IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY No. M144 of 2016

BETWEEN

THE QUEEN
Appellant
and
STEVEN LAKAMU SIOSIUA AFFORD
Respondent

APPELLANT'S SUBMISSION

Part I – INTERNET PUBLICATION

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

Part II – STATEMENT OF ISSUES

2. Is the factual inferential reasoning espoused in *Kural v The Queen*[1] (*"Kural"*) capable of proving intention under Chapter 2 of the *Criminal Code* (Cth) 1995 (the "*Code*") as held by *Saengsai v R*[2], and later authority?

3. Is the reasoning referred to in *Kural* capable of applying to the offence of importing a commercial quantity of a border controlled drug contrary to s 307.1 of the *Code*?

4. Are the cases which have applied the reasoning in *Kural* to proof of intention under Chapter 2 of the *Code* - including *Saengsai, Cao v R*[3], *Weng v R*[4], *Luong v R*[5] - distinguishable from this case, as held by the majority, on the basis of the elements of the offences in those cases?

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[1] (1987) 162 CLR 502 at 504 - 505
[2] (2004) 61 NSWLR 135 at [67][69][74] ("*Saengsai-Or*")
[3] (2006) 65 NSWLR 552 ("*Cao*")
[4] (2013) 236 A Crim R 299 ("*Weng*")
[5] (2013) 236 A Crim R 85 ("*Luong*")

Date of Document: 18 November 2016
Filed on behalf of the Appellant, Director of Public Prosecution (Cth)
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5. Whether the majority were correct to conclude the verdict of the jury was unsafe and against the weight of the evidence?

Part III: NOTICES UNDER s 78B OF THE JUDICIARY ACT

6. The Appellant considers that no notice is required to be given pursuant to s 78B of the *Judiciary Act 1903 (Cth).*

Part IV – AUTHORISED REPORT OF REASONS

7. The citation for the judgment is [2016] VSCA 56, (2016) 308 FLR 1 (Priest and Beach JJA, Maxwell P dissenting).

Part V – FACTUAL BACKGROUND

8. The facts are accurately summarised in the judgment of the Court below (at [1][61] – [76][94] – [111]).

9. On 14 March 2014, the Respondent arrived at Tullamarine Airport, Melbourne on a flight from Manila. On arrival, two suitcases, a laptop bag and a computer bag in the Respondent's possession were examined by customs officials. A total of 2,415.4 grams of pure heroin was located inside the lining of one of the suitcases and inside the lining of a laptop bag within the suitcase.

10. Much of the trial proceeded on the basis of agreed facts and exhibits, with only two witnesses called to give evidence. The Respondent did not give evidence at his trial.

11. It was agreed at trial, amongst other things, that[6] the Respondent was a self-employed builder operating a business called "Afford Property Australia"; he was asked to travel to Manila by a person calling himself Hamza Badijo ("Hamza"), who made the arrangements and paid for the travel; he arrived in Manila on 9 March 2014 and left on 13 March 2014, arriving in Melbourne on 14 March 2014 to travel to Adelaide at the request of Hamza, and to Perth the next day.

12. It was also agreed at trial that he completed an Incoming Passenger Card on arrival in Melbourne on which he wrote, *inter alia*, that all the bags in his possession were his, he had packed the bags himself, he was fully aware of their contents and he was not carrying any items for anyone else except an item of jewellery for his wife. The Respondent told Customs officers that he had travelled to Manila for a "*business trip*" to see "*hotel infrastructure*" and "*...to experience the customer service*" on his business partner's recommendation as they were planning to build a 5 star hotel in Perth. His business partner, who was located in the UAE, had paid for the trip because it was a

[6] Exhibit B

$150 million contract (he was to receive a 20% share). He produced a business document from a folder headed MOU "Partner Agreement Deed" and a business card.

13. In the Respondent's possession on his arrival, amongst other things, were four printed emails from a sender "H E Doctor Anwar Mohammed Gargesh" (Anwar).[7] A later examination of his computer revealed that these were part of a series of emails[8] commencing in late 2013 that were exchanged between the Respondent and Anwar who claimed to be a Minister in the UAE government and who was seeking to engage the Respondent in a building project for a hotel in Perth worth many millions of dollars. The subsequent email exchanges included the Respondent being introduced, via email, to Hamza, who was said to be Anwar's lawyer. Some of these emails are recited in the judgment of Maxwell P (at [62] - [68]). All of the emails were exhibits at trial.[9]

14. During the email exchange the Respondent was requested by Hamza to undertake a trip, originally to India. This was first raised on 15 January 2014, and repeated on 30 January 2014, in the following terms:[10]

> *"Further to my email dated 14th January, 2014, I have been able to discussed with our clientele also, having duly being permitted to grant you the access to the funds deposited in Australia on our behalf of our clientele Mr Anwar Mohammed Qargash.*
>
> *These funds is in the total sum of USD205Million also, is right and solidly kept by a security firm in Australia. Secondly, these funds were defaced before taken it to Australia due to security checks at the airport therefore, will require a thorough cleaning with a separation oil which will be provided to you through their agent in India.*
>
> *Be informed that you will be duly sponsored to go to India to collect this separation oil both your air ticket, Hotel lodge and BTA of USD1,000 will be provided to you by my chambers as soon as you send to us your traveling passport which will enable the flight ticket to you."* (emphasis added)

15. The Respondent immediately expressed scepticism about the legitimacy of the trip, as he replied that same day, as follows:[11]

> *"Thank you for your ph call and e mail, however after viewing an earlier e mail with the same content, we have found it very suspicious indeed.*
>
> *We have never heard of such matter, for once currency are defaced it cannot be repaired for reason of tempering with currency which is against International*

[7] Exhibit C
[8] Exhibit D
[9] Exhibit D
[10] Exhibit D; Trial Transcript ("TT") 97 lines13 – 98 lines 7; 100 lines 3-8
[11] Exhibit D; TT 100 lines 13-20

Law. Furthermore, which city in India am I to visit to pick up this magic oil?" (emphasis added)

16. The Respondent received a response on 31 January 2014 reassuring him that whilst it may seem suspicious, the currency was not defaced or damaged but required the application of separation oil and *"...only the currency experts know how it works"*. A series of exchanges ensued, and despite the fact that he said he was still not convinced, the Respondent agreed to travel to India to collect the oil.[12] On 4 March 2014, the travel destination changed to Manila.[13] The emails reflect he was expressing his scepticism as late as the eve of his departure.[14] Nonetheless he travelled to Manila and collected the suitcase in which the drugs were located.

17. After the drugs were detected upon the Respondent's arrival at Melbourne airport, he was interviewed by the police, during which he stated:

(1) the trip to Manila was *"with a high expectation of half a billion dollar building contract"* for a five star hotel for a client and an investor;[15]

(2) the trip was paid for by the investor whom he had met online after the investor emailed him directly;[16] and the *"...trip to Manila was to pick up a couple of bottles of oil (removable oil) or something to that nature"*.[17] He collected the two bottles of oil and he was to deliver them *to the clients with information in Adelaide"*,[18] he did not know who the investor's contact was in Adelaide[19] and he did not know what the two bottles of oil were for;

(3) he was to build a hotel on behalf of the company and he would get 20% of the profits the hotel[20] - he believed the contract was God's gift to him so he decided to follow it up;[21]

(4) he believed the investor was legitimate and had all the documents relating to the investment; it took him five months of negotiations with the client before he said yes as he was trying to make sure it was legitimate;[22] when he initially received the contract he pushed it aside because he considered it was a scam;[23]

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[12] TT 101 line 5 – 105 line 5
[13] TT 119 lines 4-21
[14] TT 124 lines 18-29
[15] TROI p55 Question & Answer (Q&A) 90
[16] TROI p57 Q&A 114
[17] TROI p55 Q&A 93
[18] TROI p55 Q&A 93
[19] TROI p68 Q&A 251
[20] TROI p56 Q&A 93
[21] TROI p58 Q&A 120
[22] TROI p57 Q&A 114
[23] TROI p72 Q&A 311

but he changed his mind when they paid the fare to Manila and considered it a "*God sent*";[24]

(5) in Manila he met a person called "Jenna" who gave him a suitcase which contained the bottles of oil for him to take Adelaide for the client;[25] she said it contained the bottles of oil and presents from her for the Respondent's wife;[26]

(6) he said to the investor "*I hope those are not friggin' drugs*" and he was advised they were not.[27] He was hoping that there was nothing illegal in the bottles, he had concerns about them and whether they were "*anything illegal*"[28], and when stopped by Customs at Melbourne airport, he "*...thought of the bottles and said, 'Damn, Those Bottles'*";[29]

(7) he said did not open the suitcase, he never handled the bottles and only saw the bottles when Customs opened the bag,[30] notwithstanding he had earlier said he thought he saw two bottles of water in his bag "*...that are need to be presented as evidence, that's what I went there for to get*";[31]

(8) the only thing he was thinking about was the half billion dollar contract to build the five star hotel.[32]

18. The Respondent was obsessed with becoming wealthy. This is borne out by entries in his diary[33] (which had almost daily entries asking God to grant him his wish of becoming a billionaire and bless him with wealth and riches), answers he gave in his interview with the police (particularly that relating to a cheque in his wallet at the time of arrival, made out by him, in his own name, in the amount of $1 million, which he said was so he could visualise his wealth)[34] and photographs he took while in Manila of Philippine pesos and US dollars protruding from his wallet and spread out across his hotel bed.[35]

19. It was the Crown case that he was obsessed with what appeared to him to be the prospects of untold riches, and that he was prepared to persist with the trip to Manila while he still had active suspicions about the legality of what he was doing. Collecting

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[24] TROI p72 Q&A 312
[25] TROI pp67-68, pp93-98; Q&A 227-259; 565-588
[26] TROI p87 Q&A 490-493
[27] TROI p55 Q&A 93
[28] TROI p78 Q&A 379-380
[29] TROI p95 Q&A 608-609
[30] TROI p87 Q&A 496-499; 505
[31] TROI p56 Q&A 93
[32] TROI p90 Q&A 531-532
[33] Exhibit Q
[34] Exhibit E, Q637-Q645
[35] Exhibit O

the oil was a precondition to the contract, and he was prepared to do whatever necessary to ensure this contract went ahead despite the fact that he considered the possibility he had been enlisted to import drugs – indeed, he had active concerns about the legitimacy of what he was doing.

20. The issue at trial was whether the Crown had established that the Respondent intended to import the substance in the suitcase. If the jury were so satisfied there could really be no issue as to him being at least reckless that the substance was a border controlled drug.

21. For proof of intention the Crown relied on the inference to be drawn from all facts and circumstances, including actually importing the substance in a suitcase in his possession and the circumstances surrounding that importation. For example:

(1) email exchanges wherein the Respondent expressed grave scepticism about what he was being asked to do, including on the eve of his departure. For example: "*we have found it very suspicious indeed*"[36]; "*As a matter of fact I am still not convinced of this process, and a little reluctant to act*"[37]; "*all thou I am still not convinced, I will prepare for the trip to India as instructed*"[38]; "*Sure I have some concerns I hope your deal is upfront*";[39] "*I hope all this due process are above board and not any Drug process or any illegal activities, for the Australian authorities are will geared to Detect and STOP any such matters*";[40] "*It would be an honour and a privilege to be working together on your amazing project, and I must admit my doubts, but you have had faith in me as a partner...I trust the good lord's mighty hand is with us throughout the project...*";[41]

(2) the email responses he received to his concerns either did not address those concerns or were plainly inadequate[42] – even the Respondent did not accept them as is evident from the some of the responses referred to above;

(3) the story was inherently implausible; that he was to travel to Manila to collect two bottles of separation oil to be used to clean defaced currency and return them to Australia to be delivered to an unidentified person in Adelaide;

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[36] Exhibit D, TT 100 lines 13-20
[37] Exhibit D, TT 102 lines 10-20
[38] Exhibit D, TT 104 line 27 – p105 line 5
[39] Exhibit D, TT 121 line 22 – p122 line 6
[40] Exhibit D, TT 124 lines 18-29
[41] Exhibit D, TT 146 line 12 – p147 line 3
[42] For example those at [62][64][66])

(4) the Respondent knew that if notes were defaced they ceased to be legal tender, and any response to the contrary was plainly unconvincing;[43]

(5) the oil was not connected with the project – there was no written contract for a multimillion dollar project, and at the time of the trip no building site had been selected;[44]

(6) the diary in the possession of the Respondent revealed that he had only ever been involved in modest construction jobs and was not in a position realistically to undertake any such project of this nature;[45]

(7) the answers given by the Respondent in his interview with the police, for example, that the Respondent was given no assurance about the legality of the contents of the bag (at [74]):

> *Q. "...did they give you any assurances as to the contents of the suitcase that [the woman in Manila] gave you didn't contain anything illegal?*
>
> *A. No, sir, no assurance it was just half a billion dollar deal..."*

(8) the Respondent's answers to questions by Customs Officers before the drugs were located are inconsistent with what he told the police.[46] For example, that the purpose of the trip to Manila was a business trip to see hotel infrastructure and to experience customer service on the recommendation of his business partner which, even on his own story, is plainly false (and is not supported by any of the emails).[47] Similarly, his statement that he had packed his own bags and the only thing he was carrying for anyone else was a gift for his wife - at which time he produced a jewellery box – is inconsistent with the later interview with police where the Respondent stated on a number of occasions that "Jenna" gave him the suitcase which she told him contained the two bottles of oil and some presents;[48]

(9) the Respondent was obsessed with becoming wealthy (at [82]).

22. On 2 July 2015, following a trial, the Respondent was found guilty of importing a commercial quantity of a border controlled drug contrary to s 307.1(1) of the *Code*. On 2 September 2015, the Respondent was sentenced to 3 years and 2 months' imprisonment with a non-parole period of 2 years.

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[43] Exhibit D, TT 100 line 10 - 101 line 28
[44] Exhibit D, TT 124 lines 18-29; TT 158 line 13-25
[45] Exhibit Q
[46] The trial judge directed the jury that lies were relevant to credit: TT 460 - 463
[47] TT 53 line 14; 54 line 4
[48] Q483-4, 490 p.34-35

23. On 29 September 2015, the Respondent filed a Notice of Application for Leave to Appeal against Conviction with the Victorian Court of Appeal.[49] On 30 September 2015 the Director of Public Prosecutions (Cth) lodged an appeal against the sentence imposed on the Respondent. On 23 February 2016, both appeals were heard by Maxwell P and Priest and Beach, JJA.

24. The appeal against conviction involved two grounds: *first*, the correctness of the directions given to the jury as to the element of intention in s 307.1(1); and *second*, that the verdict was unsafe and unsatisfactory. The first ground centred on whether the process of inferential reasoning espoused in *Kural* to prove the fault element of intention was applicable in a prosecution pursuant to s 307.1(1) *Code* (Cth). The direction of the trial judge is set out in the judgment below (at [5] and see [41] – [59] for the context it was given).

25. The elements of the offence contrary to s 307.1 are:

(1) a person imports a substance (physical element - conduct, fault element - intention)

(2) the substance is a border controlled drug (physical element - circumstance, fault element - recklessness); and

(3) the quantity imported is a commercial quantity (physical element - circumstance, fault element – absolute liability).

Section 5.2(1) provides that a person "*has intention with respect to conduct if he or she means to engage in that conduct*".

The judgment below

26. On 4 March 2016, the Court of Appeal by majority allowed the appeal against conviction, the conviction was quashed and a verdict of acquittal was entered.

27. The Court concluded by majority (Priest and Beach, JA) that the directions to the jury were deficient because they were based on the inferential reasoning process espoused by the High Court in *Kural* to prove intention which impermissibly allowed the jury to infer the element of intention to import a substance from an awareness of the likelihood of the presence of the substance alone. The directions to the jury did not make clear that "*...any such awareness could only be part of the circumstances from which a relevant inference of intention might be capable of being drawn, and was in any event no more than a path of reasoning which the jury could follow...*" (at [143]). The majority concluded that the decisions of *Saengsai-Or* and *Cao* do not apply to this case on the

[49] A Revised Notice of Application for Leave to Appeal against Conviction was filed on 16 November 2015

basis that those prosecutions were for offences under the *Customs Act 1901* (Cth) (at [132]) and that the decisions in *Weng and Luong*, while they related to offences under the *Code*, were for offences of attempting to possess a commercial quantity of an unlawfully imported border controlled drug contrary to ss 11.1 and 307.5(1), and attempting to possess a marketable quantity of unlawfully imported border controlled drugs contrary to ss 11.1 and 307.6(1) of the *Code* respectively, which have different and distinct elements to that pursuant to s 307.1(1) of the *Code* (at [135][136]). The majority also concluded that the verdict was unsafe (at [149]).

28. Maxwell, P in dissent found (at [41]) that the decisions in *Saengsai-Or* and *Cao* "*... establish authoritatively that the Kural formulation applies to proof of intention under the Code and to proof of the fault element of the Code importation offence*" (at [11]). His Honour recognised that on accepted principles of interpretation of Commonwealth law, the court should follow that interpretation unless convinced it is plainly wrong (at [11]). Maxwell P, having conducted an analysis of the relevant authorities (at [11] – [37]), concluded that the reasoning in *Kural* was correct and applied equally proof of intention under the *Code* (at [31]). His Honour concluded that when the charge was read in full, in the context of the conduct of the trial, there was no error in the directions to the jury (at [41]). He concluded that the verdict was open on the evidence (at [60] – [87]).

29. Given that the appeal against conviction was upheld it was unnecessary for the Court to consider the appeal against sentence.

Part VI – SUMMARY OF ARGUMENT

Grounds 1 and 2 – the applicability of *Kural* to an offence contrary to s 307(1) of the *Code*.

30. The issue on the appeal was whether the jury had been correctly directed as to the element of intention (to import the substance). The impugned direction to the jury, which is set out in the judgment (at [5]), was based upon this Court's judgment in *Kural* as applied to Chapter 2 of the *Code* in *Saengsai-Or, Cao* and later cases.

31. Maxwell P (in dissent) correctly recognised that a proper reading of those authorities (and others underpinning this direction) "*...establish authoritatively that the Kural formulation applies to proof of intention under the Code and to proof of the fault element of the Code importation offence*" (at [11]). The Court below, based on principles of comity, was required to follow those decisions unless convinced they were plainly wrong. His Honour correctly concluded that they were not (at [14]) and that there was no error in the directions to the jury on the fault element of the offence (at [41]).

32. The majority below (Priest and Beach JA) did not address the issue of comity or whether the authorities underlying the direction given were wrongly decided. Rather, the majority distinguished those authorities on the basis that the offences under consideration in those cases were contrary to the *Customs Act 1901* (Cth) and/or that the elements of the offences were different. The majority below erred in its conclusion. If that is so there was no error in the direction given.

33. *First, Kural* refers to a factual inferential reasoning process which may give rise to the inference of intention. While the majority cite a passage from *Kural* (and *Saengsai-Or*) the judgment does not involve any detailed analysis of those authorities. A proper reading of the judgment in *Kural* does not confine the reasoning to offences under the *Customs Act*. While the reasoning has been applied to offences under the *Customs Act* it also has been applied to offences under the *Code*[50] and under various State legislation.[51] The point of distinction drawn by the majority that *Kural*, *Saengsai-Or* and *Cao* do not apply to this case because it involves an offence against the *Code,* is without foundation.

34. *Second*, the point of distinction that the *Kural* reasoning does not apply because the elements of the offence in s 307.1 are different to those of the offences under the *Customs Act*, is also without foundation. *Weng* and *Luong* involved offences under the *Code* which have the same element structure as s 307.1. Moreover, the distinction ignores that inferential reasoning in *Kural* relates to "intention" under Chapter 2 of the *Code*. It is to that fault element of intention the factual reasoning relates; it is of no moment that the elements of the offence may be different.

35. *Third,* the approach of the majority is inconsistent with authority. *Saengsai-Or* and *Cao* specifically addressed the application of the reasoning process to Chapter 2 of the *Code*. Those authorities are correctly decided.

Proof of Intention

36. The *meaning* of intention and how it may be *proved* are two different concepts. The element of intention in the *Code* (and its definition) is a matter of law. Proof of that element is a matter of fact which clearly permits of inferential factual reasoning as reflected in the decisions of this Court including *He Kaw Teh,*[52] *Kural*[53] and *Saad.*[54]

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[50] For example: *Weng* (supra), *Luong* (supra), *Maltimore Smith v R* [2016] NSWCCA 93

[51] For example: see *DPP Reference No 1 of 2004* (2005) 12 VR 299 at [41] and the cases cited therein from Victoria and NSW; *Bui v R* [2005] VSCA 300; and see *Sgarlata v State of Western Australia* (2015) 49 WAR 176 (and the cases cited therein); and see *Tabe v The Queen* (2005) 225 CLR 418

[52] (1985) 157 CLR 523 ("*He Kaw Teh*")

[53] *Kural* (supra) at 504-505 per Mason CJ, Deane and Dawson JJ

[54] (1987) 61 ALJR 243 at 244 ("*Saad*")

37. In *He Kaw Teh* the Court concluded that the offence of importing a prohibited import contrary to s. 233B(1)(b) of the *Customs Act 1901* (Cth) was not an offence of strict liability and to establish the offence the prosecution was required to prove that the accused acted with *mens rea*, relevantly, intention.

38. Subsequently, the majority of this Court in *Kural*[55] considered the issue of how one proves the existence of an intention. As the Court recognised, more often intention is "*a matter of inference from what the accused has actually done. The intention may be inferred from the doing of the proscribed act and the circumstances in which it was done.*" The Court held:

> "*Where, as here, it is necessary to show an intention on the part of the accused to import a narcotic drug, that intent is established if the accused knew or was aware that an article which he intentionally brought into Australia comprised or contained narcotic drugs. But that is not to say that actual knowledge or awareness is an essential element in the guilty mind required for the commission of the offence. It is only to say that knowledge or awareness is relevant to the existence of the necessary intent. Belief, falling short of actual knowledge, that the article comprised or contained narcotic drugs would obviously sustain an inference of intention. So also would proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved that act and nevertheless persisted in that conduct. As a practical matter, the inference of mens rea or a guilty mind will ordinarily be irresistible in cases involving the importation of narcotic drugs if it is proved beyond reasonable doubt that the accused actually imported the drugs and that he was aware, at the time of the alleged commission of the offence, of the likelihood of the existence of the substance in question in what he was importing and of the likelihood that it was a narcotic drug.*" (emphasis added)

39. Those comments were made to give guidance to trial judges in formulating appropriate directions in light of the facts and circumstances of a given case, to provide assistance to a jury on proof of intention.[56]

40. In *Kural* the majority concluded that the direction given in that case, that the Crown had "*to prove that the [applicant] knew there was something in the samovar*", was unduly favourable to him, as the requisite intent may rest upon something less than actual knowledge, such as awareness of the likelihood of its presence.[57]

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[55] *Kural* (supra) at 504-505 per Mason CJ, Deane and Dawson JJ
[56] *Saad* (supra) at 244
[57] *Kural* (supra) at 507

41. This approach was affirmed by this Court in *Saad* and *Pereira v DPP (Cth),*[58] although the Court emphasised that the existence of intention is a question of fact and will, in most cases, be proved by an inference drawn from evidence. As it did in *Kural,* the Court warned against the temptation of transforming a factual matter into a legal proposition.[59]

42. There is nothing in *Kural,* or any decision of this Court thereafter, which confines the comments made therein to offences under the *Customs Act.* Indeed, so much is reflected by the fact that *Kural* was referred to with apparent approval in *Tabe v The Queen,*[60] which involved a prosecution for an offence under the *Drugs Misuse Act* 1986 (Qld).

43. In *R v Saengsai-Or* the NSW Court of Criminal Appeal squarely addressed the issue of proof of intention under Chapter 2 of the *Code.* While the offence under consideration was that of importing a prohibited import contrary to s 233B of the *Customs Act,* the elements of that offence were determined by the application of Chapter 2 of the *Code* to that offence provision. The Court concluded that the offence involved only one physical and one fault element; that the offender imported a prohibited import (the physical element of conduct) and that he did so intentionally (the fault element of intention). The Court concluded that a re-direction given to the jury as to the fault element which involved the concept of recklessness was therefore a misdirection.

44. However, Bell J (with whom Wood CJ at CL and Simpson J agreed) concluded that the direction on intention as first framed which was given to the jury (which involved the *Kural* reasoning) was <u>not</u> an error. The Court concluded that:[61]

> *"It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of an admission) the Crown may establish intention by inferential reasoning in the same way as intention may be proved at common law. Intention to import narcotic goods into Australia may be the inference to be drawn from circumstances that include the person's awareness of the likelihood that the thing imported contained narcotic goods."*

45. The Court also rejected the argument that as Chapter 2 of the *Code* includes recklessness as a fault element for some Commonwealth offences, the reasoning in *Kural* cannot apply to intention as defined under the *Code.* The Court concluded that:[62]

> *"The distinction between proof that an accused person intended to import narcotic goods and proof that he or she was reckless as to the circumstance that*

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[58] (1988) 63 ALJR 1 ("*Pereira*")
[59] *Pereira* (supra) at 3; *Saad* (supra) at 244
[60] *Tabe v The Queen* (2005) 225 CLR 418 at [10] - [12] per Gleeson CJ, [57] per McHugh J, [101] per Hayne J
[61] *Saengsai-Or* (supra) at [74]
[62] *Saengsai-Or* (supra) at [69]

> *the thing imported contained narcotic goods is to my mind a real one. The joint judgment in Kural contains discussion of how the Crown might prove the existence of the intention to import the prohibited imports by a process of inferential reasoning. The inquiry remains one of proof of intention. Their Honours emphasised that their comments were not designed as a direction to be given to juries but rather as guidance for trial judges in formulating directions appropriate to a given case to assist the jury in determining this factual question."* (emphasis added)

46. It is clear from *Saengsai-Or* that the Court's conclusion as to the application of *Kural* related to proof of the fault element of intention under the *Code*; there is nothing in the judgment which supports conclusion that the decision is confined to offences under the *Customs Act*.

47. That decision has been followed in relation to proving intention under Chapter 2 of the *Code* including[63] in *Cao*,[64] *Luong v DPP (Cth)*[65] and *Weng v The Queen*[66] and *Maltimore Smith v R*,[67] the latter three authorities involving offences under the *Code*. Regardless of the offence provision in each of those cases the fault element of intention, as in *Saengsai-Or*, was intention under Chapter 2 of the *Code*.

48. In *Cao*, a case involving an offence of attempting to possess prohibited imports contrary to s 233B(1)(c) of the *Customs Act 1901* (Cth), Howie J (with whom Spigelman CJ and Barr J agreed) considered the application of the *Kural* process of reasoning to offences pursuant to the *Code* and concluded:[68]

> *"In my opinion, the decisions of the High Court to which I have referred [Kural, Saad and Pereira] are still applicable, notwithstanding that this was a prosecution to which the Code applied. They simply set out a process of reasoning that the jury might follow in order to find the mental, or fault, element of the offence proved. That process of reasoning seems to me to be as applicable to proof of intention under the Code as to proof of intention under the Common Law. I have already pointed out that this Court in R v Saengsai-Or accepted that this line of authority was applicable to an offence of importation to which the Code applied. There is no reason in logic or law, that I can see why it should not also apply to a case of possession or attempted possession of imported goods.*

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[63] And see for example: *R v Zhang* (2005) 158 A Crim R 504; *R v Kaldor* (2004) 150 A Crim R 277 at [54]; the reasoning in *Kural* has also been applied to proof of intention in relation to State offences: see footnote 51 above
[64] (2006) 65 NSWLR 552 at [27] – [54], in particular at [33][53][54]
[65] (2013) 236 A Crim R 85 at [61] – [75]
[66] (2013) 236 A Crim R 299 at [59] – [63]
[67] [2016] NSWCCA 93 Special leave to appeal was granted the same day as in this matter.
[68] *Cao* (supra) at [62] An application for special leave to the High Court was refused: *Cao v The Queen* [2015] HCATrans 529

> *The fact that the Code defines recklessness in terms of a circumstance as "an awareness of a substantial risk that the circumstance will exist" is not to the point. As was acknowledged in R v Saengsai-Or, proof of intention is more difficult for the prosecution than proof of recklessness. In a case where there is some other inference open from a finding of a belief in the likelihood of drugs being present other than that the accused intended to possess the drugs, the Crown will have to negative that inference beyond reasonable doubt before the jury can convict the accused. The fact that in the usual case there will be no other inference available, does not mean that the process of reasoning should not apply under the Code simply because it may have some superficial similarity to how the Code defines recklessness"* (emphasis added).

49. That conclusion came after an analysis of the reasoning in *Kural* (and later judgments of this Court), *Saengsai-Or,* and a number of intermediate appellate court authorities which related to offences under Commonwealth and State legislation.[69]

50. As is obvious from the passage cited above, the Court in *Cao* also concluded that the fact that recklessness is a fault element under the *Code* does not somehow alter the correctness of the direction given in this case, or the applicability of the inferential reasoning process referred to in *Kural.* It follows that in so far as the Respondent's argument below (at [12], [33]) relied on that proposition, it was expressly addressed and rejected in *Saengsai-Or* and *Cao*. As the Court recognised in *Saengsai-Or*, there is a *"real"* distinction between proving recklessness under the *Code* and the reasoning process in *Kural* to prove intention, as the latter involved a process of *"inferential reasoning"* whereas recklessness required *"moral or value judgment".*[70]

No distinction based on the elements of the offence

51. In the Court below Priest and Beach JJ rejected the application of *Saengsai-Or* and *Cao* to this case on the basis they concerned proof of intention for an offence under the *Customs Act 1901* (Cth) and not for an offence under the *Code,* which requires proof of different elements (at [132]). There is nothing in *Saengsai-Or* or *Cao* (or the underlying authorities of this Court in *Kural*, *Saad* and *Pereira)* which supports that conclusion. To the contrary, as noted above, those decisions make clear that it is the element of intention that is being considered. The NSW Court of Criminal Appeal in the recent decision of *Maltimore Smith,*[71] decided after this case, did not agree with the majority that there was any relevant distinction, nor that reasoning was confined to *Customs Act* offences.[72]

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[69] *Cao* (supra) at [28] – [38]
[70] *Saengsai-Or* (supra) at [74]
[71] *Maltimore Smith* (supra) at [70]
[72] *Maltimore Smith* (supra) at [67]

52. Moreover, there is no basis in logic for the conclusion. On the reasoning of the majority while an inference could be drawn that the offender intended to import narcotic goods (one element) an inference could not be drawn that the offender intended to import a substance (one element). That is, the reasoning could enable an inference of the greater or more specific intention (the importation of a drug) but not the lesser (the importation of a substance).[73]

53. In relation to *Weng* and *Luong*, the offences under consideration were charged under the *Code*.

54. While the Court in *Weng* dealt primarily with the issue of whether an accused was required to know the identity of the prohibited substance that they were attempting to possess contrary to ss 11(1) and 307.6(1) of the *Code,* Osborne JA (with whom Buchanan and Neave JA agreed) considered the *Kural* process of reasoning and held that, notwithstanding the fact that *Kural* was a case which was concerned with proving that the accused had acted with mens rea or a guilty mind and not with proof of specific intention as a distinct element of the offence, the process of reasoning referred to may be open in a case such as the present.[74] In so doing the Court referred to *Cao* which judgment demonstrates that this is a process of reasoning equally applicable to proof of intention under the *Code*.[75]

55. Similarly, in *Luong*[76] a case involving an appeal against conviction for attempt to possess a commercial quantity of a border-controlled drug contrary to ss 11.1(6A) and 307.5(1) of the *Code*, Coghlan JA (Redlich JA and Williams AJA agreeing) considered this Court's decisions in *Kural*, *Saad* and *R v Tang*[77] and rejected a contention that the direction *"[i]f you are satisfied beyond a reasonable doubt that the accused was aware of the likelihood in the sense that there was a real chance that his conduct involved the possession of narcotics and he nevertheless persisted in that conduct, that would be sufficient to infer an intention to possess..."* was erroneous.

56. The majority in the Court below distinguished both *Weng* and *Luong* on the basis that as the offences were charged under the *Code* the elements of the offences were different from those in *Kural,* which was essentially the same basis upon which it distinguished *Saengsai-Or* and *Cao*. For the reasons set out above, that reasoning is erroneous.

57. However, there is an additional problem with the Court's reasoning because, in effect, the offences in *Weng* and *Luong* (which were distinguished by the majority) have the

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[73] And see *Luong* (supra) at [75]
[74] *Weng* (supra) at [63]
[75] *Weng* (supra) at [63]
[76] *Luong* (supra) at [60] (for the direction), [61] – [73] re the discussion with the conclusion at [74], [75]
[77] (2008) 237 CLR 1 (*"Tang"*)

same element structure as the offence in this case. That is, the majority held that those cases were distinguishable from *Kural* because that reasoning cannot apply to an element of intention to import a *substance* (as opposed to a *drug*). However, in *Weng* and *Luong* the Courts held that the reasoning *could* apply to an element of an intention to possess *a substance*. It follows that the point of distinction relied on by the majority does not exist. The majority has not applied the principles of comity, nor has it held that the reasoning in *Weng* and *Luong* is wrong. The reasoning of the majority provided no basis to properly distinguish those cases. Rather, the decision of the majority is directly inconsistent with them.

10 58. It is uncontroversial that where intention is the fault element of an offence the knowledge or belief of the offender may factually be relevant in proving that element.[78] That knowledge or belief may give rise to an inference of intention.

59. As Gleeson CJ observed in *Tabe* (citing *Saad*):[79]

> *"...knowledge, is not limited to knowledge gained from personal observation, or certainty based upon belief in information obtained from a third party, although those states of mind would suffice. The word 'awareness' is sometimes used as a synonym. A belief in the likelihood, 'in the sense that there was a significant or real chance', of the fact to be known, will suffice."*

60. In some circumstances, as recognised in *Kural* that inference of intention is irresistible.
20 *Kural* (and later cases) are no more than a reflection of that inferential reasoning process.[80] It would be illogical if that reasoning was confined only to proof of the element of intention to import a narcotic drug. But that is the effect of the decision of the majority in this case.

61. By relying on the reasoning in *Kural,* the Crown did not seek to rewrite the law (contrary to the view expressed by the majority at [138]). Rather the reasoning expounded in *Kural* as applied by intermediate appellate courts to Chapter 2 in *Saengsai-Or* and later cases, is equally applicable here.

62. The decisions in *Saengsai-Or* and *Cao* are both considered decisions of intermediate appellate courts which directly addressed the issue that was before the court in this case.
30 The principles therein are well established. They are correct. There was no proper basis for the majority in this case not to apply those (and later) decisions.

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[78] *The Queen v Tang* (supra) at [47] – [51] per Gleeson CJ (Gummow, Hayne, Heydon, Crennan and Kiefel JJ agreeing); *Tabe v The Queen* (supra) at [10]; *The Queen v LK* (2010) 241 CLR 177 at [117]; *Ansari v The Queen* (2010) 241 CLR 299 at [59]

[79] *Tabe v The Queen* (supra) at [10]

[80] *Tabe v The Queen* (supra) at [10] – [12][57][102]

The direction given

63. Maxwell P correctly concluded (at [41] – [59]) there was no error in the direction given. While the direction was subject of some discussion in the trial, its terms were not the subject of any complaint (at [41] – [59]). No objection was taken to the direction (at [57]).

64. In *Kural* the Court was providing guidance as to an available inferential reasoning process in relation to proof of intention. It is for the jury to decide whether, on the evidence, an inference of intention should be drawn. The direction remains throughout that the jury must be satisfied as to the intention of the accused.

10 65. It is apparent from a reading of the summing up as a whole, together with the responses to the jury questions, that this was made clear to the jury by the trial Judge. This is also in the context where the conduct of the case and addresses of counsel focussed on this issue (for example, at [55] - [57]); that intention could only be established by the drawing of inferences was clearly in the forefront of minds of all involved (at [41]).

66. For example, the trial judge made it clear from the outset that intention is a fact that is determined by drawing inferences from established facts;[81] a direction was given as to circumstantial evidence and the drawing of inferences;[82] that in this case intention is a state of mind and to determine the accused's state of mind the prosecution invites you to draw an inference as to his state of mind from certain facts;[83] that the relevant second
20 element is required to establish that the accused intended to import the package whatever it contained.[84] The direction was clear; it included that the prosecution did not need to prove actual knowledge to prove intention.[85] It emphasised that suspicion was not enough to establish intention.[86] The direction that the prosecution must prove intention, was given on more than one occasion.[87]

67. This was again emphasised in answer to a jury question where his Honour directed that it is "*important to understand that what's required is an intention to import [a substance] by way of knowledge or other inferential reasoning, that the suitcase*

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[81] T 464
[82] T 463 - 468
[83] T 470
[84] T 470 - 472
[85] T 471
[86] T 471 - 472
[87] For example, T 471 – 472, 474

contained the substance."[88] As Maxwell P acknowledges, his Honour referred to inferential reasoning on two further occasions in this answer to the jury questions.[89]

68. In any event, in circumstances where the Respondent had possession of the suitcase containing the drugs, once the jury were satisfied he knew or believed that there were, or there was a likelihood that there were drugs in that case, the inference of intention was irresistible.[90]

Ground 3 – unsafe verdict

69. The test for determining this ground of appeal is well established,[91] with the applicable principles being recently re-iterated by this Court in *The Queen v Baden-Clay*.[92] Applying those principles, an independent examination of the evidence in this case establishes that it was *open* to the jury to be satisfied of the guilt of the Applicant beyond reasonable doubt. There was no proper basis for the majority to find otherwise. There was no basis to conclude that the jury must, as opposed to might, have found a reasonable doubt.[93]

70. In allowing this ground of appeal the majority simply recited the Respondent's argument (at [146], [147]) and concluded (at [148]) that there was force in those submissions. It is accepted that the majority stated that they reviewed the evidence, however the reasons do not include any summary or analysis of the argument by the Appellant.[94] Moreover, the majority approached the assessment on the basis that the inferential reasoning in *Kural* cannot apply to this case.

71. The majority accepted the Respondent's submission that by the time he travelled from Manila to Melbourne with the additional bag, any doubts as to the nature and legitimacy of the project had been dispelled (at [147]). That conclusion is not open on the evidence.

72. The issue at trial was whether the Crown had established that the Respondent intended to import the substance in the suitcase. If the jury were so satisfied there could really be no issue as to him being at least reckless that the substance was a border controlled drug.

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[88] T 505
[89] T 505, 506
[90] *Kural* (supra) at 504 - 505; *Cao* (supra) at [60]
[91] *M v The Queen* (1994) 181 CLR 487 at 492-493, 494-495 (citing *Chidiac v The Queen* (1991) 171 CLR 432 at 443-444, 451, 461-462); *The Queen v Hillier* (2007) 228 CLR 618 at 630 [20]
[92] [2016] HCA 35, (2016) 90 ALJR 1013 at [65] - [66]
[93] *Libke v The Queen* (2007) 230 CLR 559 at [113]
[94] cf: *Miller, Smith and Presley v DPP* (SA) [2016] HCA 30 at [79] While this was an appeal by an offender against a finding that the verdict was not unsafe, the comments as to the approach must be equally applicable to the Crown arguments.

73. Even if the Respondent had been, to some degree, the victim of a scam, that is not inconsistent with his guilt of this offence. He was nevertheless capable of possessing the requisite states of mind to be found guilty of the offence.

74. As Maxwell P concluded, having set out an analysis of the evidence, that:

(1) a distinction is to be drawn between the Respondent's belief regarding the hotel project ("the project") and his belief with respect to importation of the suitcase containing the so-called "separation oil" (at [61]);

(2) the emails and the Respondent's answers in the interview show that the Respondent had doubts both of the legitimacy of the project and the side trip to the Philippines to collect separation oil (at [77]);

(3) that it was a matter for the jury to assess whether they accepted the truth of his claim in the interview that the payment of the return trip to Manila, and that alone, convinced him of the legitimacy of the project (at [77];

(4) *even if that was accepted*, there is nothing in the evidence to suggest his fears about the legitimacy of the trip to collect the oil were ever allayed (at [78]);

(5) he was expressing those doubts on the eve of the trip (at [78]);

(6) the story he had been given about the oil was "*wildly implausible*" (at [79]);

(7) the jury were entitled to view his grave suspicions which are recorded in emails, as significantly undermining his defence that he was gullible, in particular in relation to the side trip to Manila (at [81]);

(8) there was no plausible connection between the project and the side trip, nor the urgency for it (at [83]);

(9) the Respondent, in his interview, was not able to provide an adequate response to the questions concerning how he saw a connection with the project or what the oil was for (at [84]);

(10) the side trip was a pre-condition for winning what he saw as a lucrative contract and the Respondent was desperate for the contract and was prepared to do anything for that contract (at [84]).

75. Maxwell P correctly concluded that (at [85]):

> *"[t]he prosecution case was that SA was a man obsessed with what appeared to him to be the prospects of untold riches, and that he was prepared to persist with the trip to Manila while he still had active suspicions about the legality of what he was doing...it was open to the jury to view the documentation as providing strong support for that case."*

76. He correctly concluded that there is ample evidence from which the jury were entitled to draw the inference of intention (at [86]).

Part VII – APPLICABLE PROVISIONS

77. The relevant provisions which are ss 5.1 – 5.4and s 307.1 of the *Code* are annexed to these submissions.

Part VIII – ORDERS SOUGHT

78. The Appellant seeks the following orders:

(1) The appeal be allowed.

(2) The orders of the Court of Appeal of Victoria upholding the Respondent's appeal against conviction be set aside, and in lieu thereof it be ordered that the appeal against conviction be dismissed.

(3) The matter be remitted to the Court of Appeal of Victoria for determination of the Director's Appeal against sentence.

Part IX – TIME ESTIMATE

79. It is estimated that the oral argument would take approximately 1.5 hours.

Wendy Abraham QC
Counsel for the Appellant

Krista Breckweg

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No.M144 of 2016

BETWEEN:

THE QUEEN
Appellant

and

Steven Lakamu Siosiua AFFORD
Respondent

APPELLANT'S SUBMISSIONS ANNEXURE A:

LEGISLATIVE PROVISIONS:

No.	Description of Document	Date	Page No.
1.	Sections 5.1 – 5.4 *Criminal Code* (Cth)	18/11/2016	1-2
2.	Section 307.1 *Criminal Code* (Cth)	18/11/2016	3.
3.	Sections 307.5 – 307.6 *Criminal Code* (Cth)	18/11/2016	4-5.

Date of Document: 18 November 2016
Filed on behalf of the Appellant by the Director of Public Prosecutions (Cth)
Telephone: 03 96054471
Fax: 03 96704295
Ref: Ben Kerlin

Division 5—Fault elements

5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:
  (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
  (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:
  (a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Division 307—Import-export offences

Subdivision A—Importing and exporting border controlled drugs or border controlled plants

307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

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

(c) the quantity imported or exported is a commercial quantity.

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

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

307.2 Importing and exporting marketable quantities of border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

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

(c) the quantity imported or exported is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

(4) Subsection (1) does not apply if the person proves that he or she neither intended, nor believed that another person intended, to sell

Subdivision B—Possessing unlawfully imported border controlled drugs or border controlled plants

307.5 Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

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

(d) the quantity possessed is a commercial quantity.

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

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

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

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

307.6 Possessing marketable quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

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

(d) the quantity possessed is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

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

5.

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

(4) Subsection (1) does not apply if the person proves that he or she neither intended, nor believed that another person intended, to sell any of the border controlled drug or any of the border controlled plant or its products.

(5) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matters in subsections (4) and (5) (see section 13.4).

307.7 Possessing unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance was unlawfully imported; and

(c) the substance is a border controlled drug or border controlled plant, other than a determined border controlled drug or a determined border controlled plant.

Penalty: Imprisonment for 2 years or 400 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

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

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).