SUPREME COURT OF QUEENSLAND

CITATION:	*R v Duong* [2015] QCA 170
PARTIES:	**R** **v** **DUONG, Danh Quang** (appellant/applicant)
FILE NO/S:	CA No 19 of 2015 SC No 167 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 20 January 2015 (Conviction); Unreported, 22 January 2015 (Sentence)
DELIVERED ON:	18 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2015
JUDGES:	Fraser JA and Douglas and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant was convicted of one count of possession of a dangerous drug in excess of 200 grams and one count of supply of a dangerous drug – where both counts on the indictment particularised the drug as methylamphetamine, a Schedule 1 dangerous drug – whether the learned trial judge should have directed the jury that the appellant had an excuse available to him under s 24 of the *Criminal Code* (Qld) if he established that he had a reasonable and honest, if mistaken, belief that the substance in his possession was a dangerous drug other than the methylamphetamine charged in the indictment, such as a Schedule 2 dangerous drug CRIMINAL LAW – PARTICULAR OFFENCES – DRUG OFFENCES – IDENTITY OF PROHIBITED SUBSTANCE – GENERALLY – where the appellant was convicted of one count of possession of a dangerous drug in excess of 200 grams and one count of supply of a dangerous drug – where both counts on the indictment particularised the drug as methylamphetamine,

a Schedule 1 dangerous drug – whether the particular that the dangerous drug was methylamphetamine was something "material to the charge" for the purposes of s 129(1)(d) of the *Drugs Misuse Act* 1986 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of one count of possession of a dangerous drug in excess of 200 grams and one count of supply of a dangerous drug – where the appellant was 29 at the time of the offences and 31 years old when sentenced – where the appellant possessed and intended to supply 393.891 grams of a substance that held 204.391 grams of pure methylamphetamine, worth $80,000 wholesale – where the learned sentencing judge concluded that the amount and purity of the drug showed that the appellant was not a low level courier – where the learned sentencing judge held that the applicant knew that the substance he possessed contained methylamphetamine and was dishonest in his evidence to the contrary, reflecting on his lack of remorse and prospects for rehabilitation – where there was no suggestion or evidence that the applicant used or was addicted to drugs at the time of the offending – where the applicant had been convicted previously, in 2001, including of the offences of armed robbery in company, unlawful wounding and deprivation of liberty – where the sentence imposed on each count was nine years' imprisonment with no recommendation for early release on parole – whether the sentence was manifestly excessive

Criminal Code (Qld), s 24, s 564(3), s 565(e), s 668E(1A)
Drugs Misuse Act 1986 (Qld), s 4, s 6, s 9, s 116, s 129
Drugs Misuse Regulation 1987 (Qld), sch 2

Ayles v The Queen (2008) 232 CLR 410; [2008] HCA 6, cited
Bergin v Stack (1953) 88 CLR 248; [1953] HCA 53, considered
Boughey v The Queen (1986) 161 CLR 10; [1986] HCA 29, cited
CTM v The Queen (2008) 236 CLR 440; [2008] HCA 25, cited
Director of Public Prosecutions v Bone (2005) 64 NSWLR 735; [2005] NSWSC 1239, cited
Horan v F [1995] 2 Qd R 490; [1994] QCA 375, followed
Lodge v Lawton [1978] VR 112; [1978] VicRp 10, cited
Loveday v Ayre; Ex parte Ayre [1955] St R Qd 264, cited
Mellifont v Attorney-General (Qld) (1991) 173 CLR 289; [1991] HCA 53, cited
Proudman v Dayman (1941) 67 CLR 536; [1941] HCA 28, followed
R v Clare [1994] 2 Qd R 619; [1993] QCA 558, cited
R v Cooney [2004] QCA 244, considered
R v Geary [2003] 1 Qd R 64; [2002] QCA 33, cited
R v Jacobs [1998] 1 Qd R 96; [1997] QCA 114, cited
R v Kovacs [2009] QCA 52, considered
R v Nguyen; R v Le [2007] QCA 162, distinguished

R v Prince [1874-80] All ER 881; (1875) LR 2 CCR 154, cited
R v Pucci [2014] 2 Qd R 91; [2013] QCA 390, cited
R v Sorrento (Supreme Court, 22 May 2009, Douglas J, unreported), cited
R v Taiapa (2008) 186 A Crim R 252; [2008] QCA 204, considered
R v Tolson (1889) 23 QBD 168, cited
R v Tran [2014] QCA 90, considered
R v Trifyllis [1998] QCA 416, cited
R v Truong [1997] QCA 49, cited
Stuart v The Queen (1974) 134 CLR 426; [1974] HCA 54, cited
Tabe v The Queen (2005) 225 CLR 418; [2005] HCA 59, cited
Thomas v The King (1937) 59 CLR 279; [1937] HCA 83, cited

COUNSEL: B Walker SC, with A Boe, for the appellant/applicant
G Cash for the respondent

SOLICITORS: Boe Williams Anderson for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Douglas J. I agree with those reasons and with the orders proposed by his Honour.

[2] **DOUGLAS J:** The appellant, Danh Quang Duong, was intercepted by police on 12 March 2013. They found a crystalline substance containing methylamphetamine in his car in five containers. He also had two mobile phones and $1,100 in cash on him and a further $2,000 at his home. He admitted to police that he was in possession of drugs which he also described as "protein stuff", "amphetamines", "a banned substance", "DMAA" (1,3-Dimethylamylamine) and "DMA" (2,5-Dimethoxyamphetamine). At the time of the offence, DMA was a dangerous drug listed in Schedule 2 of the *Drugs Misuse Regulation* 1987 (Qld) but DMAA was not then such a drug, though it now is. Methylamphetamine was a Schedule 1 dangerous drug. Section 4 of the *Drugs Misuse Act* 1986 (Qld) defines a "dangerous drug" to include "a thing specified in the *Drugs Misuse Regulation 1987*, schedule 1 or 2 …".

[3] The indictment charged him in count 1 with possession of a dangerous drug in excess of 200 grams. Count 2 charged him with supply of a dangerous drug. Both counts particularised the drug as methylamphetamine.

[4] The main issue argued on the appeal was whether the learned trial judge should have directed the jury that the appellant had an excuse available to him under s 24 of the *Criminal Code* (Qld) if he established that he had a reasonable and honest, if mistaken, belief that the substance in his possession was a dangerous drug other than the methylamphetamine charged in the indictment, such as the Schedule 2 drug DMA. The onus lay on him to establish such an excuse because of the terms of s 129(1)(d) of the *Drugs Misuse Act* 1986.

[5] Her Honour adopted the stance, correctly in my view, that the s 24 defence was only available to him if he established that, more probably than not, he had a belief that the crystalline substance in his possession was something innocent and other than a dangerous drug, such as the protein powder or DMAA he mentioned to police.[1]

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[1] See AR 119 ll.23-25.

[6] The respondent also argued that, in any event, no substantial miscarriage of justice had occurred. The appellant argued separately that the sentence imposed on him was manifestly excessive.

The evidence

[7] When police searched the appellant's vehicle on 12 March 2013 at around 1.00 pm, they located, apart from the cash and mobile phones found on him, two rectangular Tupperware containers holding a crystalline substance under the driver's seat and three further Tupperware containers containing a similar crystalline substance in the glove box. The weight of the substance in each of the two containers found under the driver's seat was almost exactly the same, being about 138 grams. The average purity of the methylamphetamine in the substance in each container was also very similar at about 60 per cent. Each of two of the three containers in the glove box held a substance that weighed about 55 grams and 52 grams respectively. The average purity of methylamphetamine in those containers was 34 per cent and 33 per cent. The third container in the glove box held about nine grams of substance with an average purity of methylamphetamine of 25 per cent. Each container held methylsulfonylmethane (MSM) as well as methylamphetamine.

[8] At the time of his arrest, the appellant operated a body building gym. He identified the crystalline substances to the police as "protein stuff". He then said that they were "drugs" and asked police to pretend that they had not pulled him over and suggested that he just throw the "shit on the grass". When taken to his residence, after his arrest, police located digital scales there, a quantity of MSM under his sink in three containers similar in size and shape to those found in the vehicle and documentation for the purchase of MSM together with $2,000 in cash in his kitchen pantry. There was evidence at the trial that MSM is commonly used as a "cutting agent" to increase the weight of drugs such as methylamphetamine. There was also evidence from a chemist that "amphetamine" would generally refer to a class of compounds which would be methylamphetamine and amphetamine and that some other compounds would have that general chemical structure.

[9] After the search of his residence, the appellant (with his lawyer) participated in a recorded interview with police. It was then that he told police officers that the drugs he had were "amphetamines". He said that he was storing them for someone else, that he had held on to the substance for about six or seven weeks and was on his way to give it back to the man who had asked him to store it. Later he said that he assumed he was to get a payment of some sort. At the roadside, before his arrest, he told police that they were drugs and that he was about to get paid for storage of them.

[10] He gave evidence that he received the substance in two tubs that he knocked over and spilled. As a result, he repackaged the substance into the containers in which they were found by police. The respondent argued that that appeared to be inconsistent with the weights and purity of the substance found by police in the appellant's car.

[11] In the recorded interview with police at 8.45 pm that night, he said that, to his knowledge, the drugs were amphetamines and, when asked: "Do you know it's an offence to be in possession of a dangerous drug in Queensland?", answered: "Yeah, I took on that risk when I, took on the work".

[12] In short, as the respondent argued, there was evidence that the appellant had all of the chemicals, containers and equipment necessary to dilute and package methylamphetamine

as it was found by the police, had $1,100 in cash in his wallet and $2,000 in the kitchen pantry at his home. When he was interviewed by the police, he told them the substance was "drugs" and, to his knowledge, "amphetamines" that he was paid to store and deliver, having been chosen to do so because he was someone who was "more clean" or "less suspicious".

Relevant statutory provisions

[13] The offences charged were that the appellant had possession of and supplied a dangerous drug contrary, respectively, to s 9 and s 6 of the *Drugs Misuse Act*. By s 116 of that Act, the *Criminal Code* is, with all necessary adaptations, to be read and construed with the *Drugs Misuse Act*.

[14] Section 564 of the Code provides:

> "564 Form of indictment
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> (1) An indictment is to be intituled with the name of the court in which it is presented, and must, subject to the provisions hereinafter contained, set forth the offence with which the accused person is charged in such a manner, and with such particulars as to the alleged time and place of committing the offence, and as to the person (if any) alleged to be aggrieved, and as to the property (if any) in question, as may be necessary to inform the accused person of the nature of the charge.
>
> (2) If any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment.
>
> …
>
> (3) It is sufficient to describe an offence in the words of this Code or of the statute defining it.
>
> …"

[15] Section 565(e) of the *Criminal Code* also provides that "it is not necessary to set forth any particulars as to any person or thing which need not be proved, nor any other matter which need not be proved."

[16] Section 129 of the *Drugs Misuse Act* provides:

> "129 Evidentiary provisions
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> (1) In respect of a charge against a person of having committed an offence defined in part 2—
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> (a) it is not necessary to particularise the dangerous drug in respect of which the offence is alleged to have been committed; and
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> (b) that person shall be liable to be convicted as charged notwithstanding that the identity of the dangerous drug to which the charge relates is not proved to the satisfaction of the court that hears the charge if the court is satisfied that the thing to

which the charge relates was at the material time a dangerous drug; and

(c) proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place; and

(d) the operation of the Criminal Code, section 24 is excluded unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge;…"

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

"24 Mistake of fact

(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

Submissions

Respondent's submissions

[18] In that statutory context, it is convenient to commence by setting out the respondent's argument. It was submitted that if the appellant was shown to be in possession of, and intending to supply, a substance that in fact contained a dangerous drug then, subject to the operation of s 24 of the *Criminal Code*, as modified by s 129(1)(d) of the *Drugs Misuse Act*, he was guilty of the offences.[2] That is, if the appellant proved he believed the substance contained no dangerous drug, he was entitled to be acquitted. If he proved that he believed the substance contained a dangerous drug other than that "to which the charge relates", he was liable to be convicted because of the provisions of s 129(1)(b) of the *Drugs Misuse Act*.

[19] Mr Cash for the respondent went on to argue that it was not necessary for the prosecution to plead the identity of the dangerous drug the subject of the charges because of s 129(1)(a) of the *Drugs Misuse Act*. The jury need only have been satisfied of the elements of the offences, which, in this case, meant that they had to be satisfied that the substance the appellant possessed and intended to supply was a "dangerous drug" as that term is defined in the *Drugs Misuse Act*. Sections 129(1)(a) and 129(1)(b) of that Act operated to relieve the prosecution from any obligation to prove the identity of a dangerous drug the subject of the charge.[3] The pleading that the dangerous drug to which the charge related was "methylamphetamine" was surplusage that was unnecessary to prove. As it was unnecessary to prove the identity of the drug, the allegation in the indictment and any absence of proof in that regard could be ignored.[4]

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2 See *Tabe v The Queen* (2005) 225 CLR 418, 427 at [19], 429 at [24], 459 at [145], 460-461 at [148], and 463-464 at [151]-[152]; *R v Clare* [1994] 2 Qd R 619.

3 *R v Jacobs* [1998] 1 Qd R 96, 99 at l.50; *R v Geary* [2003] 1 Qd R 64, 67 at [9]-[10].

4 *R v Pucci* [2014] 2 Qd R 91, 97 at [34]-[36]; *Lodge v Lawton* [1978] VR 112.

[20] The submission continued by arguing that the allegation that the drug was methylamphetamine may be considered a particular of the case presented by the prosecution and, as such, the allegation could not define or supplant the elements of the offences prescribed by the statute.[5]

[21] Mr Cash also discussed the function of particulars, pointing out that the prosecution is not bound by particulars given at the start of the trial and can apply to amend during the course of the trial. If there is a failure to apply to amend the particulars, that may have no practical consequence, particularly where a defendant is aware of the evidence and how the case is to be put so that a verdict may be permitted to stand if the prosecution has proved the charge and there is no injustice or unfairness to the accused.[6]

[22] He submitted that the appellant was well aware of the evidence to be led by the prosecution and the nature of the case alleged. The first references to "DMAA" and "DMA" were in his evidence in chief. He gave evidence that he had never seen methylamphetamine before, that he was not at the time of the offence familiar with the *Drugs Misuse Act* and that it was only in the months preceding the trial that he undertook to research into "amphetamines-styled products that are used in gyms". He said that he thought the substance was "a banned substance which was a pre-workout and the short name for it was DMAA".

[23] Mr Cash's submission was that the verdict of the jury must indicate a rejection of the notion that his testimony established that he held an honest and reasonable belief the substance was something other than a dangerous drug.

[24] Most significantly for present purposes, he argued that the choice by the prosecution to allege the charges related to methylamphetamine did not entitle the appellant to the directions sought by his counsel at the trial, namely that he had a defence available to him under s 24 of the *Criminal Code* if he established that he had a reasonable and honest, if mistaken, belief that the substance in his possession was a dangerous drug other than methylamphetamine. He argued that the combination of s 129(1)(b) and s 129(1)(d) of the *Drugs Misuse Act* and s 24 of the *Criminal Code* meant that the defendant had to prove that he believed the substance did not contain a dangerous drug.

[25] He sought to distinguish the decision in *R v Nguyen; R v Le*[7] to which Mr Walker SC for the appellant referred. In that case, the court dealt with an appeal from convictions for trafficking in heroin, amongst other charges. The issue was whether suspicious transactions relied on by the prosecution were sufficient to prove beyond reasonable doubt the supply of heroin or trafficking in that drug. The court concluded that the evidence established a strong suspicion that the appellants were involved in some illegal business but that it did not prove beyond reasonable doubt that they were trafficking in heroin. It said that:[8]

> "The video surveillance evidence establishes only that the appellants were dealing in something small and, inferentially, of value and unlawful."

[26] In that context, the court went on to say:[9]

> "[22] The prosecution case was particularised and conducted only on the basis that the trafficking and supplying was in heroin and

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5 *Ayles v The Queen* (2008) 232 CLR 410, 413-414 at [7].
6 *R v Trifyllis* [1998] QCA 416, 15 at [28].
7 [2007] QCA 162.
8 *R v Nguyen; R v Le* [2007] QCA 162, 6 at [20].
9 *R v Nguyen; R v Le* [2007] QCA 162, 6 at [22].

> not on any alternative basis that the trafficking and supplying may have been in another dangerous drug. Section 129(1)(b) *Drugs Misuse Act* 1986 (Qld) can have no application in this case."

[27] The submission, which seems to me to be correct, was that the case is distinguishable because it was not one where the evidence suggested the existence of some other dangerous drug than heroin but, simply put, was one where the evidence did not establish to the necessary standard that whatever was exchanged was any form of dangerous drug.

[28] Here, to the contrary, it was clear that the drug in the possession of the appellant and to be supplied by him was methylamphetamine but, on his evidence, he may have believed that it was either an innocent substance or some other type of dangerous drug. In that context, the real issue was: what was the combined effect of s 129 of the *Drugs Misuse Act* and s 24 of the *Criminal Code* in circumstances where a possible interpretation of the appellant's evidence at the trial was that he believed that the substance was a dangerous drug other than the methylamphetamine particularised in the charges against him.

[29] Mr Cash accepted that s 129(1)(b) had no work to do where the identity of the dangerous drug is proved, except, he submitted, where a defendant seeks to discharge the onus of establishing his belief in a state of things material to the charge for the purposes of s 129(1)(d). In that situation, he submitted, if he establishes that he believed it was another dangerous drug, then s 24 makes him criminally responsible as if the real state of things had been such as he believed to exist, namely that he was in possession of or had supplied a dangerous drug. He argued that s 129(1)(b) had a role to play in that situation also in establishing that he should bear the same degree of criminal responsibility as if what he believed was in fact the real state of things.

[30] He did not argue orally that the particular alleged in the indictment that the dangerous drug was methylamphetamine was immaterial to the charge for the purposes of s 129(1)(d), an approach that appeared not completely consistent with the terms of paragraphs 13 and 14 of his written submissions.[10]

Appellant's submissions

[31] Mr Walker SC, for the appellant, argued that cases such as *Tabe v The Queen*[11] and *R v Clare*,[12] on which the respondent relied, were distinguishable because they were concerned with whether knowledge of the particular drug was a necessary element of establishing possession rather than what was the extent of the role to be played by s 24. He sought to distinguish *R v Pucci*[13] and *R v Jacobs*[14] because the indictments included all dangerous drugs. *Ayles v The Queen*,[15] dealing with the power to amend an indictment, was distinguishable and irrelevant because here there had been no application to amend.

[32] He focussed his argument on the concluding words in s 24 which provide that a person "is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist." He compared that to the terms of s 129(1)(d) of the *Drugs Misuse Act* by which the operation of s 24 on a person is excluded "unless that person shows an honest and reasonable belief in the existence of any state of things material to the charge".

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10 T 1-14 ll.1-19.
11 (2005) 225 CLR 418.
12 [1994] 2 Qd R 619.
13 [2014] 2 Qd R 91.
14 [1998] 1 Qd R 96.
15 (2008) 232 CLR 410, 413-414 at [7].

[33] He submitted that the particular in the indictment that the dangerous drug was methylamphetamine was "material to the charge". While s 129(1)(a) made it unnecessary to particularise the type of drug, once that was done then methylamphetamine was the only possible candidate for the dangerous drug "to which the charge relates" for the purposes of s 129(1)(b). In any event, s 129(1)(b) had no role to play in the debate because the identity of the dangerous drug as methylamphetamine had been proved to the satisfaction of the court.

[34] Section 129(1)(d), he submitted, then reversed the onus of proof in respect of the s 24 issue so that the appellant merely had to show that he held an honest and reasonable but mistaken belief that the dangerous drug was not methylamphetamine, rather than any other dangerous drug specified under the *Drugs Misuse Act*. In effect the prosecution had elected to charge that the drug was methylamphetamine and should be held to that election, no application having been made to amend the indictment.

[35] The "real state of things" hypothesised by s 24 should have included the appellant's belief that the substance was DMA rather than methylamphetamine. He should not be convicted based on his belief that the substance was some other dangerous drug than the one with which he was charged. He argued, rhetorically, that it would be absurd, where the prosecution had failed to prove that the substance was methylamphetamine or another dangerous drug, if the defendant could be found guilty simply because he believed that it was a dangerous drug other than methylamphetamine.

[36] That is not this case, however, as there was no doubt that the substance was methylamphetamine.

Consideration

Drugs Misuse Act 1986 s 129(1)(d) – "material to the charge"

[37] One issue that was raised in oral argument was whether the particular that the dangerous drug was methylamphetamine was something "material to the charge" for the purposes of s 129(1)(d). If the particular that the dangerous drug was methylamphetamine was, because of the combined effect of s 129(1)(a) and s 129(1)(b) of the *Drugs Misuse Act* and s 564(3) and s 565(e) of the *Criminal Code*, not material to the charges, then the focus would simply be on whether the appellant's belief was that he was or was not in possession of a dangerous drug. In other words, if the particular that the substance was methylamphetamine was not material to the charges, because they were truly charges of possession and supply simply of a dangerous drug, then the appellant's mistaken belief that the substance was some other form of dangerous drug than methylamphetamine was immaterial; the operation of s 24 of the *Criminal Code* would not be triggered.

[38] That argument bears the attraction of an apparent simplicity in the interpretation of s 129(1)(d) in a case like this but was specifically not advanced in the oral submissions for the respondent. It is certainly the case that possession or supply of methylamphetamine is material to the maximum potential sentence that may be imposed as compared to possession or supply of a Schedule 2 dangerous drug, but it is not obvious that it is material to the charge in this statutory context. On the approach I take to the construction of s 24 of the *Criminal Code* it is not necessary to decide the issue but I shall, nevertheless, say something more about the construction of s 129(1) in this context.

The role of s 129(1)(b) of the Drugs Misuse Act

[39] Does s 129(1)(b) have a role to play here where the identity of the dangerous drug is proved and there is no issue about that, but the defendant gives evidence that he

believed it was another dangerous drug in a category to which lesser penalties attach? One view that has been expressed is that the relationship of this provision to s 24 is unclear.[16] The learned authors go on to say:

> "The easiest way to reconcile the two provisions would be to read s 129(1)(b) as being subject to s 24 in cases where a mistake of fact has occurred. That would mean that an accused is entitled to any benefit in being judged as if the real state of things had been such as the accused believed them to be."

[40] Presumably, therefore, if the defendant established that his honest and reasonable belief was that the thing to which the charge related was not a dangerous drug then he should be found not guilty. Where he establishes the belief that the drug was another in the same legal category the learned authors accept that the mistaken belief would be irrelevant.[17] They go on to argue, however, that "a mistaken belief that one drug was another drug in a category with lower penalties would simply mean that the offender is liable only to the lower penalties."[18]

[41] To reach that conclusion the learned authors rely on the concluding words of s 24 that the person: "is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist." Such an approach does not suggest, however, that the defendant should be found not guilty of the charges of possession and supply of the drug charged. Whether the appellant believed the substance was methylamphetamine or a Schedule 2 drug was dealt with in the present case as a factual issue for the sentencing hearing.[19] Another approach, eventually not pursued by the appellant's counsel at the trial, may be to seek a special verdict from the jury pursuant to s 624 of the *Criminal Code*. When sentencing the appellant her Honour expressed the very firm view that he knew that the substance was methylamphetamine.[20]

[42] One other way that s 129(1)(b) may be relevant is if it is construed to cover both the situation where the identity of the dangerous drug is proved and the other case where the court is satisfied on the evidence that the substance was a dangerous drug but there is an issue as to the identity of the particular drug or drugs.

[43] One could, for example, construe the provision, in a case where the identity of the dangerous drug had been proved, by omitting the clause "notwithstanding that the identity of the dangerous drug to which the charge relates is not proved to the satisfaction of the court that hears the charge", to cover this situation:

> "that person shall be liable to be convicted as charged … if the court is satisfied that the thing to which the charge relates was at the material time a dangerous drug."

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16 Colvin, McKechnie and O'Leary, *Criminal Law in Queensland and Western Australia, Cases and Commentary* (LexisNexis, 7th ed, 2015) at [8.33].

17 Colvin, McKechnie and O'Leary, *Criminal Law in Queensland and Western Australia, Cases and Commentary* fn 16 at [8.32] relying on the decision of the Western Australian Court of Criminal Appeal in *Dunn v The Queen* (1986) 32 A Crim R 203.

18 Colvin, McKechnie and O'Leary, *Criminal Law in Queensland and Western Australia, Cases and Commentary* fn 16 at [8.32].

19 AR 151-152. Counsel for the defendant at the trial did not persist with a request for a special verdict pursuant to s 624 of the *Criminal Code*; AR 102 ll.1-3.

20 AR 152 ll.42-43.

[44] The "thing to which the charge relates" would be properly understood as the substance possessed or to be supplied by the defendant, in this case the methylamphetamine. Section 129(1)(d) would then cover the case where s 24 might be invoked.

[45] My concern about construing s 129(1)(b) in that fashion is that its truncated version has essentially the same effect as the version as enacted but omits the significant modification as to its application created by the missing clause. I am not comfortable with the construction of a criminal statute in that fashion and, again, on the view I take about the application of s 24 of the *Criminal Code*, do not need to decide the issue.

[46] That is because such an approach still leaves the issue of the effect of the words "material to the charge" in s 129(1)(d). If one accepts that the particular that the substance was methylamphetamine was or may be material to the charge, one still has to consider how s 24 applies in such a situation.

The effect of s 24 of the Criminal Code where the defendant's belief is not "innocent"

[47] When one applies the language of s 24, namely, that the person "is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist", his belief that he may have been in possession of and supplied some other dangerous drug than the methylamphetamine particularised does not excuse his conduct. That is my view even if that belief was material to the charge and the drug was one from a category to which lesser penalties attached. He still remains criminally responsible for possession and supply of a dangerous drug. There has been no "operative mistake"[21] and his belief about the "real state of things" still implicates him in equivalent criminal behaviour, possession and supply of a dangerous drug.

[48] That approach is consistent with the statement by Fitzgerald P in *Horan v F*[22] that: "an honest and reasonable but mistaken belief that consent existed excludes criminal responsibility for a touching **if consent would mean that the touching was not unlawful**." His Honour's remark is also consistent with the following passage in a judgment of Dixon J in *Proudman v Dayman*[23] in a different statutory context in an appeal from South Australia:

> "As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act **innocent** affords an excuse for doing what would otherwise be an offence."

[49] Section 24 was thought by Sir Samuel Griffith to be an expression of the common law.[24] When one considers the approach to this issue at common law, rather than under the *Criminal Code*, the result is made even clearer by the reasons of Fullagar J in *Bergin v Stack*.[25] There a club steward was charged with selling liquor without a licence, contrary to s 161 of the *Licensing Act* 1928 (Vic). He said, and was believed by the magistrate, that he did not know that the trading hours for clubs were universally restricted to 6 pm and that he believed that he was entitled to serve liquor during the

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21 *Loveday v Ayre; Ex parte Ayre* [1955] St R Qd 264, 267-268 per Philp J.

22 *Horan v F* [1995] 2 Qd R 490, 493 (emphasis added).

23 *Proudman v Dayman* (1941) 67 CLR 536, 540 (emphasis added). See also *Thomas v The King* (1937) 59 CLR 279, 304-306 and *CTM v The Queen* (2008) 236 CLR 440, 447 at [8], 491 at [174].

24 Sir Samuel Griffith, *Draft of a code of criminal law together with an explanatory letter to the Attorney-General, a table of contents, and a table of the statutory provisions proposed to be superseded by the code*. Brisbane: Government Printer, 1897 p 13, marginal note to s 26.

25 *Bergin v Stack* (1953) 88 CLR 248, 262-263, applied by Hayne J in *CTM v The Queen* (2008) 236 CLR 440, 491 at [174]. See also *Director of Public Prosecutions v Bone* (2005) 64 NSWLR 735, 750 at [38]-[39].

hours of his employment and that the club was registered and licensed. It was an unregistered club which made the service of liquor there illegal in any event pursuant to s 266 of that Act. He sought to rely on a defence of an honest and reasonable belief in the existence of facts which would have made the act innocent, namely that it was a registered club. Fullagar J, with whom Williams ACJ and Taylor J agreed, said:[26]

> "The rule as to the effect of an honest and reasonable mistake of fact means, I think, that such a belief excuses if its truth would have meant that no offence was being committed, not if its truth would have meant that some other and different offence was being committed. In the great case of *Reg. v. Prince*, Brett J. said that a mistake excused 'whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe … to be the facts, would, if true, make his acts *no criminal offence at all'*. The judgment of Brett J. was the single dissenting judgment in a court of sixteen judges, **but the whole point of the case is that the majority held that a mistake could not excuse unless the fact believed was such that, if it had been true, there would not merely have been no crime at all but no wrongful act at all.** The statement of Brett J. is, therefore, to be regarded as stating a *minimum* requirement. Denman J. said:—'he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing'. The rule is generally stated in terms which mean that the existence of the fact mistakenly believed must be such as to render the act an innocent act; see, e.g. *Bank of New South Wales v. Piper*. *Kenny* (*Outlines of Criminal Law*, 11th ed. (1922), p. 65), takes as an instance the case of a man who is charged with burglary, and proves that he honestly and on reasonable grounds believed that his breaking and entering occurred before 9 p.m. He would not be entitled to an acquittal on that ground, although, if his belief had been well founded, he would not have been guilty of burglary. In the present case the defendant said that he 'did not know that trading hours for clubs were universally restricted to 6 p.m.' But this, of course, is merely a statement that he did not know the law. If the facts established an offence against s. 161, the existence of a belief which, if well founded, would mean that his offence was not against s. 161 but against s. 266, affords him, in my opinion, no defence."

[50] *R v Prince*[27] was decided in 1875. It was a significant decision and treated as such in later cases such as *R v Tolson*.[28] It is safe to assume that it was well known to Sir Samuel Griffith when he drafted the *Criminal Code* in the 1890s. There is some reason, therefore, to consider the common law approach to these facts. That background may help place in historical context the closing words in s 24(1): "… to any greater extent than if the real state of things had been such as the person believed to exist."[29]

[51] In saying that I bear in mind what has been said by the High Court concerning the relevance of the common law in interpreting the Code. As Gibbs J said in *Stuart v The Queen*:[30]

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26 *Bergin v Stack* (1953) 88 CLR 248, 262-263 (footnotes omitted and bold emphasis added). See also *Carter's Criminal Law of Queensland* LexisNexis (online edition) at [s 24.40].

27 *R v Prince* (1875) LR 2 CCR 154.

28 *R v Tolson* (1889) 23 QBD 168, especially the discussion by Stephen J at 189-190.

29 See also *Kenny's Criminal Law in Queensland and Western Australia* (8th ed, 2013) at [8.85]-[8.86].

30 (1974) 134 CLR 426, 437 (footnotes omitted). See also Brennan J in *Boughey v The Queen* (1986) 161 CLR 10, 30-31.

> "The correct approach to the interpretation of a section of the Code is that stated by Dixon and Evatt JJ. in *Brennan v. The King*, as follows:
>
> > ' … it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered.'
>
> This passage does not mean that it is never necessary to resort to the common law for the purpose of aiding in the construction of the Code—it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground: see *Robinson v. Canadian Pacific Railway Co.*, cited in *R. v. Scarth*. If the Code is to be thought of as 'written on a palimpsest, with the old writing still discernible behind' (to use the expressive metaphor of Windeyer J. in *Vallance v. The Queen*), it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance."

[52] Again, in *Mellifont v Attorney-General (Qld)*,[31] Mason CJ, Deane, Dawson, Gaudron and McHugh JJ relying on that passage from Gibbs J's decision in *Stuart v The Queen* said:

> "The primary difficulty with the applicant's argument is that it is not legitimate to look to the antecedent common law for the purpose of interpreting the Code unless it appears that the relevant provision in the Code is ambiguous. That ambiguity must appear from the provisions of the statute; in other words, it is not permissible to resort to the antecedent common law in order to create an ambiguity. Nor, for that matter, is it permissible to resort to extrinsic materials, such as the draft Code and Sir Samuel Griffith's explanation of the draft Code, which are referred to in the dissenting judgment of Cooper J. in the Court of Criminal Appeal, in order to create such an ambiguity."

[53] In referring to *Stuart v The Queen* I do not take the view that the closing words of s 24 are ambiguous. To the contrary, those words, "to any greater extent than if the real state of things had been such as the person believed to exist", in context, do not excuse criminal responsibility where the accused's belief is that he was in possession of some other dangerous drug. He remains criminally responsible to the extent of the belief established.

[54] Such a conclusion is consistent with the common law approach that an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent is what affords an excuse for doing what would otherwise be an offence.[32] That background assists in placing the Code's language in historical context.

[55] Where, as here, the appellant believed that he may have been in possession of and have intended to supply some other dangerous drug, that belief was not an excuse for

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31 (1991) 173 CLR 289, 309 (footnote omitted).

32 *Proudman v Dayman* (1941) 67 CLR 536, 540.

his conduct in respect of the methylamphetamine; the "real state of things" he believed still implicated him in criminal behaviour within the confines of the counts charged on the indictment. It may be relevant to the penalty he should face, something dealt with here when the appellant was sentenced.[33] In the appropriate case it would also be open to seek a special verdict from the jury relevant to "the proper punishment to be awarded upon conviction" pursuant to s 624 of the *Criminal Code*.

[56] In other words, the fact that the appellant may have established an honest and reasonable but mistaken belief that the drug was something other than the methylamphetamine charged may establish the pre-condition set out in s 129(1)(d) for the operation of s 24 of the *Criminal Code*. Section 24 then applies in its own terms to make the appellant not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. If the "real state of things" still implicates him in such criminal behaviour he is not excused because of the operation of s 24.

[57] Nor is this a case of proving some other offence than the one particularised simply in reliance on the appellant's belief. There was no doubt that he possessed and intended to supply the particular dangerous drug, methylamphetamine, even if he thought it may have been another drug such as DMA, found in Schedule 2 rather than Schedule 1 of the *Drugs Misuse Act*. It was only if he established a belief that he was not in possession of any dangerous drug that he was entitled to an acquittal based on s 24. If he established a belief that it was some other dangerous drug, either through a special verdict or on a factual inquiry on sentence, he would then be entitled to be sentenced on that basis rather than on the basis that he was in possession of the methylamphetamine charged. The learned trial judge's direction was correct.

Application of the proviso

[58] The respondent submitted that, if the summing-up had been erroneous, then s 668E(1A) of the *Criminal Code* should apply to permit the dismissal of the appeal on the ground that no substantial miscarriage of justice had occurred. The submission was based on the strength of the prosecution case. As Mr Walker argued, however, if the appellant was deprived of the chance of an acquittal because the learned trial judge's direction was wrong, then it would not be appropriate to resolve the matter by relying on the proviso.

Sentence appeal

[59] The sentence imposed on each count was nine years' imprisonment with no recommendation for early release on parole. The argument for the appellant was that each sentence was manifestly excessive, particularly when compared with a case said to be factually similar of *R v Taiapa*.[34] In that case, the offender was also convicted after trial of possession of more than two kilograms of methylamphetamine with a pure weight of 364.213 grams which was considerably more than that charged against the appellant in this case. He had previously served a six year sentence for trafficking in cannabis and ecstasy. He was sentenced to seven years' imprisonment. That sentence was, however, cumulative on a sentence he was already serving for another drug offence with parole eligibility ordered after four years and one month. He had unsuccessfully argued that he had a defence of duress but there was evidence that threats had been made to him and his family if he did not engage in the criminal conduct of which he was convicted. There was no appeal from the sentence but the

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33 AR 151-152.

34 (2008) 186 A Crim R 252; [2008] QCA 204.

fact that it was cumulative on another sentence and occurred where threats had been made affects its utility as a comparable decision to this case.

[60] Here, the appellant was 29 at the time of the offences and 31 years old when sentenced. He possessed and intended to supply 393.891 grams of substance that held 204.391 grams of pure methylamphetamine. He had been convicted previously, in 2001, including of the offences of armed robbery in company, unlawful wounding and deprivation of liberty. He was imprisoned then for six years with parole eligibility after serving two years.

[61] The learned sentencing judge, found that, at all material times, the appellant knew that the substance he possessed contained methylamphetamine. She was clearly unimpressed by his evidence to the contrary and said his dishonest evidence reflected on his lack of remorse and his prospects for rehabilitation. The drug found in his possession was worth around $80,000 wholesale. Her Honour concluded that the amount and purity of the drug showed that the appellant was not a low level courier. Nor was there any suggestion that he used or was addicted to drugs at the time of the offending.

[62] She discussed two of the comparable sentences to which she was referred, *R v Sorrento*[35] and *R v Truong*[36] in these terms:

> "Douglas J in *Sorrento* … and the Court of Appeal decision in *Truong* … have been the most helpful.
>
> They were both pleas. Justice Douglas gave Mr Sorrento seven years imprisonment with a parole release date … two years and four months after sentence. As I say, that was a plea. That man had quite a compelling personal history. He had much less criminal history than you have. He had never been to jail, for example. He had a history of drug addiction although it was not clear that he was addicted at the time of the offending. On the other hand, he had a substance which contained 335 grams of pure methylamphetamine, which is considerably more than the drug you had. It's … 130 grams more.
>
> The case of *Truong* was a Court of Appeal case where the offender received nine years. The drug in that case was heroin which, like methylamphetamine, is a Schedule 1 drug. The offender in that case had no criminal history. [S]he also had no addiction. [S]he was found with 76.8 grams of heroin on her, which had a street value of approximately $300,000. She had family obligations and she co-operated with police. It's described in the judgment as partial co-operation but it seems to have been significant enough. In particular, she identified the principal offender in the drug operation. She also pleaded on an ex officio indictment. The sentencing judge recognised that that lady had genuine contrition and there's quite some detail at pages 4 and 5 of the Court of Appeal judgment in relation to that contrition. The Court of Appeal refused to interfere with the sentence."

[63] The respondent also submitted that the sentences of nine years imprisonment were not manifestly excessive based on decisions in *R v Cooney*,[37] *R v Kovacs*[38] and *R v Tran*.[39]

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35 (Supreme Court, 22 May 2009, Douglas J, unreported.)
36 [1997] QCA 49.
37 [2004] QCA 244.
38 [2009] QCA 52.
39 [2014] QCA 90.

[64] In *R v Cooney*, the applicant was 30 years old when he offended and 32 years old when he pleaded guilty to possessing cocaine in excess of 200 grams. He had a lengthy criminal history and was seriously addicted to cocaine. He was found with about $50,000 at Cairns Airport and followed by police to a hotel. As they approached he dropped his bags and attempted to flee. The bags held 900 grams of powder which, when analysed, was found to contain a calculated pure weight of 641 grams of cocaine. The cocaine was worth $100,000 and up to $900,000 if sold at "street level". He claimed in that sentence that he agreed to purchase and transport the drugs in order to settle an $8,000 drug debt. He was sentenced to eight and a half years imprisonment with parole after three and a half years, a sentence not disturbed in the Court of Appeal. Notably it was a sentence after a plea of guilty, not after a trial, as in this case.

[65] *R v Kovacs* was a case where the applicant pleaded guilty to possessing heroin and cannabis but was also found guilty of one count of supplying cocaine. He was sentenced to six years' imprisonment with parole after two years and six months. He was one of a chain of people who had transported and offered for sale cocaine weighing about 210 grams. The learned sentencing judge found that he possessed the heroin partly for personal use and partly for commercial purposes. He had a significant criminal history but had co-operated extensively with police as was detailed in a sealed exhibit. Again that consideration affects its utility as a comparable sentence.

[66] In *R v Tran*, the applicant also pleaded guilty to a number of drug offences committed on two separate occasions. The first and most serious offences concerned the possession of 560 grams of powder containing 83 grams of heroin and 280 grams of crystals containing 125 grams of methylamphetamine. He was charged and pleaded guilty to the offences but absconded before his sentence. He was apprehended two and a half months later when arrested for a second set of offences concerning the possession of a variety of drugs, including 131 grams of methylamphetamine and nine grams of cocaine. He also possessed a hand gun and about $4,000 in cash. He was sentenced to nine years imprisonment for the first offences and to a cumulative sentence of two years and three months for the second offences. The overall period of imprisonment was 11 years and three months of which he would have to serve half before being eligible for parole. He was 36 when sentenced and had an extensive criminal history, including previous convictions for serious drug offences. He was also addicted to dangerous drugs. The sentence was modified on appeal by ordering that he be eligible for parole after serving four and a half years of the sentence.

[67] Those authorities and the other considerations referred to by the learned sentencing judge establish to my satisfaction that the sentence imposed was within an appropriate range of punishment for these types of offences and not manifestly excessive.

Orders

[68] The appeal should be dismissed and the application for leave to appeal should be refused.

[69] **FLANAGAN J:** I agree with the orders proposed by Douglas J and with the reasons given by his Honour.