IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B26 OF 2011**

On appeal from
Court of Appeal of the Supreme Court of Queensland

BETWEEN: **DALE CHRISTOPHER HANDLEN**
Appellant

AND: **THE QUEEN**
Respondent

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B27 OF 2011**

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On appeal from
Court of Appeal of the Supreme Court of Queensland

BETWEEN: **DENNIS PAUL PADDISON**
Appellant

AND: **THE QUEEN**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent in each proceeding.

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the appellants' list of legislative provisions in each proceeding.

PART V ARGUMENT ON ISSUES PRESENTED BY THE APPEAL

4. These submissions address the argument that the approach of the Court below meant that the appellants did not receive a "trial by jury", as required by s 80 of the Constitution.

5. The Commonwealth adopts without repeating the argument in Part V of the Commonwealth submissions in the Hargraves and Stoten appeals. To summarise those submissions:

   5.1. Section 80 of the Constitution is directed to trials, not appeals. The essential characteristics of jury trials entrenched by s 80 are only those characteristics that distinguish a trial by jury from other forms of criminal trial. For that reason, s 80 does not entrench any right to have a trial free from legal error.

   5.2. An appellate court does not substitute its decision for a jury verdict when it applies the proviso to determine that a conviction (and thus the

verdict) should stand. In any event, an appellate court will not apply the proviso where there has been a radical departure from the requirements of a trial.

5.3. Appeal has always been a creation of statute, and thus s 80 does not entrench any "common law" position. Criminal appeal rights were being continually developed in the 19th century in England and elsewhere. Major changes were proposed in 1879 in England that led to legislative change shortly after federation. Section 80 does not prevent the Commonwealth from implementing and extending these reforms.

10 5.4. The appellants can derive no real assistance from the dissenting judgment of Scalia J in *Neder v United States*.[1] Those statements about the requirements of a trial by jury were made in a very different constitutional context. In any event, the majority in that case held that the error came within the "harmless error" rule. If the United States Constitution (with its express constitutional rights) does not guarantee a criminal defendant a trial free from legal error, that tends against treating s 80 of the Australian Constitution as having a more extreme operation.

6. The Court of Appeal was, with respect, correct to conclude that the
20 arguments based on s 80 of the Constitution added nothing to arguments based on the proviso.[2]

7. The appellants argue that there is no "trial by jury" unless the jury returned a verdict on every element of the offence of which an accused is convicted.[3] It is said that this requirement was not met, because the correct basis of liability (as aider and abettor) was not put to the jury.[4] In addition, it is said that there was no guidance as to the law, as required, because the judge

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1 527 US 1 (1999) at 27.

2 See Reasons below, [76]; **AB [1544-1545]**

3 Handlen/Paddison submissions, para 25.

4 Handlen/Paddison submissions, para 37.

misdirected the jury as to the true issues.[5] These arguments should not be accepted.

(1) Appellants were convicted of the offences with which they were charged

8. It should be noted that this is **not** a case where an accused was found by an appellate court to be guilty of a different offence from that with which he or she was charged.[6]

8.1. The appellants were each found guilty of two counts of importing a commercial quantity of border controlled drugs, contrary to s 307.1 of the *Criminal Code* 1995 (Cth) (the **Commonwealth Criminal Code**), and a further count of attempted possession of a commercial quantity of unlawfully imported border controlled drugs, contrary to s 307.5. Mr Handlen was also convicted of one further count of possession of a commercial quantity of unlawfully imported border controlled drugs.[7]

8.2. The indictment charged each of the appellants (and Mr Nerbas) with two counts of importing a commercial quantity of border controlled drugs, referring to s 307.1 and 311.1 of the Commonwealth Criminal Code (counts 1 and 4). The indictment charged the appellants (and Mr Nerbas) with attempted possession of a commercial quantity of border controlled drugs that were unlawfully imported, referring to ss 307.5, 311.1 and 11.1 of the Commonwealth Criminal Code (count 5). The indictment charged Mr Handlen with possession of a commercial quantity of border controlled drugs that were unlawfully imported, referring to ss 307.5 and 311.1 of the Commonwealth Criminal Code (count 2).[8]

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5 Handlen/Paddison submissions, para 36.

6 Cf s 668F(2) of the Qld Criminal Code. A defect in the form of indictment will often be of fundamental importance to the trial: see eg *Hamzy* (1994) 74 A Crim R 341 at 344.

7 Reasons below, [1]; **AB [1523]**

8 **AB [1]**

9. The offences contained in the indictment are therefore the offences of which the appellants were convicted. Whilst it is true that the indictment charged the appellants as principal offenders, and did not specify the basis of accessorial liability, that choice was open to the respondent.[9] Under the Commonwealth Criminal Code, 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 (s 11.2(1)).

(2) Error in directing the jury as to the elements of the offence does not preclude "trial by jury"

10. It should also be noted that this is not a case where the trial judge is said to have interfered with or usurped the functions of the jury – the jury determined matters of fact and reached a verdict. Nor did the Court of Appeal interfere with the factual findings or verdict of the jury – rather, that Court held that there was no substantial miscarriage of justice because the factual findings made by the jury necessarily comprehended a finding that the appellants were guilty of aiding and abetting in relation to the importation and attempted possession offences.[10]

11. For these reasons, the appellants derive no assistance from the statement in *Cheung v The Queen*[11] that the role of the jury is to determine the issues between the prosecutor and the accused, as defined by the terms of the indictment and the plea. This statement is a general description of the role of the jury, for the purposes of distinguishing the role of the jury from the role of the judge in sentencing. In any event, the jury in this case has performed that role – as noted, the appellants were convicted of the offences (correctly) identified in the indictment.[12] The appellants' argument is, in effect, that there

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9 See eg *R v Wong* (2005) 202 FLR 1 at 5 [12] (Kellam J): "...it is clearly permissible to charge an accused person who is an accessory with the substantive offence, rather than allege the nature of the complicity upon which the charge is based".

10 Reasons below, [81]-[82]; **AB [1546]**

11 (2001) 209 CLR 1 at 9 [4] (Gleeson CJ, Gummow and Hayne JJ), cited in Handlen/Paddison submissions, para 30.

12 See *R v Garland* [1914] 1 KB 154. In that case the accused was convicted of a statutory indictable offence of receiving stolen goods. However, the indictment could not support that

is no "trial by jury" unless *the trial judge* identifies the proper elements of each of the offences to the jury. That is too broad a proposition.

12. For the reasons set out in Pt A of the Commonwealth's submissions in the Hargraves and Stoten appeals, the role of s 80 of the Constitution is to ensure that Commonwealth offences tried on indictment are tried by jury. It is not the role of s 80 to ensure that trials of Commonwealth offences on indictment are without legal error. Section 80 only entrenches the essential characteristics of a trial by jury that set a jury trial apart from other criminal trials.

10 13. Although the particular offences with which the appellants were charged could not have been tried summarily, the same issue in relation to the proper mechanism of accessorial liability could generally arise in relation to Commonwealth offences tried summarily. The effect of the appellants' argument is that a legal error in this case must automatically lead to the appellants' convictions being quashed on appeal, because s 80 guarantees a trial by jury, even though exactly the same error by a judge sitting alone could potentially be excused by the proviso because s 80 would have no application.

14. The appellants' argument also takes no account of whether the misdirection
20 is to the benefit of the accused, and thus made it even harder for the jury to convict. Imagine, for example, a Commonwealth law that provided that a person could be guilty of an indictable offence if the commission of the offence was "a probable consequence" of a joint criminal enterprise.[13] Imagine further that a trial judge errs in stating the test for when a consequence was "probable", by posing a test that is too demanding (for

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offence, because it omitted the word "feloniously" (at 157). Nevertheless, the English Court of Criminal Appeal held that the indictment did support the common law misdemeanour of receiving stolen goods, so the conviction stood (albeit that the sentence could not include hard labour) (at 157-158).

13 See Qld Criminal Code, ss 8 and 9. By contrast, the "joint commission" provision in the Commonwealth Criminal Code requires that the person (and another person) intended that an offence would be committed under the agreement: s 11.2A(4).

example, more probable than not).[14] The effect of the appellants' argument is that an appellate court would be required by s 80 of the Constitution to overturn this conviction, even though a finding by the jury that a consequence was "probable" under the erroneous direction would necessarily include a finding that the consequence was probable within the correct meaning of the statute. That consequence is not supported by principle;[15] nor is it required by s 80 of the Constitution.

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14 Cf *Darkan v The Queen* (2006) 227 CLR 373 at 382 [27] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

15 *Conway v The Queen* (2002) 209 CLR 203 at 208 [6] (Gaudron A-CJ), McHugh, Hayne and Callinan JJ).