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24th October 1975

Mitchell J.

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R. v. KELLY

Criminal Appeal No. 43 of 1975

Dates of Hearing: 23rd and 24th September 1975

J U D G M E N T of the Court of Criminal Appeal

Coram: Hogarth, Mitchell and Zelling JJ.

(On appeal from His Honour Judge Mohr,
Central District Criminal Court)

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| Counsel for the Appellant: | Mr. P.J. Rice, Q.C., with Mr. R.N. Matulich |
| Solicitor for the Appellant: | R.N. Matulich |
| Counsel for the Respondent: | Mr. N. ^A .W. Birchall, with Mr. A.I. Fairbank |
| Solicitor for the Respondent: | Commonwealth Crown Solicitor |

Judgment No. 2662

R. v. KELLYCourt of Criminal Appeal (Hogarth, Mitchell and Zelling JJ.)

This is an appeal against conviction and an application for leave to appeal against sentence. Having heard counsel for the appellant we dismissed the appeal and refused the application. We now give our reasons for having done so.

The appellant was charged in the Central District Criminal Court with having been knowingly concerned in the importation into Australia of prohibited imports to which sec.233B of the Customs Act 1901-1974 applied; contrary to sec.233B(1)(d) of that Act. Particulars of the offence alleged were that between the 1st January 1975 and the 23rd May 1975 at Clarence Gardens and other places, the appellant was knowingly concerned in the importation into Australia of narcotic goods containing a quantity of Cannabis resin. The appellant pleaded not guilty, but was convicted and sentenced to three years imprisonment with hard labour, subject to a non-parole period of 15 calendar months.

The prosecution was commenced following enquiries which resulted from a substance identified as Cannabis resin being found concealed in a vase, in a package which appeared to have been addressed to the appellant and sent from Pakistan in April 1975. The facts which emerged at the trial, and about which there is no substantial dispute, are that the appellant, a man aged 24, had been in India and other places in Asia where he had spent some time with two other men, Sam Goodbaum, and Bernard Shelvey. Before this the appellant had been an employee of the Postmaster-General's Department for about five years, and he had gained the P.M.G.'s Telecommunications Technician's

Certificate. After obtaining the certificate he decided to take twelve months leave of absence, with the idea of travelling abroad. He met Samuel Goodbaum in Laos and Bernard Shelvey in Nepal. These two men were referred to in evidence by their christian names and it will be convenient to do so in this judgment. Sam came from the United States of America, and Bernard from Canada. About two months after they had first met, the three men were living together in Goa, in India. While he was there the appellant received a message from his father in Australia to the effect that his mother was seriously ill, and he decided that he would return home. This involved his making financial arrangements, including borrowing some \$U.S.200 from Sam. The appellant had to pass through Delhi on his way home; and the three men travelled by train from Goa to Delhi in company. Bernard had been sending envelopes containing drugs to Europe and Canada, and a discussion arose as to whether it would be feasible to send drugs to Australia also. In the course of the journey definite arrangements were made. Sam and Bernard would go to Pakistan and buy drugs. They would then return to Rishikesh in India ready to transmit them to the appellant in Australia on his return here. The appellant says that the drugs were not to be sent to him until he had written them a letter poste restante at Rishikesh, telling them whether his position at home was such that he could dispose of the drugs; and also providing them with a safe, or "cool", address if he wanted the drugs sent. A brass vase was purchased in Jaipur by Sam in the presence of the appellant; and it was agreed that if the scheme went ahead, Sam and Bernard would pack the drugs in the jar and send it to the appellant at the address that he was to nominate in Australia. He was then to return the vase to Sam for future use.

3610

The appellant returned to Australia, reaching Adelaide on the 29th April 1975. He went to live at his parents' home at 14 Arthur Street, Clarence Gardens. Meanwhile a letter had been written to the appellant, dated Friday, the 25th April at Rishikesh, and signed in the names of Sam and Bernard. The greater part of the letter was written above the signature "Bernard", with a few lines in a different hand above the signature "Sam" on the last page. In the part apparently written by Bernard, he mentions how he and Sam had gone to Pakistan and had been successful in obtaining the drugs, including some of a very special degree of excellence. He described how it had been packed in the vase and the procedure to be used in opening it. He wrote: "upon arrival please send us a telegram c/o post rest. rishikesh let us know you got it. then return it to the poste rest. new delhi. airmail don't forget to register". The letter goes on to discuss financial arrangements and how the appellant was to transmit money to them.

In the passage apparently added by Sam, the phrase occurs: "If you can, send us another cool address so we don't have too many parcels going through the same P.O. & postman". The letter concludes with a note apparently by Bernard regretting that he had not figured out a way "to make this letter self destruct" and adding "so you will have to eat it. be happy".

The appellant said that after his return to Australia he was concerned with family matters, and in particular with his mother whom he would visit every day, spending some hours with her. He did nothing towards looking around for a market to dispose of drugs, nor did he write either to Sam or Bernard giving any address to which to send the drugs. This was the

situation when he received the letter of the 25th April. So far as disclosed in evidence, he did nothing about the matter at that stage, but merely put the letter on top of the wardrobe in his bedroom, where it was later found by customs officers after they had intercepted the vase in May. The next development was that the appellant received a telegram addressed to him at his correct home address reading: "Letter and package sent 29.4. Wire Sam immdtely received or not. Poste Rishikesh". This telegram also was found by the customs agents in the appellant's bedroom, on the overlay of a spare bed. The appellant replied to Sam Goodbaum at Poste Restante, Rishikesh, U.P., India, on the 19th May. His cable read: "Bernards letter received no package Julian Kelly".

The next development was the arrival of the parcel. A customs examining officer named Cranz said that on the 20th May he was working in the customs section of the Mail Exchange in Grenfell Street, Adelaide. On that day his attention was attracted to the parcel. He described its dimensions, and said that it was addressed to "Mr. Julian Kelly, 14 Arthur Gardens, Adelaide 5039, South Australia". The parcel was in a bin where inwards air-mail parcels are placed to await examination. The examination of this parcel initially by Mr. Cranz, and by other officers, disclosed that it contained the brass vase and that there were four plastic bags containing a brown substance, secreted at the bottom of the vase. The parcel also contained a letter addressed "Dearest Julian", and signed "Judith", and in the body of the letter there is reference to the vase being a gift for "Judith's" aunt, and asking "Julian" to keep it for her until her return. This letter is clearly a blind, and we think nothing turns on it.

The brown substance was analysed, and each sample was found to contain tetrahydro-cannabinol; in one sample the percentage was the highest ever found in any sample in Australia to the knowledge of the analyst, Mr. Ronis. He described the resinous material as purified Cannabis resin. Another witness, a botanist named Kuchell, gave it as his opinion that that substance is the product of a plant of the genus Cannabis sativa. "Cannabis resin" is defined in sec.4(1) of the Customs Act 1901-1973 to mean "a substance that consists wholly or substantially of resin (whether crude, purified or in any other form) obtained from a Cannabis plant or Cannabis plants". "Cannabis plant" is defined as meaning "a plant of the genus Cannabis sativa". It was put to Mr. Kuchell in cross-examination that there are two types of Cannabis, Cannabis sativa and Cannabis ruderalis. He agreed that there were a few botanists who had so classified the plants, but his opinion clearly emerged that, in the light of present scientific knowledge, all Cannabis plants are of one type, that is Cannabis sativa. He regards the plants known as Cannabis ruderalis as being a sub-genus of this plant; and in any event, he says that Cannabis ruderalis is to be found only in Russia and Afghanistan. He would not deny the possibility that at some future time, a new scientific discovery might disclose the fact that Cannabis ruderalis is a separate genus; but it clearly emerges from his evidence that his opinion, in the light of present knowledge, is that it is not.

The next development was an early morning raid on the home of the appellant's family by officers of the Federal Department of Police and Customs. The appellant and his father were present; and as usual on such an occasion, there is some disagreement as to the conversation which took place. It is not suggested, however, that the appellant made any admission of

guilt. There were two single beds in the appellant's bedroom, and on the overlay of the unoccupied bed there were found a small personal diary in addition to Bernard's telegram which I have already mentioned.

The substance of the Crown case was that these facts established beyond reasonable doubt that the appellant had been "knowingly concerned" in the import into Australia of Cannabis resin, within the meaning of that expression as defined in sec.4 of the Customs Act. At the trial the appellant's main argument in defence was that, notwithstanding the arrangements which he had made with Sam and Bernard while he was in India, these were tentative in the sense that they were not to be put into operation until after his arrival back in Australia he had sent a "cool" address to which the substance could be posted; and that he had not done this. Consequently, even if they had sent him a parcel containing the prohibited substance, it was not in accordance with the arrangements to which he had been a party; and accordingly he had not been "knowingly concerned" in its importation.

In the notice of appeal, ground 1 sets out in sub-paragraphs seven grounds of appeal against conviction. Shortly before the appeal was called on we received notice that application was to be made to add eight further sub-paragraphs. On the hearing an order was made for the amendment of the notice of appeal accordingly; but we would point to the inconvenience and difficulty which arises from notification of intended applications to amend notices of appeal by way of the addition of further grounds being received on the eve of the hearing, or even at the hearing. If there is any real substance in the additional grounds, there may be unavoidable delay while a supplementary report is obtained

from the trial judge; and this may entail difficulties in reconvening the court at some later time. We think it important that if any new matter is raised which is likely to affect the outcome of the appeal, an opportunity should be given to the trial judge to report further on the new matters raised in the added grounds. In the present case we did not consider it necessary to do this because we dismissed the appeal and the application for leave to appeal against sentence without calling upon counsel for the respondent.

We will deal first with the grounds of appeal against conviction. Grounds (1) and (2) complain of the judge's directions with regard to the existence of a species of Cannabis known as Cannabis ruderalis, and of the jury's finding on the topic, implicit in the verdict. It seems to us that the learned trial judge discussed the evidence on this topic fully in his summing up, and left it as a question of fact to be determined by the jury, after having warned them in the usual way of the onus of proof which lay upon the Crown. We think that there was no misdirection as claimed in the first ground of appeal against conviction, nor can it properly be said that the jury should have accepted the possibility of the existence of the separate species of Cannabis ruderalis. The jury must have accepted Kuchell's evidence in the sense in which we understand it; and it was clearly open to them to do so. These two grounds therefore fail.

Grounds (3) and (4) complain that the trial judge misdirected the jury with regard to the appellant's alleged participation or concernment in the importation into Australia of the substance, and that he should have directed the jury that his actions did not constitute a concernment or participation in such importation. Ground (5) may be

associated with these two grounds. It complains that there was not sufficient evidence to satisfy a reasonable jury that the defendant was "knowingly concerned" in the importation into Australia of the Cannabis resin. It is convenient to postpone discussion of these grounds until the consideration of ground (13) which was added by amendment. Grounds (6) and (7) are in general terms, and could not succeed unless the appellant succeeds on one or more of the other grounds; they need not be considered separately.

Ground (8) complains that the learned trial judge misdirected the jury in the following terms:

"This case ladies and gentlemen, involves a narcotic drug, within the meaning of that term in the Custom's (sic.) Act of the Commonwealth of Australia. The drug alleged is Cannabis, it is sometimes known as Marijuana, sometimes known as Hashish, it has got all sorts of names

The allegation is that a prohibited import came into Australia. If that allegation is made out to you, and proved beyond reasonable doubt, then whatever your feelings may be, your duty is to convict. If on the other hand you have a reasonable doubt as to whether that fact has been made out, then of course you will acquit."

If taken in isolation, and read completely literally, this passage would clearly be a misdirection. It was certainly not enough for the Crown to prove merely that a prohibited import came into Australia. His Honour's purpose in directing the jury in this passage becomes clear when the part of the passage omitted from ground (8) is read. In that passage his Honour said: "You may have heard a good deal about it recently, and probably seen a good deal of discussion about it in various publications. But you are not to approach this case with any prejudice, one way or the other, because of the nature of the

substance alleged to have been imported". It is clear that his Honour was simply intending to invite the members of the jury to decide the case on the basis of the law as it is, and not on the basis of the law as what some members of the jury might perhaps think it ought to be. It was on this aspect that his Honour's attention was focussed, and this probably led him to make a generalisation which, read literally and in isolation, is inaccurate. Indeed, on its face the passage complained of is so broad that probably no jurymen would have taken it at face value even if the matter were not put beyond doubt later. But shortly after the passage in question, his Honour directed the jury in detail of what is required to be proved on the part of the prosecution. He said: "Well what do the Crown - the prosecution - have to prove to you before you can return a verdict of guilty? Firstly, that this accused was knowingly concerned in the importation into Australia of prohibited imports, namely a quantity of Cannabis resin". He then considered separately whether there was an importation into Australia of anything at all; whether what was imported was Cannabis resin within the meaning of the Act; and whether the appellant was knowingly concerned in that importation. We have no doubt that the jury could not have been misled by the generalization complained of, appearing as it does near the beginning of the summing up, and followed as it was by a careful and detailed statement of the facts to be proved before a verdict of guilty could be returned.

Ground (9) complains that the evidence relating to the parcel (exhibit P8) and its contents was wrongly admitted by the learned trial judge as evidence against the appellant, since, as the ground claims, no admissible nexus was

established by the prosecution between the appellant on the one hand and the exhibit and its contents on the other.

At the trial the package, exhibit P8, was admitted in evidence without objection on the part of the counsel for the appellant. The fact that no objection was taken, however, is not conclusive; see Madden v. Shorter (25 V.L.R. 325; 6 A.L.R. 18).

Mr. Rice Q.C. for the appellant referred us to Patel v. Comptroller of Customs (1966) A.C. 356 Comptroller of Customs v. Western Electric Co. Ltd. (1966) A.C. 367. Both cases are authority for the proposition that a statement of fact printed on a container within the package is not evidence of the truth of the matter so stated as against the addressee of the parcel. The Western Electric Company's case maintains this even though the addressee assents to the accuracy of the statement, if he had no personal knowledge of its truth or otherwise. But the prosecution in the present case is not relying upon any statement of fact contained on or in the package as evidence of the truth thereof. It is true that the appellant's name is shown as the addressee, but not his correct address. The address shown on the package was "14 Arthur Gardens, Adelaide 5039, South Australia Australia". The word "Street" is omitted after the name "Arthur", and the word "Clarence" is omitted before the word "Gardens". There is no explanation as to how this came to be. But we think it clear that the mere fact that a parcel is addressed to a person of itself is no evidence of his involvement in the importation into Australia of whatever is contained in the parcel. The Crown must go outside the mere receipt by the Australian postal authorities of a parcel so addressed.

But the parcel was admissible for other reasons. The Crown was obliged to prove the import into Australia of the Cannabis resin. The package was evidence which was properly admissible as part of the proof of that element of the case. The learned trial judge did not at any stage suggest that the receipt of the parcel as such went any way towards proving that the appellant was knowingly concerned in the importation into Australia of the substance.

In argument Mr. Rice extended the basis of the objection under ground (9) to embrace the question whether the package was properly admissible as evidence of its having been imported into Australia. The postmark and postal meter stamp on the package indicate a point of origin in Pakistan. Mr. Rice claimed that the court could not regard these markings as evidence of the truth of the matters of which they appeared to speak, on the authority of Patel's case and the Western Letric Co.'s case. In those cases a document in the parcel stated as a matter of history where the goods had originated. A postmark is something of a different order. It is an official cachet which is applied to a postal article, not as a statement of history, but as a contemporaneous record of a transaction. According to an old authority, Perkins' Case (1826) 1 Lew 99; 168 E.R. 974, a postmark is evidence of the place of posting of a postal article. In the circumstances of this case it is immaterial whether the postmark indicating that the parcel had come from Peshawar provided proof of its place of posting, or whether it was hearsay evidence which was not admissible to prove that the parcel was posted in Peshawar. (cf. Patel v. Comptroller of Customs (supra) at 365; Comptroller of Customs v. Western Letric Co. Ltd.

(supra) Myers v. D.P.P. 1965 A.C. 1001; Reg. v. Rice 1963 1 Q.B. 857 at 872). In cross-examination by counsel for the appellant, Mr. Cranz was asked: "May we all rest assured from what your knowledge of the situation is that the parcel to which we have referred, exhibit P8, was dispatched from Pakistan and not India?" He answered: "It was dispatched from Peshawar. Peshawar is situated on the border of Pakistan and Nepal". Counsel did not seek to challenge Mr. Cranz's evidence of the parcel having been dispatched from Peshawar.

The fact that the parcel was found by Mr. Cranz to be in the bin in which all airmail parcels awaiting examination by a customs officer were placed was a fact which was relevant to the issue whether the parcel was imported into Australia (cf. R. v. Rice (supra) at 871). The evidence given by the accused as to the purchase of the vase and the intention to post it to him as a container of Cannabis and the other evidence which showed communications between the accused and the other two men was cogent evidence in support of the proposition that the parcel had been sent into Australia from overseas. In his charge to the jury the learned trial judge said: "Firstly, was there an importation into Australia of anything at all? The evidence on that seems to be overwhelming that the brass vase, which is an exhibit, and the parcel which contained it, came into Australia from overseas - from India. Therefore, as it seems to me there is no possible doubt as to the fact that something was imported into Australia". Then a little later the learned trial judge said: "The specimens which we have come from India - Pakistan or India". At this stage the appellant's counsel interjected

and said: "Pardon me Sir the package comes from Pakistan". The learned trial judge continued "Pakistan, it was posted in India. Indian subcontinent, shall I use that". The appellant's counsel again interjected "It was posted from Pakistan Sir". His Honour said: "Was it. It does not make much difference it was posted from Pakistan it was not posted from Afghanistan or Russia". It was clearly common ground that the parcel was posted from outside Australia and that it reached Australia. In these circumstances it is unnecessary to decide whether the postmark was receivable as evidence of the place where the parcel was posted.

Ground (10) complains that the learned trial judge failed to direct the jury that the package (exhibit P8) was not in fact addressed to the appellant's home address, but to the address which we have already mentioned. We do not see how a reference to this fact by the trial judge could have helped the appellant. Clearly enough the package was intended for him by the sender. The fact that it contained a wrong address might have been merely an accident, the evidentiary value of which would be nil; or it might have been an effort to confuse the authorities. The latter might have had more sinister implications than a mere mistake. However that may be, we think it improbable that the sender of the parcel would have gone out of his way to address it in such a way as to raise queries which might not otherwise have been raised with regard to the delivery of the parcel; and we do not see how the appellant could have obtained any assistance had the judge directly referred to the wrong address. There was sufficient evidence ab extra, from which the jury could properly conclude that the sender of the parcel intended it for the appellant.

This of course still left the question, whether the

appellant was knowingly concerned in the sending of that parcel and of its importation into Australia. The form of the address does not touch on that issue at all.

Ground (11) complains of the admission in evidence of the telegram (exhibit P1) purporting to have been sent from Rishikesh. This was found in the possession of the appellant, and on the evidence, led to his replying, saying that the letter, but no parcel, had been received. It was clearly admissible.

Mr. Rice did not seek to rely upon ground (12) which sought to distinguish between acts matters and things done by the appellant, and of his state of mind in respect thereof, outside the jurisdiction as compared with those done within the jurisdiction. He accepted the authority of the Western Australian case Rajalingam Sivaprahasam v. R. (1972) W.A.R. 137.

Ground (13) complained that the learned trial judge failed to direct the jury as to what facts and circumstances constituted in law "active participation" on the appellant's part. This ground may be considered along with grounds (3), (4) and (5).

It is to be noted that the words in inverted commas in ground (13) are not taken from sec.233B. The words used there are "knowingly concerned".

After having discussed the question of the parcel's having been imported and of its containing Cannabis resin within the meaning of the Act the learned trial judge said: "If you are satisfied of those things, beyond reasonable doubt, then you must turn to consider the position of this accused. Has it been proved beyond reasonable doubt that he was knowingly concerned in that importation? What that phrase means ladies and gentlemen is this, that he was knowingly and to that extent

consciously and deliberately concerned and co-operating in the importation of the prohibited import. Therefore, if you are satisfied beyond reasonable doubt that he knew of the scheme, the question really to be solved is this. If all the other factors which I have mentioned are proved beyond reasonable doubt, was he or was he not co-operating in the importation of the prohibited import? It is not enough for the Crown to prove that he did nothing to prohibit, or stop the importation, if that is all he had to do with it. Was he consciously and deliberately concerned and co-operating in the importation of the prohibited import? You will readily appreciate ladies and gentlemen that probably many people were concerned in the importation of this Cannabis resin. If it came by air, there were all the people that loaded the plane, there was the pilot and so on that flew the plane into Australia, but they, although concerned, of course knew nothing of the contents of the parcel. It is knowledge and concern which must co-exist, before this accused can be guilty".

The learned trial judge then clearly stated the main ground of defence relied upon by the appellant. He said: "The accused says that there was, in effect, a missing link in the scheme and that is that the scheme was not to come into operation, unless and until he supplied to his confederates, or his to be confederates in India, the address to which they were to consign the Cannabis resin and that he never took that step". He referred at some length to the letter of the 25th April, exhibit P3. He went on: "Well ladies and gentlemen, you may well find it proved that when the accused left India, he knew of the plan. And when he received the letter from Sam and Bernard, the letter dated 25th that you will have, when he

received that on his return to Adelaide, he then knew that the plan had been put into operation. Whether or not he had communicated with the two men in India, as to an address, whether or not they, despite what he says in his evidence, they had agreed before he left India as to where the first parcel or the parcel was to be sent, whether or not either of those things are so, when he received the letter, he knew that the scheme was afoot and actually underway. The question is, was he from then on, at the very least, knowingly concerned in what was happening? Well ladies and gentlemen, we know that two other things happened. On May the 17th of this year a telegram arrived addressed to the accused 'letter and package sent, 29.4, wire Sam immediately received or not, post Rishikesh'. You may ask yourselves ladies and gentlemen, why that telegram was sent. Were the two people in India merely becoming restive at not having heard from the accused, or is there some other reason, why that telegram was sent? Certain it is that it was received by the accused. Now ladies and gentlemen, right up until then, and indeed for all times, the accused says that he was not concerned. He knew what was going on, he must have known what was going on, but it was no concern of his. He was, as it were, an unwilling participant; they were doing it without his blessing, that is sending the stuff into Australia. But on receiving that telegram ladies and gentlemen he himself sent a telegram to Mr. Sam Goodbaum, post restante Rishikesh U.P. India, and it reads: 'Bernard's letter received', that's the blue letter, the one with the 25th of April, 'No package Julian Kelly' and you will ask yourselves, ladies and gentlemen 'Why if he was not concerned in the scheme which he knew was afoot, why he sent that white telegram to Mr. Goodbaum saying 'No package?' if it was no

concern of his. If ladies and gentlemen you are satisfied beyond reasonable doubt that this accused not only knew what was going on, and either knew it right from the outset or knew it to be actually afoot at some later stage and joined in, then he is knowingly concerned".

In his summing up the learned trial judge followed the judgment of the Court of Appeal in R. v. Hussain (1969) 2 Q.B. 567, an appeal against a conviction on two counts relating to the smuggling of drugs. The first count charged the accused of being knowingly concerned in a fraudulent evasion of the prohibition of the importation of Cannabis contained in sec.2 of the Dangerous Drugs Act 1965 (U.K.). The defence was that the accused did not know precisely what the substance was which was being imported. In the charge to the jury the chairman said: "Knowingly concerned in that operation, means that he was co-operating with the smugglers, if I may so put it, and it does not matter at all if he did not know precisely the nature of the goods the smugglers were dealing with". The conviction was upheld on appeal. The case is not on all fours with the present case, but is of some help by way of analogy. In the present case, from the time he received the letter of the 25th April, it is reasonable to assume, and we think the jury were entitled to infer as proved beyond reasonable doubt, that the appellant knew what was going on. Whatever his involvement, if any, from that time at least it was "knowingly" within the meaning of the section. But was he "concerned" within that section? The word is no doubt deliberately chosen to cover a wide range of activities since it would be well-nigh impossible to define more closely the various acts which could go towards the fulfilment of a plan

for the importation of prohibited articles.

The ground complains that the trial judge failed to direct the jury in regard to what constitutes in law "active participation". The words "active participation" are not taken from the section, and indeed the learned trial judge in his charge to the jury consistently used the words of the section, namely being "knowingly concerned". We think it is a mistake to believe that a man has to be engaged in active participation in some scheme before he can be said to be knowingly concerned. No doubt some act on his part would normally be required in order to prove his knowing concernment. The meaning of the word "concerned" in a similar context was considered by the Full Court of Western Australia in Ashbury v. Reid (1961) W.A.R. 49. Having cited the definition of the word from the Oxford Dictionary, the court, in considering whether an act or omission on the part of an individual came within the terms of the section, posed the question "whether on the facts it can reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence, whether it does show a practical connection between him and the offence".

It is sufficient if a person remains inactive in Australia, but ready and willing, pursuant to some preconcerted plan, to be the recipient of a parcel when it is delivered to him, in order that he may then embark upon his part in carrying out the plan. It would be sufficient to make out the case for the prosecution if it were established that he was holding himself in readiness to receive the package and to deal with it as had been agreed, even if the package was not sent precisely in accordance with the previous arrangement. In our view the evidence amply justifies the conclusion that he was

holding himself in readiness. This was sufficient to constitute his being "knowingly concerned" in the importation of the drug. It was not required that he should be actively participating in the scheme at that stage in order for him to fall within the scope of the section. Had the appellant not sent his cable reporting the non-arrival of the package, it might have been dangerous to leave to the jury the question whether his mere inaction was a sufficient base from which to draw the inference that he was standing by waiting to receive the parcel and to deal with it according to the preconceived plan. That would have been possible, but perhaps not proved. But his retention of the letter of the 25th April and his cable in reply constituted evidence from which the jury was entitled to draw the necessary inference, which clearly it did.

His Honour concluded by putting the question to the jury, "Was he knowingly and to that extent consciously and deliberately concerned and co-operating in the importation of the prohibited import?" This, we think, adequately posed the problem which his Honour had previously discussed at length. We think that this was a proper direction on the topic. We think that grounds (3), (4), (5) and (13) must fail.

Ground (14) reads:

"The learned trial judge erred in law in failing to direct the jury properly or at all of the evidentiary effect of the package (P8) and its contents and of the letters (P3) and (P10) or any of them, and in particular, (but without limiting the generality of the foregoing) failed to distinguish clearly or at all between the relevance of the said exhibits or any of them and their probative significance".

We are not clear in what respect it is claimed that the trial judge failed to direct the jury properly on these

matters. No specific passage in the summing up was pointed to as being a misdirection.

So far as the package, exhibit P8, is concerned, the learned trial judge properly directed the jury to apply their minds to determining the nature of its contents, and whether it had been imported into Australia. So far as exhibit P3 is concerned, that is the letter of the 25th April, it cannot be taken in isolation. It is a letter written and apparently signed by the two people with whom the accused said in evidence that he had conspired for the sending of drugs to Australia; it deals in some detail with the topic of sending drugs; and it was retained, without comment, so far as the evidence goes, by the appellant. It is referred to in his cable of the 19th May, "Letter received but no parcel". We think that it was admissible as part of the Crown case to prove a conspiracy between Sam, Bernard and the appellant. It must be remembered that although the appellant gave evidence at the trial in which he frankly admitted the conspiracy, this was not done until after the close of the Crown case; and the letter was relevant when admitted as part of the Crown case, as going to the proof of there having been such a conspiracy. We think that the letter could properly be regarded by the jury as going towards proof of the original conspiracy. It said nothing, however, as to the substantive point taken by the appellant, namely that the conspiracy was not to be converted into action until he had sent an address, which in fact he had not done. This topic was dealt with separately by the learned trial judge, and we think the jury could not have been misled into thinking that the letter was any proof as against the appellant that the parcel was sent as the result of an existing agreement between the three men for Sam and Bernard to do so. So far as exhibit P10

is concerned, we do not think that it does the appellant any greater harm than could have been done by the very nature of the package itself. Clearly enough the letter was written in an attempt to deceive any prying eyes in the Customs House. But the very hiding of the Cannabis resin was obviously done for the same purpose. Both pieces of evidence, then, show that whoever sent the parcel did so hoping that the contents of the vase would slip through the customs examination without detection. The letter, so far as we can see, did nothing except emphasise the obvious, namely that the sender of the parcel did not want the Cannabis resin to be detected. But this did not touch the question, whether the appellant was knowingly concerned at that time in what was going on; and the trial judge did not suggest to the jury that it did. For these reasons we do not think there is any substance in ground (14).

Ground (15) complains that the trial judge erred in law in failing to direct the jury properly, or at all, of the evidentiary effect in law of entries in the appellant's diary, which had been found on the spare bed in his bedroom as we have already mentioned.

The diary was admitted, as exhibit P2, without objection. The purpose of the prosecution in tendering the diary was probably to help establish the conspiracy, in that it contained an entry of an address in India at which the appellant might contact his confederates until the 1st May. But it also contained other matter which suggested, for example, that he had been using drugs while in India; and Mr. Rice contended that these and some other entries were prejudicial and that the jury should have been warned not to be affected by them. From the course of the trial, by the

time his Honour came to direct the jury, the existence of the original conspiracy was well established by the evidence of the appellant himself. Consequently, the importance of the diary had receded into the background and the learned trial judge made no reference to it at all in his summing up. No point was taken by counsel of his not doing so, and we do not think that his not referring to the diary in the course of the summing up can be regarded in any way as a misdirection.

The other points raised in the notice of appeal as grounds for the appeal against conviction were not argued and we will not refer to them here.

As to the application for leave to appeal against sentence, in his remarks on sentence the learned trial judge referred to the contents of the parcel. He said that it contained a quantity of just under 100 grams of Cannabis resin in a refined form. There were four separate packages, one of which he was told by the analyst was the most highly refined Cannabis resin ever to be discovered in Australia. Evidence of values had varied. He said that the applicant's own value was somewhere around \$1,500, whereas expert evidence given from a Commonwealth narcotics officer was that he could have disposed of the Cannabis in the form in which it was to be received for somewhere between \$3,000 and \$4,000. Had the applicant chosen to put it into capsules it would have had a value on the market of about \$6,000; and had the applicant gone to the ultimate step of putting it into the most likely market of form, by adulterating ordinary cigarettes with it, the value would have been somewhere around \$20,000 and perhaps much more. His Honour referred to the recent cases involving the importation of Cannabis resin into Australia as part of a profit-making venture. In R. v. Jackson and Jennett

(4 S.A.S.R. 81; 20 F.L.R. 110) the Court of Criminal Appeal refused applications for leave to appeal against sentences of three years imprisonment and nine calendar months imprisonment respectively. The sentence of three years imprisonment was imposed on Jackson, who was regarded by the learned trial judge as being the major participant in the scheme for the importation of the drug. The amount involved there was of the value of approximately \$5,000. In R. v. Peel (1971) 1 N.S.W.L.R. 247 the appellant had been convicted of an offence against sec.233B, involving the import of Cannabis resin of the value of between \$7,000 and \$9,000. The appellant was aged 22 and had no previous convictions. He was to be paid \$1,000 for bringing the drug into Australia. The Chairman of Quarter Sessions fined the respondent \$400 and allowed him six months to pay. On appeal by the Crown on the ground that the sentence was inadequate, the Court of Criminal Appeal held that the sentence in fact was inadequate and that the appeal should be allowed; that the penalty imposed by the Chairman of Quarter Sessions should be set aside and in lieu thereof that the respondent should be sentenced to a period of imprisonment for three years with a non-parole period of nine months. On a similar charge involving Cannabis of the value of approximately \$700, the Full Court of Victoria in R. v. Piercey (1971) V.R. reduced a sentence of three years imprisonment to a sentence of one year. In their reasons for judgment, however, the Full Court said that the penalty of three years fixed by the trial judge was not unreasonable, but it was established before the Full Court that the appellant, a seaman, would be unable to return to his employment as such if he were absent from work for more than twelve months. In view of these very special circumstances the sentence was reduced to twelve months.

In Rajalingam Sivaprahasam v. R. (1972) W.A.R. 137, the appellant had been convicted of an offence involving a quantity of about 9 lbs. of Cannabis resin. He had been sentenced to imprisonment for four years. On his appeal against sentence, the Full Court of Western Australia said: "The offence related to the importation of a very large quantity of the drug. The importation was for gain and it is a matter of some notoriety that the profits are considerable so that a substantial penalty will be justified as a deterrent against the commission of a crime which is difficult to detect". The Full Court refused to interfere with the sentence. Mr. Rice pointed to the fact that the quantity involved in that case was very much greater than the quantity involved here; and that is true. Nevertheless, the evidence before the learned trial judge in this case was that the value of the Cannabis resin imported, having regard to the package of highly refined material, was potentially very large.

The trial judge referred to the fact that the applicant had hitherto borne an excellent character and we have no doubt that he had before him, mentally, the matters urged in favour of the applicant by his counsel.

We are unable to say that the sentence imposed in this case was manifestly excessive. Indeed, we think that it was generally consistent with the range of sentences imposed in other reported cases of the same nature. Nor do we think that the sentence was imposed without regard to mitigating features which applied to the applicant.

For these reasons we dismissed the appeal and refused the application for leave to appeal against sentence. We now publish these reasons for having so done.