

Drugs: Commonwealth Offences under s 233B of the *Customs Act 1901* (before the application of the *Criminal Code Act 1995*)

Possession¹

Possession involves two elements, one physical, the other mental-

- 1. Actual physical custody or control by the defendant;**
- 2. An intention to possess or control.**

The physical element is not difficult. (If the defendant is found with the substance in his actual possession. If not, the following is necessary).

The concept of possession does not require that the article be in the hand or pocket of the possessor, but it does require, if not in his physical possession, that the possessor knowingly has the article under his control either individually or jointly with others. It is not necessary to prove that the defendant has exclusive possession of the item in question. Several persons can have joint possession.

The prosecution must prove beyond reasonable doubt, not only that the defendant knew that the thing, which is the subject of the charge, was in his custody or control, but also that he knew it was a drug to which the Act applies. It is not necessary that the defendant should know precisely what is the particular substance, but it must be shown that he was aware that he had possession of the substance the possession of which is prohibited under the laws relating to illegal drugs.

Clearly, if somebody put something in your pocket or handbag and you didn't know, nor have reason to suspect it was there, you would not have it knowingly. But whether or not a person had such knowledge is not always able to be proved by direct evidence. Whilst the prosecution must prove beyond reasonable doubt the existence of knowledge in the defendant, this is a fact which might be inferred from all the circumstances. It is a question of looking at the surrounding facts and deciding whether the prosecution has proved beyond reasonable doubt that the defendant knowingly had possession of the substance. If you find there is a combination of suspicious circumstances surrounding the substance and the defendant's association with it, it may be open to you to infer the defendant has

¹ Section 233B(1)(a),(c) *Customs Act 1901*. See *He Kaw The v The Queen* ([1985](#) 157 CLR 523; *R v Pierpoint* ([1993](#)) 71 A Crim R 187; *R v Frangos* ([1979](#)) 21 SASR 331; *R v Zampaglione* ([1981](#)) 6 A Crim R 287; *Bahri Kural v The Queen* ([1987](#)) 162 CLR 502; *Pereira v DPP* (1989) 63 ALJR 1; *R v Su* [[1997](#)] 1 VR 1.

the requisite knowledge; provided there was no other inference reasonable open in the circumstances.

If appropriate, the "wilful blindness" direction could be included here -

If you find there is such a combination of suspicious circumstances and if you are satisfied there is evidence from which you might reasonably conclude that a particular defendant's suspicions were aroused but that he deliberately refrained from making further inquiries, you might properly conclude in all the circumstances that he knew that the (suitcase) was likely to contain narcotic goods. A person is not entitled deliberately to shut his eyes to the truth, ignoring suspicious circumstances which, if investigated, would show his suspicions to be well founded. These are matters that you are entitled to consider in determining whether the only reasonable inference open to you on the evidence is that the defendant had the requisite knowledge.

"Reasonably suspected of having been imported in contravention of the Act"²

This phrase is no more than part of the description of the goods, the possession of which constitutes the offence. The substance of the offence is the possession of prohibited imports,³ that is, narcotic substances.

For this offence it is not necessary for the prosecution to prove how, when, or by whom the actual importation was effected. It is sufficient for the prosecution to prove beyond reasonable doubt that there was a reasonable suspicion that the drugs were imported and that they were illegally imported. This does not mean that the prosecution must negative each possible way in which the drugs could have been lawfully imported. It is sufficient if evidence as to the character of the drug, the likely source of the drug and the circumstances in which it is found to be in possession raises a reasonable suspicion. The suspicion must be based on facts which would create a reasonable suspicion in the mind of a reasonable person. This simply requires a common sense evaluation of the evidence.

Since the expression "reasonably suspected of having been imported into Australia in contravention of the Act" refers to the character of the prohibited

² Section 233(1)(b) *Customs Act* 1901. See *Pearce & Carter v DPP (No 2)* (1992) 59 A Crim R 182; *R v Abbrederis* [1981] 1 NSWLR 530 on appeal - unreported (1981) High Court 8/10/81; *Manley v Tucs* (1985) 19 A Crim R 310; *R v Brown* (1985) 59 ALR 763.

³ Section 51 defines "prohibited imports": "goods, the importation of which is prohibited under s 50, are prohibited imports". The goods do not, in fact, have to be imported. They simply have to fall within the classification of prohibited goods: *Milicevic v Campbell* (1975) 132 CLR 307 at 314.

imports, it is not necessary that the reasonable suspicion should have existed at the time when the defendant had the prohibited imports in his possession. In other words, once it is established that the drugs are of that character it does not matter at what time such character could be established.

Importing/Exporting⁴

The law does not provide any special definition of the words "import" and "export" for the purpose of this offence. So the words retain the meaning they have in ordinary language.⁵ They mean the physical transfer of goods from one country to another. Thus, it does not matter whether the drugs were intended for another destination and were at the relevant time only "in transit". It suffices that the goods have been brought into Australia from anywhere outside Australia, whether a foreign port, a foreign land mass, or international waters.⁶

The importation begins when the drugs are physically brought within the limits of the port with the intention of being discharged or when the drugs were in fact landed. But it does not necessarily end there. So long as an act is sufficiently connected to the physical landing it can amount to importation. For example, where a person has arranged for drugs to be secreted in a container which is delivered to a depot, but delays taking delivery for some period of time, he may still be regarded as engaged in the process of "importation" as contemplated by the law. Whether that person's action is sufficiently proximate is a question of degree and is one for you to decide.

The act of exporting involves similar concepts. A direction could be couched in the following terms:-

The ordinary meaning of "export" is to send a commodity from one country to another. This involves acts which occasion or bring about the carriage of the commodity from one country to another, the exportation would be complete when the goods have physically left the limits of the port of departure. So long as an

⁴ Section 233B(1) of the *Customs Act* 1901 sets out nine offences relating to the importation and exportation of prohibited imports (narcotics). The section relates only to narcotics [s 233B(2)]. Narcotic goods (substance) are defined in s 4 - "named in Con. I of Schedule VI etc." Sections 50-51 of the Act permit the Governor General by regulation to prohibit the importation/exportation of prohibited goods - *Customs (Prohibited Goods) Regulations*. Judicial notice of regulations see s 4A(b) *Evidence Act* (Cth).

⁵ See *R v Bull* (1974) 131 CLR 203; *Phil Kim Phieu Lam v The Queen* (1990) 46 A Crim R 402; *R v Courtney-Smith (No.2)* (1990) 48 A Crim R 49; *Australian Trade Commission v Goodman Fielder Industries Ltd* (1992) 36 FCR 517; *R v Su* [1997] 1 VR 1; *R v Pimentel* (1999) 110 A Crim R 30; *R v Mohammadi* (2006) 175 A Crim R 384.

⁶ *R v Mohammadi* (2006) 175 A Crim R 384 at [28], [82].

act is sufficiently connected to, and effectual for, the physical departure of the drugs from this country it may amount to exporting. Whether the act is sufficiently connected and effectual is a question of degree for you to decide.

(For importation).

To import involves a physical element and a mental element. Both elements must be proved to your satisfaction beyond reasonable doubt to establish criminal responsibility of the defendant. The physical element is not difficult. It is simply the fact of bringing the commodity into the country [as explained above].

The mental element required is that the defendant knew or was aware that he was bringing narcotic goods into the country and intended to do so. The prosecution does not have to show that he knew or was aware that it was actually [heroin] that he was bringing into Australia, but it must satisfy you beyond reasonable doubt that he knew or was aware that he was bringing into the country something that was a narcotic substance.

The prosecution invites you to draw an inference from the following facts (... ..). You are entitled to infer such knowledge as is put to you by the prosecution if, after considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence. If there is any other inference reasonably open, then you cannot draw the inference of knowledge.

Having said that, I should tell you that actual knowledge or awareness is not an essential element in the guilty mind required for the commission of this offence. A belief falling short of actual knowledge that the (suitcase) contains narcotic drugs could sustain an inference of intention.

If you were satisfied that the narcotic drug was imported in circumstances where it appears, beyond reasonable doubt, that the defendant was aware of the likelihood in the sense that there was a significant or real chance that his conduct involved bringing narcotic goods into Australia and nevertheless persisted in that conduct, you would be entitled to infer that he had the necessary guilty mind or intent. The basic question for your consideration is whether the prosecution has satisfied you beyond reasonable doubt that the defendant intended to import a prohibited import which requires, at least, knowledge of the likelihood that what was being imported is a prohibited import.

[If appropriate the “wilful blindness” direction could be given here. See under “Possession”.]

Suggested direction: "knowingly concerned in ..."⁷

The word "concerned" to which this section relates does not refer to a state of mind in the sense of being interested in, or worried about, the importation of drugs. For example, a father learning that his son had made arrangements to import drugs into this country, might well be anxious about, interested in, or concerned about, that fact. But he would not be guilty of the offence of being knowingly concerned merely from his knowledge of the importation.

Rather, the term "knowingly concerned in" refers to some activity or role by which it is intended to facilitate the importation of drugs. That role can take one, or more, of any number of forms - organising travel, making finance available, physically moving the drugs or providing a delivery point. The words "concerned in" cover a wide range of activities. They do not necessarily require active participation in this scheme. An omission to do something or wilful neglect may involve a person in the offence. A person may be knowingly concerned in an importation if he remained inactive, but ready and willing to receive drugs according to a pre-arranged plan, even if he did not ultimately receive or physically deal with the drugs. It is enough for the offence that the defendant was knowingly concerned in a venture which centred upon an importation.

What the prosecution has to prove beyond reasonable doubt is a practical connection between the role played by the defendant and that importation or intended importation. It is immaterial whether anyone has been charged with (or even acquitted of) the charge of importing the same drugs.⁸

Alternative direction for "knowingly concerned in..." s 223B(1) (d):

The charge against the defendant is one of being knowingly concerned in the bringing into Australia of prohibited imports, namely [specify the drug]⁹

There are three elements to the offence. They are:

1. that [specify the drug] was brought into Australia;¹⁰

⁷ Section 233B(1)(d). See *Giorgianni v The Queen* (1985) 156 CLR 473; *Yorke v Lucas* (1985) 158 CLR 661; *Natesan & Subramanian v The Queen* (1996) 134 FLR 199.

⁸ *R v Shin Nan Yong* (1975) 7 ALR 271.

⁹ See *Goldie; Ex parte Picklum* (1937) 59 CLR 254; *R v Tannous* (1987) 10 NSWLR 303; *R v Nudd* [2004] QCA 154 at [47].

¹⁰ As to the first element see *R v Meliton Pimental* (1999) 110 A Crim R 30.

2. that the defendant was “concerned in” bringing the drugs into Australia;
3. that the defendant knew that he was concerned in bringing the drugs into Australia.

As to the second element of the offence, that a person is “concerned in” the activity of bringing goods into Australia simply means that the person is “involved in” that activity, or “taking part in” it, or participating in it.¹¹ To be concerned in the importation the person must be, in some way, a participant in some aspect of the importation. It is not necessary that the person be involved in all aspects of it, it is enough if he is involved in or takes part in some aspect of the progress of the drugs from their point of origin to Australia. To have been “concerned in” bringing drugs into Australia, the person charged with the offence must have done something that can be seen to have a practical connection with bringing the drugs into Australia.¹² The question is not whether the importation would have taken place without the accused, but whether the accused was concerned in the importation.

The words “concerned in” are meant to apply to a wide variety of circumstances and activities in which people may act individually or in combination with others to bring prohibited goods into the country.¹³ It is not limited to direct involvement in the means by which the drugs were brought into Australia. Someone who makes arrangements or assists with making arrangements for the importation can also be said to be concerned in the importation. It applies to acts and events which precede and which follow the actual bringing of the prohibited goods into the country.¹⁴ It is sufficient if the concern, that is, the part played by the defendant, occurs in some part of the venture, which has as its object bringing drugs into the country. That is to say, if the involvement or participation is a practical part of the venture the person is concerned in, even though the participation occurs before the particular activity which actually brings the goods into Australia. Mere knowledge of an importation is insufficient, there must be some act or conduct on

¹¹ *R v Tannous* (1987) 10 NSWLR 303 at 307, 309; *Phil Kim Phieu Lam* (1990) 46 A Crim R 402 at 405.

¹² *Ashbury v Reid* [1961] WAR 49 at 51; *R v Tannous* (1987) 10 NSWLR 303 at 307; *Natesan v The Queen* (1996) 134 FLR 199 at 205.

¹³ *Phil Kim Phieu Lam v The Queen* (1990) 46 A Crim R 402 at 405.

¹⁴ *R v Tannous* (1987) 10 NSWLR 303 at 307.

the part of the defendant to connect himself with or involve him in the importation, although it need not in reality do anything to further the importation.¹⁵

The last element of the offence is that the person charged must be “knowingly” concerned in the importation. The offence is not proved unless it is established, beyond reasonable doubt that the accused knew that the drugs were being brought into Australia and that he was doing something to bring that about. This means that he must know that what he is doing is, or is a part of, bringing drugs into the country. It is not enough that the accused merely suspected, or had reason to believe, that what he was doing was taking part in the importation of the drugs. It must be proved that the defendant himself knew that he was concerned in the importation. It is not necessary that the defendant knew all of the details of the criminal enterprise or the names of all the other participants, for example the supplier of the drugs, or knew the means by which the drugs would be distributed and sold. It is enough if the defendant knew that the drugs were being imported and that he was playing a part in the importation. ¹⁶

[It is immaterial whether anyone else, ie the importer, has been charged with (or even acquitted of) the charge of importing the same drugs.¹⁷]

To summarise, before the defendant can be convicted he must have been concerned or, involved, or have taken part in some aspect of the importation, and he must have knowledge that what he was doing constituted importing the drugs, or constituted some aspect of importing the drugs into the country.

¹⁵ *R v Tannous* (1987) 10 NSWLR 303 at 308; *R v Nudd* [2004] QCA 154 at [47].

¹⁶ *Natesan v The Queen* (1996) 134 FLR 199.

¹⁷ *R v Shin Nan Yong* (1975) 7 ALR 271 at 274.