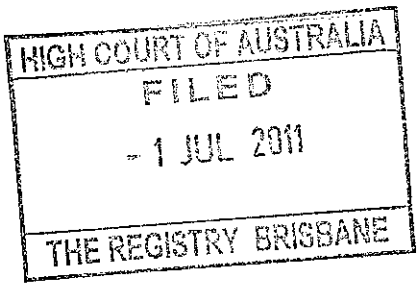
IN THE HIGH COURT OF AUSTRALIA

BRISBANE OFFICE OF THE REGISTRY No. B 27 of 2011

BETWEEN



DENNIS PAUL PADDISON

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S SUBMISSIONS

Part I – Certification

1. These submissions are suitable for publication on the internet.

Part II – Statement of Issues

2. The Appellant was convicted in the Supreme Court of Queensland of two counts of importing a border control drug and one count of attempting to possess a border control drug contrary to the *Criminal Code 1995 (Cth)* (the "*Code*"), and was sentenced on each count to 22 years imprisonment to be served concurrently, with a non-parole period of 14 years and 6 months.

20 3. The Court below concluded that in relation to the importation counts the trial judge had directed on the basis of joint criminal enterprise, which at that time was not recognized in the *Code*, whereas the proper basis of liability was that of aiding and procuring the importations (s 11.2 of the *Code*).

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4. The Court below held that was an error, but dismissed the appeal having found no substantial miscarriage of justice had occurred: see s 668E of the *Criminal Code 1899 (Qld)*. It did so because it found that while "*aiding*" was never referred to, the directions actually given were such that the factual and legal findings made by the jury must necessarily have encompassed proof of the requirements of s 11.2, and that s 80 of the *Constitution* was complied with.

5. The Appellant takes issue with the conclusion of the Court below mainly at the level of principle. He appears to contend that any misdirection of a jury as to the elements of an offence must lead to a new trial, because the proviso cannot apply as the error was fundamental or because s 80 will not permit it then to apply: in each case there is said not to be a 'proper verdict on the charge'.

6. In summary, the Respondent contends that the Appeal should be dismissed as:

   (1) *In relation to the proviso* - a misdirection in relation to an element of the offence with which an accused is charged does not mean that the trial was necessarily fundamentally flawed: *Krakouer v The Queen*[1]; *Holland v The Queen*[2].

   (2) *In relation to s 80* - the so-called "right" to the verdict of a jury rather than an appellate court is and always has been qualified by the possibility of appellate intervention and s 80 does not limit the application of the proviso here: *Weiss v The Queen*[3]; *Conway v The Queen*[4]. The question whether the terms of the proviso are coterminous with those of s 80 can be left for a case where it properly arises.

   (3) *In relation to the facts in this case* - Once the attacks on the level of principle fall away, there is no serious challenge by the Appellant to the decision below, which is correct.

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[1] (1998) 194 CLR 202
[2] (1993) 67 ALJR 946
[3] (2005) 224 CLR 300
[4] (2002) 209 CLR 303

Part III – Section 78B of the *Judiciary Act* 1903

7. The Appellant has filed appropriate notices as required by s 78B of the *Judiciary Act*.

Part IV – Statement of Facts

8. The facts are accurately summarised in the judgment of Holmes JA (with whom Fraser and White JJA agreed) (at [7] – [31]).

9. The following factual matters are noted in addition to those set out in the Appellant's submissions.

10. There was no dispute at trial:

10 (1) that the importations of the drugs (cocaine and tablets containing MDMA)[5] the subject of the two counts occurred; and

(2) the drugs were secreted in tubes inside computer monitors which were imported from Canada to Australia.

Reed, who had earlier pleaded guilty, was not challenged on these matters (at [79]).

11. The activities undertaken by Paddison with the intention of achieving the importations included the following:

(1) Reed and Handlen discussed the method of importing, Handlen financed the purchase of computer monitors and thereafter Paddison,
20 Handlen and Reed were involved in secreting the drugs within 16 computer monitors[6] which were then marked with red stickers for identification[7] (at [8][9]);

(2) Paddison stacked the monitors onto pallets for shipment[8];

(3) Handlen and Reed travelled to Australia to collect the drugs when they arrived; Paddison remained in Canada;[9]

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[5] The first importation related to over 200,000 MDMA tablets and approximately 4 kilograms of cocaine. The second importation related to approximately 121,000 MDMA tablets and 135.7 kilograms of cocaine

[6] T 5-24 to T 5-27

[7] T 5-32

[8] T 5-32

[9] T 5-32

(4) Handlen (who by this time was in Australia) arranged for Paddison (who had remained in Canada) to send money to Nerbas in Australia for expenses associated with the importation in Australia[10] (for example leasing storage premises) (at [11]);

(5) On or about 29 April 2006 Paddison transferred A$4329.17 to an account held by Nerbas to pay for expenses incurred in the importation process[11] (at [11]);

(6) On or about 17 May 2006 Paddison transferred A$5157.75 to an account held by Nerbas to pay for expenses incurred in the importation process[12] (at [11]);

(7) Computer monitors were obtained for use in the second importation and during July/August 2006 Paddison and others secreted packages of drugs in a number of the monitors and again marked them with red stickers (the second importation)[13] (at [16]);

(8) Paddison and others delivered the monitors to the consignor, stacked the monitors onto pallets for shipment and ultimately loaded the pallets into the shipping container[14];

(9) On 4 September 2006 Paddison travelled to Australia;[15] Handlen and Reed also travelled to Australia at about the same time;

(10) Between 4 and 18 September 2006 Paddison participated in intercepted conversations with Reed and Handlen in relation to the progress of clearance of the shipping container, the timing of its anticipated delivery and associated issues[16] (at [20][21]);

(11) On 18 September 2006 Paddison and Reed unloaded the container on its arrival at the storage unit[17] but on instructions from Handlen did not inspect the monitors until it had been ascertained whether something untoward had occurred in the processing of the container[18] (at [24][25][26]);

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[10] T 5-38 and see T 5-57
[11] Exhibit 110
[12] Exhibits 110, 111
[13] T 5-61
[14] T 5-62 to T 5-63
[15] And see – T 5-68 to T 5-69
[16] Exhibits 57, 58 numbers 2,4,6,9,12,16,27,29,34,41,46,49,56,58 and 66
[17] T 5-71 to T 5-74
[18] T 5-73 to T 5-75, T 5-85

(12) On 20 September 2006 after Handlen gave Paddison and Reed the go ahead they made an inspection of the monitors. They had gone to the warehouse prepared: they had a suitcases big enough to carry the drugs and took gloves and cleaning agents to avoid leaving fingerprints[19] (at [27]);

(13) Paddison was arrested shortly thereafter (at [28]).

12. Reed pleaded guilty to the offences of importing a border controlled drug and gave evidence in the Crown case as to the activities of Paddison and others involved in those importations. Reed, amongst other things, was responsible for arranging the shipping of the drugs for each importation and dealing with persons associated with that process (for example customs brokers).

13. There was substantial evidence corroborating his account including evidence of customs brokers engaged to process the containers, travel and accommodation records, bank records, lease documents, intercepted telephone calls featuring all involved (including Paddison), visual surveillance (and film recording of movements of the parties) and a fingerprint of Paddison's on the inside of the casing of a monitor from the second drug importation (at [72]).

14. Paddison gave evidence at trial (at [29] – [31]). His evidence was internally inconsistent and did not account for the evidence in the Crown case. In convicting Paddison, the jury clearly rejected his account.

Part V – Relevant Provisions

15. The Appellant's statement of applicable constitutional provisions and statutes is accepted.

Part VI - Summary of Argument

16. The steps in the Appellant's argument in relation to the importing counts can be reduced to the following:

(1) s 80 requires a 'proper verdict on the charge' from the jury (AS [20]);

(2) there can never be such a 'proper verdict' if the directions of the trial judge concerning the elements of the offence were erroneous;

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[19] T 5-75, T 5-76, T 5-86

(3) here the error was that the jury was directed as to joint criminal enterprise rather than accessorial liability as defined by s 11.2 of the *Code*;

(4) accordingly, the jury was not 'squarely' asked to, and could not properly, decide the facts upon which guilt depended as a matter of law (AS [36][37]);

(5) s 80 was thus contravened and the proviso could not apply;

(6) even if s 80 were not contravened, the proviso was nevertheless inapplicable because there was a *'fundamental failure to observe conditions necessary to a satisfactory trial'* (AS [41][42]).

17. It is submitted that the argument is misconceived. It is both contrary to authority and fails to come to grips with the facts in this case.

18. It is wrong to assert that simply because there is a misdirection as to the elements of the offence:

(1) that the jury cannot have properly decided the facts upon which guilt depends in this case; nor that

(2) the Court applying the proviso cannot be satisfied there was no substantial miscarriage of justice in this case.

19. As explained below (at [28] – [32]), the Appellant's reasoning is contrary to authority.

20. It also fails to address the facts. The Appellant never seriously challenges the conclusion of the Court below. In particular that:

> *"The positive finding which the jury must have made would equally have founded a conclusion that each appellant had aided others to commit the offence of importing. Although that characterisation of the conduct was not used, the necessary factual findings for it existed"* (at [79])

and further:

> *" [t]he intention which must have been found by the jury was, in this context, equally capable of being characterised as an intention to aid*

in the importation, even if it was not described as that by his Honour" (at [81])

and further:

"I do not think that the absence of reference to aiding deflected the jury from the true issue between the Crown and the appellants; whether the latter did things to advance the importation of drugs into Australia, with that intention" (at [82]).

That conclusion should stand. While it does, there is no basis in the evidence to find a fundamental departure from the requirements of trial by jury or a miscarriage of justice.

21. The Respondent's argument is organised as follows:

(1) The proviso;

(2) Section 80;

(3) The asserted error did not result in a miscarriage of justice.

The Proviso

22. As this was a trial on indictment of an offence against a law of the Commonwealth, the Supreme Court of Queensland had, by s 68(2) of the *Judiciary Act* 1903 (Cth), "*the like jurisdiction*" with respect to "*the trial and conviction on indictment; [as] of offenders or persons charged with offences against the laws of the State ... and with respect to the hearing and determination of appeals*" but subject to s 80 of the *Constitution*.

23. In this way, s 68(2) 'picks up' the normal jurisdiction of that Court on appeals, which provisions then apply as surrogate Commonwealth laws. If a State law operated in a particular matter to infringe the constitutional requirement of trial 'by jury', then it would not be picked up in that instance. Thus, no question of inconsistency within the meaning of s 109 of the Constitution can arise: *R v LK*[20].

24. Subject to s 80, s 668E of the *Criminal Code 1899* (Qld) applies to such appeals, stating:

[20] (2010) 241 CLR 177

"(1) The Court on ... appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

25. That provision is in a form common throughout Australia, and is indistinguishable from the provisions considered by this Court, notably but not only in *Weiss v The Queen*[21], *Cesan v The Queen*[22] and *Gassy v The Queen*[23].

26. The authorities establish that application of the proviso requires the following:

(1) applying the statutory test "*whether no substantial miscarriage of justice has actually occurred*" as opposed to judicially exegesis about its application (for example, "*fundamental*") in other cases;[24]

(2) the appellate court undertaking *"its own independent assessment of the evidence"* on the whole of the record of the trial, making "*due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record"* but not engaging in an exercise of *"speculation or prediction"* to determine whether "*the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty"*. This is a necessary, although not necessarily sufficient, step to

[21] (2005) 224 CLR 300
[22] (2008) 236 CLR 358
[23] (2008) 236 CLR 293
[24] *Gassy v The Queen* (supra) at [33] - [34]; *Weiss v The Queen* (supra) at [42] - [46]; *Cesan v The Queen* (supra) at [124][126]

its application.[25] It is an objective task, the standard of proof is beyond reasonable doubt[26]

(3) considering the nature of the error, the strength and weaknesses of the prosecution and defence cases, and the circumstances of the trial as a whole[27] so that the Court assesses for itself the gravity and significance of the error[28] in the particular trial, on the evidence properly admitted in the case;[29]

(4) with the ultimate view of determining whether no substantial miscarriage of justice has occurred.[30]

10 27. This task was undertaken unimpeachably by the Court below (see particularly at [72], [76]-[82])

28. It is suggested that a misdirection as to the elements of the offences charged necessarily prohibits the proviso having any application (even leaving aside s 80), but that is contrary to the authorities, none of which the Appellant seeks to have overruled.

29. In *Holland v The Queen,*[31] the trial judge had failed to give any express comprehensive directions about the elements of the offence of 'attempt to have sexual intercourse' and hence the directions on that offence were inadequate. However, this Court dismissed the appeal against conviction on
20 the basis that no miscarriage of justice occurred, the majority stating:[32]

> "*A failure by a trial judge fully to direct the jury about all the elements of an offence does not automatically mean that, in the event of a conviction, there has been a miscarriage of justice. To determine whether there has been a miscarriage, regard must be had to all the circumstances of the case, including the conduct of the trial.*" (emphasis added)

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[25] *Weiss v The Queen* (supra) at [41][43][44]; *Cesan v The Queen* (supra) at [124] – [128]
[26] *Weiss v The Queen* (supra) at [42]
[27] *Gassy v The Queen* (supra) at [33] – [34]
[28] *Glennon v The Queen* (1994) 179 CLR 1 at 8; *Cesan v The Queen* (supra) at [126]
[29] *Cesan v The Queen* (supra) at [124]
[30] *Weiss v The Queen* (supra) at 316
[31] (1993) 67 ALJR 946
[32] *Holland v The Queen* (supra) at 951

30. In *Krakouer v The Queen,*[33] a majority of this Court said:

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

31. *Darkan v The Queen*[34] is another example of such a case. Other examples from intermediate courts of appeal are noted in *R v Cao*.[35]

32. It follows that the Appellant's submission in relation to the proviso at the level of statement of principle cannot succeed.

Section 80

33. Section 80 of the *Constitution* relevantly provides that: *"The trial on indictment of any offence against any law of the Commonwealth shall be by jury."*

34. In *Cheatle v The Queen*[36], the High Court held that s 80 of the *Constitution* entrenched certain immutable and essential features of a jury for the purposes of a trial of a Commonwealth offence. Discerning those features may be difficult.

35. This Court has held that s 80:

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[33] (1998) 194 CLR 202
[34] (2006) 227 CLR 373 at [96][107]
[35] (2006) 65 NSWLR 552; See also *Fung v R* (2007) 174 A Crim R 169; *R v Cook* (1963) 48 Cr App R 98; *R v Lambourn* [2007] VSCA 187; *R v Gulliford* (2004) 148 A Crim R 558; *R v Garilli* [2009] SASC 228; *Worsnop v R* [2010] VSCA 188
[36] (1993) 177 CLR 541

(1) means that there is to be *"a trial before a judge and jury;"*[37]

(2) precludes majority verdicts;[38]

(3) precludes an accused person giving up his or her rights under s 80;[39]

(4) requires the jury to be randomly and impartially selected, not chosen by the prosecution or the State;[40]

(5) requires the jury to be comprised of lay decision-makers who are impartial as to the issues;[41]

(6) permits the use of reserve or additional jurors;[42]

(7) does not preclude a State law which permits the jury to separate, or to be reduced from 12 to 10 in number, before the verdict is given;[43]

(8) does not make unalterable all aspects of trials by jury as they existed in England or in the Australian colonies as at 1900 – thus property and gender qualifications for jurors need not and have not been retained.

36. As has been recognised in the authorities, the procedures with respect to the jury system are not immutable.[44] Not all traditional incidents of trial by jury are essential.[45] Classification as an essential feature of the institution of trial by jury involves an appreciation of the objectives that institution advances or achieves.[46]

37. While an historical understanding of the institution of trial by jury must be borne in mind when interpreting the scope of s 80,[47] it is nevertheless the case that the ambit of the right established by s 80 cannot be determined solely by reference to the scope of the institution as it existed at the time of the provision's enactment.[48] (In any event, criminal procedure was not uniform throughout the Australian Colonies and in England immediately before

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[37] *Brownlee v The Queen* (2001) 207 CLR 278
[38] *Cheatle v The Queen* (supra)
[39] *Brown v The Queen* (1986) 160 CLR 171
[40] *Cheatle v The Queen* (supra); *Katsuno v The Queen* (1999) 199 CLR 40 at 64-65
[41] *Cheatle v The Queen* (supra) at 549 and 560; *Brownlee v The Queen* (supra) at 289 and 299
[42] *Ng v The Queen* (2003) 217 CLR 521
[43] *Brownlee v The Queen* (supra)
[44] *Brownlee v The Queen* (supra) at 286 [12]; *Ng v The Queen* (supra) at 533 [36] per Kirby J; Spigelman CJ in *R v JS* (2007) 175 A Crim R 108 at 127 [85]
[45] As shown by Kirby J in *Ng v The Queen* (supra) at 533 [36]
[46] *Brownlee v The Queen* (supra) at 298 [54]
[47] *Cheatle v The Queen* (supra) at 560
[48] *Brownlee v The Queen* (supra) at [6]-[7], [12], [17] [33] [115], [125]

Federation – and this lack of uniformity extended to the modes and scope of challenge to criminal verdicts or sentences).

38. Rather, the content of trial by jury in a criminal context has adapted in accordance with contemporary custom and this has been reflected in concomitant legislative change (including provision for various types of appeals from jury verdicts – all appeals being statutory in their origin). It is against this evolutionary background that the interpretation of s 80 must properly take place, recognising the objectives that the institution seeks to achieve and adopting a *"readiness to accept changes which do not impair the fundamentals of trial by jury"*.[49]

39. It is not possible to say that an essential and immutable feature of jury trial comprises legally impeccable directions as to the elements of the offence even if no miscarriage of justice occurs, nor that this was always the case as a matter of history in the 19th century. Thus, this Court in *Conway v The Queen*[50] noted four quite limited avenues for challenging criminal convictions or sentences, and later said:

> *"In criminal appeals and applications for leave to appeal against criminal convictions, the Judicial Committee has always refused to allow the appeal or grant the application unless it is satisfied that the legal error — whatever it was — has brought about a miscarriage of justice."*[51]

40. Indeed, the following statement from *Weiss v The Queen*[52] tells decisively against the Appellant's premise:

> *"As Wigmore pointed out the conduct of jury trials has always been subject to the direction, control and correction both of the trial judge and the appellate courts. Once it is acknowledged that an appellate*

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[49] *Brownlee v The Queen* (supra) at [55], [21]-[22], [146]-[147]
[50] (supra) at [31]
[51] The case of *Ibrahim v The King* there footnoted makes it clear that this principle went back until at least 1893. Equally, the NSW precursor to the proviso, s 423 of the *Criminal Law (Amendment) Act* 1883 (NSW) at least applied 'where it was impossible for the appellate court to suppose that the evidence improperly admitted had any effect upon the jury': *Makin v Attorney-General* (NSW) [1894] AC 57.
[52] (2005) 224 CLR 300 at [30]

> *court may set aside a jury's verdict "on the ground that it is unreasonable or cannot be supported having regard to the evidence", it follows inevitably that the so-called "right" to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention. The question becomes, when is that intervention justified? And that, in turn, requires examination of when a court should conclude that "no substantial miscarriage of justice has actually occurred".* (emphasis added)

41. The Court below correctly recognised that s 80 did not advance the Appellant's argument as the concept of the essential requirements of trial by jury are "*little different*" to "*such a departure from the essential requirements of the law that it goes to the root of the proceedings*" (at [76]).[53] It concluded that whichever characterisation is adopted the result is the same (at [76]): if the error was "*so fundamental that there was not a trial, the proviso will have no application*" (at [76]).

42. For these reasons, s 80 was not contravened in this matter.

No substantial miscarriage of justice actually occurred

43. Turning from the level of principle to the particular circumstances of this matter, it is noted that the Appellant does not seriously dispute the findings of Homes JA below. There is in any event no doubt that her Honour was correct.

44. While the Court below concluded that the proceedings were conducted, and summed up, on the erroneous basis of joint criminal enterprise rather than aiding and procuring in terms of s 11.2 of the *Code*,[54] the Court was correct to

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[53] *Darkan v The Queen* (2006) 227 CLR 373 at [94]

[54] Noting that, at the relevant time, s 11.2 relevantly stated:
"(1) *A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.*
...
(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
...
(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
(b) is guilty of that offence because of the operation of subsection (1);
but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence."

conclude that particular error, in the circumstance of this trial did not produce a miscarriage of justice (at [82]).

45. The Court below (at [78]) recognised that to determine whether the jury was required to determine the "*true issue*" between the parties involved, amongst other things, assessing what was required to prove the offence of aiding and procuring an importation and what directions were actually given to the jury.

46. The Court concluded (at [78]) that in order to convict, the jury had to be satisfied that the Appellant had brought a border controlled drug into Australia, intending to do so; that each Appellant's conduct in fact aided in that process, and that each Appellant intended that his conduct would aid in the importation (at [78]). This is in accordance with s 11.2 of the *Code*. The Appellant does not challenge the correctness of that formulation.

47. The Court thereafter considered the directions actually given and the case proved before the jury (at [37]-[39][41][42][79] – [81]). In particular, the directions given directed the jury to the question of whether the Appellant (and Handlen) had performed tasks aimed at achieving the importation and, with others, had imported the drugs (at [79]).[55] This was in the context of clear directions as to the intent of the Appellant in importing the drugs, which, as the Court recognised in this case, were equally capable of being characterised as an intention to aid the importation (at [80][81]).

48. In addition to the directions set out by Holmes JA (at [79] – [81]), the learned trial judge also relevantly said in summing up:

> *"As you appreciate, the prosecution case is that there was an importation of large quantities of ecstasy tablets and cocaine on two occasions, the first in May 2006 and the second in September 2006. It says that no one person can do all that is necessary to achieve the importation, that there were many tasks that had to be performed and divided between the various participants. It says that each importation*

[55] For example: SU T at 16-12, 16-14, 16-26 to 16-30, T 16-38, 16-44 to 16-48

was a group exercise with each participant sharing the common objective of bringing drugs into the country.[56]

[W]as there an importation of a commercial quantity of border controlled drugs in May 2006? There seems to be no dispute about that. If there was, was it the result of a group exercise? Again, there is a lot of evidence to that effect. Critically, if it was a group exercise, who were the participants in that group exercise? Has the prosecution proven that Mr Handlen, with others, imported the drugs that arrived in May and intended to do so? Has the prosecution proved that Mr Paddison, with others, imported the drugs that arrived in May because he packed them and transferred moneys to assist with expenses and therefore intended to import the drugs?"[57] (emphasis added)

The learned trial judge repeated the same formula in relation to the second importation.

49. In view of the summing up (and this is made even clearer in view of the fuller quotes just set out), Holmes JA correctly concluded, in terms that deserve to be reproduced in full, that:

"[79]... *The jury was thus directed to the question of whether each appellant had performed tasks aimed at achieving the importation and, with others, imported the drugs. The positive finding which the jury must have made would equally have founded a conclusion that each appellant had aided others to commit the offence of importing. Although that characterisation of the conduct was not used, the necessary factual finding for it existed.*

[80] ... *Although his Honour directed the jury that each had to have the intention to import rather than an intention to aid the importation, that was in a context in which the jury had been asked to consider whether they were part of the group enterprise and told that the Crown case involved each participant in the enterprise sharing a common*

[56] 16-44 l.20-40 (RB 1183)
[57] 16-45-1646 (RB 1184-1185)

objective of importation.

[81] *As the case was put on the basis of a group exercise in which each appellant performed tasks, the jury could not have understood the necessary intention to import as an intention to single-handedly bring the drugs into the country; they can only have understood the requisite intent as being the intention of each appellant to perform his allotted tasks in the exercise with the understanding that he was doing so in order to accomplish the importation of drugs. The intention which must have been found by the jury was, in this context, equally capable of being characterised as an intention to aid in the importation, even if it was not described as that by his Honour."*

50. Thus, the Court of Appeal was right to find that, on the basis of the evidence in the case, and the directions contained in the summing up by the trial judge, that the jury must have been satisfied that the requirements of s 11(2) of the *Code* were met, even though the summing up was on the basis of 'joint criminal enterprise' rather than the aiding and procuring language of s 11(2). That being so, there is evidently no miscarriage, nor breach of s 80.

The count of attempted possession

51. The error in relation to the basis of liability for the importation counts has no relevance to the count of attempted possession.

52. The directions in relation to what was required to be proved in relation to that count are clearly correct.[58] The Appellant does not suggest otherwise.

53. The Appellant now appears to be contending that as Reed was the principal he was "*badly disadvantaged*" in relation to the attempted possession count (AS [52][53]). The Appellant provides no submission as to how the directions on the importing counts could have had any effect on the count of attempted possession let alone badly disadvantage him. There is no proper basis for the Appellant's contention.

[58] T16-29 to 16-39

54. The facts (including the allegations as to the various roles played by the Appellant, Handlen and Reed) remained the same throughout. Describing Reed as the principal and the Appellant as aiding the importations does not alter their roles or the activities which each undertook. Reed was always the person who actually imported the drugs. The jury was required to accept his evidence to convict on any of the counts. They clearly did so. As noted above (at [12]) there was substantial evidence corroborating his account. The Appellant does not challenge that or the directions given in relation to his evidence.

10 55. As noted above (at [11]) the Appellant was actually found in possession of the substance which had been substituted by the authorities for the drugs, while attempting to retrieve the substance from inside the computer monitors (at [27][28]).

56. The Appeal should be dismissed.

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