upon the conviction of the accused, either following a jury's verdict or a plea of guilty[61]. In the event that asserted facts are disputed, those facts must be proved or disregarded. It is the duty of the judge to ensure (if there be any doubt) that the accused is aware of all of the material provided to the Court upon which the judge will rely in determining the sentence[62]. Where a fact in that material is contested, it may not be acted upon for sentencing purposes unless it is established. The proof of such a fact must occur in the context of the proceeding concerned, namely an uncompleted criminal trial. It is fundamental that in any such proceeding, without clear statutory authority, the accused person cannot be obliged to prove a fact. The criminal trial process does not cease to be accusatorial after the conviction is recorded and during the proceedings relevant to the determination of the sentence.

53 When the applicable statutory provisions are considered in this case, it is important to start with the gradation and variety of offences provided by the Parliament under s 233B(1) and the associated provisions of the *Customs Act.* It is fundamental that the respondent only be sentenced in respect of the particular offence to which he had pleaded guilty and of which he had been convicted. Where there are multiple offences of possible relevance to the facts but the accused has been charged and convicted of one or some only, it is a fundamental error to punish the accused on a basis dependent upon particular circumstances of aggravation which would constitute a different offence of which the accused has not been charged or convicted. If the Crown wishes to secure the punishment of an accused in respect of such aggravated circumstances, it is obliged to lay the charge which would present the guilt of the accused of such offence as an issue for trial. This is

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**59** *R v Storey* [1998] 1 VR 359 at 366-367. See also *R v Gardiner* [1982] 2 SCR 368 at 414-415.

**60** *Criminal Procedure Act* 1986 (NSW), Pt 6A; cf *Sentencing Act* 1991 (Vic), Pt 6, Div 1A.

**61** *R v Gardiner* [1982] 2 SCR 368 at 415.

**62** *Thompson v The Queen* (1999) 165 ALR 219 at 222.

a rule of law derived from the basic requirements of fair procedure. This Court has insisted upon it[63] and it has been regularly applied[64].

54 Turning to statutory provisions relevant to sentencing procedure, the offence against the *Customs Act* of which the respondent was convicted is a "federal offence" within the meaning of s 16(1) of the *Crimes Act*. It thus became the duty of the sentencing judge to sentence the respondent in accordance (relevantly) with a number of general sentencing principles enacted by the Parliament[65]. By s 16A(1) of the *Crimes Act*, a court, in determining the sentence to be passed on a person for a federal offence, "must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". In addition to the other matters, the court is obliged, in such a case, to "take into account" a number of "matters as are relevant and known to the court" including "the nature and circumstances of the offence"[66]. The reference to the matters "known to the court" amounts to a recognition by the Parliament of the varying contexts in which facts will be made known to the court. Relevant to a trial before a judge alone, the nature and circumstances of the offence, will only become "known to the court" to the extent that the accused admits, and the court receives, evidence and other materials or to the extent that the prosecution or the accused prove the facts relevant to "the nature and circumstances of the offence". To the extent that facts so relevant are disputed, they must be proved by the party bearing the applicable burden of proof and to the standard of proof applicable to that party.

55 The accused who stands for sentence once convicted following a plea, is certainly not obliged to disprove matters which would tend to aggravate the seriousness of the circumstances of his or her offence. He or she may seek (where the Crown contests an assertion) to adduce facts aimed at convincing the sentencing judge of circumstances relevant to the mitigation of the offence and thus to the diminution of punishment[67]. But such a prisoner is not required to disprove the opposite. Specifically, the prisoner is not required to disprove circumstances which the Crown asserts (or from which the Court might infer a conclusion) that the case is an aggravated one warranting more serious punishment

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**63** *R v De Simoni* (1981) 147 CLR 383 at 389; *Savvas v The Queen* (1995) 183 CLR 1 at 5.

**64** Recent illustrations include *R v Boney; Ex parte Attorney-General* [1986] 1 Qd R 190; *Sparkes* (1997) 94 A Crim R 281; *Schluter v Trenerry* (1997) 94 A Crim R 581 at 585; *Sessions* (1997) 95 A Crim R 151 at 166-167; *P* (1997) 98 A Crim R 419 at 433; *Mardday* (1998) 100 A Crim R 317 at 320.

**65** See *Crimes Act*, Pt 1B.

**66** *Crimes Act*, s 16A(2)(a).

**67** *R v Storey* [1998] 1 VR 359 at 368.

than would be appropriate if nothing else were known about the offence of which the accused had been convicted except the fact of conviction and the legal ingredients of the offence.

Application of the principles

56 In these proceedings, the respondent contended that he was a "courier" or "mere courier" within the authorities to which I have referred. Because the Crown was not willing to concede his entitlement to be so classified for sentencing purposes, it was necessary for the respondent to decide whether he could establish that classification within the agreed statement of facts or the material from the prosecution brief handed by consent to the sentencing judge. Not unsurprisingly, given the circumstances of his apprehension, his admissions, the skilful concealment of the drug and the address book, the respondent elected to proffer additional evidence of his own in an endeavour to prove to the satisfaction of the sentencing judge that he was a "courier" or "mere courier" for the purpose of the applicable authorities. He failed in that attempt. He does not now contest the entitlement of Howie DCJ, for the reasons which he gave, to reject that endeavour. He was therefore not entitled to have his punishment mitigated for the offence to which he had pleaded upon the basis that he was a "mere courier".

57 However, the failure of the respondent to prove that he was a "courier" or "mere courier" did not warrant the conclusion by the sentencing judge that he was therefore a "principal". To so treat the appellant would be to treat, as proved, circumstances of serious aggravation of his offence. The onus of proving such circumstances of aggravation rested upon the Crown. The standard of proof which it bore was proof beyond reasonable doubt[68].

58 That Howie DCJ fell into this mistake appears clearly enough from the following passage which I repeat[69]:

> "How do I then proceed to sentence him? [Counsel] submits that I cannot sentence him on the basis that he was a principle [sic]. But that seems to me to be the only alternative, having decided that I cannot treat him as a courier."

59 With respect to his Honour, it was not the only alternative. The onus of proof of each category rested upon a different party. Moreover, on the authorities, the burden of proof was different in respect of those matters which the respondent set out to prove and those which the Crown would have been obliged to prove.

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**68** *R v Storey* [1998] 1 VR 359 at 369.

**69** Sentence at 6.

60 In the context of the authorities in which the legal dichotomy of "courier" and "principal" are used, the latter classification has a definite connotation as a matter of aggravation in sentencing drug importers. It means a person involved in an organisation of drug importation and distribution with significant responsibilities within a drug supplying or importing chain. A courier, on the other hand, is one "involved in a one-off operation" who falls to be treated within a "recognised pattern" and punished accordingly[70]. This was the way in which Howie DCJ was using the expressions which recurred throughout his reasons for sentence. The Court of Criminal Appeal was correct to discern that fact. It was right to identify the error and to require that the respondent be resentenced, his sentence being then freed from this error.

61 *De Simoni*[71] establishes in this Court that, if the Crown wishes to have an accused person sentenced for circumstances of aggravation which constitute another and different offence, it is obliged to charge and prove that separate offence. Similarly, for a single offence, where the Crown asserts that the case constitutes an aggravated example, it must prove beyond reasonable doubt the facts that demand that conclusion. Here, whether or not the Crown explicitly asserted the circumstances of aggravation (that the respondent was a "principal"), it undoubtedly secured the benefit of that conclusion not by such proof but simply because the sentencing judge rejected the attempt of the respondent to prove a mitigating circumstance. Neither logic nor law warranted that result. Failure by one to prove fact A does not constitute proof by another of fact B. The sentence imposed on the respondent was flawed as a consequence. The Court of Criminal Appeal was right to so hold.

Order

62 The appeal should be dismissed.

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**70** *Raz* unreported, Court of Criminal Appeal (NSW), 17 December 1992 at 4 per Hunt CJ at CL.

**71** (1981) 147 CLR 383.