SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mohammadi* [2006] QCA 530
PARTIES:	**R** **v** **MOHAMMADI, Mehdi** (appellant/applicant)
FILE NO/S:	CA No 156 of 2006 SC No 27 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2006
JUDGES:	de Jersey CJ, McMurdo P and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The appeal against conviction is dismissed** **2. The application for leave to appeal against sentence is refused**
CATCHWORDS:	TAXES AND DUTIES – CUSTOMS AND EXCISE – PENAL PROVISIONS – OFFENCES – PROHIBITED IMPORTS – SPECIAL PROVISIONS WITH RESPECT TO NARCOTIC GOODS – POSSESSION OF PROHIBITED IMPORTS REASONABLY SUSPECTED OF HAVING BEEN BROUGHT INTO AUSTRALIA IN CONTRAVENTION OF ACT – importation of unlawful drugs – whether Crown need establish drugs came from a foreign land – or whether it suffices to establish passage through international waters – absence of evidence of route followed by vessel – whether further evidence admissible on appeal – inference of knowledge of drugs imported – reliance on s 668E(1A) *Criminal Code* 1899 (Qld) proviso *Customs Act* 1901 (Cth), s 233B *Seas and Submerged Lands Act* 1973 (Cth), s 7 *Criminal Code* 1899 (Qld), s 668E, s 671 *Birrell v Dryer* (1884) 9 App Cas 345, cited *Brown v United States,* 16 F.2d 682 (1926), cited

Darkan v The Queen [2006] HCA 34; (2006) 80 ALJR 1250, cited
Election Importing Co Pty Ltd v Courtice (1949) 80 CLR 657, cited
Forbes v Traders' Finance Corporation Ltd (1971) 126 CLR 429, cited
McGurk Construction & Rigging Co Ltd v Comptroller-General of Customs (1987) 73 ALR 381, cited
Postiglione v The Queen (1997) 189 CLR 295, cited
R v Bull (1974) 131 CLR 203, applied
US v Cabaccang, 332 F.3d 622 (2003), considered
Weiss v The Queen (2005) 80 ALJR 444, applied
Wilson v Chambers & Co Pty Ltd (1926) 38 CLR 131, followed

COUNSEL: A J Glynn SC for the appellant
W J Abraham QC for the respondent

SOLICITORS: Arthur Browne & Associates for the appellant
Commonwealth Director of Public Prosecutions for the respondent

de JERSEY CJ:

Introduction

[1] A Supreme Court jury convicted the appellant on the following count:

> "on the eighth day of June 2005 at Townsville in the State of Queensland Mehdi Mohammadi imported goods into Australia, being prohibited imports to which section 233B of the *Customs Act* 1901 applied, namely narcotic goods consisting of a quantity of methylamphetamine being not less than the commercial quantity applicable to methylamphetamine."

[2] The appellant had been subject to an alternate count, that on 8 June 2005 at Townsville, he possessed the drugs, which were reasonably suspected of having been imported. It was not necessary for the jury to return a verdict on that count.

[3] There were two other accused persons, Maio and Labanon. They were tried together with the appellant. Towards the end of the trial, Maio pleaded guilty to importation. Labanon was convicted by the jury of the importation, on the basis (by a special verdict) that he acted recklessly.

[4] The appellant was sentenced to 14 years imprisonment, with a seven year non-parole period. Maio was sentenced to 12 years and six months, with a non-parole period of five years nine months, and Labanon was sentenced to six years imprisonment, with a three year non-parole period.

[5] The appellant appeals against his conviction, and seeks leave to appeal against his sentence. The Commonwealth Director of Public Prosecutions has appealed against the sentence imposed on Labanon.

The Crown case

[6] The thrust of the Crown case may be stated briefly.

[7] The United States warship *USS Boxer* berthed at Townsville on 8 June 2005. Over the preceding week, it had sailed to Townsville from Darwin. It had originally come from the United States, via other ports. Maio had served on that vessel as a chief petty officer, but had left it for medical treatment approximately six months earlier. While the ship was in Darwin, Maio emailed Labanon, who was a petty officer onboard, and asked Labanon to retrieve some packages for him and deliver them to him in Townsville when the vessel was in port there. Labanon did so. Maio had travelled to Townsville with the appellant. Having received the parcels, they left in a hire car travelling south, where they were intercepted by police officers some 25 kilometres from Townsville. The packages contained 7.314 kilograms of methylamphetamine.

[8] The appellant gave evidence, admitting accompanying Maio, but denying knowledge of Maio's mission, or that what he collected from Labanon was drugs.

[9] There was no evidence admissible against the appellant of how the drugs came to be onboard the vessel, who put them there, or when. The Crown position in relation to the appellant was that the jury should infer they were on the vessel before it entered Australian territorial waters en route to Darwin. (There was evidence bearing on that which was admissible against Labanon, but not against the appellant.)

[10] Counsel for the appellant raised the possibility the drugs were for the first time placed onboard the vessel while it was berthed in Darwin. That seems at least unlikely. There would be risks of detection in putting the drugs onboard there, notwithstanding the naval vessel was not subject to usual customs inspections. But perhaps more significantly, Maio flew from Manila via Brisbane and the Gold Coast to Townsville to collect the drugs. One wonders why, if the drugs were in Darwin, he did not go directly there to collect them.

[11] Ms Abraham QC, for the respondent, submitted that the prospect of entry of the drugs onto the vessel in Darwin was "inherently incredible", or "entirely out of the question". In response, Mr Glynn SC, for the appellant, suggested the owner of the drugs may have identified a risk of police interception over a long trip by road, had they been moved that way from Darwin to Townsville.

[12] This issue warrants subsequent consideration, in relation to the possible application of the proviso (s 668E(1A) *Criminal Code* 1899 (Qld)); but it is convenient to defer that until after all grounds of appeal have been considered.

[13] The fundamental reality is the possibility the drugs were first placed onboard at Darwin was raised, and the learned trial Judge was therefore obliged to deal with it in his directions to the jury.

Trial Judge's directions

[14] The concept of "importation" is relevantly dealt with in *R v Bull* (1974) 131 CLR 203, 254. His Honour, mindful of *Bull*, directed the jury in these terms:

> "Our law provides this: a person commits an offence if the person imports goods into Australia and the goods are a prohibited import to

> which the Act applies. A person will commit that offence if the following things are shown: firstly, that that person imported the goods into Australia, that is, moved them from offshore onto the shore. Although, as I will tell you in a moment, it is not limited to the point at which they come onto the shore. That is the first thing that would have to be shown, the fact of importation…
> Now let me make a distinction between the two accused in relation to the count of importation. In the case of the accused Labanon it is alleged that he imported the goods in the sense of moved them from offshore onto the shore; that is brought them from the vessel to Townsville – onto the shore. But the act of importation does not cease at the first point reached onshore. A person will still be importing goods for relevant purposes if he takes them from the person who brings them onto shore and moves them to the next step of where they are destined to go, and that is what is alleged as being the importation against the accused Mohammadi. That is how he, it is alleged, imported the goods."

[15] No complaint was made of that.

[16] His Honour then dealt with the possibility the drugs had been put onto the vessel in Darwin:

> "Let me say this also about importation; you have heard some remarks made about whether you could be satisfied that these drugs did come from offshore onto the shore. There is evidence that the vessel had been a week or so before in Darwin. Well it is a matter for you but there is no evidence that the drugs entered the vessel at Darwin. There is no evidence they did not but you consider the probability or otherwise of why somebody might want to take the drugs onto the vessel at Darwin and then remove them in Townsville and that in any case it would be highly likely that for such a vessel to come from Darwin to Townsville it would travel in international waters outside the Barrier Reef and across the Gulf of Carpentaria. So even if they entered the vessel at Darwin if the vessel went into international waters and then came into the port of Townsville they would be coming from outside Australia into Australia."

His Honour later said:

> "There is no direct evidence when the drugs went on the vessel and there is no direct evidence as to how the vessel came from Darwin to Townsville. I am sure you would understand that a vessel bringing something from Magnetic Island to Townsville would not be importing something into Australia. If you thought there was a reasonable doubt that the drugs went onto the vessel in Darwin and may have sailed within territorial waters the whole way from Darwin to Townsville, whether around the east coast or circumnavigating the country, then there would not be an importation of the drugs.
>
> However, if on the same assumption you thought there was a chance the drugs went on the vessel at Darwin – and you have heard the submissions from the prosecution about how improbable it would be somebody would put the drugs on the vessel at Darwin to take them

> off in Townsville – but if you thought that may be a possibility and you thought that at, for at least some of the time, the vessel travelled in territorial waters on that journey to Townsville then there would be an importation. These are all matters for you. The prosecution must satisfy you beyond a reasonable doubt of the importation."

[17] The later reference in that passage to travel "in territorial waters on that journey to Townsville" was obviously a slip (or a mistranscription). The reference should have been to international waters. The appellant now takes no point about this.

First ground of appeal: "importation" from international waters

[18] The first ground of appeal is expressed as follows:

> "The learned Trial Judge erred in directing the jury to the effect that 'importation' was established even if the methylamphetamine was loaded onto the ship at Darwin if, on the voyage to Townsville it went outside the territorial waters of Australia and then re-entered such waters to berth in Townsville."

[19] In *Bull*, in respect of the *Customs Act* 1901 (Cth), Gibbs J (with the agreement of Stephen J) dealt with the question of when importation occurs in the following passages:

> "No definition of 'import' or of any derivative of the word is contained in the Act. Its ordinary dictionary meaning is 'To bring in, or cause to be brought in (goods or merchandise) from a foreign country, in international commerce' (*Oxford English Dictionary*). In accordance with this meaning it has been said that the word 'import' in various sections of the Act means '<u>bring in to the Commonwealth</u>'…" (p 254)
>
> "The remarks made by Isaacs J in *Wilson v Chambers & Co Pty Ltd* (66) with regard to s 68 appear to be a correct general statement of the meaning of importation for the purposes of the Act. After saying that 'the expression "imported goods" in s 68, means goods which in fact are <u>brought from abroad into Australian territory</u>, and in respect of which the carriage is ended or its continuity in some way in fact broken', Isaacs J went on to say (66):
>
> > 'The underlying concept appears to me to be as follows: Where, within our territory, some *act* takes place with regard to <u>goods arriving from abroad</u>, whether in fact they are or are not dutiable or prohibited, which in the absence of some new or further arrangement for carrying them away would make the place of arrival their destination and would therefore result in the goods remaining in Australia, then they are "imported goods" and it is the duty of the "owner" to comply with the provisions of s 68.'" (p 255)
>
> (emphasis added)

(Counsel joined in informing us there is no helpful relevant Australian authority other than *Bull* and the cases referred to in it.)

[20] Consistently with the above analysis, an importation should be regarded as having occurred if goods are brought from outside the territorial boundaries of Australia into an Australian port. They are then brought "from abroad", which is the essence of "importation": they are brought into a country from outside that country. The word "importation" derives from the Latin "portare", meaning to carry; hence, the act of carrying in. Coming from "abroad" means coming from outside one's "home country" (*Oxford English Dictionary*), not necessarily from any particular foreign land mass or populated place. The *Macquarie Dictionary* defines "abroad" as "any place outside one's own country, especially if overseas". Most often, the goods will have come from a foreign country. But that is not essential for there to be an importation. Consistently with that, the *Australian Oxford Dictionary* (2nd ed, 2004) offers, as the first meaning for the word "import": "bring in (especially foreign goods or services) to a country". On the assumption these drugs originated in Darwin, they were nevertheless imported into Australia when they were not left in international waters, but brought back in to the port of Townsville.

[21] Ms Abraham offered this example:

> "assume that A takes drugs overseas, arrives in another country and for some reason returns to Australia with those drugs, that person would be importing into Australia. That the drugs originated in Australia…would not alter that."

[22] Take the case of a person who transports drugs from Australia to another country. Intending to sell them there, he finds a limited market, so brings them back into Australia for distribution here. That would involve importation of the drugs into Australia, notwithstanding they originated here.

[23] Perhaps more directly bearing on the present scenario, assume the discovery in international waters of a drug cache in an abandoned vessel. If the finder brought those drugs into Australia, he would import them, notwithstanding there was no evidence of their origins.

[24] As another example, assume the actual production of unlawful drugs on a vessel moored just outside Australian territorial waters. Their being moved into Australia, from 'abroad', would involve an importation into Australia.

[25] Mr Glynn SC referred to what Williams J said in *Election Importing Co Pty Ltd v Courtice* (1949) 80 CLR 657, 662, that the "ordinary natural grammatical" meaning of "import", is "bringing goods into Australia from another country". But His Honour did not in that case have to address the issue now arising.

[26] Reference may be made to *Brown v United States*, 16 F.2d 682 (1926), 685 where it was held that bringing liquor into the United States from a vessel anchored 30 miles at sea did not warrant a finding of importation. But the applicable legislation in that case in terms imposed duty "on all articles when imported <u>from any foreign country</u> into the United States". The instant legislation is not so limiting.

[27] Reference may similarly be made to *US v Cabaccang*, 332 F.3d 622 (2003), where the Court of Appeals for the Ninth Circuit held, by majority, that the transportation of unlawful drugs, on a non-stop flight, from one location in the United States to another, did not constitute importation, notwithstanding the flight travelled through international air space. The applicable legislation provided:

> "…it shall be unlawful [1] to import into the customs territory of the United States from any place outside thereof (but within the United States), or [2] to import into the United States *from any place outside thereof*, any controlled substance."

The word "import" in that provision was defined broadly, elsewhere in the legislation, as "any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States)".

The Judges constituting the majority were strongly influenced by the circumstance that the words "from any place outside thereof", italicised in the provision as set out above, were an addition to the predecessor statute. As put by Fisher J, rejecting the respondent government's submission that an importation had occurred:

> "The problem with the government's argument is that despite (the) broad definition of importation as 'any bringing in,' (the relevant provision) itself specifies that the bringing in be '*from any place outside*' the United States. This requirement was not an element of (that provision's) predecessor statute…which provided criminal penalties for 'fraudulently or knowingly importing or bringing any narcotic drug *into the United States* or any territory under its control or jurisdiction, contrary to law' … In 1970, Congress replaced (that provision) with (the presently applicable provision) inserting the phrase 'from any place outside thereof' after the words '*into* the United States' without explanation. If, as the government urges, Congress was concerned only with the destination of the drugs, it would have been sufficient to retain the original language of the importation statute, simply prohibiting the import of drugs 'into the United States' without reference to the point of origin. The addition of the phrase '*from* any place outside the United States' undercuts the government's contention that Congress intended the origin of a drug shipment to be irrelevant to a finding of importation…"

Again, one notes, the legislation applicable in the instant case is not so limiting.

[28] It suffices, for importation in the natural sense of the word, that the goods have been brought into Australia from anywhere outside Australia, whether a foreign port, a foreign land mass, or international waters.

[29] Accordingly, if these drugs were onboard the vessel when it moved into Australian waters and berthed in Darwin, that was itself an instance of importation; and there was a further importation when the goods were brought from Darwin through international waters en route to Townsville and then into that port.

Subsequent grounds of appeal: whether passage of vessel into and out of international waters the only reasonable inference

[30] The next grounds of appeal are expressed in these terms:

> " (a) The learned Trial Judge's summing up in relation to proof of importation initially directed the jury that it was highly likely that the drugs were imported.

(b) The learned Trial Judge's summing up in relation to proof of importation was confusing and inadequate."

There is also a ground asserting the verdict was unreasonable and cannot be supported having regard to the evidence.

An absence of direct evidence

[31] The short point taken in the development of all those grounds, and it was a point taken in support of an unsuccessful no-case submission to the learned Judge, is that there was no evidence of the route followed by the vessel in its passage from Darwin to Townsville, and the jury was left to speculate as to whether the vessel passed through waters outside Australian territorial boundaries – as on this scenario the Crown needed to establish.

[32] It is surprising and unfortunate the matter was not covered by evidence: presumably it would have been possible to secure evidence from naval records. Had that been done, there would presumably now be no room for debate on that factual aspect.

[33] At the latest, the Crown was clearly on notice of the currency of this point when the no-case submission was made. Absent other possibilities, Petty Officer Brust could perhaps have been recalled to give evidence of the approximate route taken. If, for some reason (eg to do with security) evidence could not be presented of the precise path of the vessel, surely the reason for its absence could have been established, and surely the Crown should then have been alive to the need to call evidence of practicable routes. For example, was there a channel (the "inner passage") from the Torres Strait passing between the Great Barrier Reef and the coastline which this vessel could have used? The jury was not even presented by the Crown with a chart showing the limits of the territorial sea. It would be surprising were the Crown not able to secure a statement from the master or captain of this ship from a friendly nation to the effect that the ship passed into and out of international waters.

[34] The Judge left the issue with the jury on the basis that it would be "highly likely" that the vessel would have gone beyond Australian territorial limits, in crossing the Gulf of Carpentaria and passing beyond the Barrier Reef. One notes at once it fell to the Crown, on this scenario, to establish that occurrence beyond reasonable doubt.

[35] The vessel, termed a "warship", had decks, was described as "large", and had a crew of 900 to 1000. There was no other evidence of its particular capacity, such as might permit some inference whether it would have taken appreciably longer than a week if it navigated around the Gulf of Carpentaria. It should be borne in mind that this US ship enjoyed the right of innocent passage through Australia's territorial sea (part 2, art 17, United Nations Convention on the Law of the Sea, scheduled to the *Seas and Submerged Lands Act* 1973 (Cth)). There was no evidence of the purpose behind the *Boxer*'s presence in Australian waters, beyond the recreation of its crew. One imagines, in theory, the opportunity could have been taken for navigational exercises around the coastline.

[36] The prospect was raised in submissions before His Honour that the vessel may even in that week have travelled to the west from Darwin and south around the continent to Townsville. The jury had no capacity to explore the feasibility of that.

[37] The Crown case could have been left to the jury on the basis the importation depended on their being satisfied the drugs were onboard before the vessel arrived at Darwin, so that if the jury was not satisfied of that, they must acquit of importation, although one expects they would then have convicted the appellant on the alternate count of possession. The evidence against him on that count was overwhelming. But the case was not left on that basis, and rather surprisingly, if the Crown's real position was the one for which Ms Abraham contended before us – that the suggestion the drugs may have been put onboard in Darwin was "inherently incredible", "entirely out of the question".

Further evidence on appeal?

[38] If it could now be established unequivocally that, travelling from Darwin to Townsville, the vessel passed into international waters, then – assuming the admissibility now of that evidence – resort to the proviso (s 668E(1A)) would be justified.

[39] Before the hearing of the appeal, the Court invited submissions from the parties as to Australia's territorial boundaries, and (subject to admissibility) evidence of the path followed by the vessel. We were presented by the Crown with some material on the former, but none on the latter.

[40] The Court has a general power to receive additional evidence (s 671B(1)(c)), "necessary or expedient in the interests of justice". Were additional evidence clear and uncontrovertible, rectifying a gap in the proof at trial, and where it could not have helped the defence if admitted at the trial, there would be an arguable case for its admission on appeal, if that would avoid a substantial and expensive retrial. But of course the defence would ordinarily be entitled, and would wish, to test such evidence. That is why in these observations there is reference to evidence which is incontrovertible.

[41] But Ms Abraham did not in any case seek to follow that path. She left the case on the basis the jury, if concerned about the possibility the drugs were placed onboard in Darwin, must reasonably have inferred – as the only inference reasonably open – that the vessel must have travelled into international waters en route to Townsville.

Establishing Australian boundaries

[42] The territorial sea ends, as a matter of law, at 12 nautical miles (cf *Seas and Submerged Lands Act* 1973, s 7, and part 2, article 3 of the United Nations Convention on the Law of the Sea, and the various proclamations under the Act).

[43] The learned Judge instructed the jury that "Australian territorial waters are 12 nautical miles from the coastline". That direction was accurate, although one would have expected much more comprehensive coverage of this aspect, including, as already mentioned, the presentation of charts delineating territorial boundaries and identifying navigable passages. Whether such a passage existed from the Torres Strait southwards between the Reef and the coastline, for example, is not notoriously well-known, such as would attract judicial notice.

The ultimate Crown contention

[44] Ms Abraham submitted it is inconceivable this foreign warship would substantially circumnavigate Australia, rather than travelling directly from Darwin to Townsville; and likewise inconceivable the vessel would have entered and hugged the entire coastline of the Gulf of Carpentaria before re-emerging at the Torres Strait, rather than travelling directly across the northern opening of the Gulf, thereby necessarily passing through international waters.

[45] That latter position depends on the Court's taking judicial notice of the fact that the distance across the waters at the northern opening of the Gulf of Carpentaria appreciably exceeds 24 nautical miles. If necessary, that plainly correct fact may be confirmed by reference to a map (cf. *Birrell v Dryer* (1884) 9 App Cas 345, 352). The distance actually substantially exceeds 300 miles.

[46] The jury was invited to draw those inferences, and on this scenario would be taken to have done so. The question is whether the inferences were reasonably open, as the only inferences to be drawn reasonably under that scenario.

Conclusion

[47] One needs to consider whether Ms Abraham's submission should be accepted, on the basis its acceptance is compelled by obvious common sense. Regrettably it cannot be accepted.

[48] The jury was left to speculate as to the route followed by the vessel, and was inadequately instructed as to its approach to the issue in the absence of evidence.

[49] This conclusion is reinforced by the trial Judge's suggestion to the jury that it was "highly likely" the vessel moved into international waters. On the case as presented, the jury should have been directed it could not reach that view beyond reasonable doubt, as to do so would involve pure speculation. There is in these circumstances no room for the application of the proviso (*Criminal Code*, s 668E(1A)), in relation to this defect in the trial.

[50] Unfortunately, there appears in relation to this aspect to have been inadequate preparation on the part of the Commonwealth Crown, inefficient trial presentation and, one fears, basic lack of understanding of an issue which could potentially assume crucial significance in the disposition of the case.

Further ground of appeal: inference as to appellant's knowledge

[51] The remaining ground of appeal against conviction contends "[t]here was no evidence from which the jury could be satisfied beyond reasonable doubt that the appellant knew that the drugs came from offshore". In the written outline of counsel for the appellant, he said: "[T]here is no evidence from which it can be inferred that the appellant had any knowledge of the source of the methylamphetamine, nor anything from which that may have been properly inferred by a jury".

[52] Counsel for the respondent relied on the following aggregation of circumstances as providing sufficient basis for the inference the jury must be taken to have drawn:

"(1) On 5 June 2005 the Appellant went to the airport to meet Maio when he arrived from overseas;

(2) The Appellant took Maio to his residence where they stayed together. Over the next couple of days they were observed to be in each other's company at shopping centres etc;

(3) During this time, the Appellant and Maio organised to travel to Townsville. The Appellant organised and paid the travel agent for two one-way air tickets on a flight to Townsville on 8 June 2005. The Appellant also made arrangements for a rental car to be collected at Townsville on 8 June 2005 to be returned at the Gold Coast on 11 June 2005. The Appellant paid for the rental of the car;

(4) On 8 June 2005 the Appellant flew with Maio to Townsville;

(5) The Appellant and Maio arrived in Townsville at a time when the USS Boxer was in port and on the day that those on the vessel were entitled to leave on liberty;

(6) The Appellant was in possession of the green bag which was ultimately given to Labanon when Labanon delivered the drugs to Maio (Maio took the blue bag from Labanon and gave him the green bag to carry away the remainder of the contents);

(7) The Appellant paid for the hire of the car in Townsville and was the driver on all occasions;

(8) On arriving in Townsville the Appellant and Maio drove straight to the Seagulls Resort car park. This was the Resort where Labanon was to stay. Neither went inside the Resort;

(9) The Appellant and Maio arranged accommodation at the Raintree Motel. It was the Appellant who did the talking and booked in and paid for an overnight stay;

(10) Four hours after booking in the Appellant and Maio checked out of the motel. The Appellant and Maio stayed only long enough to collect the drugs and to wrap them in wrapping paper;

(11) At the time Labanon delivered the drugs to Maio in the motel room, the Appellant was in the Coles Supermarket car park sitting in his car in a position that allowed him to view the motel entrance. Within minutes of Labanon departing, having handed over the drugs, the Appellant returned to the motel (that was the only time over the three days that the Appellant and Maio were not actually in each other's company);

(12) After the Appellant returned to the motel room where the brown packages were, he and Maio went to Toys-R-Us, a toy store where the Appellant purchased toys and wrapping paper;

(13) The Appellant and Maio returned to their motel room where they wrapped the drugs and toys in gift paper. It was the Crown case that this was done to hide the drugs in case they were intercepted by the police;

> (14) The Appellant and Maio were in possession of telephones in false names. They were in possession of and used these telephones so that any interceptions could not be traced back to them;
>
> (15) Having flown to Townsville the Appellant and Maio drove to the Gold Coast. This avoided the chance of a scan locating the drugs at the airport;
>
> (16) The Appellant paid for all items during this trip. When intercepted Maio had hardly any cash on him."

[53] The jury was properly instructed as to what the Crown needed to establish, namely that each accused "meant to import the goods in the sense that he was aware that he was bringing the items concerned onto the shore and intended to do so".

[54] There was strong evidence of a joint venture between Maio and the appellant. Its object was the recovery of Maio's drugs from this overseas vessel. Labanon's recovery of the drugs occurred at the instance of Maio, who had not been onboard for six months, when the ship was in places foreign to Australia. There was ample basis for an inference these drugs were onboard then, and that because of the closeness of their relationship for this venture, the appellant knew that.

[55] The jury was entitled to infer from all of these circumstances that the appellant went with Maio to Townsville for the very purpose of taking delivery of the drugs upon the berthing of the overseas vessel, and that he knew that the drugs which Labanon delivered had come from abroad.

Hypothesis that drugs were placed onboard in Darwin: application of the proviso

[56] It is necessary to return now to the possible application of the proviso. Recourse to the proviso could not cure the defect arising from the absence of evidence of the route from Darwin to Townsville, and the inadequacy (and in one respect inaccuracy) of the directions given in relation to passage through international waters. But the question arises whether in the end that imperils the conviction. For if Ms Abraham is right in submitting the prospect of the placing of the drugs onboard for the first time in Darwin is "inherently incredible" or "entirely out of the question", then there has been no miscarriage of justice, and the conviction should stand.

[57] The question arising under s 668E(1A) of the *Criminal Code* is "whether no substantial miscarriage of justice has actually occurred", notwithstanding the defect in the trial.

[58] Section 668E(1) and (1A) provides:

> "(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[59] The approach this Court should take to the possible application of the proviso was elucidated by the High Court in *Weiss v The Queen* (2005) 80 ALJR 444, critically in the following passages (p 454):

> "Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Second, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Third, the standard of proof of criminal guilt is beyond reasonable doubt.
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> …
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> That task is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.
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> …
>
> There are…some matters to which particular attention should be drawn. First, the appellate court's task must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict. The court is not 'to speculate upon probable reconviction and decide according to how the speculation comes out'. But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Second, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt."

[60] If the prospect of the introduction of the drugs to the vessel in Darwin was fanciful, such that the jury should have excluded it, then the misdirection and the evidentiary inadequacy in relation to that scenario becomes of no moment: no miscarriage of justice, substantial or otherwise, would then have occurred.

[61] The prospect of the introduction of the drugs onto the warship in Darwin is highly improbable to the point where reason dictates its exclusion.

[62] The following is confined to the evidence admitted against the appellant.

[63] One begins with the circumstance that Maio was an officer serving on the *Boxer* until about six months prior to the delivery of the drugs in Townsville, and that Labanon delivered the drugs in Townsville at Maio's request. The inference is very strong that the drugs were on the vessel during the time of Maio's active service on the ship, at times when it was in overseas places far distant from Australia. They were there when Labanon collected them for Maio, and had obviously survived the Inspector General's inspection of the ship in March 2005, which Petty Officer Brust said involved inspecting all spaces on the vessel – "for the most part", and that the inspection would lead to the removal of items which should not be present – "usually". We then pass to Maio's air travel from Manila to Brisbane on 5 June, thence on 8 June with the appellant to Townsville, where they hired a car on the basis it was to be returned on the Gold Coast. Labanon having delivered the drugs on 8 June, the appellant and Maio set off in the car, travelling south inferentially for the Gold Coast.

[64] There was no evidence to establish, or even suggest, that the drugs were placed onboard the ship in Darwin. Doing that would have involved Maio's enlisting the services of one or more crew members, which would have been inconvenient and very risky. Also and obviously, if the drugs were to Maio's knowledge in Darwin, why would he not have travelled there (if necessary with the appellant) to collect them, rather than to Townsville? Mr Glynn's response was that Maio may have identified a risk in a long car journey over "lonely roads" from Darwin to Townsville, with the possibility of police interception and inspection of the vehicle during the journey. Two things may be said about that. First, Maio and the appellant were prepared, with the drugs onboard, to make the also lengthy road journey from Townsville to the Gold Coast. (That was obviously done in order to avoid airport scanning.) Second and more fundamentally, there would be risk and inconvenience for Maio, not on the vessel, having others place the drugs onboard for him in Darwin.

[65] In the end the critical features are that Maio organised the recovery of his drugs from the vessel. He knew they were there, and where they were. He had last been on the ship months before, when it was in places foreign to Australia. In that context, the suggestion they may have been put onboard in Darwin (where there was no evidence even hinting at that possibility), where a sea voyage from Darwin to Townsville would carry a risk of detection and seem to achieve nothing to advance realistically Maio's object, which was to secure possession of the drugs, is seen to strain credibility to the point where the suggestion must be rejected. The theory simply cannot withstand rational analysis. In the terms of *Weiss*, above, "the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury".

[66] Hence the conclusion that notwithstanding the error committed in relation to that scenario, no substantial miscarriage of justice has actually occurred. The conviction must stand.

[67] In these circumstances, the appeal against conviction should be dismissed.

Application for leave to appeal against sentence

[68] The learned Judge made the following observations when sentencing the appellant:

> "You were plainly a principal in the enterprise. You met Maio at the airport when he arrived in Australia and took him to your home. You did much of the organising of the trip to Townsville, the hiring of a vehicle, the booking of a motel. You were involved in the purchase of the wrapping for the packets that the drugs were contained in. It is clear you stood to gain much by your involvement since very large sums of money were involved here. I am told that the wholesale price of the drugs uncut is somewhere in the order of one and a half million and the street value is somewhere in the order of 3.9 million and may be much greater depending upon the circumstances in which it was sold. There is not a great deal of dispute about the figure of 1.5 million and 3.9 million, although slightly lesser sums were contended for. The quantities involved are 10 times the commercial quantity provided for in the legislation.
>
> You made yourself scarce when the handover took place. But you took up a position where you could observe the man who brought the drugs to the motel and see him leave."

[69] His Honour appears to have proceeded on the basis that the criminality of the appellant and Maio was fairly comparable. Each was a principal in the enterprise. Mr Glynn for the appellant submits that the involvement of Maio "was much longer" and "much more significant". It was however open for the Judge to treat their criminality as of broadly comparable proportions. Each played a substantial role, even if Maio's extended over a somewhat longer period.

[70] The reason why Maio received a lesser term arose from his pleading guilty on the fourth day of the trial. While the Judge considered that not indicative of substantial remorse, he took the view – rightly, that it should have some mitigating effect. Also, Maio was to serve his sentence in a country in which he did not normally reside.

[71] The application is advanced on the basis there was a lack of parity in the sentencing of the appellant vis-à-vis the sentencing of Maio (cf *Postiglione v The Queen* (1997) 189 CLR 295, 301).

[72] But the difference between the penalties imposed was appropriately justified by the circumstances to which His Honour referred.

[73] The application for leave to appeal against sentence should be refused.

Orders

[74] The appeal against conviction should be dismissed, and the application for leave to appeal against sentence, refused.

[75] **McMURDO P:** I agree with the Chief Justice that the appeal against conviction should be dismissed but I have reached that conclusion by a slightly different path. Because the Chief Justice has set out the relevant facts and issues my reasons may be briefly stated.

[76] The first ground of appeal now pursued is that the primary judge "erred in directing the jury to the effect that 'importation' was established even if the

methylamphetamine was loaded on to the ship at Darwin if, on the voyage to Townsville it went outside the territorial waters of Australia and then re-entered such waters to berth in Townsville."

[77] The essence of the offence under s 233B(1)(a)(iii)[1] *Customs Act* 1901 (Cth) was that the appellant imported a commercial quantity of methylamphetamine into Australia. On the evidence admissible against the appellant, the most likely scenario was that the methylamphetamine came aboard the warship *USS Boxer* at some time before the ship entered Darwin, that it remained on board whilst the ship was docked in Darwin and that it then sailed on board the *Boxer* to Townsville where Petty Officer Labanon took it ashore as requested by Maio and delivered it to Maio. The far less plausible scenario was that the methylamphetamine came aboard the *Boxer* whilst it was docked in Darwin and then sailed with the *Boxer* from Darwin to Townsville.

[78] The judge told the jury that, in the event of the second scenario, if the drugs entered the vessel at Darwin and the vessel then sailed into international waters before reaching Townsville, the drugs would be coming from outside Australia into Australia and so would be imported.

[79] The term "imports" as used in s 233B is not defined in that Act. It bears its ordinary meaning: *Election Importing Co Pty Ltd v Courtice*;[2] *R v Bull*[3] and *McGurk v Customs*.[4] The Macquarie Dictionary's primary definition of "import" is "to bring in from a foreign country, as merchandise or commodities, for sale, use, processing, or re-export". Secondary definitions relevantly include "that which is imported from abroad; an imported commodity or article" and "the act of importing or bringing in; importation, as of goods from abroad". Its definition of "abroad" includes "any place outside one's own country, especially if overseas".

[80] In *Bull* Gibbs J expanded on the meaning of "import":

> "It does not conform to ordinary usage to say that goods are imported into a place if they are brought there in the course of transit but with no intention that they should be unloaded there ... Even if goods are brought into port they are not necessarily imported; for example, a cargo being carried from England to New Zealand is not imported into Australia when the ship on which it is carried puts into an Australian port en route: *Wilson v Chambers & Co Pty Ltd* ((1926) 38 CLR 131, at pp 138-139, 147, 150). Similarly, goods are not 'imported into a harbour' by being carried through the limits of the harbour and then landed elsewhere: *Wilson v Robertson* ((1855) 24 LJQB 185). However, if goods are brought into port with the intention of being discharged there they are imported: *Wilson v Chambers & Co Pty Ltd* ((1926) 38 CLR, at pp 136, 147, 150); and see also *Forbes v Traders Finance Corporation Ltd* ((1971) 126 CLR 429, at pp 443-444)."[5]

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1 This section was repealed by s 61 *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth).

2 (1949) 80 CLR 657, Williams J, 661 - 662.

3 (1974) 131 CLR 203, 254.

4 (1987) 73 ALR 381, 389.

5 See fn 3.

[81] It follows that if the methylamphetamine was brought into Darwin on the *Boxer* from abroad merely in transit and not with the intention of being unloaded there but at a later port of call, and was then transported on the *Boxer* to Townsville where it was taken ashore, the drugs were not imported into Australia in Darwin but in Townsville. This conclusion is not controversial. It is consistent with *Bull* and *McGurk v Customs*[6] and the trial was rightly conducted on this basis.

[82] Consistent with its ordinary meaning, "imports" in s 233B means brings goods (here, methylamphetamine) into Australia from abroad, that is, from some place outside Australia, not necessarily from a foreign country. For example, prohibited drugs manufactured on a ship in international waters and brought into Australia would be imported into Australia under s 233B. But, consistent with *Bull*, if the goods came by ship in transit through Darwin with the intention of unloading at the later port of call, Townsville, where they were subsequently unloaded or intended to be unloaded, they would be imported into Australia in Townsville, not Darwin.

[83] But what is the position if, as in the second suggested scenario here, the drugs are put on a vessel in Darwin with the intention of delivery to Townsville and in transit the vessel sails into international waters? In the absence of clear authority (and neither party has provided any) I cannot accept that the ordinary meaning of "imports" in s 233B is that drugs placed on a ship in Darwin for transportation to Townsville which are taken into international waters in transit to Townsville from Darwin are then imported into Australia. To import goods into Australia under s 233B it is in my view necessary that the goods are sourced from outside Australia, that is, from abroad. What then of the person who takes prohibited drugs from Australia to another country and then returns to Australia with some or all of the drugs? Has the person then imported the drugs into Australia? The answer will turn on the precise factual matrix. If the goods were taken abroad for export, perhaps so; if for personal use during an overseas trip, perhaps not. In any case, alternative State charges relating to the possession of the prohibited drug would presumably be open. In my view the judge erred in directing the jury that they could convict the appellant of importing the drugs if they were satisfied that he was knowingly involved in placing the methylamphetamine on board the *Boxer* in Darwin and it travelled into international waters on its way to Townsville. That error means the appeal must be allowed unless this Court is of the opinion that it should dismiss the appeal because no substantial miscarriage of justice has actually occurred: s 668E(1A) *Criminal Code*. I will return to this issue after considering the remaining grounds of appeal.

[84] The appellant's second ground of appeal, which concerned his Honour's directions as to the likelihood of the *Boxer* sailing through international waters when en route between Darwin and Townsville, becomes otiose in light of my interpretation of the meaning of "imports" in s 233B(1)(a)(iii). In case I am wrong in that interpretation I will deal briefly with this issue. The evidence on this point was certainly sparse. It would have been prudent for the prosecution to have dealt more comprehensively with it at trial. The judge rightly told the jury that international waters commenced 12 nautical miles offshore.[7] The jury can be taken to know the comparable geographical positions of Darwin and Townsville and were entitled to infer in the

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6 (1987) 73 ALR 381, 388.

7 *Seas and Submerged Lands Act* 1973 (Cth), s 7; *Commonwealth of Australia Gazette* 9 February 1983; 13 November 1990; and 6 September 2000; and the map of Queensland forming part of the *Seas and Submerged Lands Act.*

absence of contrary evidence that a large warship like the *Boxer* with about 1,000 crew would travel at some point across the Gulf of Carpentaria in the week it took sailing from Darwin to Townsville. As the Chief Justice explains, the mouth of the Gulf appreciably exceeds 24 nautical miles.[8] I am satisfied that the jury were entitled to find that the only rational inference from the evidence was that the *Boxer* in travelling between Darwin and Townsville travelled outside Australian territorial waters into international waters.

[85] If I am also wrong on this view, I record my agreement with the Chief Justice that the jury were entitled to reject as inherently improbable on the evidence admissible against the appellant that the methylamphetamine was placed on the *Boxer* in Darwin rather than somewhere outside Australia.

[86] I also agree with the Chief Justice's reasons for concluding that the jury were entitled to find on the evidence admissible against the appellant that he knew the drugs found in his possession had been imported from abroad on the *Boxer*.

[87] I return now to the question of whether this case is a suitable one in which to apply the proviso in s 668E(1A) *Criminal Code* despite his Honour's error in instructing the jury as to the meaning of "imports" in s 233B. This Court's task in considering that issue is to independently evaluate the evidence to determine if it is satisfied beyond reasonable doubt of the guilt of the appellant; if so there is no substantial risk of a miscarriage of justice: *Weiss v The Queen*[9] and *Darkan v The Queen*.[10] The facts set out by the Chief Justice well demonstrate that the case against the appellant, though circumstantial, was overwhelming, despite his contrary but unconvincing sworn evidence denying any involvement with Maio in the importation of the methylamphetamine. I am well satisfied of his guilt beyond reasonable doubt. Despite the judge's error in explaining the meaning of "imports" in s 233B no miscarriage of justice has occurred and the appeal against conviction should be dismissed.

[88] I also agree with the Chief Justice's reasons for refusing the application for leave to appeal against sentence.

Order

[89] 1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence refused.

[90] **CHESTERMAN J:** Section 668E of the *Criminal Code* provides:

> "(1) The Court on any … appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided

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8 At [45].
9 (2005) 80 ALJR 444, [35] - [36], [39], [41], [43] - [47].
10 [2006] HCA 34, Gleeson CJ, Gummow, Heydon and Crennan JJ, [83] and [84].

> in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[91] The High Court has recently explained how a court of criminal appeal should approach the application of the proviso found in subs (1A). In *Weiss v The Queen* (2005) 80 ALJR 444 the court said (at 453 [35]):

> "The fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the appeal. In so far as that task requires considering the proviso, it is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do. Rather, in applying the proviso, the task is to decide whether a 'substantial miscarriage of justice has actually occurred'."

[92] The court offered this further guidance (at 454 [39] and [41]):

> "Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Second, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Third, the standard of proof of criminal guilt is beyond reasonable doubt.
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> …
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> That task is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty…' (footnotes omitted)

[93] The case against the appellant was a circumstantial one. The jury was invited to infer guilt from circumstances which were proved beyond all doubt. The question for the jury was whether the only reasonable inference from those facts was that the appellant was guilty of importing the methylamphetamine. In such a case the task of the appellate court to determine whether there has been a substantial miscarriage of justice is easier than in those cases where guilt depends upon an assessment of contested evidence. An appellate court is in as good a position as a jury to determine whether a circumstantial case is such that there is no reasonable inference arising from the facts which is consistent with the appellant's innocence.

[94] In the present appeal the point is whether a lacuna in the evidence produced by the prosecution allows of an inference that the accused was not guilty. Putting it another way the question is whether it is a reasonable possibility that the drugs were loaded on to the *Boxer* in Darwin. If it is not a reasonable possibility then the only

reasonable inference from the proved facts is that they were on board the ship before she arrived in Darwin, and came from abroad.

[95] In undertaking this analysis one bears in mind the caution sounded by the High Court in *Weiss* (at 455 [44]):

> "It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."

[96] The only evidence in support of the proposition that the drugs may have been boarded at Darwin came in the cross-examination of Petty Officer Brust (AR79.15-25):

> "[T]he Boxer had been to another port in Australia before it came to Townsville though, hadn't it? -- Yes, it had.
> And that … was Darwin? -- Yes, it was.
> And it had been in Darwin for a period of time? -- Yes.
> And there was nothing to stop people purchasing or bringing items onto the … ship in Darwin? -- Other than normal regulatory stuff, no, there is nothing to stop them from.
> And people had shore leave in Darwin? -- Liberty leave, yes.'

[97] This evidence then establishes the possibility. There will have been no substantial miscarriage of justice if the circumstances actually proved beyond reasonable doubt by the Crown excluded it as a reasonable possibility: if those circumstances established that the only reasonable inference is that the drugs were on board the *Boxer* when she arrived in Darwin.

[98] The facts are set out in the reasons for judgment of the Chief Justice. It is not necessary to repeat them nor to duplicate his Honour's analysis of them. The appellant's submission is that it is a reasonable inference that the carriage of 7 kg of methylamphetamine destined to be sold in and about the Gold Coast was intended to be effected by two separate means of conveyance: by United States warship from Darwin to Townsville and by motor vehicle from Townsville to the Gold Coast. The inference must necessarily accommodate the presence of Maio, a foreigner, who travelled from the Philippines to Brisbane and then to Townsville for the transportation of the drugs in this purely domestic transaction. The carriage of the drugs in this way involved the risks of detection in loading and unloading the drugs from *Boxer*. The only reason advanced for this mode of transport is that it avoided the risks of detection by a random police enquiry on the long journey by road from Darwin to the Gold Coast. This advantage loses much, if not all of its force, when it is remembered that the appellant and Maio embarked upon a long car journey from Townsville to the Gold Coast.

[99] For the reasons described by the Chief Justice it is not a reasonable inference that the drugs were placed on board the *Boxer* in Darwin. The only reasonable inference to draw, particularly from Maio's involvement, is that the drugs were put on board in some foreign port. It is an appropriate case to dismiss the appeal because no substantial miscarriage of justice has actually occurred.

[100] I agree with the orders proposed by his Honour.