# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Barrett* [2020] QCA 142 |
| PARTIES: | **R**<br>**v**<br>**BARRETT, Phaedra Joy**<br>(appellant/applicant) |
| FILE NO/S: | CA No 120 of 2019<br>DC No 208 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Maroochydore – Date of Conviction: 12 April 2019; Date of Sentence: 7 May 2019 (Cash QC DCJ) |
| DELIVERED ON: | 30 June 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 November 2019; 3 June 2020 |
| JUDGES: | Philippides and McMurdo JJA and Boddice J |
| ORDERS: | **1. The appeal against conviction be allowed.**<br>**2. The appellant's convictions of each counts 1, 2, 3, 5, 6 and 7 be set aside.**<br>**3. There be a retrial on each of counts 1, 2, 3, 5, 6 and 7.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – where the appellant was found guilty of one count of trafficking in a dangerous drug, two counts of producing a dangerous drug, one count of possessing property obtained from trafficking, one count of possessing a thing used in connection with trafficking a dangerous drug and one count of possessing a thing used in connection with producing a dangerous drug – where the appellant pleaded guilty to one count of possessing a dangerous drug – where the appellant was sentenced to two years' imprisonment for the count of trafficking in a dangerous drug and convicted but not further punished in respect to the remaining counts – where the appellant appeals the convictions on the ground that there has been a miscarriage of justice in that the appellant's trial, as conducted, deprived the appellant of a fair chance of acquittal – where the appellant operated a business which sold chemically treated vegetable matter – whether changes to legislation and the definition of 'dangerous drug' rendered the appellant's business illegal – where the appellant |

continued to carry on the business, which constituted illegal trafficking in a dangerous drug – where the central question at trial was whether the chemical substances being sold by the appellant were substantially similar to illicit substances within the *Drugs Misuse Regulation* 1987 – where the appellant was in possession of an expert report which contained an opinion that the substance was not substantially similar to any substances in the Regulations – where the expert report was not provided to trial counsel – where trial counsel's lack of knowledge of the report deprived the appellant of the opportunity to receive legal advice as to the availability of a defence pursuant to s 129(1)(d) of the *Drugs Misuse Act* 1986 – whether the appellant was denied the opportunity of relying on a potential defence at trial – whether there was a miscarriage of justice

*Drugs Misuse Act* 1986 (Qld), s 129(1)(d)
*Drugs Misuse Regulation* 1987 (Qld), Schedule 1

*Mraz v The Queen* (1955) 93 CLR 493; [1955] HCA 59, cited
*TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: The appellant/applicant appeared on her own behalf on 20 November 2019
S Di Carlo for the appellant/applicant (pro bono) on 3 June 2020
C M Cook for the respondent

SOLICITORS: The appellant/applicant appeared on her own behalf on 20 November 2019
No appearance for the appellant/applicant on 3 June 2020
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** On 1 April 2019, the appellant pleaded not guilty to one count of trafficking in a dangerous drug, two counts of producing a dangerous drug, one count of possessing property obtained from trafficking, one count of possessing a thing used in connection with trafficking in a dangerous drug and one count of possessing a thing used in connection with producing a dangerous drug. The appellant pleaded guilty to one count of possessing a dangerous drug.

[2] On 12 April 2019, the trial Judge, after a judge alone trial, found the appellant guilty of each count.

[3] On 7 May 2019, the appellant was convicted and sentenced to imprisonment for two years, in respect of the count of trafficking in a dangerous drug, and convicted and not further punished in respect of each of the remaining counts. It was ordered that the sentence of imprisonment be suspended after serving a period of eight months' imprisonment, for an operational period of three years. A serious drug offence certificate was issued in respect of the count of trafficking in a dangerous drug.

[4] The appellant appeals those convictions. Her stated ground of appeal is "evidence cited by the Judge was not shown to me prior to trial. Failure of disclosure of brief of evidence to me by my legal team".

[5] The appellant also seeks leave to appeal her sentence on the count of trafficking in a dangerous drug. The grounds of appeal, should leave be given, are that the sentence is manifestly excessive and was imposed notwithstanding errors in the sentencing discretion, being wrong findings of fact and a failure to take into account facts.

[6] At the hearing of the appeal, the appellant and the respondent adduced further evidence. The appellant, the instructing law clerk and the appellant's trial counsel were cross-examined at the hearing of the appeal.

**Background**

[7] The appellant was born on 18 February 1972. Prior to the commission of these offences, she had lawfully operated a business which sold chemically treated vegetable matter to customers.

[8] The Crown case at trial was that, after the appellant had become aware of legislative changes to the definition of "dangerous drug" which rendered her business illegal, the appellant continued to carry on a business which constituted unlawfully trafficking in a dangerous drug.

[9] The dangerous drug in question was two chemical substances, known as PB-22 and 5-Fluoro PB-22. Relevantly, the Crown particularised PB-22 as having a chemical structure substantially similar to JWH-018, and 5-Fluoro PB-22 as having a chemical structure substantially similar to AM-2201, illicit substances in the Schedule to the *Drugs Misuse Regulation* 1987 ("the **Regulations**").

[10] The appellant disputed at trial that the chemicals in question were substantially similar, within the meaning of the *Drugs Misuse Act* 1986 and the Regulations and, further, that she carried on a business. The defence case was that the appellant had sold her business to Mark Cullinane.

**Evidence**

[11] On 25 August 2014, Customs alerted the Queensland Police Service to two packages forwarded by international mail, which had been screened and recorded a positive presumptive test for chemical substances of interest. The two packages originated from the United Kingdom and were addressed to Mark Cullinane, care of a Post Office box in Caloundra in Queensland.

[12] On 25 August 2014, Detective Senior Constable Huelin attended the international mail facility at Brisbane Airport and executed a warrant to seize the two packages. The packages were each found to contain a white opaque bottle containing a liquid. The writing on the bottle referred to pineapple flavouring. The customs declaration attached to the package also referred to pineapple flavouring.

[13] Huelin arranged for the contents of the bottles to be poured into specimen bottles for analysis. A substitute liquid was inserted before the bottles were resealed into the packages. The intention was to trace the packages to delivery.

[14] On 27 August 2014, Huelin drove to Caloundra with the resealed packages and arranged with the Post Office to have them placed back into the system for collection.

[15] On 29 August 2014, Huelin was advised that the packages had been collected from the Post Office box by a female. Huelin was given the registration number of the

vehicle used by that person, as well as the person's description. It was not in dispute at trial that the female who collected the packages was the appellant.

[16] Huelin made enquiries in relation to the relevant vehicle and subsequently attended the appellant's address with a search warrant. The appellant was present at the address, as was the vehicle.

[17] A search of the residence located, in the defendant's handbag, two key cards in the name of Mark Cullinane, a Post Office box key, a storage shed key, two mobile phones and other miscellaneous items. The appellant provided the location of the storage shed, at a storage facility near Noosaville. Huelin subsequently confirmed that the Post Office key opened the relevant Post Office box at Caloundra. A search of other areas of the residence located a passport in the name of Mark Cullinane.

[18] An examination of the mobile telephones revealed that one of the telephones was a personal telephone, which was returned to the appellant. The other telephone was seized, as was a computer and a folder of paperwork containing tracking numbers on different pieces of paper, together with other general documents. Those documents included Australia Post postal receipts and correspondence from the Customs and Border Protection Service. Some of that correspondence was addressed to Mark Cullinane. There were also a number of business cards for "Vapeze".

[19] Whilst the search was being undertaken of the appellant's residence, the appellant was asked about Mark Cullinane. The appellant advised she had met Cullinane on the internet when he was a customer of her business. Cullinane was looking to buy the business, as she was getting out of the business because legalities were making it too difficult.[1] The appellant thought he was in New Zealand. She said she had stored some material for him at her residence.

[20] Huelin searched the appellant's motor vehicle. The two packages previously delivered to the Post Office were retrieved from its boot area. Huelin then conducted a search of the storage shed. That shed was opened by the key located in the appellant's handbag. The appellant directed them to two suitcases and two boxes within that storage shed. A search of those items revealed that they contained bottles of flavouring, dried plant material and other items, including commercial packaging and clip seal bags. Huelin also located a whiteboard in the storage shed. It contained the word "Vapeze" as well as other writings.

[21] A subsequent analysis of the seized mobile telephone revealed a large number of text messages. Some of those messages referred to "Mark", "orders" and the Post Office box at Caloundra. There were also text messages sent by Australia Post notifying when packages were ready for collection. An analysis of the seized computer revealed a large number of files containing terms such as synthetic cannabinoids, illegal, happy high herbs, acetone, PB-22, 5-fluoro, UR144, *Drugs Misuse Act*, trafficking, production, pineapple, invoice and spray.

[22] On 24 September 2014, Huelin was again alerted by Customs of the interception of packages addressed to Mark Cullinane at the same Post Office box at Caloundra. There were two packages, very similar to the earlier intercepted packages. They also originated from the United Kingdom. Those packages were examined and

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1 AB232/45.

found to contain packaging and plastic bottles identical to the earlier packages. A customs declaration for each package referred to pineapple flavouring. The nominated sender of those packages was D Stepney, the same sender for the previous packages.

[23] On 14 November 2018, Huelin conducted a search of the Queensland Police Service database in relation to Mark Cullinane, with the date of birth identified in the passport. That search would have revealed details of any driver's licences, weapons licences or security licensing in the same name, as well as registered vehicles. That search was unsuccessful in locating Mark Cullinane.

[24] Enquiries in relation to the use of the passport in the name of Mark Cullinane returned a negative result. Cullinane was not currently in Australia and had not travelled into Australia at the time of the investigation. Later enquiries revealed that there were no records of a passport in that name with that date of birth or with that passport number. No person using that passport had entered Australia between 1 January 2000 and 31 December 2014. If a person by that name had used a different passport or a different date of birth, that would not have been identified in those enquiries.

[25] Records from the United Kingdom also identified no travel movements by Mark Cullinane into or out of the United Kingdom, although it was accepted that its eBorder system did not capture all movements in or out of the United Kingdom. No enquiries were made with police or Border Force in New Zealand, even though the appellant had indicated that Cullinane was in New Zealand.

[26] Enquiries with the storage facility revealed that the storage shed was the subject of a monthly lease agreement, in the appellant's name, from 17 July 2014. Invoices in that name for the lease of the storage shed had been paid by the appellant. The lease agreement in respect of the relevant Post Office box was in the name of Mark Christopher Cullinane, with an address at Airlie Beach. The identified mobile telephone number was the number attached to the mobile phone seized from the appellant's residence. A subsequent search with Residential Tenancies Authority revealed no record for Mark Christopher Cullinane at that Airlie Beach address.

[27] Enquiries made in relation to the debit cards located in the defendant's handbag revealed that each bank account had been opened in the name of Mark Cullinane in 2013, using the passport in Mark Cullinane's name as identification.

[28] In cross-examination, Huelin agreed that his enquiries with the Residential Tenancies Authority had revealed the name of a previous bond contributor. No effort was made to speak to those people in order to try to track down Cullinane. Similarly, although enquiries were made of the Queensland Police Service database and of the Commonwealth database, no enquiries were made of the equivalent system in New South Wales. Huelin accepted that he had received confirmation of bank records in the name of Cullinane and of the Australia Post application in Cullinane's name.

[29] Huelin also accepted that an analysis of the text messages from the seized mobile telephone identified a significant number of different customer names. A lot of those names were not false names, but, as those names often did not contain the customer's full name, it was difficult to locate those people. Huelin accepted that he had the capacity to contact those persons to enquire whether they had ever

spoken to Cullinane. Huelin did not take any steps to marry up the text messages with the order messages or bank records or attempt to contact any persons identified in order documents from July 2013.

[30] Huelin accepted that a consideration of those messages revealed various entries referring to Mark signing off or identifying himself as sending messages, or to what appeared to be a second person referring to Mark being away overseas.

[31] Huelin accepted that the appellant had stated Cullinane had bought the business from her and that there had been an issue with Cullinane obtaining an ABN. The appellant had said she was working the business for Cullinane while he was overseas, because she wanted to obtain the balance of the sale moneys from Cullinane. Bank records revealed deposits on 20 and 28 June 2013, into the appellant's bank account, by direct credit from Mark Cullinane. Huelin made no enquiries with the bank to ascertain how that money was placed into the appellant's account.

[32] Huelin accepted that text messages on the seized mobile telephone contained reference to the appellant being out of the country on a cruise in January 2014. Huelin also accepted that, in the execution of the search warrants, the appellant had identified the location of the packages delivered by him to the Post Office but said that there was some hesitation and pause. The appellant was surprised they knew she had collected the packages earlier in the morning. The appellant had also expressed surprise when the passport in Mark Cullinane's name was located by police. Huelin accepted that the appellant identified another package of liquids in the laundry area.

[33] Huelin accepted that police did not make contact with a company referred to in both emails and documents contained in a seized folder. Huelin said it was a Hong Kong or China based company notorious for supplying illicit chemicals into Australia and around the world. It was a black market organisation for synthetic cannabinoid liquids, so "contacting them is near impossible".[2] Huelin tried to make enquiries in the United Kingdom in respect of the sender on those parcels. Authorities had confirmed that Cullinane was a real person in the United Kingdom but not within Australia. Huelin's enquiries also identified that the company said to have been purchased by Cullinane was a registered, legitimate company in Australia. He did not make any enquiries in relation to its income tax or other items.[3]

[34] Huelin accepted that his investigations revealed that the appellant had ordered some PB-22 chemicals from the United Kingdom. He did not contact that particular person. However, the timeframe indicated that the order had been placed in Australia, to be forwarded to the United Kingdom, then an order arrived from the United Kingdom of the same chemical addressed to Mark Cullinane at the Post Office box in Caloundra.

[35] Huelin said the appellant was asked to contact Cullinane. The appellant wanted to obtain some legal advice before contacting him. He accepted that any reticence to speak to him could be attributed to her exercising her right to silence. Huelin accepted that no handwriting analysis was undertaken of the signature or handwriting on Cullinane's passport with any other signatures. Huelin also did not

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2 AB288/30.
3 AB290/5.

make any enquiries with Vapeze, which appeared to be a New Zealand based company.

[36] Huelin accepted that the appellant had indicated she was trying to or had moved into a vaping type business. In his experience the plant material in question was not used in vaping. Synthetic cannabinoids were normally sent through the post from Asia to a legitimate country before coming to Australia. Anything coming from the United Kingdom would be a low risk and would be a good way to get it into Australia rather than coming directly from China.[4]

[37] Luke Hodge was another detective who attended the appellant's residence on 29 August 2014. He took part in the execution of the search warrant. He located several items in the main bedroom, consistent with the operation of an illicit laboratory. Those items included a quantity of bottles with different chemicals, as well as green leafy material and some advertising material. He also located cards which formed packaging or instructions in relation to different types of material that may be purchased, that were referred to as herbal remedies or synthetic cannabinoids.[5] Hodge also located approximately $75,000 cash in three separate bundles.

[38] Hodge was involved in a search of the living area. In one of the drawers of a sideboard he located a UK passport in the name of Mark Christopher Cullinane. He also located a package wrapped in plastic, yellow tape with a label containing chemical words. In a side drawer he located the appellant's Australian passport. There was also a large amount of paperwork in a folder, as well as Australia Post's express post envelopes. A number of those envelopes were already addressed, with the declarations on the back filled out with various versions of the name M Cullinane or MC.

[39] Hodge said a search of the boot area of the relevant motor vehicle located several items of interest. There were several plastic lids with different residue and leafy material, some wire racks and two packages with the addressee being Mark Cullinane at a Post Office box at Caloundra. The rear of the parcel contained a customs declaration and the sender's details, which was an address in Brighton, England.

[40] Hodge later located a quantity of laboratory equipment in a gazebo area. The seized items included a white plastic bottle with liquid in it and several boxes with various items, including a set of scales and scissors, as well as vegetable matter.

[41] In cross-examination, Hodge accepted that he located various liquids and plant products and other paraphernalia, which displayed signs consistent with being used in the production of dangerous drugs. He could not comment on whether it constituted an active set up, as opposed to items being stored in that area.

[42] Terrence Pschek, an employee of the Australian Postal Corporation, gave evidence that Mark Cullinane made application for the Post Office box in question, using a passport containing the expiry date 28 March 2023. The counter officer at the relevant Post Office would verify the person producing that photo identification by viewing the passport and assessing that the person in front of them was consistent with the appearance of the person shown in the passport photograph.

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4 AB299/40.

5 AB189/10.

[43] Anthony Chapman undertook an electronic analysis of the computer seized from the appellant's residence. Thousands of emails were identified through a search using key words, namely "happy", "high", "herb" and "shop". He subsequently searched using different terms being "illegal", "legal", "get high", "cannabis", "synthetic", "ketone" and "happy high". If an email had come from the email address [ABC]@gmail.com that did not include any of those keys words, it would not be contained in his report. His search also would not reveal whether a particular email account was active on the computer.

**Expert evidence**

[44] Helen Eldridge, a forensic chemist, conducted various chemical analyses on items seized from the appellant's residence. The liquid in the two bottles seized from the packages contained the substance PB-22. There was also detected a substance known as 5-Fluoro PB-22. An analysis of the bottles the subject of the second customs intercept also revealed the chemical PB-22.

[45] Eldridge compared the molecules of compounds of PB-22 and 5-Fluoro PB-22 to two substances within Schedule 2 of the Regulations, namely JWH-018 and AM-2201. Those two substances are frequently referred to in the literature as synthetic cannabinoid-type compounds. Neither PB-22 nor 5-Fluoro PB-22 appears in Schedule 2 of the Regulations. To her knowledge, neither of those compounds had established scientific or commercial applications.

[46] Eldridge said the framework around the types of molecules known as synthetic cannabinoids indicates there are four parts to these molecules, being the tail, core, link and ring. Some of those parts are quite similar in structure in different substances. Molecules that are not synthetic cannabinoids do not have that structure. Molecules are combinations or configurations of atoms, which are linked by bonds between the atoms.

[47] Eldridge said generally there are around 40 to 50 atoms per molecule in the molecules concerned with synthetic cannabinoids. A consideration of the carbon skeletons or molecular structures of JWH-018 and of PB-22 revealed that the tails and core were exactly the same. The one difference was that PB-22 had an extra oxygen atom. Further, a consideration of the rings in the two substances revealed that in JWH-018 there were two six member rings, which were all carbon and hydrogen, but in PB-22 the hydrogen had been replaced by nitrogen.

[48] Essentially, the difference between the two substances was a matter of three atoms. The number of atoms in each substance was the same, namely, 49. However, in PB-22 there were 23 carbons, 22 hydrogens, 2 nitrogens and 2 oxygens; whereas in JWH-018 there were 24 carbons, 23 hydrogens, 1 nitrogen and 1 oxygen. In Eldridge's opinion, these substances were alike, with the only significant difference in reactivity being at the point of this oxygen molecule. That difference is quite small.

[49] Eldridge said that, a consideration of the carbon skeletons of AM-2201 and 5-Fluoro PB-22 revealed that there was a fluorine atom at the end of the tail of 5-Fluoro PB-22, whereas PB-22 had a carbon atom at the end of its tail. However, comparing the two structures, they were the same, with the difference between the link in AM-2201 and 5-Fluoro PB-22 being a carbon and oxygen. Each molecular

structure contained 49 atoms. AM-2201 contained 24 carbons, 22 hydrogens, 1 fluorine, 1 nitrogen and 1 oxygen; whereas 5-Fluoro PB-22 contained 23 carbons, 21 hydrogens, 1 fluorine, 2 nitrogens and 2 oxygens. The difference between their structures was quite small, with the only real difference in potential reactivity being at the point of the oxygen atom.

[50] In cross-examination, Eldridge accepted that a combination of different atoms causes different properties in terms of reactivity and flexibility. An oxygen is a reactive type of atom, compared to, say, a carbon in a structure like these substances. However, in conducting an analysis, Eldridge would not consider the reactivity of the substance, or its pharmacological effects. She would identify its core structure, being the arrangement of the atoms and bonds. The comparison is restricted to structure or arrangement of atoms.

[51] Eldridge accepted that it was the arrangement of the atoms that was significant compared to the number of atoms, although the number of atoms was relevant to the size of the molecule. Whilst the addition or subtraction of one atom could have significant effects to a molecule, it depends on the change in respect of the structure of these substances. This change would not be particularly significant. It could have some reactive changes but the structure itself does not differ a lot. The chemical structure would appear much the same for the bulk of the molecule. In assessing the similarity of the structures, you do not look at the functional properties as such. The legislation was written to be a structural comparison, not a consideration of the potential reactivity that is implied by the structure or the various functional groups.

[52] Dr Michael Robertson, a forensic toxicologist, gave evidence that differences between molecules can give rise to a difference in functionality in compounds. Different substances may appear similar, but have different pharmacological effects. Relevant factors are not so much the absolute number of atoms, but the arrangement of those atoms. In his opinion, the addition of a hydrogen or a carbon to a large molecule is probably going to be insignificant as far as its properties are concerned, but relatively small changes in large molecules can make them fundamentally different, both chemically and pharmacologically. Whilst structurally they may be similar, from a chemistry perspective they are fundamentally quite different.

[53] Robertson accepted that "chemical structure" is a well-used phrase, which refers to the arrangement of chemical bonds and atoms. The distinction between chemical structure and chemical properties is that structure infers the properties. It is the structure that gives us the properties to some extent. Robertson agreed that Eldridge had properly expressed the structures of JWH-018 and PB-22 and AM-2201 and 5-Fluoro PB-22. However, in his opinion, a chemical can have a number of functional groups. A functional group is a component of the overall chemical structure.

[54] In cross-examination, Robertson accepted that he fundamentally agreed with Eldridge's identifications of the similarities and differences in the molecular structure of each substance but opined that there was a significant change in its pharmacological effects. Robertson accepted that the difference in the connections of the substances was not a drastic change, but said that his consideration of chemical structure infers functionality.

**Appeal hearing**

[55] The appellant gave evidence that around the time of legislative changes which rendered the sale of previously legitimate substances illegal, she determined to sell that business and move into operating a vaporising business. It was in that context that she had sold the business to Cullinane.

[56] The appellant further stated that, in about June 2013, after Cullinane had agreed to purchase her business, she came into possession of a preliminary report prepared by Robertson in relation to PB-22. That report contained an opinion to the effect that it appeared PB-22 was not substantially similar in chemical structure to any substances contained in the Schedule to the Regulations. The appellant said she relied upon that report, and assurances by Cullinane, when assisting Cullinane in his business.

[57] The appellant said when police executed the search warrant at her residence, her copy of that preliminary report was in the folder seized by police. It was one of the documents being referred to by police when discussing documents in the recorded conversation. Although police told her she would be able to obtain a copy of the documents, she was not provided with a copy of that document.

[58] The appellant said she raised that report in discussions with her legal representatives. She was not able to provide the legal representatives with a copy of the report but told them it had been seized by police. The law clerk overseeing her court case, Michael Osborne, told her the report would be of no assistance as ignorance of the law was no excuse. Having been given that advice, she did not pursue the relevance of that report with the solicitor, Neale Tobin, or any of the barristers briefed by Tobin to appear on her behalf in the Court case.

[59] The appellant said that, after she was convicted, she obtained a further copy of the preliminary report through a friend. She forwarded it to her legal representatives for consideration as to its use on sentence. Counsel who had appeared at her trial indicated that, had she been aware of the existence of the preliminary report prior to trial, she would have given her advice in relation to its relevance at trial. Trial counsel recommended the appellant obtain independent legal advice. The appellant said that, in the interim, trial counsel relied upon the report in her submissions on sentence.

[60] Michael Osborne gave evidence that, whilst he was the point of contact between the appellant and Tobin, he did not ever give the appellant legal advice. As a law clerk, he was careful not to do so. He would convey the appellant's instructions or concerns to Tobin and then convey back to the appellant Tobin's advice.

[61] Osborne said the appellant had provided him with a copy of Robertson's preliminary report. He thought it was as early as 2016. He did not tell the appellant it would be of no assistance as ignorance of the law was no excuse. He told the appellant there were mistakes of fact and mistakes of law and that ignorance of the law was no excuse, but said the appellant should take the matter up with counsel. He forwarded a copy of the report to counsel. This was subsequent to delivery of the brief to the initial trial counsel.

[62] Osborne recalled no further discussion about that report until after the appellant's conviction, when the appellant forwarded a copy of the report to him by email with a request that trial counsel consider its use on sentence.

[63] The email was in the following terms:

> "Hi Michael,
>
> Am I allowed to use this at all in pleading for a lenient sentence.
>
> It has been acknowledged in court that my reaction to DC Scott Huelin informing me that PB22 is scheduled, that I would be abhorrent and mortified at the idea of the substance in my possession being a scheduled drug.
>
> I enclose a document that I had in my possession that gave me every reason to believe that PB22 is NOT substantially similar.
>
> To sentence me in accordance with someone knowingly and willingly dealing in illegal substances, when I had authoritative written evidence between highly qualified forensic scientists and legal representatives, that it was unlikely to be against current analogue laws, must give me some lenience?
>
> This letter was in my possessions and disregarded, or not seen, by the police raid."

[64] In response to an email query by counsel as to how the appellant obtained the letter and whether it was on the computer seized by police, Osborne told counsel the appellant had located it in her documents and that the document had not been seized by police at the time of execution of the search warrant. That was in accord with what he was told by the appellant. He accepted his email did not contain any reference to the fact that he had been provided with a copy of the report by the appellant at a much earlier stage or that it had been forwarded to counsel to form part of the brief.

[65] Osborne accepted that, when the initial trial counsel was unable to appear, he had collected that counsel's brief and provided it to the replacement counsel. He did not at that time check the brief to see whether the copy of the preliminary report formed part of it. He could not say whether replacement counsel had ever seen a copy of that report. Further, as that counsel had arranged for trial counsel to recover the brief, he could not say whether trial counsel had ever been given a copy of that preliminary report prior to the appellant's conviction.

[66] Trial counsel gave evidence that she was unaware of the existence of the preliminary report until a copy of it was emailed to her subsequent to the appellant's conviction of the offences. Upon receipt, she took advice from senior counsel and forwarded an email advising the appellant of the potential significance of the document. Had she had that document in her possession prior to trial, counsel would have given advice to the appellant as to a possible available defence pursuant to section 129(1)(d) of the Act. Whilst trial counsel could not say what effect that further advice may have had, there was no downside in the appellant giving evidence as the right of last address had been lost when Robertson was called in the defence case.

**Appellant's submissions**

[67] The appellant submits there has been a miscarriage of justice in that the appellant's trial, as conducted, deprived the appellant of a fair chance of acquittal. Evidence of the appellant having possession of Robertson's preliminary report by at least June 2013, and of her reliance upon its content when assisting Cullinane in his business in the period between January 2014 and August 2014 was relevant to a potential defence of mistake of fact.

[68] The appellant submits that whether PB-22 was a substantially similar compound to a compound in the Schedule to the Regulations was a question of at least mixed fact and law. As such, the appellant may have been able to give evidence at trial, supportive of a defence pursuant to s 24 of the *Criminal Code* (Qld), as qualified by s 129(1)(d) of the Act. The appellant was denied that opportunity because she was not given relevant advice as to the availability of that defence and as to the importance of giving evidence in her own defence.

[69] The respondent submits that there has been no miscarriage of justice. The central issues in dispute at trial were whether the compounds were substantially similar to compounds in the Schedule to the Regulations and whether the appellant was carrying on the business of unlawfully trafficking in dangerous drugs. Whether a compound is substantially similar is a question of law. The existence of the preliminary report in the appellant's possession at a time prior to the central period the subject of the trafficking charge would not have altered the finding that the appellant was guilty of the offence.

**Consideration**

[70] The appellant's grounds of appeal and affidavit material were premised on failures on the part of her legal representatives in the conduct of her defence. However, at the hearing of the appeal the appellant's counsel expressly disavowed any reliance upon incompetence by those legal representatives. The appellant's counsel submitted that, whatever be the reason, the preliminary report of Robertson did not come to the attention of trial counsel and there had been a miscarriage of justice.

[71] A determination of whether there has been a miscarriage of justice in any particular case requires a consideration of whether, by reason of act or omission or other relevant matter in the conduct of the trial, the accused has been deprived of a chance of acquittal that was fairly open.[6] A miscarriage of justice may arise even though there is no defect or irregularity in a trial.[7] The ultimate question to be answered is whether the accused was deprived of a chance of acquittal that was fairly open.

[72] The evidence led on appeal is conflicting in essential respects. In particular, in relation to whether the preliminary report of Robertson was in the documents seized by police and whether a copy of it was provided by the appellant to her legal representatives at any time prior to the appellant's conviction of the offences. Both matters are particularly significant having regard to the contents of the appellant's email to her legal representatives subsequent to her conviction. That email expressly states that the report is a document in her possession and that it had not

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6 *Mraz v The Queen* (1955) 93 CLR 493 at 514.
7 *TKWJ v The Queen* (2002) 212 CLR 124 at [29].

been seized by police. Those statements are directly contrary to the appellant's sworn evidence.

[73] It is not, however, necessary to resolve those unsatisfactory aspects of the appellant's evidence as the respondent called evidence from the law clerk involved in the preparation of the appellant's case to the effect that the appellant did give him a copy of the preliminary report at a time early in the proceedings; that he forwarded that report to counsel as part of the brief; but that he could not say whether the report had formed part of the brief obtained by trial counsel. The only conclusion to be drawn from that evidence, having regard to trial counsel's sworn evidence and, further, trial counsel's immediate and understandable reaction to being told after the appellant's conviction, for the first time, of the existence of that report, is that trial counsel was unaware of the existence of the report prior to the appellant's conviction.

[74] Trial counsel's lack of knowledge of the existence of that report deprived the appellant of the opportunity of obtaining legal advice as to the availability of a potential defence pursuant to s 24 of the *Code*.

[75] The basis for that potential defence was the preliminary report by Robertson, dated 13 May 2013, which the appellant claims that she had read prior to the conduct for which she was convicted. The period of trafficking which was alleged in the indictment commenced on 30 April 2013, but, as the trial judge recorded in his sentencing reasons, the prosecution case was that it was really only between January and August 2014 that the appellant was involved in this business. In those same reasons, his Honour accepted that this report came to her attention in June 2013 and that it caused her to believe that each of the chemicals "was not within the definition at the time" in the *Drugs Misuse Regulation* 1987 (Qld).

[76] It was not until the sentencing hearing that the trial judge heard that the appellant had seen and relied upon this preliminary report. In the course of submissions, the judge said to the appellant's counsel that if there had been a mistake (as his Honour came to accept in his sentencing reasons), it was a mistake of law. No submission to the contrary was then made by the appellant's counsel, no doubt because by then, her task was to persuade the judge that this was a mitigating circumstance, rather than a defence to the charges.

[77] We respectfully disagree with his Honour's observation that this was a mistake of law. It is necessary to explain our view, which rejects the respondent's argument in support of the judge's observation.

[78] Section 22(1) of the *Criminal Code* provides that:

> "Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence."

[79] Section 24(1) of the *Criminal Code* provides:

> "A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater

> extent than if the real state of things had been such as the person believed to exist."

[80] Section 129(1)(d) of the *Drugs Misuse Act* provides, in respect of offences such as those in this case, that the operation of s 24 is excluded unless the person shows an honest and reasonable belief in the existence of that state of things material to the charge.

[81] In *Ostrowski v Palmer*,[8] Gleeson CJ and Kirby J said that ss 22 and 24 must be read together, and that they correspond with the common law. Their Honours said that the common law was as stated by Jordan CJ in *R v Turnbull*,[9] as follows:

> "[I]t is also necessary at common law for the prosecution to prove that [the accused] knew that he was doing the criminal act which is charged against him, that is, that he knew that *all the facts constituting the ingredients necessary to make the act criminal* were involved in what he was doing. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his *knowledge of the presence of some essential factual ingredient of the crime charged*." (Emphasis added.)

Gleeson CJ and Kirby J there said:

> "What Jordan CJ referred to as 'the ingredients necessary to make the act criminal' are what we have earlier called the elements of the offence. Sections 22 and 24 must be read together. The reference in s 24 to a belief in the existence of a state of things must be, and can be, understood in the light of s 22, and of the common law principle reflected in ss 22 and 24. In a case such as the present, the key to such understanding is in Jordan CJ's reference to 'the facts constituting the ingredients necessary to make the act criminal'. Section 24 is not concerned with mistakes at large. In particular, it is not concerned with mistakes about whether there is a law against conduct of a certain kind. Section 24 requires that attention be directed to the elements of the offence charged, and to the facts relevant to those elements, understood in the wider sense explained at the commencement of these reasons. It requires identification of the act or acts alleged to constitute the offence, and consideration of the extent to which the accused would have been criminally responsible for such act or acts 'if the real state of things had been such as he believed to exist'. Section 24 applies to mistakes about the elements of the offence, not mistakes about the existence of the law creating the offence."

[82] The relevant element of the charge here was that each of these two substances had a chemical structure that was substantially similar to the chemical structure of something which was listed in a schedule to the *Drugs Misuse Regulation*, more specifically the chemicals described as JWH-018 and AM-2201. The chemical structures of those things were factual matters, as were the chemical structures of the things which were said to have been trafficked, produced and possessed by the

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8 [2004] HCA 30; (2004) 218 CLR 493, 503 at [9]-[10].

9 (1943) 44 SR (NSW) 108 at 109.

appellant. In turn, the comparison between those two groups of chemicals was, in each case, an assessment of a factual matter. At the trial, evidence was tendered which was relevant to those questions, and his Honour's clearly expressed reasons for judgment set out his factual findings in those respects and his reasons for them. Had this case been tried by a jury, those questions would have been for the jury to answer, because they are questions of fact.

[83] What then was the appellant's belief? Her evidence now is that, having read Robertson's preliminary report, she believed that she was not committing an offence by acting as she did. That was a misunderstanding of her legal position. However, that was an understanding that came from a belief about scientific facts, rather than the law. It was her belief that, *in fact*, the substances in her case had a chemical structure which was not substantially similar to any of the substances listed in schedules to the Regulations. The understanding which the appellant claims to have held was incorrect, not because she misunderstood what was the law, but because she misunderstood the facts which engaged that law.

[84] It appears that, by an oversight within the office of the appellant's then solicitors, no advice from counsel was sought about the potential relevance of Robertson's preliminary report. When the appellant provided a copy of this report to a law clerk at the firm, she said that she was told that ignorance of the law was no excuse. Mr Osborne's evidence was that whilst he did not say that to her, he did tell her that there was a difference between a mistake of fact and one of law, before saying to her that counsel would be asked about the matter. The appellant's failure to pursue an answer of the matter, before her conviction, is understandable.

[85] The appellant was sentenced upon the basis that she did hold a mistaken belief on the faith of this report. She is thereby in the position of having been sentenced upon findings that could have led to her being acquitted on these charges, had all of these findings been made before the verdicts.

[86] Whilst the availability of such a defence would ultimately depend on the evidence led at trial, a fair trial, according to law, required the appellant to be afforded the opportunity to raise that defence, if appropriate, having regard to all of the evidence and appropriate legal advice.

[87] However, a retrial should be ordered, rather than this Court ordering that she be acquitted. The prosecution case at the trial also alleged that these chemicals were within the Regulations upon the alternative basis that the appellant intended them to have a substantially similar pharmacological effect to that of a thing in the schedules to the Regulations. The trial judge found it unnecessary to consider that alternative case for the prosecution, but this potential basis for criminal responsibility would be open to the prosecution on a re-trial.

**Orders**

[88] We would order:

(1) The appeal against conviction be allowed.

(2) The appellant's convictions of each of counts 1, 2, 3, 5, 6 and 7 be set aside.

(3) There be a retrial on each of counts 1, 2, 3, 5, 6 and 7.