

26/13; [2013] WASC 9

SUPREME COURT OF WESTERN AUSTRALIA

WRIGHT v CHIEF EXECUTIVE OFFICER of CUSTOMS

EM Heenan J

31 October 2012; 16 January 2013

CUSTOMS PROSECUTION – IMPORTATION OF PROHIBITED IMPORT – ELECTRIC SHOCK DEVICE – MAKING A FALSE OR MISLEADING STATEMENT – WHETHER PARTS OF A PROHIBITED IMPORT WERE THEMSELVES PROHIBITED – CHARGES FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: CUSTOMS ACT 1901 (CTH), SS233(1)(b), 234(1)(d); CUSTOMS (PROHIBITED IMPORTS) REGULATIONS 1956 (CTH), SCH 2 ITEM 1.

W. imported into Australia four electric shock devices. W. was later charged with an offence of importing the prohibited devices and with intentionally making a statement to a Customs officer which was false or misleading in a material particular. The evidence disclosed that the shock devices did not work but that another person travelling with W. had certain capacitor coils in his luggage which when fitted to the shock devices made the devices capable of administering an electric shock. The Magistrate found the charges proved. Upon appeal—

HELD: Appeal dismissed.

1. The sole question which the Magistrate was called upon to consider was whether the attempted importation of electric shock devices with certain missing components which rendered them temporarily inoperable constituted an offence against s233(1)(b) of the *Customs Act* as alleged.

2. W. had submitted that the items were not within the schedule because they were incomplete or only parts or were not immediately capable of administering an electric shock, arguments which were all variations of the essential substantial submission that they were not prohibited imports. Accordingly, a finding that notwithstanding that the items found in the appellant's luggage were incomplete or not immediately functional they nevertheless were prohibited imports was a finding on the essential question of whether, notwithstanding the absence of some components, the items imported were prohibited imports. Accordingly, this proposed particular could not be made out even if taken at its broadest ambit.

3. The evidence relating to W. and his travelling companion, both when departing Australia and returning, and the discovery of the pins and capacitor coils in the companion's luggage on arrival at Perth Airport was directly relevant, and so admissible, with regard to the second charge against the appellant.

4. It was clear from the Magistrate's reasons for decision, although not expressly stated, that her Honour inferred that when the items were purchased at Pattaya they were entire and that they had been partially dismantled and the missing pins and capacitor coils carried in the companion's luggage deliberately. In those circumstances, the Magistrate had plainly concluded that there was, at the very least, a significant risk that the items in the condition in which they were found in W.'s luggage at Perth Airport were, as they were found to be, prohibited imports and that any statement made by him on the Incoming Passenger Card to the contrary was made reckless of the substantial risks that the items were, as they turned out to be, prohibited imports.

EM HEENAN J:

1. This is an application for leave to appeal against two convictions of the appellant, Sean Jamieson Wright, for offences under the *Customs Act* 1901 (Cth) in the Magistrates' Court at Perth. Mr Wright was tried on these two charges on 17 August and 31 October 2011 before her Honour Magistrate BA Lane who reserved her decision. On 31 January 2012 her Honour delivered written reasons for her decision to convict the appellant of both charges and thereupon imposed a fine of \$8,000 on the first charge, and a fine of \$5,000 on the second charge. In addition, her Honour ordered the appellant to pay costs fixed at \$20,000.

2. The two offences are:

1. that on 2 November 2009 at Perth International Airport Sean Jamieson Wright imported prohibited imports, namely four (4) electric shock devices in contravention of reg 4(1) of the *Customs (Prohibited*

Imports) Regulations 1956 (Cth) and Item 12 of sch 2 to those regulations contrary to s233(1)(b) of the Customs Act; and

2. that on 2 November 2009 Sean Jamieson Wright at Perth International Airport intentionally made a statement to a Customs Officer, reckless as to the fact that the statement was false or misleading in a material particular, contrary to s234(1)(d)(i) of the *Customs Act*.

3. The prosecution notice for each charge also included an attachment setting out particulars in support of that charge. In relation to the first charge these particulars were as follows:

And the Prosecutor avers:

1. The said Melissa Marie Rouse [the person named as issuing the notice] is a Customs Officer and an authorised delegate of the CEO of Customs to make this prosecution notice.
2. On 2 November 2009 the accused arrived at Perth International Airport on Thai Airways flight TG 481 from Thailand.
3. An examination of the accused's baggage revealed, amongst other things, four (4) electric shock devices.
4. Regulation 4(1) of the *Customs (Prohibited Imports) Regulations 1956* (the Regulations) provides that subject to sub-regulations (1AAA), (1AAB) and (1AAC), the importation into Australia of the goods specified in Schedule 2 to the Regulations is prohibited unless the permission in writing of the Minister or an authorised person to import the goods has been granted.
5. Electric shock devices are listed in Item 12 of Schedule 2 to the Regulations.
6. The accused did not have the requisite permission pursuant to Regulation 4(1) of the Regulations to import the electric shock devices.

4. The particulars annexed to the prosecution notice for the second charge were as follows:
And the Prosecutor avers:

1. The said Melissa Marie Rouse [the person named as issuing the notice] is a Customs Officer and an authorised delegate of the CEO of Customs to issue this prosecution notice.
2. On 2 November 2009 the accused arrived at Perth International Airport on Thai Airways flight TG 481 from Thailand.
3. The accused presented his completed Incoming Passenger Card (the IPC) to a Customs Officer.
4. The accused had completed the IPC by answering 'No' to the question:
'Are you bringing into Australia:
1. Goods that may be prohibited or subject to restrictions, such as medicines, steroids, firearms, weapons of any kind or illicit drugs?'
5. Prior to the accused's baggage being examined, the accused presented his completed IPC to a Customs Officer.
6. The Customs Officer asked the accused questions about the IPC and the accused responded with words to the effect of the following:
 - (a) it was his signature on the IPC;
 - (b) he had read and understood all the questions on the IPC
 - (c) he had packed his baggage and was aware of its contents; and
 - (d) he was the owner of the bags and their contents.
7. The Customs Officer examined the accused's baggage and found, amongst other things, four (4) electric shock devices.
8. The items referred to in paragraph (vii) were not declared by the accused on his completed IPC.

Magistrate's reasons for decision

5. In her Honour's reasons for decision, the learned Magistrate set out the details of the charges and the material provisions of the *Customs Act* applicable. Her Honour began by describing how the appellant and another person, a Mr Fullarton, travelled to and from Thailand together and how upon their return to Perth the luggage of each was examined by Customs at Perth Airport. Customs Officers found in the appellant's luggage four handheld electric shock devices but without pins or capacitor coils. The wire inside those four devices was present but had been cut. Numbers were etched on each device. Inside Mr Fullarton's luggage, were four capacitor coils and pins. There were also numbers etched on those devices. The capacitor coils and pins found in Mr Fullarton's luggage fitted the devices located in Mr Wright's luggage. Also, the wiring inside the devices in Mr Wright's luggage matched the wiring in colour and cut to the items located in Mr Fullarton's luggage. The appellant conceded before the Magistrates' Court that he had imported the four handheld electric shock devices without pins or capacitor coils, but contended that as they were not immediately capable of then administering an electric shock they were not prohibited items.

6. Her Honour then reviewed the evidence which had been adduced at the trial, very little of which was significantly contested, except as to its ultimate legal effect, before making the essential findings which led to her Honour's decision to convict the appellant. Among these were the following:

[24] The four devices found within Mr Wright's luggage were seized and the seizure notice states that there were 4 x electric shock devices (Taser), two of the devices had the inscription on the casing which states:

'1,800 K volt, WS-800 type, Direct current and ultra high voltage'.

[25] The size, shape and construction of the devices indicate that they are hand held electric shock devices....

[31] In the form they were found in Mr Wright's luggage, the devices were unable to immediately administer an electric shock. This is because the devices were not complete. The four devices had components missing. Those missing components were found in the luggage of Mr Fullarton who was travelling with Mr Wright.

[32] This evidence is entirely relevant. Mr Wright and Mr Fullarton were travelling together both on departure and re-entry into Australia. Located in Mr Wright's luggage were four hand held electric shock devices which had the four capacitor coils and wire in them removed. There were holes where the pins had been. There were also cut wires inside the devices with voids into which the capacitor coils and wire fitted. In Mr Fullarton's luggage, Customs Officers located four capacitor coils and pins.

[33] Mr Hill [one of the Customs Officers] used the actual capacitor coils and pins located in Mr Fullarton's luggage and placed these into one of the devices seized from Mr Wright's luggage. The cut wiring was reconnected, the pins and capacitor inserted into the device and the device operated as demonstrated in the courtroom. This operated as a hand held electric shock device and also a torch.

7. The learned Magistrate then identified and addressed the submissions which had been advanced on behalf of the appellant that the devices found in his luggage were not immediately capable of operating as an electric shock device and were not, as required by Item 12 in sch 2 of the *Customs (Prohibited Imports) Regulations* 'designed to administer an electric shock ...'. So far as is material, Item 12 sch 2 to the *Customs (Prohibited Imports) Regulations* provides that the following goods are prohibited:

Handheld electric shock devices that are designed to administer an electric shock on contact, other than cattle prods designed exclusively for use with animals.

8. The appellant had also submitted that there are other provisions in the legislation dealing with harmful goods which do prohibit parts of, or incomplete, goods being imported (firearms - reg 4F sch 2) and, therefore, because Item 12 does not mention parts or incomplete goods the devices imported by him were not prohibited goods. Her Honour then found that the devices imported by the appellant were 'designed' to administer an electric shock and then proceeded to her ultimate conclusions as follows:

[44] The only reasonable inference from the evidence is that Mr Wright intended to import the electric shock devices, knowing that the pins and coils were in Mr Fullarton's luggage. Once the capacitor coils, wiring and pins were reconnected inside the casing they would be immediately operational.

[45] I find that the four devices located in Mr Wright's luggage were 'designed' to administer an electric shock. The word 'designed' meaning 'planned' or 'fashioned according to design'. The devices were fashioned or planned to administer an electric shock. They do not have to be immediately capable of administering an electric shock.

9. The only evidence at trial was for the prosecution. Ms MM Rouse, the person authorised to file the prosecution notice, her herself a Customs Officer, gave evidence. Further evidence was adduced by a witness who had been a Customs Officer on duty at the time, Mr JL Jones, who described the arrival of Mr Wright, Mr Wright's delivery to him of a completed Incoming Passenger Card (IPC) which was identified and of a Mr Fullarton arriving at the same time and standing in the Customs queue travelling together with Mr Wright. A third Customs Officer, Ms SM Thomas, gave evidence relating to the discovery of the alleged electric shock devices and how, on Xray examination, it was discovered that the capacitor coils were not inside them. It was her evidence that in the following discussion with Mr Wright after the devices had been discovered he maintained that they were just torches.

10. Photographs of the items were produced in court. There was then evidence from a further Customs Officer, Mr W Hill, whose evidence was long, detailed and intricate. However, its import was, in the end, straightforward and simple. It demonstrated that if the capacitor coils and wires located in Mr Fullarton's luggage were reinserted and/or reconnected to the devices found in Mr Wright's luggage, which, incidentally, they fitted exactly, then the latter immediately operated as effective electric shock devices.

11. The appellant did not give evidence at his trial nor was any other evidence adduced on his behalf. There had been a series of objections to the evidence to be led from the principal prosecution witnesses and to the relevance of that evidence, particularly the evidence to the effect that Mr Wright and Mr Fullarton were travelling together, but these were overruled by the learned magistrate. One of these rulings, a decision by the learned magistrate to admit evidence concerning the appellant's association with Fullarton, is the subject of one of the proposed grounds of appeal.

Grounds of appeal

12. The proposed grounds of appeal contained in the appeal notice are.

The Learned Magistrate erred in law in finding that the Appellant had imported prohibit[ed] imports.
Particulars

(a) The Learned Magistrate wrongly confined her consideration of the defence case to the items imported by the Appellant being incapable of immediately delivering an electric shock when the written submissions advanced on behalf of the Appellant raised a primary argument based on whether 'parts' of a hand held electric shock device were prohibited imports within the legislative prohibition provided by Item 12 of Schedule 2 of the *Customs (Prohibited Imports) Regulations* 1956 (Cth) ('the Regulations');

(b) The Learned Magistrate failed to give any reasons on whether 'parts' of a hand held electric shock device were prohibited imports within the legislative prohibition provided by Item 12 of Schedule 2 of the Regulations;

(c) The Learned Magistrate's finding at [45] that the items imported by the Appellant were 'designed' to administer an electric shock failed to properly consider whether what was actually imported contravened the Regulations;

(d) The Learned Magistrate erred in law in finding at [15] of her reasons for decision that the Appellant had conceded that the four electric shock devices were prohibited devices as they fell within the description of 'weapons of any kind' when there was no evidence of any such concession;

(e) The Learned Magistrate erred in law in finding at [50] of her reasons for decision that the Appellant accepted the devices were electric shock devices when the evidence was that the Appellant told Customs officers that they were torches; and

(f) The Learned Magistrate erred in law by considering the use to which the devices would be subsequently put when there was no evidence of such use.

The Learned Magistrate erred in law by admitting evidence concerning a third party, Fullarton, as evidence capable of establishing the guilt of the Appellant.

Particulars

(a) There was insufficient grounds established to support the admission of evidence concerning Fullarton contrary to objections;

(b) By wrongly confining her consideration of the defence case to whether or not the items imported by the appellant were capable of delivering an immediate shock, the Learned Magistrate erroneously took into account evidence concerning what Fullarton had in his possession;

(c) There was no evidence to support the finding made by the Learned Magistrate at [44] of her reasons for decision that the Appellant knew that the missing pins and coils from the items he imported were in Fullarton's luggage.

The Learned Magistrate erred in law in failing to provide any adequate reasons for her finding at [17] of her reasons for decision that the Appellant was aware of a substantial risk that the items he was importing were prohibited imports and that he was not justified in taking such a risk when he imported them.

13. When considering these proposed grounds of appeal and the respondent's case against the appellant generally, it is important to appreciate that no attempt was made by the respondent to present a case that the appellant and Fullarton were jointly engaged in a common unlawful enterprise of importing or attempting to import prohibited imports. Nor did the prosecution assert that the appellant was in actual or constructive possession of the wires, pins and capacitor foils found in Fullarton's luggage or even that the appellant had secreted wires, pins and capacitor foils in Fullarton's luggage with the intention of retrieving them after re-entering Australia so as to reassemble, in working order, all the components of prohibited items which he intended to import into this country.

14. Whether or not it might have been possible for the respondent to conduct a case against

the appellant including all or any of these aspects need not be considered. The sole question which the learned magistrate was called upon to consider was whether the attempted importation of electric shock devices with certain missing components which rendered them temporarily inoperable constituted an offence against s233(1)(b) of the *Customs Act* as alleged.

15. There was comparatively little separate attention devoted to a consideration of the second offence charged, namely whether or not the appellant had intentionally made a statement to a Customs Officer reckless as to the fact that the statement was false or misleading in a material particular. There was no dispute that the appellant had completed his incoming passenger card and in doing so had answered 'No' to the question enquiring whether he was bringing into Australia any goods that may be prohibited or subject to restriction such as medicine, steroids, firearms, weapons of any kind or illicit drugs. Nor was there any real issue over whether or not the appellant had understood the questions and answers in the IPC or that he was aware that the alleged electric shock devices, which he referred to as torches, were contained in the luggage that he was bringing into Australia.

Leave to appeal

16. The appeal notice filed by Mr Wright seeks leave to appeal against his conviction. Leave to appeal is necessary by reason of s7 of the *Criminal Appeals Act* 2004 (WA). That provides that leave of this court is required for each proposed ground of appeal from a court of summary jurisdiction. It also provides that this court must not grant leave to appeal on a proposed ground unless it is satisfied that the ground has a reasonable prospect of succeeding. In *Samuels v The State of Western Australia* [2005] WASCA 193; (2005) 30 WAR 473, 487 it was held that these requirements mean that any proposed ground of appeal must have a rational and logical prospect of succeeding, that is, that it would not be irrational, fanciful or absurd to envisage it succeeding. Unless leave to appeal is granted, the application must be refused and the appeal will be deemed to be dismissed. The requirements for the grant of leave to appeal have been frequently examined in many other cases, including *Re The State of Western Australia*; *Ex parte Worswick* [2005] WASCA 187 [11] and *Horn v Butcher* [2010] WASCA 67.

17. Sometimes the application for leave to appeal will be heard first and separately from any appeal. Indeed, this procedure is contemplated by the *Criminal Appeals Act* as a filter mechanism to ensure that only appeals, or grounds of appeal with reasonable prospects of success, progress to the stage where a full examination of the appeal is conducted. This is designed to ensure that scarce and valuable resources of the court are not consumed by unmeritorious applications or ones without any reasonable prospect of success. Sometimes, however, as in the present case, initial directions are made that the application for leave to appeal and any appeal if leave be granted should be heard simultaneously. This may occur when the degree of investigation, consideration and scrutiny necessary to determine whether or not there are sufficient prospects of success in any proposed ground of appeal to warrant the grant of leave to appeal on that ground is extensive.

18. If such an investigation requires, to a significant degree, an evaluation of the merits of the proposed grounds of appeal to such an extent there may well be a considerable duplication of effort if only leave to appeal were granted leaving further consideration of the merits of the proposed appeal to be repeated and carried further at the eventual hearing of the appeal. It may be more efficient to determine both steps together. However, a reference of the question of the grant of leave to appeal to a simultaneous hearing of the leave application and an appeal, if leave is granted, does not necessarily imply that there is sufficient merit to warrant a grant of leave to appeal or that the appeal should succeed. Perhaps in some cases it may do so but not in all instances. All that results from such an order being made is that it has been considered to be more efficient or expeditious for the question of any grant of leave to appeal, and the determination of any ground of appeal if leave is granted, to be conducted simultaneously than sequentially. Whether that initial characterisation finally turns out to be well founded or not is often one which varies from case to case.

19. In a case such as the present where the question of grant of leave to appeal on each proposed ground of appeal has been directed to be heard simultaneously with any appeal if leave is granted this can often mean that the questions of the grant of leave and the results of any appeal if leave is granted are so interconnected that it is preferable to deal with them both at once. This accounts for the procedure which I am now about to follow of proceeding to the merits of the

proposed grounds of appeal after the benefit of full written submissions and argument in order to deal with both questions if they arise. In doing so, however, it is still necessary to determine whether or not each proposed ground of appeal justifies the grant of leave to appeal.

Whether the devices found were prohibited imports

20. The challenge to the learned magistrate's finding that the devices found in the appellant's luggage were prohibited imports is advanced on six separate sub-grounds set out in the particulars already recorded.

21. The first of these contends that the learned magistrate wrongly confined her consideration to the question of whether the devices were incapable of immediately delivering an electric shock whereas, the appellant submits, the real question was whether parts of a hand held electric shock device were prohibited imports. There is no merit in this ground because the learned magistrate clearly approached and determined her decision on the footing that the issue involved a question of whether or not the absence of 'a necessary component' meant that the electric shock device was 'not immediately operational' and so not a prohibited import. In [28], [31] and [38] her Honour acknowledged that the devices were not complete and that for that reason the appellant was contending that they did not come within item 12 of schedule 2 of the regulations. However, her Honour held that notwithstanding the absence of the pins and the capacitor coils, the items were nevertheless prohibited imports.

22. The particular in subparagraph (b) of the first ground of appeal advances the contention that her Honour failed to give any reasons why 'parts' of hand held electric shock device were prohibited imports within item 12 of schedule 2 of the regulations. The respondent submits that this proposed particular does not engage s8 of the *Criminal Appeals Act* and invites linguistic semantics unrelated to the substance of a determination of the issue which her Honour was required to decide. There is merit in that objection because the essential question is whether the items came within the description of item 12 of the second schedule.

23. The appellant had submitted to her Honour, as he has again on this occasion, that the items were not within the schedule because they were incomplete or only parts or were not immediately capable of administering an electric shock arguments which are all variations of the essential substantial submission that they were not prohibited imports. Accordingly, a finding that notwithstanding that the items found in the appellant's luggage were incomplete or not immediately functional they nevertheless were prohibited imports is a finding on the essential question of whether, notwithstanding the absence of some components, the items imported were prohibited imports. Accordingly, I do not consider that this proposed particular can be made out even if taken at its broadest ambit.

24. But there is another answer to the submission and it is that in determining the issue of whether or not these 'incomplete devices' were prohibited imports her Honour had regard to the language of item 12 schedule 2 of the regulations which described as prohibited imports 'hand held electric shock devices that are designed to administer an electric shock on contact ...'. Her Honour discussed in detail the significance of the word 'designed' in item 12 at [34] to [40] and in doing so concluded that item 12 does not require that that a device be immediately capable of operating as an electric shock device [39]. Her Honour posed the question at [40] 'what is the objective characterisation of the goods themselves in the light of all the relevant circumstances' before concluding that the devices imported by the appellant were 'designed' to administer an electric shock. Accordingly, this proposed particular (b) of ground 1 of the proposed grounds of appeal has no prospect of success.

25. Proposed particular 1(c) contends that the finding that the items were 'designed' to administer an electric shock failed to consider properly whether what was actually imported contravened the regulations. Again, with respect, this proposed particular cannot succeed. The very purpose of considering whether or not the items were 'designed' to administer an electric shock was part of the process of conducting a full interpretation of the scope and application of item 12. There can be no prospect of any successful contention that her Honour failed to consider properly whether the items actually imported contravened the regulation because it is unmistakably clear that when considering the design of the items under consideration her Honour was specifically addressing the devices found in the appellant's luggage in the condition which they were at that time that is, with some components missing.

26. Proposed particular 1(d) advances the contention that the learned magistrate erroneously found that the appellant had conceded that the four electric shock devices were prohibited devices if they fell within the description of 'weapons of any kind', contending that no such concession was made. However, her Honour's finding at [15] that the four electric shock devices are prohibited imports because they fall within the description of 'weapons of any kind', is an independent finding made by the learned magistrate and is not based on any alleged concession said to have been made by the appellant. The only concessions to which her Honour has referred are those in [12] and [13] of her Honour's reasons. The following paragraphs, including [15], are findings made by her Honour on all the evidence and upon her Honour's interpretation of the regulation. This proposed particular is based apparently upon a misunderstanding of her Honour's reasons and has no foundation.

27. In particular 1(e) of the proposed grounds of appeal the appellant contends that her Honour erred in law in observing that the appellant accepted that the devices were electric shock devices when the evidence was that he had told the customs officers that they were torches. Again this particular advances a proposition which cannot be supported in the light of the context in which the finding was made. Paragraph [50] of her Honour's reasons for decision is well towards the end of those reasons and is at a point where, quite independently of the matters then being referred to, her Honour had already concluded that the items in the appellant's baggage were prohibited imports within the meaning of 'electric shock devices' referred to in item 12 of the regulations.

28. At the point where her Honour made the observations contained in [50] the learned magistrate was addressing, through an abundance of caution because it had not been raised expressly by the appellant, the possible availability of a defence of mistake of fact under s 9.2 of the Commonwealth *Criminal Code*. In doing so, her Honour noted that the appellant himself had not given evidence but that he had made a statement initially to the customs officers that the devices were torches. Her Honour did not accept the truth of that statement in the light of other evidence. Her Honour referred to the fact that the devices did not look like torches and that the appellant had purchased them on two separate occasions in the markets in Pattaya.

29. Her Honour's reference to the fact that the appellant accepted that the devices were electric shock devices itself has support in the evidence. The seizure notice prepared by the customs officers and signed by the appellant referred to the items as 'four x electric shock devices (Taser)'. In addition, in the evidence of customs officer Thomas (exhibits P6 and P8) it was recorded that shortly after stating the devices were torches the appellant agreed that they were electric shock devices and then signed photographs of them. This evidence had been specifically referred to by the prosecution in its closing submissions at the trial. The passage at [50] of her Honour's reasons and the evidence just described did not contribute to the finding that the items were prohibited imports. Rather, it was a reason for rejecting any possibility of a defence of mistake of fact by the respondent and of any belief by the appellant in the truth of the statement which he made to the customs officers that the items were torches. As already noted, the appellant did not rely upon any mistake of fact defence and does not attempt to challenge any of the findings of her Honour rejecting the possibility of that defence.

30. The final proposed particular of ground 1 is that the learned magistrate erred by considering the use to which the devices found in the appellant's luggage would subsequently be put when there was no evidence of any such use. This is a variation of the earlier contention that no reasons were given for concluding that the devices found in the luggage with parts missing were nevertheless prohibited imports within the meaning of item 12. That contention has already been rejected and earlier I have set out the method by which the learned magistrate correctly approached the discernment of the proper interpretation of item 12 of the regulations and carried out an objective characterisation of the nature of the items found in the appellant's luggage. Considering the actual or potential use, or the 'design' purpose of the items is an entirely acceptable, indeed necessary, method of carrying out that process of characterisation.

31. The evidence before the learned magistrate showed that a pin and capacitor coil found in Fullarton's luggage fitted, indeed matched, a device found in the appellant's luggage and that when the wiring was joined and the pin and coil inserted, the device immediately was operable as an electric shock device. A demonstration of this by the customs officers had been performed in the courtroom, as noted in the earlier review of the evidence at the trial. The very language

of item 12 imports into the definition of these prohibited imports the concept of design purpose and function and, accordingly, is entirely relevant to examine the items seized and, by legitimate methods, investigate that designed function and capacity as her Honour did. This particular has no prospect of success.

32. These six proposed particulars of the first proposed ground of appeal do not entirely exhaust the potential significance of the ground itself which contends that the items seized were not prohibited imports. It is a well-known risk and potential consequence of giving particulars to a pleading that, by doing so, the breadth and reach of the pleading itself may be unexpectedly constrained. This accounts for the observation that a party is bound by his particulars and may not go into matters outside the particulars even though the pleading itself may otherwise have had a wider ambit: *Woolley v Broad* [1892] 2 QB 317 and *James v Smith* [1891] 1 Ch 384.

33. This approach, if insisted upon by the respondent, may have prevented the appellant from raising the larger question of whether or not, because of the language of item 12 itself, an electric shock device with one or more operational parts missing is a prohibited import within the meaning of the regulation. However, no such point was taken by the respondent and the appellant did raise this larger issue at trial.

34. At [38] of her reasons the learned magistrate noted the submission by the appellant's counsel that other provisions of customs regulations dealing with harmful goods do prohibit parts of, or incomplete, goods to be imported (firearms reg 4F of sch (2)) and that because item 12 does not mention parts or incomplete goods the devices which were imported by the appellant in the state in which they existed at the time of importation these were not prohibited goods. It is, therefore, necessary to address this more fundamental contention which I note was accepted both at trial and on the hearing of this application as being within the scope of proposed ground 1. This is, in effect, an invocation of the maxim of statutory interpretation *expressio unius est exclusio alterius* for a full consideration of which see Pearce & Geddes, *Statutory Interpretation Australia* (7th ed, 2011) [4.31] [4.33] where the authorities are collected and the many warnings and cautions about the employment or application of the maxim are repeated.

35. The provisions of reg 4F pt 2 of the *Customs (Prohibited Imports) Regulations* are accepted as not applying to the particular parts of a firearm which were relevant in the course of events which led to the decision in *Brayley v Malkovich* see the reasons of the Court of Appeal at [7]. The magazine tubes of the kind imported by the appellant in that case were not prohibited or subject to any restrictions whether under reg 4F or otherwise. I do not consider that the detailed provisions in reg 4F of the *Customs (Prohibited Imports) Regulations* which make specific provision for the importation of firearms, firearm accessory, firearm parts or other components, including ammunition, should be regarded as conditioning or affecting the interpretation of item 12 in sch 2.

36. It is the case that the regulations have been substantially amended since the date of this offence and a new regulation, 4H, has been included to provide specifically that parts of electric shock devices, among other things, are within the prohibition. No submission was made on this occasion that this subsequent amendment establishes or acknowledges that the earlier regulation did not apply to parts of such devices. Rather, I consider that I should treat that amendment as a comprehensive revision of the regulations which made many changes and rearrangements rather than constituting an acknowledgement of the validity of any point along the lines of that advanced by the appellant on this present application. With respect, I consider that the learned magistrate's interpretation of the former item 12 of the second schedule is correct and that the result is produced by an examination of the terms of the regulation itself and an objective characterisation of any item said to fall within it.

37. I do not consider that any of the proposed particulars under ground 1 of the proposed grounds of appeal has reasonable prospect of success and were those the only matters for consideration I would have refused leave to appeal on that ground. However, the wider question of whether or not these items found within the baggage of Mr Wright with certain components missing were nevertheless prohibited imports within the meaning of item 12 of sch 2 of the regulations is a matter which I am satisfied was arguable and should be the subject of a grant of leave to appeal. Having considered the point and for the reasons given, however, I consider that that ground of appeal should be dismissed.

Intentionally making a statement reckless as to the fact that it was false or misleading in a material particular

38. The statement proved to be made by the appellant was the answer he wrote on the IPC that he was not bringing goods into Australia that may be prohibited or subject to restrictions such as medicines, steroids, firearms, weapons of any kind or illicit drugs. In the context this was statement to the effect that the four items in the appellant's luggage, which the respondent alleges were prohibited electric shock devices but which the appellant described as torches, were not 'goods that may be prohibited or subject to restrictions such as ... weapons of any kind'. There was no question but that the appellant knew that these items were in his possession. Two questions then arose. The first was whether or not the prosecution had proved to the requisite standard that, in relation to them, the question answered by the appellant in the IPC was false or misleading in a material particular. The second question was whether or not the statement of denial, so far as it related to those items, made by the appellant to the customs officer was made intentionally and reckless as to whether it was false or misleading in a material particular.

39. The first of these questions, whether or not the statement was false or misleading in a material particular, concerns the objective characterisation of the items. If they were, objectively, prohibited or subject to restrictions, then the negative answer given was either false or misleading in a material particular. Item 12 sch 2 of the regulations plainly provides that hand held electric shock devices that are designed to administer an electric shock on contact other than cattle prods, designed exclusively for use with animals, are prohibited imports. Accordingly, if the items were electric shock devices within the meaning of the regulation then the negative answer given was false or misleading in a material particular. This is even more clearly so when the exact terms of the question on the IPC are addressed, namely whether or not the declarant was bringing into Australia goods that may be prohibited or subject to restrictions, indicating that there is an obligation to declare the existence of any such items even if there is doubt or uncertainty as to their true character.

40. Consequently, the determination of whether or not the negative answer given by the appellant on the APC was objectively false or misleading in a material particular must depend upon whether, objectively speaking, the four devices found in the appellant's luggage were, in the condition in which they then existed (that is, with certain pins and capacitor coils missing) or might be, prohibited or subject to restrictions, such as electric shock devices within the meaning of regulation 12 certainly were. So revealed, this question is essentially the same question which is at the centre of the issue of whether or not the appellant committed the first offence charged, namely of importing four prohibited imports the same alleged electric shock devices.

41. The determination of that question adverse to the appellant in relation to the first charge will inevitably mean that the answer which he gave on the IPC denying that he was bringing into Australia goods that may be prohibited or subject to restriction, was objectively false or misleading in a material particular. As I have already concluded that the goods were, in the condition in which they were imported by the appellant, prohibited imports this means that the answer which he gave in the IPC was objectively false or misleading in a material particular.

42. However, that of itself is not sufficient to support the conviction of the appellant on the second charge. For that conviction to be justified in accordance with law, it was also necessary for it to be established, to the criminal standard of proof, that the statement made by the appellant on the IPC was made intentionally and reckless as to the fact that it was false and misleading in a material particular.

43. There was certainly evidence to establish that the appellant had made the statement intentionally. He completed the IPC and signed it in circumstances where it was unmistakable that he was required to give an honest answer to the questions on it to the best of his knowledge and ability. He was also asked by the customs officers whether or not he had completed, understood and signed the IPC and he said that he had. He stated that, insofar as the IPC related to these four items, his answer was correct because they were torches.

44. In this setting, therefore, the issue became whether or not the evidence sustained to the requisite degree of proof the finding of the learned magistrate that the statement had been made reckless as to the fact that it was false or misleading in a material particular. On the basis now

established that the items were, objectively speaking, prohibited imports and that the statement was, therefore, false or misleading in that material particular, it is still necessary to show that the answer on the IPC given by the appellant denying that he may be importing prohibited or restricted goods was reckless within the meaning of s234(1)(d)(i) of the Act.

45. At [16] of the reasons for decision of the learned magistrate her Honour identified the meaning of the term 'reckless' in this setting by reference to s5.4 of the *Criminal Code* (Cth) which, although not specifically so identified, was reproduced verbatim in that paragraph. The question was whether or not the evidence established that the appellant was reckless with respect to a circumstance rather than to a result. The appellant would be shown to be reckless with respect to a circumstance if the evidence proved that he was aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him it is unjustifiable to take the risk. By s4.1 of the *Criminal Code* a physical element of the offence charged may be (a) conduct or ... (c) a circumstance in which conduct or a result of conduct occurs. The conduct in this aspect of the case was the appellant's making of the statement in answer to the question on the IPC.

46. The circumstance was whether or not any of the items contained in his luggage and being imported into Australia was or may be prohibited goods or subject to restrictions. The making of the statement recklessly is a fault element for a physical element of the offence charged and accordingly proof of intention, knowledge or reckless making of the statement would satisfy that fault element. It was therefore relevant and appropriate for the learned magistrate to consider whether the evidence at trial established intention, knowledge or recklessness by the appellant with regard to the true objective character of what, by now, I have concluded the learned magistrate was correct in characterising the four items in the appellant's luggage as electric shock devices and so prohibited imports. Accordingly, any inferences which could properly be drawn from the evidence which the learned magistrate accepted as showing that the appellant was aware that with the missing capacitor coils and pins the devices were fully functional electric shock devices was, therefore, directly relevant to the appellant's state of knowledge or intention with regard to the true character of the items and hence the truth, intention or recklessness of the statement which he made on the IPC.

47. If, as the learned magistrate effectively found, the appellant was aware that the four devices were partially dismantled by the removal of some pins and capacitor coils which, especially if they were being carried separately by his companion Fullarton, usually belonged together, then a statement denying that the appellant was importing any prohibited or restricted goods could readily lead to an adverse inference being drawn. That would justify an inference that the statement was made with knowledge that before they had been partially dismantled the items were fully operational electric shock devices, and that the statement was made falsely and/or recklessly. This is especially so when the explanation was given by the appellant that they were merely torches a statement which is capable of supporting an inference justifiably drawn by the magistrate that this was a dishonest and/or misleading answer designed to conceal the true character of the items which was well known to the declarant.

48. Accordingly, although the appellant was not charged, nor was the case conducted on the footing that the alleged unlawful importation was carried out in concert with Fullarton, or that both the appellant and Fullarton were participants in a common unlawful enterprise, the role of Fullarton in carrying within his baggage the missing components of the four devices was relevant and material. It supported an inference drawn by the magistrate that the appellant was aware of the existence of the pins and capacitor coils in Fullarton's luggage. This in turn suggested that, as the customs officers testified, those particular pins and capacitor coils came from and fitted the devices carried by the appellant in his luggage and that this was so inconsistent with an assertion that the items were not prohibited or restricted imports as to render the statement made in the IPC knowingly false or reckless as alleged. Consequently, the evidence relating to the appellant and Fullarton travelling together, both when departing Australia and returning, and the discovery of the pins and capacitor coils in Fullarton's luggage on arrival at Perth Airport was directly relevant, and so admissible, with regard to the second charge against the appellant.

49. The submission made at the trial, and again on this application, that the evidence relating to the appellant travelling with Fullarton and the discovery of the pins and capacitor

coils in Fullarton's luggage, and the further evidence from the customs officers that those pins, coils and wires fitted and matched the devices carried in Mr Wright's luggage was irrelevant and prejudicial cannot be accepted. It was suggested in argument for the appellant that this evidence of the items found in Fullarton's baggage and his association with the appellant was irrelevant and inadmissible because it was an attempt to prove, or was treated by the learned magistrate as proving, that by combination with Fullarton the appellant imported components which, when readily reassembled, constituted prohibited imports.

50. The prosecution did not conduct or attempt to conduct its case on that footing, nor did the learned magistrate treat or decide the case on any such basis. The essential question was and always remained whether the items discovered in the appellant's luggage, with pins and capacitor coils missing, were nevertheless prohibited imports. The evidence relating to the discovery of the pins and capacitor coils in Mr Fullarton's luggage did not, as the case was presented, conducted and determined, bear on that issue. However, the role of Fullarton and the presence of the pins and capacitor coils in his luggage did have a bearing upon, and was relevant and therefore admissible, with regard to the charge against the appellant that he had intentionally made the statement in the IPC reckless as to the fact that it was false or misleading in a material particular, that is, in regard the true nature of the items contained in the appellant's own baggage.

51. It is necessary to note precisely the position taken by the respondent on the question of whether or not the appellant could be convicted of the second offence, intentionally making a statement to a customs officer reckless as to whether or not it was false or misleading in a material particular, if in law the items found in Mr Wright's luggage were not prohibited imports. On this issue her Honour held at [18] that if the devices are found not to be prohibited imports the appellant could not be convicted of making a false or misleading statement.

52. The appellant has submitted that this was conceded by the respondent at the trial but that is not quite correct. The position of the respondent, in the course of the prosecution of Mr Wright at this trial, was that the reasoning in *Brayley v Malkovich* [2008] WASCA 20 was indistinguishable on this point and binding on the learned magistrate which meant that her Honour was bound to approach the case on the footing that if the devices were not prohibited imports the appellant could not be convicted of the second charge. However, the respondent contended that the decision in *Brayley v Malkovich* on this point was not correct and although binding on the learned magistrate, the submission that the decision was wrong was formally advanced and the respondent's position reserved in this regard. The same position was adopted by the respondent on this present application because, of course, I am also bound by the decision in *Brayley v Malkovich* but I record the formal submission in case circumstances ever arise in which this matter goes further and that submission is renewed.

The evidence of Fullarton

53. These conclusions that the evidence of the role of Fullerton was relevant and admissible to the second charge are sufficient to dispose of pars 2(a) and (b) of the proposed second ground of appeal.

54. Lest it might otherwise be implied that this evidence had no relevance to the first charge, that of importing prohibited goods, I consider that it was also relevant to the design purpose and application of the devices which were in the possession of the appellant. The readiness with which the pins and capacitor coils fitted the apparatus found in Mr Wright's luggage, the fact the colouring of the wires and the ends matched, and that when reassembled the devices functioned as immediately operable electric shock devices was part of the evidence, and hence admissible, for the necessary determination of the nature, design and function of the items contained in the appellant's luggage. It is not necessary that there be any pre-concert alleged or proved between the appellant and Fullarton for that to be so and, as here, where that was not alleged, the evidence was nevertheless material and permissible.

55. By the proposed particular (c) of ground 2 the appellant contends that there was no evidence to support the finding at [44] that Wright knew that the missing pins and coils were in Fullarton's luggage. Even if that had been the case, that would not have rendered the evidence irrelevant or inadmissible on the issue of what was the design function and capacity of the items contained in the appellant's luggage in their incomplete state. Nor would it have rendered the evidence

inadmissible on the issue of whether the second charge had been made out, that is to intentionally make a statement reckless as to whether it was false or misleading in a material particular. This is because the appellant's true state of knowledge about the nature, design function and capacity of the items was not dependent on whether or not he knew that the missing pins and capacitor coils were located in Fullarton's luggage or, indeed, brought into Australia by Fullarton or anyone else.

56. It was open to the learned magistrate to infer, as it is clear by implication that she did, that when Wright purchased the items at the markets in Pattaya they were complete notwithstanding his denial to the customs officers that he had not removed any components. The evidence that the detached pins and capacitor coils found in Fullarton's, luggage including wires which matched in colour and dimension those within the devices contained in the appellant's luggage, and that the pins and capacitor coils fitted exactly and rendered operable the devices found in the appellant's luggage is highly suggestive of the inference that the four devices were originally entire and completely assembled and were partly dismantled and wires severed to allow them to be carried separately.

57. As it was also proved that the appellant and Fullarton had left Australia together, travelled to Thailand together, returned together and been processed by customs together, it was open to the learned magistrate to conclude that the appellant had knowledge that the detached pins and capacitor coils were in Fullarton's luggage. Such a finding was the product of circumstantial evidence but the circumstances were potent for such an inference to be drawn. There was no denial by the appellant in evidence that he was aware that those detached items were in Fullarton's luggage and, in the absence of such a denial, the readiness with which the inference drawn by the magistrate could be reached was even greater. There is nothing to suggest that the learned magistrate was unaware of the onus or burden of proof nor anything else to suggest that this finding was unjustified.

58. It must be noted, however, that the correctness or otherwise of the finding that Mr Wright was aware that the detached components were located in Mr Fullarton's baggage is not in any way germane to the question of whether or not the evidence that these items were discovered in Fullarton's luggage was admissible as raised by the proposed second ground of appeal. As already observed, a finding that the appellant was aware of the contents of Fullarton's suitcase makes the case against him on the second charge so much stronger although such a finding is not indispensable to the proof of that charge. Consequently, evidence designed to establish that Mr Wright was aware of the contents of Fullarton's luggage in this respect was relevant and therefore admissible at this trial. If the evidence on that subject which was adduced failed to prove knowledge by Fullarton of that fact, then no such finding could be made but that does not make evidence attempting to establish that proposition, even if not fully probative, inadmissible.

59. Proposed ground 2 of the appellant's grounds of appeal has no reasonable prospect of success and, accordingly, leave to appeal on that ground should be refused.

Adequacy of reasons

60. The third proposed ground of appeal is that the learned magistrate erred at [17] by failing to provide any adequate reasons for finding that Mr Wright was aware of the substantial risk that the items he was importing were prohibited imports and that he was not justified in taking such a risk when he imported them.

61. Her Honour's observations at [17] were made in the course of the reasons which addressed the meaning of 'reckless' within s234(1)(d)(i) of the *Customs Act* and as defined by s5.4 of the *Criminal Code* (Cth). Her Honour's observations commence with a finding that the appellant was aware that he had packed the four devices [in his luggage] and then went on:

... and as such that a substantial risk that circumstances existed and having regard to the circumstances known to him, it was unjustifiable for him to take that risk.

62. The reference to 'circumstances' in this setting is, as earlier observed, a reference to circumstances known to Mr Wright at the time that there was a substantial risk that the items may be prohibited imports.

63. Her Honour's observations and finding in this regard must be evaluated in the light of the evidence as a whole. By this point in the reasons for decision her Honour had already concluded, for reasons previously explained, that the items in the possession of the appellant contained in his luggage as discovered at the Perth Airport were prohibited imports. As already described, this conclusion followed from an examination of the items themselves and an assessment of their design function and capacity.

64. It is also clear from her Honour's reasons for decision, although not expressly stated by them, that her Honour inferred that when the items were purchased at Pattaya they were entire and that they had been partially dismantled and the missing pins and capacitor coils carried in Fullarton's luggage deliberately. In those circumstances, the learned magistrate has plainly concluded that there was, at the very least, a significant risk that the items in the condition in which they were found in Mr Wright's luggage at Perth Airport were, as they were found to be, prohibited imports and that any statement made by him on the IPC to the contrary was made reckless of the substantial risks that the items were, as they turned out to be, prohibited imports.

65. These conclusions follow from the findings that the learned magistrate made about the true nature, design purpose and capacity of the items; the explanation given to the customs officer by Mr Wright as to how he had originally acquired them, and to the evidence about the missing pins and capacitor coils which closely matched and fitted them and which were found in Fullarton's baggage. The basic facts and course of reasoning of the learned magistrate in reaching this conclusion are quite apparent from the reasons for decision which entirely satisfy the requirements of s31 of the *Magistrates' Court Act*: *Tran v Claydon* [2003] WASCA 318; *Bennett v Carruthers* [2010] WASCA 131 [22] [28]; *AK v The State of Western Australia* [2008] HCA 8; (2008) 232 CLR 438 [84]; 243 ALR 409; (2008) 82 ALJR 534; (2008) 182 A Crim R 262 (Heydon J); and *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 430; (1997) 25 MVR 373 (Meagher JA) see the review of these decisions by Simmonds J in *Giles v Douglas* [2011] WASC 14.

66. I do not consider that there is any reasonable prospect of success for the proposed ground 3 and that, therefore, leave to appeal on this proposed ground should be refused.

Conclusion

67. For these reasons, therefore, I would refuse leave to appeal on the proposed grounds of appeal 2 and 3 but I would grant leave to appeal in relation to one aspect of the first proposed ground. Nevertheless, I do not consider that this first ground of appeal has been established and, consequently, it is dismissed. The overall result is that the proposed appeal insofar as it relies on grounds 2 and 3 will be deemed to be dismissed and that upon ground 1 it should be dismissed.

APPEARANCES: For the appellant Wright: Mr DP Jones, counsel. Darren Jones, Barrister & Solicitor. For the respondent Chief Executive Officer of Customs: Mr AC Willinge, counsel. Australian Government Solicitor.