IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M161 of 2017

BETWEEN:

THE QUEEN

Appellant

and

ROMANOFALZON

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Filed on behalf of the Respondent by:
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TWO MODES OF REASONING AND THE APPELLANT'S SHIFTING CASE

1. In the 'Appellant's Submissions' to this Court, the Appellant argued that the provenance of the money found in the Respondent's possession was irrelevant or not to the point to the prosecution case at trial, and to its defence in this Court.[1]

2. But that is not how the prosecution case at trial case was run. The evidence of the cash was admitted,[2] and relied upon at trial,[3] as proceeds of the Respondent's past sales of Cannabis; which in turn had not been included in his tax returns over the preceding four years because it betrayed his criminality.

3. That having been pointed out, the Appellant's reply now contends that the provenance of the money 'might have assisted in giving the money its status' as a tool of the trade.[4]

4. In this way, the Appellant's case has sought to elide two distinct modes of reasoning. The Appellant's case, to adapt Gleeson CJ's analogy in *Sultana v R*,[5] is akin to producing the accounts of a tailor's business in previous years, and relying upon those accounts to demonstrate that the tailor must still be operating in that same business. That process of reasoning is quite distinct from the process exposed by Gleeson CJ in *Sultana v R*.

5. To alter the analogy slightly, a hypothetical tailor, charged with possessing cloth with intent to cut, may be condemned by the innate utility of the implements he possesses to cut cloth, and by their circumstantial connection to the cloth, on the date that he is discovered. The same is not true of the accounts of the tailor's business: they are merely evidence that the tailor has carried out his business in the past, from which one might 'postdict' the probability that the tailor intends to cut the cloth in his possession.

'TOOLS OF TRADE' AND 'PAST OFFENDING' REASONING

6. As a general proposition, it may be accepted that, in a case of possession of

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1 Appellant's submissions at [6.4] and [6.5]
2 AB 17, lines 12 – 16
3 AB 78 lines 1 – 21, SAB 9 at [28], SAB 11 at [34](a)
4 Appellant's Reply at [2.2]
5 (1994) 74 A Crim R 27

Cannabis for the purpose of sale, the prosecution may prove an intent to sell by demonstrating that, at the time of possession, the accused was conducting an ongoing business of selling Cannabis. It does not follow, however, that the prosecution can do so by *any* means. One mode of reasoning that a prosecutor might invite a jury to engage in may be permissible, another may not.

7. One mode of reasoning that may lead to the conclusion is 'past sales' reasoning, which invites an inferential process predicated upon a person's past conduct, disclosing their past disposition or tendency, from which their disposition or tendency at the time of the charged act may be determined. Importantly, that chain of reasoning does not depend on a connection between the cash and drugs located in an accused person's possession; rather, the cash is itself relied upon as 'black money', which in turn (it is said) must have come from earlier drug trafficking.

8. The other mode or process is 'tools of trade' reasoning. It relies upon the *presence of items* (including money) commonly possessed by drug dealers – and the circumstances attending their location – as illustrating that the accused person possessed the drugs in his or her possession for the purpose of sale.[6] It neither involves nor necessitates evidence founding an inference in proof of past offending.

9. When applied to cash, this second process of reasoning possesses little legitimate force, unless there is a demonstrable connection between the cash and the drugs.[7]

10. The Appellant says, of this case, that "the simple possession of the money" 'took forward the Crown case'[8] because the jury could perceive that it was akin to 'a cash float'.[9] This is quintessential 'tools of trade' reasoning. The legitimacy of that mode of reasoning is not here under attack; just as it was not under attack in the Court of Appeal. It is uncontroversial.[10]

11. But in the respondent's trial, the cash evidence was neither admitted, nor deployed, as 'a cash float,' or as an item that *incidentally* betrayed on the

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6 *Sultana v R* (1994) 74 A Crim R 27 at 29 per Gleeson CJ

7 See, by analogy, *Thompson and Wran v R* (1968) 117 CLR 313 at 317 per Barwick CJ and Menzies J

8 Appellant's Submissions at paragraph [6.4]

9 Appellant's Submissions at paragraph [6.5]

10 See, eg, Judgment below at [136], [138], [140], [142] and [145]

Respondent's part – at the time that it was located at his home – an intention to traffick.

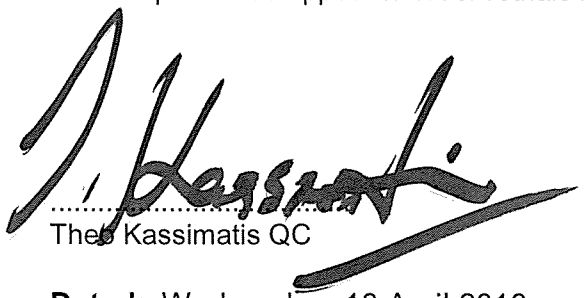
12. Far from being irrelevant, the provenance of the money was *the very point* of its admission at trial. The evidence was admitted,[11] and relied upon by the prosecution,[12] as the proceeds of earlier trafficking.

CONCLUSION – THE APPEAL MUST FAIL

13. The appellant now contends that the issue at stake in this case is the admissibility of evidence that *incidentally* reveals past wrongdoing, and thus a criminal tendency, but which may be *primarily* relevant and admissible for a different purpose.[13] That contention cannot be accepted. It flies in the face of the prosecution opening; the basis upon which the evidence was admitted; and the lengths to which the prosecutor went to demonstrate that the cash signified past conduct.

14. Indeed, in his closing address to the jury, the prosecutor made clear that the cash was probative of an intent to sell *precisely because* it was (said to be) "income from dealing in drugs".[14] So understood, the prosecution at trial invited 'past sales' or tendency reasoning.

15. The attack upon the correctness of the majority's reasons does not withstand scrutiny. A fortiori, the correctness of the Court's decision to allow the Respondent's appeal to order retrials is beyond doubt.



Theo Kassimatis QC

Chris Carr

Dated: Wednesday, 18 April 2018

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11 AB 17, lines 12 - 16

12 SAB 78 lines 1 - 21, SAB 9 at [28], SAB 11 at [34](a)

13 Appellant's Submissions at [6.1]

14 Trial transcript at p1351 from line 3