SUPREME COURT OF QUEENSLAND

CITATION:	*R v Douglas* [2014] QCA 104
PARTIES:	**R** **v** **DOUGLAS, Scott David Pelham** (appellant/applicant)
FILE NO/S:	CA No 320 of 2012 SC No 115 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2014
JUDGES:	Muir and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction be dismissed.** **2. The application for appeal against sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – PARTICULAR CASES – where the appellant was convicted after a trial of attempting to possess a commercial quantity of a border controlled drug reasonably suspected of having been imported contrary to s 307.8(1) and s 11.1(1) of the *Criminal Code* 1995 (Cth) – where the appellant contended that a sentence had been included in the tendered admissions document by mistake – where the inclusion of the sentence was not agreed upon by the parties – whether the sentence was admissible – whether placing inadmissible evidence before the jury was prejudicial CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant checked into two different motels under fake names – where parcels were delivered to the motels – where powder partly composed of MDMA was found inside one of the parcels – where a man posing as a police officer came to the motel seeking to

question the motel owner about the appellant – where inquiries revealed that no police officer had attended the motel – whether the trial judge erred in directing the jury that the evidence of someone else being involved was simply someone coming and asking for the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant argued that the primary judge erred in not directing the jury that the Crown was required to prove beyond reasonable doubt that the appellant intended to possess a substance and that the appellant knew or believed that the substance was a border controlled drug – where the appellant contended that he attempted to possess the parcel but not with knowledge that it contained MDMA – whether the trial judge erred in his directions on the fault elements of the offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the associate to the trial judge failed to say "so says your speaker, so say you all" when delivering the verdict – whether the trial judge erred in failing to ensure beyond reasonable doubt that the verdict of the jury was unanimous

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to nine and a half years imprisonment with a non-parole period of six years – where the appellant pleaded not guilty – whether in regards to all relevant circumstances the sentence was manifestly excessive

Criminal Code 1995 (Cth), s 3.2, s 5.2, s 5.3, s 11.1, s 300.5 s 307.8, s 644, s 668E

Darkan v The Queen (2006) 227 CLR 373; [2006] HCA 34, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered
Milgate v The Queen (1964) 38 ALJR 162, considered
Nudd v The Queen (2006) 80 ALJR 614; [2006] HCA 9, considered
Patel v The Queen (2012) 247 CLR 531; [2012] HCA 29, followed
R v Burling & Gill [2011] QCA 51, distinguished
R v Grippo Sentencing Remarks, Boddice J, Indictment No 451 of 2013, 28 August 2013, distinguished
R v Harris [2009] QCA 370, distinguished

R v Maya & Kennedy [2012] QCA 123, considered
R v Olbrich (1999) 199 CLR 270; [1999] HCA 54, considered
R v Oprea [2009] QCA 184, distinguished
R v Sparks [2005] QCA 435, considered
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, considered
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, followed
Weng v The Queen (2013) 279 FLR 119; [2013] VSCA 221, considered

COUNSEL: The appellant/applicant appeared on his own behalf
M Woodford for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MUIR JA**: **Appeal against conviction** The appellant appeals against his conviction on 2 November 2012 after a two day trial of attempting to possess a commercial quantity of a border controlled substance reasonably suspected of having been imported contrary to s 307.8(1) and s 11.1(1) of the *Criminal Code* 1995 (Cth) (the Code). He was sentenced on 5 November 2012 to nine and a half years imprisonment with a non-parole period of six years. He appeals against his conviction on the grounds identified and discussed below and applies for leave to appeal against the sentence on the grounds that it was manifestly excessive.

[2] Before addressing the grounds of appeal, it is instructive to outline the evidence before the jury.

The evidence

[3] Jacqueline and Peter Hannah owned and managed the Anchorage Motor Inn at 18 Bowman Road, Caloundra in 2010. Its telephone number was (07) 5491 1499.

[4] On 6 July 2010, a man identifying himself to Mrs Hannah as "Ben Connors" filled in a reservation booking sheet for six nights in the name Ben Connors, giving an address of 6 Jade Street, Bowen Hills and a car registration number 165-KEJ. He was allocated room 22.

[5] Mrs Hannah, observing that the motor vehicle registration number on the booking sheet did not coincide with that on the vehicle she could see through the motel office window, queried the number. The appellant said something to the effect that he was driving "a different" or "the other" or "my other" vehicle today. Mrs Hannah wrote 935-MYE, the number she saw on the vehicle outside, on the reservation booking sheet. It was admitted by the defence that the appellant was the registered owner of a black Jeep Cherokee four-wheel drive with that registration number.

[6] Mrs Hannah also wrote down a phone number that she said that she would have asked the appellant for: 0416 486 716. At all material times that number was in the name of Julie Waters, 1/501 North Hill Drive, Robina Qld 4266.

[7] The appellant told Mrs Hannah that he did not have a licence with him. He did not produce a credit card and, in accordance with the Hannahs' requirements, the appellant paid a cash deposit of $100. He also paid the room price of $520 for the six nights booked by him.

[8] The motel's closed-circuit television (CCTV) security cameras showed the appellant booking into the motel.

[9] A couple of days later, Mrs Hannah checked room 22 and noticed that it looked unused. She did not see or have telephone contact with the appellant after he checked in. He checked out of the motel on 13 July 2010. Mr Hannah recalled that as he was leaving, the appellant said to him, "I've got a package coming, it should have been here by now". Mr Hannah said to the appellant, "if the phone number on the records was the phone number, [he would] give him the call". He said that the appellant "agreed the phone number was correct and that was it".

[10] On 16 July 2010, a man posing as a police officer came to the motel seeking to question Mr Hannah about a "Mr Connors". He did not ask Mr Hannah about the package. As he lacked convincing police identification, Mr Hannah spoke to the police about him. Inquiries revealed that no Queensland police officer had attended the motel that day.

[11] A parcel addressed to "Ben Connors, Anchorage Unit 22, 18 Bowman Road, Caloundra Qld 4551 Australia" was delivered to the motel on 16 July 2010 after the visit by the bogus police officer. Mrs Hannah telephoned 0416 486 716, the number written by "Ben Connors" on the booking sheet. The call went through to an answering machine and Mrs Hannah left a message that a parcel had arrived.

[12] The appellant telephoned the motel on 17 July 2010 and left a couple of messages with the receptionist. On 18 July 2010, Mr Hannah contacted the police about the parcel and a police officer took possession of it. "EMS Xpresspost – International" documentation attached to the parcel stated that it was sent from Chilliwack, British Colombia, Canada on 7 July 2010 and that it contained a "Pioneer Hdmi Receiver". The parcel, in fact, contained a "JVC stereo receiver ampli-tuner stereo" as well as a flat rectangular package under a user guide taped to the stereo which contained 1,014.9 grams of powder which was comprised in part of 545 grams of pure MDMA.

[13] Mrs Hannah saw the appellant when he called at the motel on 19 July 2010 concerning the parcel. Mr Hannah, who was also present, told him about the bogus policeman and showed him some CCTV footage of the man. He also told the appellant that he had contacted the police about the impersonator and that the police had collected the parcel.

[14] There was evidence concerning another hotel booking made by the appellant on 6 July 2010 using another alias. It was admitted that:

> On 6 July 2010, [the appellant] booked room 10 at the Watermark Resort, 38 Maloja Avenue, Caloundra … for the period 6 July 2010 to 13 July 2010 … in the name of Ron Green, 3 Jade Street, Bowen Hills. On 9 July 2010, the booking was changed to room 22."

[15] The appellant paid a $500 cash deposit on making the booking with Mrs Martens, who managed the Watermark Resort with her husband. She was given the

telephone number 0416 486 716 by the appellant who she noticed was driving a black Jeep Cherokee wagon. Mrs Martens moved the appellant to another room after approximately three days. She said in evidence-in-chief that it appeared that the appellant had not stayed in the first room. In cross-examination she conceded that she had said on an earlier occasion that there were signs that the customer had stayed in room 10 for one night.

[16] Ms Martens, Mr and Mrs Martens' daughter, was a receptionist at the Watermark. She spoke to "Mr Green" on the telephone during the period of his booking about the change of rooms but never saw him. He said to her in the conversation that he had stayed at a friend's house after the State of Origin and that he would drop the key back later. Mrs Martens recalled that when "Ron Green" checked out of the Watermark on 13 July 2010 she observed that she had not seen him around and that she did not feel that "he'd actually stayed here with us". "Ron Green" responded, "Oh, yeah, that's right, I had a few too many drinks and crashed at a friend's place". He then said, "I'm expecting a parcel from a friend of mine … Can you just ring me when it comes and I'll just swing by and pick it up".

[17] Mr Martens arguably conceded in cross-examination that he did see "Ron Green" at the Watermark. Defence counsel did not seek any amplification of this evidence. Mrs Martens said that after "Ron Green" checked out, she inspected the room and it appeared to her that no-one had stayed in it.

[18] The appellant returned to the Watermark one or two days after he checked out and spoke to Mr Martens. He asked Mr Martens if the package had arrived and was told that it had not.

[19] Mrs Martens gave evidence to the effect that "maybe" a day or two after the appellant checked out a large, quite heavy package arrived and she left a message on "Ron Green's" telephone number concerning it.

[20] Mr Martens' recollection was that a parcel for "Mr Green" was delivered to the motel. It was about the size of desktop computer hard drive and was "far heavier than … that sort of equipment [a sub-woofer] would be".

[21] Mr Martens telephoned "Mr Green" on the number given by "Mr Green" and left a message. After Ms Martens rang that number and left a message, "Mr Green" collected the parcel from her.

[22] The appellant did not give or call evidence.

[23] It is now convenient to address the grounds of appeal.

[24] The only ground identified in the original Notice of Appeal was "the verdict was unsafe and unsatisfactory". That ground was abandoned and a number of other grounds were added pursuant to leave given on 22 October 2013.

Ground 1 - The jury were provided with facts not admitted by the defence

[25] During the trial, a document headed "Admissions" was tendered. It stated that the appellant made admissions, including the following, pursuant to s 644 of the Code:

> "**Motel Bookings**
>
> 1. On 6 July 2010, the accused, Scott David Pelham Douglas, booked room 22 at the **Anchorage Motor Inn**, 18 Bowman

Road, Caloundra. The booking was for the period 6 July 2010 to 13 July 2010. The booking was made in the name of **Ben Connors, 3 Jade Street, Bowen Hills**.

2. On 6 July 2010, the accused, Scott David Pelham Douglas booked room 10 at the **Watermark Resort**, 38 Maloja Avenue, Caloundra. The booking was for the period 6 July 2010 to 13 July 2010. The booking was made in the name of **Ron Green, 3 Jade Street, Bowen Hills**. On 9 July 2010, the booking was changed to room 22."

[26] The appellant contended that the last sentence of paragraph 2 above was included in the tendered admissions document by mistake and that its exclusion had been agreed between the prosecution and the defence. He submitted that the placing of such inadmissible evidence before the jury was extremely prejudicial to him as the only reasonable inference to be drawn from it was that "the person described by Ms Rebecca Martins (sic) as Ron Green who she dealt with on the phone, handed her keys on 9 July 2010 and later picked up a parcel". He submitted that he was also disadvantaged as Ms Martens gave her evidence by telephone and that, in consequence, the defence did not have the opportunity to exclude the appellant as the person to whom Ms Martens referred in her evidence.

[27] In an affidavit filed on 14 January 2014, the appellant swore that Annexure B to the affidavit was, to the best of his knowledge, a copy of the original and that he had instructed his legal representatives that the document contained admissions which he had not made. He further swore that he witnessed his legal representative put a line through the last sentence of paragraph 2 of the admissions document. The document exhibited has a line through that sentence as well as through the last sentence of paragraph 1 of the document and the first sentence of paragraph 4. The second page of the two page document appears to bear the signatures of defence counsel and the appellant. The alterations on the first page are not initialled.

[28] Counsel for the respondent noted that the admissions document was tendered by consent without objection and that the appellant did not place before the Court any evidence on the issue from his legal representatives at trial. It is, however, unnecessary to pursue the question whether the offending sentence accidentally found its way into Exhibit 1.

[29] There was clear and unchallenged evidence from Ms Martens that she spoke to "Mr Green" concerning the change of rooms and that she saw him when he dropped a room key off to her in connection with the room change. Mrs Martens also gave relevant evidence. She, as the above factual account shows, checked "Mr Green" into the resort, was instrumental in moving him to another room and had a conversation with him when he checked out concerning the parcel he was expecting and his failure to use his room. It was admitted or uncontested that: the appellant booked the room at the Watermark Resort on 6 July 2010; Mrs Martens took the booking face to face and dealt with the appellant face to face when he checked out; various telephone calls were made from the Watermark to the number given by the appellant, at least one of which was responded to by him. Those facts gave rise to an inescapable inference that the "Ron Green" with whom the Martens' dealt was the appellant.

[30] The sentence complained of thus merely stated an incontrovertible fact which was proved by uncontested evidence.

[31] The complaint about the defence not having the opportunity to exclude the appellant as the person to whom Ms Martens was referring in her evidence also lacks substance. Defence counsel did not require her attendance and there were sound forensic reasons for concluding that her presence would be unlikely to assist the appellant's case. In those circumstances, the appellant is bound by the conduct of his counsel.[1]

Ground 2 – The trial judge erred in directing the jury that the evidence of someone else being involved was simply someone coming and asking for the appellant

[32] In summing up concerning whether the prosecution established an intention on the part of the appellant to possess the substance in the parcel, the trial judge summarised the prosecution and defence contentions. In relation to the latter, his Honour said:

> "The defence submits that there's an alternative hypothesis which relates to his state of mind, to his intention. Its submission focuses on paragraph (c), as we'll see shortly, and that's the one you've asked about, but it also makes that submission in relation to (a) because you can't find that he meant to get the drug if he didn't know anything about it and the defence says that it's a reasonable hypothesis to say that he might have not known anything about it even though he did all these odd things that the Crown relies upon. The defence says, 'Oh, well, he might have been a patsy. He might have been silly. He might have been in the grip of some drug master mind.' Oh, well, it's up to you to say whether you think that that really is an hypothesis which can be inferred from the actual evidence that you've got."

[33] The trial judge then said:

> "The evidence of somebody else being involved simply is someone else coming and asking for this man. There was no request about the parcel, you'll remember, made to the innkeeper. It was all simply about this man in that room and who knows, the Crown wouldn't say what that was all about."

[34] The appellant submitted that, in the passage immediately above, the trial judge misstated the evidence. It was contended that the evidence of somebody else being involved is not limited to the attendance of the bogus police officer and was used by the defence to support the theory that the appellant was "just a patsy".

[35] It was contended by the appellant that if the subject direction had not been given, it was reasonably possible that the jurors would not have inferred that the appellant intended to get the substance in the package. In that regard, it was said that the evidence of someone else being involved was supported by evidence that:

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1 *Patel v The Queen* (2012) 247 CLR 531 at 550 [65] and 562 [114]; *TKWJ v The Queen* (2002) 212 CLR 124 at 134–135.

- the parcel was delivered soon after the bogus police officer visited the motel;
- the bogus police officer deliberately attempted to conceal his identity from a CCTV camera;
- a photocopy of the appellant's driver's licence was in the possession of the bogus police officer;
- the telephone number 0416 486 716 was not in the appellant's handwriting;
- the mobile telephone service 0416 486 716 was not registered to the appellant; and
- an unidentified person also collected a parcel from the Watermark Resort.

[36] The passages from the summing up quoted above were from redirections given by the trial judge after the jury had requested clarification of "the process of reasoning in circumstantial evidence and drawing inferences, and also [clarification of] paragraph (c) of section 307.8, the explanation of knowledge and intention". The trial judge had earlier summarised the defence argument to the effect that the appellant "was just a patsy". Defence counsel did not complain about either version of the trial judge's summaries. That was no doubt because the trial judge's summaries were an accurate reflection of the defence case, including the proposition that the appellant was "just a patsy".

[37] The trial judge had made it clear to the jury in his summing up that the comments made by him on the facts were not binding, could be disregarded by the jury and that the jurors were the sole judges of fact.

[38] The prosecution case was extremely compelling. The observations of the trial judge under consideration were factually accurate and not misleading. The making of such comments was well within the province of a trial judge.[2] The appellant's assertions about the evidence were not completely accurate. It was not established that the "photocopied thing on a bit of paper" was a copy of a driver's licence, let alone a copy of the appellant's driver's licence.

[39] The fact that the appellant made use of another person's telephone number does not show that such person had any further or conscious involvement in the appellant's activities. The fact that an unidentified person collected the parcel from the Watermark also has little significance. The most likely explanation for the absence of identification is that the parcel was collected on Mrs Martens' day off. Ms Martens, who had spoken to "Mr Green" but not seen him, was on reception when the package was collected in response to Mrs Martens' telephone message. Mr Martens, who does not recall seeing the person who picked up the package, does recall that "Mr Green" came to the motel and enquired about it on an occasion after he checked out. The circumstances surrounding the writing down of the telephone number of the Anchorage Motor Inn's booking sheet are discussed in the reasons in respect of the application for leave to appeal against sentence.

[40] This ground was not made out.

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2 *RPS v The Queen* (2000) 199 CLR 620 at 637.

Ground 3 – The trial judge erred in his directions on the fault elements of the offence

[41] Sections 3.2, 5.2(2), 5.3, 11.1, 300.5 and 307.8 of the Code relevantly provide:

> "**3.2 Establishing guilt in respect of offences**
>
> In order for a person to be found guilty of committing an offence the following must be proved:
>
> (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
>
> (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.
>
> Note 1: See Part 2.6 on proof of criminal responsibility.
>
> Note 2: See Part 2.7 on geographical jurisdiction.
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> …
>
> **5.2 Intention**
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> …
>
> (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
>
> …
>
> **5.3 Knowledge**
>
> A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.
>
> …
>
> **11.1 Attempt**
>
> **(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.**
>
> (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
>
> **(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.**

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

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

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

(a) committing the offence attempted is impossible; or

(b) the person actually committed the offence attempted.

…

300.5 Particular identity of drugs, plants and precursors

If, in a prosecution for an offence against this Part, it is necessary for the prosecution to prove that a person knew, or was reckless as to whether, a substance or plant was a controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border controlled precursor, it is not necessary for the prosecution to prove that the person knew, or was reckless as to, the particular identity of the controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border controlled precursor.

…

307.8 Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance is reasonably suspected of having been unlawfully imported; and

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

(d) the quantity possessed is a commercial quantity.

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

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

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

[42] The appellant's argument was to the following effect. The primary judge erred in not directing the jury that the Crown was required to prove beyond reasonable doubt that the appellant intended to possess a substance and that he knew or believed that

the substance was a border controlled drug. This requirement flows from s 307.8(1)(c), s 307.8(3) (the fault element for para (1)(c) is recklessness), s 5.2 (definition of intention) and s 5.3 (definition of knowledge).

[43] The defence case was that the appellant "did attempt to possess the parcel but not with knowledge that what was in the parcel was the drug that they found".

[44] The primary judge relevantly directed as follows:

> "As I said, it's not challenged that he did the three acts that I referred to a moment ago, but there has to be a mental element as well. The [appellant] must either have known that the MDMA was in the box or going to be in the box when he did the acts in question, or he must have intended to get the MDMA in the box regardless of whether he actually knew it was there or didn't. He maybe just suspected it might be there or thought it was there, or something, but if you intended to get it, that's the second alternative there. So, he must have either known of the drug being there when he did the acts or intended to get it."

[45] After this passage, the trial judge summarised the prosecution and defence submissions relating to the requisite mental elements of the offence. He said that "the Crown submits that you should infer that mental element from his conduct" and went on to list the factual matters relied on by the prosecution to support its contention that from such facts the jury should infer that the appellant "knew that the MDMA was in the box, or intended that it be in the box and intended to get it".

[46] In stating the defence case, the trial judge said:

> "The defence says that that hypothesis is he didn't have the necessary knowledge or intention, he was just a patsy, somebody being used by some other person, and that the presence of the police pretender shows that."

[47] The primary judge gave a redirection which included the following:

> "I referred to 'attempt' when I began to give you the law on the matter and I told you that there had to be the conduct and the mental element…
>
> Now, the mental element that's required for paragraph (a) is the intention to possess the substance. To intend to get it really simply means that the [appellant] meant to get it, that he did what he did meaning to get the substance.
>
> The Crown submits that the only inference that you can draw is that he did mean to get the substance and it submits you should infer from his conduct that that was what he meant to do. Otherwise why would he come to the motel with no reservation, pay by cash, not by credit card, give the false registration to the vehicle, give a false excuse for giving the wrong registration, not need or use the room and not go to the police station to collect the parcel?...

> The defence submits that there's an alternative hypothesis which relates to his state of mind, to his intention. Its submission focuses on paragraph (c), as we'll see shortly, and that's the one you've asked about, but it also makes that submission in relation to (a) because you can't find that he meant to get the drug if he didn't know anything about it and the defence says that it's a reasonable hypothesis to say that he might have not known anything about it even though he did all these odd things that the Crown relies upon. The defence says, 'Oh, well, he might have been a patsy. He might have been silly. He might have been in the grip of some drug master mind.' Oh, well, it's up to you to say whether you think that that really is an hypothesis which can be inferred from the actual evidence that you've got…
>
> Well, that's the first element. That's (a). Let me go now to the one you specifically asked about, (c).
>
> I told you as a matter of law, MDMA is a border-controlled drug. It's in the list of drugs in a statute that says it's a border-controlled drug. So, you can take that from me that it is a border-controlled drug. But there is a mental element required for (c) and the question as regards to the mental element is whether the [appellant] knew or believed that there was MDMA in the box. Now, there's a bit of a difference between knowing it's there – that implies some level of certainty – and believing that it's there. If he knew or believed that that was the position, then the mental element is satisfied."

[48] Counsel for the respondent submitted, and I accept, that s 307.8(1)(c) is a circumstance. By virtue of s 11.1(3) "intention and knowledge are fault elements in relation to each physical element of the offence attempted". Consequently, by virtue of s 5.2(2), the appellant had "intention with respect to [that] circumstance if he … believe[d] that it exist[ed] or [would] exist".

[49] There was no need for the trial judge to go back over his earlier direction in relation to s 307.8(1)(a) in which he dealt with intention to possess at some length. The jury did not seek a redirection in that regard. The thrust of the appellant's argument on this ground thus lacked substance.

[50] There is, however, a question in relation to the summing up which was not adverted to in the notice of appeal or the appellant's argument. The trial judge, declining to accept the prosecutor's submissions to the contrary, directed that the requisite knowledge, belief or intention for the purposes of s 307.8(1)(c) related to the drug MDMA and not to "a border controlled drug". The prosecutor and defence counsel had addressed the jury on the basis that the prosecution was required to prove that the appellant had knowledge of and an intention to possess a border controlled drug in the package; not that he knew that the drug was MDMA and that he intended to possess that drug.

[51] The primary judge appears to have been motivated by a desire to exclude from the jury's consideration matters he regarded as improbable or hypothetical. The following exchange occurred in the course of argument in relation to the trial judge's proposed direction:

"HIS HONOUR: Well, it's most improbable that he was going there to get some drug or other that he had no knowledge of what it was----

DEFENCE COUNSEL: That might-----

HIS HONOUR: -----that it was just a border-controlled one. You couldn't draw that inference here.

DEFENCE COUNSEL: Well, that - that might - that might be less likely, but in my submission, there are two - there are those two paths to - to that element.

HIS HONOUR: Yes. Well, I think we'll keep the summing-up practical here."

[52] Defence counsel supported the approach the trial judge proposed and later took. His conduct in so doing, objectively viewed, is readily explicable as a rational forensic decision.[3]

[53] The primary judge's direction was erroneous. It is inconsistent with s 300.5 of the Code which relevantly provides:

> "If, in a prosecution for an offence against this Part, it is necessary for the prosecution to prove that a person knew, or was reckless as to whether, a substance or plant was a … border controlled drug, … it is not necessary for the prosecution to prove that the person knew, or was reckless as to, the particular identity of the … border controlled drug, ..."

[54] In my view, the limiting of the direction to MDMA, one of a great many border controlled drugs, favoured the defence. As a general proposition, a person acting as the appellant did was more likely to know or believe that the package he was at such pains and expense to take delivery of contained drugs rather than a particular drug.

[55] Nevertheless, it was open to the jury on the whole of the evidence to be satisfied beyond reasonable "doubt"[4] that the appellant was guilty of attempting to possess a border controlled substance. The appellant paid $520 in cash for six nights accommodation in a motel room which he occupied for one night at the most. When booking at the Anchorage under a false name, he avoided giving his address and attempted to give a false motor vehicle registration number. He did not go to the police station to collect his parcel after being told where it was. At around the same time, he booked another room under a false name at the Watermark, which he did not use either. That booking was also made for the purpose of using the Watermark as an address to which a parcel could be delivered to him. He paid a cash deposit of $500 at the Watermark and was persistent in his attempts to take delivery of both parcels until he found that the police had possession of the one sent to the Anchorage.

[56] Clearly the appellant believed that something that was both illegal and of very considerable value was being sent to him. One of the parcels was found to contain

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3 See *Nudd v The Queen* (2006) 80 ALJR 614 at [9] per Gleeson CJ.

4 *M v The Queen* (1994) 181 CLR 487 at 494–495.

a border controlled substance. It may readily be inferred that the appellant believed that he was to receive such a substance.

[57] The evidence does not indicate the knowing involvement of anyone else in Australia in the appellant's activities in relation to the two parcels. In the circumstances discussed above, it is highly improbable that the appellant was unaware of the intended content of the parcels and that he did not believe that the parcels would contain the border controlled drug, MDMA. It was thus open to the jury on the whole of the evidence to be satisfied of the appellant's guilt on the basis of the summing up.

[58] It is clear that if the trial judge had summed up consistently with s 300.5, the jury, having convicted on the basis of a summing up more favourable to the appellant, would have returned a guilty verdict. After making an independent assessment of the evidence and making due allowance for the natural limitations inherent in doing so on the record,[5] I have concluded that the appellant was proved beyond reasonable doubt to be guilty of the offence of attempting to possess a commercial quantity of a "border controlled substance, namely 3,4 – Methylenedioxymethamphetamine" and that "no substantial miscarriage of justice has actually occurred".[6]

[59] For the above reasons, this ground was not made out.

Ground 4 – The trial judge erred in failing to ensure beyond reasonable doubt that the verdict of the jury was unanimous

[60] At the conclusion of his summing up, the trial judge said:

> "When you're agreed upon your verdict, notify the bailiff. The procedure on your return will be this: you'll be asked by the clerk of the court if you're agreed upon a verdict. You should all answer, 'Yes,' to show that you have done so. Of course, if you haven't all agreed, say, 'No,' and make sure I see you."

[61] When the verdict was delivered, the procedure set out by the trial judge was followed except that there was no inquiry, "so says your speaker, so say you all". After the jurors were discharged, the following exchange took place:

"PROSECUTOR:	Can I just raise one thing that I feel obliged to raise only because it's something that's never come up before in my experience, that the time-honoured words, 'Thus says your speaker, thus so says you all?' I don't recall was used, but I didn't see any dissent among the jury to the verdict that was given.
HIS HONOUR:	Oh.
DEFENCE COUNSEL:	I thought they were used.
ASSOCIATE:	Yeah, sorry maybe not. I said 'guilty, your Honour' and then you started talking.

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5 C.f. *Darkan v The Queen* (2006) 227 CLR 373 at 399.

6 See *Criminal Code* (Qld), s 668E(1A).

HIS HONOUR: Oh.

DEFENCE COUNSEL: Well, everybody answered-----

PROSECUTOR: I – I-----

DEFENCE COUNSEL: They all answered collectively, I saw that."

[62] The trial judge asked, "Should we try to get the jury back if they are still in the precincts?". Defence counsel said that if that was to be done it should be done "straightaway". He added:

> "… but it's not, in my submission, given the fact that everyone has answered, and they all did answer – I'm just trying to think, 'Do you have a verdict?', they all answered, 'Yes,' because I was watching them."

[63] Shortly afterwards it was ascertained that the jury had left the precincts of the Court.

[64] The appellant submitted that the failure to follow "time honoured procedure" in ensuring beyond unreasonable doubt that the verdict pronounced by the speaker was agreed to by all members of the jury was such a radical departure from the requirements of a criminal trial that it deprived the appellant's trial of an elemental prerequisite of a valid conviction.

[65] The appellant relied on the following observation of Barwick CJ in *Milgate v The Queen*:[7]

> There is in Queensland neither a rule of law nor a rule of practice that a jury in a criminal trial must be told by the trial judge that their verdict must be unanimous. The law and practice of England is the same. The interrogation of the jury by the Clerk of Arraigns upon the return of their verdict by their foreman is the traditional method of ensuring unanimity on the part of the jury, coupled to some extent with the form of the oath individually administered to each juror … But several factors lead me to think that great care should be exercised by the Clerk of Arraigns and by the presiding judge as to the manner in which the Clerk of Arraigns expresses to the jury the traditional formula: 'Are you agreed on your verdict?' … 'So says your foreman, so say you all?' … Therefore the Clerk of Arraigns' formula on the taking of a verdict should not be expressed in a perfunctory way nor allowed to appear as a mere statement of an assumed or concluded state of affairs, but should be clearly interrogative of the members of the jury."

[66] After quoting the above passage in *R v Sparks*,[8] Williams JA, in whose reasons the other members of the Court concurred, observed:[9]

> "[9] In dealing with the way in which a verdict was taken in a court in Trinidad and Tobago the Privy Council in *Nanan v The State*

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7 (1964) 38 ALJR 162.

8 [2005] QCA 435 at [8].

9 *R v Sparks* [2005] QCA 435 at [9]–[11].

> quoted in full that passage from the judgment of Barwick CJ and indicated that it applied throughout the common law world. Specifically Lord Goff of Chieveley delivering the opinion said: 'The crucial requirement is that the verdict should be taken from the jury by questions which are so designed to ensure, beyond all reasonable doubt, that the verdict of the jury is a unanimous verdict.' (citations omitted)

[10] The critical statement of Barwick CJ was also cited with approval recently by this court in *R v Conway*.

[11] In *R v Wooller* Lord Ellenborough is recorded as saying:

> 'The Court cannot, according to established form and precedent, receive the affidavit of a juryman in any case; but the reason is, that in general, from the circumstances, it must be intended, that the verdict was given with his assent, and his assent must be inferred from his having consented that the foreman should deliver the verdict which is delivered in his hearing.'

> Referring to that statement Atkin LJ in *Ellis v Deheer* said: 'In accordance with the ordinary practice the verdict is, or ought to be, delivered in open Court by the foreman in the presence of the other jurymen, and if it is so delivered in their presence, and none of them protest, there is a prima facie presumption that they all assented to it.' That decision was discussed by the Privy Council in *Nanan* and Lord Goff said:

> > 'If a juryman disagrees with the verdict pronounced by the foreman of the jury on his behalf, he should express his dissent forthwith; if he does not do so, there is a presumption that he assented to it. It follows that, where a verdict has been given in the sight and hearing of an entire jury without any expression of dissent by any member of the jury, the court will not thereafter receive evidence from a member of the jury that he did not in fact agree with the verdict, or that his apparent agreement with the verdict resulted from a misapprehension on his part.'" (citations omitted)

[67] Immediately before the jury retired, the trial judge directed that the verdict must be unanimous whether it was guilty or not guilty. He further said:

> "When you're agreed upon your verdict, notify the bailiff. The procedure on your return will be this: you'll be asked by the clerk of the court if you're agreed upon a verdict. You should all answer, 'Yes,' to show that you have done so. Of course, if you haven't all agreed, say, 'No,' and make sure I see you."

[68] When the jurors were brought back into the courtroom to deliver their verdict, the record notes the speaker as saying, "Guilty" and the Associate repeating, "Guilty,

your Honour". The jurors were present in the courtroom. The prosecutor observed that he "didn't see any dissent among the jury to the verdict". Defence counsel said in respect of the delivery of the verdict, "They all answered collectively, I saw that".

[69] Having regard to the trial judge's directions to the jury and the delivery of the verdict without the dissent of any juror and, indeed, with every appearance of uniform assent, there is no reasonable doubt about the unanimity of the verdict. It is unfortunate that the practice of using the formula, "So says your speaker, so say you all?" was not followed. Its use ensures that there can be no doubt that the jurors are unanimous in their verdict. The above discussion of principle establishes, however, that failure to employ the formula did not amount to an error of law. Nor did it occasion any miscarriage of justice in this case.

[70] This ground of appeal was not made out.

Conclusion on appeal against conviction

[71] For the above reasons, I would order that the appeal against conviction be dismissed.

Application for leave to appeal against sentence

[72] The appellant was sentenced on 5 November 2012 to nine and half years imprisonment with a non-parole period of six years.

[73] He had been convicted on 5 March 2007 of trafficking in the dangerous drug amphetamine. He was sentenced to four years and eight months imprisonment for that offence with a parole eligibility date fixed at a date 16 months from the date of sentence. He was on parole at the time of committing the subject offence. The appellant had been convicted of two other minor drug related offences prior to the 2007 conviction as well as a number of other minor offences for which fines had been imposed.

[74] The appellant was 27 at the time of offending and 29 when sentenced. He left school after Year 12. From the time he was released from gaol in July 2008, he was working as a supervisor/foreman on the airport link construction.

[75] He was suffering from a drug addiction when he committed the trafficking offence. By the time of sentencing for that offence on 15 March 2007, he had been working, drug free, for 12 months as a fitter in a mine.

[76] The appellant assisted with the administration of justice in making admissions which the primary judge found substantially reduced the duration of the trial. As well as the ground that the sentence imposed was manifestly excessive, the appellant relied on three other grounds which are now addressed.

Ground 1 – The sentencing judge erred in finding that the appellant supplied the room number of the motel for the address to be put on the parcel

[77] The primary judge found that, although the precise role played by the appellant in the importation was unclear, he "must have supplied the room number of the motel for the address on the parcel".

[78] The appellant takes issue with this finding. He contends that it is unsustainable for these reasons. The CCTV camera footage shows Mrs Hannah writing the registration number of the appellant's vehicle but not the telephone number,

0416 486 716. Mrs Hannah said that the number looked to be in her handwriting and must have been given to her verbally by the appellant. However, the CCTV footage does not support that conclusion. The number could have been provided before the appellant checked into the motel on 6 July 2010. The bogus police officer, in his conversation with Mr Hannah, showed that he was aware that a "Mr Connors" was in room 22. According to Mr Hannah, the bogus police officer said that he wanted "a bit of information about a guest you have staying [here]".

[79] These matters were submitted to support the inference that a person other than the appellant booked the room and informed the forwarder of the parcel of the room number.

[80] The quality of the CCTV footage is insufficient to determine whether Mrs Hannah wrote down the telephone number when the appellant was checking in. Her evidence is to the effect that the appellant told her the number. She was not challenged on that evidence in cross-examination. The contention that someone else may have provided the number on another occasion is mere speculation and inherently improbable. The number would not have been written on a blank reservation booking sheet before the appellant booked in and there is no reason to suppose that it was not filled in at the time the other information was recorded on it.

[81] The conduct of the bogus police officer, as reported by Mr Hannah, does not suggest that he was a person who was connected with or allied to the appellant. He did not ask Mr Hannah about any package or seek entry to room 22. He was inquiring about a person in room 22.

[82] Defence counsel admitted in argument on the sentencing hearing:

> "… and the involvement here is, you know - as I'd have [to] concede, is to the extent that he booked the room and must have provided information back to someone who was able to get the address put on the parcel …"

[83] This concession was not been shown to be wrong.

[84] This ground was not made out.

Ground 2 – The sentencing judge erred in failing to classify the appellant as a courier

[85] The appellant referred to *R v Olbrich*[10] and *R v Burling & Gill*[11] in which there was discussion of the importance of establishing an offender's role in a drug business or network in fixing the offender's level of criminality. It was submitted that the evidence indicated that the appellant was probably a low level courier.

[86] The primary judge expressly found that the appellant's precise role was unclear and that although he must have supplied the room number of the motel for the address on the parcel, it was unknown what else he did. Of course, it is established that he booked the room at the Anchorage Motor Inn, paid the proprietor in cash, went to the motel to check out and organised to be informed of the arrival of a parcel so that he could collect it and attempted to collect it.

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10 (1999) 199 CLR 270.

11 [2011] QCA 51.

[87] The following observations of Keane JA in *R v Oprea* are apposite:[12]

> "That no more is known about the circumstances of the applicant's offending is due to the circumstance that he has remained steadfast in his silence about the network of which he was a part and the precise nature of his role in that network. Of course, the applicant should not be subjected to a harsher punishment than would otherwise be appropriate to the criminality of his offence because he has not chosen to cooperate with the authorities by disclosing details of the nature and extent of his role; nevertheless, he is not to be rewarded by the administration of justice for his loyalty to his co-offenders. His failure to disclose the circumstances of his involvement in this importation means that a sentencing court cannot give him the benefit given to those who, like the offenders in *Tran* and *Mokoena*, are prepared to disclose the nature and extent of their role in the criminal enterprise." (citations omitted)

[88] As the discussion in relation to sentence shows, there was no evidence of the involvement of any other person in Australia in the subject activities of the appellant. The primary judge did not err in not finding that the appellant was a low level courier. The finding, if anything, was generous.

Ground 3 – The sentencing judge erred in accepting that the sentencing range was between nine and 11 years

[89] At first instance, the prosecution and the defence each referred the primary judge to sentences said to be comparable. The primary judge referred in his sentencing remarks to the decisions perceived by him to be most relevant. The prosecution also provided a schedule of comparable sentences which the primary judge did not appear to find of particular assistance.

[90] The appellant attached to his outline of argument a schedule which summarised 10 decisions said to be comparable. He placed particular reliance in oral submissions on *R v Burling & Gill*,[13] *R v Maya & Kennedy*[14] and *R v Oprea*.[15]

[91] The offenders in *Burling & Gill* were convicted after a trial for importing 5.2193 kg of pure MDMA. Burling was sentenced to 12 years imprisonment with a non-parole period of seven years and three months and Gill to nine years imprisonment with a non-parole period of five years and six months. Both were mature women without previous convictions with families who would suffer upon their imprisonment. The principal offender, Dehghani, was Burling's spouse who "was a domineering man with a particularly nasty disposition".[16] Burling claimed that she was prevented from cooperating with authorities because she was intimidated whilst on bail. Gill had a solid work history and because of her unfortunate home life and social history was vulnerable to Dehghani's solicitations. Gill's role in the importation was her agreement to receive parcels containing ecstasy tablets delivered to her residence in return for payment between $20,000 and $30,000 for

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12 [2009] QCA 184 at [30].
13 [2011] QCA 51.
14 [2012] QCA 123.
15 [2009] QCA 184.
16 *R v Burling & Gill* [2011] QCA 51 at [9].

the first delivery. Further payments were to be made for any subsequent deliveries. Burling's and Gill's applications for leave to appeal against sentence were refused.

[92] The appellant argued that the seriousness of Gill's offending was worse than his as it involved between two and four deliveries of MDMA which had a total weight of 5.2193 kg of pure MDMA. Reference was also made to the monetary benefits Gill received and was to receive. The appellant submitted that Gill's lack of prior criminal history and her favourable personal circumstances had little weight in mitigation of sentence as general deterrence was necessary to deter persons such as Gill "who are tempted by the huge profits to be made from successful large scale drug transactions to participate in them".[17]

[93] The points the appellant made are sound but the fact remains that Gill's lack of a criminal history and the other matters relied on by her in mitigation were relevant and stood in Gill's favour on sentencing. In the appellant's case, personal as well as general deterrence are important. Not only did he have a relevant criminal history but he offended while on parole for a drug offence.

[94] Oprea was sentenced after a trial to 10 years imprisonment with a non-parole period of six years and six months for attempting to possess a marketable quantity of a border controlled drug – 1,489.7 grams of pure cocaine. He picked up a package of the drug and delivered it to a Brisbane suburb. He was 45 at the time of offending and had a minor drug related criminal history which contained no convictions during the 15 years preceding the subject offending. Oprea was sentenced as a courier on the basis that he knew or believed that border controlled drugs were supposed to have been contained in the package. It was held that in the absence of any explanation from Oprea, the sentencing judge was entitled to conclude from the jury's verdict that Oprea was generally aware of the quantity and nature of the drug involved or was recklessly indifferent to it. The trial was of short duration and the offending involved no planning or sophistication. Oprea's conduct may be contrasted with that of the appellant who, under an alias, rented a motel room to obtain an address for the delivery of drugs to him. He expended money on his project and was prevented from taking delivery by a circumstance beyond his control. Oprea's criminal history was far less relevant to his sentence than that of the appellant.

[95] Maya and her de facto husband, Kennedy, were both convicted of two counts of attempting to possess marketable quantities of cocaine and were sentenced to concurrent terms of 11 years imprisonment with non-parole periods of seven years. Their applications for leave to appeal against sentence were refused. Neither offender had a criminal history. The drug involved was 1.865 kg of cocaine and the maximum penalty for the offences was 25 years imprisonment.

[96] Like the appellant, they played an active role in the receipt of the drugs, booking different apartments and motels as addresses for the deliveries using false names when booking.

[97] There was no evidence as to the commercial benefit the offenders were to receive from their participation in the importations. Kennedy was 50 and Maya 27. Like the appellant, they made formal admissions which reduced the duration of the trial.

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17 *R v Burling & Gill* [2011] QCA 51 at [41].

[98] The offender in *R v Grippo*,[18] was a 20 year old Canadian citizen with no criminal history. He was sentenced after an early plea of guilty to seven years imprisonment with a non-parole period fixed at two years and nine months for each of two offences of attempting to possess a commercial quantity of a border controlled drug reasonably suspected of having been unlawfully imported. In each case, the offender hired a motel room in order to receive a parcel containing drugs sent from abroad. Three parcels in all were involved and the total pure weight of MDMA was 1,640.6 grams. The sentencing judge took into account the consideration that imprisonment would be harsher for the offender than for a local resident. That matter coupled with Grippo's age, lack of criminal history and early plea of guilty prevent this sentence from offering any support for the appellant's argument.

[99] The offender in *R v Harris*[19] was Oprea's co-accused. Her appeal against a sentence of seven years imprisonment with a non-parole period fixed at four years imposed after a guilty plea for an offence of attempting to possess a marketable quantity of a border controlled drug, namely cocaine, having a total weight of 1,489.7 grams was refused. She had a minor criminal history which included one conviction for possession of dangerous drugs. The sentencing judge concluded that she was a "minion" rather than a courier acting merely as a post box. She had no involvement in planning or funding the offence and was to receive a second hand car of uncertain value and to have a small debt forgiven in return for her assistance.

[100] The sentence in *Harris* was also imposed after a plea of guilty. Her role in the relevant importation was known and was regarded as relatively minor.

[101] A substantial number of the other sentences, summarised in the annexure to the appellant's submissions, were also ones in which the sentence was imposed after guilty pleas.

[102] Having regard to the appellant's criminal history and to the fact that he committed the subject offence whilst on parole for a trafficking offence, the sentences in *Burling & Gill*, *Maya & Kennedy* and *Oprea* do not cast doubt on the appellant's sentences. If anything, they support it.

[103] The appellant has not established this ground of appeal or that the sentence was manifestly excessive.

[104] The appellant requested that the hearing of his application for leave to appeal against sentence be adjourned on the basis that he had just received advice that a particular barrister would appear for him pro bono on his application for leave to appeal. The application was opposed by the respondent on the basis that the matter had first come before this Court on 22 May 2013. It was then adjourned and came back to this Court on 22 October 2013 when it was adjourned again.

[105] This Court reserved it decision on the adjournment application, which was not supported by any sworn evidence and required that the applicant present his argument on the application for leave to appeal against sentence after he had made his submissions on the appeal against conviction.

[106] The applicant's written outlines of argument had been carefully and effectively prepared. They did not have the appearance of having being prepared by a lay

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[18] Sentencing Remarks, Boddice J, Indictment No. 451 of 2013, 28 August 2013.

[19] [2009] QCA 370.

person and they may not have been. The applicant revealed himself to be an effective advocate with a sound grasp of the detail of his case and the ability to make submissions on principles of law. He had prepared thoroughly for the hearing and was not disadvantaged by having to rely on his own written and oral arguments. I would therefore refuse the application to adjourn the application for leave to appeal against sentence.

Conclusion

[107] For the above reasons, I would order that the application for appeal against sentence be refused.

[108] **GOTTERSON JA**: I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[109] **MULLINS J:** I agree with the orders proposed by Muir JA for the reasons given by his Honour, subject to the following comments relating to paragraphs [56] and [57] of his Honour's reasons.

[110] The reason why the offence under s 307.8(1) of the *Criminal Code* (Cth) does not require the prosecution to prove that a defendant knew or believed that the substance in the package delivered from overseas was the specific border controlled drug that is identified in the charge is apparent. In many instances, the person who has the task of collecting a package sent from overseas may suspect that it contains illicit drugs, but has no idea about the specific drug in the package. See the observations by Osborn JA in *Weng v The Queen* [2013] VSCA 221 at [64]-[66].

[111] The direction and redirection given by the trial judge on the fault element under s 307.8(1)(c) were in error. It did make the task of the prosecution more difficult than was required under s 307.8(1)(c), but the relevant consequence for the jury deliberations was whether they could reach a guilty verdict on the basis of the evidence in the light of this direction.

[112] Even though the package that was delivered to the Anchorage Motor Inn did contain MDMA, as the package had been intercepted by the police before it could be delivered to the appellant, the appellant did not actually receive the MDMA. There was no other evidence at the trial from which it could be inferred the appellant was involved with the specific illicit drug MDMA or that he knew or believed that the package he had foreshadowed would be delivered to the Anchorage Motel Inn would contain MDMA, rather than any other illicit drug. Strictly speaking, on the directions that the trial judge gave on the fault element for s 307.8(1)(c), it was not possible for the jury to be satisfied beyond reasonable doubt that the appellant knew or believed the package contained MDMA.

[113] Despite the error in the direction given to the jury, this was an overwhelming prosecution case against the appellant, as summarised in Muir JA's reasons at [55]. Like Muir JA, my independent assessment of the evidence leads to the conclusion that the appellant was proved beyond reasonable doubt to be guilty of the offence and that no substantial miscarriage of justice occurred as a result of the misdirection.