THE QUEEN v. AFFORD (M144/2016)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 56

Date of judgment: 4 March 2016

Date special leave granted: 14 October 2016

In 2014, the respondent received unsolicited email from a person describing himself as Dr Anwar Mohammed Qargash ('Anwar') who claimed he was a Minister in the United Arab Emirates government. The ostensible purpose for the email was to engage the respondent to build a luxury hotel on their behalf in Australia. His reward in the building contract was to be a monthly retainer of $38,000 and twenty per cent of the dividends of the hotel. Over the next few months, emails were exchanged which alluded to large amounts of funds being held in Australia by a security company, and a Memorandum of Understanding was produced, purporting to be a partnership agreement between Anwar and the respondent. In mid-January 2014, the respondent received an email informing him that cash funds held in Australia for the project had been defaced. He was told that the money required cleaning by the security company using what was described as 'separation oil'. The respondent was asked to travel to Manila to retrieve the separation oil, and to provide it to staff of the security firm in Adelaide. On 8 March 2014, he departed Australia for Manila where he met a woman named 'Jenna', who gave him a suitcase, telling him that it contained bottles of oil 'and some presents'. The respondent returned to Australia on 14 March 2014. At Tullamarine airport his baggage was examined by Customs officers and found to contain 2,415.4 grams of pure heroin. Following a trial in the County Court, on 2 July 2015 a jury found him guilty of importing a commercial quantity of a border controlled drug. He was sentenced to three years and two months imprisonment, with a non-parole period of two years.

On appeal to the Court of Appeal (Beach and Priest JJA, Maxwell P dissenting) the respondent argued that a substantial miscarriage of justice occurred as a result of the trial judge's failure to properly direct the jury on the intentional fault element of the offence created by s 307.1 of the *Criminal Code* (Cth) (the Code). It was submitted that the judge's directions to the jury improperly left open the real risk that one or more jurors founded an inference that the respondent had intended to import the substance, upon no more than an awareness on his part of a significant or real chance that his conduct involved the importation of that substance. That awareness, it was submitted, could not be reconciled with the definition of intention set out in s 5.2(1). Hence, the directions resulted in a substantial miscarriage of justice.

The Crown submitted that the judge's charge was unimpeachable and that what his Honour said was supported by what this Court had said in *Kural v The Queen* (1987) 162 CLR 502.

The majority of the Court considered that the *Kural* reasoning, which has application in cases where the prosecution is required to prove an intention to import a narcotic drug, was not easily translatable into cases where the prosecution is only required to prove an intention to import a substance. Adopting the language of *Kural* and the authorities that have followed it, it may be that an intention to import a substance into

Australia may be an inference to be drawn from circumstances that include a person's awareness of the likelihood that the substance would be imported. Their Honours could not see how (without more) it could be said, in all cases, involving any conceivable type of substance, a jury could infer to the requisite standard an intention to import a substance from an awareness of the likelihood of the presence of the substance alone.

They considered that the charge suffered from two deficiencies. First, it may have left the jury with the impression that the establishment of an awareness of likelihood that the substance was being imported, was the equivalent of establishing the intention required under the Code. Secondly, the judge 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 or not follow as it saw fit.

Having reviewed all of the evidence, the majority of the Court was unable to see how the jury could not have had a reasonable doubt about the respondent's intention to import the substance. The conviction was set aside and an acquittal was directed.

Maxwell P (dissenting) found that the authorities established authoritatively that the *Kural* formulation applies to proof of intention under the Code and hence to proof of the fault element of the Code importation offence.

The proposed grounds of appeal include:

- The majority of the Court of Appeal erred by concluding that the factual reasoning referred to in *Kural v The Queen* (1987) 162 CLR 502 in relation to proving intention, does not apply to the offence contrary to s 307.1 of the *Criminal Code* (Cth).