SUPREME COURT OF QUEENSLAND

CITATION:	*R v Antic* [2019] QCA 203
PARTIES:	**R** **v** **ANTIC, Jordan** (appellant)
FILE NO/S:	CA No 260 of 2018 SC No 1372 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 21 September 2018 (Bowskill J)
DELIVERED ON:	4 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2019
JUDGES:	Gotterson and McMurdo JJA and Mullins J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty of attempting to possess a commercial quantity of an unlawfully imported border controlled drug, namely cocaine – where it was alleged that the appellant had entered an agreement to commit the offence – where the Crown case against the appellant was circumstantial and relied upon the testimony of numerous Australian Federal Police officers involved in the surveillance, arrests and searches, as well as surveillance footage, telephone records, maps and photographs – where the appellant contended on appeal that it was reasonably open to infer from the evidence that his discussions did not extend to entering an agreement to take possession of drugs – where the appellant also contended that the Crown case was deficient because there was no proof of any conduct that went beyond mere preparation to commit the offence – whether it was reasonably open to be satisfied that the appellant had agreed to commit the offence of possession of unlawfully imported border controlled drugs – whether there was conduct by either party to the agreement that was capable of being characterised as being beyond mere preparation for the commission of the possession offence CRIMINAL LAW – APPEAL AND NEW TRIAL –

PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was charged with an offence of attempt under s 11 *Criminal Code Act* 1995 (Cth) – where the appellant contended on appeal that s 11.1(2) *Criminal Code Act* 1995 (Cth) is a physical element of the offence of attempting to commit a substantive offence – where the appellant contended that the jury should have been directed of the need to be satisfied beyond reasonable doubt that the conduct of the person doing the acts which constituted the physical element of the offence of attempted possession was not merely preparatory to the commission of the substantive offence and that the person who did those acts intended that they would be more than merely preparatory to the commission of the substantive offence – whether s 11.1(2) *Criminal Code Act* 1995 (Cth) creates a separate element for the attempt offence – whether the jury were properly directed as to the elements of the attempt offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was charged with an offence of attempt under s 11 *Criminal Code Act* 1995 (Cth) – where the learned trial judge provided the jury with a document shortly after their empanelment describing, amongst other things, the conduct and circumstances required for attempting to possess a substance – where the learned trial judge also provided the jury with a question trail – where the learned trial judge referred to the question trail during summing up, but did not make reference to the substance of the requirement under s 11.1(2) *Criminal Code Act* 1995 (Cth) – where no objection was taken by the appellant's trial counsel to the summing up – whether the jury should have been reminded during summing up of the requirement in s 11.1(2) *Criminal Code Act* 1995 (Cth) – whether the omission of express words in the summing up referring to the requirement in s 11.1(2) *Criminal Code Act* 1995 (Cth) resulted in a miscarriage of justice

Criminal Code Act 1995 (Cth), s 11.1(2)

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
R v LK (2010) 241 CLR 177; [2010] HCA 17, applied

COUNSEL: T A Ryan for the appellant
L K Crowley QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **GOTTERSON JA:** On 21 September 2018, the appellant, Jordan Antic, was found guilty and convicted of attempting to commit an offence against s 307.5(1) of the *Criminal Code Act* 1995 (Cth) ("*Code*"). He had been tried on a single count (Count 2 on the indictment) which, in reliance also upon the attempt provision in s 11.1(1) of the *Code* and the joint commission provision in s 11.2A thereof, alleged that between 21 and 24 August 2015 at Coomera he, Victor Vladimir Jocic and a third person attempted to possess a commercial quantity of an unlawfully imported border controlled drug, namely cocaine.

[2] The same jury found Mr Jocic not guilty of the joint offence. The third person had absconded on bail and did not participate in the trial.

[3] The indictment also contained another count (Count 1) which alleged that between 3 and 24 August 2015 at Coomera, Artur Rivkin and Martin Mayers committed an offence against s 307.1(1) of the *Code* in that at Coomera they imported a commercial quantity of a border controlled drug, again cocaine. Mr Mayers was tried with the appellant and Mr Jocic. He was found guilty of the offence alleged against him. Mr Rivkin had earlier pleaded guilty to it.

[4] The appellant was sentenced to 12 years imprisonment on 12 September 2018. A period of some 1,131 days of pre-sentence custody was declared to be time served under the sentence. His non-parole period was fixed at six years.

[5] On 11 October 2018, the appellant filed a notice of appeal against his conviction.[1]

Circumstances of the alleged offending

[6] The *Solay*, a 12.89 metre fibreglass cutter yacht, was skippered by Mr Rivkin. It entered the Southport Seaway during the night of 23 August 2015 at the end of a long sea voyage from Ecuador. In the early hours of 24 August 2015, it moored at "The Boat Works" marina at Coomera.

[7] Hidden inside the fibreglass hull and frame of the yacht were 94 individually wrapped blocks. These blocks were comprised of compressed cocaine weighing 66.538 kilograms that had been unlawfully imported into Australia.

[8] Mr Mayers was a United Kingdom national who had recently arrived in Australia. The prosecution alleged that he assisted Mr Rivkin by giving directions that guided the yacht through the Seaway to the mooring point. Mr Mayers met Mr Rivkin and the *Solay* at the marina.

[9] Throughout that day, Mr Rivkin and Mr Mayers made two trips to Bunnings to buy tools and equipment. During the afternoon, they used them to extract 40 of the blocks from where they were concealed on the yacht.

[10] Before, during and after the extraction of those blocks, Mr Mayers was in regular telephone contact with the third person who resided at the Gold Coast. That morning, and before the first trip to Bunnings, Mr Mayers had met with the third person twice in an unoccupied carpark at Hope Island.

[11] Throughout the day, the third person was also in regular telephone contact with the appellant. The latter had checked into a motel at the Gold Coast on the previous

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1 AB 1-2.

day after travelling from Sydney in a hired Hyundai van driven by his friend, Mr Jocic.

[12] The prosecution further alleged that just on dusk on 24 August 2015, Mr Mayers and Mr Rivkin drove to the Coomera Roadhouse and Café in Mr Mayers' Toyota Echo motor vehicle. The 40 blocks of cocaine had been placed in three black duffle bags which were stored in the boot and on the back seat of the Toyota.

[13] Mr Mayers and Mr Rivkin arrived at the roadhouse at around 6 pm. Within minutes, the appellant and Mr Jocic arrived there in the Hyundai van. Moments later, the third person arrived in another car driven by him.

[14] Mr Mayers exited the café and gestured towards the appellant and Mr Jocic. He indicated that they were to drive around to the rear of the roadhouse. The appellant and Mr Jocic did so, followed by Mr Mayers in his Toyota.

[15] The van and the Toyota were parked next to each other at an unlit location behind the roadhouse and away from other cars. The rear tailgate doors of the van were open. The appellant and Mr Jocic both exited the van and stood at the rear of it near the opened doors. Mr Mayers exited his vehicle and stood at the driver's side door.

[16] Police then intercepted the appellant and Mr Jocic as they were standing near the opened doors of the van. They were arrested. Mr Mayers was also arrested where he was standing. Mr Rivkin was arrested in the café. The third person was intercepted and arrested at the front of the roadhouse as he was driving from the carpark.

[17] The interception and arrest of the appellant and Mr Jocic occurred at a time when the three duffle bags were still inside the Toyota. They had not been moved from it.

The appellant's account given to police

[18] The appellant did not give or call evidence at trial. He did, however, participate in an interview with police after his arrest. The interview was recorded and the recording was tendered at the trial.[2]

[19] The appellant told police that a Serbian man named "Steve Petrovic" whom he had known for a number of years socially, had asked him to travel to the Gold Coast to do a painting job at an apartment. The appellant had previously done casual work as a painter for cash. He was not familiar with the Gold Coast. The request that Petrovic made to him was to do the painting job and then transport items from the apartment, including expensive light fittings, back to Sydney. Boxes and bubble wrap that police found in the Hyundai van were, he said, for that purpose. He was offered $5,000 for the work, including expenses.

[20] The appellant agreed to the request. He did not hold a current driver's licence. Therefore he arranged for his wife to hire the van and for a pensioner friend, Mr Jocic, to drive him to the Gold Coast for which he offered the latter "a couple of hundred dollars a day".

[21] The appellant said that he was given a mobile phone by Petrovic so that another Serbian man at the Gold Coast could contact him when he arrived and tell him

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2 Exhibit 21. Transcript of the interview is exhibit MFI "H": AB 788-826.

where the apartment was located. This man's name was "Boris". The appellant maintained that he did not know that he was about to participate in the acquisition of drugs.

[22] "Boris" was an alias for the third person. After speaking by phone to "Boris" at the Gold Coast on the morning of 24 August 2015, the appellant and Mr Jocic met up with the third person at Hope Island. The appellant and the third person then drove around the Coomera area in the latter's vehicle with Mr Jocic following. They needed to locate another man who the third person said owned the apartment and would tell them where it was situated. They failed to locate that individual. The third person told them to go back to their motel.

[23] The appellant told police that he remained in telephone contact with the third person during the day. That afternoon, the latter told him to go to the Coomera Roadhouse where he was to meet up with the individual that they had been unable to locate that morning. The appellant and Mr Jocic then drove to the roadhouse. Their van was parked at the rear of it.

[24] The arrest followed. According to the appellant, it was by that time that he realised that there was "something strange" going on.

Matters to be proved in the Crown case

[25] The Crown was obliged to prove beyond reasonable doubt the following matters in order to sustain a conviction against the appellant on Count 2:

(i) that the appellant entered into an agreement with Mr Jocic and/or the third person to commit an offence of possessing a commercial quantity of an unlawfully imported border controlled drug: s 11.2A(1)(a);

(ii) that the appellant and at least one other party to that agreement intended that an offence would be committed under the agreement: s 11.2A(4); and

(iii) that an offence was committed in accordance with the agreement: s 11.2A(1)(b)(i).

[26] With regard to (iii), by virtue of s 11.2A(2)(a), it was sufficient for the Crown to prove that the offence that was committed was of the same type as the offence which the parties had agreed to commit. Here, the appellant did not contend at trial or on appeal that an offence of attempting to possess a commercial quantity of an unlawfully imported border controlled drug was not of the same type as the offence which, it was alleged, the parties had agreed to commit.

[27] Also, by virtue of the same provision, it was not necessary that the appellant himself have performed all the necessary conduct required to commit an offence of the same type that was the subject of the agreement. It was sufficient for the Crown to prove beyond reasonable doubt that one or more of the parties to the agreement by their conduct performed the acts necessary for the commission of the offence of attempting to possess a commercial quantity of unlawfully imported border controlled drugs.

[28] However, for the appellant to have committed the attempt offence, it was necessary that the conduct attributed to him have been more than merely preparatory to the commission of the offence. Whether it was or not is a question of fact: s 11.1(2).

The Crown case and evidence led in it

[29] The Crown case against the appellant was a circumstantial one. It was therefore necessary for the Crown to exclude all reasonable hypotheses consistent with innocence. Whether it had done so or not was to be determined by considering and weighing all the evidence in the Crown case and then deciding whether there was an inference consistent with innocence reasonably open on it. The evidence was not to be looked at in a piecemeal fashion.[3]

[30] In order to discharge that onus, the Crown relied on the oral testimony of numerous Australian Federal Police officers who had variously been involved in surveillance of the *Solay*, the arrests at the Coomera Roadhouse, and searches of the Toyota motor vehicle, the Hyundai van, the *Solay* and the motel premises that had been occupied by the appellant and Mr Jocic and, separately, by Mr Rivkin. Many documents were tendered including maps, photographs, surveillance footage and telephone records.

[31] A significant number of facts were the subject of formal admissions.[4] The Crown also drew upon the appellant's version of how and why it was that he had been at the rear of the roadhouse in order to exclude any reasonable hypothesis consistent with innocence.

[32] Given that the appellant has challenged the verdict against him as unreasonable, but at the risk of some repetition, I propose to summarise significant evidence adduced in the Crown case.

[33] The *Solay*, skippered by Mr Rivkin, entered the Southport Seaway at the end of a voyage from Ecuador on 23 August 2015.[5] It moored at The Boat Works marina at Coomera in the early hours of 24 August 2015.[6]

[34] Mr Mayers had arranged for the *Solay* to berth at the marina.[7] He assisted Mr Rivkin in navigating the vessel from the seaway to the mooring.[8]

[35] There were 94 blocks of a compressed and packaged substance concealed inside the framework structure of the *Solay*. In all, the substance contained 66.538 kilograms of unlawfully imported cocaine.[9]

[36] Mr Mayers maintained contact with the third person during the morning and afternoon of 24 August 2015.[10]

[37] The appellant was a Sydney resident. He was not familiar with the Gold Coast.[11] Because he did not have a current driver's licence, he arranged for his wife to hire a white Hyundai van on his behalf to travel to the Gold Coast. The van was due to be returned to the hire company on 25 August 2015.[12]

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3 *R v Baden-Clay* [2016] HCA 36; (2016) 258 CLR 308 per French CJ, Kiefel, Bell, Keane and Gordon JJ at [46]-[48], [77].
4 Exhibit 1 – Admissions: AB 571-578.
5 Exhibit 1 – Admissions: AB 572.
6 AB 191 Tr 1-30 ll36-37.
7 Exhibit 1 – Admissions: AB 572.
8 Exhibit 3: AB 736-753; exhibit MFI "C" – Transcripts of Telephone Surveillance.
9 Exhibit 1 – Admissions: AB 573-574.
10 Exhibit 4 – Supplementary Telecommunications Schedule: AB 584-587.
11 Exhibit MFI "H" – Police Interview: AB 792, 812.
12 Exhibit 1 – Admissions: AB 572.

[38] The account that the appellant gave to police of events that led to the hire of the van and his travelling to the Gold Coast with Mr Jocic, a summary of which I have already given, was, as I have noted, tendered in the Crown case.

[39] The appellant and Mr Jocic travelled from Sydney in the van, arriving at the Gold Coast on 23 August 2015.[13] They checked into the Tropicana Motel at Broadbeach. The appellant completed a reservation form for a two day stay. He used his own name as the guest. He did not provide the telephone number of the mobile phone that he said Petrovic had given him.[14]

[40] In addition to Mr Mayers' telephone contact with the third person during 24 August 2015, the former met the latter twice that day in the carpark of the Hope Island Tavern.[15]

[41] Throughout the day of 24 August 2015, the third person was in regular telephone contact with the appellant.[16] Such contact occurred during the first carpark meeting between Mr Mayers and the third person. That meeting took place between 8.15 and 8.27 am. Thereafter, telephone calls were made between the appellant and the third person at approximately the same time as telephone calls were made between the third person and Mr Mayers.[17]

[42] The number for the mobile phone used by the appellant for his contacts with the third person was not registered to him or to a Steve Petrovic. It was registered to a "Mrs Min Li" of a Sydney address and had been activated on 15 June 2015.[18] That address was for shop premises that were vacant.

[43] This mobile phone was black in colour. It was seized by police and tendered as an exhibit.[19] The number for it was handwritten on a note that was stuck onto the back of the handset.[20] A distinctive feature of the handwriting (a crossed figure 7) also appeared in the appellant's handwriting in the reservation form he had written for the Tropicana Motel[21] and in another note found on the appellant.[22]

[44] The second carpark meeting between Mr Mayers and the third person took place shortly after 10 am on 24 August 2015. Mr Mayers had travelled there in the Toyota Echo with Mr Rivkin. The third person arrived at the carpark in a blue Ford Fiesta. The meeting between Mr Mayers and the third person took place in the Ford Fiesta.[23]

[45] During the afternoon of 24 August 2015, Mr Mayers and Mr Rivkin broke into the fibreglass frame of the *Solay* and extracted 40 of the concealed packaged blocks.[24]

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13 AB 332 Tr 3-78 ll13-28.
14 Exhibit 32: AB 697.
15 AB 223 Tr 2-25 l25 – AB 224 Tr 2-26 l40; AB 226 Tr 2-28 l21 – AB 227 Tr 2-29 l15.
16 Exhibit 1 – Telecommunications Schedule: AB 575-578; exhibit 4 – Supplementary Telecommunications Schedule: AB 584-587.
17 Ibid.
18 Exhibit 1 – Admissions: AB 573.
19 Exhibit 19.
20 AB 337 Tr 4-3 l38 – AB 338 Tr 4-4 l39.
21 Exhibit 32: AB 697.
22 Exhibit 20: AB 686.
23 Exhibit 5 – Surveillance Video of marina; AB 226 Tr 2-28 ll21-41.
24 Exhibit 5 – Surveillance Video of marina; exhibit 33 – Photographs of the *Solay* taken during a police search.

These blocks contained 29.404 kilograms of pure cocaine. They were placed into three black duffle bags which, in turn, were placed into Mr Mayers' Toyota Echo.[25]

[46] At 5.39 pm, Mr Mayers carried one of the duffle bags from the *Solay* across the jetty to the marina carpark and at 5.44 pm, he and Mr Rivkin carried the other two duffle bags along the same route.[26] In the interval, the third person telephoned Mr Mayers at 5.41 pm and then the appellant at 5.42 pm.[27]

[47] Mr Mayers and Mr Rivkin then transported the 40 blocks of cocaine in the Toyota Echo from the marina carpark to the Coomera Roadhouse and Café. As this occurred, the following events took place:

(i) between 5.45 pm and 5.50 pm, they exited the carpark, drove along nearby roads and then returned to the carpark at the marina;[28]

(ii) at 5.46 pm, Mr Mayers telephoned the third person;[29]

(iii) the Toyota Echo remained parked in the carpark from 5.52 pm until 6 pm when it again exited;[30]

(iv) at 5.58 pm, Mr Mayers telephoned the third person;[31]

(v) at 5.59 pm, the third person telephoned the appellant;[32] and

(vi) at 6.02 pm, Mr Mayers and Mr Rivkin arrived at the roadhouse in the Toyota Echo and parked in the carpark at the front of the building.[33]

[48] Evidence tendered at the trial established that the further following events next took place:

(i) at 6.04 pm, Mr Mayers stood at the front of the roadhouse and appeared to be talking on a mobile phone;[34]

(ii) at 6.05 pm the Hyundai van with the appellant and Mr Jocic aboard, drove in the carpark and parked next to the Toyota Echo at the front of the roadhouse;[35]

(iii) at 6.07 pm, the appellant, who was smoking, and Mr Jocic stood at the front of the roadhouse on the eastern side;[36]

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25 Exhibits 14, 15 – Photographs of items seized from Toyota Echo; AB 314 Tr 3-60 l43 – AB 316 Tr 3-62 l15; AB 317 Tr 3-63 l24 – AB 319 Tr 3-65 l36; exhibit 1 – Admissions: AB 573.

26 Exhibit 5.

27 Exhibit 1 – Telecommunications Schedule: AB 577; exhibit 4 – Supplementary Telecommunications Schedule: AB 586.

28 AB 265 Tr 3-11 ll1-36.

29 Exhibit 1 – Telecommunications Schedule: AB 577; exhibit 4 – Supplementary Telecommunications Schedule: AB 586.

30 AB 265 Tr 3-11 ll32-42.

31 Exhibit 1 – Telecommunications Schedule: AB 577; exhibit 4 – Supplementary Telecommunications Schedule: AB 586.

32 Ibid.

33 AB 265 Tr 3-11 l46 – AB 266 Tr 3-12 l5.

34 AB 267 Tr 3-13 ll8-14.

35 Ibid ll21-32.

36 Ibid ll34-41.

(iv) at 6.07 pm, Mr Mayers telephoned the third person;[37]

(v) also, at 6.07 pm, the third person telephoned the appellant;[38]

(vi) at 6.08 pm, the third person again telephoned the appellant;[39]

(vii) at 6.12 pm, the third person drove into the roadhouse carpark in his Ford Fiesta and parked in front of the building on the other side of the Toyota Echo, towards the western side of the carpark;[40]

(viii) at 6.13 pm, Mr Mayers exited the café at the roadhouse, looked in the direction of the appellant and Mr Jocic, and then made a sweeping gesture indicating the eastern side of the building;[41] and

(ix) at 6.14 pm, the appellant and Mr Jocic got into their van and Mr Mayers got into his vehicle. The van travelled around the eastern side of the roadhouse to the rear of it, followed by the Toyota driven by Mr Mayers. At the same time, the third person reversed the Ford and drove towards the eastern side of the building.[42]

[49] According to further evidence, at 6.14 pm, the Hyundai van and the Toyota Echo, each having been driven from the front of the roadhouse, stopped and parked next to each other in the carpark at the rear of the roadhouse.[43] They were in a location that was reasonably dark, without overhead lighting and where there were no other vehicles parked.[44]

[50] Mr Jocic and the appellant got out of the van. They stood at the rear of it with the tailgate doors open. Simultaneously, Mr Mayers got out of the Toyota and stood next to the driver's side door.[45]

[51] At that point, police intervened and apprehended the men. Later they found in the Toyota, three duffle bags containing the 40 blocks of unlawfully imported cocaine that had been retrieved from the structure of the *Solay*.

[52] Police also found boxes, bubble wrap and tape in the van together with a tax invoice for the purchase of those items that had been issued by a self-storage business in Sydney.[46] They did not find any painting equipment in the van or in the room at the Tropicana Motel occupied by the appellant and Mr Jocic.[47]

[53] The Crown contended at trial that this evidence, in its totality, admitted of only one rational and reasonable inference. It was that the appellant, Mr Mayers and Mr Jocic had pre-arranged a coordinated handover of the 40 blocks of unlawfully imported cocaine that was about to take place. Implementation of the handover had been disrupted by police intervention.

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37 Exhibit 1 – Telecommunication Schedule: AB 577; exhibit 4 – Supplementary Telecommunications Schedule: AB 586.
38 Ibid.
39 Ibid.
40 AB 267 Tr 3-13 l43 – AB 268 Tr 3-14 l5.
41 AB 268 Tr 3-14 ll7-16; AB 272 Tr 3-18 l30 – AB 274 Tr 3-20 l30; AB 276 Tr 3-22 ll14-17.
42 AB 268 Tr 3-14 ll18-35.
43 AB 294 Tr3-40 ll42-47.
44 AB 296 Tr 3-42 ll7-31.
45 AB 294 Tr 3-40 ll42-47; AB 296 Tr 3-42 l43 – AB 297 Tr 3-43 l6; AB 307 Tr 3-53 ll21-28.
46 AB 381 Tr 4-47 l12 – AB 383 Tr 4-49 l4; exhibit 27 – Photographs of van; AB 385 Tr 4-51 ll20-29.
47 AB 392 Tr 4-58 ll29-35.

The Grounds of Appeal

[54] The appellant relies on the following grounds of appeal:

1. The jury's verdict of guilty is unreasonable and cannot be supported by the evidence.

2. The failure of the learned trial judge to direct the jury in accordance with s 11.1(2) of the *Code* resulted in a miscarriage of justice.

[55] I propose to address these grounds in that order. There are two bases of challenge in each ground. It is convenient to consider them separately in each instance.

Ground 1 – first basis of challenge

[56] **Appellant's submissions:** The appellant submitted that it was unreasonable for the jury to have found beyond reasonable doubt that he had entered into an agreement with Mr Jocic and/or the third person to commit the substantive offence of possession of drugs **prior to** the police intervention. That was because, the appellant argued, it was reasonably open to infer from the evidence that his discussions with the third person had not extended beyond the making of an arrangement for him to travel to the roadhouse for the purpose of attending a meeting there.[48]

[57] The appellant advanced a series of propositions in support of this basis of challenge. First, an absence of evidence implicating Mr Jocic militated against an inference that there had been an agreement of any kind with him. Mr Jocic had not been a party to the appellant's initial conversations with the individual who had approached him in Sydney or with the third person; he had not possessed or used the mobile phone that had been given to the appellant to use at the Gold Coast; he did not communicate with the third person on 24 August 2015 or travel in his vehicle that morning, as the appellant had done. In light of the acquittal, the jury must have had a reasonable doubt that the appellant had told the third person that they were to collect drugs.[49]

[58] Hence, the jury had to be satisfied beyond reasonable doubt that it was the appellant and the third person who had agreed, in their conversations on 24 August 2015, to commit the offence of possession of unlawfully imported border control drugs. They could not have been so satisfied because, the appellant argued, an inference was at least equally open that the third person chose not to inform the appellant that his role would entail the collection of drugs from Mr Mayers. It was reasonably open to infer that they agreed no more than that the appellant would attend at the roadhouse at Coomera.[50]

[59] On the appellant's case, such an inference was supported by evidence that the third person had not engaged the appellant to travel from Sydney, that engagement having been made before the appellant ever spoke to him; that all of the appellant's contact with the third person occurred after he had arrived at the Gold Coast, the first being on the morning of 24 August 2015; that the appellant had no telephone communications with either Mr Mayers or Mr Rivkin; and that notwithstanding the

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48 Appellant's Outline of Submissions ("AOS") paras 25, 26.
49 AOS paras 30, 31.
50 Ibid para 33.

proximity in respective telephone calls, there was no direct evidence that the third person passed on to the appellant what he had discussed with Mr Mayers.

[60] Further, it was contended that it was unnecessary for the third person himself to have discussed collection of drugs in advance with the appellant since the former would have been aware that some other individual who was involved in the importation must have made arrangements with the appellant to travel to the Gold Coast.[51] As well, the third person dealt with the appellant on a "need to know" basis, thereby restricting the latter's capacity to communicate with anyone else in the importation syndicate.[52]

[61] The inference urged by the appellant carries with it the allied inference that the third person, and perhaps others, proposed to solicit agreement from the appellant to take possession of, and then transport, the packages of drugs at the time possession was actually taken by him. The tactic, the appellant argued, would have maintained secrecy about the distribution of the drugs for as long as possible, minimised the risk of the appellant withdrawing from participation, and confronted the appellant with an unattractive option of returning to Sydney without recompense for his time and travel expenses.[53]

[62] That the appellant suspected that he would be asked to participate in some unlawful activity fell well short of agreement to do so.[54] The appellant submitted, in any event, that other evidence supported a conclusion that he was unaware of his prospective involvement in any illegal activity. The van that was hired had a carrying capacity that well exceeded that necessary to transport three duffle bags and the appellant gave his own name and address when he registered at the motel.[55]

[63] Finally, the appellant argued that a rejection of the account he gave to police did not displace a hypothesis consistent with innocence of the offence charged, namely, that the appellant had not entered into any agreement to take possession of drugs prior to the police intervention.[56]

[64] **Respondent's submissions:** The respondent submitted that, in the light of the totality of the evidence and in the absence of further evidence that he might have given, the scenarios postulated by the appellant were properly viewed as mere possibilities arrived at by way of speculative afterthought. They were not reasonable.[57] Nor were they "equally open" with the inference that the appellant was present at the roadhouse by arrangement with the third person for the purpose of taking possession of drugs.

[65] The respondent maintained, as it had at trial, that the evidence, in its totality, admitted of only one rational and reasonable inference, namely, that the appellant and the third person had pre-arranged that the appellant would take possession of drugs at the roadhouse for transportation of them to Sydney.[58]

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51 Ibid para 34.
52 Ibid para 35.
53 Ibid para 36.
54 Ibid para 39.
55 Ibid para 42.
56 Ibid paras 43, 44.
57 Respondent's Outline of Submissions ("ROS") para 29.
58 Ibid para 28.

[66] **Discussion:** At the trial, the jury were presented with an explanation by the appellant for his attendance that evening at the Coomera Roadhouse. It was an explanation that began with an approach made to him by a Steve Petrovic to do a painting job at a Gold Coast apartment and then transport light fittings back to Sydney. It culminated with his attendance at the roadhouse carpark to meet an individual who would tell him where the apartment was located. If the jury had accepted that explanation as truthful, then it would have necessarily concluded that the appellant had travelled to the Gold Coast and was at the carpark for an innocent purpose.

[67] However, the explanation was evidently rejected by the jury. It is unsurprising that it was. There was no independent confirmation in the evidence that a Steve Petrovic existed or that the appellant had ever met him. Why it was that Petrovic would have offered the appellant a painting job at an apartment he did not own was puzzling as were why he should have given the appellant a mobile phone to make contact with some intermediary at the Gold Coast who also did not own the apartment, and why that phone was registered to a Mrs Li at a false address. In short, the explanation given by the appellant to police was evidently implausible.

[68] On appeal, the appellant does not invite this Court to conclude that the jury was wrong to have rejected the appellant's explanation. The hypothesis consistent with innocence that is now advanced does not, in terms, rely upon the explanation. However, it is a hypothesis that lacks a firm evidential foundation once it is rejected. That is because the evidence does not yield some other innocent reason for why the appellant travelled to the Gold Coast and, in due course, attended at the roadhouse carpark that evening. To hypothesise that no prior agreement may have been made between the appellant and the third person for the former to take possession of drugs, fails to address that important evidential deficiency.

[69] By contrast, the evidence gives rise to a strong inference that the appellant had agreed with the third person to take possession of drugs at the roadhouse. He and the appellant had been in telephone contact 13 times that day. The third person had met Mr Mayers twice that day and had been in regular telephone contact with him.

[70] Mr Mayers and Mr Rivkin arrived at the roadhouse first at about 6 pm with the packaged drugs in the duffle bags. The appellant and Mr Jocic arrived a few minutes later and parked their van directly next to Mr Mayers' Toyota. After a few more minutes, the third person arrived in his Ford vehicle and parked several bays away.

[71] The appellant and Mr Jocic got out of the van but the third person remained in his vehicle all the time. He did not, for example, collect the appellant and take him to meet someone else. He did, however, make telephone calls from within his vehicle to both the appellant and Mr Mayers.

[72] It was Mr Mayers who exited the café and motioned to the appellant and to Mr Jocic to drive round the eastern side of the roadhouse building. They complied. They stopped the van at a dimly lit location in the carpark to the rear. The Toyota drew up to a stop a few metres away. The third person followed.

[73] Significantly, the appellant and Mr Jocic got out of the van. They went to the rear of it. The tailgate doors were opened and they stood adjacent to them.

[74] To my mind, the conduct of the appellant and Mr Jocic in parking next to the Toyota and then in following Mr Mayers' direction to move to the rear carpark, on the one hand, and the conduct of Mr Mayers and Mr Rivkin in parking adjacent to the van in the rear carpark, reveals a significant degree of coordination of the movements of the occupants of those vehicles. The intensity of the telephone contacts that the third person had with the appellant and Mr Mayers respectively reveals his role as a coordinator of these movements. The coordinated conduct is, in my view, a telling manifestation of a prior agreement between the appellant and the third person of the kind alleged.

[75] I am unable to accept that there is a reasonable hypothesis that the third person withheld any reference to the possession and transportation of drugs in his communications with the appellant that day. It is, I think, quite unrealistic to suppose that either he thought that it was unnecessary to do so because of what the appellant had been told in Sydney about his true role or that as the hypothesis implies, the appellant would unconcerningly comply with his coordinating directions until the drugs were handed to the appellant and he was then asked to transport them to Sydney.

[76] I would add that the acquittal of Mr Jocic reflects the fact that the jury were not satisfied beyond reasonable doubt that he had made an agreement to commit a possession offence with anyone. That they were not so satisfied is understandable in view of his functionary role as a hired driver and of the absence of evidence of communication between him and any participant in the coordinated conduct, other than the appellant. The acquittal does not in any way support the hypothesis for which the appellant now contends.

[77] For these reasons, I conclude that this basis of challenge is not viable.

Ground 1 – second basis of challenge

[78] **Appellant's submissions:** The appellant submitted that if the proved agreement was one between the appellant and the third person only, then having regard to s 11.2A(2)(b) of the *Code*, it was acts done by either of them only that were capable of making up the physical elements of the attempted possession offence.[59]

[79] The appellant accepted that the fact that the tailgate doors of the van were opened was capable of supporting an inference that the person who opened them was expecting to collect something to be transported away in the van. Further, he accepted that, in light of the provision in s 11.1(2) of the *Code*, a conclusion that that conduct went beyond mere preparation to commit the substantive offence of possession was open.[60]

[80] There was an evidential deficiency in the Crown case, the appellant argued, in that it did not definitively prove who it was who had opened the doors of the van. It could have been Mr Jocic whom the Crown had failed to prove was a party to the agreement alleged. This deficiency had the consequence that there was no proof of any conduct by the appellant or the third person that went beyond mere preparation to commit the offence.[61]

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59 AOS para 46.
60 Ibid para 48.
61 Ibid paras 47, 49, 51.

[81] **Respondent's submissions:** The respondent accepted that the evidence led in the Crown case did not prove who it was who had opened the tailgate doors on the van. That was so, notwithstanding that the appellant's trial counsel had put to one of the arresting police officers that it was the appellant who had opened them and that Mr Jocic had opened the driver's side door of the van only.[62]

[82] It was wrong, the respondent submitted to categorise the opening of the doors as a "decisive act". It was not, as the respondent suggested, the only act of the appellant that went beyond mere preparation to commit the offence. The evidence disclosed anterior conduct of the appellant and the third person that was capable of being regarded by the jury as being beyond the merely preparatory.[63]

[83] **Discussion:** It is a question of fact whether conduct is more than preparatory to the commission of an offence. Thus, to succeed on this basis, the appellant must establish that there was no conduct by either party to the agreement between the appellant and the third person that was capable of being characterised by them as beyond mere preparation for commission of the possession offence.

[84] In my view, there was. On the appellant's own account, it was the third person who instructed him to go to the Coomera Roadhouse. That aspect of his account is corroborated by the phone call he received from the third person at 5.59 pm followed by his arrival at the roadhouse at 6.05 pm. Then, the appellant drove to the rear carpark on Mr Mayers' direction. Again, the telephone calls made by the third person to each of them immediately beforehand imply that this was a coordinated move in which the appellant participated. Next, the van was parked in a dimly lit location. The appellant got out. The tailgate doors were opened and the appellant stood near them.

[85] All of this conduct on the appellant's part is capable of characterisation as conduct in implementation of an agreement to take possession of drugs and then transport them to Sydney. Necessary steps in implementing such an agreement were travelling to a venue where possession of the drugs would be taken, moving to a location within the venue where a transfer of possession of the drugs was to occur and then standing by ready to take possession.

[86] In my view, the argument advanced by the appellant is illogical. It implies that the opening of the doors of the van marked the commencement of conduct that was beyond the merely preparatory. The illogicality in the argument is that it necessarily categorises significant conduct by the appellant that occurred thereafter, namely, his standing by at the opened rear doors, as merely preparatory.

[87] I therefore reject this basis of challenge.

Ground 2 – first basis of challenge

[88] **Appellant's submissions:** The appellant contended that the requirement imposed by s 11.1(2) of the *Code* is a physical element of the offence of attempting to commit a substantive offence.[64] Referring to s 11.1(3) thereof which provides that for an attempt offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted, the appellant further submitted that the jury should have been directed of the need to be satisfied beyond reasonable

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62 AB 307 Tr 3-53 ll18-26.
63 ROS paras 33, 38, 39.
64 AOS paras 56-58.

doubt that the conduct of the person or persons doing the acts which constituted the physical element of the offence of attempted possession, was not merely preparatory to the commission of the substantive offence **and** that the person or persons who did those acts intended that they would be more than merely preparatory to the commission of the substantive offence.[65]

[89] No such direction as to intention was given at the trial. The failure to give it, the appellant further submitted, constituted a fundamental defect in his trial.[66]

[90] **Respondent's submissions:** The respondent challenged the validity of the appellant's contention. The requirement in s 11.1(2) is not a physical element of the offence of attempting to commit a substantive offence, it submitted. Consistently with the reasoning of the plurality in *R v LK*,[67] the role of that provision is to state clearly a characteristic that the person's conduct must have in order for the person to be guilty of an attempt offence.

[91] It follows, the respondent further submitted, that the learned trial judge was not required to direct the jury as if s 11.1(2) imposed an additional physical element for the offence charged.

[92] **Discussion:** In *LK*, the High Court considered s 11.5 of the *Code*, subsection (1) of which defines conspiracy to commit an offence. Subsection (2) which follows, sets out in three paragraphs aspects of a person's conduct or intention that must be present in order for the person to be guilty of a conspiracy offence.

[93] The plurality explained that paragraphs (a) and (b) in s 11.5(2) are epexegetical of what it is to "conspire" with another person to commit an offence within the meaning of s 11.5(1).[68] Their Honours concluded that the condition in paragraph (c) thereof was not intended to be an element of the offence.[69] The Court upheld the conclusion of the Court of Criminal Appeal of New South Wales that the law creating the conspiracy offence in its entirety is s 11.5(1).[70]

[94] Section 11.1(2) of the *Code* is, in my view, analogous with s 11.5(2). To use their Honours' language, it is epexegetical of a necessary characteristic of the person's conduct in order for him or her to be guilty of an attempt offence. That characteristic is that the conduct be more than merely preparatory to the commission of the offence. Specifically, the section does not create a separate element for the attempt offence, additional to that set out in s 11.1(1).

[95] Accordingly, I am of the view that the trial was not defective because the jury were not directed as if there is a separate s 11.1(2) element to the offence charged. This basis of challenge is not made out.

Ground 2 – second basis of challenge

[96] **Appellant's submissions:** Separately to the first basis of challenge, the appellant submitted that the directions that were given to the jury failed to direct them with respect to the requirement in s 11.1(2) that for a person to be guilty of the attempt

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65 Ibid para 59.
66 Ibid paras 59, 60.
67 [2010] HCA 17; (2010) 241 CLR 177.
68 Per Gummow, Hayne, Crennan, Kiefel and Bell JJ at [133].
69 At [134]-[138].
70 At [141].

offence, his or her conduct must be more than merely preparatory to the commission of the offence and that that was a question of fact for them to decide.

[97] The failure so to direct was, it was further submitted, an error of law.[71] As well, it had given rise to a substantial miscarriage of justice.[72] The appellant argued that it was therefore an inappropriate case for the application of the proviso in s 668E(1A) of the *Criminal Code (Qld)* and that the appeal must therefore be allowed.[73]

[98] **Respondent's submissions:** The respondent submitted that the jury had been sufficiently directed in this respect.[74] Even if there had been a deficiency in the directions as the appellant alleged, his trial counsel had not raised an issue with respect to it.[75] Consequently, the learned trial judge was never seized of an issue of law concerning a s 11.2(1) direction that she was to determine. Hence there had been no error of law committed by her Honour in this regard.

[99] The respondent argued that in the absence of an error of law, it was necessary for the appellant to establish that any insufficiency in the directions had caused a miscarriage of justice in order for the appeal to be allowed. In the circumstances of this case no miscarriage of justice had arisen. The respondent further argued in the alternative that had justice miscarried, this was a case for the application of the proviso because no substantial miscarriage of justice had actually occurred.[76]

[100] **Discussion**: Shortly after the empanelment of the jury, the learned trial judge addressed them. In the course of so doing, she handed to them a six page typed document headed "Charges and Elements".[77] In paragraph 6(a) on the last pages of the document, the conduct and circumstances required for attempting to possess a substance were described as follows:

> "**Attempting to possess** a substance:
>
> (i) A person **possesses** a substance if it is in his actual physical custody or if he has control over it, either alone or jointly with another person(s).
>
> (ii) A person **attempts** to possess a substance if they take steps that are more than merely preparatory to possessing the substance – which means they do some act or acts, by which they begin to put their intention to possess the thing into effect, in a way which is suitable to bring about that intention."[78]

[101] After court on 17 September 2018, the day prior to the commencement of addresses, the associate to the learned trial judge emailed to counsel a draft question trail for the jury and indicated that her Honour would be happy to hear submissions with respect to it.[79] During the hearing on the following day, the appellant's trial counsel twice said that he was content with the draft questions.[80]

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71 AOS para 55.
72 Ibid para 68.
73 Ibid para 70-72.
74 ROS para 42.
75 Ibid paras 43-46.
76 Appeal Transcript 1-32 ll30-41.
77 Exhibit MFI "B": AB 730-735.
78 AB 735.
79 Exhibit MFI "O": AB 841-846.
80 AB 549 Tr7-11 ll40-41; AB 554 Tr 7-16 l33.

[102] In the course of her summing up, the learned trial judge marked the question trail for identification,[81] provided it to the jury and explained it to them.[82] Her Honour made reference to the questions at times during the summing up.

[103] Question 4 in the question trail asked:

> "Did one or more of Antic, Jocic or [the third person] [depending upon who you find the agreement was with] attempt to possess the cocaine – that is, did they do some act or acts, by which they put the intention to possess the drugs into effect, in a way suitable to bring about that intention?
>
> If yes – go to question 5
>
> If no – Antic is not guilty of the offence."[83]

Neither this question nor any of the other questions invited the jury to give separate consideration to whether the act or acts they were considering went beyond mere preparation for the commission of a possession offence.

[104] The learned trial judge referred to both documents during the summing up, a draft of which had also been provided to counsel in advance. Her Honour told the jury that it was paragraph 6(a) that they needed to consider. As to that, she said:

> "So it's (a) that you need to consider, and in considering whether a person has attempted to possess a substance, you need to consider whether they have done some act or acts by which they have put their intention to possess the thing into effect in a way suitable to bring about that intention.
>
> So the question is, are you satisfied depending on who you found entered into the agreement at element one, that one or more of those parties did some act or acts by which they put their intention to possess the cocaine into effect. And insofar as it is alleged that they attempted to possess the cocaine, the acts which the Crown says were done, by which they put their intention into effect are: Mr Antic, by his wife, hiring the van to travel up to the Gold Coast; Mr Antic and Mr Jocic driving to the Gold Coast arriving on the 23rd of August; Mr Antic making arrangements by telephone with [the third person] for where to meet to pick up the drugs; Mr Antic and Mr Jocic travelling to the Coomera Roadhouse in the van at the same time as Mayers and [the third person]; and Mr Antic and Mr Jocic moving the van and parking the van at the rear next to the Toyota Echo, opening the back door which the [Crown] invites you to infer was for the purposes of taking possession of the duffle bags of drugs in the backseat and boot of the Echo."[84]

[105] With regard to question 4 , the learned trial judge directed the jury as follows:

> "And at question four, did one or more of Antic, Jocic or [the third person] attempt to possess the cocaine, that is, did they do some act

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81 Exhibit MFI "Q".
82 AB 139 ll46-49.
83 AB 872.
84 AB 149 ll25-42.

> or acts by which they put the intention to possess the drugs into effect in a way suitable to bring about that intention. If yes, you go to question five, if no, you find Mr Antic not guilty."[85]

[106] On no occasion during the summing up was reference made to the substance of the requirement in s 11.1(2) of the *Code*. However, no objection was taken on that account by the appellant's trial counsel.

[107] The position then is that the "Charges and Elements" document given to the jury did in paragraph 6(a)(ii) refer to the need for there to have been an act or acts done by the person that was more than merely preparatory. However, that was not mentioned at all by the learned trial judge during the summing up. In particular, it was not referred to when her Honour was dealing with paragraph 6(a). It neither featured in the question trail document nor was it mentioned in oral elaboration of question 4.

[108] I consider that for this trial, the jury should have been reminded during the summing up of the requirement in s 11.1(2). That is because there was a risk that, without it, the jury might have overlooked what was written in paragraph 6(a)(ii). It was on the last page of the document. Beyond the document itself, there were, in effect, three trials that the jury was hearing and only two of them involved an attempt count. As well, the facts were detailed, if not complex, and concerned the contemporaneous movements of, and communications between, a number of individuals over a considerable period of time.

[109] For the reasons advanced by the respondent, the omission of express words in the summing up referring to the requirement in s 11.1(2) is not apt to be characterised as an error of law. Those reasons find support in the observations of McHugh and Gummow JJ in *Dhanhoa v The Queen*.[86] There was no wrong decision on a question of law. Thus that ground of appeal under s 668E(1) of the *Criminal Code (Qld)* is unavailable to the appellant.

[110] The question that arises is whether the omission of such words from the summing up satisfies the miscarriage of justice ground of appeal in the section. I now turn to consider that question.

[111] In *Dhanhoa*, consideration was given by the High Court to what is required in order for the omission of a direction that should have been given to the jury to constitute a miscarriage of justice. As to that, McHugh and Gummow JJ observed:[87]

> "When no re-direction concerning evidence is sought at a criminal trial, the appellant can only rely on a failure to direct the jury on the evidence if he or she establishes that that failure constituted a miscarriage of justice. No miscarriage of justice will have occurred in such a case unless the appellant demonstrates that the direction should have been given and it is 'reasonably possible' that the failure to direct the jury 'may have affected the verdict.[88]'"

To similar effect, their Honours later said:[89]

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85 AB 150 ll15-19.
86 [2003] HCA 40; (2003) 217 CLR 1 at [49].
87 At [38].
88 *Simic v The Queen* (1980) 144 CLR 319 at 332.
89 At [49].

> "In such a case, a miscarriage of justice will have occurred if the direction should have been given and it is "reasonably possible" that the failure to direct the jury "may have affected the verdict.""

[112] It may be accepted that the omitted direction was one that should have been given during the summing up. The issue that next arises is whether the omission to give it may have affected the verdict.

[113] As I have explained in discussion of the second basis of challenge in Ground 1, on the evidence led in the Crown case, there was a catalogue of conduct on the appellant's part that was apt to be characterised as conduct in implementation of an agreement to take possession of the drugs and transport them to Sydney.

[114] Had the jury been given the omitted direction during the summing up, it is highly likely that they would have concluded that that conduct was not merely preparatory to the commission of a possession offence. It is correspondingly highly unlikely that they would have concluded that all acts of the appellant were merely preparatory to the commission of such an offence and acquitted him on that account. I am therefore quite unpersuaded that the omission of this direction from the summing up may have affected the verdict.

[115] Finally, I note that no issue was raised by way of defence at trial to the effect that all of the appellant's conduct was capable of being characterised as merely preparatory to a possession offence. Unsurprisingly, no submission to that effect was made by defence counsel in their addresses.

[116] For these reasons, I would reject this basis of challenge.

Disposition

[117] Neither ground of appeal has succeeded. It follows that this appeal must be dismissed.

Order

[118] I would propose the following order:

1. Appeal dismissed.

[119] **McMURDO JA:** I agree with Gotterson JA.

[120] **MULLINS J:** I agree with Gotterson JA.