SUPREME COURT OF QUEENSLAND

CITATION:	*R v Handlen & Paddison* [2010] QCA 371
PARTIES:	**R** **v** **HANDLEN, Dale Christopher** (appellant) **R** **v** **PADDISON, Dennis Paul** (appellant)
FILE NO/S:	CA No 30 of 2009 CA No 154 of 2009 CA No 12 of 2009 CA No 158 of 2009 SC No 1320 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATES:	5 August 2010; 6 August 2010
JUDGES:	Holmes, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In CA No 30 and 154 of 2009:** **1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.** **In CA No 12 and 158 of 2009:** **1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF GENERAL CONDUCT OF TRIAL – where appellant, Handlen, convicted of two counts of importing, one count of possessing and one count of attempting to possess a commercial quantity of a border controlled substance – where appellant, Paddison, convicted

of two counts of importing and one count of attempting to possess a commercial quantity of a border controlled substance – where appellants argued that the Crown case was put to the jury and summed-up by the learned trial judge on the basis that the appellants, together with others, carried out a joint criminal enterprise – where respondent argued that the Crown case at trial was that the appellants were joint principal offenders – where joint criminal enterprise was not a form of criminal liability available under the *Criminal Code* 1995 (Cth) as it then stood – whether the appellants' conduct amounted to importing so as to make them principal offenders – whether, if based on an unavailable form of criminal liability, the proceedings were fundamentally flawed or lacked the essential requirements of a trial by jury – whether miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – JOINT TRIAL OF SEVERAL PERSONS – where appellants jointly charged with another co-defendant – where, during the course of the trial, co-defendant pleaded guilty to all the charges against him – where prosecution case based on joint criminal enterprise – where appellant, Handlen, intimated that the co-defendant had pleaded guilty – where the learned trial judge confirmed that the co-defendant had pleaded guilty but directed the jury to consider the case against each appellant separately – whether, considering that the prosecution case was based on a joint criminal enterprise, the learned trial judge erred in not discharging the jury – whether direction given in response to the guilty plea adequate

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where Crown case was that the appellants had imported a commercial quantity of a border controlled substance in two shipments – where appellants argued that evidence that they had engaged in cannabis production in the past and that drugs from the first shipment had been distributed was prejudicial and irrelevant to the charge of importation – where no objection was taken at trial to the admission of this evidence – whether evidence of distribution admissible against Handlen – whether admission of the evidence relating to cannabis production amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PRESENTATION OF CROWN CASE – where appellant, Paddison, complained that the Crown prosecutor had used the word "criminals" in his closing address – where Crown relied

on money transfers from the appellant, Paddison, to a co-defendant, as evidence implicating him in the joint criminal enterprise – where the learned trial judge summed-up the evidence of appellant, Paddison, relating to the transfers – whether the learned trial judge's directions relating to the money transfers were adequate

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – DISCHARGE OF JURY – where appellant, Handlen, withdrew his counsel's instructions – where appellant, Handlen, complained that his counsel had not followed his instructions and had failed to review the transcript of interview of the Crown's main witness – where appellant, Handlen, argued that a consequence of his counsel's failure to review the transcript was that illegal police conduct had been overlooked – where appellant, Handlen, argued that the jury should be discharged and a voir dire held for the purpose of seeking the exclusion of the record of interview – where appellant, Handlen, sought to recall Crown witnesses and call witnesses who had not given evidence at the trial – where learned trial judge found that no proper basis had been demonstrated for calling and recalling witnesses – whether the learned trial judge erred in refusing to discharge the jury – whether the learned trial judge erred in refusing to invite the calling of new witnesses or the recalling of Crown witnesses

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OR PROCEEDINGS – ADJOURNMENT – TO OBTAIN LEGAL REPRESENTATION – where appellant, Paddison, sought an adjournment for the purpose of seeking new legal representation and obtaining a hair sample aimed at establishing alcohol and drug use at a particular time – where appellant, Paddison, intended to retain a law firm whilst appearing as an advocate for himself – where there were poor prospects of any adjournment's resulting in new legal representation – where an adjournment for the purpose of obtaining a hair sample absurd – whether the learned trial judge erred in refusing the adjournment

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where appellant, Handlen, represented when called on to say whether he would give or call evidence – where appellant, Handlen, withdrew his counsel's instruction shortly before appellant, Paddison, opened his case – where appellant, Handlen, consequently unrepresented at the time of the prosecutor's address – whether prosecutor entitled to address the jury as to the appellant, Handlen's, guilt under s 619 of the *Criminal Code*

1899 (Qld) – whether, if not so entitled, a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant, Handlen, convicted of two counts of importing, one count of possessing and one count of attempting to possess a commercial quantity of a border controlled substance – where appellant, Handlen, sentenced to life imprisonment with a non-parole period of 22 years – where the first importation count related to the importing of 14.763 kilograms of 3,4- methylenedioxymethamphetamine, 1.254 kilograms of methamphetamine and four kilograms of cocaine – where the second importation count related to the importing of 7.6 kilograms of 3,4-methylenedioxymethamphetamine, 1.085 kilograms of methamphetamine and 135.7 kilograms of cocaine, 75.9 per cent pure – where the learned trial judge found that the appellant, Handlen, had played "a senior supervisory and management role" – where the appellant, Handlen's, activities were purely for profit – where the appellant, Handlen, intended to carry out further importations – whether offending fell "in the worst category" – whether sentence manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant, Paddison, convicted of two counts of importing and one count of attempting to possess a commercial quantity of a border controlled substance – where appellant, Paddison, sentenced to 22 years imprisonment, with a non-parole period of 14 and a half years – where the learned trial judge held that three features called for a substantial sentence: the very large quantity of drugs imported and their potential for harm, the appellant, Paddison's, involvement in more than one importation and the fact that the appellant, Paddison, knew the quantity of drugs imported because he packed them – where the learned trial judge found the appellant, Paddison's, role to be "functional rather than … managerial" – where the appellant's Paddison's role in concealing the drugs was critical to the success of each importation – whether sentence manifestly excessive

Acts Interpretation Act 1901 (Cth), s 23
Acts Interpretation Act 1954 (Qld), s 32C
Crimes Act 1914 (Cth), s 16A(1), s 16A(2)
Criminal Code 1995 (Cth), s 2.1, s 3.2, s 4.1, s 5.2, s 5.6, s 11.2, s 11.2A, s 300.2, s 307.1, s 307.5, 307.11
Criminal Code 1899 (Qld), s 7, s 619

Customs Act 1901 (Cth), s 233B
Judiciary Act 1903 (Cth), s 68(2)
Commonwealth Constitution, s 80

Bell v The Queen (1983) 8 CCC (3d) 97; [1983] 2 SCR 471, cited
Darkan v R (2006) 227 CLR 373; [2006] HCA 34, considered
De La Espriella-Valesco v The Queen [2006] 31 WAR 291; [2006] WASCA 31, considered
Krakouer v The Queen (1988) 194 CLR 202; [1998] HCA 43, considered
Melgar Sevilla v The Queen [2007] WASCA 116, considered
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, considered
R v Bartle & Ors (2003) 181 FLR 1; [2003] NSWCCA 329, considered
R v Bellino and Conte [1993] 1 Qd R 521; [1992] QCA 97, considered
R v Bingley (1821) Russ & Ry 446; [1821] 168 ER 890, considered
R v Campbell (2008) 73 NSWLR 272; [2008] NSWCCA 214, applied
R v Campillo Vaquere [2004] NSWCCA 271, considered
R v Chan Kam Wah, unreported, New South Wales Court of Criminal Appeal, No 60168 of 1991, 13 April 1995, considered
R v Flavel [2001] NSWCCA 227, considered
R v Gonzalez-Betes [2001] NSWCCA 226, considered
R v Hancox [1989] 3 NZLR 60, cited
R v Jackson (2003) 138 A Crim R 148; [2003] QCA 31, considered
R v Lee [2007] NSWCCA 234, considered
R v Mo (2007) 169 A Crim R 60; [2007] NSWCCA 61, considered
R v Neale (2004) 148 A Crim R 493; [2004] NSWCCA 311, considered
R v Reaves (2004) 147 A Crim R 26; [2004] WASCA 106, considered
R v Sherrington & Kuchler [2001] QCA 105, considered
R v Stanbouli (2003) 141 A Crim R 531; [2003] NSWCCA 355, considered
R v Suarez-Mejia (2002) 131 A Crim R 577; [2002] WASCA 187, considered
R v Toe (2010) 106 SASR 203; [2010] SASC 39, applied
R Twala, unreported, New South Wales Court of Criminal Appeal, No 60187 of 1993, 4 November 1994, considered
R v Ung (2000) 112 A Crim R 344; [2000] NSWCCA 195, considered
R v Walsh & Bunting [1902] St R Qd 6, considered
R v Wyles; ex parte Attorney-General [1977] Qd R 169, considered

Re Pong Su (No 13); Yau Kim Lam (2005) 191 FLR 272 ; [2005] VSC 38, cited
Sukkar v The Queen (No 2) (2008) 178 A Crim R 433; [2008] WASCA 2, considered
The Queen v Storey (1978) 140 CLR 364; [1978] HCA 39, applied
Tripodi v The Queen (1961) 104 CLR 1; [1961] HCA 22, applied
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, considered
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, considered
Wilde v The Queen (1988) 164 CLR 365; [1988] HCA 6, considered

COUNSEL:

In CA No 30 and 154 of 2009:
P J Davis SC, with L Morgan, for the appellant
G R Rice SC for the respondent

In CA No 12 of 2009:
D C Shepherd for the appellant
G R Rice SC for the respondent

In CA No 158 of 2009:
The applicant appeared on his own behalf
G R Rice SC for the respondent

SOLICITORS:

In CA No 30 and 154 of 2009:
Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

In CA No 12 of 2009:
Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

In CA No 158 of 2009:
The applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES JA**: Each of the appellants, Dale Handlen and Dennis Paddison, was convicted, after a trial, of two counts of importing a commercial quantity of border controlled drugs (cocaine, 3,4-methylenedioxymethamphetamine (ecstasy) and methamphetamine), an offence under s 307.1 of the *Criminal Code* 1995 (Cth), and a further count of attempted possession of a commercial quantity of unlawfully imported drugs of the same kind, contrary to s 307.5 of the *Criminal Code*. They were jointly charged in each of those counts. Handlen was also charged with, and convicted of, a further count of possession of a commercial quantity of such drugs, unlawfully imported contrary to s 307.5. Another man, Kelsey Nerbas, went to trial with the appellants charged with the same offences as Handlen, but pleaded guilty to all counts against him in the course of the trial.

[2] Handlen was sentenced to life imprisonment with a non-parole period of 22 years on each of the counts against him, while Paddison was sentenced to 22 years imprisonment with a non-parole period of 14 and a half years. Each appeals against conviction and sentence.

The appeal grounds

[3] The appellants' grounds of appeal overlap to some extent. Each complains that the Crown case was put to the jury by both the Crown and the primary judge on the basis that they were engaged in a "joint criminal enterprise" in the importation of drugs, a form of criminal liability not known under the *Commonwealth Criminal Code*, which at the relevant time contemplated an offence of importation committed either as a principal or as an aider, abettor, counsellor or procurer of a principal offender. Both also advance grounds of appeal alleging miscarriage of justice arising from the disclosure of Nerbas' plea of guilty during the trial.

[4] Further grounds of appeal arise from separate incidents in which each of the appellants withdrew his instructions to his counsel. Handlen asserts these errors: the trial judge failed to discharge the jury, although the trial had not been conducted on his, Handlen's, instructions and was unfair; his Honour failed to invite the Crown to recall witnesses for him to cross-examine; and, although he was thereafter unrepresented and did not give evidence, the Crown prosecutor was allowed to address and the trial judge referred, in his summing-up, to the content of that address. Paddison says that there was a miscarriage of justice because his application for an adjournment on his counsel's withdrawal was refused.

[5] Both appellants complain that evidence in relation to their cultivation of cannabis in Canada and the distribution of the drugs from the first importation was wrongly admitted. Paddison also complains of a reference in the prosecutor's address to "criminals" and of the trial judge's failure to instruct the jury as to innocent explanations for transfers of funds from his account to that of Kelsey Nerbas.

[6] Each appellant appeals against the sentences imposed on him on the ground that they are manifestly excessive.

The Crown case

[7] The Crown case was that the appellants, both Canadian citizens, had been involved in two shipments of large amounts of ecstasy, methamphetamine and cocaine from Canada into Australia, the drugs having been secreted in cathode ray tubes in computer monitors. The first importation was said to have taken place in May 2006, the second in September 2006. Handlen was charged with possession, in late May and early June 2006, of the drugs from the first shipment. The attempted possession count against both men concerned their activities in relation to computer monitors from the September shipment stored in a Brisbane warehouse, at a time when, unknown to them, the drugs had already been removed from the monitors by law enforcement authorities.

[8] The evidence in the Crown case came principally from a co-offender, Matthew Reed, who had already pleaded guilty and been sentenced in respect of his role in the two drug importations. On Reed's account, he worked for a computer recycling company in Vancouver. In August 2005, he was introduced by a fellow employee, known as "TJ", to Handlen, with whom he discussed the possibility of sending drugs

concealed in computer monitors by shipping container to Australia. At Handlen's behest, Reed prepared a list of costs in relation to freight and warehousing and was later given $2,000 by Handlen to place a deposit on an order of 480 computer monitors. In January 2006, Handlen, Reed and TJ located a warehouse to use in their activities; the premises were leased in the name of a legitimate business, Cyberdesk, operated by TJ. Reed paid the balance owing for the computer monitors with money provided by Handlen and they were duly delivered to the warehouse premises.

[9] In March 2006, the three men met by arrangement at the warehouse to begin packing the computer monitors with drugs. They were met there and assisted by two other men, Paddison (introduced to Reed as "Doc") and his father-in-law. The process consisted of cutting into cathode ray tubes in the monitors and placing packages in them before resealing them. Some of the computer monitors were dealt with in this way at the warehouse, while six or seven others were taken away to be packed, according to Paddison's father-in-law, with "keys" and later returned. In total, 16 computer monitors had drugs hidden in them; they were marked with red stickers. All the monitors were placed on pallets and wrapped with plastic in readiness for shipment.

[10] Reed and Handlen travelled to Australia in order to rent a warehouse where the consignment could be received. Reed had a friend in Brisbane, Kelsey Nerbas, who rented a unit for them at Spring Hill. The two arrived in early April, Reed having booked the tickets and Handlen having paid for them. At their instigation, Nerbas registered a company, "Reliable Computer Conversions Pty Ltd", of which he and Reed became directors, so that it could receive the shipment, and they established a bank account for the company to which they were both signatories. Handlen made Nerbas aware, Reed said, of the plan to import drugs in the shipment.

[11] Reed contacted an agent engaged in leasing industrial property who showed him and Handlen a number of warehouses, although, as it happened, they did not lease any of them. The agent in question gave evidence at the trial of his activities, over a week or so, showing properties to Mr Reed and his friend, whom he knew as "Dale". In the event, Nerbas and Reed signed the lease for a warehouse which another agent found for them at Newman Road, Geebung. Rent and the security deposit on the premises were initially paid by Nerbas, to whose account Paddison made two transfers of money in May 2006. Paddison was also transferring money to Nerbas to meet the living expenses of Handlen and Reed while they were in Australia. (The Crown tendered bank records showing four transfers of funds of between $4,000 and $6,500 in May 2006, two from Paddison's credit union account and two from the account of his de facto wife, to Nerbas' account. An account information card for the credit union account was found among Paddison's possessions after his arrest.)

[12] Reed arranged the freight of the monitors to Australia, organising to have the shipment collected in Vancouver, put into a container and shipped to Australia. In Brisbane, he engaged the assistance of customs brokers whom he provided with the bill of lading and an invoice for 480 monitors from Cyberdesk to Reliable Computer Conversions. At a point when there was some delay in getting the container to Brisbane because it had been sent by an indirect route, Handlen obtained the name of a union official who might be able to assist by getting the container cleared more quickly through customs at Brisbane. He telephoned him to

establish that he was willing to assist; Reed then dealt with the union official in relation to the difficulties in securing the arrival and clearance of the container. It was delivered to the warehouse at Geebung, where Handlen, Reed and Nerbas used a borrowed forklift to transfer the pallets into the warehouse. Handlen told Reed that they would leave the monitors packed on the pallets until the clients who were to receive the drugs were ready to take them.

[13] About a week later, the three men returned to the warehouse with tools to remove drugs from those monitors which contained them. The remaining computer monitors were left on their pallets. Reed recognised some of the packages as of the kind he had seen packed in Canada, but there were others which were unfamiliar. Handlen put some of the packages of drugs into a shopping bag, saying that they were samples to give his clients. On their return to their shared unit, Reed saw Handlen open one of the packages, count the pills in it and place them into zip-lock bags. They were given to a man named "John". Handlen told him that another client was coming to pick up the remaining samples; Reed later saw an older Asian man called "Frank" leave with the shopping bag. Handlen told him that Frank was from Sydney and was experienced in the drug business. (Other evidence showed that "Frank" was a man named David Shen.)

[14] A few days later, Handlen, Reed and Nerbas returned to the warehouse with two duffle bags in which they packed the remaining drugs. By this stage, Reed had rented his own apartment, and the drugs were hidden there. After Handlen had made some telephone calls, two men arrived to take some of the drugs. Reed was then deputed to remain in the premises to await the arrival of Shen's employees, who were to take the balance. Handlen instructed him to count the packages; there were 285. Eventually, two men arrived and took possession of the duffle bags. All that remained were two large packages which Handlen had taken earlier with the samples. Handlen disposed of those over time.

[15] In mid-June, Handlen and Reed returned separately to Canada, Handlen having said that he would speak to his clients about another shipment. Later, he told Reed that on Shen's advice, they would send a second shipment of computer monitors free of drugs to deflect any Customs suspicion, followed by a third shipment again containing drugs. Handlen and TJ bought the monitors for both shipments, while Reed made contact with the customs brokers who had assisted them previously. Reed, Handlen and Paddison were involved in the packing and loading of the second, legitimate shipment.

[16] Reed made the shipping arrangements for the second shipment, which was sent at the end of July 2006, and for the third shipment, which followed soon after. Reed, TJ and Handlen took the monitors for that shipment to Paddison's house, where they were left on his garage floor. At Paddison's house, Reed saw Handlen opening a package which contained cocaine; it looked the same as some of the packages he had seen in the first shipment. He next saw the monitors from Paddison's house loaded and taken to the warehouse where he, Paddison, and a friend of Paddison's unloaded them and put them onto pallets with the remaining, intact monitors. Again, those monitors containing drugs were identified with red stickers.

[17] On 10 August 2006, at around the time the third container was sent to Australia, Reed flew to Brisbane, again using cash provided by Handlen. The question of what to do with the drug-containing monitors imported on the first occasion was

exercising the minds of Handlen and Reed. At Handlen's suggestion, Reed rented a storage space to which he and Nerbas moved the used monitors, with the intention, ultimately, of destroying them. On Handlen's instructions, Nerbas and Reed travelled to Sydney to meet Shen, to collect $50,000 from him. Reed gave $25,000 of the cash to Nerbas, who had been paying the rent on the Geebung warehouse. Later, Shen transferred another $10,000 to Nerbas' account at Reed's request.

[18] The second of the shipments of computer monitors, the one without any concealed drugs, arrived and was unloaded on pallets into the warehouse. By this time, Paddison had travelled to Australia, arriving on 4 September, and helped to unload it. Handlen also travelled to Australia, arriving on 6 September; he telephoned Reed to let him know he was in Sydney with Shen (still known to Reed as "Frank"). A hotel employee confirmed that Handlen's wife had rented a hotel room, which she had occupied with a man of Handlen's description. They had been visited there by a man she identified from a photo-board as Shen. Later Handlen advised Reed that he had moved to Coolangatta.

[19] Unknown, of course, to the appellants, Customs officers examined the third container on 8 September and discovered packages of drugs inside one of the monitors. They alerted the Federal Police, who found in the monitors 135.7 kilograms of cocaine powder and 121,291 tablets which contained a mix of 3,4 methylenedioxymethamphetamine and methamphetamine. They removed all the drugs from the monitors and replaced them with packages of a harmless substance in an endeavour to recreate the appearance of the originals.

[20] Soon after that discovery, Federal Police commenced surveillance of the group and placed intercepts on their mobile telephones. Those intercepts reveal a good deal of discussion between Handlen, Paddison and Reed about the container's progress through Customs, with Reed in particular expressing anxiety. Other conversations between Handlen and Shen indicate that Shen was being kept informed about the clearance of the container. On 12 September Reed informed Paddison that there had been a "paperwork screw-up"; the shipping company had sent two manifests so that although the shipment had been cleared on the first, the process had started again in respect of the second. The shipping line had to be contacted and told to withdraw the second manifest. Paddison's response was to say,

> "So, basically, I shouldn't be getting drunk today."

Reed rang Paddison back later that day to tell him that the container had "got the green" and was going into fumigation for 24 hours, and they would "work on Thursday morning".

[21] The following day, Wednesday 13 September, Paddison rang Reed to be told that there had been a hold up until Friday. Paddison rang again the next day and was told that it would probably be about midday. In later conversations that day, Reed and Handlen discussed the delay with the fumigation. Handlen asked Reed to e-mail him the shipping information and told him to stop "stressing out". Reed was to stay out of it; Handlen would "handle that part"; he had already made arrangements for the guy "that helped us the first time". He counselled Reed not to use his mobile phone; he should have set up a customer number to call his work number. They discussed Reed's need for money to "clear this last one" and the fact that the person at Cyberdesk was waiting for funds.

[22] In a conversation on Friday 15 September, Reed informed Handlen that he had looked up the "Government procedures" for clearing containers. "They" would have to open the doors of the container, which, he said, caused him difficulty in not being paranoid. Handlen told him not to worry about it saying,

> "The guy that closed the doors originally is gunna be with ya."

Later that day, Reed rang Handlen to tell him that the container's delivery had now been put back to Monday. On Saturday, Handlen telephoned Shen and told him that the "meeting" was on Monday morning; he had had a report that there were well publicised problems which were "across the board". His contact did not think it was an issue.

[23] On 17 September, Nerbas and Reed drove to the Gold Coast to meet Handlen and his wife at a resort. At their meeting, Reed told Handlen that he needed $7,000 to pay the customs brokers their fees and outlays. Handlen gave him $5,000 in cash to pass on to the brokers with the promise that the balance would be provided in a few days; Reed duly did so, as one of the customs brokers who gave evidence confirmed.

[24] The container was delivered to the warehouse on the morning of Monday 18 September 2006. At about midday, Reed and Paddison travelled by train to Geebung and walked to the warehouse. They borrowed the forklift again and opened the container. They saw that its contents were disordered, as if it had been interfered with. They unloaded the pallets, then rang Handlen to tell him of their concern about the container's condition. That brief call, in which Reed told Handlen they were "just in the middle of work here ... I don't like it", was intercepted and recorded by police. During their journey to the warehouse and their unloading of the container, Reed and Paddison were kept under surveillance and photographed by Federal Police officers. They were collected from the warehouse by Kelsey Nerbas, who drove them back to their hotel. That afternoon, police watched as Handlen, a man he employed as a driver and the union official met at a hotel. That evening, Shen rang Handlen, who told him that "they" had gone "through it with a … fine tooth comb", but it was a "clean bill of health".

[25] Still under surveillance, Reed, Handlen and Paddison met that night at a restaurant, where, according to Reed, they discussed the condition of the container and reached a tentative consensus that it was unlikely, had it had been searched by Customs, that the contents would have been left so obviously disturbed. Handlen decided that he would speak to the union official in an attempt to discover whether there had been any search, while Paddison and Reed should again travel to the warehouse to look inside the monitors to make sure the drugs were there. During that meeting, Handlen took from Reed the mobile telephone he had used to call him from the warehouse and destroyed both the telephone and its SIM card.

[26] In the afternoon of 19 September, Handlen rang Shen and said he was waiting for his friend to do some research for him and should know by the end of the day. Shen rang him back late that night to ask whether he had heard anything because he needed to know whether to "buy the ticket or not". Handlen said that everything had been taken apart and put together in disarray which, to him, was a good sign because if "they" were intending anything, "they" would have put it back exactly as it was. He said that "the guy that put them [presumably the computer monitors] together" had been there and had advised that they had not been touched but were rearranged. He had told everybody to relax until his friend gave him the word on what happened; he would probably get that information the next morning.

[27] On 20 September, Paddison and Reed returned to the warehouse. In anticipation of unpacking the drugs, they had bought some luggage of sufficient size to carry the "140 keys" Paddison told Reed had been loaded. As well, they took rubber gloves and cleaning agents to avoid leaving fingerprints. Again, they caught the train to Geebung and walked to the warehouse. Again, they were under police observation. In addition, the police had installed a camera in the interior of the unit which recorded their activities while inside. The close detail of what they are doing is not discernible from the video footage, but they can be seen to put on gloves and, after a period apparently moving objects, to lift a computer monitor and make screwing or unscrewing motions. According to Reed, they used a screwdriver to undo the casing of one of the monitors; Paddison looked inside, shook his head, and replaced the casing; and they immediately left the premises. The entire episode occupies about six minutes of footage.

[28] The pair returned to the train station where they were arrested; Handlen was arrested later that evening. In his pocket was found an e-mail from Reed dated 15 September 2006 advising the details of the ship, the container and the container's present location at a container receival depot in Brisbane. Police searched the warehouse that night and found cleaning products and screwdrivers. The computer monitors were seized. The monitors from the earlier shipment which had been moved to a separate storage space were also seized; one of them proved to have Paddison's fingerprint on the inside of its outer casing. In one of them, police found a packet of 698 tablets, apparently overlooked, which was similar, though not identical, to those seized from the September shipment.

Paddison's evidence

[29] Paddison gave evidence, Handlen did not. Paddison said that he was on friendly terms with Handlen in his native Canada. In June or July 2006, Handlen had introduced Reed to him. At this point in his life, Paddison said, he was a heroin addict, attempting to withdraw from the drug, and he was drinking heavily. He recalled hearing Reed and Handlen talk about moving old computer monitors to Australia for recycling. One day Reed telephoned him saying that he needed help to get rid of some property. At his request, Paddison drove him to a warehouse where he saw there were computer monitors and bottles of health drinks. As it turned out, it was the latter which Reed wanted to get rid of, but in order to shift them, Paddison had to move computers, some of which were dismantled.

[30] Handlen told Paddison that he was intending to go to Australia to look at some properties and suggested that he, Paddison, accompany him for a holiday in an effort to overcome his heroin addiction, an offer which he accepted. On the day he was arrested, Reed and Handlen had asked him to help restack computers which had fallen over and been damaged in a truck; that was the reason he went to the warehouse. On arrival, he realised that it was impossible to do the work without a fork-lift, so he and Reed left again. He had no idea that any drug importation had taken place. Paddison was asked by his counsel about bank records showing transfers of money from his account, but refused to comment because they were not originals. Similarly, he declined to comment on transcripts of telephone conversations because they had been edited.

[31] Under cross-examination, Paddison said that when he left Canada he did not know that container loads of monitors were on their way to Australia; his trip was

unrelated to them. He spent a good deal of his time in Brisbane drinking. He denied any recall of telephone conversations in which the progress through customs of a shipping container was discussed. He agreed that he had helped Reed unload a truck (rather than a container) on 18 September 2006, but he denied having any concern about or discussing the condition of the monitors. He also denied opening a computer monitor and looking inside it. He maintained that bank records showing transfers of money from his account were fraudulent.

The Crown case on criminal responsibility and the summing-up

[32] In his opening address, the Crown prosecutor said this in relation to the importations:

> "In cases such as the present where the importations are large, no one person can do all that is necessary to achieve the importation. Here there were many tasks directed towards the importation of the drugs, and the performance of the tasks was divided amongst the participants. In short, each importation was a group exercise with each participant sharing the common objective of bringing drugs into the country."

[33] During the Crown case the jury sent a message with this query:

> "Can you please clarify the defendants are linked by association; do we take this into account?"

In discussion of the appropriate response, the Crown prosecutor said:

> "The Crown case is, and has always been, one of joint enterprise, so that evidence which tends to associate all defendants with the matters charged is evidence that they can take into account."

The learned trial judge instructed the jury, on their return, as follows:

> "... the Crown's case is that there was an association between the defendants and that association is relevant to the offences with which they've been charged. The Crown's case is that each importation was a group exercise with each defendant sharing a common objective of bringing drugs into the country. As was opened by the prosecutor, the Crown's case is that tasks were divided, but there was a common objective of bringing drugs into the country, and so to answer your question, evidence of association is something that you do take into account."

[34] The prosecutor returned to the subject in his closing address:

> "In this case the Crown alleges that these defendants did import drugs on two occasions in partnership with each other, with Reed and others such as the man TJ and perhaps Tom, the other man from Canada whose name you've heard mentioned. The Crown says that each of the defendants consciously made his own contribution on both occasions to achieving the object of bringing drugs into the country and that the arrival of drugs in Australia on each occasion was the product of their combined effort. And if at the end of the day you agree with that to the required standard the Crown says it

> follows that you would find each defendant guilty of the two charges of importation."
>
> ...
>
> "... the Crown says that there was a joint enterprise to carry out both of those importations. The reason for that, as I explained at the commencement of the case, was because the task was too big for one person. Simply too much to do, too much to carry, et cetera. And so the roles and functions to effect each importation were divided. And in fact, the Crown says, the roles were divided in the same or at least a very similar fashion on each occasion."

[35] The learned judge summed-up the prosecution case accordingly:

> "As you appreciate, the prosecution case is that there was an importation of large quantities of ecstasy tablets and cocaine on two occasions, the first in May 2006 and the second in September 2006. It says that no one person can do all that is necessary to achieve the importation, that there were many tasks that had to be performed and divided between the various participants. It says that each importation was a group exercise with each participant sharing the common objective of bringing drugs into the country."

[36] His Honour gave this direction as to what was involved in importing;

> "The word 'imports' requires conduct that brings something into Australia. Items are not imported until they are brought into Australia. The act of importing is not something that occurs or ceases in a single moment. The act of importing does not finish the moment that the items containing the substance are brought into the port or are landed. Delays in the port or the intervention of the authorities do not prevent the process of importing from continuing. The process may continue after the items containing the substance have been landed. It may end when the items in the container are picked up by an agent and are being transported to a place that will result in the substance remaining in Australia. At the latest that will be when the container arrives at its destination and before it is unpacked."

[37] In relation to the first importation, his Honour framed the questions to be considered by the jury as follows:

> "For example, was there an importation of a commercial quantity of border controlled drugs in May 2006? There seems to be no dispute about that. If there was, was it the result of a group exercise? Again, there is a lot of evidence to that effect. Critically, if it was a group exercise, who were the participants in that group exercise? Has the prosecution proven that Mr Handlen, with others, imported the drugs that arrived in May and intended to do so? Has the prosecution proved that Mr Paddison, with others, imported the drugs that arrived in May because he packed them and transferred moneys to assist with expenses and therefore intended to import the drugs?"

He posed a similar set of questions in relation to the second importation:

> "Was there an importation of commercial quantities of border controlled drugs in September 2006? Clearly the evidence is that there was. Was it the result of a group exercise? Well, you would readily conclude that it was. Critically, who were the participants in that group exercise? Has the prosecution proven that Mr Handlen, with others, imported the drugs that arrived in September and intended to do so? Has the prosecution proved that Mr Paddison, with others, imported the drugs that arrived in September because he helped pack them and intended them to be brought into Australia?"

[38] The learned judge returned to the cases against Handlen and Paddison respectively, referring to whether each man was part of a joint enterprise as relevant to whether each had the intent to import.

> "In order to have imported the drugs in May - and that's the first count against Mr Handlen - Mr Handlen, along with others, must have brought the drugs into Australia when they came into the port in May 2006 and were cleared through the port.
>
> The question is did he intend to import the substances that were concealed inside the monitors? In other words, did he mean to import those substances? If he did, did he know they were border controlled drugs?
>
> If it was part of the joint exercise that caused the monitors to be imported in May 2006, are you satisfied beyond reasonable doubt that he knew or believed that the monitors contained the drugs? Do you infer that he intended to import the drugs on the basis of the things that were put to you by the respondent or other things that you draw by way of inference from the evidence?"

[39] The learned judge directed in similar terms in respect of Handlen's alleged role in the September importation.

> "In order to have imported the drugs in September 2006 Mr Handlen, along with others, must have engaged in conduct which brought the drugs into Australia in September 2006. You consider the direct evidence and the circumstantial evidence and decide if you are satisfied beyond reasonable doubt that he imported the drugs and intended to import the drugs that were concealed inside the monitors. In other words, did he mean to import those substances knowing that they were border controlled drugs?"

[40] In each case, he said, the jury could look at the evidence of Reed and decide whether to accept it; at the circumstantial evidence of what Handlen did and said during his two visits to Australia; or reach its conclusions from a combination of Reed's evidence and circumstantial evidence.

[41] In relation to Paddison, his Honour said this:

> "In order to have imported the drugs in May 2006, Mr Paddison, along with others, must have brought the drugs into the country. Are you satisfied that he packed drugs inside the monitors in

> Canada? Are you satisfied of that on the basis of Mr Reed's evidence? Are you satisfied that Mr Paddison sent money to Mr Nerbas in April and May 2006?"

He then turned to remind the jury of Paddison's and Handlen's claims (the latter's made in his address) about the inauthenticity of the documentary evidence before continuing:

> "If you are satisfied that there was a transfer of funds because there is evidence from, for example, Mr Reed about those arrangements, and if you are satisfied of the authenticity of those documents, then you can reach a conclusion about the transfer of those funds. If you are satisfied that there was the transfer of funds that the prosecution alleges and which Mr Paddison denies, then you still have to consider whether you are satisfied that that transfer was for the purpose of facilitating the importation of drugs by funding Customs clearances or warehouse expenses or other expenses in circumstances in which Mr Paddison knew and intended that drugs be imported.
>
> You have to consider: might that transfer of funds, if you are satisfied it occurred, have occurred for some innocent purpose with Mr Paddison not knowing that the money was to be used to import monitors containing drugs.
>
> So the first issue on the first count against Mr Paddison is whether he, along with others, engaged in conduct which brought the drugs into Australia. The second issue is intent. Did he intend to import the substances that were concealed inside the monitors? In other words, did he mean to import those substances? You also have to be satisfied that he knew the substances were border controlled drugs.
>
> If it was part of a joint enterprise that caused the monitors to be imported in May 2006, and if you are satisfied beyond reasonable doubt that he knew or believed that the monitors contained drugs, then you may infer that he intended to import the substances knowing that they were border controlled drugs."

[42] In relation to Paddison's alleged involvement in the September importation, his Honour directed that the same issues arose:

> "You must be satisfied beyond reasonable doubt that Mr Paddison imported and intended to import the substances that were imported in September 2006 and he knew them to be border controlled drugs. You consider whether he had a role in packing the drugs into the monitors knowing they were to be sent to Australia. If it was part of a joint enterprise that caused the drugs to be imported in September 2006 and if you are satisfied beyond reasonable doubt that he knew or believed that the monitors contained the drugs, and he was part of that joint enterprise, then you can infer that he intended to import them."

The offence of importing

[43] Section 307.1 of the *Criminal Code* creates the offence of importing a commercial quantity of a border controlled drug. At the relevant time, s 300.2 defined "import"

in an inclusive definition as "bring[ing] into Australia". (It has since been expanded to include "deal[ing] with the substance in connection with its importation.") Section 3.2 sets out the elements which must be proved for an offence created by the *Code*:

> "**3.2 Establishing guilt in respect of offences**
>
> In order for a person to be found guilty of committing an offence the following must be proved:
>
> (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
>
> (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element."

[44] Section 4.1 explains the "physical element" referred to in s 3.2:

> "**4.1 Physical elements**
>
> (1) A physical element of an offence may be:
>
> **(a) conduct; or**
>
> (b) a result of conduct; or
>
> (c) a circumstance in which conduct, or a result of conduct, occurs.
>
> (2) In this Code :
>
> ***conduct*** means an act, an omission to perform an act or a state of affairs.
>
> ***engage in conduct*** means:
>
> (a) do an act; or
>
> (b) omit to perform an act."

[45] For importing, the fault element in relation to the nature of the drug as a border controlled drug is recklessness[1] and whether the quantity is a commercial quantity is a matter of absolute liability.[2] By virtue of s 5.6, which operates where the *Code* does not specify a fault element for a physical element consisting of conduct, intention is the fault element for the acts which constitute importing. Section 5.2(1) provides:

> "A person has intention with respect to conduct if he or she means to engage in that conduct."

[46] In *R v Campbell*,[3] Spigelman CJ, with whose reasons the other members of the New South Wales Court of Criminal Appeal agreed, considered the meaning of the word "imports" as used in s 307.11 of the *Code*. That section concerns precursor substances rather than drugs, but his reasoning is equally applicable to s 307.1. Section 307.11 made it an offence to import or export (as does s 307.1), suggesting an equation between the two concepts. That focussed attention, Spigelman CJ said, on

> "crossing the national border, rather than upon arrival at a destination",[4]

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1 s 307.1(2).
2 s 307.1(3).
3 (2008) 73 NSWLR 272.
4 At 293-294.

indicating,

> "that what the legislature has rendered criminal is the act of arrival in Australia, without regard to subsequent deployment".[5]

The concept of "import" was a narrow one, as opposed to that of "importation", so that cases dealing with the offences under s 233B of the *Customs Act* 1901 (Cth) of being "knowingly concerned in" importation were of little assistance. The practical result in *Campbell* was that goods were imported once they were cleared through customs and collected; or, at the latest, when the container in which they had been shipped arrived at the appellant's premises.

[47] In *R v Toe*,[6] Bleby J, delivering the leading judgment, referred with approval to Spigelman CJ's analysis in *Campbell* and went on to make these observations about the physical elements of importing:

> "It had to be shown that [the appellant] 'import[ed]' the packages and their contents. By definition, that could include bringing into Australia. There was no suggestion that the appellant did that. The bringing in was effected by the crew of an airline on its behalf. But to import has a wider meaning, as the inclusory definition implies. It would include the conduct of a person who arranges or causes the goods to be imported. That person may be within Australia or may be in a foreign country.
>
> If I import an article I may merely sign a request or authority to a consignor, or merely make a telephone request or request a shipper to dispatch the goods to an address in Australia. I may ultimately receive the consignment note which authorises me to collect the goods in Australia. On the other hand, I may request that the goods be sent to someone else or authorise someone else to collect the goods. In all of those cases all I have done is make a request to a consignor, a transport company or an airline to bring the goods into Australia and to arrange for their collection or delivery. In any of those cases, if the goods are brought into Australia, I have imported the goods. I am an importer."[7]

The ordinary and natural meaning of "import" which Bleby J adopted was, he said:

> "the doing of an act or acts which constituted the bringing or arranging or procuring of the bringing of the border controlled drugs into Australia."[8]

That conclusion, his Honour said, was supported by the decision in *Campbell*, the Canadian case of *Bell v The Queen*[9] and the New Zealand case of *R v Hancox*.[10]

Criminal responsibility under Chapter 2 of the *Criminal Code* 1995 (Cth)

[48] Section 2.1 of the *Criminal Code* says that the purpose of ch 2 of the *Code* is:

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5 At 294.
6 (2010) 106 SASR 203.
7 At 224.
8 At 225.
9 (1983) 8 CCC (3d) 97.
10 [1989] 3 NZLR 60.

"... to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created."

[49] Section 11.2, which appears in that chapter, provided at the time of the offences alleged here:

"**11.2 Complicity and common purpose**

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:
(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:
(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

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

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
(a) terminated his or her involvement; and
(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1)

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
(b) is guilty of that offence because of the operation of subsection (1);

but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence."

[50] Section 11.3 dealt with the use of others as agents in the commission of an offence:

"**11.3 Innocent agency**

A person who:

(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and

(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly."

[51] Chapter 2 was amended by the *Crimes Legislation Amendment (Serious and Organised Crime) Act* 2010 (Cth),[11] which inserted a new provision:

"**11.2A Joint commission**

Joint commission

(1) If:

(a) a person and at least one other party enter into an agreement to commit an offence; and

(b) either:

(i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or

(ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));

the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

Offence committed in accordance with the agreement

(2) An offence is committed in accordance with the agreement if:

(a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the ***joint offence***) of the same type as the offence agreed to; and

(b) to the extent that a physical element of the joint offence consists of a result of conduct—that result arises from the conduct engaged in; and

(c) to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

..."

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11 No. 3 of 2010.

The same legislation amended the heading to s 11.3 of the *Criminal Code*; it was replaced by the words **"Commission by proxy"**. Those amendments, however, have no direct application in this case, because the offences here were committed in 2006.

The "joint criminal enterprise" ground of appeal

[52] The appellants contended that the case had been left to the jury on the basis of joint criminal enterprise, a common law concept not incorporated into the *Criminal Code (Cth)*. The structure of the *Code* was to provide for a primary offender in respect of whom the elements provided for in s 3.2, s 4.1 and s 5.2 were made out, and a secondary offender whose liability arose under s 11.2(1). The Crown did not mount its case against the appellants as aiders under s 11.2(1); and the case as particularised did not establish that either was the primary offender. The person who had actually imported the drugs on each occasion was Reed, who had arranged for the freighting of the computer monitors containing them. The charge had been brought against Handlen and Paddison as primary offenders in circumstances where it could not be made out; and the jury had been asked to consider guilt on the basis of a joint enterprise, an offence not known to the *Code*. The trial had miscarried as a result.

[53] The notion of joint criminal enterprise had also, the appellants submitted, permeated the case of attempted possession against them. Paddison pointed out that the judge had directed the jury to consider whether he:

> "… took steps, along with others, to secure the monitors in the warehouse knowing that they contained drugs so as to take them and the drugs into his control or into the joint control of him and others."

and whether he:

> "… knew or believed that the monitors contained drugs and that he intended that the monitors and the drugs inside them be put under the group's control in the warehouse."

which suggested a focus on group endeavour. In any event, it was suggested that the proceedings as a whole were so fundamentally flawed by the erroneous basis advanced for criminal responsibility, and the counts so intertwined that all convictions (including Handlen's for actual possession of drugs) should be set aside, rather than isolating separate counts on what was described as a "technical basis"

[54] The respondent accepted that the *Criminal Code* at the relevant time did not embrace any notion of joint criminal enterprise. That disavowal of the concept may have been prompted or reinforced by the unequivocal rejection of the doctrine's existence in the *Code* in a text to which the court was referred: "*The Commonwealth Criminal Code: A Guide for Practitioners*".[12] The work's author, Mr Leader-Elliott, pointed out that the *Code* "contains all the general principles of criminal responsibility that apply to any offence …",[13] which cannot be supplemented by common law principles. Liability under it (as it stood at the time relevant here) was established by proof of "[the] physical elements ... relevant to establishing guilt",[14] or conduct in terms of s 11.2 (aiding, abetting, counselling or procuring the commission of the

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12 Leader-Elliot (2002).

13 Section 2.1

14 Section 3.2.

offence) or s 11.3 (procuring conduct of another which would constitute an offence if the procurer engaged in it). Those possibilities exhausted the bases of criminal responsibility under the *Code*, to the exclusion of the doctrine of joint criminal enterprise. The *Guide's* reasoning on the point is compelling.[15]

[55] The respondent argued instead that the Crown case at trial was that the appellants were joint principal offenders, each having performed part of the conduct which amounted to importation. Section 307.1, which created an offence where a person imported a substance, was, by virtue of s 23 of the *Acts Interpretation Act* 1901 (Cth), to be read as including the plural; so it was clear that more than one person could commit the offence of importing. Importing was not an offence involving a single act, but a range of acts; two or more persons could perform acts which, together, comprised the importing of a border-controlled substance. Section 3.2 of the *Code* required proof of the physical elements relevant to establishing guilt, but it did not require that one person commit all of those acts.

[56] The use of the term "principal offender" in s 11.2(5) showed that that concept was relevant to criminal responsibility under the *Code*. The expression also was to be read as including the plural. Section 11.2 thus recognised the possible existence of more than one principal offender who were not accessories, allowing for the possibility of more than one person who committed acts which, together, made up the offence. In the absence of statutory definition, the expression "principal offender" should be given its common law content; and the common law recognised joint principal offenders who, in association, each contributed a physical element to the commission of an offence.

[57] To support the proposition that the term "principal offender" in s 11.2 should be construed with its common law connotations, the respondent pointed to an analogous situation in *R v Wyles; ex parte Attorney-General*,[16] in which regard was had to the common law in the construction of s 7 of the *Criminal Code (Qld)*. At the time of that decision, it was in this form:

> "**7 Principal offenders**
>
> When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
>
> …"

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15 It was accepted by Kellam J in a decision relied on by the appellants, *Re Pong Su (No 13); Yau Kim Lam* [2005] VSC 38.

16 [1977] Qd R 169.

[58] *Wyles* involved an offence of breaking and entering with intent to commit a crime. The trial judge had taken the view that in order for the section to operate, an offence must have been committed, and where the offence committed consisted of more than one element, that required either that one person commit all the elements or that two or more persons acting in concert take part in the commission of each of the elements. The Court of Criminal Appeal reached a different conclusion. Lucas J noted that s 2 of the *Code* defined the word "offence" as meaning,

> "an act or omission which renders the person doing the act or making the omission liable to punishment."

Applying s 32(c)[17] of the *Acts Interpretation Act* 1954 (Qld) (the then equivalent of s 23 of the Commonwealth Act) the words "act or omission" in s 7(a) were to be read as including the plural. Since some offences were constituted by more than one act or omission, s 2 had to be read as meaning "act or omission or series of acts or omissions"[18] and Section 7(a) should be read, consequently, as follows:

> "All persons who actually do the act or one or more acts in a series which … constitute the offence."[19]

[59] As long as an offence was ultimately committed, two persons who, acting pursuant to a common unlawful purpose, undertook acts which were constituent elements of the offence would be covered by s 7(a). Hoare J, in the same case, had recourse to the common law to construe s 7(a) as extending to cases where several persons, acting in concert, each did one of a number of acts which, in their totality, constituted an offence. The respondent contended that a similar approach should be taken to the construction of s 11.2.

[60] Although the description of joint perpetrators acting in association sounded very much like joint criminal enterprise, the respondent maintained that it was a distinct concept. It was the first of three categories discussed in McHugh J's analysis of the common law relating to criminal complicity in *Osland v The Queen*:[20]

> "At common law, a person who commits the acts which form the whole or part of the actus reus of the crime is known as a "principal in the first degree". There can be more than one principal in the first degree. However, a person may incur criminal liability not only for his or her own acts that constitute the whole or part of the actus reus of a crime but also for the acts of others that do so. The liability may be primary or derivative. In earlier times, when it was alleged that a person should be held criminally liable for the acts of another, it mattered whether the crime was a felony or a misdemeanour. In Victoria, the distinction between felonies and misdemeanours has been abolished. There is no longer any need to draw a distinction between the two categories of crime.
>
> Those who aided the commission of a crime but were not present at the scene of the crime were regarded as accessories before the fact or principals in the third degree. Their liability was purely derivative and was dependent upon the guilt of the person who had

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17 Now s 32C.
18 At 177.
19 At 177.
20 (1998) 197 CLR 316 at 341-342.

> been aided and abetted in committing the crime. Those who were merely present, encouraging but not participating physically, or whose acts were not a substantial cause of death, were regarded as principals in the second degree. They could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the principal in the second degree could not be guilty. Their liability was, accordingly, also derivative.
>
> However, there is a third category where a person was not only present at the scene with the person who committed the acts alleged to constitute the crime but was there by reason of a pre-concert or agreement with that person to commit the crime. In that category, the liability of each person present as the result of the concert is not derivative but primary. He or she is a principal in the first degree. In that category each of the persons acting in concert is equally responsible *for the acts* of the other or others ... ." (Citations omitted.)

[61] At the beginning of that passage, the respondent argued, McHugh J recognised a category of principal in the first degree: persons who each committed part of the acts which, taken together, constituted an offence. In the second paragraph, his Honour dealt with the second category, which concerned accessorial or derivative liability. That category – aiders and encouragers – was dealt with in s 11.2 of the *Criminal Code*. The final paragraph dealt with the third category, that of persons acting in concert, or joint criminal enterprise. It was added to the *Code* in 2010 by the inclusion of s 11.2A, and it was the category to which the appellants' submissions were mistakenly directed. In fact, the respondent submitted, the case here fell within the first category: the appellants were principals, each performing part of the acts which, as a whole, constituted the crime. Although the prosecutor had used the expression "joint enterprise" in the course of the trial, he had not used it in the sense of the third category referred to by McHugh J in *Osland*.

[62] The respondent also referred to *Campbell* and *Toe* to support the argument. In *Campbell*, considering whether a new trial should be ordered, Spigelman CJ observed:

> "There was evidence before the jury that justified a conclusion that the appellant was a participant in a joint enterprise to import the goods, when the word "imports" is understood in the sense I have identified."[21]

And in *R v Toe*, Bleby J had observed that there might be a "question of joint enterprise",[22] but it was not alleged, nor the subject of any direction. Those obiter references, the respondent submitted, amounted to an acknowledgment that two persons could be liable as principals where one consigned the goods and the other took receipt of them.

[63] I am, with respect, unconvinced that there exists a category of joint perpetrator involved in some form of association independent of the concept of joint criminal enterprise. The third category referred to by McHugh J in *Osland* seems to me directed to a particular state of affairs, where a person both is at the scene of the

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21 (2008) 73 NSWLR 272 at 294.

22 (2010) 106 SASR 203 at 227.

crime and is party to a plan to commit the offence; in which case he becomes a principal in the first degree. It does not exhaust the possible forms of joint criminal enterprise, so as to exclude, by implication, the principal offenders in the first category from that characterisation.

[64] It is noteworthy that McHugh J cited as authority for the proposition that a person committing acts which were part of the actus reus was a principal in the first degree *R v Bingley*,[23] in which a number of people were charged with forgery of bank notes, that forgery consisting of a variety of acts: obtaining paper, cutting it and impressing images onto it. Bingley's contribution was to add a note, number and a date. At the end of its judgment in *Bingley*, the informal twelve-judge panel (the forerunner of the Court for Crown Cases Reserved) reached this conclusion:

> "[T]he judges were of opinion, that as each of the prisoners acted in completing some part of the forgery, *and in pursuance of the common plan*, each was a principal in the forgery ... ."
> (italics added)

[65] It is difficult to see how someone who committed only some of the acts constituting a crime could be liable for it in the absence of a common plan of the kind referred to in *Bingley*. In *Wyles*, Lucas J emphasised that liability would not attach to a person who did an act which was a constituent element of an offence, absent a common unlawful purpose; and Hoare J described the principals referred to in s 7(a) as,

> "persons, *acting in concert*, each doing some act which in their totality would constitute an offence if done by one person."[24]
> (italics added).

[66] The respondent was driven to acknowledge, at the least, that there must be some form of association between the perpetrators. The difficulty is in discerning what that form of association might be, if not a joint criminal enterprise. Although it is possible to aid an offence without the principal's being aware of the assistance given, the situation where more than one person commits the constituent elements of the offence is hardly equivalent. The notion of two or more people each carrying out the necessary acts with the knowledge of what the others were proposing to do, but without any shared intent, seems simply fanciful.

[67] Even if there be a distinct form of criminal responsibility attaching to perpetrators who in an association short of joint criminal enterprise each commit some of the acts constituting an offence, I do not think sufficient warrant has been given for its implication into s 11.2. The apparently incidental use of the expression "principal offender" in s 11.2(5), combined with the availability of a plural reading, is too slender a thread to bear the weight of an otherwise unidentified basis of criminal responsibility. I note that in speaking of *Wyles*, McPherson JA in *R v Sherrington & Kuchler*[25] described importing the words "in concert" into the *Criminal Code* 1899 (Qld) as a "form of heresy", not to be engaged in unless all else failed. The uncompromising terms of s 2.1 are sufficient to deter me from the more liberal approach of the learned judges in *Wyles*.

[68] There are other problems for the respondent's argument. The elusive concept of joint perpetrators acting in association but not in concert is not reflected in the way

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23 (1821) Russ & Ry 446 [168 ER 890].

24 At 182.

25 [2001] QCA 105.

in which this case was put to the jury: the Crown's submissions and the learned judge's directions in this case were, in fact, couched in terms of joint criminal enterprise. It is hard to see what else talk of dividing up the performance of tasks, engaging in a group enterprise and sharing a common objective could have meant. And even had it been theoretically possible to advance the Crown case on the basis of the co-accused each committing some of the acts which, taken together, amounted to the importation, the evidence in this case would not support it.

[69] Accepting Spigelman CJ's view in *Campbell* as to the narrowness of the concept of "import", together with the elaboration offered by Bleby J in *Toe*, the acts of importing here were those of arranging the shipping of the goods, including any further steps necessary during their passage to ensure their arrival in Brisbane. It is very doubtful that either Paddison or Handlen could be said to have undertaken any of those acts.

[70] Paddison's role, on the Crown case, was essentially that of packing and unpacking. The closest that the Crown particulars provided at trial put his activities to importation was an allegation that he loaded the pallets of monitors into the shipping container for the September shipment. Whether that would amount to an act of importation as opposed to an act aiding importation is arguable; more to the point, the particular was not made out on Reed's evidence as it was given. The respondent suggested that Reed's answers indicated that Paddison had forwarded money for the purpose of fumigating the second of the containers holding drugs, but his responses to questions on the subject do not in fact support that proposition. Paddison, in my view, could only have been found criminally responsible for the two importations as an aider under s 11.2.

[71] Handlen's role was more extensive; it was more of a planning and funding nature with some hands-on involvement in placing the drugs in the computer monitors. But the only activity of his which might be characterised as importing in relation to the first container was his contact with the union official for the purpose of getting it cleared through customs; even then, the actual negotiations with that person were carried out by Reed. His involvement in getting the second of the drug-holding containers through Customs came after the drugs had been removed by police, at which stage the importation must be regarded as complete. On the evidence, Handlen was a procurer and an aider of Reed's commission of the importation offences.

[72] The appellants are correct, in my view, when they say that the case was advanced and left to the jury in terms alien to the forms of criminal responsibility then recognised by the *Criminal Code.* The question then is as to what follows from that conclusion. The evidentiary content of the Crown case is unaffected: the prosecutor was entitled to lead evidence of the acts and statements of all accused in furtherance of the common purpose of importation on the *Tripodi* principle,[26] whatever basis of criminal liability was advanced. The case was extremely strong: Reed's account of the appellants' involvement in the importations was amply supported by the evidence of travel arrangements and transfer of moneys, the recordings of telephone conversations, the surveillance evidence, particularly of Paddison at the warehouse, and the fingerprint evidence against Paddison. In my view, the guilt of each appellant was established beyond reasonable doubt: one could not regard either as having lost "a real chance of acquittal"[27] by reason of the failure to frame the

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26 *Tripodi v The Queen* (1961) 104 CLR 1.

27 *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

question of criminal responsibility in terms of aiding under s 11.2. That conclusion, however, is a necessary but not sufficient condition for the application of the proviso.

The submissions in relation to the proviso

[73] Both appellants argued that the proviso could not be applied, because there had been a fundamental error of the kind referred to in *Wilde v The Queen*;[28] the court could not be satisfied that no substantial miscarriage of justice had occurred. In written submissions delivered by leave after the appeal was argued, they advanced a further contention: the fundamentals of trial by jury did not exist where the jury had not made a finding on the elements necessary to establish guilt, because it had not been directed on the basis of accessorial liability; so the proviso's application to this case would be inconsistent with the constitutional right to trial by jury provided by s 80 of the *Constitution*.

[74] Section 68(2) of the *Judiciary Act* 1903 (Cth) confers jurisdiction on State courts with respect to persons charged with offences against Commonwealth laws, subject to s 80 of the *Constitution*. Section 80 provides that:

> "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

Because the jury had been misdirected as to the elements of the offence and as to the basis of the appellants' criminal responsibility for it, the appellants contended, it had not returned a verdict on the controversy between them and the Crown, so that the minimum requirements of trial by jury had not been met. Notices were given to the Attorneys-General of the States and Commonwealth under s 78B of the *Judiciary Act*, none of whom sought to intervene.

[75] The respondent relied on the form of the directions given by the learned judge. The jury, in reaching its verdicts, must have been satisfied that the conduct alleged against each of the appellants had occurred; that it contributed to the commission of the offence of importing; and that it was done for the purpose and with the intention that the offences be committed. All of the requirements of s 11.2(2) must have been met. In any event, misdirection as to the elements of the offence would not amount to fundamental error.

The application of the proviso

[76] I do not think that the appellants' reformulation of their argument in constitutional terms advances matters. The contention that the absence of direction in terms of aiding under s 11.2 entailed departure from the essential requirements of trial by jury under s 80 seems to me little different from considering whether it produced:

> "such a departure from the essential requirements of the law that it goes to the root of the proceedings"[29]

or, as it was put in *Weiss v The Queen*,[30]

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28 (1988) 164 CLR 365 at 373.

29 *Wilde v The Queen* (1988) 164 CLR 365 at 373.

30 (2005) 224 CLR 300.

> "such a serious breach of the presuppositions of the trial as to deny the application of the common form of criminal appeal provision with its proviso".[31]

Whichever characterisation one adopts, the result is the same; if the error was so fundamental that there was not a trial, the proviso will have no application.

[77] In *Krakouer v The Queen*,[32] the High Court made it clear that while

> "a misdirection which has the effect of denying procedural fairness and depriving an accused person of the right to have some substantial part of his or her case decided by the jury would result in a trial that is fundamentally flawed",[33]

not every misdirection as to the elements of an offence entails a fundamental error. In that case, the High Court held that the relevant error was not to be so characterised, but there had, nonetheless, been a substantial miscarriage of justice, precluding the application of the proviso. Similarly, in *Darkan v R*,[34] although the error in direction went to an element in the case against one appellant, it did not lead the Court to the conclusion that there had been "in truth no trial at all";[35] in that case the proviso was applied.

[78] Here, of course, the appellants assert that the jury was not directed as to the elements of aiding in importation and thus was not required to determine the true issue as between the Crown and the appellants. The appropriate starting point for assessing that contention is to consider what those elements were, before examining the effect of the directions given. In order to convict each appellant of importation on the facts of this case, the jury had to be satisfied to the requisite standard that a person other than the appellants had brought into Australia border controlled drugs, intending to do so; that each appellant's conduct in fact, aided the bringing in of the border controlled drugs; and that each appellant intended that his conduct would aid the commission of that offence.

[79] There was no dispute that importations had occurred in May and September 2006; Reed was not challenged on that aspect of his evidence. The learned judge put the case to the jury on the basis that the Crown alleged

> "… that there were many tasks that had to be performed and divided between the various participants"

in a

> "… group exercise with each participant sharing the common objective of bringing drugs into the country".

Against that background, he asked them to decide whether the importation was the result of a group exercise, and if so, to consider who were the participants in it and whether the prosecution had proved that Handlen, with others, had imported the drugs and that Paddison, with others, had imported the drugs. The jury was thus

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31 At 317.
32 (1998) 194 CLR 202.
33 At 212.
34 (2006) 227 CLR 373.
35 At 405.

directed to the question of whether each appellant had performed tasks aimed at achieving the importation and, with others, imported the drugs. The positive finding which the jury must have made would equally have founded a conclusion that each appellant had aided others to commit the offence of importing. Although that characterisation of the conduct was not used, the necessary factual finding for it existed.

[80] After asking the jury to address those questions, his Honour went on to ask them to consider whether the prosecution had proved that each of the appellants had imported the drugs in each shipment with the intention to do so; and in that regard whether each, as part of the group exercise, meant to import, knowing or believing that the monitors contained border controlled drugs. Although his Honour directed the jury that each had to have the intention to import rather than an intention to aid the importation, that was in a context in which the jury had been asked to consider whether they were part of the group enterprise and told that the Crown case involved each participant in the enterprise sharing a common objective of importation.

[81] As the case was put on the basis of a group exercise in which each appellant performed tasks, the jury could not have understood the necessary intention to import as an intention to single-handedly bring the drugs into the country; they can only have understood the requisite intent as being the intention of each appellant to perform his allotted tasks in the exercise with the understanding that he was doing so in order to accomplish the importation of drugs. The intention which must have been found by the jury was, in this context, equally capable of being characterised as an intention to aid in the importation, even if it was not described as that by his Honour.

[82] I do not think that the absence of reference to aiding deflected the jury from the true issue between the Crown and the appellants; that is, whether the latter did things to advance the importation of drugs into Australia, with that intention. It follows that I do not accept that there was a fundamental departure from the requirements of trial by jury under s 80 or otherwise. Nor do I consider that the failure to direct in terms of aiding has produced any miscarriage of justice. I would regard the case as a proper one for the application of the proviso, subject to the success of any of the remaining grounds of appeal.

The co-accused's guilty plea

[83] Kelsey Nerbas went to trial with the appellants charged with the same counts as Handlen: importation in May and September 2006, possession of drugs from the first shipment and attempted possession of drugs from the second shipment. On the ninth day of the trial, shortly before the close of the Crown case, Nerbas pleaded guilty to all the charges against him. The trial judge advised the members of the jury that they were discharged from giving their verdict in respect of those charges, telling them that the case against Nerbas had been disposed of and was no longer before them. That should not, he told the jury, influence them in any way in their verdicts with respect to the other accused. Those verdicts were to be based solely on the evidence relating to them.

[84] In his address to the jury, Handlen, who by that stage was unrepresented, said this:

> "And the reason why I stated about the Google search[e]s and that, the Google searches - well, there's no point me talking about it. That was against somebody that's not even here anymore but it was

> in my - in his mind it was good enough reason not to be here anymore. And he's mentioned to me that he - he just took the deal that was offered, basically, rather than face the penalties at the end if he didn't take whatever deal was on the table. His claim to me is that he's not guilty. He's also planning on trying to come back into this trial."

(The reference to Google searches was to internet searches that Nerbas had undertaken in relation to Customs searches and drug seizures on 18 September, when there was some anxiety about Customs interference with the shipment.)

[85] Handlen's address finished very shortly after those comments. It was followed by these remarks from his Honour:

> "Just before I start my summing-up I should just say something about what Mr Handlen just said about Mr Nerbas. As I told you some many days ago, the case against Mr Nerbas has been disposed of and the count on the indictment relating to him is no longer before you. That shouldn't influence your verdicts with respect to the remaining defendants. Mr Handlen said that Mr Nerbas changed his plea to guilty. That is the case. Mr Handlen having told you that, I can confirm that. But you shouldn't let that affect your views about Mr Handlen or Mr Paddison. The position of them has to be separately considered.
>
> So, put the fact that Mr Nerbas has pleaded guilty aside. Instead, consider the case against Mr Handlen and against Mr Paddison on the evidence that's relevant to them in deciding whether the prosecution has established its case against each of them."

[86] In his summing-up, the learned judge referred to the searches by Nerbas and said this:

> "The evidence is relied on by the prosecution as proof of the group exercise. It may suggest that Mr Nerbas was a party to a plan that had the common purpose of taking possession of drugs and of ascertaining whether the presence of the drugs had been detected by the authorities. His acts, in making those internet searches, may say something about his state of mind. It doesn't say anything about the state of mind of each defendant. You should not infer that because Mr Nerbas had a certain state of mind, that either of the defendants had the same state of mind."

[87] In fact, the appellants pointed out, Handlen had not said that Nerbas changed his plea to guilty. In circumstances where Nerbas was said by the Crown to be involved in a joint criminal endeavour with Handlen and Paddison, the revelation of his plea of guilty was highly prejudicial. For Handlen, it was said that the trial judge ought to have discharged the jury by reason of his own, unnecessary statement that Nerbas had pleaded guilty. Paddison relied more generally on the combined effect of what Handlen had said and his Honour's statement to argue that the jury ought to have been discharged.

[88] Both submitted in the alternative that the judge should have directed the jury that accused persons pleaded guilty for various reasons, sometimes other than because of

consciousness of guilt; that the fact of Nerbas' plea of guilty was not evidence against the appellants; and that although the Crown case was one of a joint criminal enterprise, Nerbas' acceptance of guilt did not go to support the existence of such a joint criminal enterprise involving either appellant or any involvement of them in the alleged offences. Paddison argued that in circumstances where the jury had been told that the Crown case was one of association between Reed, Nerbas, Paddison and Handlen, among others, it was confusing and inconsistent then to instruct it that it should ignore Nerbas' plea of guilty to the charges. The learned judge's later direction that Nerbas' state of mind was not to be imputed to the appellants, separated as it was in time from the plea of guilty and what was said about it, could not assist.

[89] In my view, Handlen's reference to Nerbas' having taken "the deal that was offered" made it clear to the jury that Nerbas had pleaded guilty. His Honour's explicit statement of that fact added nothing. I do not think that disclosure of the plea of guilty warranted discharge of the jury or occasioned any miscarriage of justice. As earlier observed, this was a case in which the Crown relied on the *Tripodi* principle for the admissibility of evidence of the acts and words of all three accused done or said in furtherance of the common purpose. The fact of Nerbas' plea therefore, made no difference to the jury's ability to consider the evidence of his involvement.

[90] There was no challenge to Reed's evidence that there were two shipments of drugs; what was put to him by counsel for both appellants was that he, Reed, was the one responsible for the importation and that their clients neither knew of nor were involved in the importation of the drugs. The issue was, who was involved in the importations besides Reed. Nerbas, who was Reed's friend, had admitted he was; the judge appropriately warned the jury that the position of each of Handlen and Paddison had to be separately considered. It did not follow from Nerbas' admission, by his plea, of involvement in and knowledge of the importation of drugs that the appellants' involvement or knowledge had been established, and the jury was told that. As to the adequacy of the direction given, the essential point, properly addressed in it, was that Nerbas' plea of guilty had no bearing on the cases against Handlen and Paddison. It was not incumbent on the learned judge, and in my view it was unlikely to be helpful, to suggest that an accused might plead guilty for reasons other than guilt.

Prejudicial matters and inadequate direction

[91] Both appellants complained of the admission of two sets of prejudicial evidence: evidence that drugs from the first shipment had been distributed and evidence that they had been engaged in cannabis production in Canada. The former came from Reed's evidence-in-chief, the latter emerged in his cross-examination by Paddison's counsel. Counsel had asked Reed whether anyone had suggested that Paddison was being brought to Australia because Handlen and others felt sorry for him in his struggle with heroin addiction. Reed said that on their first trip to Australia nothing of the kind was mentioned, but on his second visit, when he and Nerbas met Handlen at Coolangatta, Handlen told him,

> "… that Doc [Paddison] did have a drug problem and that he thought about firing him from the marijuana grow-ops that they had together and that he wanted him down here to dry out."

When counsel asked if he was aware that Paddison had saved money to come to Australia, he answered,

> "No. I knew that he and Dale ran marijuana grow-ops, that's where they got their money from. That's why they call him Doc, because he's good with the plants."

He went on to say that he had seen the "grow-op" near Handlen's house, and that Paddison was there.

[92] In his evidence, Paddison said that he had a couple of marijuana plants in his backyard for personal use and that his nickname "Doc" had nothing to do with growing cannabis. In his summing-up, the learned judge in summarising Paddison's evidence reminded the jury of what he had said on the topic.

[93] Although both appellants were represented at the time Reed's evidence was given and must have been aware, from his statement and the Crown's opening, that he would testify as to the distribution of drugs from the first shipment, no objection was taken. It is necessary, therefore, for the appellants to show that the admission of the evidence produced a miscarriage of justice. They argued that it was irrelevant to importation and was highly prejudicial.

[94] But the evidence of how the drugs were dealt with plainly was highly relevant to the charges against Handlen, both of importing and possession, because it went to show his knowledge of both the nature and quantity of what was brought in; his readiness to deal with it made clear his familiarity with the product which he had been involved in importing and had possessed. So far as Paddison is concerned, Reed's evidence of counting packages of drugs was relevant in proving that the quantity of the drugs imported was commercial. It is difficult, however, to see how what Reed said as to the handing over of the drugs to their buyers was admissible against him. But no suggestion was made at the trial that it was, in fact, relevant in any way to the charges against him; Paddison's counsel did not see it as of sufficient consequence to ask for any direction relating to it; and the learned judge referred to the evidence in his summing-up only as it related to the possession charge against Handlen.

[95] The evidence of cannabis production in Canada was plainly gratuitous. Although the appeal ground was characterised as wrongful admission of evidence, it was not something to which defence counsel had the opportunity to object or on which the trial judge had occasion to rule. Neither counsel sought the discharge of the jury in consequence of it. Although it was plain from Paddison's own evidence that he had used heroin and cannabis, it may be accepted that this evidence was prejudicial to both him and Handlen because it indicated involvement in a commercial concern.

[96] However, that prejudice was likely to be of insignificant weight in the context of the evidence in the strong Crown case. There was no suggestion, correctly in my view, that this was an instance of "fundamental error" in the *Wilde* sense. I am satisfied that the reference to cannabis production did not occasion any substantial miscarriage of justice in Handlen's case, and would apply the proviso. I would take the same view in Paddison's case in relation to the effect of that evidence and the evidence of drug distribution (whether the two matters are taken separately or cumulatively).

[97] Paddison had two other complaints. The first was that the prosecutor in his closing address, in speaking of the distinction between "importation" and "possession", made this remark,

> "From a criminal's point of view, distinctions of that kind are irrelevant. The object in this case was to import drugs on two

> occasions and when they got imported, the object was to get their hands on them."

The reference to "criminals" was, Paddison's counsel said here, prejudicial. I do not think there is anything in this point. The statement was made in a general sense and was most unlikely to have any bearing on the jury's view of the appellants.

[98] Paddison also submitted that the learned judge's direction as to the funds transferred from his account to Nerbas' account was inadequate. His Honour told the jury to consider the exhibits relating to the account and what Paddison had said in his evidence about their unreliability, and to decide whether they were satisfied of the authenticity of the documents and whether, if there was a transfer of funds, it was for the purposes of facilitating the importation, or whether it might have occurred for some innocent purpose, with Paddison not knowing that it was to be used to import the drugs.

[99] Paddison contended that the judge should have raised the possibility, as another available inference, that someone else might have effected the transfers from his account. In the absence of any evidence to suggest that anyone else had access to the account (Paddison's position being that it was not his account and the records were fakes), there is no substance in this proposition. There was no alternative innocent explanation open on the evidence as to which the learned judge could have instructed the jury.

The judge's refusal, on Handlen's application, to discharge the jury or invite recall of witnesses

[100] On the eleventh day of the trial, after the Crown had closed its case and Handlen, when called upon, had indicated that he would not give or call evidence, Handlen withdrew the instructions of his counsel and solicitor. He engaged new solicitors and counsel, but they too had their instructions withdrawn before taking any active part in the trial. Handlen's counsel here submitted that the trial judge erred in refusing applications which Handlen then made for discharge of the jury or, alternatively, for the calling or recalling of Crown witnesses.

[101] Handlen gave to the trial judge a written document in which he asserted that his lawyers had failed to follow his directions in relation to Reed's evidence and had failed to read Reed's records of interview; had they done so, they would have realised that there had been criminal conduct by the Australia Federal Police. He complained that while he was provided before trial with Reed's witness statement, which took up 180 pages, he was not given the transcripts of Reed's interviews, which occupied 1,000 pages. It was apparent that Reed had altered his statement at the direction of Federal police officers. The jury should be discharged so that there could be a voir dire for the purpose of seeking exclusion of Reed's evidence and a new trial for which he, Handlen, should be given the opportunity to retain new counsel.

[102] Handlen also made an application to recall witnesses – Reed and the Federal Police officer who examined Nerbas' computer and located the Google searches – and to call three Federal Police officers who had not given evidence at the trial. Asked his basis for wanting the witnesses recalled, he said,

> "I have plenty of questions that went unanswered by my previous legal team, and I would like to submit that these questions need to be answered in the interests of justice and a fair trial."

As to the basis for seeking to have other witnesses called for the first time in the trial, he said,

> "They were at the committal phase, they were questioned, and some of the material I believe that they were questioned on, I believe the jury has a right to hear."

The Crown declined to recall the witnesses without any particularity given of the reason for doing so. Handlen in reply offered no further explanation.

[103] The learned judge noted that Reed had given extensive evidence at the committal hearing. Handlen, Paddison and Nerbas had applied at a pre-trial hearing for the exclusion of his evidence, in the process canvassing the circumstances of his interview. Reed had been cross-examined at the trial about what was said to him by Federal Police officers. It was impossible, in the circumstances, to conclude that Handlen's lawyers had not reviewed the transcripts of Reed's interviews, and it was clear from his cross-examination that counsel had, in fact, done so. He had not cross-examined Reed about the evolution of his statement, but it might have been thought better not to dwell on the contents of his interviews. There was no basis for a conclusion that counsel had overlooked any matters of consequence. It was not surprising that in order to obtain instructions, Handlen's legal representatives had given him only the witness statement. They could themselves examine the interview transcripts to identify any issues about the statement's preparation and could ascertain the circumstances in which it was provided.

[104] The evidence before the existing jury had been tested in the usual way and the issues raised by Handlen in relation to Reed's records of interview did not justify a new trial. As to the suggestion that Handlen needed to engage new counsel, the judge noted that Handlen had withdrawn the instructions of his original lawyers, retained new representatives and then, in turn, withdrawn their instructions. He refused the request to discharge the jury. His Honour also declined the application to call and recall witnesses, which he treated as a request for him to ask the Crown to do so. No basis had been made out for him to make that request: the questions which might be asked had not been identified. It was not necessary to do so to achieve a fair trial; in fact, a fair trial might be imperilled if witnesses were recalled without a proper basis and without any indication of what further cross-examination might be undertaken.

[105] Counsel for Handlen submitted here that there was no evidentiary basis for the learned judge to draw the conclusions that counsel had reviewed the transcripts of interview or that there were forensic reasons not to cross-examine in relation to the transcripts.

[106] As to the first issue, Handlen's counsel at trial cross-examined Reed about things said to him in the course of the police interviews which indicated the strength of the evidence that the police had against him, particularly in relation to the content of intercepted telephone conversations and about what they had said to him in relation to the benefits of co-operation. The source of that cross-examination plainly was the transcripts of Reed's interviews; it is not correct, therefore, to assert that there was no evidentiary basis for the learned judge to conclude that counsel had reviewed them.

[107] The learned judge's recognition that counsel might have had good forensic reason not to reinforce Reed's account by exploring the content of the interviews, was

perfectly reasonable; and in the absence of any evidence as to how cross-examination of Reed or the Australia Federal Police officers was deficient, there was no reason to conclude the contrary. No proper basis was identified to his Honour for discharging the jury, and he rightly declined to do so. His refusal to invite the prosecutor to recall witnesses was similarly correct. Without any identification by Handlen of the reasons for calling or recalling a witness, there was simply no basis to entertain the proposition. Handlen has failed to show any error in his Honour's reasoning in either respect.

The failure to adjourn the trial when Paddison withdrew his legal representatives' instructions

[108] On the fifteenth day of the trial, while under cross-examination by the Crown prosecutor in his defence case, Paddison withdrew the instructions of his counsel. He informed the trial judge that he considered he could do a better job of representing himself. His barrister had not followed his directions, had rushed him through evidence-in-chief and would not say the things he considered necessary in his address. Paddison's counsel on this appeal said that his client had been denied the opportunity to obtain new representation or advice from solicitors, in contrast with what had happened when Handlen withdrew the instructions of his counsel; then, the matter was adjourned for two days to allow counsel to familiarise himself with the material. To assess that submission, it is necessary to examine how matters unfolded once Paddison withdrew his barrister's instructions.

[109] The learned judge warned Paddison of the consequences of dispensing with the assistance of his counsel and of the difficulties facing him in representing himself; that so far as his address was concerned, there were limits on what either he or indeed counsel could say; and that he would lose the benefit of re-examination by his counsel. Paddison, nonetheless, remained intent on dispensing with his counsel's services. He said that he did not want an adjournment for new legal representation, but after questioning by the learned judge, it emerged that what he anticipated was that he would continue to retain his solicitors while appearing as his own advocate. He explained that in that capacity he proposed to tender the transcript of a Four Corners program about the Australian Federal Police and subpoena an officer who had appeared in it to comment on what he had said in it about the conduct of the Federal Police. (Not surprisingly, since the program had nothing to do with the case before the court, his Honour ruled the transcript inadmissible and declined to issue a subpoena to the Federal Police officer who had been interviewed in it.)

[110] Paddison's solicitors, like his counsel, sought and were granted leave to withdraw. Paddison then said that, although he had had some time to make his decision to represent himself, it was a surprise to him that his solicitors were withdrawing. He would like to seek new counsel, but if it were not possible, he would go ahead. The learned judge said that Paddison had made a considered decision to cease his legal representation and had not established grounds to have the trial adjourned in order to obtain new counsel. It was unlikely, in any event, that legal aid would be available for new legal representatives. He told Paddison that if there were any matters that he wished to raise which would assist with the orderly transition of documents to him to enable him to represent himself, he would consider those matters.

[111] Paddison said that he wished to adjourn in order to have a hair sample taken and tested to show that he had, as he said, ingested heroin and had been drinking alcohol

to excess in September 2006. He also wanted to adduce evidence of a DNA test referred to at the committal which excluded him as a donor of DNA on a rubber glove. (The glove, however, was found at the storage facility where the monitors from the May shipment were stored; since they had been moved there by Reed and Nerbas in August 2006, before Paddison's arrival in Australia, the result was not surprising and not helpful to him.)

[112] The difficulty with counsel's argument now is that it would have availed nothing to give Paddison an adjournment to seek new legal representation, because it was simply inconceivable that any firm of solicitors would have been prepared to represent him while he appeared as advocate. Nor would any reputable lawyer have been prepared to support him in advancing the arguments which enthused him. And, as his Honour pointed out, it was unlikely that Legal Aid would fund further legal representation in the circumstances.

[113] Paddison was told that he could raise any needs in relation to transfer of documentation to him; he did not suggest that he needed an adjournment so far as that was concerned. The notion of adjourning so that he could have a hair sample tested in the hope of establishing alcohol and drug use at a particular time was plainly absurd. Given the poor prospects of any adjournment's resulting in new legal representation, and the pointlessness of the proposed adjournment for hair testing, it cannot be said that the learned judge erred in exercising his discretion as he did.

The Crown prosecutor's address in respect of Handlen's case and the judge's reference to it in the summing-up

[114] Handlen did not give evidence and was unrepresented at the time of addresses, although he had been represented when he was called on to say whether he would give or call evidence. He withdrew instructions shortly after, before Paddison's counsel opened his case. The learned judge took the view that the prosecutor's right to address accrued when it was indicated that Handlen did not propose to call evidence.

[115] Section 619 of the *Criminal Code* (Qld) relevantly provides:

> "**619 Speeches by counsel**
>
> ...
>
> (2) If the accused person or any of the accused persons, if more than 1, is defended by counsel, and if such counsel or any of such counsel says that the accused person does not intend to adduce evidence, the counsel for the Crown is entitled to address the jury a second time for the purpose of summing up the evidence already given against such accused person or persons for whom evidence is not intended to be adduced.
>
> ...
>
> (4) If evidence is adduced for an accused person, the counsel for the Crown is entitled to reply.

> (5) If evidence is adduced for 1 or more of several accused persons, but not for all of them, the counsel for the Crown is entitled to reply with respect to the person or persons by whom evidence is so adduced, but not with respect to the other or others of them.
>
> (6) However, a Crown Law Officer is entitled to reply in all cases, whether evidence is adduced by any accused person or not."

[116] It was common ground that the Commonwealth prosecutor was not a "Crown law officer" because he did not meet the definition in s 1 of the *Criminal Code* (Qld). That meant, counsel for Handlen said, that the prosecutor was entitled to address the jury in relation to the case against Paddison, who had given evidence, but not in relation to the case against Handlen, except insofar as it was relevant against Paddison, and could not address the jury as to Handlen's guilt. Notwithstanding, the prosecutor, in the course of his address, had addressed on the evidence against Handlen and suggested to the jury that they ought to find him guilty, and the trial judge had reminded the jury of the prosecutor's address.

[117] Counsel for Handlen pointed out that in fact, it was Handlen himself who had said that he did not intend to adduce evidence; but he did not rely on that as a basis for saying that s 619(2) could not apply, conceding that it would be an extraordinary result if a Crown prosecutor could be precluded from addressing by the simple mechanism of the accused person's speaking rather than his counsel. But, he said, the policy behind s 619(2) was plainly that where an accused did not give evidence and had no counsel to address on his behalf, the Crown prosecutor should not have the opportunity of addressing.

[118] Sub-sections 619(2) and (4) do not in terms specify that their converse applies: that is, that the Crown is <u>not</u> entitled to address where an unrepresented accused does not give evidence; but that is the way in which the section has been construed. Not long after the *Criminal Code* came into effect, the question of the right to reply arose in *R v Walsh & Bunting*.[36] Two unrepresented accused had not adduced evidence, but each addressed the jury. The trial judge allowed the Crown prosecutor to reply. The Full Court concluded that where prisoners were undefended, there was no right of reply by the prosecutor unless he was a Crown law officer. Griffith CJ noted that the right of reply had

> "… in fact, never been allowed, unless evidence was given for the prisoner, except as a personal right to the Attorney-General or counsel representing the Attorney-General".[37]

Section 619(2), he explained,

> "provides for the case where prisoners are defended by counsel, and gives counsel for the Crown the right to address the jury a second time if the prisoner does not intend to call evidence, otherwise he may not do so at that stage. It is then provided that at the close of the evidence for the prosecution the accused or his counsel may address the jury for the purpose of opening the evidence, and again after the

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36 [1902] St R Qd 6.

37 At 7-8.

> whole evidence is given; but if evidence is adduced for the accused person, counsel for the Crown is entitled to reply. In the case of two accused persons, if evidence is given for the one and not for the other, counsel for the Crown may reply as to the one for whom evidence is given but not in respect to the other."[38]

[119] In *R v Bellino and Conte*,[39] McPherson JA explained the operation of s 619 where the Crown prosecutor was entitled to address in respect of one of two co-accused. In that case, Conte was represented by counsel, but Bellino was not and did not give evidence. The prosecutor was entitled, McPherson JA explained, to sum up the evidence against Conte and to reply to the arguments of his counsel, in the process, inviting the jury to conclude that he was guilty of the offences. He was entitled to refer to evidence against Bellino which implicated Conte, but he was not entitled to address the jury in relation to Bellino's guilt or to refer to evidence admissible only against him.

[120] In the ordinary course, where there is only one accused, there would be no interval between the intimation that the accused will not adduce evidence and the prosecutor's address. In this case, it was only because Paddison gave evidence that the Crown's address in respect of Handlen was deferred. It would be an odd result if the fact of a co-accused going into evidence, or any other cause for delay before the prosecutor's address during which instructions might be withdrawn, should be the determining factor in the Crown's entitlement to address. And if the simple fact of the accused becoming unrepresented were sufficient to terminate the Crown's right in that regard, the result would be, presumably, that if during the prosecutor's address, the accused withdrew his instructions, the address would have to be discontinued.

[121] I doubt that s 619 (2) contemplates a situation where the accused may exercise control over the commencement or continuation of a Crown address by the mechanism of withdrawing instructions, with the right of address being extinguished or reviving as the accused terminates instructions or obtains new legal representation. And the tenor of the section as a whole is not that the Crown should not be permitted to address simply because the accused is without counsel to address on his behalf: s 619(4) contemplates a reply by the Crown once an accused gives evidence, whether or not he is represented. The learned judge was right, with respect, to construe s 619(2) as creating a right for counsel for the Crown to address upon the meeting of the two conditions it specifies: that the accused is defended by counsel and that counsel says (expressly, or by allowing his client to speak for himself) that evidence will not be adduced.

[122] If I am wrong in that conclusion, I would in any event consider it an appropriate circumstance in which to apply the proviso. Given that the prosecutor was entitled in his address on Paddison's case to traverse Handlen's role in the importations, any prejudice arising from so much of his address as was directed to Handlen's guilt must have been minimal.

Handlen's application for leave to appeal against sentence

[123] Handlen sought leave to appeal against the sentences of life imprisonment, with a non-parole period of 22 years, imposed on him. Section 16A(1) of the *Crimes Act*

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38 At 8.

39 [1993] 1 Qd R 521.

1914 (Cth) requires the court in sentencing for a Federal offence to impose a sentence "of a severity appropriate in all the circumstances of the offence". Section 16A(2) sets out a non-exhaustive list of matters which must be taken into account; each of which the learned judge here considered in turn. As to the nature and circumstances of the offences, he found that Handlen had played a leadership role – "a senior supervisory and management role" – in managing each importation and directing the activities of others. In particular, his dealings with Shen showed that it was he who made decisions about when and how the drugs, once imported, would be dealt with. He knew what was being imported. Although there was no evidence of the reward he was to receive, it was inconceivable that it was other than a substantial one. His activities were purely for profit; there was no question of his being an addict.

[124] The learned judge made these findings about the quantities of the drugs imported. Extrapolating from the package of 698 tablets left inside a monitor from the May importation and Reed's evidence that he counted 285 such packages, he found that an amount slightly under 200,000 ecstasy tablets was imported in May, with four kilograms of cocaine. Again extrapolating from the package found, he estimated that the tablets in the May importation comprised pure weights of 14.763 kilograms of 3,4-methylenedioxymethamphetamine and 1.254 kilograms of methamphetamine. The potential street value of the ecstasy tablets was around $8 million; of the cocaine, $3.5 million. The September importation involved 121,200 tablets with an estimated pure weight of 7.6 kilograms of 3,4-methylenedioxymethamphetamine and 1.085 kilograms of methamphetamine, as well as 135.7 kilograms of cocaine with an average purity of 75.9 per cent. The prospective street value of the ecstasy tables was $4.8 million; that of the cocaine, $120 million.

[125] Handlen was 39 years old at the time of the importations and 42 when he came to sentence. He had worked in wall cladding and similar occupations for many years and had his own business. He had been in a de facto relationship for 20 years and was, effectively, the step-father of his wife's daughter. His criminal history was limited to a single juvenile offence which the learned judge regarded as irrelevant. His Honour observed, however, that prior good character was of reduced significance in the context of drug importation. He noted that Handlen had not shown any contrition for the offences. He would be separated from his country, family and friends, a factor which the judge said he took into account, but one on which he placed little weight. As to the effect of the sentence on Handlen's family and dependents, there were no exceptional circumstances. Deterrence was of primary importance.

[126] The learned judge referred to a number of cases as supporting the Crown's contention that life imprisonment was the proper sentence. A number of them were also relied on here: *R v Jackson*;[40] *R v Lee;*[41] three linked cases from New South Wales, *R v Gonzalez-Betes,*[42] *R v Flavel*[43] and *R v Campillo Vaquere*;[44] *R v Neale*;[45] and *Melgar Sevilla v The Queen.*[46]

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40 (2003) 138 A Crim R 148.
41 [2007] NSWCCA 234.
42 [2001] NSWCCA 226.
43 [2001] NSWCCA 227.
44 [2004] NSWCCA 271.
45 [2004] NSWCCA 311.
46 [2007] WASCA 116.

[127] *Jackson* concerned a 60 year old applicant who had pleaded guilty to importing 89.1 kilograms of cocaine, 70 per cent pure, brought in by boat from Mexico. The applicant had played a central role in the planning and commission of the offence, supplying a vehicle, providing some of the finance and arranging the crew, in return for an expected reward of $800,000. The relevance of the case was that his Honour regarded Handlen's role as comparable to that of the applicant in *Jackson*, and the sentencing judge there had said that, but for the applicant's plea of guilty and the absence of prior convictions, he would have regarded the case as warranting a sentence of life imprisonment. Instead, he imposed a sentence of 25 years with a non-parole period of 13 years.

[128] In *Lee*, McClellan CJ at CL reviewed a large number of appellate decisions from the different States involving large-scale importations of heroin and cocaine and observed that in cases where sentences were imposed after the repeal of s 16G[47] of the Crimes Act, offenders who were key organisers of importations, although not at the organisational "pinnacle", received head sentences greater than 20 years, and in a number of cases, life imprisonment.

[129] The applicants who sought leave to appeal against sentence in *Flavel*, *Gonzalez-Betes* and *Campillo Vaquere* imported 224.84 kilograms of cocaine, 172.2 kilograms pure, on a yacht. They had different roles in shipping the cocaine and taking delivery of it in Australia. The principal of the organisation, who was the yacht's owner, was not among them. Each was sentenced to life imprisonment, with different non-parole periods ranging between 22 and 25 years. All three unsuccessfully argued that because the sentencing judge had characterised them in each case as a "mid-level executive", she was wrong in finding that they fell within the worst category of cases, justifying a sentence of life imprisonment. In *Flavel*, the New South Wales Court of Criminal Appeal emphasised the importance of looking at what exactly the applicant did, rather than the label given him by the sentencing judge.[48]

[130] The applicant in *Melgar Sevilla* pleaded guilty to the importation of 100.6 kilograms of cocaine powder, 78 per cent pure, by boat into Western Australia. He had come to Australia in order to supervise the importation, communicating with those involved and making arrangements to retrieve the drugs once they arrived. His role was described as "crucial to the success of the operation". He was refused leave to appeal his sentence, of life imprisonment with a 21 year non-parole period.

[131] His Honour referred to *Neale* because it involved ecstasy tablets in similar quantities to the present case. That offender imported 271,000 ecstasy tablets said to weigh 105.4 kilograms, about 50 per cent pure. He had imported the drug in wine bottles. His sentence of life imprisonment was upheld, but the non-parole period, set at first instance at 21 years, was adjusted to 15 years to allow for the fact that he was already 57 years old.

[132] Those cases showed, his Honour said, that individuals at the top of the organisation of substantial drug importation should receive a term of life imprisonment. Consistency in punishment with other sentences imposed throughout the Commonwealth was important, as was the achievement of consistency in the

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47 Section 16G, repealed in 2003, required adjustment of any sentence to be served in a State where remissions were not available to be adjusted accordingly, which usually meant a reduction of about one third.

48 At [46].

sentencing of co-offenders. Reed was, his Honour observed, effectively second-in-charge to Handlen. The sentence imposed on him, of 12 years imprisonment with a non-parole period of eight years had been halved, both as to head sentence and non-parole period, by reason of his co-operation. Reed was 26, had no criminal history, had pleaded guilty and was said to have a vulnerable personality. In addition, the evidence against him in respect of the May importation came from his admissions.

[133] The objective circumstances of the offending, Handlen's knowledge of what was being imported, his role in each importation and in taking steps to obtain the imported drugs, and the fact that neither importation was a "one-off" exercise, brought his case into the worst category of cases warranting the penalty of life imprisonment. There were few mitigating circumstances justifying leniency. Handlen was a mature adult who had encouraged others to become involved and he had not desisted from his activities; had the authorities not intercepted the second shipment of drugs, he intended to continue importing.

[134] His Honour's reference to the "worst category of cases" derives from *Veen v The Queen [No 2]*,[49] in which the High Court said:

> "[T]he maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed ... that does not mean that a lesser penalty must be imposed if it is possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."[50]

[135] Handlen argued that his offending was not in the "worst category of cases". He pointed to the joint observation of Spigelman CJ and Carruthers AJ in *R v Stanbouli*[51] that life imprisonment should be reserved

> "… as 'the norm' for persons at the top of the importation hierarchy, rather than those who 'provide important assistance',"

and to this statement from *R v Twala*:[52]

> "… in order to characterise any cases being in the worst case category, it must be possible to point to particular features which are of very great heinousness and it must be possible to postulate the absence of facts mitigating the seriousness of the crime (as distinct from subjective features mitigating the penalty to be imposed)."

[136] Handlen was not, his counsel asserted, at the top of the importation hierarchy, but rather depended on instructions and funds from others. For that contention, he relied on Reed's evidence as to the reasons for delay in completing the order for monitors for the May shipment:

> "Dale said he was dealing with the clients, which is how he described them, but he never said exactly who it was and that he was

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49 (1988) 164 CLR 465.

50 At 478.

51 (2003) 141 A Crim R 531 at 533, 565.

52 Unreported, New South Wales Court of Criminal Appeal, No 60187 of 1993, 4 November 1994.

> trying to get money to be able to pay the balance of a load and to keep money coming in to pay for the warehouse, that he wanted the clients to front that money, and they weren't really forthcoming with the money for a while and so we were waiting to go."

After a meeting, Handlen told Reed:

> "... that the clients had finally sorted their end of things out and that they wanted to go and that the money would be coming in and that I should get ready to buy the rest of the monitors."

[137] Handlen also sought to support the argument that his offending was not within the worst category of cases by pointing to other cases which had attracted life imprisonment; such cases, he said, had the common features that the offender was at the top of the importation hierarchy, the quantities imported exceeded those here and the offenders had relevant prior criminal history. To make that point, he cited *R v Bartle*,[53] *R v Suarez-Mejia*,[54] *R v Reaves*[55] and *De La Espirella-Valesco v The Queen*[56].

[138] In *Bartle*, applicants named Diez and Fry were two of a number of applicants for leave to appeal against sentence; they received sentences of life imprisonment with a non-parole period of 25 years for importing 383 kilograms of pure cocaine. Diez was the contact between the suppliers of the cocaine in Latin America and the prospective importers in Australia and arranged transfers of funds to pay for the enterprise. He had a previous conviction for conspiring to import cocaine for which he had been sentenced to imprisonment for two years and nine months. Fry's role was to equip, provision and sail a vessel to which the drugs were transferred in the Pacific and which he then sailed to Australia. Their appeals were dismissed.

[139] In *Suarez-Mejia,* the applicant was convicted of importing 707 kilograms of pure cocaine. He, with others including the applicant in *Reaves,* sailed a vessel from Africa to a point in the Atlantic Ocean at which the cocaine was transferred to it, and then brought it into Western Australia. Suarez-Mejia was sentenced to life imprisonment with a non-parole period of 20 years; a Crown appeal against the inadequacy of the non-parole period was dismissed. Reaves had a criminal history which included conspiracy to import and possess marijuana in the United States and a narcotics conviction in Germany. The Western Australian Court of Criminal Appeal upheld a Crown appeal against the sentence imposed at first instance and substituted a sentence of life imprisonment with a non-parole period of 18 years. A third co-offender, the applicant in *de la Espirella-Velasco*, was a Colombian citizen who had come to Australia to find a suitable spot for the boat to land in order to off-load its cargo, to keep interested parties informed of its progress and to obtain transport to move the drugs when they arrived. His appeal against a sentence of life imprisonment with a non-parole period of 26 years was dismissed.

[140] I do not think that the evidence of Reed, quoted above, is of much assistance to Handlen in his attempt to argue that the learned judge overstated his role. It simply shows that he had paying clients on whom he depended for advances in order to fund the importations. The judge's conclusion that he had supervised both importations was clearly correct. Whether he was at the "pinnacle" of whatever

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53 (2003) 181 FLR 1.
54 (2002) 131 A Crim R 577.
55 (2004) 147 A Crim R 26.
56 [2006] 31 WAR 291.

organisation was behind the operation is not to the point; the learned judge rightly focussed on what he actually did. The cases Handlen cited, in which offenders on whom sentences of life imprisonment were imposed had imported greater quantities of drugs or had prior previous convictions, do not stand for the proposition that such factors must exist before a case may properly be described as "in the worst category". It may be observed, however, that his role was of no less importance than each of theirs in the various importations in which they took part.

[141] In this case, a combination of factors, the most important of which was that Handlen managed a commercial operation which conducted, not one, but two importations and would have continued, undetected, in the business, handling massive quantities of drugs, entitled the learned judge to reach the conclusion that it was in the worst category. His Honour methodically reviewed all the factors relevant to sentencing and took a view of the case's seriousness which was open to him. No error has been shown in his exercise of the sentencing discretion.

Paddison's application for leave to appeal against sentence

[142] Paddison was sentenced to 22 years imprisonment, with a non-parole period of 14 and a half years, on each count. He turned 29 years of age in 2006 when the offences were committed, and was 31 at sentence. He had no relevant criminal history. He had worked as a welder, had owned shares in some small businesses and had been a cleaner. Paddison was a long-term cannabis user and was, according to him, addicted to heroin in 2006. Shortly prior to his departure for Australia in August 2006, his de facto wife had borne twins; he was also the father of a teenage son from an earlier relationship.

[143] The learned judge accepted that one of the reasons for Paddison's coming to Australia was to have a break from those who supplied him with heroin in Canada; but he noted, too, that the surveillance evidence showed no sign of Paddison's using heroin or being debilitated by addiction during his time in Australia. He took into account Paddison's previous good character and lack of previous convictions and the fact that he was to be imprisoned away from his young family and home. The difficulties that Paddison's family would suffer did not make their circumstances exceptional compared to any other case.

[144] Although his Honour accepted that Paddison played a less important role than Handlen and Reed, there were, he said, three features calling for a substantial sentence: the very large quantity of drugs imported and their potential for harm which made deterrence of primary importance; the fact that Paddison was involved in more than one importation; and the fact that Paddison knew the quantity of drugs imported because he packed them. His role in concealing the drugs was critical to the success of each importation. His role, the learned judge said, was

> "functional rather than ... managerial".

It was improbable that he played his role without expecting a reward, although there was no evidence as to precisely what it was to be.

[145] The learned judge referred to *R v MO*,[57] *Sukkar v The Queen(No 2)*,[58] *R v Lee*,[59] *R v Ung*[60] and *R v Chan Kam Wah*[61] as well as the sentence imposed on Reed, in

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57 (2007) 169 A Crim R 60.
58 [2008] WASCA 2.
59 [2007] NSWCCA 234.
60 (2000) 112 A Crim R 344.
61 Unreported, New South Wales Court of Criminal Appeal, No 60168 of 1991, 13 April 1995.

concluding that sentences of 22 years imprisonment were required to reflect the quantity and kind of drugs, Paddison's knowledge of that quantity and his critical role in concealing them in Canada and attempting to unpack the second importation in Australia. He did not, he said, see any reason to impose different sentences in relation to each offence, given that they were part of a course of conduct.

[146] In *MO*, heroin with a pure weight of over 76 kilograms was imported in two shipping containers. The respondent travelled from Hong Kong, paying his own expenses, in order to complete his assigned task, the physical retrieval of the drugs from the containers. He was to be paid $50,000. The New South Wales Court of Criminal Appeal, in allowing a Crown appeal against sentence, described the appropriate starting point, before discount for a plea of guilty and assistance to the authorities, as 22 years imprisonment. Allowing for those factors, a sentence of 13 years and two months with a non-parole period of eight years and eight months was imposed.

[147] *Lee* was also a Crown appeal. Lee was convicted of importing 76.3 kilograms (pure) of heroin brought into the country in shipping containers. He spent almost two years in Australia, incorporating the company which would act as the importer, arranging a test run in which a container without drugs was brought in, making the arrangements for landing the two containers with drugs and their clearance through customs, renting warehouses and arranging the delivery and unloading of the containers. The Court of Criminal Appeal accepted that he was not at the pinnacle of the operation, but his role was critical, and was not diminished by the fact that he left Australia before the drugs were actually retrieved from the container. His was a "senior management role of critical significance to the success of the enterprise".[62] It warranted a very severe penalty, although not a term of life imprisonment. A sentence of 27 years and five months with a non-parole period of 18 years and 11 months was imposed.

[148] In *Ung*, 54 kilograms of pure heroin were imported in tins of canned pineapple in a shipping container. The appellant was involved in having the goods cleared through customs, paying the customs agent involved and in giving instructions for the container's delivery, later assisting with its unloading. He was convicted after a trial and sentenced to 16 and a half years imprisonment with a non-parole period of 11 years. Of significance here, from the Crown's perspective, was that the sentencing judge started from a notional head sentence of 25 years, which he reduced to 16 and a half years pursuant to the then requirement in s 16G of the *Crimes Act*.

[149] In considering *R v Chan Kam Wah*, the sentencing judge referred in particular to the sentence imposed on appeal on one of the six accused in that case, Law Yat Kai. The case involved importation of blocks of heroin with a pure content of 38 kilograms in refrigeration and heating units. Law Yat Kai had helped to load part of the heroin into a vehicle in Hong Kong before travelling shortly after to Australia to take delivery of the consignment with two other conspirators. Because of delays in the arrival of the drugs, he withdrew from the arrangement. He was convicted of being knowingly concerned in the importation of heroin and conspiring to have it in his possession. He was sentenced, at first instance, to terms totalling 28 years imprisonment; on appeal, that sentence was set aside and a sentence of 24 years with a non-parole period of 18 years was substituted.

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62 At [33].

[150] The applicant in *Sukkar v The Queen (No 2)* was a co-offender with the applicant in *Melgar Sevilla v The Queen.* He had assisted Melgar Sevilla, making telephone calls, purchasing mobile telephones, and driving him to where the boat carrying the cocaine was to dock. The two planned how and where the cocaine would be brought ashore and how it would be hidden. Sukkar drove with Melgar Sevilla to retrieve the cocaine from the place where the latter had hidden it. He had pleaded guilty on the second day of his trial and was sentenced to 21 years imprisonment with a 13 year non-parole period. Leave to appeal was refused.

[151] Paddison appeared for himself on his application for leave to appeal against sentence. His submissions included a contention that he should not have been convicted because he had nothing to do with Reed's company, which was the real importer. A second submission was that since the concept of importing was concerned only with the goods' physical entry into Australia, their clearance through customs and their delivery to their destination, he could only be sentenced for his involvement in relation to those specific acts; which, presumably, was none. Those submissions may be disregarded. Paddison also argued that the learned judge was wrong in finding and taking into account that he knew the quantities of the drugs in the importations because, he said, there was no evidence at the trial suggesting he had any such knowledge. That submission may be immediately rejected; the judge's finding was properly based on Reed's evidence as to Paddison's role in packing both shipments.

[152] Paddison's more relevant submission was that the judge's classification of his role as "functionary" meant that he was in a different position from offenders in the comparable sentences relied on, who were in organising or managing roles. He argued that a proper sentence for him would be that imposed by the trial judge in *Campbell v The Queen*[63] of two years and six months with release after 18 months on a recognizance. That sentence, of course, was the subject of a Crown appeal which was not resolved, because Mrs Campbell's conviction was set aside. In consequence, one can tell from the judgment only that it concerned the importation of pseudoephedrine in an amount exceeding 1.2 kilograms; and, of course, in the circumstances, it is hardly authoritative. Alternatively, Paddison contended, his sentence should be the time he had already served since his arrest in September 2006.

[153] I do not think that examination of the facts in, at least, *MO*, *Sukkar*, and *Chan Kam Wah* bears out Paddison's characterisation of the relevant offender's role in those cases as significantly different from his. And, importantly, Paddison was involved in not one, but two importations; in the case of the second importation at both ends of the operation. A crucial finding for the purposes of sentence was that he knew, because of his involvement in packing the drugs, exactly what was being transported. His role in concealing the drugs for importation was a significant one; and it is of some importance, too, that he made a financial contribution to the first importation. Those findings warranted a substantial sentence. The authorities to which his Honour referred indicate that the sentence imposed was not disproportionate.

Orders

[154] I would dismiss the appeals against conviction and refuse the applications for leave to appeal against sentence.

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63 (2008) 73 NSWLR 272.

[155] **FRASER JA:** I have had the advantage of reading Holmes JA's reasons for judgment. I agree with those reasons and with the orders proposed by her Honour.

[156] **WHITE JA:** I have read the reasons for judgment of Holmes JA. I agree with those reasons and the orders that her Honour proposes.