IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

27
No. B07 of 2011

BETWEEN:

DENNIS PAUL PADDISON
Appellant

and

10 **THE QUEEN**
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. The appellant was tried on indictment and convicted by a jury in the Supreme Court
20 of Queensland of the following offences:

   a. two counts of importing a commercial quantity of border controlled drugs in contravention of s 307.1 of the *Criminal Code* (Cth); and

   b. one count of attempting to possess border controlled drugs in contravention of s 307.5 of the *Criminal Code* (Cth).

3. The Court of Appeal found that the case advanced by the Crown and put to the jury in relation to the counts of importing a commercial quantity of border controlled drugs was *"in terms alien to the forms of criminal responsibility"*[1] then recognised

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1 *R v Handlen & Paddison* [2010] QCA 371 at [72].

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by the *Criminal Code* (Cth). However, the Court of Appeal found that there was no *"substantial miscarriage of justice"* within s 668E(1A) of the Queensland *Criminal Code* ('the proviso') and dismissed the appeal against the convictions.

4. The questions that arise on this appeal are the following:

   (i) Was there was a *"substantial miscarriage of justice"* because the jury had been misdirected as to the factual ingredients that needed to be established before the appellant could be convicted under the *Criminal Code* (Cth) of the offences of importing a commercial quantity of border controlled drugs?[2]

   (ii) Did s 80 of the Constitution preclude the application of the proviso in any event because the jury had been so misdirected?

   (iii) If the answer to either question is *"yes"*, did the misdirection give rise to *"substantial miscarriage of justice"* in relation to the conviction for attempting to possess border controlled drugs?

PART III: SECTION 78B NOTICES

5. The appellant has served notices in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV: JUDGMENT BELOW

6. There is no authorised report of the judgment of the Court of Appeal. The media neutral citation is [2010] QCA 371.

PART V: MATERIAL FACTS

7. The appellant was convicted of the offences outlined in paragraph 2 above and was sentenced to life imprisonment with a non-parole period of 22 years on each of the counts against him.

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2 The result would be that the proviso could not operate so as to maintain the convictions.

8. The Crown case was that the appellant and Mr Paddison, Mr Nerbas and Mr Reed (who gave evidence for the prosecution) had worked together to import the drugs in shipments of computer monitors.

9. According to Reed there had been three shipments of computer monitors. He claimed that one shipment did not contain border controlled drugs was sent to deflect suspicion.[3] Two of the shipments contained drugs. One, according to Reed, was not intercepted and the drugs reached Australia.[4] That shipment resulted in the appellant being charged with one count of importing a border controlled drug and one count of possession of a border controlled drug. The other shipment was intercepted by law enforcement officers and the drugs were removed. This shipment resulted in the second count of importing a border controlled drug and the count of attempting to possess a border control drug.[5]

10. The Crown case put to the jury was that, in relation to each count of importing a border controlled drug, the appellant and the others were guilty if they formed part of a *"joint criminal enterprise"* and :[6]

    a. the appellant, Reed and others all committed acts by which they together *"imported"* the border controlled drug; and

    b. those acts included acts which were done in preparation for the freighting of the drugs to Australia.

11. The appellant appealed to the Queensland Court of Appeal against the convictions and the sentences imposed.

12. On appeal against conviction the appellant submitted (among other things) that:

    a. *"joint criminal enterprise"* was not a basis of accessorial liability then provided by the *Criminal Code* (Cth);

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3 [2010] QCA 371 at [15].

4 [2010] QCA 371 at [9]-[14].

5 [2010] QCA 371 at [17]-[28.

6 [2010] QCA 371 at [35]-[42].

b. the appellant was only criminally liable if he *"imported"* or if he was an aider , better, counseller or procurer of the person who *"imported"* border controlled drugs;

c. the acts alleged against him could not prove that he had *"imported"* the border controlled drugs;

d. the Crown's evidence, taken at its highest, could only establish a prima facie case that:

i. Reed *"imported"* the border controlled drugs; and

ii. the appellant was an aider, abettor, counselor or procurer of Reed; and

e. that case had never been put to the jury.

13. The appellant submitted that the jury should not have been instructed that the basis of liability was a joint criminal enterprise but rather directed that in order to convict the appellant in relation to each count of importing a border controlled drug they had to be satisfied beyond reasonable doubt of the following:

a. Reed imported the border controlled drug;

b. the appellant aided, abetted, counseled or procured Reed to import the border controlled drug; and

c. the appellant intended to aid, abet, counsel or procure Reed to import the border controlled drug.

14. The appellant further submitted that the jury was never asked to return verdicts upon consideration of those facts. Rather, the jury was required to consider:

a. whether the appellant was part of a group exercise with others to import the border controlled drugs; and

b. whether the appellant acted in furtherance of the group exercise.

15. It was further submitted to the Court of Appeal that the circumstances of the offences of possession and of attempting to possess border controlled drugs and the directions given with respect to those charges were so interwoven with the other two counts that those convictions were tainted and should not stand.[7]

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7 [2010] QCA 371 at [53].

16. The Court of Appeal found that the appellant's contentions with respect to the misdirection about the basis of liability were correct. Justice Holmes (with whose reasons Fraser JA and White JA agreed) held that *"the case was advanced and left to the jury in terms alien to the forms of criminal responsibility then recognized by the Criminal Code"*.[8] Her Honour held that the appellant could only be criminally responsible as an aider under s 11.2 of the *Criminal Code* (Cth).[9] As submitted in paragraphs 10, 11 and 12 above, however, the Crown had never advanced its case in that way.

17. The appellant contended that the errors at the trial were fundamental so as to exclude the operation of the proviso. He also contended that fundamentals of trial by jury under s 80 of the Constitution did not exist where the jury had not made a finding on the basis necessary to establish guilt of the offences charged.

18. The Court of Appeal concluded that the proviso should be applied. Justice Holmes observed that the Crown case was *"extremely strong"* and the guilt of the appellant was established beyond reasonable doubt.[10] Her Honour rejected the appellant's submissions regarding the proviso and s 80 of the Constitution. In rejecting these submissions, Her Honour said:[11]

> I do not think that the appellants' reformulation of their argument in constitutional terms advances matters. The contention that the absence of direction in terms of aiding under s 11.2 [of the *Criminal Code* (Cth)] entailed departure from the essential requirements of trial by jury under s 80 seems to me little different from considering whether it produced:
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> "such a departure from the essential requirements of the law that it goes to the root of the proceedings"
>
> or, as it was put in *Weiss v The Queen*,
>
> "such a serious breach of the presuppositions of the trial as to deny the application of the common form of criminal appeal provision with its proviso".

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8 *R v Handlen & Paddison* [2010] QCA 371 at [72]. And the Crown accepts this; no notice of contention to the contrary has been filed.

9 [2010] QCA 371 at [70].

10 [2010] QCA 371 at [72].

11 [2010] QCA 371 at [76] (citations omitted).

> Whichever characterisation one adopts, the result is the same; if the error was so fundamental that there was not a trial, the proviso will have no application.

19. After reviewing the directions given to the jury and the evidence presented, her Honour added that she did not regard the absence of reference to accessorial liability by the trial judge in his directions as deflecting the jury from *"the true issue between the Crown and the appellant; that is, whether the latter did things to advance importation of drugs into Australia, with that intention"*.[12]

PART VI: STATEMENT OF ARGUMENT

20. The appellant makes the following submissions about the convictions for importing a commercial quantity of a border controlled drug:

(i) an essential element of the institution of *"trial by jury"* in s 80 of the Constitution is that the jury must deliver a proper verdict on the charge;

(ii) in relation to the charges of importing a commercial quantity of a border controlled drug, the jury were never directed as to proper basis of criminal liability but was instead directed as to a basis of liability then unknown to the *Criminal Code (Cth)*; and

(iii) consequently:

a. the jury never delivered verdicts on the charges;

b. there was no trial by jury within the meaning of s 80 of the Constitution and the proviso cannot apply; or

(iv) the errors were so fundamental that there was a substantial miscarriage of justice and the provision could not apply.

SECTION 80

21. Section 80 of the Constitution provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was

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12 [2010] QCA 371 at [82].

committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

22. Section 80 prescribes the form of trial, that is, *"by jury"* for a *"trial on indictment of any offence against any law of the Commonwealth"*. The *"offence"* clearly refers to the acts and omissions constituting a breach of Commonwealth criminal law. This is consistent with the later use of the word *"offence"* in the phrase *"where the offence was committed"* and is consistent with this Court's approach in *R v Barlow*.[13]

23. By section s 11.2 of the *Criminal Code* (Cth) a person who *"aids, abets, counsels or procures the commission of an offence"* is taken to have committed that offence. Therefore the count on the indictment will charge all accused (principal offender and accessories) as principals but if the evidence does not establish a particular accused as a principal offender then the Crown must prove against that offender the elements of accessorial liability.

24. In the context of s 80 of the Constitution trial by jury of the *"offence"* demands the jury's verdict on:

(i) the acts or omissions committed by the principal offender to prove his guilt of the principal offence; and

(ii) the acts or omissions of the accessory (the persons aiding or abetting etc) said to make him liable for the acts or omissions of the principal.

25. The principal submission is that in the absence of direction to the jury to return a verdict on each of such elements there has been no *"trial by jury"*.

26. It is well settled that s 80 *"encompasses the essential features of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England"*.[14] Section 68 of the *Judiciary Act 1903* (Cth) *("the Judiciary Act")*, which would otherwise apply the proviso and other State criminal

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13 (1997) 188 CLR 1.

14 *R v Snow* (1915) 20 CLR 315 at 323 (Griffith CJ); *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

laws in federal jurisdiction, cannot operate so as to deny those essential features.[15] It is on this basis that s 68 of the Judiciary Act does not operate to permit majority verdicts in criminal cases where there has been a trial on indictment for a Commonwealth offence.[16]

27. An essential feature of the system of jury trial, long recognised in the United Kingdom, in this country and in the United States, is that the jury must determine the facts constituting the offence with which an accused has been charged. In *R v Courtie*, Lord Diplock stated:[17]

> [A]n accused person cannot be convicted of any offence with which he is charged unless it has been established by the prosecution that each one of the factual ingredients, which are included in the legal definition of that specific offence, was present in the case that has been brought against him by the prosecution.

28. His Lordship added:[18]

> [I]f there has not been an informed and unequivocal plea of guilty, the question whether any particular factual ingredient of the specific offence charged (or of any lesser offence of which he might be convicted on that indictment) was present in the case against an accused person, falls to be determined by those persons, and by those persons alone, in whom, under English criminal procedure, there is vested the function of finding whether or not the factual ingredients necessary to constitute the offence have been proved to their satisfaction.

29. In *Kingswell v The Queen*, a case concerning s 80 of the Constitution, Gibbs CJ, Wilson and Dawson JJ quoted these passages with evident approval.[19]

30. In *Cheung v The Queen*,[20] Gleeson CJ, Gummow and Hayne JJ described the role of the jury in terms consistent with *Courtie*. Their Honours stated:[21]

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15 It follows that from these considerations that the proviso will sometimes operate differently in State jurisdiction. The possibility of such a result was raised, although not decided, in *Weiss v The Queen* (2005) 224 CLR 300 at [36].

16 *Cheatle v The Queen* (1993) 177 CLR 541.

17 [1984] 1 AC 463 at 467.

18 [1984] 1 AC 463 at 467.

19 (1985) 159 CLR 264 at 274-276.

20 (2001) 209 CLR 1.

21 (2001) 209 CLR 1 at [4] (emphasis added). See also at [53] and *Cheikho* (2008) 234 FLR 124.

> When an accused person is tried upon indictment before a judge and jury, the role of the jury is to decide whether the accused is guilty or not guilty of the charge or charges laid on the indictment. That involves determining the issue or issues joined between the prosecution and the accused. *Such issue or issues are defined by the terms of the indictment and by the plea.*

31. In *Neder v United States*, Scalia J with whose reasons Souter and Ginsburg JJ agreed, stated:[22]

> The right to be tried by a jury in criminal cases obviously means the right to have a jury determine whether the defendant has been proved guilty of the crime charged. And since all crimes require proof of more than one element to establish guilt (involuntary manslaughter, for example, requires (1) the killing (2) of a human being (3) negligently), it follows that trial by jury means determination by a jury that *all elements* were proved. The Court does not contest this.

32. Although Scalia J was in dissent in the result, his reasoning on this point accorded with that of the majority.[23]

33. Prior to the enactment of the Constitution, moreover, the common law as a rule did not countenance the notion that the jury could have found the factual ingredients necessary to establish guilt if it had not been properly directed about them. In *Directors of the Prudential Assurance Co v Edmonds* ('*Edmonds*'), Lord Blackburn said:[24]

> When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or not the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo.*

34. This formulation, although made in a civil case, was consistent with the general acceptance of the *"Exchequer rule"* in criminal proceedings in both the United Kingdom and in the Australian colonies.[25] In 1918, in *R v Snow*[26], the Full Court of

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22 (1999) 527 US 1 at 31 (original emphasis).

23 See (1999) 527 US 1 at 12.

24 (1877) 2 App Cas 487 at 507-508.

25 See *R v Gibson* (1887) 18 QBD 537 at 540-541; *R v M'Leod* (1890) 11 LR (NSW) 218 at 231-232 (Windeyer J); *R v Saunders* [1899] 1 QB 490; *R v Hall* (1905) 1 Tas R 21. See also J H Wigmore, *Evidence in Trials at Common Law,* vol 1, 1983 at p 888 (pointing out that the Exchequer rule had gained ascendancy in virtually all the court by the second half of the nineteenth century).

the Supreme Court of South Australia accepted that *Edmonds* represented the common law applicable to criminal trials.

35. In addition, the scope of the jury's findings of fact have always hinged upon the judge's guidance as to the law.[27] In *Huddart, Parker & Co Pty Ltd v Moorehead*, O'Connor J said:[28]

> What are the essential features of a trial by jury? I adopt the following from the definition approved by Miller J in his lecture on the Constitution of the United States .... It is a method of trial in which laymen selected by lot ascertain *under the guidance of a Judge* the truth in questions of fact arising either in civil litigation or in a criminal process.

36. In the case the subject of the present appeal, however, there was no *"guidance"* provided by the trial judge. The issues that the jury had to determine included whether Mr Reed imported the drugs and whether any accessorial liability attached to the appellant as a result of his proved acts. The jury was never squarely asked to decide these issues; instead, it was asked to decide whether there was a *"joint criminal enterprise"*, a species of criminal liability that was then unknown to the *Criminal Code* (Cth). Put simply, the jury was told that the facts necessary to establish the offence were A, B and C when in truth they were D, E and F.

37. Because the jury was never directed to decide any of the facts upon which criminal liability depended, it was not asked to, and it could not, deliver a proper verdict in relation to the charges of importing a commercial quantity of border controlled drugs. The situation is no different from that in *Andrews v The Queen*,[29] where this Court described the failure of the trial judge properly to instruct the jury as to the

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26 [1918] SALR 173 at 204, 207 (Murray CJ, with whose reasons Buchanan J agreed). Special leave to this Court was refused: 25 CLR 377.

27 See *Blackstone's Commentaries*, Book iii, 1809, p 375: 'When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and *giving them his opinions in matters of law arising upon that evidence*' (emphasis added).

28 (1909) 8 CLR 330 at 375 (emphasis added).

29 (1968) 126 CLR 198. The indictment charged the accused with six counts of fraudulently omitting to account for money received.

matters to which the indictment gave rise as denying *"the very fundamentals of a criminal trial"*.[30] In response to the Court of Criminal Appeal's suggestion that the summing up only fell short if *"looked at as a matter of the pedantic approach of a lawyer"*,[31] Barwick CJ, McTiernan, Taylor, Windeyer and Owen JJ stated: *"[I]t is not pedantry to insist that an accused be tried for the crime for which he is charged"*.[32]

38. One of the essential features of trial by jury within the meaning of s 80 of the Constitution was therefore lacking in this case. Accordingly, contrary to what the Court of Appeal held, the proviso cannot apply.

39. Nothing in the American jurisprudence on *"harmless error"* supports the view expressed by the Court of Appeal. While the Supreme Court of the United States has found that even breaches of the Sixth Amendment may be subject to harmless error analysis, the application of harmless error in the context of constitutional rights only began in the later decades of the twentieth century.[33] The *"harmless error"* doctrine did not form part of the background against which s 80 of the Constitution was enacted. On the contrary, before federation a purported jury verdict as a rule would have been set aside if the trial judge had misdirected the jury as to any element of the offence.[34]

40. Furthermore, there is no case in which the Supreme Court of the United States has upheld the use of harmless error analysis where the error has consisted of putting to a jury grounds for liability—in this case, joint criminal enterprise—that had no legal

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30 (1968) 126 CLR 198 at 207.

31 (1968) 126 CLR 198 at 208.

32 (1968) 126 CLR 198 at 209.

33 *Chapman v California* (1967) 368 US 18. See also R Fairfax, 'Harmless Constitutional Error and the Institutional Significance of the Jury' (2008) 76 *Fordham Law Review* 2027 at 2035: 'Prior to the Supreme Court's 1967 decision in *Chapman v California*, constitutional errors prompted automatic reversal of a conviction'.

34 Prior to federation, the predecessors or analogues to the proviso had also been interpreted very narrowly: see, for example, *R v McLeod* (1890) 11 NWSLR 218 at 234-235 (Windeyer J); *R v O'Keefe* (1893) 14 NSWLR 345; and *Makin v Attorney-General (NSW)* [1894] AC 57 at 69-71.

basis. Indeed, the cases from the United States suggest that in such cases, there would be *"structural error"*.[35]

41. Even if s 80 of the Constitution can be placed to one side (and it cannot), the proviso should not apply. It is well established that, in the context of State offences, the proviso will not save a conviction where there *"there has been a failure to observe the conditions which are essential to a satisfactory trial"*.[36] Examples of such a failure include the improper disallowance of a valid peremptory challenge,[37] the improper addition of a charge to an indictment,[38] the wrongful determination of a challenge for cause by a judge and not by the jurors,[39] and the failure to properly swear a witness.[40]

42. The failure here was just as fundamental, if not more so. Justice Holmes correctly held[41] that the appellant could only have been found criminally responsible for the two importations as an aider under s 11.2 of the *Criminal Code*. The jury, however, was never directed as to that basis of criminal liability but was instead directed as to a basis of liability then unknown to the *Criminal Code*. The jury was never asked to determine the determinative facts in the dispute between the Crown and the appellant.

43. The Court of Appeal's conclusion that there was no substantial miscarriage of justice was based on the proposition that the jury nonetheless considered the *"true issue"* between the Crown and the appellant.[42] That conclusion resulted from a consideration of the directions regarding the joint criminal enterprise and the

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35 See *Neder v United States* (1999) 527 US 1 at 8, 12, 33.

36 *Nudd v The Queen* (2006) 80 ALJR 614 at [6].

37 *Roger Johns v The Queen* (1979) 141 CLR 409.

38 *Maher v The Queen* (1987) 163 CLR 221. For a discussion of this case, see *Katsuno v The Queen* (1999) 199 CLR 40 at 60 [34]-[35].

39 *R v Smith* (1954) QWN 49.

40 *R v BBR* [2009] QCA 178.

41 [2010] QCA 371 at [70].

42 [2010] QCA 371 at [82].

evidence produced at the trial.[43] In other words, the Court of Appeal treated the jury, although wrongly directed about *every* factual ingredient of the offence of importation, as nonetheless delivering a proper verdict on the charge because it must have found the factual ingredients necessary to establish liability for aiding and abetting (which was never put).

44. That approach is erroneous. The *"true issue"* between the Crown and the appellant depends on the Crown case and the directions given to the jury about the factual ingredients of the offence charged on the indictment. The Crown case was never put as one of accessorial liability under s 11.2 of the *Criminal Code*, and the jury was never asked to determine the facts that would establish such liability. In these circumstances, it cannot be said that the jury somehow determined the *"true issue"* between the Crown and the appellant. In *Andrews v The Queen*, this Court criticised a like failure to instruct the jury as to the proper ingredients of the offence in these terms:[44]

> [T]he Court of Criminal Appeal failed to perform its proper function. It is not pedantry to insist that an accused be tried for the crime for which he is charged : and the function of the proviso to s. 6 of the *Criminal Appeal Act*, 1912 is not to provide a Court of Criminal Appeal with a refuge from the performance of the exacting duty imposed in the interests of the due administration of the law of close analysis of the sufficiency of the evidence led to support the essential ingredients of the precise charges laid and of the manner in which a presiding judge has instructed the jury as he should in the elements of the offence and the relevance of the evidence thereto. In our opinion, the Court of Criminal Appeal in this case did not perform this task.

45. It follows that the nature of the error, namely the failure to give the jury any directions about the only proper basis of criminal liability, was such a fundamental departure from the essentials of a criminal trial that the proviso can have no application.

THE COUNTS OF POSSESSION AND ATTEMPTED POSSESSION

46. By s 668E of the *Criminal Code (Qld)* jurisdiction is vested in the Court of Appeal to set aside a conviction in any one of the following circumstances:

    a. where the verdict is unreasonable;

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43 [2010] QCA 371 at [78]-[81].

44 (1968) 126 CLR 198 at 209.

b. where the verdict is not supported by the evidence;

c. error of law; or

d. *"any ground whatsoever there was a miscarriage of justice"*.

47. Here there was no error of law in the way the counts of possession and attempted possession were put to the jury and the evidence of Reed provided a basis upon which to return verdicts of guilty if the jury accepted Reed's evidence.

48. In *Nudd v The Queen*,[45] it was explained that miscarriage occurs when, for any reason, the trial was unfair.[46] While often the impact of irregularities can be assessed by considering the strength of the case against the appellant,[47] the categories of circumstances amounting to miscarriage are not closed.[48]

49. Here, the case against the appellant on all counts depended virtually completely on acceptance by the jury of the evidence of Reed.

50. The Crown case on the counts of possession and attempted possession of border controlled drugs was intrinsically bound up with the narrative supporting the counts of importing border controlled drugs. The count of possession of border controlled drugs concerned drugs which Reed said were actually imported and the importation was the subject of a count on the indictment. The count of attempted possession related to the intercepted drugs which Reed said were being imported.

51. Reed was, in law, the principal offender on the importation counts. He was also a very active party. In particular:

- **In August 2005**

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45 (2006) 80 ALJR 614.

46 (2006) 80 ALJR 614 at 617.

47 *Nudd* (2006) 80 ALJR 614 at 617-618 *Darkan v R* (2006) 227 CLR 373 at 399.

48 *Nudd* (2006) 80 ALJR 614 at 617-8.

(i) Reed was working for Rayz Computer Recycling ("RCR") in Vancouver Canada where the computer monitors used in the importing were sourced.[49]

(ii) Reed said he discussed with a colleague *"TJ"* his idea that the lead in the monitor screens would probably enable drugs to pass through customs screening.[50]

(iii) TJ introduced Reed to Handlen.[51] Reed said he told Handlen of his idea and described to Handlen the lead content in the screens and how the casings came off.[52] There were discussions, Reed said, firstly at RCR and then at Wendy's restaurant about using monitors to conceal things so as to pass through customs.[53]

(iv) Reed said that Handlen was given sample monitors from RCR.[54]

(v) Reed prepared a document with a list of costs to ship a container to Australia, to rent a warehouse in Vancouver, to rent a warehouse in Australia, and the costs of freight, airline tickets and packaging materials.[55]

(vi) Reed ordered a load of more than 450 monitors though a broker.[56]

(vii) Reed paid for the monitors and arranged for them to be delivered to the warehouse arranged by TJ.[57]

- **In late February or early March 2006**

(viii) Reed was involved in packing the monitors for shipment.

(ix) Reed purchased airline tickets to Australia for himself and Handlen through a travel agent.[58]

(x) Reed had experience with overseas shipping[59] and arranged for the freight of the monitors to Australia.

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49 Transcript 5-15.23.
50 T 5-16.29.
51 T 5.16.27.
52 T5-17.20-30.
53 T 5.17.13.
54 T 5-17.32.
55 T 5-19.50.
56 T 5-21.48-50.
57 T 5-24.1-10.
58 T 5-28.11.

(xi) Reed travelled to Australia to make arrangements.[60] Reed had a friend, Kelsey Nerbas, who lived and worked in Brisbane with whom he kept in regular contact.[61]

(xii) Reed arranged for accommodation in Brisbane with Ronald Eric Dowling,[62] manager of Spring Hill Manor.

(xiii) Reed arranged for the registration on 24 April 2006 of a company "Reliable Computer Conversions Pty Ltd" ("RCC") established for the purpose of accepting delivery of the shipment. Reed and Nerbas were the directors and shareholders.[63]

(xiv) Reed leased a warehouse.[64]

(xv) Reed dealt with Australian Customs Professionals ("ACP") (a customs brokerage firm), Trent Barratt and Nick Wallace to assist with customs clearance.[65] Reed engaged ACP on behalf of RCC by Customs Clearance Letter of Authority (Exhibit 3) from 20 May 2006 providing bill of lading and an invoice to RCC– customs Exhibits 5 and 6.

(xvi) Reed assisted with unpacking the monitors when they arrived.[66]

(xvii) Reed took possession of some of the drugs and supplied them to two Asian males who came to Reed's suite at Oaks North Quay, Brisbane.[67]

(xviii) Reed obtained a sailing schedule from the customs broker Nick Wallace[68]. Email dated 7 July 2006.[69]

(xix) Reed sourced monitors for the second shipment[70] and saw them delivered.[71]

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59 T 5-28.40-50.
60 T 5-28.55.
61 T 5-30.17.
62 T 8-7-10.
63 T 5-33.33 Ex 60.
64 T 5-37.40 Exhibits 61, 62, 63.
65 T R 5-41.30.
66 T 5-46:8.
67 T 5-52.38.
68 T 5-58.18.
69 Ex 12 and 13.
70 T 5-59.28.
71 T 5-59.37.

(xx) Reed played a part in transport arrangements for the second and third containers and shipping arrangements.[72]

(xxi) Reed helped prepare the monitors for the third shipment.[73]

(xxii) On 10 August 2006 Reed flew to Australia.[74]

(xxiii) Reed hired a Kennards storage unit together with Nerbas[75] on 11 August 2006.

(xxiv) Reed and Nerbas flew to Sydney on 20 August 2006[76] to collect $50,000 from Asian man named Frank (Shen). Reed gave $25,000 in cash to Nerbas to reimburse the rent on the Geebung warehouse.

10 (xxv) Reed was in Australia when the second container (without drugs) arrived and he helped unload it.[77]

(xxvi) On 12 September Reed told Paddison there had been a problem with the paperwork from the shipping company, later advised him that the container had cleared, was going to be fumigated and would be available on Thursday of that week.

(xxvii) 14 September 2006 Reed visited the Eye Spy Shop[78] and heard assistant say they didn't have "anything that detects government GPS".

(xxviii) 18 September 2006 Reed took the train with Paddison to unload the third container.[79] Reed and Paddison walked towards Geebung Railway Station
20 and got into a car (Audi 964-JDL) driven by Nerbas.

(xxix) Reed kept Paddison up to date with delivery times.[80]

(xxx) Reed and Paddison completed unloading.[81] The next day they went back to the warehouse, on Reed's version, to determine whether the drugs were still there.[82]

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72 T 5-59.39.
73 T AR 436.20.
74 T 5-64.12.
75 T 5-64.35.
76 Exhibit 87 & 88.
77 T 5-68.25-35.
78 Surveillance Argenti R678.
79 T 5-71.47.
80 T 5-72 .15.

(xxxi) Reed and Paddison took luggage to carry the goods cleaning supplies to the warehouse[83]. They caught the train to the warehouse. They were under AFP surveillance and police had installed a camera in the interior of the unit which recorded the activities inside.

52. The Crown was faced then with forensic issues. Reed was the Crown's crucial witness. His evidence had to be accepted if convictions were to be achieved. However, not only had Reed actually taken most of the physical steps to effect the importations and made most of the arrangements, but in law, he was the principal offender, with the co-accused as parties to his offending.

53. This awkward situation was avoided by the Crown by having the importation counts put on an improper basis. The Crown witness Reed was not put as the principal, but was put with the others as several participants in the *"joint criminal enterprise"*. The appellant was therefore badly disadvantaged in his defence of all counts including those of possession and attempted possession of a border controlled drug.

54. This constituted a miscarriage of justice.

PART VII: APPLICABLE PROVISIONS

55. Annexure A sets out the relevant constitutional provisions and statutes.

PART VIII: ORDERS SOUGHT

56. The following orders are sought:

(iii) Appeal allowed;

(iv) Set aside the orders of the Court of Appeal made on 23 December 2010 and, in lieu thereof, order that:

a. the appeal to that Court be allowed;

b. the appellant's convictions be quashed; and

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81 T 5-73.1.
82 T 5-74.59.
83 T 5-76.10.

c. a new trial for each be held.

Dated 10 June, 2011

.....

M Byrne QC

with **C Morgan**

Counsel for the appellant

10

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

B27 of 2011

DENNIS PAUL PADDISON
(Appellant)

AND

THE QUEEN

(Respondent)

APPELLANT'S ANNEXURE A

Statement of currency: With the exception of s 11.1 and s 11.2 of the *Criminal Code* (Cth), each of the provisions contained in this annexure is still in force, in that form, at the date of the making of the submissions.

The amendments to s 11.1 and s 11.2 of the *Criminal Code* (Cth) are reproduced under their respective headings.

Commonwealth of Australia Constitution Act

Section 80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The Criminal Code 1995 (Cth)

3.1 Elements

(1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

Legal Aid Queensland
PO Box 2449, Brisbane, Qld 4001
Telephone: 3238 3921
Fax:07 3229 7067
Ref: Toby Davidson

3.2 Establishing guilt in respect of offences

In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note 1: See Part 2.6 on proof of criminal responsibility.

Note 2: See Part 2.7 on geographical jurisdiction.

10

4.1 Physical elements

(1) A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

(a) do an act; or

20 (b) omit to perform an act.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) 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.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

10

11.1 Attempt

(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

20 Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

(4) A person may be found guilty even if:

(a) committing the offence attempted is impossible; or

(b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

30 (6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

Subsequent amendment: Section 11.1 was amended by the provisions of Schedule 4 to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* as follows:

Part 1 — Joint commission

Criminal Code Act 1995

1 Subsection 11.1(7) of the *Criminal Code*

After "section 11.2 (complicity and common purpose)," insert "section 11.2A (joint commission), section 11.3 (commission by proxy)".

There were no transitional provisions.

11.2 Complicity and common purpose

(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.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(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.

(6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

(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);

Subsequent amendments:
Section 11.2 was amended by the provisions of Schedule 4 to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* as follows:

Part 1 — Joint commission

Criminal Code Act 1995

2 Subsection 11.2(5) of the *Criminal Code*

Omit "principal offender", substitute "other person".

3 Subsection 11.2(6) of the *Criminal Code*

Omit "to the offence of aiding, abetting, counselling or procuring the commission of that offence", substitute "for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1)".

There were no transitional provisions.

307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

(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.

(2) The fault element for paragraph (1) (b) is recklessness.

(3) Absolute liability applies to paragraph (1) (c).

307.5 Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:
(a) the person possesses a substance; and
(b) the substance was unlawfully imported; and
(c) the substance is a border controlled drug or border controlled plant; and
(d) the quantity possessed is a commercial quantity.

penalty: imprisonment for life of 7,500 penalty units, or both.

(2) Absolute liability applies to paragraphs (1) (b) and (d).

(3) The fault element for paragraph (1) (c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported in relation to the matter in subsection (4) (see section 13.4).

Criminal Code Act 1995

Act No. 12 of 1995 as amended

This compilation was prepared on 12 July 2005
taking into account amendments up to Act No. 100 of 2005

Section 3AA ceased to have effect and is taken to have been repealed on the day specified in subsection 2.2(2) of the *Criminal Code*

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part 2.2—The elements of an offence

Division 3—General

3.1 Elements

(1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

3.2 Establishing guilt in respect of offences

In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note 1: See Part 2.6 on proof of criminal responsibility.

Note 2: See Part 2.7 on geographical jurisdiction.

Division 4—Physical elements

4.1 Physical elements

(1) **A physical element of an offence may be:**

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

4.2 Voluntariness

(1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

(3) The following are examples of conduct that is not voluntary:

(a) a spasm, convulsion or other unwilled bodily movement;

(b) an act performed during sleep or unconsciousness;

(c) an act performed during impaired consciousness depriving the person of the will to act.

(4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.

(5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

Division 5—Fault elements

5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) 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.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

11.2 Complicity and common purpose

(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.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(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.

(6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

(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.

11.3 Innocent agency

A person who:

(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and

(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

11.4 Incitement

(1) A person who urges the commission of an offence is guilty of the offence of incitement.

(2) For the person to be guilty, the person must intend that the offence incited be committed.

(2A) Subsection (2) has effect subject to subsection (4A).

(3) A person may be found guilty even if committing the offence incited is impossible.

(4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Penalty:

(a) if the offence incited is punishable by life imprisonment—imprisonment for 10 years; or

Criminal Code Act 1995

Act No. 12 of 1995 as amended

This compilation was prepared on 6 December 2005
taking into account amendments up to Act No. 129 of 2005

Section 3AA ceased to have effect and is taken to have been repealed on the day specified in subsection 2.2(2) of the *Criminal Code*

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Division 307—Import-export offences

Subdivision A—Importing and exporting border controlled drugs or border controlled plants

307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

(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.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

307.2 Importing and exporting marketable quantities of border controlled drugs or border controlled plants

(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 marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

(4) Subsection (1) does not apply if the person proves that he or she neither intended, nor believed that another person intended, to sell any of the border controlled drug or any of the border controlled plant or its products.

Subdivision B—Possessing unlawfully imported border controlled drugs or border controlled plants

307.5 Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a commercial quantity.

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

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

307.6 Possessing marketable quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

Queensland

Criminal Code Act 1899

Reprinted as in force on 1 July 2010

Reprint No. 7K

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passed on conviction, including any order made under that section.

668E Determination of appeal in ordinary cases

(1) The Court on any such 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 can not 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.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

668F Powers of Court in special cases

(1) If it appears to the Court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed at the trial or pass such sentence, whether more or less severe, in substitution therefor, as it thinks proper, and as may be warranted in law by the conviction on the count or part of the