

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

THE KING

APPELLANT

AND

TSZ CHEUNG HERMAN KO

RESPONDENT

The King v Ko
[2026] HCA 29
Date of Hearing: 13 March 2026
Date of Judgment: 12 August 2026
S172/2025

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

R J Sharp KC with O P Holdenson KC and C J Tran for the appellant
(instructed by Director of Public Prosecutions (Cth))

G A Bashir SC with G E L Huxley for the respondent (instructed by Sydney
Criminal Lawyers)

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CATCHWORDS

The King v Ko

Criminal practice – Trial – Adequacy of jury directions – Attempted importation of commercial quantity of border controlled drug – Fault element – Intent to import substance – Where respondent alleged to have facilitated customs clearance and delivery of consignment – Where consignment intercepted prior to departure – Where consignment contained border controlled drugs – Where trial judge directed jury it was "open" to infer intent to import substance if satisfied respondent perceived a real or substantial chance of substance being present in consignment – Whether jury directions amounted to miscarriage of justice – Whether real risk jury would conclude respondent's awareness of that real or significant chance sufficient to establish intent.

Words and phrases – "attempt", "aware of", "beyond reasonable doubt", "border controlled drug", "conditional intention", "directions", "fault element", "inference", "intended to import", "intention", "intention to import", "intermediate facts", "jury", "knowledge or belief", "link in a chain of reasoning", "material", "meant to", "miscarriage of justice", "nevertheless persisted", "only reasonable conclusion", "open to infer", "perceived", "physical element", "preliminary facts", "real or significant chance", "recklessness", "state of mind", "substance".

Criminal Appeal Act 1912 (NSW), s 6.

Criminal Code (Cth), ss 5.2, 5.4, 5.6, 11.1, 300.2, 300.6, 307.1, 311.1

1 GAGELER CJ, GORDON AND BEECH-JONES JJ. It is an element of both the
offence of importing a commercial quantity of a border controlled drug contrary
to s 307.1(1) of the *Criminal Code* (Cth), and the offence of attempting to commit
that offence contrary to ss 11.1 and 307.1(1) of the *Criminal Code*, that the accused
intended (ie meant) to import a substance ("the second element"). It is also an
element of those offences that the accused was reckless as to whether the substance
imported (or attempted to be imported) was a border controlled drug ("the fourth
element").¹

2 This appeal by the Commonwealth Director of Public Prosecutions against
orders of the Court of Criminal Appeal of the Supreme Court of New South Wales
quashing the respondent's conviction for attempting to commit an offence contrary
to s 307.1(1) of the *Criminal Code* concerns the adequacy of directions given to
the jury at the respondent's trial in relation to the second element.

3 In *Smith v The Queen; R v Afford* ("*Smith and Afford*"),² a majority of this
Court held that, at a trial for an offence under s 307.1(1), a trial judge may direct a
jury that, if the prosecution establishes beyond reasonable doubt that the accused
perceived there to be a real or significant chance of a substance being present in an
object that the accused brought into Australia, then it is "open" to the jury to infer
on the basis of all the facts and circumstances of the case that the accused intended
to import the substance.³ However, to only so state is to give an incomplete
description of the effect of *Smith and Afford*. Relevantly, three further propositions
that were either stated by the majority in *Smith and Afford* or implicit in the
reasoning of the majority in *Smith and Afford* should be noted.

4 The first proposition is that it is not sufficient, in proving that the accused
intended to import a substance, to *only* establish beyond reasonable doubt that the
accused was aware of, or perceived, a real or significant chance that he or she was
importing a substance.⁴

5 The second proposition is that it is sufficient, to prove that the accused
intended to import a substance, to establish beyond reasonable doubt that: (i) the
accused was aware of, or perceived, a real or significant chance that the object they
were importing into the country contained a substance; and (ii) the accused's state

1 *Criminal Code* (Cth), s 307.1(2). See below at [13].

2 (2017) 259 CLR 291.

3 *Smith and Afford* (2017) 259 CLR 291 at 320-321 [60]-[61].

4 *Smith and Afford* (2017) 259 CLR 291 at 322-323 [65], 326 [69(12)(i)].

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of mind was that "even if the substance is in the object, I am prepared to take the object into Australia".⁵

6 The third proposition is that a miscarriage of justice may be occasioned if the effect of a trial judge's directions is that there is a real risk or real chance that the jury would conclude that it is sufficient to find that the accused intended to import a substance merely by establishing that the accused was aware of, or perceived, a real or significant chance that he or she was importing a substance.⁶

7 In this case the effect of the Court of Criminal Appeal's reasons was that there was a risk of such a miscarriage and to obviate that risk the trial judge should have expressly directed the jury that, even if it was established beyond reasonable doubt that the respondent was aware of, or perceived, a real or significant chance that the object the respondent imported (ie brought into the country or dealt with in connection with its importation⁷) contained a substance, the jury must still consider whether, based on all the facts and circumstances of the case, it was proved beyond reasonable doubt that the respondent intended to import the substance.⁸

8 For the reasons that follow the Court of Criminal Appeal was correct to so conclude. Accordingly, the appeal should be dismissed.

Background

9 Following a trial in the District Court of New South Wales, the respondent, Tsz Cheung Herman Ko, was convicted of one count of attempting to import a commercial quantity of two border controlled drugs, being methamphetamine and phenylethylamine, contrary to ss 11.1(1), 307.1(1) and 311.1(1)(f) of the *Criminal Code*. The offence was alleged to have been committed between about 6 September 2021 and about 20 October 2021.

10 The prosecution alleged that the respondent used his experience in logistics and knowledge of the freight-forwarding industry to facilitate customs clearance and delivery of a consignment containing a commercial dough mixer that had been

5 *Smith and Afford* (2017) 259 CLR 291 at 320 [58].

6 *Smith and Afford* (2017) 259 CLR 291 at 323-324 [67]; see also 336 [97].

7 "[I]mport", in relation to a substance, includes bringing the substance into Australia, as well as dealing with the substance in connection with its importation: *Criminal Code* (Cth), s 300.2. See below at [16].

8 *Ko v The King* (2025) 397 FLR 135 at 159 [125]-[126].

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shipped from Toronto to Sydney. The dough mixer had been intercepted prior to its departure from Canada and found to contain 101 packages of methamphetamine and phenylethylamine, each weighing around 1 kg. An inert substance was substituted for the drugs and the dough mixer continued to Australia.

11 The consignment containing the dough mixer arrived in Brisbane on 4 October 2021 and was transported to a bonded warehouse in Sydney until customs clearance was obtained and arrangements were made for the dough mixer's collection. The consignment was delivered to an address leased by an associate of an organiser of the attempted importation, Mr Yang. During the execution of a search warrant, a mobile phone and laptop computer containing communications between the respondent and Mr Yang,⁹ as well as communications and documentation relevant to the importation of the dough mixer, were located at the respondent's home. The respondent told the police that the mobile phone and laptop computer were given to him by Mr Yang.

12 Section 307.1 of the *Criminal Code* relevantly provides:

"(1) A person commits an offence if:

- (a) the person imports or exports a substance; and
- (b) the substance is a border controlled drug or border controlled plant; and
- (c) the quantity imported or exported is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both."

13 The fault element for the physical element in s 307.1(1)(a) is intention; that is, the person meant to import the substance.¹⁰ The fault element for the physical element in s 307.1(1)(b) is recklessness; that is, the person was reckless with respect to the substance imported being a border controlled drug.¹¹ Absolute

9 Ko (2025) 397 FLR 135 at 139 [18].

10 *Criminal Code* (Cth), ss 5.2(1), 5.6(1); *Smith and Afford* (2017) 259 CLR 291 at 300 [6].

11 *Criminal Code* (Cth), s 307.1(2). A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take the risk: *Criminal Code* (Cth) s 5.4(1). See also *Director of Public Prosecutions (Cth) v Kola* (2024) 279 CLR 104 at 114 [24].

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liability attaches to the physical element in s 307.1(1)(c), being that the quantity of the substance imported is a commercial quantity.¹² Further, if on the same occasion a person imports different parcels of border controlled drugs, then the person may be charged with a single offence in respect of all or any of the different parcels of drugs under s 307.1(1).¹³

14 As there were no border controlled drugs secreted within the dough mixer when it came into Australia, the respondent was charged with attempting to commit an offence under s 307.1(1).¹⁴ The physical elements for an attempt to commit an offence under s 307.1(1) are the same as the substantive offence save that the conduct of the accused must only involve an attempt, although the accused's conduct "must be more than merely preparatory to the commission of the offence".¹⁵ The fault elements for attempting to commit an offence under s 307.1(1) are the same as for the substantive offence.¹⁶

15 Accordingly, the elements of the offence of attempting to import a commercial quantity of a border controlled drug that the prosecution had to prove beyond reasonable doubt against the respondent were:

- (1) the respondent attempted to import a substance;
- (2) the respondent intended to import a substance, in the sense that he "meant" to import the substance (ie the "second element");¹⁷
- (3) the substance the respondent attempted to have imported was a border controlled drug;
- (4) the respondent was reckless as to whether the substance attempted to be imported was a border controlled drug (ie the "fourth element"); and

12 *Criminal Code* (Cth), s 307.1(3); see *Director of Public Prosecutions (Cth) v Kola* (2024) 279 CLR 104 at 114-115 [24].

13 *Criminal Code* (Cth), s 311.1(f).

14 *Criminal Code* (Cth), ss 11.1(1), 11.1(4)(a).

15 *Criminal Code* (Cth), s 11.1(2).

16 *Criminal Code* (Cth), s 300.6(d) in relation to s 307.1(b); cf *Criminal Code* (Cth), ss 11.1(3) and s 11.1(6A) in relation to s 307.1(c).

17 *Criminal Code* (Cth), s 5.2(1).

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- (5) the quantity of the border controlled drug to be imported was a commercial quantity.

16 The *Criminal Code* defines "import" in relation to a substance as including "(a) bring[ing] the substance into Australia; and (b) deal[ing] with the substance in connection with its importation".¹⁸ In the context of the prosecution of the respondent, the "substance" attempted to be imported was the packages of drugs secreted within the dough mixer (and not the dough mixer in the consignment). The respondent did not personally attempt to transport that substance in the dough mixer into Australia, but the prosecution alleged that his actions in facilitating the dough mixer's importation constituted an attempted "deal[ing] with the substance in connection with its importation". To that end the prosecution relied on 16 actions allegedly undertaken by the respondent between 6 September 2021 and 20 October 2021 to establish that he attempted to import the substance.¹⁹

The trial judge's summing up

17 In summing up, the trial judge told the jury that the prosecution case was "at least partially circumstantial" and directed the jury accordingly. In doing so his Honour identified two intermediate facts that were essential to the prosecution's case and which had to be proved beyond reasonable doubt before the respondent could be found guilty.²⁰ The first of those intermediate facts was that the respondent had possession of and used the mobile phone provided to him by Mr Yang from about 8 October 2021 until about 20 October 2021. The second intermediate fact was that the respondent "perceived that there was a real or substantial chance of a substance being present in the consignment containing the dough mixer".

18 The trial judge told the jury that the "two critical issues" in the case were the second and fourth elements. In relation to the second element, his Honour directed the jury that the respondent "intended to import the substance, if he meant to import the substance" and that intention "may be inferred from the surrounding circumstances or from the conduct of the accused, both before, at the time of, or after the alleged offence". His Honour directed the jury as follows:

".... if you are satisfied beyond reasonable doubt that the accused perceived that there was a real or substantial chance of a substance being present in

18 *Criminal Code* (Cth), s 300.2 ("import").

19 See above at [14].

20 See *Shepherd v The Queen* (1990) 170 CLR 573 at 576, 581- 585.

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the consignment that he attempted to import, then it is *open to you* to infer, having regard to all the facts and circumstances of the case, that he intended to import the substance.

Bear in mind though that it is not permissible to draw an inference that he meant to bring the substance into Australia, unless that is the only inference reasonably open on the established facts and the circumstances of this case." (emphasis added)

19 This direction was accompanied by a set of written directions which addressed the second element in relevantly similar terms.

20 The trial judge repeated his explanation of the second element to the jury by directing them that "[t]o decide whether the [respondent] meant to bring the substance into Australia, it is permissible to draw an inference as to the [respondent's] state of mind, at the time of dealing with the substance". His Honour again directed the jury that it was not permissible to draw an inference that the respondent "meant to bring the substance into Australia unless that is the only inference available or open on the established facts and the circumstances of the case".

21 Having explained the elements of the offence, the trial judge then summarised the prosecution and defence cases in relation to each element. In respect of the prosecution's case regarding the second element, his Honour directed the jury that:

"The Crown says that you should be satisfied beyond reasonable doubt, this is element 2, that the accused intended to deal with the original substance by first finding seven preliminary facts, and then to infer that, at the time he took steps in connection with the consignment, *he perceived that there was a real and substantial risk that there was a substance in the consignment other than the mixer itself.*

It says that, amongst other things, these facts, considered as a whole, show that the accused was seeking to distance himself from the dealings with the consignment and so suggest, in turn, that he knew that there was a real and substantial risk that there was something else in it. As I have said, *this last step must be proved beyond reasonable doubt by the Crown.*" (emphasis added)

22 The trial judge then summarised seven preliminary facts relied on by the prosecution to establish the second element, one of which was the respondent's possession and use of the mobile phone given to him by Mr Yang. His Honour reminded the jury that this particular fact had to be proved beyond reasonable

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doubt. His Honour did not direct the jury to that effect in relation to the other six preliminary facts relied on by the prosecution to prove the second element.

23 His Honour then summarised the respondent's case on the second element as being that "the Crown has not excluded the reasonable possibility that the [respondent] neither knew nor believed that there was a real significant chance that there was another substance in the consignment [that contained the dough mixer]".

24 Neither counsel for the prosecution nor counsel for the respondent raised any complaint about these directions. There was no request made for any further directions on the second element.

The Court of Criminal Appeal's reasons

25 The respondent applied for leave to appeal against his conviction,²¹ relevantly contending that the trial judge erred in his directions to the jury in relation to the second element. The Court of Criminal Appeal granted leave to appeal, upheld the ground of appeal, quashed the respondent's conviction and remitted the matter to the District Court for re-trial.

26 Before the Court of Criminal Appeal, the respondent advanced two contentions in support of his ground of appeal. First, the respondent contended that the trial judge erred in not directing the jury that they had to be satisfied beyond reasonable doubt of each of the facts and circumstances from which an inference of intention to import the substance was drawn.²² Although the Court of Criminal Appeal appears to have accepted that the jury had to be so satisfied, that Court nevertheless appears to have rejected this contention, concluding that the trial judge's directions, when read in context, "made clear that [what] was required was proof beyond reasonable doubt of the facts from which any inference of intent was to be drawn" by the jury.²³

27 Second, the respondent contended that the trial judge erred in failing to direct the jury that it was necessary for the prosecution to establish, beyond reasonable doubt, not just that the respondent knew or believed there was a significant chance that the consignment contained a substance within the dough

21 *Criminal Appeal Act 1912* (NSW), s 5(1)(b).

22 See above at [17].

23 *Ko v The King* (2025) 397 FLR 135 at 159 [124].

mixer "but also that, knowing or believing that to be so the [respondent] intended to import it anyway".²⁴

28 The Court of Criminal Appeal upheld this second contention. The dispositive part of that Court's reasoning was as follows:²⁵

"... the difficulty I see with the direction in the present case is that it fell short of stating that an awareness of a real and significant chance that the conduct involved the importation of the substance would not of itself be sufficient to draw the necessary inference but that it also must be proved beyond reasonable doubt that the [respondent] '*nevertheless persisted* with that conduct' notwithstanding that awareness or belief (see the *Afford* direction):

... If you are satisfied beyond reasonable doubt that the accused believed that the suitcase [contained] the substance ..., that would sustain an inference as to intention. So also if you were satisfied beyond reasonable doubt that he was aware of a real and significant chance that his conduct involved the importation of the substance and he nevertheless persisted with that conduct. That would suffice to infer an intention to import.

and *Kural* at [14]. In other words, that if the jury was satisfied that the [respondent] had the state of mind that there was a 'significant or real chance' that the consignment contained the substance, the jury must go on to consider whether that was sufficient to satisfy it beyond reasonable doubt that the [respondent] intended to import the substance in the sense that he meant to import the consignment notwithstanding that significant or real chance (to adopt the direction in the *Smith* trial extracted at [46] of *Smith and Afford*).\" (emphasis added)

The appeal to this Court

29 In this Court, the Crown's sole ground of appeal contended that the Court of Criminal Appeal erred in the above passage in concluding that the trial judge misdirected the jury by not directing the jury that the prosecution had to prove beyond reasonable doubt not only that the respondent was aware of a real and

24 *Ko v The King* (2025) 397 FLR 135 at 158 [122].

25 *Ko v The King* (2025) 397 FLR 135 at 159 [125].

significant chance that his conduct involved the importation of a substance, but that the respondent "nevertheless persisted" with that conduct.

30 The dispositive passage in the Court of Criminal Appeal's reasons set out above refers to both the "*Afford* direction" and *Kural v The Queen*²⁶ as supporting the supposed obligation of the trial judge to direct the jury that the prosecution had to prove that the respondent "nevertheless persisted" notwithstanding his knowledge or belief of a "real and significant chance that the conduct involved the importation of the substance". The phrase "nevertheless persisted" was used in the directions given by the trial judge in *Afford*,²⁷ which was reproduced in the majority's judgment in this Court.²⁸ The Court of Criminal Appeal's reference to "*Kural* at [14]" appears to be a reference to a passage from the judgment of the majority in *Kural* that included the phrase "nevertheless persisted". That passage is addressed below.²⁹

31 The Crown's submissions interpret the dispositive reasoning of the Court of Criminal Appeal as having concluded that the trial judge was obliged to direct the jury that, to prove the second element of the offence, the prosecution had to prove that the respondent was aware of a real or significant chance that his conduct involved importing a substance and that he engaged in *further conduct* after developing that awareness, namely persisting in the attempt to import the dough mixer. The Crown contended that there was no such requirement. The Crown submitted, citing *Kural*,³⁰ that all that is necessary with respect to proof of the second element is that any such awareness coincide with the conduct comprising the importation or attempted importation.

32 If the dispositive passage from the Court of Criminal Appeal's reasoning was meant to convey that it was necessary to direct the jury that it had to be proved that the respondent engaged in further conduct in relation to the importation of an object containing a substance after becoming aware of a real or significant chance that his conduct involved importing that substance, then that reasoning would be erroneous. As will be explained, neither *Kural* nor *Smith and Afford* supports that proposition. All that is required with respect to the second element of the offence

26 (1987) 162 CLR 502.

27 See *Smith and Afford* (2017) 259 CLR 291 at 308 [26], 334 [92].

28 *Smith and Afford* (2017) 259 CLR 291 at 308 [26].

29 *Kural* (1987) 162 CLR 502 at 505; see below at [35], [38]-[39].

30 (1987) 162 CLR 502 at 505.

is that a state of mind that amounts to an intention to import coincide with the relevant conduct comprising the importation or attempted importation.³¹

33 That said, when read with the balance of the dispositive passage from the Court of Criminal Appeal's judgment and in light of *Kural* and *Smith and Afford*, the essence of that Court's reasoning was that the trial judge erred in failing to explicitly instruct the jury that, even if they were satisfied that the respondent was aware of a real or significant chance that his conduct involved importing a substance, it was necessary to go on to consider, in light of all the circumstances, whether it had been proved beyond reasonable doubt that he intended to import the substance (in the dough mixer). To explain why the Court of Criminal Appeal was correct in this respect it is necessary to address *Kural* and then *Smith and Afford*.

Kural

34 When *Kural* was decided, former s 233B(1)(b)³² of the *Customs Act 1901* (Cth) made it an offence to import into Australia any "prohibited import[]" to which the section applied, including a narcotic good.³³ Prior to this Court's decision in *Kural*, in *He Kaw Teh v The Queen*³⁴ a majority of this Court held that, with respect to an offence against s 233B(1)(b), the prosecution had to prove that the accused acted with mens rea; that is, with an intention to import the narcotic good.³⁵

35 In *Kural* a majority confirmed that such an intention could be established if the prosecution proved that the accused "knew or was aware that an article which he intentionally brought into Australia comprised or contained narcotic drugs".³⁶ However, in the passage to which the Court of Criminal Appeal referred,³⁷ their

31 See below at [38].

32 Section 233B(1)(b) was the "predecessor" to s 307.1 of the *Criminal Code (Cth)*: *Smith and Afford* (2017) 259 CLR 291 at 298 [2].

33 *Kural* (1987) 162 CLR 502; *Smith and Afford* (2017) 259 CLR 291 at 298 [2]; *Customs Act 1901* (Cth), ss 4(1) definition of "narcotic goods", 233B(2).

34 (1985) 157 CLR 523.

35 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 545, 546, 589 and 596.

36 *Kural* (1987) 162 CLR 502 at 504.

37 That is, the Court of Criminal Appeal's reference to "*Kural* at [14]": see above at [28].

Honours also stated that "actual knowledge or awareness" was not "essential" to establishing an intention to import and instead that:³⁸

"[b]elief, falling short of actual knowledge, that the article comprised or contained narcotic drugs would obviously *sustain* an inference of intention. So also would proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved that act and *nevertheless persisted* in that conduct. *As a practical matter*, the inference of mens rea or a guilty mind will ordinarily be irresistible in cases involving the importation of narcotic drugs if it is proved beyond reasonable doubt that the accused *actually imported* the drugs and that he was aware, *at the time of the alleged commission of the offence*, of the likelihood of the existence of the substance in question in what he was importing and of the likelihood that it was a narcotic drug." (emphasis added)

36 Three matters should be noted about this passage in *Kural*. First, this passage holds that proof that the act of importing a prohibited drug was undertaken in circumstances where the accused was aware of a likelihood, in the sense of a significant or real chance, that their conduct involved the importation of a prohibited drug can "sustain" an inference that the accused intended to import a prohibited drug. Even so, this passage³⁹ and the balance of the reasoning in *Kural*⁴⁰ accept that there is a distinction between a conclusion that an accused was aware of the likelihood that an object they intentionally brought into Australia comprised or contained a prohibited drug, and a conclusion that an accused intended to import the drug.

37 Second, the passage in *Kural* records that where the "accused actually imported" the prohibited drug, and was aware at the time of the alleged commission of the offence of the likelihood both of the existence of a substance in what he was importing, and that the substance was a narcotic drug, then a conclusion that the accused intended to import the prohibited drug will "ordinarily

38 *Kural* (1987) 162 CLR 502 at 504-505 (emphasis added).

39 See *Kural* (1987) 162 CLR 502 at 505, referring to the inference of intention "ordinarily" arising from awareness of the likelihood of the existence of the substance in question (emphasis added).

40 (1987) 162 CLR 502 at 505, referring to the inference of intention arising "in most cases" from other primary facts (emphasis added).

be irresistible". In *Kural* the appellant had imported narcotic drugs within a tea urn in a parcel in his suitcase.⁴¹

38 Third, nothing of particular significance arises from the deployment of the phrase "nevertheless persisted" in the above passage. The reference to "nevertheless persisted" could be a reference to the *conduct* of the accused in *Kural*, in that the facts in that case involved the accused being suspicious about the contents of a parcel he was asked to transport to Australia, and the accused supposedly inspecting the parcel to resolve his doubts, but then bringing the parcel into the country.⁴² The significance of his conduct was that it was a circumstance from which an inference of an intention to import a prohibited import could be drawn⁴³ (in addition to an awareness of the likelihood that the parcel being imported into Australia contained a narcotic good). It was not a separate requirement, in demonstrating intent, that the accused persisted in committing acts of or towards the importation of the parcel after becoming aware of the likelihood that the parcel being imported into Australia contained a narcotic good. So far as the temporal aspect of an intention is concerned, the last sentence in the passage from *Kural* confirms that all that is necessary to be proved in this respect is that the relevant intention coincide with the conduct amounting to the importation.

39 Alternatively, the reference to "nevertheless persisted" in the above passage from *Kural* could have been a reference to a *state of mind* of the accused; that is, being aware of a significant or real chance that his conduct involved the importation of a prohibited import, the accused was "nevertheless" prepared to take the object into Australia even if it did contain such a prohibited import. As explained in *Smith and Afford*, that statement encapsulates one state of mind that amounts to an intention to import.⁴⁴

Smith and Afford

40 By the time *Smith and Afford* was decided, s 233B of the *Customs Act* had been repealed and the *Criminal Code* had come into force. The two accused in *Smith and Afford* had each been convicted at separate trials of the substantive offence under s 301.7(1) (ie importing a commercial quantity of a border controlled drug).

41 *Kural* (1987) 162 CLR 502 at 505.

42 *Kural* (1987) 162 CLR 502 at 505-506.

43 *Kural* (1987) 162 CLR 502 at 504, 507.

44 See below at [44]; *Smith and Afford* (2017) 259 CLR 291 at 320-321 [60].

41 The majority in *Smith and Afford* held that the reasoning in *Kural* concerning an intention to import a prohibited import was applicable to the second element of an offence under s 307.1(1) of the *Criminal Code*,⁴⁵ specifically, where it is established that an accused perceived there to be a real or significant chance of a substance being present in an object that the accused brought into Australia, then it is open to infer "on the basis of all the facts and circumstances of the case" that the accused intended to import the substance.⁴⁶

42 Two matters should be noted about the reasons of the majority in *Smith and Afford*.

43 First, in rejecting a submission that to apply *Kural* to the second element would have the effect of substituting recklessness for intention,⁴⁷ the majority stated:⁴⁸

"It may be accepted that, where a person takes an object into Australia, despite being aware of a real or significant chance that the object has a substance in it, the person cannot be regarded as meaning to take the substance into Australia unless the person's state of mind at the time of taking the object into Australia is that: 'even if the substance is in the object, I am prepared to take the object into Australia.' By contrast, if at the time of taking the object into Australia, the person's state of mind were: 'although there is a real or significant chance of the presence of the substance in the object, I would not be prepared to take the object into Australia if I knew or believed that the substance is in the object', the person's mental state in terms of the Code would rise no higher than recklessness. But it must be emphasised that, although the latter is a theoretical possibility, in most cases it is most unlikely to occur.

Recklessness may be the right conclusion, for example, in the case of an honest tourist who, although being aware of the risk known to us all that strangers may sometimes slip a foreign substance into a tourist's luggage, does not have any particular reason to be concerned about the chance of the presence of a substance in his or her luggage, and, in that state of mind, brings his or her luggage into Australia without declaring any

45 *Smith and Afford* (2017) 259 CLR 291 at 321-322 [62].

46 *Smith and Afford* (2017) 259 CLR 291 at 320-321 [60]; see also 321 [61].

47 See *Smith and Afford* (2017) 259 CLR 291 at 317 [52], 319 [55].

48 *Smith and Afford* (2017) 259 CLR 291 at 320 [58]-[59].

concerns. *But, in cases like those the subject of these appeals, a mental state short of intent is highly unlikely* because, if someone is aware of a real or significant chance that there is an extraneous substance in his or her luggage, and the person's state of mind is truly that he or she would not be prepared to take the substance into Australia if it were within the luggage, it is to be expected that the person would inspect the luggage to ensure that there is no substance in it, or at the very least declare his or her concerns to Customs upon arrival. Where, therefore, as in these appeals, a person is aware of a real or significant chance of the presence of an extraneous substance in an *object which the person brings into Australia*, and does nothing by way of inspection or declaration to avoid the risk of its presence, the circumstances of the case strongly suggest that the person's state of mind is, in truth, that he or she is prepared to proceed with bringing the object into Australia even if the substance is in the object; and thus that the person means and intends to import the substance." (emphasis added)

44 The opening and concluding parts of this extract are not directed to any process of drawing an inference as to an accused's state of mind based on another finding as to their state of mind. Instead they describe a particular state of mind and confirm that, as a matter of law, an accused intends to import a substance if (but not only if) they are aware of a real or significant chance that the object they are bringing into the country contains a substance and their attitude is that "even if the substance is in the object, I am prepared to take the object into Australia". As noted,⁴⁹ the reference to "nevertheless persisted" in the above passage from *Kural* may have been a reference to that state of mind.

45 Otherwise, it is not necessary to explore the possible circumstance referred to in this passage in which the "honest tourist" who "does not have any particular reason to be concerned about the chance of the presence of a substance in his or her luggage" may nevertheless be reckless as to their importing of the substance. Instead it suffices to observe that those parts of the above passage from *Smith and Afford* that refer to the inherent improbability that a person who is aware of a real or significant chance that the relevant object has a substance within it possesses a state of mind "short of intent" concern a state of facts which involve a person bringing the object into Australia. Hence, the passage notes that it is to be expected that, if such a person had that awareness and did not intend to import the substance, they would inspect their luggage to ensure there is no substance or at least would declare their concerns to customs agents on their arrival. The facts in *Kural*, *Smith* and *Afford* all involved a person who personally brought an object into Australia. This case does not.

49 See above at [39].

46 Second, like the reasoning of the majority in *Kural*, the reasoning of the majority in *Smith and Afford* accepted that there is a distinction between a conclusion that an accused was aware of a real or significant chance that an object they imported contained a substance, and a conclusion that the accused intended to import the substance. The majority accepted that finding the former does not necessarily satisfy the latter:⁵⁰

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

47 Thus, the majority in *Smith and Afford* held that in *Smith* there was no error in the trial judge's direction which "made it abundantly clear to the jury that, while it was relevant for them to consider whether [the accused] knew or believed there to be a real or significant chance that there was a substance in the items which he brought into Australia, they would then need to *go on* to consider whether that was sufficient to satisfy them beyond reasonable doubt that [the accused] intended to import the concealed packages which contained the substance, in the sense that he meant that those packages would be imported, and that they could only reach that conclusion having regard to all the evidence if they considered that that inference was the only reasonable conclusion to be drawn from all the circumstances of the case".⁵¹ It was this direction to which the Court of Criminal Appeal was referring at the end of the passage in that Court's dispositive reasoning set out above⁵² as the direction that should have been given in this case.

The effect of the trial judge's directions

48 Given the essence of the Court of Criminal Appeal's reasoning, the issue in this appeal is whether that Court erred in concluding that the trial judge should

50 *Smith and Afford* (2017) 259 CLR 291 at 322-323 [65] (footnote omitted).

51 *Smith and Afford* (2017) 259 CLR 291 at 324 [67] (emphasis added), referring to 314-315 [46].

52 See above at [28].

have given a direction to similar effect to that given by the trial judge in *Smith* as just described.⁵³ Whilst there may be some omissions in a summing up that amount to a wrong decision on a question of law,⁵⁴ it is unnecessary to decide whether this is such a case because the failure in this case to give a direction to the effect of the direction given by the trial judge in *Smith* amounted to a miscarriage of justice.

49 In addressing the effect of the trial judge's directions, it is necessary to refer to the 12 propositions at [69] of *Smith and Afford* regarding the appropriate directions that might be given in a case where an accused is charged with an offence under the *Criminal Code* that involves them bringing a substance into Australia ("the *Smith and Afford* propositions").⁵⁵ The trial judge had recourse to the *Smith and Afford* propositions in summing up to the jury.

50 In *Smith and Afford*, having analysed the directions given by the trial judges in those respective cases, the majority observed that "it might be preferable" in the future if directions given in cases involving offences under s 307.1 aligned more closely with the language of the *Criminal Code*.⁵⁶ To that end, but with the caveats that directions "must always be tailored to the issues in the case at hand" and that "[i]t is not practicable or desirable to suggest anything in the nature of a template",⁵⁷ the majority articulated 12 propositions in relation to directions concerning the second and fourth elements of a substantive offence under s 307.1(1).

51 Proposition (7) of the *Smith and Afford* propositions is:

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

53 See above at [47].

54 *Criminal Appeal Act*, s 6(1). See *MDP v The King* (2025) 99 ALJR 969 at 992-993 [102]; 423 ALR 204 at 230-231.

55 *Smith and Afford* (2017) 259 CLR 291 at 324-326 [69].

56 *Smith and Afford* (2017) 259 CLR 291 at 324 [68].

57 *Smith and Afford* (2017) 259 CLR 291 at 324 [69].

52 To emphasise its importance, the second limb of this proposition is repeated at proposition (10) of the *Smith and Afford* propositions.⁵⁸ In this case, the trial judge's directions to the jury were consistent with the second limb of proposition (7).

53 The first limb of proposition (7) was the basis for the respondent's submission to the Court of Criminal Appeal that the trial judge erred in not directing the jury that they had to be satisfied beyond reasonable doubt of all the facts and circumstances from which an inference of an intent to import was to be drawn. That submission is not raised in this Court. It suffices to observe that the first limb of proposition (7) is not to be taken as involving any departure from *Shepherd v The Queen*.⁵⁹ Whether a fact and circumstance from which an inference is to be drawn must be proved beyond reasonable doubt turns on whether the fact or circumstance is an indispensable intermediate "link in a chain of reasoning" towards guilt.⁶⁰ The trial judge in this case appropriately identified those facts that formed such a link and directed the jury accordingly.⁶¹ The other facts relied on by the prosecution at the trial to demonstrate the respondent's intention were not part of such an indispensable link in the chain of reasoning towards guilt and did not need to be proved beyond reasonable doubt.

54 Proposition (8)⁶² of the *Smith and Afford* propositions provides:

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

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

58 *Smith and Afford* (2017) 259 CLR 291 at 325-326 [69(10)].

59 (1990) 170 CLR 573.

60 *Shepherd* (1990) 170 CLR 573 at 585; see also 575, 579, 586.

61 See above at [17].

62 *Smith and Afford* (2017) 259 CLR 291 at 325 [69(8)] (emphasis added).

55 Two matters should be noted about this proposition. First, the proposition concerns circumstances in which the accused brought a container into Australia and "it is open" to infer that the accused meant to bring a substance in the container into Australia. Neither this proposition nor any of the other *Smith and Afford* propositions explicitly provides that the jury should be directed that, even if the accused knew or believed there to be a real or significant chance that there was a substance in the object which they brought into Australia, the jury must go on to consider whether, based on all the facts and circumstances of the case, the accused intended to import the substance (being an inference that is the only reasonable conclusion to be drawn from all the circumstances of the case⁶³). However, as explained above, the balance of the reasoning in *Smith and Afford* confirms that the jury must undertake that consideration in addressing the second element.⁶⁴

56 Second, consistent with what has been stated about *Kural* and *Smith and Afford*, proposition (8) and the balance of the *Smith and Afford* propositions are referable to a case in which the accused is alleged to have brought the relevant object into Australia.⁶⁵ However, in this case, the acts of the respondent were not acts that constituted bringing the dough mixer and the substance secreted within the dough mixer into Australia. It was not suggested that the respondent had any opportunity to inspect the dough mixer. As this was not a case where the respondent "actually imported the drugs",⁶⁶ the possibility that he had a mental state "short of intent"⁶⁷ (such as recklessness) in relation to the second element was not as unlikely as if he had brought the object into Australia in his luggage.

57 The relevant parts of the summing up are set out above.⁶⁸ The jury was told orally and in writing that, if they were satisfied beyond reasonable doubt that the respondent perceived there was a real or substantial chance of a substance being present in the consignment that he attempted to import, then it was "open" to infer, having regard to all the facts and circumstances of the case, that he intended to import the substance. The jury was also directed that they should not draw the

63 *Smith and Afford* (2017) 259 CLR 291 at 325 [69(7)], 325-326 [69(10)].

64 See above at [46]-[47]; see *Smith and Afford* (2017) 259 CLR 291 at 320 [58], 320-321 [60]-[61], 324 [67].

65 *Smith and Afford* (2017) 259 CLR 291 at 324 [69(1)], 325 [69(6)], [69(8)], 325-326 [69(10)], 326 [69(11)].

66 *Kural* (1987) 162 CLR 502 at 505.

67 *Smith and Afford* (2017) 259 CLR 291 at 320 [59].

68 See above at [17]-[24].

inference that the respondent "meant to bring the substance into Australia unless that is the only inference available or open on the established facts and the circumstances of the case". Those directions were consistent with the *Smith and Afford* propositions.⁶⁹ However, the jury was not directed that, even if they concluded that the respondent perceived there was a real or substantial chance of a substance being present in the dough mixer that he attempted to import, the jury still had to go on to consider whether it had been demonstrated beyond reasonable doubt that he intended to import the substance. The jury was also not directed as to the significance or relevance of a finding about the former in relation to a finding about the latter (beyond being told that it was "open" to use the former to conclude the latter).

58 Critically, in summarising each of the prosecution and defence cases, the trial judge did so in terms that were capable of suggesting that the prosecution case on the second element was established even if all that was proved beyond reasonable doubt was that the respondent "perceived that there was a real and substantial risk that there was a substance in the consignment other than the mixer itself" and that the defence case was limited to only responding to that contention.⁷⁰

59 It follows that, in this case, there was a "real risk"⁷¹ or a "real chance"⁷² that the jury might conclude from the trial judge's directions that, if it was demonstrated beyond reasonable doubt that the respondent perceived that there was a real or significant chance that there was a substance in the dough mixer, that finding (alone) would suffice to establish the second element of the offence of attempting to import a commercial quantity of a border controlled drug. However, proof of that finding alone would not suffice;⁷³ it would not exclude the possibility that the respondent was only reckless as to whether the substance was being imported.

60 Although the failure of counsel to seek such a direction can bear on the assessment of the magnitude of the relevant risk of the jury adopting impermissible

69 See the second limb of *Smith and Afford* (2017) 259 CLR 291 at 325 [69(7)]; see also 325 [69(8)] and 325-326 [69(10)].

70 See above at [21]-[23].

71 *BRS v The Queen* (1997) 191 CLR 275 at 302, 308; *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at 560 [67]; see also *WHS v The King* (2025) 100 ALJR 71 at 80 [38]; 426 ALR 599 at 610.

72 *BRS* (1997) 191 CLR 275 at 306, 308.

73 See above at [46]-[47]; see *Smith and Afford* (2017) 259 CLR 291 at 320 [58], 320-321 [60]-[61], 324 [67], 333-334 [91].

reasoning,⁷⁴ the risk in this case of the jury finding the second element to be established on a basis that did not amount to intention was a real one. To the extent that it is relevant, there is no question of any forensic advantage being derived by the respondent from the failure of his counsel to seek any further direction from the trial judge.⁷⁵ As this aspect of the directions that were given and not given at the trial concerned the sufficiency of the directions as to the element of an offence that was seriously in issue at the trial, it follows that the relevant failure was material⁷⁶ and amounted to a miscarriage of justice.⁷⁷

Conclusion

61 The appeal should be dismissed.

74 *Hamilton* (2021) 274 CLR 531 at 557-558 [54]-[57], 563 [76]; see also *De Silva v The Queen* (2019) 268 CLR 57 at 70 [35].

75 *cf Hamilton* (2021) 274 CLR 531 at 555-556 [49]-[53].

76 *Brawn v The King* (2025) 99 ALJR 872 at 876 [10]; 423 ALR 69 at 73-74.

77 *Criminal Appeal Act*, s 6(1).

EDELMAN J.

Imprisonment for stupidity

62 It is said that, after the House of Lords decision in *Director of Public Prosecutions v Smith*,⁷⁸ Fullagar J walked into Dixon CJ's chambers and said, "Well, Dixon, they're hanging men for manslaughter in England now".⁷⁹ On a purely literal reading of aspects of the majority reasons of this Court in *Kural v The Queen*⁸⁰ and in *Smith v The Queen*⁸¹ and *R v Afford*⁸² (jointly, "*Smith and Afford*"), it might have been suggested that people could be imprisoned for stupidity in Australia now.⁸³ In a meticulous judgment in this case, the Court of Criminal Appeal of New South Wales (Ward P, Yehia and Weinstein JJ agreeing), paying careful attention to their duty to follow the dispositive reasoning of the majority of this Court in *Smith and Afford*, properly interpreted those reasons to deny such a suggestion by concluding (in effect) that it was a miscarriage of justice for the jury to have been directed in a manner which permitted them to treat intention (one state of mind) as established by, or sufficiently able to be inferred from, Mr Ko's belief in a real or significant chance that he was importing the substance that was imported (a different state of mind). In other words, it was a miscarriage of justice to allow the jury to think that a finding of one state of mind could be inferred from a finding of a different state of mind.

63 With one possible exception, there will almost always be a grave danger of a miscarriage of justice arising from any direction by a trial judge regarding intention which refers to the accused having a belief in a "real or significant chance" (or "real and significant chance", "real or substantial chance", or "real and substantial chance") that a container being imported contains the substance imported. The danger arises because the jury might equate the stupidity of such a risk-running accused with intention. The exception may arise where the Crown case is that the accused has a conditional intention: an intention to import the substance *if* it is present in a container being imported. In such a case, a belief by the accused in a real or significant chance that the substance is present in the container imported by the accused may be necessary to establish the accused's intention to import the substance. A simple example is a case where three couriers

78 [1961] AC 290.

79 Ayres, *Owen Dixon* (2003) at 276.

80 (1987) 162 CLR 502.

81 (2017) 259 CLR 291.

82 (2017) 259 CLR 291.

83 See, eg, *Karamitsios v The Queen* (2015) 256 A Crim R 67 at 70 [15].

carried containers into Australia and each of them believed that one of them was carrying the substance and intended to import the container whether or not they were the courier who was carrying the substance.⁸⁴

64 The Crown did not assert at the trial in this case that Mr Ko had any conditional intention. The Crown case on intention was that Mr Ko (unconditionally) intended to import the substance. The trial judge in this case directed the jury, consistently with some of the literal terms of the reasons of the majority of this Court in *Smith and Afford*, that it was open to the jury to infer that Mr Ko intended to import the substance if they were satisfied beyond reasonable doubt that Mr Ko "perceived that there was a real or substantial chance of a substance being present in the consignment that he attempted to import". That direction, and a related direction, were an error and a miscarriage of justice.

65 For the reasons below, as well as the reasons of Gageler CJ, Gordon and Beech-Jones JJ with which I agree, the Court of Criminal Appeal correctly allowed the appeal and ordered that there be a new trial. The Crown's appeal to this Court should be dismissed.

Smith and Afford

66 In *Smith and Afford*,⁸⁵ the majority of this Court said:

"[W]here it is established in cases like this that an accused perceived there to be a real or significant chance of a substance being present in an object which the accused brought into Australia, it is open to infer on the basis of all the facts and circumstances of the case that the accused intended to import the substance."

67 The notion that it can be inferred that a person intends something because they believe there to be a real or significant chance of that thing has been politely described as "curious".⁸⁶ In Mr Afford's case, that curious notion had a potentially unjust consequence. The trial judge relevantly directed the jury that they could find the element of intention to import a substance satisfied, beyond reasonable doubt, if Mr Afford had a belief that there was a real or significant chance that he was importing the substance. The trial judge then directed the jury that they could find the requisite intention if Mr Afford "believed in the likelihood of importation of

84 *Smith and Afford* (2017) 259 CLR 291 at 332 [86].

85 (2017) 259 CLR 291 at 320-321 [60].

86 Odgers, "A Guilty Mind" (2017) 41 *Criminal Law Journal* 131 at 133.

the substance and by likelihood I mean a real or significant chance". The trial judge continued:⁸⁷

"So also if you were satisfied beyond reasonable doubt that he was aware of a real and significant chance that his conduct involved the importation of the substance and he nevertheless persisted with that conduct. That would suffice to infer an intention to import."

68 The Crown case against Mr Afford had not been run as a case of conditional intention. In other words, it was not suggested that he had that particular form of intention which is an intention to import the substance *if* the substance was present in a container being imported. This direction to the jury therefore had the effect of equating a suspicion by Mr Afford (belief in a real or significant chance) with an intention.

69 Mr Afford's defence was that he had believed a story told to him by a man called "Hamza" that Mr Afford would be importing separation oil for cleaning defaced currency. Mr Afford had been obsessed with the prospect of untold riches. Although he considered that it was possible that he was being duped into importing drugs, and although he worried about that possibility, he did not know of the existence of the substance and did not have the purpose (intention) to import the substance that was concealed in the suitcase given to him in Manila. As the majority of this Court said, defence counsel for Mr Afford had argued that "even if the jury considered that [Mr] Afford had been suspicious that there might be drugs in the suitcase, it was not established beyond reasonable doubt that [Mr] Afford intended to import the substance in the concealed packages".⁸⁸

70 There were obstacles to a jury accepting Mr Afford's defence but, on one view, the effect of the directions given by the trial judge was that, even if Mr Afford's own defence were accepted, his belief in a real or significant chance would be equated with an intention to import the concealed substance. The trial judge effectively permitted stupidity, and risk-taking, to be treated as sufficient for intention. My view in that case was, and remains, that this was a significant error which caused a miscarriage of justice.

71 Although the majority of this Court allowed the appeal in Mr Afford's case, and although there are passages when read in isolation in the majority judgment

87 *Smith and Afford* (2017) 259 CLR 291 at 308 [26]. See *Afford v The Queen* (2016) 308 FLR 1 at 2-3 [5].

88 *Smith and Afford* (2017) 259 CLR 291 at 307 [24].

that support the equation of risk-taking with intention,⁸⁹ there are also passages in the majority judgment which do not treat this risk-taking (belief in a real or significant chance) as equivalent to, or a sufficient basis from which an inference can be drawn about, intention. For instance, the majority referred, with apparent disapproval, to a direction by the trial judge which could be read as conveying that if Mr Afford "believed or was aware of a real and significant chance that his conduct involved the importation of a substance, '[t]hat would suffice to infer an intention to import'".⁹⁰ The majority also cogently said:⁹¹

"if at the time of taking the object into Australia, the person's state of mind were: 'although there is a real or significant chance of the presence of the substance in the object, I would not be prepared to take the object into Australia if I knew or believed that the substance is in the object', the person's mental state in terms of the Code would rise no higher than recklessness".

72 However, the majority in *Smith and Afford* added, in an assertion of empirical fact apparently based on intuition, that "it must be emphasised that, although the latter is a theoretical possibility, in most cases it is most unlikely to occur". This "double-most" assertion seems to have been based on a doubtful assumption that there is a high degree of improbability that a person would run the risk of an unintended consequence despite believing there to be a real or significant chance of that unintended consequence. Yet every day people purchase lottery tickets despite believing in a highly likely chance, and not merely a real or significant chance, of an unintended consequence (losing their money). Of course, an unintended consequence of being used as a means to import drugs and, if so, being exposed to criminal prosecution and imprisonment is much more significant than loss of the small capital required to buy a lottery ticket. But different people assess and weigh risk and reward in different ways.

73 The decision of the majority of this Court to uphold the Crown's appeal in Mr Afford's case, despite the trial judge's apparent equation of belief in a real or significant chance with intention, may have been the consequence of reasoning of the majority of this Court in *Kural*.⁹² In that case, Mason CJ, Deane and Dawson JJ said that an inference of intention could be drawn from "proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the

89 See [66] above. See also *Smith and Afford* (2017) 259 CLR 291 at 325 [69], proposition eight and proposition nine.

90 *Smith and Afford* (2017) 259 CLR 291 at 323 [66]; see also at 322-323 [65].

91 *Smith and Afford* (2017) 259 CLR 291 at 320 [58].

92 (1987) 162 CLR 502 at 505.

accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved that act and nevertheless persisted in that conduct". But, on one sensible understanding of this passage, their Honours may have been speaking of the jury being satisfied that the accused had a conditional intention. The conditional intention was that Mr Kural believed there was a real or significant chance that the substance was in the samovar that he was importing and he "persisted" because he intended to import the samovar if the substance was present. Further, their Honours emphasised that:⁹³

"it is important not to succumb to the temptation of transforming matters of fact into propositions of law. In that regard, we would emphasize that the foregoing comments are not designed as a direction or instruction to be read by trial judges to juries."

74 Putting aside cases of conditional intention, it is clear from *Kural* and from *Smith and Afford* that there is no requirement for a trial judge, when directing a jury about intention, to make any reference to a belief by an accused person in a real or significant chance (or any similar expression) that a container being imported contains the substance. References to such a belief also carry the danger of a miscarriage of justice because the belief establishes no more than that the accused was aware of a risk. The accused might grossly underestimate a risk of something that is foreseen as a real or significant chance. Further, the greater the propensity of the accused for risk, the more that the accused might be willing to run the risk. In either case, the awareness of a risk is a different state of mind from intention. Even where "an act is done with foresight of its probable consequences", it has been said that "intent may more properly be described as a form of recklessness".⁹⁴ At the very least, it will cause substantial confusion to suggest that intention as to some matter can be inferred from a belief that there is a real or significant chance of that matter.⁹⁵

Intention as a centrepiece of Mr Ko's defence

The case against Mr Ko

75 Mr Ko was a married man with two young children. He worked at a freight forwarder—EMO Trans Australia Pty Ltd ("EMO Trans")—in a sales position, and was involved in client retention and attracting new clients. He was charged with the offence of attempting to import a commercial quantity of two border

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

94 *Giorgianni v The Queen* (1985) 156 CLR 473 at 506.

95 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 392-398 [92]-[103].

controlled drugs contrary to ss 11.1(1), 307.1(1), and 311.1(1)(f) of the *Criminal Code* (Cth). The Crown case against Mr Ko was that he had attempted to import from Canada a commercial quantity of a border controlled drug (in this case, around 60.2 kg of methamphetamine and 19 kg of phenylethylamine) which was concealed in a consignment of an industrial dough mixer weighing around 600 kg. The drugs had been intercepted by the Canadian authorities who had substituted an inert substance and had allowed the consignment to continue to be shipped via Brisbane and then (as initially directed, although later redirected) to the recipient's address in Burwood, described as the premises of Ngon Bakehouse, a legitimate business in Sydney.

76 The Crown case was that Mr Ko was friends with Mr Yang, who was the "boss" of the importation, and that Mr Ko developed an awareness over time that the substance was in the dough mixer consignment. After developing that awareness, Mr Ko was said to have dealt with the substance in connection with its importation in the following ways: using his experience in logistics to ensure that the consignment would clear customs and get to the delivery address; providing advice, including to Mr Yang, about what the meaning of a bonded warehouse was; conducting internet searches so that he could pretend to be the principal of Ngon Bakehouse; using encrypted apps to communicate with Mr Yang; arranging storage before the ultimate delivery; seeking delivery agents to deliver the consignment to a residential address in Wentworthville; receiving and sending receipts for payment in relation to the freight forwarders and delivery agents whose services were used; and advising Mr Yang as to the expected delivery.

77 Mr Ko had no criminal record. In his electronic record of interview, Mr Ko said that he had known Mr Yang for two or three years, and that they had been betting together. He said that he knew that Mr Yang was an importer (and he had seen tiles) and knew that Mr Yang had gone to jail, which he had heard from Mr Yang's family was for importing drugs. The police conducted a thorough search of Mr Ko's house and financial records but found no drugs, no cash, and no records of suspicious transactions.

78 An essential issue in the Crown case was to establish that Mr Ko intended to import the substance which was concealed in the dough mixer. Some aspects of the Crown case were apparently met with some force by Mr Ko. For instance, there was evidence of communications with Mr Yang concerning a request by Mr Ko for "an extra 20", to which Mr Yang responded that he would get Mr Ko a dishwasher. Mr Ko replied that he wanted cash and had no need for a dishwasher. Mr Ko said in his electronic record of interview that the message was about \$20,000 in cash and was concerned with betting: "That's the bet that we win. \$20,000." There was evidence that the encrypted apps were used by Mr Ko and Mr Yang to discuss betting, and bet365 was mentioned throughout the messages. In sentencing Mr Ko, the trial judge found that Mr Ko had not acted for profit but had acted to assist his friend, Mr Yang.

79 Other aspects of the Crown case were generally met with Mr Ko's answer that he had received things from his friend, Mr Yang, and that he was assisting Mr Yang, including by "just offering advice or helping ... to fill the paperwork, because I also do that for my customer ... but I never thought too much". These aspects included evidence that showed that Mr Ko had a work phone, a personal phone, and a third phone which was an iPhone 7. In his electronic record of interview, Mr Ko said that the iPhone 7 had been given to him by Mr Yang and was used by Mr Ko to send messages to Mr Yang. There was also evidence that the iPhone 7 had been registered in a false name and that Mr Ko had used encrypted apps, including an app called Threema, in which he had made a new account at Mr Yang's request. Mr Ko used Threema to talk about the consignment with Mr Yang. Mr Yang also gave Mr Ko a laptop computer which Mr Ko used to arrange the delivery. Mr Ko communicated with freight forwarders and others by using a false name, Tom Ngon.

80 Further, although it was Mr Ko's job to attract new clients for EMO Trans, and although Mr Ko received commission from EMO Trans for new clients, Mr Ko did not use the services of EMO Trans to process the consignment of the dough mixer. Without the use of EMO Trans to process the consignment, Mr Ko encountered the logistical complexities of organising delivery agents through Gumtree, including providing those agents with the dimensions and weight of the dough mixer and advising them that a forklift would be required.

81 There was also evidence that Mr Ko acted as if he were the client receiving the consignment, by using an email address (ngonbake@gmail.com) from which he sent emails as though he was Tom Ngon. Mr Ko populated documents that would ordinarily be the responsibility of the consignee (purportedly Ngon Bakehouse), conducted searches to obtain the details of Ngon Bakehouse, and took instructions from Mr Yang rather than obtaining required details from Ngon Bakehouse. The Crown also led evidence that Mr Ko had arranged for the redirection of the dough mixer from the premises of Ngon Bakehouse in Burwood to the residential address in Wentworthville. Mr Ko's answer in this respect was, "[w]ell, that's what I was told, there wasn't enough room at the bakery". Mr Ko also received a message in a three-participant Threema chat with Mr Yang and another person which asked if a photograph could be taken of the consignment while it was being stored in a bonded warehouse prior to its delivery to see if the "particular way" in which it was wrapped had been "tampered with". Mr Ko said that he thought the worry was that "people will take their stuff".

A central issue in dispute

82 The elements of the offence of attempting to import a commercial quantity of a border controlled drug are: (i) the accused attempted to import a substance (which includes attempting to "deal with the substance in connection with its

importation"⁹⁶); (ii) the accused intended to import the substance; (iii) the substance attempted to be imported was a border controlled drug; (iv) the accused was reckless as to whether the substance attempted to be imported was a border controlled drug; and (v) the quantity of the border controlled drug attempted to be imported was a commercial quantity.

83 Element (ii), namely intention to import, was a central issue in dispute. The defence case on this element was that Mr Ko might have been gullible, even suspicious, but he did not intend to import the substance. In closing submissions to the jury, the defence said:

"This is a man, after all, Mr Ko, never been in trouble with police. Evidence is that he was a mature man, fully employed, highly experienced in his job. He's got a wife, he's got two kids, he's got his own home, no evidence of financial difficulties. As I said before, no evidence that he's got a drug habit or a gambling habit or any reason to turn to crime. What I say to you is the established facts are that Mr Ko helped [Mr Yang]. He did so because he thought this was part of their friendship, not because he intended to import a substance in a dough mixer. And if you're looking for a rational inference to draw, the rational inference to draw, it is clear that that is what occurred; he was trying to help his friend.

Now, at its height, you might think that Mr Ko's too easygoing. You might even think he's gullible by agreeing to his friend's requests. That's not proof of intent to import a substance."

Mr Ko's counsel argued that "[s]uspicion is as high as [the Crown] get[s]".

The confusion about intention

84 As explained above, the Crown case against Mr Ko at trial was that over time he had formed an intention to import the substance contained in the dough mixer. The Commonwealth Director of Public Prosecutions was clear, precise, and correct in her submission to this Court that no case had been run at trial that Mr Ko had a conditional intention. In other words, no case was run that Mr Ko believed that there was a real or significant chance that the substance was present in the dough mixer and intended to import the dough mixer if the substance was present.

85 Despite the absence of any case of conditional intention, the Crown referred in submissions that were apparently about intention to an asserted belief by Mr Ko in a real or significant chance that border controlled drugs were contained in the dough mixer. In closing submissions, the Crown said:

96 See the extended definition of "import" in *Criminal Code*, s 300.2.

"Mr Ko's knowledge developed over time. It's not necessarily the case that he realised back in September or October or the first day of October *that he was aware of the substantial risks of the presence of border-controlled drugs in the dough mixer*. He could have developed that over time." (emphasis added)

Prior to the directions by the trial judge, the jury may therefore have had the impression that belief in a real or significant chance was sufficient to conclude that Mr Ko intended to import the substance. On Mr Ko's own defence, the element of intention might have been thought by the jury to have been established if they concluded that Mr Ko was suspicious that the substance might be present in the dough mixer.

The dangerous directions by the trial judge

86 The trial judge correctly directed the jury that intention may be inferred from surrounding circumstances or the conduct of Mr Ko, before and after the alleged offence. Then the trial judge directed the jury that:

"... if you are satisfied beyond reasonable doubt *that the accused perceived that there was a real or substantial chance of a substance being present in the consignment* that he attempted to import, then it is open to you to infer, having regard to all the facts and circumstances of the case, that he intended to import the substance.

Bear in mind though that it is not permissible to draw an inference that he meant to bring the substance into Australia, unless that is the only inference reasonably open on the established facts and the circumstances of this case." (emphasis added)

And in describing the defence case, the trial judge said: "[t]he defence case is that the Crown has not excluded the reasonable possibility that *the accused neither knew nor believed that there was a real significant chance* that there was another substance in the consignment" (emphasis added).

The decision of the Court of Criminal Appeal

87 The Court of Criminal Appeal was acutely aware of the danger of a miscarriage of justice that arose from references to a belief in a real or significant chance (or equivalent expressions) in the trial judge's directions about intention. The Court of Criminal Appeal was also aware of the apparent limited endorsement of such references in the decisions of this Court in *Kural* and in *Smith and Afford*, in which convictions had not been quashed. In a beautifully crafted decision which reflected both institutional responsibility and justice, Ward P focused closely upon the directions at trial in Mr Afford's case, which had been held by a majority of this Court not to amount to a miscarriage of justice. Ward P emphasised that although the trial judge in Mr Afford's case had equated intention with belief in a

real or significant chance that the accused's conduct involved importation of the substance, the trial judge had also required the jury to be satisfied that Mr Afford "nevertheless persisted with that conduct". Her Honour explained the significance of that addition to the direction concerning a belief in a real or significant chance:⁹⁷

"the jury must go on to consider whether that was sufficient to satisfy it beyond reasonable doubt that the applicant intended to import the substance in the sense that he meant to import the consignment notwithstanding that significant or real chance".

The Court of Criminal Appeal found a miscarriage of justice arising from the failure of the trial judge to direct the jury that they still needed to find that Mr Ko meant (intended) to import the substance notwithstanding any finding of a belief by Mr Ko in a real or significant chance.

The Court of Criminal Appeal was correct

88 The reasoning of Ward P was correct and well expressed. The dangerous directions by the trial judge concerning Mr Ko's belief in a real or significant chance that the consignment contained the substance were not neutered in the way that the Court of Criminal Appeal explained to be necessary, namely that the jury nevertheless needed to find that Mr Ko intended to import the substance. The problem was therefore that if the jury had found that Mr Ko had a belief in a real or significant chance, that would have established no more than that Mr Ko was aware of a risk that the dough mixer contained the substance. That awareness is not intention. The Court of Criminal Appeal was correct to conclude that there was a miscarriage of justice arising from the directions of the trial judge.

89 In the trial of Mr Ko, as well as the preceding trials of Mr Kural, Mr Smith, and Mr Afford, the prospect of a miscarriage of justice arising in relation to directions on intention could have been substantially reduced by avoiding the dangerous language of a belief in a "real or significant chance" or equivalent expressions. Although such expressions find support in limited passages from *Kural* and from *Smith and Afford*, in neither of those decisions do the majorities insist upon the use of such expressions. And in *Smith and Afford*, some aspects of the reasons of the majority recognise dangers in the use of such expressions.

90 The dangerous directions by the trial judge were material. The directions erroneously suggested to the jury that a finding of a state of mind of suspicion or risk-taking might be sufficient for, or from which to infer, a finding of another state of mind of intention. Those directions "could realistically have affected the

97 *Ko v The King* (2025) 397 FLR 135 at 159 [125].

reasoning of the jury" to the verdict of guilty that the jury returned.⁹⁸ It was not, and could not have been, suggested by the Crown on this appeal that despite the dangerous directions the verdict would inevitably have been the same.⁹⁹

Conclusion

91 The directions given by the trial judge in this case may have been influenced by some of the propositions expressed by the majority in *Smith and Afford*.¹⁰⁰ Those propositions were prefaced by the statement that directions "must always be tailored to the issues in the case at hand".¹⁰¹ In any event, however, great care should be taken before transplanting those propositions into any direction. In particular, propositions eight and nine, if read without the context discussed above, are simply wrong.¹⁰² Those propositions were:

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

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

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

92 Although the trial judge's directions resembled these propositions in some respects, the directions did not pay full attention to the context in which those propositions were made. The danger revealed by that context means that the expression a "real or significant chance" or equivalent expressions should usually

98 *Brawn v The King* (2025) 99 ALJR 872 at 876 [10]; 423 ALR 69 at 73.

99 *Criminal Appeal Act 1912* (NSW), s 6(1).

100 (2017) 259 CLR 291 at 324-326 [69].

101 *Smith and Afford* (2017) 259 CLR 291 at 324 [69].

102 See also *Smith and Afford* (2017) 259 CLR 291 at 325 [69], proposition seven; *Shepherd v The Queen* (1990) 170 CLR 573 at 579.

be avoided. There are many synonyms for "intention" if a trial judge considers it necessary to elaborate upon the meaning of the term. A person intends to do something if the person *means* to do it.¹⁰³ Or, perhaps with less precision, a person intends to do something if that is the person's "purpose or design".¹⁰⁴ But, putting to one side conditional intention cases, a person does not intend to do something, nor can an inference of that intention necessarily be drawn, if the person believes there is a real or significant risk that they will be doing that thing.

- 93 The Court of Criminal Appeal was correct to conclude that the directions were erroneous and involved a miscarriage of justice. The appeal must be dismissed.

103 *Criminal Code*, s 5.2(1).

104 *Zaburoni v The Queen* (2016) 256 CLR 482 at 488 [8], quoting *R v Willmot [No 2]* [1985] 2 Qd R 413 at 418.

94 STEWARD J. I agree with the description of the applicable law in relation to s 307.1(1) of the *Criminal Code* (Cth) as set out in the reasons of Gageler CJ, Gordon and Beech-Jones JJ. In particular, I agree with and endorse the three propositions of law described at [4]-[6].

95 Following from the decisions of this Court in *Kural v The Queen*¹⁰⁵ and *Smith v The Queen; R v Afford* ("*Smith and Afford*"),¹⁰⁶ I also agree with Gageler CJ, Gordon and Beech-Jones JJ¹⁰⁷ that the second element of the offence of attempting to import a commercial quantity of a border controlled drug contrary to s 307.1(1) does not necessarily prevent a trial judge from instructing a jury that, while it is relevant for them to consider whether the accused knew or believed there to be a real or significant chance that there was a substance in the item which the accused brought into Australia, the jury would then need to go on to consider whether that is sufficient to satisfy them beyond reasonable doubt that the accused intended to import the concealed packages which contained the substance, in the sense that the accused meant that those packages would be imported, and that the jury can only reach that conclusion having regard to all the evidence if they consider that that inference is the only reasonable conclusion to be drawn from all the circumstances of the case.¹⁰⁸

96 Correctly interpreted, a direction of the foregoing kind was, in substance, given by the trial judge to the jury in this case. In my view, the trial judge correctly directed the jury that they needed to be satisfied beyond reasonable doubt that the accused intended to import a substance. My brief reasons are as follows.

The charge to the jury

97 It is necessary to set out in full what the trial judge said to the jury concerning the second element of the offence. His Honour directed as follows:

"Element 2 is one of the two critical issues in the case, and it is where a state of mind comes into play, and that is that the accused intended to import a substance. Intention in this context means to mean to do it, that is the accused – the allegation is the accused intended to import the substance, if he meant to import the substance. This involves his actual state of mind at the time of the alleged offence, not what a reasonable person in his position may have intended.

105 (1987) 162 CLR 502.

106 (2017) 259 CLR 291.

107 See the reasons of Gageler CJ, Gordon and Beech-Jones JJ at [47].

108 *Smith and Afford* (2017) 259 CLR 291 at 314-315 [46], 324 [67].

Now the question, as I have raised before, is how does the Crown prove what is in somebody's mind – that is how can they prove it without some admission from the accused. The answer is that intention may be inferred from the surrounding circumstances or from the conduct of the accused, both before, at the time of, or after the alleged offence.

Here, if you are satisfied beyond reasonable doubt that the accused perceived that there was a real or substantial chance of a substance being present in the consignment that he attempted to import, then it is open to you to infer, having regard to all the facts and circumstances of the case, that he intended to import the substance.

Bear in mind though that it is not permissible to draw an inference that he meant to bring the substance into Australia, unless that is the only inference reasonably open on the established facts and the circumstances of this case."

98 The trial judge made it very clear what the task of the jury was to be. He thus again said:

"It must be stressed, however, that [it] is not permissible to draw an inference that he meant to bring the substance into Australia unless that is the only inference available or open on the established facts and the circumstances of the case."

99 After referring to the "16 actions" relied upon by the Crown as a basis for inferring an intention to import a substance, the trial judge also directed as follows:

"The Crown says that you should be satisfied beyond reasonable doubt, this is element 2, that the accused intended to deal with the original substance by first finding seven preliminary facts, and then to infer that, *at the time he took steps in connection with the consignment, he perceived that there was a real and substantial risk that there was a substance in the consignment other than the mixer itself.*

It says that, amongst other things, these facts, considered as a whole, show that the accused was seeking to distance himself from the dealings with the consignment and so suggest, in turn, that he knew that there was a real and substantial risk that there was something else in it. As I have said, this last step must be proved beyond reasonable doubt by the Crown." (emphasis added)

Here, the trial judge correctly emphasised that there needed to be coincidence in time as to the physical act of importation and the intention to import.

100 Considering these directions as a whole, I do not think there was a real risk that the jury would have convicted the accused here based upon *nothing more than* their being satisfied beyond reasonable doubt that there was a real or significant

risk that there was a substance in the item, a dough mixer. When the trial judge said that it was "open" to the jury to find an intention to import a substance based upon their satisfaction that the accused perceived there was a real or significant chance of a substance being in the dough mixer, that was – in context – simply a direction as to a permissible step in necessary reasoning. The trial judge also made it clear to the jury:

- a) that "intention" meant "to mean to do it" (that is, to import a substance) and that this involved the accused's actual state of mind at the time of the alleged importation; and
- b) that it was not possible to draw an inference that the accused meant to bring the substance into Australia "unless that [was] the only inference reasonably open on the established facts and circumstances of [the] case".

101 In such circumstances, the jury could not have been in any doubt that their task, for the purpose of the second element of the offence, was to determine whether they were satisfied beyond reasonable doubt that there was an intention to import a substance.

Disposition

102 The appeal should be allowed. Orders 2 to 5 made by the Court of Criminal Appeal of the Supreme Court of New South Wales should be set aside, and in their place, it should be ordered that the appeal against conviction to that Court be dismissed.

GLEESON J.

Introduction

103 The respondent was convicted, following a trial by jury before Judge J Smith in the District Court of New South Wales, of attempting to import a commercial quantity of border controlled drugs (namely methamphetamine and phenylethylamine) contrary to ss 11.1(1), 307.1(1) and 311.1(1)(f) of the *Criminal Code* (Cth). The Court of Criminal Appeal of the Supreme Court of New South Wales (Ward P, Yehia and Weinstein JJ agreeing) granted the respondent leave to appeal and allowed an appeal against conviction on the ground that the trial judge erred in directing the jury. The conviction was quashed and the matter remitted to the District Court for retrial.

104 The offence arose from the respondent's admitted involvement in the importation into Australia of a piece of commercial machinery, namely a dough mixer said to have weighed 600 kg, in which 101 packets of the drugs, each weighing approximately 1 kg, had been secreted. The drugs were intercepted by Canadian law enforcement authorities and replaced with an inert substance before the dough mixer was imported. The respondent denied any knowledge of the substances concealed in the dough mixer and denied any intention to import the border controlled drugs into Australia.

105 The Court of Criminal Appeal held that the trial judge erred in directing the jury as to the fault element of intention to import a substance, being the second element of the offence.¹⁰⁹ The Court considered that the direction "fell short of stating that an awareness of a real and significant chance that the [respondent's] conduct involved the importation of the substance would not of itself be sufficient to draw the necessary inference" of intention.¹¹⁰ In particular, the Court concluded that the jury should have been directed that, even if satisfied that the respondent was aware of such a real and significant chance: (1) it must also be proved beyond reasonable doubt that the respondent "nevertheless persisted with [the] conduct" that involved importing the substance, "notwithstanding that awareness or belief"; or (2) the jury must "go on to consider" whether that awareness "was sufficient to satisfy it beyond reasonable doubt that the [respondent] intended to import the

109 The five elements of the offence of attempting to import a commercial quantity of a border controlled drug are set out in the reasons of Gageler CJ, Gordon and Beech-Jones JJ at [15].

110 *Ko v The King* (2025) 397 FLR 135 at 159 [125].

substance in the sense that he meant to import the consignment notwithstanding that significant or real chance".¹¹¹

106 By grant of special leave, the prosecution raised the following single ground of appeal:

"The Court of Criminal Appeal erred ... in concluding that the trial judge misdirected the jury by not directing them that the prosecution had to prove beyond reasonable doubt not only that the respondent was aware of a real and significant chance that his conduct involved the importation of a substance, but that the respondent 'nevertheless persisted' with that conduct."

107 In substance, the issue is whether the trial judge's summing up could have led the jury to reason erroneously from a finding, beyond reasonable doubt, that the respondent was aware of a real and significant chance that his conduct involved the attempted importation of a substance to a finding, beyond reasonable doubt, that he intended to import a substance.

108 I accept that the additional direction identified by Gageler CJ, Gordon and Beech-Jones JJ¹¹² may be appropriate and useful, particularly in a case where the prosecution relies upon the accused's awareness of suspicious circumstances surrounding the importation of goods to support an inference of intention to import a substance, because the importation of a substance would have been the inevitable consequence of the accused's actions. However, this was not such a case. Here, the respondent was alleged to have engaged in a deliberate attempt to import a substance into Australia. The respondent's state of mind was alleged to have evolved into an intent, in the sense of an object or purpose, of importing a substance concealed in the consignment. The additional direction would have confused the jury by distracting it from the prosecution's case.

109 The trial judge's summing up, read fairly and in the context of the trial that was had, did not involve error. The jury could have been in no reasonable doubt that, to be satisfied of the second element of the offence, it was required to find that the respondent meant to import a substance. The Court of Criminal Appeal misapprehended the prosecution case on intent, which was that the respondent was ultimately engaged in a deliberate attempt to import a substance concealed in the dough mixer. The appeal should be allowed, orders 2 to 5 of the Court of Criminal Appeal set aside, and, in their place, the appeal against conviction dismissed.

111 *Ko* (2025) 397 FLR 135 at 159 [125].

112 Reasons of Gageler CJ, Gordon and Beech-Jones JJ at [55], [57].

The trial that was had

110 When determining an appeal against conviction on indictment, the "common form" appeal provision requires the appellate court to have regard to the trial that was had, regardless of whether the alleged error is "second limb"¹¹³ error or "third limb"¹¹⁴ error. In this case, it is sufficient to consider the trial that was had by reference to the matters set out below.

Intention to import a substance

111 The trial proceeded on the following basis: (1) the first element of the alleged offence was that the respondent attempted to import a substance;¹¹⁵ (2) that element was a "physical element" within the meaning of the *Criminal Code*;¹¹⁶ (3) that physical element consisted only of conduct;¹¹⁷ and (4) because s 307.1 did not specify a fault element for that physical element, which was a physical element consisting only of conduct, intention was the fault element for the first element.¹¹⁸

112 Section 5.2(1) of the *Criminal Code* provided that "[a] person has intention with respect to conduct if he or she means to engage in that conduct". That provision may be contrasted with s 5.2(3), which provided that "[a] person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events".

113 The ordinary and natural meaning of the word "intends" is "to mean, to have in mind ... [W]hat is involved is the directing of the mind, having a purpose or design."¹¹⁹ That meaning has been noted to accord with the first limb of the

113 *MDP v The King* (2025) 99 ALJR 969 at 976 [9], 980-981 [33], 989 [78]-[79], 993 [107]; 423 ALR 204 at 208-209, 215, 225-226, 232.

114 *Brawn v The King* (2025) 99 ALJR 872 at 876 [11], 882 [43]; 423 ALR 69 at 74, 81.

115 *Criminal Code* (Cth), ss 11.1(1) and 307.1(1)(a).

116 *Criminal Code* (Cth), s 4.1.

117 *Criminal Code* (Cth), s 4.1(1)(a).

118 *Criminal Code* (Cth), s 5.6(1).

119 *Zaburoni v The Queen* (2016) 256 CLR 482 at 488 [8], quoting *R v Willmot [No 2]* [1985] 2 Qd R 413 at 418. cf *Giorgianni v The Queen* (1985) 156 CLR 473 at 506.

definition of intention in s 5.2(3).¹²⁰ Similarly, that meaning corresponds with the definition of intention in s 5.2(1). As explained below, the prosecution contended that the respondent intended to import a substance in the ordinary sense: when he engaged in the conduct that amounted to attempting to import a substance, he meant to import a substance; the importation of a substance was his purpose or design. The trial judge's jury directions on the meaning of intention correspond with this aspect of the prosecution case.

References to Smith v The Queen; R v Afford

114 In submissions to the trial judge about his jury directions, the Crown Prosecutor addressed the effect of the significance of the guidance in *Smith v The Queen; R v Afford*¹²¹ ("*Smith and Afford*") and, in particular, the proposition that "[i]n order to draw an inference of intent, it is necessary to be satisfied beyond reasonable doubt of the facts and circumstances from which the inference of intent is drawn and that the inference of intent is the only reasonable inference open to be drawn from those facts and circumstances".¹²² After making a submission about the scope of this proposition, the Crown Prosecutor submitted that this Court had approved of the directions given at the trial of Smith in support of the contention that it was not necessary for the prosecution to prove beyond reasonable doubt all of the facts and circumstances from which an inference of intent is sought to be drawn. Ultimately, the trial judge accepted this submission. Concerning the identification of the precise facts that had to be proved beyond reasonable doubt to sustain an inference of intent, defence counsel submitted that [61] of *Smith and Afford* was "somewhat dispositive of the argument". The relevant passage of that paragraph is as follows:¹²³

"[I]t is likely to be of considerable assistance to the jury for the judge to direct them as to how, in the absence of an admission, the Crown may establish intent by inferential reasoning, and to identify for the jury the evidence on which the Crown relies to establish the inference. Bearing in mind always that it is a question of fact for the jury to decide by a process of inferential reasoning on the basis of all the facts and circumstances of the case, and that the jury must be so directed, it is therefore entirely appropriate in cases like this for a trial judge to tell the jury that, if they consider it to be established beyond reasonable doubt that the accused perceived there to

120 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [12].

121 (2017) 259 CLR 291 at 324-326 [69].

122 *Smith and Afford* (2017) 259 CLR 291 at 325 [69(7)].

123 *Smith and Afford* (2017) 259 CLR 291 at 321 [61].

be a real or significant chance of the presence of a substance in an object which the accused brought into Australia, it is open to infer that the accused intended to import the substance."

115 The parties did not address whether, or the extent to which, the trial was relevantly analogous to the kind of case discussed in this passage of *Smith and Afford*. Ultimately, however, the parties agreed that there were two intermediate facts essential to the prosecution case, so that each had to be proved beyond reasonable doubt,¹²⁴ and their status as intermediate facts was not challenged in the Court of Criminal Appeal or this Court. The first was that the respondent possessed and used the iPhone 7 from about 8 October 2021 to about 20 October 2021. The second was that the respondent perceived that there was a real or substantial chance of a substance being present in the consignment containing the dough mixer. The Crown Prosecutor reiterated that he relied on other facts to support the inference of intent, being facts that did not need to be proved beyond reasonable doubt. That second intermediate fact sufficiently identified a state of mind that was essential, although not sufficient, to sustain an inference of intention beyond reasonable doubt. Where the prosecution case was that the respondent's intention, in the sense of purpose or design, was to import a substance, a more appropriate intermediate fact is that the respondent believed that a substance was present in the consignment.

Prosecution closing address

116 The prosecution closing address to the jury preceded that of defence counsel.¹²⁵ The Crown Prosecutor commenced by reminding the jury of the five elements of the offence, the second being that the respondent intended to import a substance. After making submissions about the first element, the Crown Prosecutor moved to the second element, stating:

"[T]he Crown accepts that [the respondent's] knowledge developed over time. It's not necessarily the case that he realised back in September or October or the first day of October that he was aware of the substantial risks of the presence of border-controlled drugs in the dough mixer. He could have developed that over time."

117 The Crown Prosecutor identified the second element as "that the [respondent] intended to import a substance, that is, a substance beyond just a dough mixer". Although the Crown Prosecutor had earlier suggested the possibility that the respondent's state of mind was one of developing awareness of "the substantial risks of the presence of border-controlled drugs in the dough mixer",

124 *Shepherd v The Queen* (1990) 170 CLR 573 at 576, 581-585.

125 *Criminal Procedure Act 1986* (NSW), s 160(1).

he submitted that seven facts demonstrated that the respondent intended to import something beyond just the dough mixer. These facts were later referred to by the trial judge in his summing up as the "seven preliminary facts". For each preliminary fact, the Crown Prosecutor made a contention to the effect that the fact supported a conclusion that the respondent intended to import a substance. Although the Crown Prosecutor did not attempt to explain the meaning of intent in the context of the prosecution case, he used the word in the familiar sense of a purpose or design.

118 The first fact was that the respondent possessed and used an iPhone 7 from about 8 October 2021 until about 20 October 2021. The iPhone was registered in a false name, and the respondent told police in his record of interview that it was separate from his personal and work phones. After describing the relevant evidence, and submitting that the respondent had the iPhone 7 "because it distanced him from that consignment", the Crown Prosecutor said:

"The use of the iPhone 7, in the manner in which [the respondent] used it, and of the Acer computer, I suggest to you, is evidence that he intended that, that which he was importing, or assisting in the import, dealing with in connection with its import, the dough mixer, contains something extra, contained a substance."

119 The second fact concerned the respondent's "avoidance" of using his employer "to do the job". The Crown Prosecutor submitted that a natural inference was that the respondent "was going to earn more money by not putting [the consignment] through" his employer, and that this choice also had the advantage of distancing him from the consignment. On that basis, the Crown Prosecutor submitted that the respondent wished to avoid questioning about the importation "because, I suggest to you, he intended that there would be more than just a dough mixer in that dough mixer". The Crown Prosecutor repeated the submission that the first and second preliminary facts "indicate that [the respondent] intended that there would be a substance in the dough mixer beyond just being a dough mixer".

120 The Crown Prosecutor next submitted that the third fact relied upon to establish "that intent" was that the respondent "acted as if he was the client himself", in that he sent emails purporting to be from "Tom Ngon", the nominated importer.

121 The fourth fact was the respondent's use of encrypted applications (including the use of Threema and not just his "normal" WeChat) and the creation of "fresh identities" within those applications including, on 10 October 2021, to communicate about the importation. The Crown Prosecutor submitted that "the way those encrypted apps were used, the creation of identities within them, Answer

Answer,^[126] for example, indicates that [the respondent] was aware that he intended that there would be a substance in the dough mixer".

122 The fifth fact was the respondent's knowing use of false consignee details. Addressing the evidence concerning that fact, the Crown Prosecutor concluded:

"[G]etting back to my central point, is that [the respondent] knew that this wasn't about a dough mixer going to a bakery. There was a substance concealed inside it."

123 The sixth fact concerned the respondent's stress in connection with the consignment. The Crown Prosecutor suggested that the stress was explicable because "he knew – that is, [the respondent] intended that the machine would contain a concealed substance".

124 The seventh fact was that the respondent knew of, and gave advice about, counter-surveillance methods. The Crown Prosecutor submitted that this fact demonstrated the respondent's knowledge that there was a concealed substance in the consignment: "it's important that they know that it's been inspected by law enforcement bodies, because – and [the respondent], I suggest, knows this – because it has a concealed substance in it. You wouldn't want to take delivery of it if you knew it had been the subject of law enforcement scrutiny."

125 In contrast, the prosecution relied on the respondent's awareness or perception of a "substantial risk" the substance was a border controlled drug as proof of the fourth element of the offence. The Crown Prosecutor explained recklessness as a concept that "centres around awareness of a substantial risk". Noting that the question of recklessness arose only if the jury was satisfied of the second element, the Crown Prosecutor submitted that "somebody aware that there was something concealed would be aware of a substantial risk that it was drugs concealed inside this 700 kilogram machine where the dimensions were known to him".

Defence closing address

126 Defence counsel commenced his closing address by contending that a "fundamental flaw" in the prosecution case was that the prosecution had no direct evidence to prove beyond reasonable doubt that the respondent intended to import a substance. Counsel observed that the respondent had made no admission of any intention to import a substance, and that no other witness said that he held such an intention. He questioned the prosecution's submission that the respondent's knowledge could have developed over time, contending that the jury had not been

126 It was an agreed fact that the respondent was the user of the Threema account handle "Answer Answer".

told when the respondent was said to have "developed this intent to import a substance".

127 The respondent's case was that he had no involvement in what was described as "this transaction of drugs", and that he was merely seeking to help a friend who later betrayed him. Defence counsel concluded by acknowledging that the jury might think that the respondent was "gullible" in agreeing to his friend's requests, but emphasised that such gullibility is "not proof of intent to import a substance".

Trial judge's directions to the jury

128 The trial judge identified the "central issue" in the case as the respondent's state of mind at the relevant times. His Honour noted that this issue concerned the second and fourth elements of the offence, and identified the second element as whether the respondent intended to import "a substance, that is something in the consignment other than the dough mixer". His Honour explained that "the Crown's case is largely, although not entirely, a circumstantial case", and gave orthodox directions, based on well-established principles,¹²⁷ as to how the jury may approach the drawing of inferences and a circumstantial case, including warning the jury to be "extremely careful about drawing any inference". His Honour directed the jury that they were first required to determine what facts were established by the evidence, and then to consider whether those established facts, taken together, proved the respondent's guilt. If they did not, the respondent was to be found not guilty. If they did, there was "one more step before you can convict the accused, that is, you must determine whether there is any other reasonable conclusion arising from those fact[s] that is inconsistent with the conclusion that the Crown says". Those directions were not the subject of complaint at trial or on appeal.

129 Concerning the two agreed intermediate facts, the trial judge directed the jury that, in drawing an inference "as to the [respondent's] state of mind", those two facts were essential to the prosecution case. His Honour instructed the jury that they must first be satisfied beyond reasonable doubt of the existence of those facts, "not because they alone prove the guilt of the [respondent], but because they are an essential step in the reasoning that the Crown asks you to follow in order to establish its case".

130 In relation to the defence case, the trial judge said that it included, "in particular, that the Crown has not excluded the reasonable possibility that [the

127 See, eg, *Plomp v The Queen* (1963) 110 CLR 234 at 242; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 531; *R v Hillier* (2007) 228 CLR 618 at 637 [46]; *R v Baden-Clay* (2016) 258 CLR 308 at 324 [47].

respondent] was entirely unaware of the substance in the consignment, or that there was a real and substantial risk that there might be such a substance".

131 The trial judge then provided the jury with a document headed "Written Directions" and explained, consistent with the opening statements in the document, that it must be read in conjunction with the oral directions and that the prosecution must establish each of the elements beyond reasonable doubt. The written directions set out the offence and identified the five elements that the prosecution was required to prove beyond reasonable doubt. In relation to the second element, the document stated:

"Element 2: the accused intended to import a substance

'Intention'

To intend to do something is to *mean* to do it. In this case, the accused *intended* to import the substance if he *meant* to import the substance.

This involves the actual state of mind of the accused at the time of the alleged offence, not what a reasonable person in his position may have intended.

Intention may be inferred from the surrounding circumstances or from the conduct of the accused before, at the time of, or after the alleged offence.

If you are satisfied beyond reasonable doubt that the accused perceived that there was a real or substantial chance of a substance being present in the consignment that he attempted to import, it is open to you to infer, having regard to all the facts and circumstances of the case that he intended to import the substance.

It is not permissible to draw an inference that the accused meant to bring the substance into Australia unless that is the only inference reasonably open on the established facts and circumstances of the case.

For this element, the Crown does not have to prove that the accused was aware:

- (a) what the type of substance he was importing was;
- (b) what that substance looked like;
- (c) how it was wrapped;
- (d) what it otherwise contained; or
- (e) where it was contained or concealed within the consignment."

132 This direction conformed with the submission of defence counsel that the trial judge should give a direction of the kind identified in the passage of *Smith and Afford* set out earlier.¹²⁸

133 The trial judge then gave oral directions about each of the five elements by reference to, and in conformity with, the written directions. Next, his Honour indicated that, before summarising the prosecution and defence cases, he would "highlight a number of critical matters" concerning the second and fourth elements. His Honour directed that those two elements must be considered separately, "even though they seem similar". Concerning the second element, the trial judge said, "[i]t must be stressed, however, that [it] is not permissible to draw an inference that [the respondent] meant to bring the substance into Australia unless that is the only inference available or open on the established facts and the circumstances of the case".

134 Finally, the trial judge told the jury that he would give them a "brief summary of each of the cases for the Crown and the defence". His Honour stated that he would not "go into any great detail" and "[i]f I miss something, then that does not mean that you should not have regard to it and you should not consider it as part of the whole process". The trial judge identified the prosecution's argument as to the second element in the following terms:

"The Crown says that you should be satisfied beyond reasonable doubt, this is element 2, that the accused intended to deal with the original substance^[129] by first finding seven preliminary facts, and then to infer that, at the time he took steps in connection with the consignment, he perceived that there was a real and substantial risk that there was a substance in the consignment other than the mixer itself.

[The Crown] says that, amongst other things, these facts, considered as a whole, show that the accused was seeking to distance himself from the dealings with the consignment and so suggest, in turn, that he knew that there was a real and substantial risk that there was something else in it. As I have said, this last step must be proved beyond reasonable doubt by the Crown."

The trial judge completed his summary of the prosecution's case on the second element by listing the seven preliminary facts.

135 Turning to the defence case, his Honour repeated that "[t]he defence case is that the Crown has not excluded the reasonable possibility that the accused neither

128 (2017) 259 CLR 291 at 321 [61]. See above at [114].

129 Being the substance that was replaced in the dough mixer. See [104] above.

knew nor believed that there was a real significant chance that there was another substance in the consignment". The trial judge summarised the defence case as one of the respondent "helping his friend" and "using his experience just to help out". His Honour also referred to the respondent's identification of what was said to be a flaw in the prosecution case, namely that it depended upon the respondent "developing an awareness that there was a substance in the consignment other than the mixer, that is, developing that awareness over time, but that the Crown [had] not identified any moment or incident when that awareness first arose".

Case law on jury directions about intent to import

- 136 The purpose of jury directions is to direct the jury as to the way it must conduct deliberations on the questions of fact that it is its function to decide.¹³⁰ Whether the accused had the requisite intent will generally depend on an inference drawn from primary facts found by the jury (in a jury trial), in the absence of an admission by the accused. In relation to jury directions about an intention to import a substance, this Court has repeatedly emphasised the importance of directions that are appropriate to the facts and circumstances of the particular case and cautioned appellate courts against transforming matters of fact into propositions of law.¹³¹

Kural v The Queen

- 137 In *Kural v The Queen*, the jury was required to decide whether the accused had acted with mens rea (that is, a guilty mind) in importing a narcotic good into Australia. Mason CJ, Deane and Dawson JJ identified the relevant state of mind as an intention to do the prescribed act.¹³² Their Honours identified the following three bases for drawing an inference that the accused intended to import a narcotic good: (1) the accused knew or was aware that an article which he or she intentionally brought into Australia comprised or contained narcotic drugs;¹³³ (2) the accused held a belief, falling short of actual knowledge, that such an article comprised or contained narcotic drugs, which "would obviously sustain an

130 *Alford v Magee* (1952) 85 CLR 437 at 466; *R v Lawrence* [1982] AC 510 at 519; *Darkan v The Queen* (2006) 227 CLR 373 at 394 [67].

131 *Kural v The Queen* (1987) 162 CLR 502 at 505, 511-512; *Saad v The Queen* (1987) 61 ALJR 243 at 244; 70 ALR 667 at 669; *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1 at 3; 82 ALR 217 at 219; *Smith and Afford* (2017) 259 CLR 291 at 331-332 [84]-[85].

132 *Kural* (1987) 162 CLR 502 at 504.

133 *Kural* (1987) 162 CLR 502 at 504.

inference of intention";¹³⁴ and (3) where there was "proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved that act and nevertheless persisted in that conduct".¹³⁵

138 The majority in *Kural* observed:¹³⁶

"As a practical matter, the inference of mens rea or a guilty mind will ordinarily be irresistible in cases involving the importation of narcotic drugs if it is proved beyond reasonable doubt that the accused actually imported the drugs and that he was aware, at the time of the alleged commission of the offence, of the likelihood of the existence of the substance in question in what he was importing and of the likelihood that it was a narcotic drug."

139 In *Kural*, the accused had, on his own account, been concerned about the possibility that the samovar he imported into Australia in his luggage might contain drugs or a bomb. He inspected the samovar, but did not discover the substance in the base of it.¹³⁷ The majority observed that the requisite intent could rest on something less than actual knowledge of an unidentified substance in the samovar, such as awareness of the likelihood of its presence. Accordingly, the direction to the jury was unduly favourable to the accused by requiring the jury to be satisfied beyond reasonable doubt that the accused actually knew that there was a substance concealed in the samovar.¹³⁸

140 The underlying logic of the majority's reasoning is that, where a person imports an item into Australia being aware of the likelihood that it contains an unknown substance, that person can be taken to have intended to import that substance, in the absence of some reasonable possibility to the contrary. That logic applies to the second element of the offence with which the respondent was charged.

134 *Kural* (1987) 162 CLR 502 at 505.

135 *Kural* (1987) 162 CLR 502 at 505.

136 *Kural* (1987) 162 CLR 502 at 505.

137 *Kural* (1987) 162 CLR 502 at 506.

138 *Kural* (1987) 162 CLR 502 at 507-508.

141 The reasoning in *Kural* was affirmed in *Saad v The Queen*¹³⁹ and *Pereira v Director of Public Prosecutions*.¹⁴⁰ In *Pereira*, where the state of mind to be proved was knowledge rather than intention, this Court explained that "a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter".¹⁴¹

Smith and Afford

142 *Smith and Afford* involved two appeals heard together, and concerned whether the process of inferential reasoning posited in *Kural* for the purposes of finding mens rea at common law was applicable to proof of an intention to import a commercial quantity of a border controlled drug contrary to s 307.1 of the *Criminal Code*. This Court concluded that that process of inferential reasoning was applicable.

143 The context-specific nature of the issue is emphasised by the majority's acceptance that "[i]n some cases it may ... be that a person does not mean to do something unless it is the person's object or purpose to do that thing".¹⁴² However, their Honours cited *Peters v The Queen*¹⁴³ for the proposition that, in other cases, where a person foresees that the inevitable consequence of what he or she is doing is that it will bring about a particular result, the person may sometimes be taken to mean – that is, intend – to produce that result.¹⁴⁴ In *Peters*, McHugh J (with whom Gummow J agreed) considered that persons charged with conspiracy may have intended to injure or defraud a person, even though that person or his or her interests were not the object of the conspiracy.¹⁴⁵

144 The majority in *Smith and Afford* accepted Smith's contention that an intention to import a substance under the *Criminal Code* may only be inferred from an accused's knowledge or belief of a significant chance of the presence of a substance in their possession where "an accused proceeds with the state of mind that he or she is aware that there is a real or significant chance of the presence of

139 (1987) 61 ALJR 243 at 244; 70 ALR 667 at 669.

140 (1988) 63 ALJR 1; 82 ALR 217.

141 *Pereira* (1988) 63 ALJR 1 at 3; 82 ALR 217 at 220.

142 *Smith and Afford* (2017) 259 CLR 291 at 319 [57].

143 (1998) 192 CLR 493.

144 *Smith and Afford* (2017) 259 CLR 291 at 319-320 [57], citing *Peters* (1998) 192 CLR 493 at 521-522 [68].

145 *Peters* (1998) 192 CLR 493 at 522 [69]; see also 533 [93].

the substance being in his or her possession, and is prepared to proceed even if the substance is present".¹⁴⁶ While acknowledging the theoretical possibility of a state of mind no higher than recklessness – where the accused is aware of the relevant chance but would not be prepared to take the object into Australia if they knew or believed that the substance was in the object – the majority "emphasised that ... in most cases it is most unlikely to occur".¹⁴⁷

145 As explained earlier, defence counsel referred the trial judge to the majority's conclusion that:¹⁴⁸

"Bearing in mind always that it is a question of fact for the jury to decide by a process of inferential reasoning on the basis of all the facts and circumstances of the case, and that the jury must be so directed, it is therefore entirely appropriate in cases like this for a trial judge to tell the jury that, if they consider it to be established beyond reasonable doubt that the accused perceived there to be a real or significant chance of the presence of a substance in an object which the accused brought into Australia, it is open to infer that the accused intended to import the substance."

The majority cautioned against a jury direction that belief or awareness of a "real and significant chance" that the accused's conduct involved the importation of a substance would suffice to infer an intention to import.¹⁴⁹

146 In *Afford's* case, their Honours concluded that the directions, taken as a whole, "were adequate to convey to the jury that the process of inferring intent was one that involved them drawing an inference from all the facts and circumstances of the case and that, if they found that *Afford* knew or believed there was a significant chance that his luggage contained the substance, it was then for them to decide whether that, in combination with all the other facts and circumstances of the case, persuaded them beyond reasonable doubt that *Afford* intended to import the substance".¹⁵⁰

147 In *Smith's* case, the majority rejected *Smith's* submission that a direction framed in accordance with *Kural* would have misled the jury by equating

146 *Smith and Afford* (2017) 259 CLR 291 at 318 [55]; see also 320 [58].

147 *Smith and Afford* (2017) 259 CLR 291 at 320 [58].

148 *Smith and Afford* (2017) 259 CLR 291 at 321 [61]; see also 322-323 [65].

149 *Smith and Afford* (2017) 259 CLR 291 at 323 [66].

150 *Smith and Afford* (2017) 259 CLR 291 at 323 [66].

recklessness with intent regardless of other evidence.¹⁵¹ Smith had told police that he had concerns about the contents of a suitcase that he was asked to deliver to "Vernon" in Sydney.¹⁵² The prosecution case was that Smith's intent to import a substance contained in concealed packages in his luggage "was to be inferred from all the facts and circumstances of the case, including that there was no dispute that Smith brought the substance into Australia in items in his possession; the sheer implausibility of Smith's version of events; the circumstances surrounding his importation of the items; and the incredibility of Smith's denial of wrongdoing, in view of the many inconsistencies in what he told Customs and police".¹⁵³ Smith's defence included an argument that he had been tricked and did not know that there were drugs in the items he brought into Australia.¹⁵⁴ The trial judge asked the jury to consider whether Smith:¹⁵⁵

"was aware of the likelihood that those packages were in the items in his suitcase or the briefcase ... in the sense that he recognised there was a significant or real chance that the orange containers, the soaps, the golf sets, contained those extra packages in which the substance was located.

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

This Court unanimously concluded that there was no error in this direction.¹⁵⁶

No error in the trial judge's summing up

148 I am not persuaded that the trial judge's summing up could have led the jury to reason erroneously from a finding, beyond reasonable doubt, that the respondent was aware of a real and significant chance that his conduct involved the attempted importation of a substance to a finding, beyond reasonable doubt, that he intended to import a substance. That is so for two reasons. First, in the context of the trial that was had, the trial judge's directions as to the law concerning the second

151 *Smith and Afford* (2017) 259 CLR 291 at 323-324 [67].

152 *Smith and Afford* (2017) 259 CLR 291 at 312 [40].

153 *Smith and Afford* (2017) 259 CLR 291 at 313 [43].

154 *Smith and Afford* (2017) 259 CLR 291 at 314 [45].

155 *Smith and Afford* (2017) 259 CLR 291 at 315 [46], 336-337 [100].

156 *Smith and Afford* (2017) 259 CLR 291 at 323-324 [67], 337 [102].

element were correct and corresponded to the prosecution case. Second, the aspect of the trial judge's summing up that purported to summarise the prosecution case on the second element was not a direction as to the relevant law, and could not have deflected the jury "from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt".¹⁵⁷

Adequacy of the jury directions

149 The trial judge's directions must be understood in the context of the case made by the prosecution, which was based on the development over time of the respondent's state of awareness concerning the intended contents of the consignment, resulting ultimately in the respondent's intention, in the sense of his purpose, in importing the dough mixer, to import a substance concealed in the consignment.

150 In contrast with the prosecution cases in *Smith and Afford*, the prosecution case was not that the respondent merely foresaw the importation of a substance as the inevitable result of his actions in importing the dough mixer. Having taken on the burden of proving intent in the way identified above at [149], the prosecution necessarily failed if the jury was satisfied only that the respondent was aware of a real or significant chance that the consignment contained a substance. There was no requirement for the trial judge to direct that "an awareness of a real and significant chance that the conduct involved the importation of the substance would not of itself be sufficient to draw the necessary inference" of intent as no such possibility arose on the prosecution case.¹⁵⁸

151 Apparently applying *Smith and Afford*, the trial judge directed the jury as to the possibility of inferring the necessary intent from a finding that the respondent "perceived that there was a real or substantial chance of a substance being present in the consignment that he attempted to import", and qualified that direction in two important respects. First, it was necessary for the jury to have regard "to all the facts and circumstances of the case". Second, the jury was warned not to draw the inference "unless that is the only inference reasonably open on the established facts and the circumstances of this case". Contrary to the Court of Criminal Appeal's conclusion, the trial judge's directions neither stated nor implied that an awareness of a real and significant chance that the respondent's conduct involved the importation of the substance was sufficient to draw the necessary inference of

157 *Huxley v The Queen* (2023) 98 ALJR 62 at 72 [41]; 416 ALR 359 at 370-371, quoting *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [46].

158 cf *Ko* (2025) 397 FLR 135 at 159 [125].

intention.¹⁵⁹ Such an implication is inconsistent with the trial judge's repeated admonitions that the jury must be satisfied beyond reasonable doubt that the respondent meant to import a substance and also with the trial judge's reminder to the jury that the prosecution case on intent required consideration of the seven preliminary facts.

152 Having regard to the prosecution case and the trial that was had, the jury was correctly directed to consider the state of mind of the respondent at the time of the alleged offence. In those circumstances, contrary to the reasoning of the Court of Criminal Appeal, there was no requirement for the jury to have been directed that, even if satisfied that the respondent was aware of such a real and significant chance, it must also be proved beyond reasonable doubt that the respondent "nevertheless persisted with [the] conduct" that involved importing a substance, "notwithstanding that awareness or belief".

153 Nor was it required for the jury to be directed to "go on to consider" whether that awareness "was sufficient to satisfy it beyond reasonable doubt that the [respondent] intended to import the substance in the sense that he meant to import the consignment notwithstanding that significant or real chance". Such a direction would not merely have amounted to unnecessary repetition of the exhortation that the finding of intention must be made beyond reasonable doubt. In addition, where the prosecution did not ask the jury to reason from that state of awareness to find the requisite intent, the additional direction would also have tended to distract the jury from the prosecution's essential case on intention, namely that the respondent acted with the purpose or design of importing a substance into Australia.

The trial judge's summary of the prosecution case on intention to import a substance

154 In the passage set out at [134] above, referring to the second element of the offence, the trial judge twice described the prosecution case as involving an inference that the respondent "perceived" or "knew that there was" a risk that there was a substance in the consignment other than the dough mixer. The passage was part of a "brief summary" of the prosecution case, where the trial judge told the jury that he was "not going to go into any great detail", and that they should not overlook any aspect of the prosecution case that his Honour might have missed. The summary was separate from the trial judge's earlier directions concerning the elements of the offence, and not an instruction to the jury as to how they must conduct their deliberations.

¹⁵⁹ cf *Ko* (2025) 397 FLR 135 at 159 [125]-[129].

155 A direction is something which the law requires the trial judge to give to the jury and which they must heed.¹⁶⁰ Directions are not to be conflated with comments,¹⁶¹ nor should they be conflated with a brief summary of a party's case in circumstances where extensive and correct directions concerning the elements of the offence were given.

156 The only remaining question is whether the trial judge's summary was capable of being understood by the jury as directing an alternative path to a finding of intention, namely that intention could be established based on the importation of the dough mixer notwithstanding the respondent's awareness of a real or substantial risk that it might conceal a substance. In my view, the trial judge's summary was not capable of being understood in that way. The passage did not qualify, expressly or impliedly, the trial judge's earlier and correct directions concerning how to decide whether the second element of the offence was proved. Rather, it described a process of inferential reasoning to the agreed intermediate fact, indispensable to the prosecution case, that the respondent perceived that there was a real or substantial chance of a substance being present in the consignment. The passage did not purport to identify a path of reasoning from a finding of the intermediate fact to a finding of intent to import a substance. Having been correctly directed, both orally and in writing, that intention must be determined "having regard to all the facts and circumstances of the case" and should not be inferred "unless that is the only inference reasonably open on the established facts and the circumstances of this case", the jury was not deflected by the trial judge's summary from the task of deciding whether intention was proved beyond reasonable doubt.

Conclusion

157 The appeal should be allowed, orders 2 to 5 of the Court of Criminal Appeal set aside, and, in their place, it should be ordered that the appeal against conviction to that Court be dismissed.

160 *Azzopardi v The Queen* (2001) 205 CLR 50 at 70 [50]; *Mahmood v Western Australia* (2008) 232 CLR 397 at 403 [16].

161 *Azzopardi* (2001) 205 CLR 50 at 69-70 [49]-[52]; *Mahmood* (2008) 232 CLR 397 at 403 [16].

JAGOT J.

The appeal

158 This appeal concerns a trial judge's directions to a jury in respect of proof of the elements of an offence. The appeal exposes why standardised versions of such directions must be tailored to the facts and circumstances of the particular case in which the directions are to be given.

159 In this case, the trial judge in the District Court of New South Wales gave directions to the jury in accordance with the terms of 12 propositions this Court identified in *Smith v The Queen; R v Afford* ("*Smith and Afford*"),¹⁶² adapted to the alleged offence of the respondent attempting to import a commercial quantity of border controlled drugs.¹⁶³ The Court of Criminal Appeal of the Supreme Court of New South Wales (Ward P, Yehia and Weinstein JJ) allowed the respondent's appeal against conviction on the basis that the trial judge's directions in respect of the respondent's intention, an element of the offence, were inadequate.¹⁶⁴ The Court of Criminal Appeal was correct to so hold. These reasons explain why that is so.

The element of intention

160 By s 307.1(1) of the *Criminal Code* (Cth), a person commits an offence if, relevantly, the person imports a substance, the substance is a border controlled drug, and the quantity imported is a commercial quantity. In the terms used by the *Criminal Code*, the "physical element" of the offence is the conduct "imports" and the "fault element" for that conduct of "imports" is "intention".¹⁶⁵ By s 5.2(1) of the *Criminal Code*, a "person has intention with respect to conduct if he or she means to engage in that conduct". "[I]mport" is defined in s 300.2 of the *Criminal Code* to mean, in relation to a substance, "import the substance into Australia and includes: (a) bring the substance into Australia; and (b) deal with the substance in connection with its importation". Accordingly, the required "intention" is that the person meant to bring the substance into Australia or meant to deal with the substance in connection with the bringing of the substance into Australia.

161 In the case of an "attempt" to import a commercial quantity of a border controlled drug, s 11.1(1) of the *Criminal Code* provides that a "person who attempts to commit an offence commits the offence of attempting to commit that

162 (2017) 259 CLR 291 at 324-326 [69].

163 *Criminal Code* (Cth), ss 4.1, 5.1(1), 5.6(1), 307.1(1).

164 *Ko v The King* (2025) 397 FLR 135 at 159 [125]-[129].

165 *Criminal Code*, ss 4.1, 5.1(1), 5.6(1).

offence and is punishable as if the offence attempted had been committed". By s 11.1(2), for "the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence", which is a question of fact. The fault element for the conduct of "imports" for attempting to commit the offence of importing a commercial quantity of a border controlled drug remains "intention". The required "intention" in such a case remains that the person meant to bring the substance into Australia or the person meant to deal with the substance in connection with the bringing of the substance into Australia.¹⁶⁶ In the present case, the relevant offence was the offence of attempting to commit the offence of importing a commercial quantity of border controlled drugs, because the substances (101 packages of methamphetamine and phenylethylamine, each weighing about 1 kg) were removed from the container by authorities before its consignment from Canada to Australia and substituted with an inert substance. That the substances had been so removed and replaced meant only that the respondent's conduct involved an attempt to commit the offence as specified in s 11.1(1) of the *Criminal Code* because the substances were not in fact in the container at the time of the respondent's dealings with the container in connection with the bringing into Australia of the container.

162 In *Smith and Afford*, having held that the directions to the jury in each case there under consideration were adequate,¹⁶⁷ this Court observed that "directions must always be tailored to the issues in the case at hand and to the facts and circumstances which are relevant to the determination of the issues".¹⁶⁸ The Court then said that "where it is not disputed that the accused brought a substance into Australia and not disputed that it was a border controlled drug ... it may be advantageous" for certain directions to be given to a jury. In respect of the required element of intent, those directions were:¹⁶⁹

- "(3) The accused cannot be convicted of importing a border controlled drug unless it is established beyond reasonable doubt that:
 - (i) he or she intended to import a substance; ...
- (5) The accused cannot be regarded as having intended to do something unless it is established beyond reasonable doubt that he or she meant to do that thing.

166 *Criminal Code*, ss 11.1(3), 300.2.

167 (2017) 259 CLR 291 at 323 [66], 324 [67].

168 (2017) 259 CLR 291 at 324 [69].

169 (2017) 259 CLR 291 at 325-326 [69].

- (6) To decide whether the accused meant to bring the substance into Australia, it is permissible to draw an inference as to the accused's state of mind at the time of bringing the substance into Australia.
- (7) In order to draw an inference of intent, it is necessary to be satisfied beyond reasonable doubt of the facts and circumstances from which the inference of intent is drawn and that the inference of intent is the only reasonable inference open to be drawn from those facts and circumstances.
- (8) Where, as here, the accused brought into Australia a case, object or other thing (the container) which has a substance in it, and it is open to infer that the accused meant to bring the container into Australia, it is open to infer that the accused meant to bring the substance into Australia if, at the time of bringing the container into Australia:
 - (i) the accused knew that the substance was in the container; or
 - (ii) the accused knew or believed there was a real or significant chance that the substance was in the container.
- (9) It is not necessary that the accused knew or had a belief as to where, or in what fashion, or in what form, the substance existed or was secreted in the container. It is enough if the accused knew or believed there was a real or significant chance that the substance was somehow, somewhere, in some form within the container.
- (10) It must be stressed once again, however, that it is not permissible to draw an inference that the accused meant to bring the substance into Australia unless that is the only inference reasonably open on the established facts and circumstances of the case."

163 These propositions are readily adjustable to an offence of attempting to commit the offence of importing a commercial quantity of a border controlled drug. The trial judge made those adjustments in the giving of the impugned directions to the jury, and no complaint is made in that regard.

164 It will be apparent that each of the 12 propositions identified in *Smith and Afford* is framed as a statement of law. The issue which this appeal exposes concerns proposition (8)(ii). Proposition (8)(ii) involves directing a jury to the effect that, if a container containing a substance is brought into Australia, and the jury is satisfied beyond reasonable doubt that at that time the accused knew or believed there was a real or significant chance that the substance was in the container and that the accused intended to bring the container into Australia, it is "open" to the jury to be satisfied beyond reasonable doubt that the accused intended to import the substance. In saying that it is "open" to the jury to be so satisfied, what is meant is that the jury "could" be so satisfied. That is, what is being said is

that proof of one fact beyond reasonable doubt (that the accused knew or believed there was a real or significant chance that the substance was in the container), where other facts have also been proved beyond reasonable doubt or are not in dispute (that the container was brought into Australia and that the accused intended to bring the container into Australia), is a legally sufficient basis for the jury to infer another fact beyond reasonable doubt (that the accused intended to bring the substance into Australia). Understood in the context of propositions (7) and (10), the result is that the mode of reasoning described in proposition (8)(ii) is legally sufficient for a jury to find that the ultimate inference – that the accused intended to import the substance – is the only reasonable inference "open" to be drawn (that is, the only inference legally available) from the facts and circumstances so proved.

165 These propositions in respect of intent in *Smith and Afford* followed from the Court's acceptance in that case that the reasoning in *Kural v The Queen*¹⁷⁰ concerning intent to import a narcotic drug applied to intent to import a border controlled drug.¹⁷¹ The Court expressed its key conclusion in *Kural* in these terms:¹⁷²

"As a practical matter, the inference of mens rea or a guilty mind will ordinarily be irresistible in cases involving the importation of narcotic drugs if it is proved beyond reasonable doubt that the accused actually imported the drugs and that he was aware, at the time of the alleged commission of the offence, of the likelihood of the existence of the substance in question in what he was importing and of the likelihood that it was a narcotic drug."

166 The Court in *Kural* immediately thereafter said this:¹⁷³

"What we have said is designed to emphasize that the existence of the requisite intention is a question of fact and that in most cases the outcome will depend on an inference to be drawn from primary facts found by the tribunal of fact. In this, as in other areas of the law, it is important not to succumb to the temptation of transforming matters of fact into propositions of law. In that regard, we would emphasize that the foregoing comments are not designed as a direction or instruction to be read by trial judges to juries. They are intended to give guidance to trial judges in order to enable them to formulate such directions as may be appropriate to the facts and circumstances of particular cases."

170 (1987) 162 CLR 502.

171 (2017) 259 CLR 291 at 300-301 [7], 321-322 [62]-[64].

172 (1987) 162 CLR 502 at 505.

173 (1987) 162 CLR 502 at 505.

167 The difference then is between: (i) on the one hand, the "practical matter" of the drawing of inferences by the jury as the trier of fact in a case where an accused has "actually imported the drugs" (meaning brought the drugs into Australia), which is a question of fact; and (ii) on the other hand, the statement of law in proposition (8)(ii) as set out in *Smith and Afford* as to a legally permissible mode of reasoning by a jury to a state of satisfaction beyond reasonable doubt that an accused intended to import the substance.

168 The reasoning of the Court in *Smith and Afford* discloses that proposition (8)(ii) cannot be applied in the terms in which it is expressed and in isolation from its context. This is because the legal sufficiency of the primary inference – that the accused knew or believed there was a real or significant chance that the substance was in the container – to found the ultimate inference – that the accused intended to bring the substance into Australia – always depends on the primary inference either including or carrying with it a finding or inference of the jury beyond reasonable doubt that the accused meant (that is, intended) to bring the container into Australia even if it did have the substance in it. Whether the primary inference does contain or carry with it that finding or inference beyond reasonable doubt would depend on the other facts and circumstances of the case as proved.

169 Accordingly, in *Smith and Afford*, the Court's reasoning preceding the 12 propositions of law closely reflected the "practical" focus in *Kural* on the inferences that a jury might properly draw depending on the facts and circumstances as found. The Court in *Smith and Afford*, in this context, expressly distinguished between a jury inferring: (i) on the one hand, that an accused knew or believed that there was a real or significant chance that the container had the substance in it *and was prepared to bring the container into Australia even if it did have the substance in it*; and (ii) on the other hand, that an accused knew or believed that there was a real or significant chance that the container had a substance in it *and was not prepared to bring the container into Australia if it had the substance in it*. In the former case, the jury could and should draw the ultimate inference that the accused intended to import the substance. In the latter case, as the Court explained, the accused's mental state, in the terms of the *Criminal Code*, would amount to no more than recklessness¹⁷⁴ and would not amount to intent.¹⁷⁵

170 To the same effect concerning intent, the majority said in *Smith and Afford*:¹⁷⁶

174 *Criminal Code*, s 5.4(1).

175 (2017) 259 CLR 291 at 320 [58].

176 (2017) 259 CLR 291 at 322 [63] (emphasis added).

"for the purposes of establishing the fault element for s 307.1(1)(a) [of the *Criminal Code*] of intending to import a substance, the accused must be shown to have known or believed there to be a significant chance that there was a substance within an object that the accused was carrying into the country *and, knowing or believing that to be so, meant to carry it in*".

171 Leaving these matters aside, proposition (8)(ii), on its own terms, is confined to a case where "it is not disputed that the accused brought a substance into Australia and not disputed that it was a border controlled drug".¹⁷⁷ This reflects the factual circumstances with which the Court was concerned in both *Smith and Afford* and in *Kural*. In the present case, however, it was not alleged that the respondent brought the container (which had contained the substances before their removal) into Australia. Rather, it was alleged that the respondent had intentionally dealt with the container (which had contained the substances before their removal) in connection with the substances being brought into Australia. As explained, the alleged offence was the attempt to commit the offence of importing border controlled drugs because of the removal of the substances before the container was imported into Australia.

172 When it came to proposition (8)(ii), the required tailoring was more than merely adjusting the reference to the respondent having attempted to bring the substances into Australia (limb (a) of the definition of "import" in s 300.2 of the *Criminal Code*) so that it referred to the respondent having attempted to deal with the substances in connection with them being brought into Australia (limb (b) of the definition of "import"). The jury could not be instructed to the effect that it could be satisfied beyond reasonable doubt that the respondent intended to import the substances into Australia only by reason of it being satisfied beyond reasonable doubt that the respondent knew or believed there was a real or significant chance that the substances were in the container. Such a direction would involve instructing the jury to the effect that such a state of knowledge or belief on the respondent's part (if inferred to the criminal standard of beyond reasonable doubt) was legally sufficient for the jury to draw the ultimate inference that the respondent intended to deal with the substances in connection with them being imported into Australia. This was not so, however, unless the jury was satisfied beyond reasonable doubt that the respondent's state of mind was, knowing or believing there was a real or significant chance that the substances were in the container, even if the substances were in the container, the respondent was prepared to deal with the container in connection with the container being brought into Australia.

Conclusions

173 For these reasons, I agree with the statements of law of Gageler CJ, Gordon and Beech-Jones JJ that: (1) it is not sufficient, in proving that an accused intended

177 *Smith and Afford* (2017) 259 CLR 291 at 324 [69].

to import a substance, to establish beyond reasonable doubt *only* that the accused was aware of, or perceived, a real or significant chance that he or she was importing a substance; (2) it is sufficient, to prove that an accused intended to import a substance, to establish beyond reasonable doubt that: (i) the accused was aware of, or perceived, a real or significant chance that the object they were importing into the country contained a substance; and (ii) the accused's state of mind was that "even if the substance is in the object, I am prepared to take the object into Australia";¹⁷⁸ and (3) "a miscarriage of justice may be occasioned if the effect of a trial judge's directions is that there is a real risk or real chance that the jury would conclude that it is sufficient to find that the accused intended to import a substance merely by establishing that the accused was aware of, or perceived, a real or significant chance that he or she was importing a substance".¹⁷⁹ I additionally agree that proposition (7) in *Smith and Afford* is not to be understood in any manner inconsistent with the reasoning in *Shepherd v The Queen*¹⁸⁰ to the effect that it is only facts and circumstances which are an indispensable intermediate "link in a chain of reasoning" towards guilt that must be proved beyond reasonable doubt.¹⁸¹

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I agree also that the terms of the trial judge's directions were material to an element of the offence in dispute at the trial. The legal inadequacy of the trial judge's directions was necessarily material. It follows that the Crown's appeal against the orders of the Court of Criminal Appeal must be dismissed.

¹⁷⁸ *Smith and Afford* (2017) 259 CLR 291 at 320 [58].

¹⁷⁹ See reasons of Gageler CJ, Gordon and Beech-Jones JJ at [4]-[6].

¹⁸⁰ (1990) 170 CLR 573.

¹⁸¹ (1990) 170 CLR 573 at 585; see also at 575, 579, 586. See reasons of Gageler CJ, Gordon and Beech-Jones JJ at [53].

