HANDLEN v. THE QUEEN (B26/2011)
PADDISON v. THE QUEEN (B27/2011

Court appealed from: Court of Appeal of the Supreme Court of Queensland [2010] QCA 371

Date of judgment: 23 December 2010

Date special leave granted: 13 May 2011

The appellants were, on 18 December 2008, found guilty of several drug offences: Handlen of two counts of importing and one count of attempting to import a commercial quantity of border controlled drugs, and one count of possessing a commercial quantity of border controlled drugs; and Paddison of two counts of importing a commercial quantity of border controlled drugs and one count of attempting to possess a commercial quantity of border controlled drugs. They were tried with a third co-offender ("Nerbas") who pleaded guilty during the trial, and a fourth co-offender ("Reed") had pleaded guilty prior to trial. The four offenders had been involved in two shipments in computer monitors from Canada of more than 135 kg of cocaine and over 121,000 of mixed ecstasy and methamphetamine tablets. The Crown case against the appellants was presented to the jury, and the jury was instructed by the trial judge, on the basis that the appellants, together with Nerbas and Reed, had all committed acts by which they together imported the drugs. At the time, the *Criminal Code* 1995 (Cth) ("the Code") did not contain s 11.2A (joint commission of offences), only s 11.2 (aid, abet, counsel or procure). The appellants appealed against their convictions, arguing that they had been convicted on the basis of a form of criminal liability not then known under the *Code* which at the time contemplated an offence of importation committed either as a principal or as an aider or abettor of a principal offender.

The Court of Appeal (Holmes, Fraser and White JJA) agreed but dismissed the appeal after applying the proviso. Holmes JA delivered the principal judgment of the Court. Her Honour held that the appellants could only be criminally responsible as aiders under s11.2 of the *Code*, which was not how the Crown case was put to the jury nor were the trial judge's directions to the jury consistent with that basis of criminal responsibility. However, her Honour concluded that the proviso should be applied, finding that the Crown case was extremely strong and that the guilt of the appellants was established beyond reasonable doubt. Her Honour did not regard the absence of reference to accessorial liability by the trial judge in his directions to the jury as deflecting the jury from "the true issue between the Crown and the appellants; that is, whether the latter did things to advance importation of drugs into Australia, with that intention". Her Honour rejected the appellants' argument that the errors at trial were so fundamental that the proviso could not operate, and the appellants' argument that the fundamentals of trial by jury under s 80 of the *Constitution* did not exist where the jury had not made a finding on the basis necessary to establish guilt (that is, as to aiding and abetting, rather than as to joint criminal enterprise).

The grant of special leave to appeal was limited to a single ground of appeal. Notices pursuant to s 78B of the *Judiciary Act* 1903 (Cth) have been filed in each appeal.

The ground of appeal for which special leave was granted is:

- The jury were not directed, in relation to counts 1 and 4 on the indictment, to return a verdict on the essential elements of accessorial criminal liability under s 11.2 of the Criminal Code (Cth) with the result that:

    - There was a substantial miscarriage of justice in the convictions on counts 1 and 4 and the proviso in s 668E(1A) of the Criminal Code 1899 (Qld) could not apply;

    - the application of the proviso to the convictions on counts 1 and 4 was excluded by s 80 of the *Constitution* as the trial lacked the essential elements of trial by jury;

    - there was a substantial miscarriage of justice in the convictions on counts 2 and 3 on the indictment.