

15/07; [2007] VSCA 19

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v TRAN

Nettle, Neave and Redlich JJ A

12 September 2006; 21 February 2007

CRIMINAL LAW – TRAFFICKING IN A DRUG OF DEPENDENCE – TRAFFICKABLE QUANTITY FOUND IN MAIN BEDROOM OF HOUSE OCCUPIED BY ACCUSED – DRUG DEEMED TO BE IN POSSESSION OF ACCUSED – ELEMENTS OF POSSESSION – *PRIMA FACIE* EVIDENCE OF TRAFFICKING – MEANING OF *PRIMA FACIE* – CLAIM BY ACCUSED THAT DRUG BELONGED TO ANOTHER PERSON LIVING IN THE HOUSE – CLAIM THAT ACCUSED DID NOT KNOW THAT OTHER PERSON TRAFFICKED IN DRUGS OR OF THE EXISTENCE OF THE DRUG – ACCUSED FOUND GUILTY – WHETHER APPLICATION FOR LEAVE TO APPEAL SHOULD BE REFUSED: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT 1981*, S73(2).

A traffickable quantity of heroin was found concealed in T.s bedroom and elsewhere in the premises at which T. lived. T. was charged with trafficking in a drug of dependence. T.s defence was that although he lived at the premises, the drugs belonged to another person (V.) who also lived there and trafficked in drugs. Further, that T. did not know that V. trafficked in drugs or of the existence of the drugs. The charge was found proved. Upon application for leave to appeal—

HELD: Application for leave to appeal refused.

1. The Crown's case that T. had possession of the heroin rested upon proof beyond reasonable doubt that the applicant was in occupation of the premises on which the drugs were found. Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* ("the Act") provides that a substance is deemed to be in the possession of a person if it is on premises occupied by him unless he satisfies the Court to the contrary. Consequently, once the Crown established that T. was the occupier, the accused had to satisfy the Court on the balance of probabilities that he was not in possession of the drugs.

2. For a person to be in possession, there must be physical control of the subject matter accompanied by an intention to exercise control. At common law, knowledge of the presence of the item by the occupier of the premises will generally provide the basis from which the necessary intent can be inferred.

3. To overcome the effect of the deeming provision in s5 of the Act, T. had to satisfy the jury, on the balance of probabilities, that he was unaware that the drug was on the premises or had no intention to exercise control over the drug or the place where it was kept. As there was no evidence which would have enabled T. to discharge the burden of negating his presumed intent to exercise control by virtue of his deemed possession, there was no ground on which leave to appeal should be granted.

4. Section 73(2) of the Act provides that where a person has possession of not less than the traffickable quantity of a drug of dependence, the possession of that drug of dependence in that quantity is *prima facie* evidence of trafficking by that person in that drug of dependence. *Prima facie* evidence is evidence which would be sufficient to convict a person in the absence of any evidence to the contrary. If a person possesses such a quantity of drugs that the only commonsense conclusion is that it is possessed for commercial purposes and that the drug is knowingly moved along a chain from its point of manufacture to its ultimate consumer, that is *prima facie* evidence of trafficking.

REDLICH JA: [Nettle and Neave JJ A agreeing]

13. On the afternoon of 29 November 2002 police searched a home occupied by the applicant at 7 Renbold Place, Mulgrave. At those premises the police discovered and seized a number of items from a chest of drawers in the main bedroom. In the top drawer was a set of scales, a bag of white powder, a plastic tackle box and some balloons which contained 24.8 grams of heroin. In the bottom drawer were some plastic bags, balloons and foil. In another drawer were some plastic bags containing white powder which was a cutting agent. In the same drawer was 55.9 grams of heroin wrapped in packaging tape. In a cupboard behind the mirrors in the toilet area to the

left of the main bedroom the police found a gel container with foils inside which contained 0.9 grams of heroin. In a silver tin which was open on the kitchen bench the police found two orange balloons which contained 7 grams of heroin. A total of 88.6 grams of heroin was recovered from the premises. A trafficable quantity of heroin is 3 grams.

14. The Crown presented the applicant on one count of trafficking in a drug of dependence and one count of possessing a drug of dependence. At the applicant's trial, it was the Crown case that he possessed the heroin for sale found in the house, and that he had sold heroin from the premises on 29 November 2002. The Crown accepted that the applicant's friend, Minh Vo, who stayed at the premises from time to time, also sold heroin from the premises, but alleged that Vo and the applicant were both involved in trafficking, either separately or jointly. The applicant's defence was that the drugs were Vo's, and that he was unaware of Vo's trafficking from the premises.

15. The applicant was interviewed by police in relation to the search on 25 June 2003. In that interview, he admitted that he had lived at 7 Renbold Place before the search (although he claimed that he was away on a trip to Sydney on the day when the search was conducted), and that he occupied the master bedroom of the premises. He denied having any knowledge of heroin being in the house or of any trafficking in heroin from the premises. He did not know to whom any of the items found in his bedroom belonged.

16. The applicant's trial in the County Court began 9 November 2005. The learned trial judge instructed the jury that, given the way the Crown presented its case, the second count was effectively an alternative count and the applicant could only be convicted on one of the charges against him. On 16 November 2005 the jury returned a verdict of guilty on count one (trafficking in a drug of dependence). The applicant now seeks leave to appeal against his conviction and his sentence.

17. It is convenient to consider grounds 1 and 3 together as the same issue is raised by both grounds:

"1. The learned trial judge erred in his directions to the jury as to the effect of s5 of the *Drugs, Poisons and Controlled Substances Act 1981*, and, in particular, in directing the jury that if they were satisfied that the applicant was the occupier, the applicant was deemed to be in possession unless he satisfied the jury on the balance of probabilities that he did not know the powder was there or did not know that it contained heroin.

3. The learned trial judge erred in his answer to the question put by the jury, in that he failed to instruct the jury that, if on the balance of probabilities, they were satisfied that Minh Vo was trafficking drugs from the house and the heroin found related to that business, but the applicant was not involved in that business, they must acquit the applicant."

Whether a direction as to intention to exercise control was necessary

18. The Crown's case that the applicant had possession of the heroin rested upon proof beyond reasonable doubt that the applicant was in occupation of the premises on which the drugs were found. Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* ("the Act") provides that a substance is deemed to be in the possession of a person if it is on premises occupied by him unless he satisfies the Court to the contrary. Consequently, once the Crown establishes that the accused is the occupier, the accused must satisfy the Court on the balance of probabilities that he was not in possession of the drugs.^[7]

19. The applicant's defence involved a denial that he was an occupier or that he had any knowledge of the presence of drugs on the premises. It involved a denial that Minh Vo was a drug trafficker or that the applicant trafficked in heroin or had ever given Minh Vo heroin. Although the applicant denied in his interview that he had any knowledge that there were drugs in his bedside table or that he had any knowledge of the presence of heroin on his premises, there was ample evidence relating to those issues upon which the jury could have reached a contrary conclusion.

20. The judge directed the jury on the basis that the applicant was deemed to be in possession if the jury was satisfied that the applicant was the occupier of the premises. The direction as to the applicant's occupancy of the premises included, as required, a direction as to the control necessary to establish occupancy. As Vincent JA observed in *R v Phung*:^[8]

"[T]he jury had to consider whether the applicant could be said to have been in practical control of the premises at the relevant time, bearing in mind that in consequence of making that finding (unless he satisfied the Court to the contrary) he would be deemed to be in possession of what was found there. The ability to control access would, of course, be crucial in answering the question."^[9]

21. One of the underlying rationales for the deeming provision is the fact that a person will not be an occupier unless they have a requisite degree of control over the premises so as to be able to control access to it,^[10] and hence be able to control access to the substance which they are alleged to possess. So a person who has control over a building will have possession of a pocket book dropped within it.^[11] A person driving a car will have possession of the items in the boot.^[12] A person with the sole key to a locker will have control over the items in the locker.^[13] Even in a shared house, a person who can control access by hiding an item will have the necessary degree of control over it.^[14]

22. The directions given to the jury by his Honour concerning occupation of the premises are not in issue nor is it alleged that the evidence was insufficient to establish the applicant's occupation. The contention advanced on the applicant's behalf under grounds 1 and 3 is that the jury was not adequately directed as to what would constitute possession so that the jury could determine whether it had been established by the Crown or disproved by the applicant.

23. A person proved to be in occupation of the premises is deemed to be in possession, as it is understood at common law, unless he proves that he was not in possession of the substance.^[15] The elements of common law possession are "the corpus and the *animus*, the first consisting in a certain physical relationship between the *propositus* and the thing, the second consisting in a certain mental attitude on his part towards it."^[16] Possession requires both physical dominion over the subject matter and an intent to exercise control.^[17] That is to say, for the person to be in possession, there must be physical control of the subject matter accompanied by the intention to exercise control. At common law, knowledge of the presence of the item by the occupier of the premises will generally provide the basis from which the necessary intent can be inferred.^[18]

24. If the jury were satisfied that the drugs were on premises occupied by the accused,^[19] the physical element of custody or control of the substance and the mental elements of knowledge and intent to possess or control the substance^[20] would be deemed to be satisfied as a consequence of s5.^[21] To overcome the effect of the deeming provision in s5, an occupier of a premises must satisfy the jury, on the balance of probabilities, that he or she was unaware that the drug was on the premises or had no intention to exercise control over the drug or the place where it was kept.

25. The evidence as to the applicant's state of mind (knowledge and intent) was to be found in his answers in his record of interview. He had told the investigators that he occupied the master bedroom at 7 Renbold Place where the drugs were found in his bedside drawer. He said that he had no knowledge of any of the heroin found by the police in the house and had never seen any heroin in the house. He denied that he had ever taken any heroin into the house or been in possession of any heroin and did not know to whom the scales and balloons located in his bedroom belonged. He said that he did not know that the heroin was in his bedroom. The jury rejected his explanation.

26. A conclusion that a person is the occupier within the meaning of section 5 of the Act may, depending upon the circumstances, leave open an issue as to whether they knew of the presence of or were in "control" of the item found on the premises.^[22] Deemed possession would be disproved if it were shown, on the evidence, as more likely than not that one of these elements of possession did not exist. The applicant would not have possession of the heroin if he did not know of its presence or intend to exercise dominion or power over it.^[23]

27. As in the present case, if an issue arises from the evidence as to whether the occupier had knowledge of the presence of the substance, a direction to the jury as to that element would be required. Similarly, where there is evidence that the occupier did not intend to exercise control over the substance, a direction to the jury as to that element of possession would be required.

28. The trial judge, in directing the jury as to what it was the applicant would have to establish if he was to disprove possession, instructed the jury that the burden thrown upon the applicant

would only be discharged if he satisfied the jury on the balance of probabilities that he did not know the drugs were on the premises or that the powder contained heroin. This direction was said to be deficient. It was submitted that proof that the applicant had a knowledge that the substance was on his premises and knew what that substance was, did not establish the necessary animus to exercise control over the substance and would therefore be insufficient to constitute possession. Mr Nash QC, who appeared with Mr Dickinson on this appeal, argued that proof that the applicant occupied the premises, including a bedroom, and had knowledge of the presence of the drugs, did not establish that he had possession in the absence of proof that he exercised control over the drugs. Based upon this proposition it was submitted that the trial judge was bound to direct the jury that the applicant would disprove possession if, on the balance of probabilities, he established a lack of control or a lack of intent to control the heroin that was on the premises. The directions given were said to be inadequate as they did not involve a direction as to the element of an intent to control the substance.

29. Counsel for the applicant further submitted that such a direction was necessary because there was evidence from which the jury could infer that the applicant did not have control or the intention to control the drugs. Contrary to the applicant's defence at trial, it was submitted in this court that there was a view of the facts open that the applicant knew of the presence of the drugs on his premises and in particular in his bed side drawer, that they belonged to Vo, were being used by Vo for trafficking heroin from the premises, and that the jury could have inferred that the applicant was not exercising control over them and did not intend to do so. Such facts, if made out by the evidence, would be sufficient to discharge the applicant's burden of proof. It was asserted that as such findings were open on the evidence, a direction as to the elements of possession was necessary.

30. These submissions cannot be sustained. Once the Crown established the applicant's occupation of the premises, carrying with it the legal consequence of deemed possession, the Crown had established all the elements of possession, including the applicant's intent, unless the applicant was able to prove the contrary. There was no evidence that could support a finding, on the balance of probabilities, that any of the drugs found at the time of the search in fact belonged to Vo alone. Moreover, even if there had been sufficient evidence for the jury to have made such a finding, there was no evidentiary material upon which the applicant could rely to establish that he did not intend to exercise control in relation to those drugs. Counsel for the applicant acknowledged that a person may have possession of something that belongs to another or is part of another person's business.

31. Mr Nash properly conceded that the only source from which such evidence could have come was the applicant's record of interview and stated candidly that he was unable to suggest that any answers of the applicant could support such a contention. There were no answers that gave rise to or could positively support the hypothesis that the applicant, whilst aware that Vo's drugs were concealed in his bedside table, had no control over them and did not intend to exercise control over them.

32. In the absence of some evidence to overcome the effect of the deeming provision, the trial judge correctly determined that the only issue raised by the evidence concerned the applicant's knowledge of the presence of the drugs. Moreover, as hereafter appears, the defence, for forensic as well as evidentiary reasons, only wished to pursue the issue of the applicant's knowledge of the presence of the drugs at the premises. It was not necessary that the trial judge direct the jury as to an element of possession which was not open on the evidence or raised by the defence as an issue at the trial.

33. Ground 3 concerns the directions which it is asserted should have been given following the jury question raised during the course of their deliberations. It is said that the jury question emphasised the need to give the direction the subject of ground 1. The jury asked: "[I]f Tran knew that Vo was trafficking drugs from the house and that there were drugs in the house but he was not involved in this business, it was Vo's business only, is Tran guilty of trafficking?" Mr Nash submitted that the jury question, which he assumed was directed to the issue of possession and not trafficking, showed that there was a live issue as to whether the applicant had possession or control of the drugs. He submitted that the question showed that the jury thought that it was Vo who was trafficking from the premises and that the applicant was not involved in Vo's business.

34. Defence counsel at the trial told the trial judge that the question asked by the jury was "impossible to answer" and expressed concern that what the applicant knew or may have known of Vo's trafficking in drugs had to be the subject of evidence and not mere speculation by the jury. He described the question whether the applicant knew that Vo was trafficking drugs from the house as "hypothetical". Defence counsel strenuously resisted any direction that would be based upon the applicant's awareness of the presence of drugs or that trafficking in heroin at the premises took place from the house. He submitted that there was no evidence that established that the applicant was aware of the presence of the drugs. Counsel approved the direction proposed by the trial judge to answer the jury question – namely that the only basis upon which they could find guilt was through finding that the applicant was the occupier and thus deemed to be in possession.

35. The answer which his Honour gave the jury was as follows:

"In respect of count 1, that's the trafficking charge, Mr Tran is charged with trafficking in heroin by having in his possession for sale at the time of the police raid a quantity of heroin in excess of three grams. It is only on that basis, only on that basis, that you can convict him and then only if you are satisfied of that beyond reasonable doubt. The only way you can legitimately reach that conclusion is by the following steps:

(1) You are satisfied beyond reasonable doubt that at the time he was an occupier of the premises as I have defined 'occupier' for you;

(2) If you are so satisfied of occupancy, he is deemed to be in possession of the heroin at that time unless he satisfies you on the balance of probabilities that either (a) he did not know that the powder found by the police was there at the time; or (b) that he did not know that it contained heroin. If he has satisfied you of one or other of those things, on the balance of probabilities, then he is not deemed to be in possession of the heroin and the further steps of proof which the Crown must establish in order to convict him cannot be established because the first step has not been established and therefore you must acquit him. If you are so satisfied of occupancy, on the other hand, and if he has not persuaded you of either of those two matters then he is deemed to be in possession of the heroin found at the time that it was found.

The next matter that the Crown must prove is that he was in possession of the heroin found for sale, for the purpose of selling it. The law is that possession of more than three grams of heroin is prima facie evidence of trafficking by being in possession for sale, and I told you what prima facie evidence is. Next, if after considering that prima facie evidence and indeed all of the evidence, you are satisfied beyond reasonable doubt that he was in possession of the heroin for sale at the time it was found, then you must consider whether by possessing the heroin for sale you are in all the circumstances on all the evidence satisfied beyond reasonable doubt that he was trafficking in it by this means – by means of having it in his possession for sale – that is, you are satisfied beyond reasonable doubt that he was knowingly concerned in the commercial movement of that heroin from its manufacture to its ultimate consumption. If you are so satisfied then he is guilty of trafficking. If you are not so satisfied, beyond reasonable doubt, then he is not guilty of trafficking and you turn to count 2. He is not charged with trafficking by, for example, selling on the streets in the way that Mr Vo and Mr Nguy were, or jointly with them. He is charged with trafficking by a different means altogether, namely, by possession of heroin for the purpose of sale. It is only by proof of trafficking in that way that he can be convicted. What, if anything, he knew about Mr Vo's activities is relevant to his state – Mr Tran's state of mind and knowledge and therefore relevant to whether, for example, he knew the powder was there at the time it was found and he knew that it contained heroin. But even if he was trafficking jointly with Mr Vo by selling on the streets during the previous fortnight, even if that were established, that would not make him guilty of trafficking in the manner alleged here – that is trafficking of a different kind altogether, he has not been charged with trafficking in that way, the case has not been conducted on the basis that he was trafficking in that way and he cannot be convicted in this trial of this charge by finding that he trafficked in that way. You can convict him in this trial on this charge only if you are satisfied that the crime has established each of those steps, starting with occupancy, deeming possession, Mr Tran not satisfying you on the balance of probabilities that he was not in possession, the fact that possession of more than three grams is prima facie evidence of, that's all, prima facie evidence of trafficking by way of possession for sale. It is only if you can go down that path and be satisfied of all those matters beyond reasonable doubt, insofar as the Crown had to prove them, and they have to prove them all except the one that Mr Tran has to prove which he can prove on the balance of probabilities. Now that's not a direct answer to your question, I understand that, I don't think it can be answered Yes or No or in any other way. What I have endeavoured to do briefly is to show you the path, and the only path that you can take to convict. I'm not saying you have to take that path but you can't reach conviction unless you go down that path. You can't go down any other path. Now it's entirely a matter for you whether you are satisfied of guilt at the end of the day but my point is there's only one way you can get there."

36. Although the learned trial judge had directed the jury in precisely the manner requested by defence counsel, it was submitted in this court that the learned trial judge, in answering the jury's question, failed to give the direction raised under ground 1 – that is to say, as to the element of possession concerning the applicant's control and intent to control the drug. It was further submitted that his Honour failed to instruct the jury that the applicant should be acquitted if they found that the applicant knew of the presence of the heroin but, on the balance of probabilities, they were satisfied that the heroin was in the exclusive control of Vo. The jury were directed that they could not convict the applicant unless they could exclude as a reasonable hypothesis that it was Vo alone who had possession of the heroin.

37. Mr Nash submitted that the trial judge was obliged to direct the jury as to this element of possession notwithstanding that counsel for the applicant at the trial had urged the trial judge to confine his directions to the factual issues which arose as a consequence of the applicant's defence, and had urged his Honour not to direct them upon any alternative view of the evidence that the applicant knew of the presence of the drugs. Mr Nash argued that the applicant would not have had a fair trial if the jury had not been given instructions as to the legal principles which must be applied to any view of the facts reasonably open on the evidence which has been adduced in the course of the trial. *[After discussing matters not relevant to this Report, His Honour continued]*

Ground 2

47. Ground 2 is in these terms:

"The learned trial judge misdirected the jury as to the effect of s73(2) of the *Drugs, Poisons & Controlled Substances Act 1981* and in particular, as to the meaning of the term 'prima facie'."

48. Section 73(2) of the Act relevantly provides that where a person has possession of not less than the trafficable quantity of a drug of dependence,

"The possession of that drug of dependence in that quantity is *prima facie* evidence of trafficking by that person in that drug of dependence."

49. The learned trial judge directed the jury as to the meaning of the expression "prima facie evidence" in these terms:

"If you have a significant quantity of a drug of dependence the inference is that you intend to sell it and the law says that having more than three grams of heroin powder in your possession is *prima facie* evidence that you have it there for the purpose of selling it – it is an example, if you like, of a common sense conclusion of which the words 'prima facie evidence' is really a translation. *Prima facie* evidence is evidence which would be sufficient to convict a person in the absence of any evidence to the contrary. However, although uncontradicted *prima facie* evidence may be used by you to convict an accused person such as Mr Tran, you would only be entitled to do so if in fact the *prima facie* evidence, either by itself or in conjunction with other evidence, satisfies you beyond reasonable doubt of his guilt of trafficking by possessing for sale. ... But if you have in your possession such a quantity that the only common sense conclusion is that you have it for commercial purposes, that is to sell it, and that is that you are knowingly moving it along a chain from its point of manufacture towards its ultimate consumer, then the law says that is *prima facie* evidence that you are trafficking in it and having it in your possession for sale is a step in that movement along the line."

50. Complaint is made that the direction given did not adequately convey the correct meaning of the term and overstated its effect. I do not agree. The direction included a passage which was in its terms, almost identical to a passage approved by this Court in *Stavropoulos v Zamouzaris*.^[35] The direction made clear that it was for the jury to decide whether on the whole of the evidence they were satisfied beyond reasonable doubt that the applicant trafficked in the drug which he possessed.^[36] His Honour in fact directed the jury in the very terms which counsel for the applicant submitted were required.^[37]

51. It was further submitted, as it had been in *Clarke and Johnstone*, that the trial judge failed to distinguish the evidentiary effect of s73(2) from that of s5 and had not elaborated upon how the evidence may have overcome the effect of the *prima facie* evidence provision. Again I must point out that the issue in the trial was whether the applicant knew that the drugs were present in his bedside drawer. If the "real issue"^[38] had been whether the person in possession had trafficked by having it in possession for sale, a more elaborate explanation of the evidentiary effect of s73(2)

may have been warranted.^[39] It is apparent from what I have already said that defence counsel was resistant to the development of secondary issues. His Honour was not asked to elaborate upon the concept of *prima facie* evidence and no exception was taken to his directions. Whilst the failure of counsel to object will not necessarily be fatal to the success of an application for leave to appeal, its significance is now well established.^[40] The circumstances of the present case did not call for any greater elaboration of the direction which was given and to which no exception was or could be taken. [*His Honour discussed matters not relevant to this Report and refused the application for leave to appeal.*]

^[7] See *R v Clarke and Johnstone* [1986] VicRp 64; [1986] VR 643 at 647; (1986) 21 A Crim R 135 as to the history of the legislation.

^[8] [2003] VSCA 32; (2003) 141 A Crim R 311.

^[9] At 317.

^[10] *R v Tao* [1977] QB 141 at 144 per Roskill LJ.

^[11] See the examples given in Holmes J, in *The Common Law*, "Lecture VI: Possession".

^[12] *R v Brooks* [1974] AC 862; (1974) 59 Cr App R 185.

^[13] *R v Warner* [1969] 2 AC 256; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303; *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; 25 ALR 213.

^[14] *R v Van Swol* [1975] VicRp 5; [1975] VR 61; (1974) 4 ALR 386; (1974) 27 FLR 353.

^[15] *R v Clarke and Johnstone* [1986] VicRp 64; [1986] VR 643 at 647-8; (1986) 21 A Crim R 135.

^[16] *R v Boyce* (1976) 15 SASR 40 at 43.

^[17] *R v Van Swol* [1975] VicRp 5; [1975] VR 61 at 68-9 per Gowans J (for the Court); (1974) 4 ALR 386; (1974) 27 FLR 353. See also *R v Phung* [2003] VSCA 32; (2003) 141 A Crim R 311 and *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.

^[18] *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523 at 599 per Dawson J; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.

^[19] *R v Clarke and Johnstone* at 659.

^[20] *R v Lambert* [2001] EWHC 719 (Admin); [2002] QB 1112; [2002] 2 AC 545; [2001] 3 All ER 577; [2001] All ER (D) 69; [2001] 3 WLR 206 at [61] per Lord Hope of Craighead; [2001] 2 Cr App R 511; [2001] Crim LR 806; [2001] UKHRR 1074; [2001] HRLR 55.

^[21] *Tabe v R* [2005] HCA 59; (2005) 225 CLR 418; (2005) 221 ALR 503; (2005) 79 ALJR 1890; (2005) 157 A Crim R 1; *R v Marabito* (1990) 50 A Crim R 412 at 415 per O'Bryan J.

^[22] *R v Phung and R v Maio* [1989] VR 28.

^[23] *R v Maio* at 285-7; *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523 at 585, 600; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553; *R v Van Swol* [1975] VicRp 5; [1975] VR 61 at 68; (1974) 4 ALR 386; (1974) 27 FLR 353.

^[35] (1990) 50 A Crim R 315 at 318-9 per McGarvie J with whom Murphy and Brooking JJ agreed.

^[36] *R v Clarke and Johnstone* at 659-60 per Crockett, McGarvie and Southwell JJ; *R v Medici* (1989) 40 A Crim R 413.

^[37] Outline of Submissions at [15].

^[38] *Tully* at [44], [49] per Kirby J, and [75]-[77] per Hayne J.

^[39] *R v Clarke and Johnstone* at 660.

^[40] *R v Gaffney* [1968] VicRp 54; [1968] VR 417 at 423; *R v Smart* [1983] VicRp 22; [1983] 1 VR 265 at 297; 6 A Crim R 192; *R v Clarke and Johnstone* at 662.

APPEARANCES: For the Crown: Mr OP Holdenson QC, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the applicant Tran: Mr PG Nash QC with Mr JP Dickinson, counsel. Access Law.