

SUPREME COURT OF QUEENSLAND

CITATION: *R v Tran* [2017] QCA 31

PARTIES: **R**
v
TRAN, Lam Hoang
(appellant)

FILE NO/S: CA No 310 of 2015
SC No 864 of 2014

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Date of Conviction: 2 December 2015

DELIVERED ON: 14 March 2017

DELIVERED AT: Brisbane

HEARING DATES: 24 August 2016; 3 November 2016

JUDGES: Margaret McMurdo P and Morrison and Philippides JJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The appeal against conviction is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT
UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO
EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of attempting to possess a commercial quantity of an unlawfully imported border controlled drug – where commercial quantities of heroin were concealed and imported in altars – where the appellant assisted with dismantling the altars in a locked shed – where a small group of people had access to the locked shed – where the police searched the shed during the dismantling process and the appellant’s appearance and behaviour suggested he was involved in the dismantling process – where the appellant denied knowledge of heroin but admitted he thought something illegal might have been concealed in the altars – where the respondent submitted that the appellant’s intention to possess the heroin was indicated by his participation – where the jury had the benefit of seeing and hearing the appellant’s evidence – whether on the whole of the evidence it was open to the jury to be

satisfied of the appellant's guilt beyond reasonable doubt

Criminal Code 1995 (Cth), s 307.5

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: P J Callaghan SC, and B Dighton, for the appellant
 G R Rice QC, and T Ryan, for the respondent

SOLICITORS: Bosscher Lawyers for the appellant
 Director of Public Prosecutions (Commonwealth) for the
 respondent

- [1] **MARGARET McMURDO P:** After reviewing the evidence in the appellant's trial, I am satisfied, for the reasons given by Morrison JA, that the guilty verdict is not unreasonable or unsupported by that evidence. I agree with Morrison JA that the appeal against conviction should be dismissed.
- [2] **MORRISON JA:** On 28 October 2012, a container load of freight from Vietnam arrived at the Port of Brisbane. On 6 November, Customs officers examined three wooden crates in the container. The crates contained two wooden altars as well as some other items of furniture.
- [3] Each of the altars was found to contain just over 27 kilograms of heroin, of varying purity. The total weight of pure heroin in the first altar was just over 17 kilograms, and just over 16.6 kilograms in the second altar. In total, there were 78 rectangular packages containing the powder, hidden in the base of the altars.
- [4] Customs officers removed the heroin and inserted 78 replacement packages into the base of the altars, containing an inert substance. Listening devices and tracking devices were inserted into the altars.
- [5] On 9 November, the two altars were collected¹ and delivered to an address at Chauvin Street, Robertson. They remained there, unopened, until the next day. On 10 November, Mr Tran and two others (Mr Pham and Mr Nguyen) collected the altars and other items from Chauvin Street, Robertson and delivered them to Greenhill Road, Munruben. They were placed in a locked shed.
- [6] Later that afternoon, police raided the shed and found that all 78 packages had been removed from the base of the altars. Mr Tran, Mr Pham and Mr Dang were all present inside the shed at the time of the raid.
- [7] Arising out of those basic facts, Mr Tran was charged with attempting to possess a commercial quantity of an unlawfully imported border controlled drug, namely heroin. He was convicted of that offence at the end of a five day trial.
- [8] Mr Tran appeals against his conviction on the ground that the verdict is unsafe and unsatisfactory and cannot reasonably be supported by the evidence.

¹ Along with the other items in that consignment.

Legal principles

[9] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*² requires that this Court perform an independent examination of the whole evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[10] In *M v The Queen* the High Court said:³

“Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.”

[11] *M v The Queen* also held that:⁴

“In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.”

[12] Recently the High Court has restated the pre-eminence of the jury. In *R v Baden-Clay*⁵ the Court said:

² (2011) 243 CLR 400, at [20]-[22]; see also *M v The Queen* (1994) 181 CLR 487, 493, 494.

³ *M v The Queen* at 493. Internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.

⁴ *M v The Queen* at 494.

⁵ [2016] HCA 35, at [65]-[66]. Internal citations omitted.

“[65] It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is “the constitutional tribunal for deciding issues of fact.” Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury’s verdict on the ground that it is “unreasonable” within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury’s function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.

[66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court ‘must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.’”

Review of the evidence

Admitted facts

[13] A Schedule of Agreed Facts was tendered at the trial. I do not intend to set them out in full, but rather record the following synopsis:

two altars, contained within wooden crates, were imported in a container load of goods from Vietnam; it arrived in the Port of Brisbane on 28 October 2012, and was examined by Customs officers on 6 November 2012;

in the case of the wooden altars, Customs officers detected white powder and when the bases were removed, each was found to contain 39 rectangular tape wrapped packages, containing a total of over 54 kilograms of powder;

in the first altar, the total weight of white powder was 27.1226 kilograms; the average purity of the powder for heroin in that altar was 62.7 per cent; the total weight of pure heroin in that altar was 17.0167 kilograms;

in the second altar there was 27.2421 kilograms of powder, at an average purity of 61.1 per cent, and therefore a total weight of pure heroin of 16.6503 kilograms;

inert powder was substituted for the heroin, packaged in a way that was similar to the original 78 packages; 78 packages were reinstalled and the base of each altar was reconstructed; listening devices and tracking devices were then inserted;

on 9 November 2012, the wooden altars (and some other items) were delivered to 40 Chauvin Street, Robertson; there they remained unopened and under surveillance, until the following day;

the shipping and freight records relating to the assignment referred to one Le Trinh Tran (LTT)⁶ as the consignee, but did not identify the person who had consigned the contents to Australia from Vietnam;

the charges for the consignment from Vietnam to Brisbane were paid in Vietnam by an unknown person;

a fingerprint of the defendant, Mr Pham, was located on a FoodSaver vacuum sealer machine, which was located inside a shed at 36 Greenhill Road, Munruben; in addition, a number of Mr Pham's fingerprints were located on FoodSaver plastic bags inside the same shed;

no prohibited substances were found on the FoodSaver vacuum sealer machine or the plastic bags;

Mr Dang's fingerprints were found inside a Nissan X Trail vehicle, located inside the same shed;

Mr Dang hired the Nissan X Trail some five days previously, on 25 October 2012, in Footscray in Victoria;

the value of the heroin was estimated to be between AUD\$10 million and AUD\$20 million, depending on the size of the quantities into which the powder might be broken down and sold.⁷

Police and investigation evidence

- [14] A number of police and other witnesses were called to establish the investigative train of events concerning the concealed heroin, events during the raid, and items found in the shed. For example one officer was called to establish that Mr Tran's vehicle was parked near the front of the property at the time of the raid. Their evidence need not be referred to in full, but I will endeavour to set out the pertinent details below.

Evidence of Officer Mcllwham

- [15] Officer Mcllwham gave evidence of the inspection of the crates when they were initially opened by Customs, including photographs of what was found. She also gave evidence of the investigative steps taken in terms of opening the base of the altars and extracting the 78 packages. She referred, by reference to photographic evidence, to the steps taken to substitute packages which looked like the originals, and rebuild the base of the altars.
- [16] Officer Mcllwham also took photographs inside the shed at Greenhill Road on 10 November 2012. In addition, she gave evidence of her own observations at that time. The relevant details from that evidence are as follows:
- (a) the shed was about four or five metres from an adjoining house;
 - (b) it had two roller doors and an additional door; the door had a short chain and padlock attached to it;

⁶ She was not related to or connected with Mr Tran.

⁷ Agreed Facts, AB 477.

- (c) inside the shed she took photographs of the altars, lying in a way where the bases could be seen; none of the substituted blocks of powder were left in the altars; the substitute packages were lying on the floor, and none had been opened;
- (d) inside the shed, at the back, were a number of other furniture items wrapped in cardboard, a freezer and a ride-on lawn mower;
- (e) there was a vehicle in the shed, a Nissan X Trail; that vehicle was subsequently removed for further examination;
- (f) on the floor of the shed was part of a mobile phone, with the battery missing and no SIM card; a separate photograph showed the battery on the concrete floor;
- (g) a number of SIM cards were located in the shed and one particular SIM card (a yellow or gold one) was located on one of the beams to the side of the shed;
- (h) other photographs showed another phone (a Samsung), other mobile phones⁸ and a Nokia battery; the bits of the phone were scattered in amongst the furniture wrapped in cardboard;
- (i) in amongst the debris near the altars, three sets of gardening gloves were discovered, and a number of tools; there were two paint scrapers on which was evident some of the acrylic resin that had been used to reconstruct the altars; in addition, there was a hammer on which was some of the white material consistent with the substitute material used in the base of the altars; further, the search located a mallet and a flathead screwdriver, each of which had the white substance on them; another piece of equipment similar to a wrench was found;
- (j) a FoodSaver machine was found, and subjected to investigation later; in addition there were 16 different sized FoodSaver bags that had been partially heat sealed; no traces of drugs were found on the FoodSaver machine or the plastic bags;
- (k) Pham's fingerprint was found on the FoodSaver machine and on two of the sealed plastic bags; and
- (l) later examination of the Nissan X Trail showed that the door trim on one side had been removed; Dang's fingerprint was found on the left rear passenger door.

Evidence of Officer Illidge

- [17] Officer Illidge led the investigation. He gave evidence concerning the surveillance of the various people involved in dealing with the altars, including the provenance of video and audio recordings as a result of that surveillance. The surveillance showed that on 10 November 2012, Mr Tran, Pham and Nguyen, collected the altars from Chauvin Street, Robertson and took them to the property at Greenhill Road. Both altars were moved on the first trip, and other items were taken on the second trip.
- [18] At 4.38 pm, various officers went to the shed at Greenhill Road. It was a stand-alone garage, with double lockable roller doors. When the officers arrived at the shed, there was a side access door that had a large chain and padlock on it. The roller doors were

⁸ A Samsung and a Nokia.

down and the side access door was secured (from the inside) with the chain and lock. Unsuccessful attempts were made to cut through the bolt. He had to move away from his location because there were a number of people arriving at the main house (some 7-10 metres away) and he was required to assist with managing them. When he returned, Mr Tran, Pham and Dang had been removed from the shed.

- [19] He went in the side door and saw the altars on their side, to the right as one came through the entrance. He could see the bottom of the altars had been tampered with and that the packages had been removed and were lying on the floor of the garage.
- [20] At the time of his arrest, Mr Tran was wearing the same clothes as he had been wearing earlier in the day, when the altars were moved to the shed. Officer Illidge identified the transcript made of the surveillance recording from inside the shed. That started at about 3.32 pm, ending at about 4.38 pm when the police went inside the shed.
- [21] Officer Illidge identified various items that he saw in the shed, apart from the altars. That included the Nissan X Trail vehicle, a Sunbeam brand heat sealer, vacuum seal equipment and plastic bags. There were a lot of items which he described as general items or ordinary items that one would normally find in a shed.
- [22] In cross-examination, Officer Illidge confirmed that LTT, a person who ran a furniture import business, had organised the importation of the contents of the container. She had brought in at least two containers of general furniture. Following that she was contacted by another person, Hue, who wished to bring in a third container. As a consequence LTT organised it to be shipped to Australia.
- [23] In the surveillance video of events on 10 November 2012, Nguyen drove a van and trailer to the Chauvin Street address and Mr Tran and Dang arrived in a different vehicle, one that belonged to Mr Tran. Mr Tran's vehicle was parked beside the shed at the time of the police raid.
- [24] At the time of the raid, police were shouting out to those inside the shed. The police were shouting "police, police, police, open the door, open the door". At first there was difficulty in gaining entrance, but eventually the padlock on the door was opened from the inside. At that point a number of armed police entered the shed. Upon entry, those inside the shed were told to get on the ground and display their hands, at which point they were handcuffed.
- [25] The surveillance records showed this sequence of events at the shed:
- (a) the relevant recording started at 3:32 pm;
 - (b) at 3.32 pm, Mr Tran's vehicle was noted travelling west on Koorungal Road, Munruben, then turning left to travel south on Greenhill Road, towards the shed;
 - (c) at 3.33 pm, a grey Nissan Pathfinder vehicle, towing a trailer, travelled towards the shed;

- (d) Officer Illidge accepted that at the point when the listening device started to make a relevant recording, Mr Tran's Ford Fairmont was not at the premises, but on its way;⁹
- (e) at 3.43 pm, Mr Tran's vehicle turned out of Greenhill Road, onto Koorungal Road, travelling east; that is, it was driving away from the shed; and
- (f) at the same time the Nissan Pathfinder left; at 3.59 pm, Mr Tran's vehicle returned to the shed.

Evidence of Officer Harbour

- [26] Officer Harbour was one of the police officers who raided the shed. His evidence concerned what he saw at the time of the raid itself. He tried to open the roller door at the front of the shed, but it was locked. He moved around to the left hand side of the shed to a door, which was also locked with a chain that went through the door and through the wall of the shed. It appeared to be locked from the inside. However, there was enough movement in the door to be able to pull it open a small distance. He looked inside and saw people inside the shed. He started banging at the chain and door calling out "Police, open the door". Soon after that he heard voices from the inside call out that they would open the door, and then the door opened.
- [27] Immediately inside the door were three Asian men. He grabbed the person directly in front of him, who was Pham. The other two occupants were brought out of the shed by fellow officers.

Evidence of Officer Payne

- [28] Officer Payne was part of the team who conducted the raid on the shed. He was in the lead in the effort to gain access to the shed. He described what happened:

"And as we came down we could hear all of the banging, a whole lot of noise, coming from the front which masks – ... – the reason I remember that it actually masked our approach as we came down. We got there. I thought I could lift up the front roller door; that as the first thing I was going to do. I went down to lift it up and it was locked. ... – part of the training is we look for a second point of entry. Looked around to ... – my left side of the shed and you could see another door through there. One of the members or two of the members – I can't say exactly how many of the members stayed, but the rest of us went around to the other door to try and gain entry and I remember seeing ... the chain around through the door but there was no padlock on the outside. Federal Agent Harbour was pushing against the door and he started yelling out ['Police']. Every – all the other officers were yelling out police ... The door opened. There's three of the gentlemen – the defendants inside. They were taken out one by one, out of the shed, while we covered."¹⁰

⁹ AB 124.

¹⁰ AB 181.

- [29] He described the noises that were heard as they approached, as “just loud banging noises ... it’s just loud ... one thing hitting another for want of a better word ...”. The noises were still going on when he tried to pull up the roller door.
- [30] Once the door was opened, he could see the three men inside “sort of pushed into the door ready to come out”. They had dust or powder upon themselves, on their bodies.¹¹
- [31] In cross-examination, Officer Payne said that the officers did not need to enter the premises in order to pull the three men out. The officers were on the outside and they grabbed the first man, pulling him outside where he was handcuffed. Then the others were pulled out one at a time.
- [32] In cross-examination he confirmed that all three men had dust upon them, which looked like white coloured powder.¹² It was specifically put to him that Mr Tran was not covered in powder, and that was denied.
- [33] Officer Illidge said that he could remember very clearly that all three were covered in dust and explained why, in re-examination:

“[What] I recall quite distinctly was the fact that when I saw the wires out I – I couldn’t understand with all of the – the dust around that was on everything and still in the air – and the guys were covered in dust – that the wires coming out of the – the blocks would have been the first giveaway that police were – were involved in this matter, and yet they were on blocks – in blocks that were already in a pile, and – they were still banging and still removing things, obviously, at that time, and it didn’t occur to them, so there was just the dust ...”¹³

Evidence of Officer Salvatore

- [34] Officer Salvatore was involved in the raid on the shed. He attempted to open the roller doors, but they were locked and so he went around the side to the single door. There was a thick chain that went into two holes between the side of the wall and the door. It was also locked. He called out several times, very loudly, that they were Federal Police and the people inside were to unlock the door. After several attempts to get them to open it, he could hear the chain moving and then the door was unlocked.
- [35] The three men inside were removed quickly. He could see the altars with bits broken off and a number of blocks on the floor. When he first looked inside when the door was opened, the three men were fairly close to the doorway. He observed the Nissan X Trail vehicle, and mobile phones which were in pieces with the SIM cards removed.
- [36] He gave evidence about the positioning of the three sets of gloves in relation to the altars. There was also a FoodSaver vacuum seal machine, and a number of plastic bags in a box. In addition there were other items such as a washing machine and lawn mower, and a lot of furniture.

¹¹ AB 182.

¹² AB 185.

¹³ AB 186. Officer Payne had mentioned seeing wires coming out of the blocks, at AB 182.

Evidence of LTT

- [37] LTT gave evidence that she operated a small business importing and selling wooden items from Vietnam. She said that Ms Hue asked if LTT could arrange for a shipment that included items she wanted. Those items included an altar which she wished to set up at home. That shipment was successfully managed, and Ms Hue asked if she could include something in the next shipment. She told LTT that her sister would like to have an altar as well and therefore could that be included in the next container. When it eventually arrived she contacted Ms Hue to pick it up straight away.
- [38] She could recall three men arriving and taking the items from the shipment. She recognised one of them as being a person who had handed her money previously, a couple of times, to pay for a shipment. He was the driver of a four wheel drive vehicle.

Interpreter's evidence

- [39] Mr Vu, a Vietnamese interpreter, was called to verify the translation of the surveillance recording of the events in the shed. At the start of his evidence the jury were provided with a transcript (in English) of the recording which was, naturally, in the Vietnamese language.¹⁴ The jury were instructed that the recording was the actual evidence.
- [40] The transcript that was given to the jury is in the Appeal Record Book.¹⁵ Mr Vu's evidence consisted of the recording being played to the jury, interrupted where necessary, so he could clarify what had been said and what had been written in the transcript.¹⁶
- [41] For present purposes, it is convenient to look at the transcript in several compartments. Officer Illidge accepted that according to the surveillance reports, Mr Tran's vehicle arrived and left at certain particular times. He first arrived at 3.32 pm. That is about when the audio recording for events in the shed starts. During the next 11 minutes there are entries consistent with a discussion about how to dismantle the altars. Thus, there are references to taking out a hinge, putting something into something else, and the difficulty in "lifting it".¹⁷
- [42] Up to a point at which the surveillance shows that Mr Tran left (3.43 pm), there is no entry that is directly referable to a discussion about a hammer. It is true, however, that some comments were not able to be translated because they were not in the Vietnamese language and there were a couple that were inaudible. In the few minutes leading up to the time when Mr Tran left, however, someone said the words "going home".

¹⁴ As the evidence was given it transpired that some comments were in an Asian language, but not Vietnamese.

¹⁵ AB 503.

¹⁶ It became Exhibit 17.

¹⁷ AB 503-504.

- [43] In the 16 minute interval during which Mr Tran was away, according to the surveillance, there were comments consistent with exhortations from one person to another to make a better effort, as well as comments about not being able to lift it up or bear it.¹⁸
- [44] At about the point at which the surveillance report suggests Mr Tran returned (3.59 pm), a comment is recorded: "Hello brother. We have hammer or something?"¹⁹ Mr Vu clarified that this was posed as a question, asking for a hammer. The next comment a few seconds later, refers to having a hammer and having "everything ready".²⁰
- [45] Over the next 40 minutes there are a number of entries consistent with the efforts to dismantle the altars. Thus, comments are made to "take little by little", to lift it up and lay it down, using a hammer to tap it, how many layers there are, and using some tool to cause some part of the altar to come apart, as well as pulling nails out. During that time the audio recording also has various noises associated with the dismantling, such as loud banging.
- [46] As will be seen, according to Mr Tran's evidence, he went home to collect a hammer, then delivered it to those inside the shed. However, according to his version, he then stayed outside the shed until eventually knocking on the door and going in to retrieve the hammer. There are a couple of entries which, according to Mr Tran, related to his entry into the shed:
- (a) 4.36 pm – "Different two Buddha statues. This is a lot thicker. When did you arrive?"
 - (b) 4.37 pm – "Just then. Give hammer."
 - (c) 4.38 pm – "Not yet. Not yet. Still doing it."²¹
- [47] The last entry in the sequence above came seconds before the police commenced to call out and demand that the door be opened.
- [48] The jury had the benefit of hearing Mr Tran because he gave evidence. This Court does not have that benefit. Thus the jury were in a far better position to make a judgment on whether the voice they heard from Mr Tran when he gave evidence was one of the voices on the audio tape. This Court is simply not in a position to make the same comparison.
- [49] The significance of that comparison, however, is that the jury may have concluded that it was, in fact, Mr Tran who remained in the shed after he brought a hammer back and during the time that work continued on dismantling the altars.²²

Evidence of Mr Tran

¹⁸ AB 504.

¹⁹ AB 504.

²⁰ AB 505.

²¹ AB 508-509.

²² Note the entries at AB 514-515-517.

[50] Mr Tran elected to give evidence. The essential features of his evidence were as follows:

- (a) he first met Pham on 10 November 2012; he had never been to the premises at Greenhill Road before that time;
- (b) on 10 November 2012, he was contacted by an old friend, Nguyen, who asked him to move some furniture, in return for which he would be paid \$100;
- (c) he was told to go to Chauvin Street, Robertson, at about 1.00 pm;
- (d) he travelled alone to that address, driving his blue Ford Fairmont; he had not been to that house before;
- (e) there he met Pham and Nguyen joined them; they loaded furniture onto the trailer attached to Nguyen's car, at the direction of Nguyen; Nguyen said to follow him to the shed, and to make sure that Pham worked with him;
- (f) Pham accompanied Mr Tran in driving to the shed after the first load; when they arrived there he saw Dang inside the shed; the two roller doors were closed; one of the roller doors was open and he saw Dang inside the shed;
- (g) when they arrived at the shed, Nguyen introduced Mr Tran to Dang, saying he was his brother; he had not met Dang before;
- (h) the two altars were removed, with Dang giving instructions as to what to do; it took four people to lift one of the altars off the back of the trailer; the altar was so heavy it could only be moved a bit at a time;
- (i) they went back for the second load, bringing back the rest of the furniture; when they arrived back the roller doors were locked; as the trailer was reversed the roller door opened and Dang came out;
- (j) Mr Tran then described what happened; Nguyen or Dang asked them to stay and help:

"Yeah and I get out and ask us about hey, guys, I need you to like stay here for help me for dismember altar. We have the cigarette hidden inside altar ... Then it turns out he asked me about a hammer. Hey brother, you have hammer in the car? I said I don't have it. But I can get you one because my house near here. So he agree with that. Then Nguyen left and he say about he go home or he return the trailer. And then I left ...";²³

- (k) Nguyen and Mr Tran left at about the same time, but Mr Tran expected to see him later because he had not been paid;
- (l) Mr Tran went home and got a hammer, then returned to the shed; he then described what happened:

"I tried to open the roller door for go in but they closed so I had to go to the side door. When I knock Dang open the door and ask me hammer and

I gave him the hammer. Then I turn – I go out, come back to my car, stay there, then have smoke.”²⁴

- (m) he said he spoke to some of the people who were gathering at the house next door, but did not go into the shed at any time;
- (n) he said he remained outside waiting for Nguyen to return and give him his money;
- (o) Mr Tran then explained how he went inside the shed:

“And little bit late so I come inside the side door again, knock the door, the other door lock and Dang opened the door. Yeah. So he let me in ... when I go in the smell and the look – how it’s called [indistinct] smell on the glue or from the wood very strong. So I say something ... about the smell ... Then I have to phone – then someone asked [indistinct] Pham he ask me about when did I arrive. So I just say just then can I have hammer back. And I have phone call. My missus call me.”²⁵
- (p) Mr Tran said that before he went back inside the shed, he heard banging inside;
- (q) Mr Tran said when he received a phone call from his wife she asked him “where did I go”, then “suddenly heard the bang, the noise, then police call out. I just threw the phone and lay down on the ground”;²⁶
- (r) Mr Tran identified a comment in Exhibit 17, at 3.39 pm as being definitely not his voice; that was when someone said “going home”;²⁷
- (s) Mr Tran said it was Dang who spoke to him when he came back and asked him about a hammer; that is by reference to the entry at 3.59 pm “having hammer. Have everything ready”;
- (t) Mr Tran said that he did not use any equipment when in the shed;
- (u) Mr Tran said that a comment at 4.34 pm, “this smell motherfucker making me so hot”, was made by him;²⁸
- (v) Mr Tran also identified that the question at 4.36 pm, “when did you arrive?”, was asked by Pham of him;²⁹ the next two entries were made by him;³⁰
- (w) later in his evidence, whilst Mr Tran said that he did receive a phone call from his wife and spoke to her on it, he could not recall if the next two entries at 4.38 pm

²⁴ AB 295.

²⁵ AB 296.

²⁶ AB 298.

²⁷ AB 299 line 33.

²⁸ AB 302.

²⁹ AB 302.

³⁰ AB 302.

were actually made by him;³¹ that includes an entry where, after a phone rings, the comment is made “Not yet. Not Yet. Still doing it”;

- (x) Mr Tran said that when he was taken outside by the police, he had thick powder all over his body, on his clothes and in his pants;³² and
- (y) he said that he did not wear any gloves at all that afternoon, nor touch any tools except the hammer which he gave to Dang;

Cross-examination of Mr Tran

[51] In cross-examination, Mr Tran maintained that when the police came through the shed door, he was already lying down on the ground. He did so, he said, because he panicked at the noise and banging.³³ He said that he was at a point some distance to the right of the doorway and that police officers had to walk all the way in, in order to get him off the ground.³⁴

[52] Mr Tran said he threw his phone away because he panicked, even though he was at that time still talking to his wife.³⁵

[53] He said that when he came back to the shed, shortly before 4.34 pm, he had to knock on the door because it was locked. Dang let him in and then the door was locked behind him.³⁶ He thought it was “a little bit” unusual that the door was locked when he walked inside, but went on:

“Of course, ... [b]ecause I know that they would take cigarette out like they told us before.”³⁷

[54] He said he did not say anything to the others about the cigarettes because it was “not my problem”.³⁸ He said Dang told him that there was going to be cigarettes inside the altars after they finished unloading the second trip and were outside the shed:³⁹ Dang “tell that I need some of you to stay here to help me remove all the cigarettes that was hide inside the altar”.⁴⁰

³¹ AB 302-303.

³² AB 304.

³³ AB 308-309.

³⁴ AB 310.

³⁵ AB 312-313.

³⁶ AB 314-315.

³⁷ AB 315.

³⁸ AB 315.

³⁹ AB 317.

⁴⁰ AB 317.

[55] Mr Tran was questioned about why he understood he was being asked by Dang for a hammer. He responded:

“MR RYAN: Right. So what did you think the hammer was going to be used to do?

WITNESS: Must be involved with something for take the cigarette out.

MR RYAN: The hammer had to be used to get the cigarettes out?

WITNESS: Yeah, I think so. Yeah, I guess. That’s why he need it.

MR RYAN: Yeah. So what did you think, then, if you were going to use a hammer and you needed to get cigarettes out of an altar, what did you think was going to have to happen to the altar to get the cigarettes out?

WITNESS: I don’t care. Not my problem.”⁴¹

[56] Mr Tran maintained that he did not know that the furniture and altars had been imported from overseas, nor that they contained drugs.⁴²

[57] Mr Tran was questioned about whether he asked, or it crossed his mind, about the cigarettes and the need to remove them and why that was occurring, or whether that crossed his mind at all. He said that he was not involved in the business and had no questions about it.⁴³ He explained that he went to get a hammer when asked by Dang whether he had one, and then continued:

“MR RYAN: And you’ve been telling us all the way through your evidence that you just didn’t want to know anything about this.

WITNESS: That’s right.

MR RYAN: So why, then, did you go off to your house and get a hammer to give to Dang?

INTERPRETER: Yeah. Because he asked me to lend him a hammer, and I thought that is not a big business or matter, that’s why I am ready to get the hammer for him.

MR RYAN: And what did you think he was going to do with the hammer?

INTERPRETER: I thought he needed the hammer to open something so he can remove the cigarette.

MR RYAN: So – but if he was going to use the hammer to hammer something to remove the cigarettes, that meant it would involve damaging the furniture, wouldn’t it?

INTERPRETER: Yeah.

⁴¹ AB 318-319.

⁴² AB 320, 324.

⁴³ AB 330.

MR RYAN: And here you were – you’d been paid money, you say, to deliver this furniture for some – for Nguyen’s relative – for your friend’s relative.

WITNESS: Yes.

MR RYAN: So did you want to contact Nguyen and say, ‘hang on, something’s wrong here, Dang wants to damage your furniture’?

INTERPRETER: So, as I say, I thought that the business – I did not want to involve – so I have no questions about that.

MR RYAN: So you didn’t tell Nguyen that Dang was going to damage the furniture?

WITNESS: No. I didn’t.”⁴⁴

[58] He was then asked whether he thought that Dang was going to do something illegal and answered:

“Yeah, maybe, yeah”.

[59] He then elaborated:

“WITNESS: Yeah, because only that time I know, so maybe a yes on that – maybe [indistinct], yeah.

MR RYAN: Well, at that stage, if you thought he might have been doing – Dang was doing the wrong thing, why then did you go and help him by going and getting a hammer?

WITNESS: Because when he’s just [indistinct] cigarettes, so I thought ‘that’s not a big deal’, because cigarettes are not a big deal, you know ...”⁴⁵

[60] Mr Tran reiterated shortly thereafter that he thought it was a bit strange that the shed was locked up, and he knew they were doing something illegal in there, taking the cigarettes out.⁴⁶

[61] Later in his cross-examination, Mr Tran was specifically cross-examined about that part of the transcript which has a comment “Not yet. Not yet. Still doing it.” At that point he denied that he said that to his wife.⁴⁷

[62] Mr Tran said that when he first went into the shed, before the police came, he saw Dang and Pham both wearing gloves.⁴⁸ Mr Tran said that he saw the yellow packages being pulled out of the altars, and saw a lot of them on top of the altars.⁴⁹

⁴⁴ AB 330-331.

⁴⁵ AB 333-334.

⁴⁶ AB 341-342.

⁴⁷ AB 353 line 44.

⁴⁸ AB 360-361.

Appellant's submissions

[63] Senior Counsel for Mr Tran contended that the evidence left a significant possibility that Mr Tran was not guilty of the offence with which he was charged.⁵⁰ The contentions on this point can be summarised in the following way:

- (a) there was no direct evidence linking Mr Tran to any of the evidentiary matters set out in the Schedule of Agreed Facts;
- (b) there was no evidence that Mr Tran had any relevant association with any of the persons or things involved, including no evidence of any conversations with anyone prior to 10 November 2012, which might indicate his involvement, nor any evidence since;
- (c) no part of the recordings mention heroin or any illegal activity and there was no analysis of telephone records that might establish such a link;
- (d) without speculation, it was not possible to reach any sound conclusion about Mr Tran's culpability;
- (e) the evidence established only a menial role played by Mr Tran, characterised as being no more than a "gofer"; even if he assisted handling the altars, that did not establish any basis to conclude that Mr Tran sought to bring himself into a position of control over a quantity of heroin;
- (f) no reliance could be placed on the parties provisions in the criminal code as the "aiding issue" was no part of the prosecution case;
- (g) whilst possession could be joint, it still required an element of actual custody or control; mere presence in the company of others who were exercising control is not sufficient.

[64] That argument was developed in oral submissions, but essentially along the same line.

Respondent's submissions

[65] The respondent contended that the particulars of the attempt to possess the material in the altars was:

- (i) loading each altar onto a trailer; and
- (ii) participation in dismantling them. It was contended that the exercise of dismantling the altars in the shed and recovering the packages manifested control over the contents, and that exercise was shared amongst the three persons present when the police arrived.⁵¹ It was open on the evidence for the jury to infer that Mr Tran undertook the conduct particularised, with the intention of having at least joint possession of the substance inside, believing that substance to have been a border controlled drug.

⁴⁹ AB 365.

⁵⁰ Relying on *M v The Queen* (1994) 181 CLR 487, at [9].

⁵¹ That is, Mr Tran, Mr Pham and Mr Dang.

- [66] It was contended that, as a general proposition, it was implausible that those responsible for the importation and distribution of such a large quantity of heroin would entrust a critical task to anyone unaware of the true nature of what needed to be done. The participants could not afford the risk of an innocent person belatedly discovering the presence of drugs, and then informing on the others. The activities at the shed, combined with the loading of the altars at Chauvin Street, and moving them to the shed, was sufficient for the jury to infer Mr Tran's belief as to the presence of drugs, and his conduct being directed at having control or custody of the heroin.
- [67] Alternatively, it was said, the verdict could be supported by the jury simply reasoning that custody and guilty knowledge were established from what happened at the shed. That submission pointed to: the locking of the shed doors in order that dismantling be carried out to the exclusion of all others; Mr Tran's knowledge that the doors were locked; the substantial destruction of the altars in the dismantling process; the fact that the altars were laid horizontally so as to access the bases (indicating that those dismantling the altars knew where to look for the contents); Mr Tran admitting that he obtained a hammer to be used in the process; the sounds of the use of tools on the recording; (inferentially) that each of the three men used a set of gloves; the fact that the three men were covered in dust when apprehended; the inference that Mr Tran had deliberately dismantled his phone and thrown it away when police banged on the shed; and (inferentially) Mr Tran's voice at 4.38 pm saying "Not yet, not yet, still doing it", from which a conclusion of requisite intent could be drawn.

Discussion

- [68] It is evident that the jury rejected Mr Tran's exculpatory account of the events on 10 November 2012. That being so, it is useful to review what the evidence established on that basis, absent any part of Mr Tran's account:
- (a) over 33 kilograms of pure heroin was imported, concealed in the base of two altars;
 - (b) the heroin was contained in 78 wrapped packages;
 - (c) once the heroin was replaced and the altars reconstructed, they were delivered to an address at Chauvin Street on 9 November 2012;
 - (d) on 10 November 2012, Mr Tran, together with Pham and Nguyen loaded the altars onto a trailer; with Mr Tran in attendance, the altars were delivered to the shed in Greenhill Street;
 - (e) Mr Tran, Pham, Dang and Nguyen unloaded the altars and placed them in a shed;
 - (f) the shed was locked;
 - (g) a further delivery was made of the balance of the furniture from the shipping container;
 - (h) Mr Tran assisted in that process;
 - (i) at 3.43 pm, Mr Tran left; 16 minutes later he returned;
 - (j) at some point after that, Mr Tran was inside the shed, at a time when the roller doors were locked and the side door was padlocked with a chain;

- (k) the audio recording, Exhibit 10, reveals that from 3.32 pm (when the recording starts) to about 4.01 pm (after Mr Tran's return) there are no discernible sounds of banging, hitting or anything that might constitute dismantling of wooden altars;
- (l) the only thing that is heard up to Mr Tran's return (apart from conversation) are sounds consistent with sliding something or a door opening;
- (m) there is almost complete silence between about 3.48 pm and 4.01 pm, after Mr Tran's return;
- (n) from about 4.01 pm loud sounds of banging, hitting, hammering and use of metal tools commences and continues fairly consistently until the police arrive;
- (o) in the period after Mr Tran returned, discussions in the shed included references to a hammer, a crowbar, using the hammer to "tap it", pliers, pulling the nails and using a crowbar to "jam it in";
- (p) during that period subsequent to Mr Tran's return, the work of dismantling the altars was completed;
- (q) the altars were situated very close to the roller doors, which were facing the driveway and near where Mr Tran's car was parked;⁵²
- (r) Mr Tran was inside the shed with Pham and Dang, with all doors locked or padlocked, at the time the police conducted the raid;
- (s) Mr Tran's body and clothes were covered in white powder;
- (t) Mr Tran's phone was destroyed and in pieces on the floor of the shed; and
- (u) three pairs of worn gloves were lying in the debris from the dismantling.⁵³

[69] That evidence demonstrates why the events which occurred once the altars were at the shed cannot be divorced from the collection of the altars at Chauvin Street and their delivery to the shed. Mr Tran was one of the people who was physically responsible for collecting the altars and removing them from Chauvin Street, and installing them in the locked shed. Mr Tran helped to unload the altars, and carry them into the shed where they were locked away from the outside world. Once in there, the shed was locked and access was restricted. The installation of the altars in the locked shed could not have been achieved without their retrieval from the address at Chauvin Street.

[70] On that evidence, the jury could infer that Mr Tran was present inside the shed when the dismantling took place.

[71] If certain parts of Mr Tran's evidence were treated as admissions against interest, the availability of the inference becomes even stronger. The following is added to the evidentiary base:

⁵² Exhibits 4.1, 4.3, 4.4, 4.6 and 4.9.

⁵³ Exhibits 4.6, 4.7, 4.8, 6.1, 6.2 and 6.3.

- (a) Dang asked Mr Tran to stay and help “dismember” the altars, because they had cigarettes hidden inside;⁵⁴
- (b) as a result of that request Mr Tran stayed;
- (c) Dang asked for a hammer;⁵⁵
- (d) as a result of that request Mr Tran offered to drive home to get a hammer, to assist in the dismantling process;⁵⁶
- (e) he did drive home and get a hammer, for the purpose of it being used to extract something from the altars;⁵⁷ Mr Tran thought that the hammer would be used to “open something so he can remove the cigarette”, and that would mean damaging the furniture;⁵⁸
- (f) he returned to the site of the shed and stayed there;
- (g) when he got back with the hammer the roller doors were closed and locked, as Mr Tran tried to go in through them but could not; the side door was closed and locked as well;⁵⁹
- (h) the side door was closed and locked and he had to knock on the door;⁶⁰ however he did not have to identify who he was, but just knocked and the door opened;⁶¹ it was Dang who let him in;⁶² once inside the door was locked again;⁶³ and
- (i) once inside the shed he witnessed Pham and Dang wearing the gloves,⁶⁴ and packages being pulled out of the altars.⁶⁵

[72] Once the explanations by Mr Tran were rejected, as it seems they were by the jury, then the balance of the evidence was sufficient to infer Mr Tran’s direct involvement in the movement of the altars, their being placed in a shed where access was restricted to only a few people, the dismantling of them to extract the material in the base, and his provision of equipment for that purpose.

⁵⁴ AB 292 line 26; AB 316 line 35- AB 317 line 3; AB 317 lines 9-19, 33-34; AB 329 line 36.

⁵⁵ AB 292 lines 31-37.

⁵⁶ AB 292 lines 31-34.

⁵⁷ AB 293 line 45 – AB 294 line 7.

⁵⁸ AB 330 lines 27-34.

⁵⁹ AB 295 lines 12-13; AB 340 lines 15-17.

⁶⁰ AB 314 lines 40-47; AB 367 lines 40-41.

⁶¹ AB 367 lines 43-46.

⁶² AB 370 lines 45-47.

⁶³ AB 315 lines 5-8. Whilst this was said about when, on his account, he went to retrieve his hammer from Dang, it was open to the jury to infer that it applied to his access to the shed generally.

⁶⁴ AB 361 lines 3-13.

⁶⁵ AB 365 lines 7-16.

- [73] The dismantling of the altars evidently took place very close to the roller doors of the shed. The audio recording, Exhibit 10, reveals how loud that process was, and that the loud hammering and banging all took place after Mr Tran arrived back. Mr Tran's car was parked right next to the roller doors (Exhibit 4.3). None of it could have been missed even if Mr Tran was outside, as he said.⁶⁶ However, there was ample to infer he was inside, and part of the process.
- [74] Insofar as the submissions for Mr Tran highlighted the menial nature of his role, that necessarily depended upon acceptance of Mr Tran's evidence. Once it was rejected, then various explanations fall away. For example, the suggestion that he was simply moving furniture for a \$100 fee, and that he remained outside the shed for most of the time. More importantly, the suggestion that his participation was limited to the production of a hammer, and then its retrieval, is no longer part of the equation.
- [75] Further, the jury may have viewed with some suspicion, Mr Tran's evidence as to how his Nokia phone ended up where it was, and in the condition it was. It was in several pieces, with the battery separated and the SIM card remote from that location, on a beam. Mr Tran's explanation was that he panicked when the police banged on the shed and called out. All he did, he said, was throw his phone on the floor. The jury may well have considered that it was unlikely to have ended up in its dismembered state, with the SIM card itself remote from the phone, unless a more deliberate attempt had been made to destroy it.
- [76] Even more telling, perhaps, was the fact that Mr Tran was covered in dust when apprehended. According to his version of events, he had only gone in the shed when the altars were put in the shed and then he remained outside except for:
- (i) the limited time when he produced a hammer; and
 - (ii) then immediately before the police arrived when he went to retrieve it. On that version, he could not possibly have been covered in dust from the dismantling process.⁶⁷
- [77] Stripped of Mr Tran's exculpatory explanations, but including admissions, the evidence before the jury was as follows:
- (a) Mr Tran participated in collecting the altars from Chauvin Street, loading them onto a trailer and unloading them into the shed;
 - (b) he did so in the company of Pham and Nguyen; at the shed Dang joined in;
 - (c) within about 10 minutes of the second trailer load being unloaded into the shed, Nguyen's vehicle left, as did that of Mr Tran; inferentially, those vehicles were driven by Nguyen and Mr Tran respectively;

⁶⁶ In fact Mr Tran said that while he was standing outside he heard a lot of noise coming from inside the shed: AB 295 lines 26-28; AB 347 lines 32-47.

⁶⁷ Interestingly, it was put to Officer Payne that Mr Tran was not covered in powder or dust (AB 185), yet that is the evidence that Mr Tran gave himself.

- (d) the recording (Exhibit 10) to that point does not exhibit anything that might indicate something being dismantled;
- (e) in the 16 minutes that Mr Tran was away, there are, similarly, very few noises on the tape which would indicate dismantling;
- (f) there are some references to attempts to get someone to help, and being unable to lift it up;
- (g) once Mr Tran returns, the recorded conversations refer to a hammer, that something had been delivered okay, various instructions about laying something down, using a hammer to tap it, a crowbar and nails; more importantly, the period following Mr Tran's return is when all the loud sounds of hammering and banging took place; it is only those sounds which were consistent with dismantling;
- (h) at 4.38 pm someone says (apparently on a phone) "Not yet, not yet, still doing it"; Mr Tran said in evidence that immediately before that he was phoned by his wife; the jury could infer that it was his response; further, the jury may have taken the view that the phrase "still doing it" was only rationally consistent with participation in dismantling the altars; it could not rationally relate to Mr Tran's account of merely assisting in moving furniture from one place to another, as that had ceased over an hour before;
- (i) when the police apprehended those in the shed, there were three men and three pairs of gloves; the jury could infer that Mr Tran had been wearing one set of the gloves;
- (j) Mr Tran was covered in dust when apprehended, from which the jury could infer that he had been actively involved in dismantling;
- (k) Mr Tran's phone was destroyed, and the SIM card removed well away from the body of the phone, from which the jury might infer that there had been an effort to destroy the phone, rather than merely throw it on the floor;
- (l) Mr Tran admitted that he was present in the shed when Pham was dismantling the altars; and
- (m) Mr Tran admitted that he saw the 78 packages on the floor, and knew they had been taken out of the altars; the jury could have rejected his evidence that he believed that it was cigarettes, and inferred belief that it was heroin.

[78] Senior Counsel for the respondent made the submission that it was wholly implausible that those responsible for removing over 30 kilograms of what they believed to be heroin from the base of altars in a locked shed, would have permitted someone not involved in the process into the shed. There is force in the submission, but in my view it is not necessary to draw upon that line of reasoning. Shorn of the exculpatory explanations by Mr Tran, the evidence shows, in my view, sufficient connection between Mr Tran and the moving of the altars, relocation and subsequent dismantling of the altars, that it was open to the jury to infer the requisite element of custody or control sufficient to constitute possession on the part of Mr Tran. That does not mean possession exclusive to himself as against Pham or Dang, or for that matter Nguyen. Possession against others is sufficient, and for that purpose the relocation of the altars into a locked shed, inside which the dismantling took

place, is sufficient when combined with the other inferences that might be drawn from the dismantling process and the recordings of what was said.

[79] The question which this Court must ask itself is whether it considers, upon the whole of the evidence, that it was open to the jury to be satisfied beyond reasonable doubt that Mr Tran was guilty.⁶⁸ In conducting that exercise, one must bear in mind that the jury had the undoubted benefit of seeing and hearing Mr Tran give evidence, and therefore were better placed to judge whether Mr Tran's voice was on the recordings, and at which point. Further, the jury were in an obviously better position to make an assessment of the value of the admissions made by Mr Tran, as to his participation.

[80] Having reviewed all of the evidence,⁶⁹ I am unpersuaded that it was not open to the jury to be satisfied beyond reasonable doubt of Mr Tran's guilt. Put another way, I am not persuaded that there is a significant possibility that an innocent person has been convicted.

[81] For the reasons given above, I would dismiss the appeal.

[82] The orders I propose are:

1. The appeal is dismissed.

[83] **PHILIPPIDES JA:** As Morrison JA has explained in his reasons for judgment, after reviewing all of the evidence, I am also unpersuaded that it was not open to the jury to be satisfied beyond reasonable doubt of Tran's guilt. I agree for the reasons stated by his Honour that the appeal should be dismissed.

⁶⁸ *M v The Queen* (1994) 181 CLR 487; *R v PAH* [2008] QCA 265.

⁶⁹ Including the audio recordings in Exhibit 17.