SUPREME COURT OF SOUTH AUSTRALIA

(Court of Criminal Appeal)

R v PRINGLE

[2017] SASCFC 9

Judgment of The Court of Criminal Appeal
(The Honourable Justice Kelly, The Honourable Justice Nicholson and The Honourable Justice Hinton)

23 February 2017

CRIMINAL LAW - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS OF APPEAL - MISDIRECTION AND NON-DIRECTION

CRIMINAL LAW - PARTICULAR OFFENCES - DRUG OFFENCES - TRAFFICKING

CRIMINAL LAW - PARTICULAR OFFENCES - DRUG OFFENCES - POSSESSION - KNOWLEDGE AND INTENT - SOUTH AUSTRALIA

Appeal against conviction. The appellant was convicted after a trial by jury of the offence of trafficking in a large commercial quantity of a controlled drug, contrary to section 32(1) of the Controlled Substances Act 1984. The police searched a locked shipping container and found 38.2 kg of cannabis. The container was located on business premises owned by a company of which the appellant was the sole shareholder and sole director and from which the appellant conducted a business. The container had been purchased by the appellant in a business name registered to the appellant. The prosecution case was wholly circumstantial. Whether the trial miscarried as the result of the wrongful admission of various pieces of evidence (including having regard to section 34P of the Evidence Act 1929) – whether the Judge erred in the directions to the jury concerning various types of discreditable conduct evidence (section 34R of the Evidence Act 1929) – whether the trial miscarried as a result of a misdirection concerning an element of the offence – whether the trial miscarried as a result of the jury being invited to return a verdict of guilty on one of two mutually exclusive legal and factual pathways – whether the trial miscarried as a result of the failure by the Judge to give an extended unanimity direction – whether the verdict of guilty was unreasonable or unsupportable by the evidence.

Held per Nicholson J (Kelly and Hinton JJ agreeing):

On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (HIS HONOUR JUDGE COSTELLO) DCCRM-14-1515

Respondent: R Counsel: MR I PRESS SC WITH MS E MACGREGOR - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS (SA)
Appellant: BARRY ROBERT PRINGLE Counsel: MR D EDWARDSON QC WITH MR K HANDSHIN - Solicitor: WOODS & CO LAWYERS

Hearing Date/s: 15/09/2016

File No/s: SCCRM-16-169

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1. Appeal allowed on the basis of grounds 3, 5 and 7.2, there having been a miscarriage of justice as a consequence of the Judge's failure to comply with section 34R of the Evidence Act 1929 in conjunction with a misstatement of the requisite standard of proof.

2. Conviction set aside.

3. Matter remitted to the District Court for a new trial.

Controlled Substances Act 1984 s 4, s 32; *Evidence Act 1929* s 34P, s 34R; *Criminal Law Consolidation Act 1935* s 353, referred to.
Barca v The Queen [1975] HCA 42, (1975) 133 CLR 82; *Peacock v The King* [1911] HCA 66, (1911) 13 CLR 619; *Plomp v The Queen* [1963] HCA 44, (1963) 110 CLR 234; *R v Barker* (1988) 34 A Crim R 141; *Anderson v The Queen* (1992) 60 SASR 90; *Wheal v Bottom* (1966) 40 ALJR 436; *Lawler v Leeder* (1981) 1 SR (WA) 389; *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 7)* (1987) 14 NSWLR 104; *Shepherd v The Queen* [1990] HCA 56, (1990) 170 CLR 573; *R v Forrest* [2016] SASCFC 76, (2016) 125 SASR 319; *R v Perara-Cathcart* [2015] SASCFC 103; *R v Parisi* [2014] SASCFC 57, (2014) 119 SASR 277; *R v McCarthy* [2015] SASCFC 177, (2015) 124 SASR 190; *R v Leivers & Ballinger* (1998) 101 A Crim R 175; *R v Cramp* (1999) 110 A Crim R 198; *Libke v The Queen* [2007] HCA 30, (2007) 230 CLR 559; *M v The Queen* [1994] HCA 63, (1994) 181 CLR 487; *R v Cluse* (2014) 120 SASR 268; *Lithgow City Council v Jackson* (2011) 244 CLR 352; *Martin v Osborne* (1936) 55 CLR 367, considered.

R v PRINGLE
[2017] SASCFC 9

Court of Criminal Appeal: Kelly, Nicholson and Hinton JJ

KELLY J.

1 I agree with the orders proposed by Nicholson J and with his reasons.

NICHOLSON J.

Introduction

2 On 26 May 2016, following a trial before a jury in the District Court, Barry Robert Pringle was convicted of the offence of trafficking in a large commercial quantity of a controlled drug.[1] He has raised nine grounds of appeal, a number of which contain numerous sub-grounds.

3 Appeal ground 2 raises a question of law for which permission to appeal is not required. A single Judge of this Court, at an earlier hearing, granted permission to appeal on grounds 6 and 7. All other grounds, being grounds 1, 3, 4, 5, 8 and 9, were referred to the Court of Criminal Appeal for the question of permission to be heard and decided at the same time as the appeal.

Brief summary of the prosecution case

4 The appellant was the proprietor of a business, Bench Excavations, which operated from premises comprising approximately 4,000 square metres at Port Adelaide. On 14 June 2013, at about 12.40pm, police attended at the Port Adelaide premises for the purpose of conducting a search of a shipping container located on the premises. The appellant was not present but a number of other persons, including various employees were present. A person who identified himself as John Winslet, the manager of the business, spoke with the police. The shipping container was secured with three padlocks. No keys were made available to the police and they had to remove the three padlocks using an angle grinder. At some time between 2.40 and about 3pm, the police gained access to the shipping container and located boxes containing approximately 90 bags of cannabis, weighing, in total, 38.2 kilograms.

5 On that same day, the police also searched an external room at residential premises in Walkerville where the appellant lived with his partner, Karen Rutland. The room contained hydroponic equipment and other evidence suggesting that cannabis had recently been grown and harvested there. The appellant was originally charged with a second count, that of possessing prescribed equipment. However, shortly before the trial on the trafficking charge commenced, an application for severance of the two charges was upheld by the trial Judge.

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[1] Contrary to section 32(1) of the *Controlled Substances Act 1984*.

6 The order for severance was based, essentially, on the concern that the possessing prescribed equipment charge imposed a burden of proof on the appellant which conflicted with the burden of proof assumed by the prosecution with respect to the trafficking charge, to the potential confusion of the jury. Nevertheless, the Judge held that all of the evidence bearing on the charge of possessing prescribed equipment was admissible in the trial of the trafficking charge.

The charge

7 The offence of trafficking in a large commercial quantity of a controlled drug is comprised of the following four elements, each of which must be proved by the prosecution beyond reasonable doubt.[2]

(i) the substance found by the police was a controlled drug;

(ii) the appellant trafficked in the substance;

(iii) when trafficking in the substance the appellant did so knowing that the substance was a controlled drug; and

(iv) the quantity of the controlled drug trafficked was a large commercial quantity.[3]

8 Element (i) was never in contest. It was common ground that the substance located by the police and relied upon by the prosecution to make out the charge was a quantity of 38.2 kilograms of female cannabis head material, packaged roughly in one pound lots. Elements (ii), (iii) and (iv) were in dispute.

9 The definition of "traffic" in section 4(1) of the *Controlled Substances Act 1984* is in the following terms.

> Traffic in a controlled drug means–
>
> (a) sell the drug; or
>
> (b) have possession of the drug intending to sell it; or
>
> (c) take part in the process of sale of the drug;

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[2] Section 32(5) of the *Controlled Substances Act 1984* provides that where it is proved that the defendant had possession of a trafficable quantity of a controlled drug, a presumption as to the defendant's belief or intention concerning sale arises in particular defined circumstances. It is arguable that the presumption was available in the present case. However, because the prosecution relied on alternative pathways leading to guilt of the offence (referred to further below) it elected to assume the usual burden of proving all elements of the offence beyond reasonable doubt without relying on any otherwise available presumption.

[3] The relevant regulation under the *Controlled Substances Act 1984* prescribes a quantity of two kilograms or more of cannabis to be a large commercial quantity.

The prosecution case was that either (b) or (c) or both had been proved as against the appellant beyond reasonable doubt.

10 Insofar as paragraph (b) is concerned, section 4(1) contains the following inclusive definition.

> Possession of a substance or thing includes–
>
> (a) having control of the disposition of the substance or thing; and
>
> (b) having joint possession of the substance or thing;

Insofar as paragraph (c) of the definition of "traffic" is concerned, subsections 4(4) and 4(5) provide as follows (emphasis supplied).

> (4) For the purposes of this Act, *a person takes part in the process of sale*, manufacture or cultivation *of a controlled drug* or controlled plant *if the person directs, takes or participates in any step*, or causes any step to be taken, *in the process of sale*, manufacture or cultivation *of the drug* or plant.
>
> (5) For the purposes of this Act, *a step in the process of sale* of a controlled drug *includes*, without limitation, *any of the following when done for the purpose of sale of the drug*:
>
> (a) storing the drug;
>
> (b) carrying, transporting, loading or unloading the drug;
>
> (c) packaging the drug, separating the drug into discrete units or otherwise preparing the drug;
>
> (d) guarding or concealing the drug;
>
> (e) providing or arranging finance (including finance for the acquisition of the drug);
>
> (f) providing or allowing the use of premises or jointly occupying premises.

11 The primary issues before the jury were whether the appellant was proved to have been in "possession" of the 38.2 kilograms of cannabis with an intention to sell at least a large commercial quantity, that is, two kilograms or more, thereof *or* whether the appellant was proved to have taken part in the process of sale of the 38.2 kilograms of cannabis or, at least, a large commercial quantity thereof. Insofar as the latter alternative is concerned, it was the prosecution case that the appellant took or participated in a step in the process of sale of the cannabis in that his involvement, at the least, fell within paragraphs (a), (d) or (f) of section 4(5).

The factual basis of the prosecution case in more detail

12 The prosecution case was wholly circumstantial and required the jury to be directed in accordance with and to adopt the required reasoning as explained in *Barca v The Queen*,[4] *Peacock v The King*[5] and *Plomp v The Queen*.[6]

13 The primary matters of fact relied on by the prosecution, based on the evidence and inferences to be drawn are summarised in the following paragraphs. Much of the evidence in support of these matters is not in contest other than as will be referred to when considering the various grounds of appeal. The availability of certain inferences, the relevance of certain facts and inferences and the ultimate inference to be drawn as to guilt are in contest.

14 The appellant was the sole shareholder and director and, in effect, the controlling mind of the company BRP Holdings Pty Ltd. That company owned premises in Lipson Street, Port Adelaide from where the company conducted its business. The premises had been purchased by BRP Holdings Pty Ltd in April 2012. The appellant is also the registered owner of the business name Bench Excavations and has been so since the date of registration of that business name, 22 May 2007.

15 The shipping container in question was purchased in the name of Bench Excavations in February 2010. As at the date of the police search of the shipping container, 14 June 2013, it was situated at the Port Adelaide premises. It is an available inference that the appellant, as owner of the shipping container and as the controlling mind of the company that owned the Port Adelaide premises, arranged for the shipping container to be moved to and located on the Port Adelaide premises sometime after those premises were purchased in April 2012.

16 On 14 June 2013, the shipping container was sealed with three padlocks. The keys were not available to the police and the padlocks were of a type such that a police locksmith was unable to gain access to the container. Access to the container had to be obtained by using an angle grinder. The container was under the cover of a large industrial carport in a prominent position in the yard of the premises.

17 In addition to the 38.2 kilograms of cannabis, the contents of the container included various documents that on their face showed a connection with the appellant. Some such documents were seen by Senior Constable Flavel when he first entered the container on 14 June 2013 and a box of such documents was seized by police three days later on 17 June 2013. The box contained invoices for the years 2010 and 2011 to Bench Excavations and were addressed to the appellant at his residential address and a previous work address. The container had been left unsecured between 14 June and 17 June 2013.

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4 [1975] HCA 42; (1975) 133 CLR 82.
5 [1911] HCA 66; (1911) 13 CLR 619.
6 [1963] HCA 44; (1963) 110 CLR 234.

18 The police attended the Port Adelaide premises on 14 June 2013 at about 12.40pm and made various attempts over the next two hours to open the container in view of a Mr John Winslett who identified himself as the site manager. The police attempted to telephone the appellant on a number of occasions but were unable to speak to him. The police officer concerned could not recall whether or not he left a message. The container was opened some time between 2.40 and about 3pm.

19 According to the billing record of outgoing calls and charges for the phone number subscribed to by the appellant, a number of calls were made from that phone number, on 14 June 2013, to Karen Rutland, the appellant's partner. The prosecution relies on this evidence for the inference that the appellant was using his phone service on that day.

20 According to the call charge records, the appellant's phone also called:

(i) the number of a man called Damien Morley at 2.10pm (22 seconds) 9.15pm (28 seconds) and 10.43pm (text message);

(ii) the number of John Winslett at 2.12pm (2 minutes) 2.38pm (5 seconds) and 2.41pm (54 seconds); and

(iii) the number of a man called Simon Jones at 2.50pm (2 minutes) 7.18pm (4 seconds) and 7.56pm (3 seconds).

21 Apart from any inference that might be available from the duration of the various calls, there was no evidence as to whether or not direct contact was in fact made by the appellant with any of Damien Morley, John Winslett or Simon Jones, nor as to whether any message was left at a message service available to any of those men or, if so, whether access to any such message was obtained. There was no evidence as to the content of any message that may have been left or conversation that may have been conducted.

22 Fingerprints were located on two of the plastic bags containing cannabis found in the container. One of the fingerprints belonged to a man called Ian Thompson. According to the evidence given by Ian Thompson, he worked for the appellant for three years at Bench Excavations when it conducted its business from premises at Royal Park. Ian Thompson finished working for the appellant in January 2010. Between 2010 and 2014, Ian Thompson worked for a shop called "Bloomin' Hydro". He said that at the Bloomin' Hydro shop he handled lots of plastic shopping bags. He did not recall the appellant as being a customer of Bloomin' Hydro.

23 However, the registered owner of the business name Bloomin' Hydro was the man called Damien Morley. The prosecution relied on this fact as permitting an inference that it was not merely a coincidence that the appellant called Mr Morley on the afternoon of 14 June 2013 at 2.10pm.

24 The man Simon Jones, whom the appellant's phone called or attempted to call at 2.50pm, was found by the police at or about 5pm on 14 June 2013 in the external room at the appellant's Walkerville premises, apparently in the process of dismantling an hydroponic system. The police located in the room four large pots, eight large light shades, nine transformer boxes, an irrigation system and a broom. The pots did not contain any growing cannabis. Fingerprints matching those of Simon Jones were found on transformers forming part of the hydroponic equipment in the room. Fingerprints matching those of the appellant were found on two lightshades.

25 The prosecution maintains that the evidence supports an inference that the appellant contacted Simon Jones at 2.50pm on the day in question in order to arrange for him to dismantle and remove the hydroponic system.

26 The prosecution contends that it was open to the jury to infer, to the effect, that at 2.50pm the appellant did contact Simon Jones; that this was because the appellant had become aware (probably through telephone contact with John Winslett) that the police were intending to search or were in fact searching the shipping container; that the appellant knew that they would find the cannabis; and that the appellant perceived a risk that the police would thereupon attend at his Walkerville premises and locate the hydroponic system unless it could be dismantled and removed in the meantime. In short, the prosecution contends, *inter alia*, for the inference that the appellant was aware of the cannabis in the shipping container.

27 Unchallenged expert evidence given by Detective Sergeant Nguyen was to the effect that a sophisticated hydroponic system for the cultivation of cannabis can include equipment such as high wattage lighting, irrigation systems, cooling exhaust fans, carbon filters and plastic sheeting. He also expressed the opinion that a hydroponic system for cannabis cultivation may also include ropes to support the cannabis plants when, as they mature, the branches become heavier due to the presence of the thick oily cannabis head material. Many of these features including such a rope system were present in the room.

28 Police officers who attended gave evidence that they observed cannabis fronds or leaves or leaves that looked like cannabis leaves, that there was a smell of cannabis and that the room was unusually warm or muggy.

29 The prosecution also relies upon the evidence relating to the cannabis grow room for an inference that the appellant, as at shortly prior to 14 June 2013, had the means and the knowledge needed to produce cannabis; a strand of circumstantial evidence relevant to whether the appellant had been in possession of some or all of the cannabis in the shipping container.

30 The prosecution did not seek to establish that the appellant had produced or was solely in possession of all of the 38.2 kilograms of cannabis found in the shipping container. It was accepted, during the prosecution address to the jury,

that the hydroponic equipment located in the Walkerville premises was not capable of producing anywhere near all of the 38.2 kilograms of cannabis found. However, the prosecution adduced evidence from Detective Sergeant Nguyen to the following effect.

> Due to the high profit margin there is now a well-established trend towards groups of persons forming syndicates to grow cannabis, which once harvested, is pooled together to make commercial quantities of packaged cannabis which is then transported for sale interstate.

31 The prosecution case was that the appellant was in possession, whether alone or jointly with others, of all of the cannabis found in the shipping container. However, the prosecution was unable to and did not need to demonstrate from where the cannabis had been sourced or as to whether or not it had been sourced from persons other than the appellant.

32 The prosecution acknowledged that the phone call to Damien Morley's phone service, the fingerprint of Ian Thompson on one of the bags, the involvement of Simon Jones, the expert evidence of Detective Sergeant Nguyen and the expert evidence of Tanya McKew to the effect that four cannabis plants would produce up to six pounds of cannabis, considered together, raised as a possibility that the cannabis had been sourced from various locations.

33 According to the prosecution, it was open to the jury to find, on the evidence, that there had been a pooling with others of cannabis, that the appellant was in possession of the whole intending to sell it and that the appellant had taken part in the process of sale of the cannabis by storing, or concealing the cannabis or providing or allowing for the use of premises for the purpose of its sale.

34 The Judge summarised the relevant pieces of circumstantial evidence relied upon by the prosecution as sufficient to enable the jury to infer guilt of the offence beyond reasonable doubt in the following terms.[7]

> Those pieces [of circumstantial evidence] would appear to encompass the following matters: the fact that the drugs were located in a container on land owned by one of the accused's companies; the fact that the container belonged to an entity, namely Bench Excavations, controlled by the accused; the fact that the container was securely locked with some three padlocks, the amount and value of the drugs that were located in the container, the existence of documents located in the container with the names Bench Excavations and Barry Pringle on them; the fact that calls were made from the accused's phone to phones in the names of Mr Morley, Mr Jones, Mr Winslett and Ms Rutland at or about the time the police had arrived, or after the time the police arrived at the Lipson Street premises and were seeking to gain access to the container; the fact that one of the persons that the accused rang, or a phone in the name of the accused, was connected to a phone in the name of Mr Jones; the fact that that man was later located in the accused's home in a room which was set up for the cultivation of cannabis; the fact that Officer Marsh observed a strong smell of cannabis in that room, that Officers Marsh and Munn

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7 Summing up at p11-12, AB 59-60.

noted that it was warm and that Marsh and McFarlane observed what looked like cannabis leaf below the floor; the existence of the accused's fingerprints on some of the equipment in that room; the fact that one the Crown case the man Morley was a proprietor of a hydroponic shop which sold things like pots, pipes for pumping water and hydroponic nutrients; and the fact that a fingerprint of a man employed by Morley, on the Crown case, Mr Thompson, his fingerprint was found on one of the plastic bags in the container.

35 As I have indicated, the case against the appellant was wholly circumstantial. The jury were directed accordingly and returned a unanimous verdict of guilty of the offence of trafficking in a large commercial quantity of a controlled drug.

Appeal ground 1 – the trial miscarried as a result of the wrongful admission of evidence

36 There are eight subgrounds, each identifying an aspect of the evidence to which objection is taken.[8]

Subground 1.1

37 By subground 1.1, the appellant contends that the evidence of the presence of the hydroponic equipment at the Walkerville premises constituted inadmissible discreditable conduct evidence and should not have been admitted. The appellant has submitted that, save for the presence of cannabis fronds of unidentifiable age and provenance, there was no evidence that the room had been used to cultivate cannabis and, *a fortiori*, no evidence that the room had been used to cultivate any of the cannabis located in the shipping container.

38 The Judge, following a *voir dire* hearing, ruled that all of the evidence of: the existence of the hydroponic equipment, as found; the finding of fingerprint impressions matching the appellant's fingerprints on two lightshades in the room; the fronds or leaves as found by the police and identified by two police officers as cannabis leaf fragments; the smell of growing cannabis recognised by one of the police officers; and the muggy atmosphere in the room observed by one of the police officers, was admissible as probative of the fact that the appellant had knowledge of the means for producing cannabis and the means to produce cannabis. The appellant contended that the evidence was wrongly admitted for four reasons.

(i) Contrary to the reasons given by the trial Judge, the evidence was not capable of establishing knowledge of or access to the means of production of cannabis. As such there was no foundation for the admissibility of the evidence for a non-propensity purpose, as required by section 34P of the *Evidence Act 1929*.

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[8] The eight subgrounds are grounds 1.1 to 1.7 inclusive and 1.9. Subground 1.8 in the original Notice of Appeal is not now relied upon.

(ii) The evidence did no more than expose a general propensity on the appellant's behalf to criminal behaviour involving cannabis and as such the evidence contravened the prohibition under section 34P(1) of the *Evidence Act*.

(iii) Even if the evidence was capable of demonstrating a specific propensity or disposition such that it may have been admissible under section 34P(2)(b) of the *Evidence Act*, the evidence did not possess the necessary probative value in the circumstances.

(iv) Even if the evidence did have a non-propensity use, that use could not be kept sufficiently separate from its prohibited use, insofar as the jury was concerned, and as required by section 34P(3).

39 Section 34P of the *Evidence Act* is in the following terms.

34P—Evidence of discreditable conduct

(1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (discreditable conduct evidence)—

(a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and

(b) is inadmissible for that purpose (impermissible use); and

(c) subject to subsection (2), is inadmissible for any other purpose.

(2) Discreditable conduct evidence may be admitted for a use (the permissible use) other than the impermissible use if, and only if—

(a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and

(b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial.

(3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.

(4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

The evidence concerning the grow room at the Walkerville premises was evidence tending to suggest that the appellant had engaged in discreditable conduct such that the requirements of section 34P applied. However, I agree with the overarching submission of the respondent that the evidence was probative and admissible.

40 The evidence had a permissible use or uses probative of a fact in issue independently of any impermissible propensity use. In any event, insofar as a permissible use of the evidence might be characterised as relying on a particular propensity or disposition of the defendant, as circumstantial evidence of a fact in issue, I am satisfied that it had the strong probative value as required by section 34P(2)(b). I am also of the view that any prejudicial effect of the evidence was substantially outweighed by its permissible use and that its permissible use was capable of being kept sufficiently separate and distinct from any impermissible use so as to satisfy the requirements of section 34P(2)(a) and (3).

41 Independently of the evidence of cannabis leaves, the smell of cannabis and the feeling of mugginess, the evidence concerning the equipment located in the room was sufficient to permit a strong inference to be drawn by the jury that the room had been used for the growing of cannabis. The evidence concerning the leaves, the smell and the mugginess (which I am satisfied was properly admitted – see further below) only served to strengthen what was already a readily available inference. No alternative use for the room was suggested by the appellant during the cross-examination of any witness. I agree with the submission put on behalf of the prosecution to the effect that the reason for this is obvious; there was no possible alternative use or, at least, none that could not be considered fanciful. The fact that it was a cannabis grow room is implicit in the submission put on behalf of the appellant that the evidence of the hydroponic set up did no more than expose a general propensity on the appellant's behalf for criminal behaviour involving cannabis.

42 It is accepted that, if the evidence permitted only an inference of such a general propensity as contended for by the appellant, it would not have been admissible for that purpose bearing in mind the requirements of section 34P.

43 It was submitted by the appellant that the potential use of the evidence was limited in this way because there was no evidence that the cannabis in the shipping container had been grown hydroponically or by using the hydroponic equipment at the Walkerville premises or that the hydroponic equipment had been in working order or that the equipment could have been or was, in fact, used to produce any or all of the cannabis in the container or that the appellant knew how to cultivate or had in the past cultivated cannabis.

44 It can be accepted that there is no direct evidence of these matters. However, the evidence concerning the grow room at the appellant's residential premises (including that of the police concerning leaves, smell and mugginess) considered in conjunction with the facts: that the hydroponic system was being

dismantled during the very afternoon of the day when police searched the shipping container owned by the appellant on premises owned by the appellant and in which was found 38.2 kilograms of packaged cannabis; that the appellant had the means and opportunity to have contacted Simon Jones earlier that afternoon; and that he had at the very least, attempted to do so, combine to leave open an inference or inferences in line with those asserted by the prosecution. The weight to be given to any such inference or inferences, particularly in the context of the prosecution's wholly circumstantial evidence case, was a matter for the jury.

45 I accept the prosecution submission that this evidence was relevant and strongly probative of facts in issue being:

(a) that at the time the cannabis was being stored in the shipping container, on 14 June 2013, the appellant knew how and had the means to produce cannabis; and

(b) that shortly prior to 14 June 2013, the appellant had access to hydroponically grown cannabis capable of forming part of the cannabis found in the shipping container.

The evidence of the grow room when considered in conjunction with other circumstantial evidence was also strongly probative of a third fact in issue:

(c) that the appellant had knowledge of the cannabis in the container.

In this latter respect, the conduct of the appellant that afternoon, to be inferred from the telephone records and Simon Jones' conduct, was consistent with his having knowledge that the police were about to locate or had located cannabis in the shipping container and with a concern that the police may, as a result, proceed to investigate his home shortly thereafter. It was open to the jury to infer that the appellant did contact and instruct Simon Jones that afternoon as a consequence of his knowledge of the contents of the container.

46 The fact that the evidence in question also was capable of demonstrating a general propensity on the appellant's behalf to criminal behaviour involving cannabis is not sufficient, alone, for the evidence to be excluded. Its admissible permissible uses are plainly different from any inadmissible general propensity use. A jury, adequately instructed, would be able to draw that distinction.

Subgrounds 1.2 and 1.3

47 By subgrounds 1.2 and 1.3, the appellant contends that the evidence given by police officers purporting to identify cannabis fronds or leaves in the room and purporting to identify a smell of cannabis in the room was, in each case, inadmissible opinion evidence.

48 Senior Constable Marsh gave evidence that the room was set up to grow hydroponic cannabis and that he observed cannabis leaf below wooden slats in the floor. He also said that the room was muggy and that he could smell growing cannabis or cannabis that had been grown. Senior Constable McFarlane said that he observed what he believed to be dried cannabis leaves on the ground. However, he explained that he had seen what was in effect three or four pieces of leaf not complete five or six or nine stemmed leaf. He knew from his experience that the pieces of leaf were cannabis.

49 Senior Constable Marsh has been a police officer since 2007, he had worked at Operation Mantle, focussing on street level drug dealing, for a period between April 2013 and April 2014 and again between November 2014 to April 2015. He described his experience in dealing with low level street dealing, packaging of cannabis, cannabis equipment, and equipment used to cultivate cannabis. He also had experience with dried cannabis, growing cannabis, and in searching houses, warehouses, cars and so on in order to locate cannabis and cannabis related items. As at June 2013, he had attended cannabis cultivations between 10 and 20 times.

50 Senior Constable McFarlane has been a police officer since 2005. He has completed an Advanced Diploma in Public Safety Investigations which dealt with drug investigations. He told the Court that he had been involved in investigating cannabis related offences and had attended 10-12 indoor cannabis cultivations.

51 During the *voir dire*, following which this evidence was admitted, Senior Constable McFarlane said that he believed he had seen a cannabis leaf and qualified this in these terms.

> Just from my own experience from looking at cannabis leaves, but on a chemical level, no, I didn't.

Senior Constable McFarlane also said.

> That sort of shape and structured leaf is something that I've only ever seen as cannabis leaf. If there is another plant that exists that has the same structure and proportion that looks exactly like a cannabis leaf but isn't, then, then I – then basically to me that leaf looked like a cannabis leaf. I believe it was a cannabis leaf, if there is another plant that looks exactly like that them I'm not discounting that it couldn't have been that but I believe from looking at that and from my experience at looking at other leaves that a cannabis leaves that that was a cannabis leaf.

During the trial Senior Constable McFarlane gave this evidence.

> So I observed approximately three to four pieces of cannabis leaf, which is the leaves to a mature plant. The cannabis leaf I recall is or was, I should say, just spiny leaf, I only saw individual leaves not the traditional five, six or nine stemmed leaf, so I just seen bits of leave, spikey, narrow leaf, they range between 3-10 cm had a jagged edge, which I recall, and I knew that from my experience, to be cannabis.

During the *voir dire* Senior Constable McFarlane said that he had been trained in identification of cannabis leaf as a police officer but he had no tertiary qualifications in botany.

52 During his cross-examination, Senior Constable Marsh confirmed that the cannabis leaf he observed below the slats in the floor was not photographed nor seized nor analysed and that he himself is not trained in botany. Senior Constable Marsh also agreed that his observations of cannabis leaf, smell and mugginess did not feature in his contemporaneous notes although in a witness statement prepared on 31 August 2013 (one and a half months after the arrest) reference is made to a strong cannabis smell and remains of cannabis leaf that had fallen through the lattice work of a floating floor. The burden of the cross-examination, in this respect, was to the effect that Senior Constable Marsh's observations that something was seen and something was smelt were unreliable. It was not put to him that what he observed was something other than cannabis leaf and that what he smelt was something other than a cannabis smell. It can be inferred that cross-examining counsel had no instructions as to an alternative explanation for anything that may have been seen and smelt.

53 Senior Constable McFarlane was also cross-examined as to the reliability of his recollection of what he saw. He also made no contemporaneous note but did include in his statement of 13 July 2013, approximately one month after the arrest, that he had observed several leaves on the ground which he believed to be cannabis leaves. Ultimately, the proposition was put and agreed to that "all you've got is your word for it". This time, it was put to Senior Constable McFarlane in cross-examination that his evidence was incorrect and "that it [his observation of the leaves] didn't happen" which proposition Senior Constable McFarlane said was incorrect. In effect, the cross-examination was directed to persuading the jury that no leaves at all were seen in the room. Again, it is to be inferred that counsel was not instructed as to any alternative characterisation of the leaves in the event that the jury accepted that Senior Constable McFarlane did in fact observe them.

54 The appellant's challenge to the police evidence, in essence, was based on the contentions that the macroscopic or visual identification of leaf fragments, as originating from a cannabis plant, and the recognition of the smell of cannabis were not the proper subject matter for expert evidence and that the police officers concerned were not qualified to give such evidence. Whilst these contentions were developed in the context of the leaf evidence, they were relied on by the appellant for his argument that the evidence of smell of cannabis present in the room was also inadmissible.

55 The police officers concerned were experienced, through their work as investigating officers, in matters to do with cannabis use and cannabis production including by use of hydroponic equipment. Each of the police officers had significant experience of having encountered dried cannabis and growing

cannabis plants. The fact that the police officers had a number of opportunities to observe leaves subsequently identified as cannabis leaves was not disputed on the *voir dire* or at the trial. I accept the submission put on behalf of the prosecution that the evidence given in this context was not strictly expert evidence. It was not to be subjected to the usual, strict, constraints relevant to the admissibility of expert evidence.

56 The evidence given was evidence of fact based on the observations of the police officers informed by their experience of what a cannabis plant and its leaf looked like and smelt like. There will be situations where any person might be able to give evidence of this nature based on the general experience of all or most persons. For example, in a circumstantial evidence case, evidence by a lay witness that upon entering a bathroom they noted a smell of or akin to lemon scented disinfectant would be admissible, if probative of a fact in issue; an observation by a lay witness that they observed what appeared to be blood at the scene of a motor vehicle incident would be admissible, if probative of a fact in issue.[9]

57 There is no reason why a similar approach should not be taken with respect to observations based on experience, but limited only to members of a particular group of persons, where it can be shown that the witness has relevant experience on the basis of which the reliability of their observations can be assessed and given weight. In *R v Barker*,[10] an issue before the Court of Criminal Appeal concerned the admissibility of evidence of a police officer as to her knowledge of the use of particular appliances in the consumption of Indian hemp. King CJ (with whose reasons Matheson and O'Loughlin JJ agreed) said this.

> The debate at the trial as to the admissibility of this evidence was conducted upon the basis that it was induced as the opinion evidence of an expert and her Honour treated at least part of the witness' evidence as evidence of that kind. Appraisal of the evidence indicates to me, however, that it was not opinion evidence at all. Constable Raven was relating her observations and experiences over years of contact with Indian hemp and the uses of Indian hemp, and, in particular, with the appliances which are used for smoking it. She was well able to identify Indian hemp *and its smell.* She had seen the bongs being used for the smoking of Indian hemp. She had on a great many occasions seen pipes, including the bong type pipe, and joint clips, of the kind found in this shop, at places where quantities of Indian hemp were found. She had also on many occasions *detected remnants of Indian hemp* in such appliances and had that confirmed on analysis. None of this evidence was opinion evidence it merely recounted her actual observations and experience.
>
> [emphasis supplied]

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9 Other relevant circumstances may need to be considered in order to assess the weight to be given to such evidence. For example, if the car contained smashed bottles of sauce or wine such may undermine the weight to be given to the observation.

10 (1988) 34 A Crim R 141 at 143. See also, *Anderson v The Queen* (1992) 60 SASR 90 at 102 (Olsson J).

58 The position is analogous to that line of authorities which stand for the proposition that evidence can be admissible where it consists of a generalisation from observed facts within the personal experience of the person in a field outside ordinary lay experience. An example is the evidence of a witness possessed of considerable experience in the driving and movement of articulated vehicles who gives evidence to the effect that such vehicles have a tendency to swing out when rounding a curve and that this tendency can be more marked when the road surface is wet.[11]

59 In the present case, the evidence of the police officers concerned was admissible as a piece of circumstantial evidence to be considered together with the observations of the hydroponic equipment in the room rendering an inference open to the jury to the effect that the room had been used to grow cannabis rather than something else. The reliability of the police observations is enhanced by the circumstances in which they were made – a room containing hydroponic equipment in the process of being dismantled. It is true that insofar as the inference that the room had recently been used to grow cannabis is relied upon, there is an element of circularity to the reasoning. However, where circumstantial evidence reasoning is concerned one piece of circumstantial evidence can gain strength from another and vice versa. Here, the evidence concerning the grow room when considered as a whole is capable of supporting the prosecution case.

60 The fact, relied upon by the appellants, that the expert evidence of the forensic scientist, Tanya McKew, to the effect that she would need to examine leaf fragments under a microscope with a view to observing particular hairs unique to cannabis in order to "positively" identify the leaf fragments as cannabis, does not serve to preclude the admissibility of the evidence of the police officers as a strand in the prosecution's circumstantial evidence case. What might count as or be required in order to satisfy scientific proof does not necessarily dictate what is required for legal proof, particularly where an item of circumstantial evidence is concerned. I add, that different considerations may well apply in circumstances where, say, the identification of a leaf as a cannabis leaf constituted the element of an offence or an essential intermediate link in a chain of proof towards guilt of an offence,[12] such that proof beyond reasonable doubt would be required.

61 I would reject appeal grounds 1.1, 1.2 and 1.3.

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[11] *Wheal v Bottom* (1966) 40 ALJR 436 and see also, *Lawler v Leeder* (1981) 1 SR (WA) 389 at 391, *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 7)* (1987) 14 NSWLR 104 at 105 and the other authorities cited in *JD Heydon Cross on Evidence*, LexisNexis Butterworths Australia, 8th ed, 2010 at footnotes 18 and 19 of paragraph [29025].

[12] *Shepherd v The Queen* [1990] HCA 56; (1990) 170 CLR 573 at [4]-[6], 579 (Dawson J with whose reasons Mason CJ, Toohey and Gaudron JJ agreed).

Appeal grounds 3 and 7.2

62 On the basis that the evidence concerning the hydroponic equipment in the external room of the Walkerville premises and the evidence of the police officers as to what they saw and smelt was admissible such that grounds 1.1, 1.2 and 1.3 should be rejected, it is convenient now to consider the appellant's grounds 3 and 7.2 concerning the attack on the Judge's directions as to the use of this discreditable conduct evidence and ground 5 raising the contention that the Judge's directions in this respect undermined the standard of proof.

63 Grounds 3 and 7.2 complain about the directions given by the Judge as to the use of the discreditable conduct evidence and are in the following terms.

> 3. The learned trial Judge erred in directing the jury that evidence of the hydroponic equipment at the Walkerville premises indicated the applicant had "both the knowledge and the means to produce cannabis".
>
> 7.2 The applicant's trial miscarried as a result of the learned trial Judge's failure to ... direct the jury that the evidence of the "grow room" at the Walkerville premises was not admissible in relation to the prosecution case as to take part in the sale of cannabis.

The argument put by the appellant with respect to these grounds, during submissions, extended beyond the terms of the grounds themselves and challenged more generally the directions given as to the permissible use of the discreditable conduct evidence. Before considering those directions, it will be helpful to provide, by way of context, a brief summary of the structure of the summing up.

64 His Honour commenced with a series of conventional directions dealing with the presumption of innocence, the prosecution's burden of proof, methods (in the abstract) for the assessment of the evidence of witnesses, the role of inferential reasoning and a relatively standard circumstantial evidence direction, albeit one in the abstract unrelated to any of the evidence in the case. His Honour then summarised the factual basis of the prosecution case, interspersed with a recitation of prosecution and defence submissions as to the nature of the inferences that might or ought not, respectively, be drawn from the various items of circumstantial evidence dealt with. His Honour canvassed the circumstantial evidence in quite some detail.

65 Perhaps unusually, his Honour summarised the evidence and the submissions by the parties as to competing inferences, in advance of identifying for the jury the nature of the offence charged and the elements of that offence. This is not an offence where the elements can be simply stated. As earlier indicated element (ii), the issue of trafficking, requires quite a complex explanation of its statutory components. As a consequence, it is possible the jury or some members of the jury may well have struggled, throughout this evidence discussion, to relate the various competing submissions to the issues in the case.

66 At one point, towards the end of the Judge's evidence discussion, his Honour restated for the jury the following prosecution submission.

> The prosecution says you may infer from the existence of the accused's fingerprints on the lightshade that he had been in the room and that he was actively involved with the production of cannabis. The Crown says that this fact, again taken in conjunction with a number of the others I have mentioned, *renders it more likely than not that he was knowingly in possession of the cannabis or knowingly taking part in its sale*.[13]
>
> [emphasis supplied]

After completing the discussion of the evidence his Honour concluded this section of his summing up in the following terms.

> These then in general, ladies and gentlemen of the jury, are the facts, the pieces of circumstantial evidence upon which the Crown relies upon which it submits you may infer knowledge of the accused of the cannabis in the container which he was either intending to sell or knowingly taking part in its sale.

67 The Judge then reminded the jury of some critical aspects of his earlier circumstantial evidence direction including a restatement of the propositions: that the jury must first decide which of the facts "you accept as established by the evidence"; that the jury must then "consider what inferences or what conclusions you are prepared to draw from the combined weight of those established facts"; that the jury could not find that the accused was in possession of the drugs with an intention to sell or was knowingly taking part in the process of sale unless "that is the only rational inference or conclusion that the established facts considered as a whole enable you to draw"; and that if the jury considers "there is a reasonable hypothesis consistent with innocence, the accused cannot be convicted". The Judge emphasised that the prosecution case relied on the strength of all of the circumstantial evidence in accordance with its combined weight and did not rely on each piece of evidence being considered in isolation.

68 To this point, the Judge had referred to the inferences that the prosecution contended for, including that the accused was in possession of the drugs with an intention to sell or was knowingly taking part in the process of sale. However, his Honour had not yet identified for the jury the elements of the offence of trafficking in a large commercial quantity of a controlled drug nor the definition of trafficking and the aspects of that definition relied upon by the prosecution. Those aspects were that the appellant was in possession of a commercial quantity of the cannabis found in the container with an intention to sell it[14] or that the appellant was taking part in the process of sale of a commercial quantity of the

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[13] It is acknowledged that this is not a direction by the Judge but rather a recitation of a submission made by the prosecution. However, later in the summing up, his Honour posits a proposition along the lines of that in italics by way of direction.

[14] Paragraph (b) of the definition of "traffic in a controlled drug" in section 4(1) of the *Controlled Substances Act 1984*.

cannabis found in the container[15] and, in this latter case, the definitional aspects of what it means to "take part in the process of sale".[16]

69 His Honour then proceeded to direct the jury with respect to the discreditable conduct evidence comprised of the finding by the police of the hydroponic equipment in the Walkerville premises and any inferences that might properly be drawn therefrom. It is necessary to set out this part of his Honour's summing up in full. I have numbered each paragraph for ease of reference.

> (1) I now turn to the direction that I mentioned earlier about the equipment, the hydroponic equipment, found at the accused's house which is commonly used, you heard, for the cultivation of cannabis.
>
> (2) The fact that the accused has such equipment in his house is not the subject of any criminal charge. Usually in a criminal trial evidence of another alleged crime which is not the subject of an actual charge is not admissible because it is only the evidence relating to the actual charge which is relevant for a jury to hear and evaluate.
>
> (3) You in this trial have been permitted to hear this evidence, but I need to give you a direction as to the purpose for which this evidence may be used. You may use the evidence, if you are prepared to accept it, to show first that the accused owned property, domestic property in which there was hydroponic equipment.
>
> (4) You may use the fact of the accused's fingerprints being found on the light shade in the room to show that he was aware that the equipment was there, and you may use the evidence to show that as a result the accused had both the knowledge and the means to produce cannabis.
>
> (5) You may also use the evidence of Officer Marsh with respect to detecting a smell of growing cannabis and Officers Marsh and McFarlane with respect to seeing leaf material that they believed bore a resemblance to cannabis leaf, even though there was no evidence to prove it actually was cannabis. If you accept that evidence, you may use it to show that this room was being used, or was recently used for the growing of cannabis.
>
> (6) In summary, you may use this evidence, if you accept it, to conclude what the accused was doing at his domestic premises at the time drugs were found in the container, that he was combining his knowledge of cannabis with the means to produce it.
>
> (7) If you accept that he was acting in this way in his domestic premises, you may think it more likely than not that he was knowingly in possession for the purposes of the sale of the cannabis at his commercial premises.
>
> (8) Alternatively, you may think these facts make it more likely he was taking a step in the process of selling cannabis by storing or otherwise providing his premises for it, or guarding it, or concealing it.

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[15] Paragraph (c) of the definition of "traffic in a controlled drug" in section 4(1) of the *Controlled Substances Act 1984*.

[16] Subsections 4(4) and 4(5) of the *Controlled Substances Act 1984*.

(9) These then are the uses which you may make of that evidence. There are, however, uses which you are not permitted to make of the evidence. You are not permitted to use the evidence to reason that because the accused may have been involved in the cultivation of cannabis at his home, that accordingly he is the sort of person who would traffic in illicit drugs in the ways alleged by the Crown, and that he is therefore guilty of the charge before the court.

(10) You must not use the evidence in that way because that would be to reason that because he may have done something unlawful in the past, he must have committed and be guilty of this offence, and that is a form of reasoning which is not permitted.

70 After dealing with the discreditable conduct evidence in this way, the Judge provided a series of directions as to the nature of and elements of the offence in question and provided an explanation of the law dealing with aspects of the elements including, for example, the concept of "to traffic", the concept of "possession" and the concept of "taking part in the process of sale". After that his Honour provided another summary of the evidence but essentially without commentary and a summary of the prosecution and defence final addresses. His Honour concluded by, *inter alia*, reminding the jury of the need for proof beyond reasonable doubt of the charge.

71 In his argument dealing with the Judge's directions on the use of the discreditable conduct evidence, the appellant first contended that the directions were flawed because "as a matter of content, [the evidence] did not establish the appellant had the knowledge or means to grow cannabis". In other words, the directions were flawed because they were based on evidence that was inadmissible in the first place and did not permit the inferences relied on by the prosecution to be drawn in any event. The appellant maintained that the evidence in question revealed no more than a predisposition to offend with respect to cannabis which rendered the evidence inadmissible in accordance with the requirements of section 34P of the *Evidence Act*. I have already dealt with the question of admissibility of the evidence concerning the Walkerville grow room and the police observations in my discussion of section 34P and I have identified the proper inferences open to the jury if they were to accept that evidence.

72 However, the appellant also contends that having admitted the evidence (wrongly) the Judge in his directions did not properly address the permissible and impermissible uses of the evidence in accordance with the requirements of section 34R of the *Evidence Act*.

73 Section 34R of the *Evidence Act* is in the following terms.

34R—Trial directions

(1) If evidence is admitted under section 34P, the judge must (whether or not sitting with a jury) identify and explain the purpose for which the evidence may, and may not, be used.

(2) If evidence is admitted under section 34P and that evidence is essential to the process of reasoning leading to a finding of guilt, the evidence cannot be used unless on the whole of the evidence, the facts in proof of which the evidence was admitted are established beyond reasonable doubt, and the judge must (whether or not sitting with a jury) give a direction accordingly.

74 Section 34R imposes an important obligation on a trial Judge to identify both the permissible and impermissible uses of any discreditable conduct evidence that has been admitted. The primary purpose of this is to ensure that the jury does not reason in a manner prohibited by section 34P(1). It is important (and required by section 34R) that a Judge direct not just as to impermissible uses but also as to the permissible uses of such evidence. Any failure to do so may well increase the risk of its improper use by a jury.[17] The failure to properly direct as to permissible uses will be an error of law just as will be a failure to properly direct as to impermissible uses.[18] It is another question as to whether or not, in particular circumstances, any such error of law will necessarily warrant the setting aside of a conviction.[19]

75 The Judge in this case directed the jury as to two permissible uses, being the two possible intermediate inferences available as identified in paragraphs (4) and (5) as summarised in paragraph (6) of the direction set out above. His Honour then identified two, *ultimate*, permissible uses of the evidence in paragraphs (7) and (8) of the direction: first, the drawing of an inference that the appellant was "knowingly in possession for the purposes of the sale of the cannabis at his commercial premises"; and second, the appellant "was taking a step in the process of selling the cannabis by storing or otherwise providing his premises for it, or guarding it, or concealing it".

76 His Honour went on to direct as to an impermissible use, namely, "to reason that because the accused may have been involved in the cultivation of cannabis at his home, that accordingly he is the sort of person who would traffic in illicit drugs in the ways alleged by the Crown and that he is therefore guilty of the charge ..." (paragraph (9)). His Honour amplified this direction by telling the jury that to reason in this way would be to reason that "because [the appellant] may have done something unlawful in the past, he must have committed and be guilty of this offence, and that is a form of reasoning which is not permitted" (paragraph (10)).

77 The second, ultimate, permitted use identified by the Judge in this direction (paragraph (8)), is not one of the permitted uses that I have earlier identified when considering the admissibility of the grow room evidence in accordance

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[17] See *R v Forrest* [2016] SASCFC 76; (2016) 125 SASR 319 at [47] (Kourakis CJ, with whose reasons Kelly and Lovell JJ agreed).

[18] See generally *R v Perara-Cathcart* [2015] SASCFC 103 at [12]-[18] (Kourakis CJ) and [56]-[58] (Stanley J).

[19] See the different approaches adopted by Kourakis CJ and Stanley J, respectively, in *R v Perara-Cathcart* [2015] SASCFC 103 at [12]-[18] and [56]-[58] respectively.

with the requirements of section 34P nor is it one that his Honour identified when finding, following the *voir dire*, that evidence to be admissible. The Judge, in his ruling, made these findings with respect to the evidence of the grow room.

> In my view, the evidence on count 2 demonstrates that the accused:
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> - has a knowledge of the means for the production of cannabis;
> - has the means to produce quantities of cannabis;
> - occupied premises at which plant leaves bearing a close similarity to cannabis and a strong cannabis odour were detected.
>
> This evidence, if proved, is strongly probative evidence in support of the Crown case that the accused was knowingly in possession at the same time of cannabis in the container.
>
> It is also capable of rebutting any suggestion of the accused having an innocent association with the drugs in the container.
>
> Furthermore, I am satisfied that the probative value of this evidence substantially outweighs its probative force.

78 The appellant submits that the grow room evidence is irrelevant to and not probative of the second pathway relied on by the prosecution to prove trafficking, that is, that the appellant was taking a step in the process of selling cannabis by storing it, concealing it or otherwise providing his premises for the purpose of its sale.

79 If the first, ultimate, permissible use (knowingly in possession for the purposes of sale) is an available inference then it would seem to follow in the circumstances of this case that the second stated permissible use (that the appellant was storing or otherwise providing premises etc) would also seem to be an available inference. To this extent, I do not accept the appellant's contention.

80 However, the ultimate permissible uses as described by the Judge have been incorrectly overstated. The probative and permissible inferences available from the evidence of the grow room, including the police officer evidence tending to show recent use to grow cannabis, are that: the appellant had the knowledge and the means to produce cannabis at the relevant time; the appellant had access to hydroponically grown cannabis shortly prior to 14 June 2013; and when taken in conjunction with other evidence (as earlier explained) the appellant was aware of the contents of the container. These permissible inferences are merely stepping stones towards but, alone, do not support an inference that the appellant was knowingly in possession for the purposes of sale of the cannabis at his commercial premises or that the appellant was taking a step in the process of selling this cannabis by storing or otherwise providing his premises etc. The grow room evidence needs to be considered in the context of the other aspects of the prosecution's circumstantial case in order to support those, ultimate, inferences. The Judge did not draw this distinction to the jury's attention.

Rather, the Judge directed the jury that the discreditable conduct evidence, on its own, may be sufficient to enable the two, ultimate, inferences his Honour identified to be drawn.

81 The overstatement of the permissible uses and the risk this posed for the jury to reason in an improper way was exacerbated by the Judge's direction as to the impermissible use as to which the grow room evidence could not be put (paragraphs (9) and (10) of the direction). The impermissible use is couched in conventional general propensity terms – the jury is not to reason that because the accused may have been involved in the cultivation of cannabis at his home he is the sort of person "who would traffic in illicit drugs in the ways alleged by the Crown". However, it is very difficult to see a difference between this statement of impermissible general propensity and the statement of permissible use that, if the jury accepts that the appellant was acting in this way in his domestic premises (that is, cultivating cannabis at his home) they might think it more likely than not that he was "knowingly in possession for the purposes of the sale of the cannabis at his commercial premises" (that is, a person who would traffic in illicit drugs in the ways alleged by the Crown). Different language has been used but the substance of the expressed permissible use is the same as the substance of the expressed impermissible use.

82 Overlaying all of this is the fact that the jury to this point still have not been directed as to the elements of the offence. In due course, they are so directed. In essence, the form of each of the permissible, ultimate, inferences identified by the Judge (paragraphs (7) and (8) is, in effect, an element of or at least essential to the charged offence. If the jury were to be satisfied beyond reasonable doubt that the appellant was "knowingly in possession for the purposes of the sale of the cannabis at his commercial premises" then, subject to being satisfied that the substance was in fact cannabis and a controlled drug and that a large commercial quantity was involved, the jury would thereupon be satisfied that the offence had been established.

83 In my view, the Judge erred in law by failing to comply with the requirements of section 34R of the *Evidence Act* with respect to the directions given to the jury as to the permissible and impermissible uses of the discreditable conduct evidence. Further, the already appreciable risk that the jury or some of its members may have been misled by the direction, so as to engage in an impermissible form of reasoning, was exacerbated by another aspect of the direction which may have served in the jury's mind to undermine the proper standard of proof to be observed by the prosecution. This is the subject of appeal ground 5.

Appeal ground 5

84 Ground 5 is in these terms.

> The applicant's trial miscarried as a result of the learned trial Judge's directions that "if you accept that [the appellant] was acting in this way in his domestic premises, you may

> think it more likely than not that he was knowingly in possession for the purposes of the sale of the cannabis at his commercial premises" and "alternatively, you may think these facts make it more likely [the appellant] was taking a step in the process of selling cannabis by storing or otherwise providing his premises for it, guarding it, or concealing it" which directions:
>
> 5.1 misdirected the jury as to the burden of proof;
>
> 5.2 impermissibly invited the jury to find the applicant guilty if the jury found that the applicant was involved in growing cannabis in the external room in the Walkerville premises.

85 In considering this issue, I will confine myself to paragraph (7) the direction where his Honour said to the jury that if they were to accept that the appellant was, in effect, combining his knowledge of cannabis with the means to produce it in his domestic premises "you may think it more likely than not that he was knowingly in possession for the purposes of the sale of the cannabis at his commercial premises". Similar observations can be made with respect to the alternative position put (in paragraph (8)) that the jury might think "it more likely he was taking a step in the process of selling cannabis by storing or otherwise providing his premises, or guarding it, or concealing it".

86 The appellant submits that the vice in this form of the direction is that it:

(i) invited the jury to treat satisfaction of the state of affairs at the Walkerville premises as conclusive of the appellant's involvement with the cannabis in the shipping container;

(ii) eroded, or at the very least obfuscated, the trial Judge's directions on the standard of proof by injecting the concept of probabilities into the dispositive question to be resolved by the jury.

87 It is well accepted that the prosecution's burden to prove a criminal charge beyond reasonable doubt relates to each and every one of the elements of that charge but does not relate to intermediate findings of fact or inferences to be drawn from findings of fact which taken as a whole are relied on by the prosecution for its circumstantial evidence case and where no such intermediate finding is an dispensible link in the chain of proof towards guilt. In *Shepherd v The Queen*,[20] Dawson J (with whose reasons Mason CJ, Toohey and Gaudron JJ agreed) observed as follows.[21]

> Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual

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[20] [1990] HCA 56; (1990) 170 CLR 573.
[21] At [4]-[6], 579.

> conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.
>
> On the other hand, it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every possible intermediate conclusion of fact will be of that character. If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that that fact must be found beyond reasonable doubt before the ultimate inference can be drawn. But where - to use the metaphor referred to by *Wigmore on Evidence*, vol.9 (Chadbourn rev. 1981), par.2497, pp 412-414 - the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so. It will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt and, where it is helpful to do so, to tell them that they must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence.
>
> As I have said, the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.

88 The Judge, elsewhere in the summing up as I have indicated, provided the jury with conventional statements of the prosecution's burden and standard of proof and of the proper approach to the determination of a case based on circumstantial evidence. To the extent that the Judge in the impugned direction was simply identifying a strand of evidence in the prosecution's circumstantial evidence case, there was no obligation to advise the jury that that strand needed to be demonstrated beyond reasonable doubt. If the inference relied on by the prosecution that the appellant was "knowingly in possession for the purposes of the sale of the cannabis at his commercial premises" was no more than an intermediate fact or inference to be considered in conjunction with other intermediate facts or inferences relied on for the proof of an element of the charge then, conventionally, the jury would not be directed as to any particular level of satisfaction required. That is not to say that it would not, in appropriate circumstances, be open to a Judge to invite the jury to conclude that an

intermediate fact or inference more likely than not would follow if satisfied of some other fact or inference. As the prosecution submitted, such terminology is unexceptional in criminal trials where evidence of one act will often make it more likely that another act has occurred.

89 However, the difficulty with the direction in this case emerges, again, from the fact that the inference intimated by the Judge to have been "more likely than not" was not an intermediate fact or inference but rather an element of the charge or at least an intermediate fact essential to be established before any ultimate inference of guilt could be drawn. In this respect, I agree with the submission of the appellant that the direction served to connect the ultimate issue with the concept of probabilities and was, to this extent, a misdirection as to the prosecution's standard of proof.

90 I appreciate that, in general, the jury were properly directed on a number of occasions as to the prosecution's standard of proof and that this direction was given in the context of permissible and impermissible uses of the grow room discreditable conduct evidence and was not provided to the jury as a direction concerning the prosecution's standard of proof. Nevertheless, the admissibility of the grow room evidence and the permissible purposes for which it might be used were very important, perhaps central, to the prosecution case. Without that evidence, the prosecution case would have been very much weakened. Further, for the reasons earlier given, the possible permissible inference identified has been stated in a form that constitutes a finding essential to arriving at the ultimate inference of guilt. In these circumstances, the invitation to the jury that they might find that inference "more likely than not" was apt to confuse the jury with respect to the required standard of proof for an element of or a finding of fact essential to proof of the charge. I agree with the submission of the appellant to the effect that the directions here may have encouraged the jury to reason towards guilt by reference to the concept of probabilities.

91 I am satisfied that there has been a miscarriage of justice with respect to the directions given as to the permissible and impermissible uses of the discreditable conduct evidence considered in conjunction with the misdirection concerning the prosecution's standard of proof (grounds 3, 7.2 and 5 in the form as argued on the appeal). These are not matters to which the proviso in section 353(1) of the *Criminal Law Consolidation Act 1935* ought to apply. I would allow the appeal on this basis.

92 I turn to consider the remaining grounds but, given that I would allow the appeal in any event, only briefly and only insofar as is necessary in order to determine whether an acquittal should be entered rather than a new trial ordered.

Appeal ground 1.4

93 By this ground, the appellant contends that the trial miscarried as a result of the wrongful admission of:

> Irrelevant, inadmissible or highly prejudicial evidence of telephone contact between a mobile phone registered in the applicant's name and mobile phones registered or said to be used by a Karen Rutland, John Winslett, Damien Morley and Simon Jones.

The appellant contends, in effect, that because there was no evidence that any of the telephone calls, apparently attempted, resulted in a connection such that a conversation was held or a message left, there was no basis upon which a conclusion could be drawn that the appellant communicated with any of these persons at the times noted in the telephone records. For example, it was submitted that with respect to the call apparently made or attempted to be made to Simon Jones, proof of actual contact was indispensable to the process of reasoning upon which the trial Judge admitted the evidence.

94 I do not accept these submissions. The evidence relied upon by the prosecution in this respect and notwithstanding the absence of proof of actual contact or communication being achieved, was admissible as a part of the prosecution's circumstantial evidence case. The phone service in question was registered to the appellant. The evidence of the phone calls made or attempted to be made to Ms Rutland was probative of an inference that the appellant was using the telephone on the day in question. Building on this inference, the evidence with respect to calls made or attempted to be made to Mr Winslett was evidence from which an inference might be available to the effect that the appellant had been made aware, on the day in question, of the police search. As far as the calls made or attempted to be made to Mr Morley are concerned, such were relevant to support an inference that the appellant had some connection with a man who owned a hydroponic equipment shop and thus to support the inference that the appellant had been involved in installing the hydroponic equipment in the external room at Walkerville. It also supported a possible connection with the plastic bag found in the container on which was located a fingerprint of Mr Thompson who worked at Mr Morley's shop where he had handled plastic shopping bags of the type found in the container. The relevance of the evidence concerning the phone calls made or attempted to be made to Mr Jones has earlier been identified.

95 In short, the possibility of or, indeed, the likelihood of telephone communication having occurred between the appellant, Ms Rutland, Mr Winslett and Mr Jones on the day of the police search of the container forms part of a chain of inferential reasoning leading to the potentially available inference that the appellant knew what was in the container, had some connection with the means by which the cannabis came to be in the container and was concerned to arrange for the hydroponic equipment to be removed from his Walkerville premises as a consequence. The telephone contact evidence was admissible. It could have had no detrimental effect of significance to the appellant's defence apart from its probative value. It was not to be characterised as prejudicial let alone as the appellant submitted, as "highly prejudicial". I would reject ground 1.4.

Ground 1.5

96 The appellant contends that the evidence of his suggested association with the shop known as "Bloomin' Hydro" was irrelevant or highly prejudicial.

97 The respondent contends that it was open to be inferred that the appellant had contact with Mr Morley at or about the time the container was being searched in circumstances where the fingerprint of one of Mr Morley's employees, Mr Thompson, was found on one of the plastic bags containing cannabis in the container. The phone call evidence formed part of a chain of evidence linking the appellant with Mr Thompson, through his association as an employee of Mr Morley's Bloomin' Hydro business.

98 The evidence was relevant for the reasons discussed under ground 1.4. It might be considered to be of slight probative value in the context of the whole of the circumstantial case. However, it was not "highly prejudicial". In the circumstances where hydroponic equipment was observed by police being dismantled at the appellant's Walkerville premises, evidence that the appellant knew a man who was the proprietor of a shop called Bloomin' Hydro which sold some types of hydroponic equipment could hardly be prejudicial. In any event, the objection is as to admissibility. Any prejudicial effect the evidence may have had could easily be accommodated by judicial direction. I would reject ground 1.5.

Ground 1.6

99 By this ground, the appellant contends that evidence of the presence of documents said to be in the name of or to relate to the appellant or his business found in the shipping container was "irrelevant, inadmissible or highly prejudicial". The appellant contends that any inference to be drawn from the finding of these documents can only be categorised as speculative which exposes its irrelevance and prejudicial value. The appellant complains that there is no temporal connection between the documents discovered on 17 June (particularly given that the container had been left open and unguarded by police for three days) and the secretion of the cannabis in the container.

100 The documents in question are described by the respondent in its written submissions in the following terms.

> Some typed documents with the words "Bench Excavations" were seen by SC Flavel when he first entered the container on 14 June 2013 and a box of documents were seized by the police three days later on 17 June 2013 which contained 2010 and 2011 invoices to Bench Excavations addressed to the appellant Barry Pringle at a Walkerville PO address and at [a] Royal-Park address.

The respondent contends that the documents were admissible as circumstantial evidence connecting the appellant with the container. I accept that submission. All of the circumstances must be considered. The example given by the respondent in its written submissions is of assistance. A single piece of paper

bearing the name of a particular person found in a public location will not, necessarily, indicate that the person had a physical connection with that public location. For example, such a piece of paper found in a street, and absent any other material evidence, would lead to at best a very weak inference that the person whose name appears on the paper had entered upon the street.

101 However, in this case a significant number of documents bearing the name or showing a connection to the name of the appellant were found inside the locked container owned by the appellant and which was situated on land owned by the appellant from which a business owned by the appellant was conducted. It was open to infer from the evidence of the finding of the documents that the appellant had a connection with the container and, in particular, that the appellant or someone on the appellant's behalf had at some stage had access to the locked container for the purpose of depositing those documents. This possibility of access is a piece of circumstantial evidence bearing on the question of how the cannabis may have found its way into the locked container and who had control over the contents of the locked container.

102 The fact that the container was not secured between the police search on 14 June 2013 and the later seizure of the box of documents on 17 June 2013 is unfortunate. However, there is the evidence of SC Flavel who observed documents of the type in question on 14 June and, in any event, the fact that the container was not secured is a matter for cross-examination and ultimately submission as to weight but does not bear on admissibility. Furthermore, it is not apparent how the evidence could be described as "highly prejudicial" over and apart from the fact of its probative value being detrimental to the defence case. I would reject ground 1.6.

Ground 1.7

103 Under this ground the appellant complains that evidence elicited by the prosecutor from Detective Sergeant Brain concerning enquiries he made about obtaining keys to the container on the day of the search constituted "inadmissible hearsay or highly prejudicial evidence". The evidence that is now complained of was as follows.[22]

> Q Can you tell me what you did in relation to gaining access to that container.
>
> A We made enquiries with John Winslett about how –
>
> OBJECTION: [DEFENCE COUNSEL] OBJECTS
>
> D/C: I don't want any heresay evidence coming from this witness. The question was – how did you gain access to the container?
>
> P/C: I think the witness is being responsive to the question.

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[22] Trial transcript 271-272.

XN

Q Did you make enquiries to obtain keys.

A Yes, we did.

Q Were you able to do that.

A No, we weren't.

Q Was Mr Winslett asked to do certain things.

A Yes, he was.

Q Was the container still locked after he was asked to do those things.

A Yes, it was.

Q So what decisions were made then.

A At that stage I made enquiries with the police station to arrange for a locksmith to attend to unlock the container.

I first observe that defence counsel initially made a hearsay objection. That objection was not ruled on. Prosecuting counsel continued with the line of questioning without eliciting any hearsay evidence and no further objection whether on the grounds of inadmissible hearsay or "highly prejudicial" (more prejudicial than probative) evidence was made by defence counsel. This suggests that the only issue that concerned defence counsel was the issue of hearsay and that once that issue had been resolved, defence counsel saw no reason or basis to object to the evidence as it unfolded.

104 The evidence as it unfolded was not hearsay. No content of any conversation was asked for or provided. The fact of the matter is that following enquiries, keys were not obtained and a locksmith had to be called. It is true that the jury might reach a conclusion as to why the keys were not available to the police and that any such conclusion might involve speculation. At no stage were they ever invited to do this. It may be that a direction, warning against speculation in this context, was warranted. In any event, as the prosecution contends, had the police simply proceeded to arrange for a locksmith and ultimately an angle grinder to achieve entry into the container, the jury may still have asked itself the question why the police did not simply ask for the keys and answer the question in the same way.

105 Furthermore, the evidence was not prejudicial much less highly prejudicial. The appellant was not present. There were any number of possible reasons why the keys may not have been available at that time, including that the keys may not have been present at the location. The Judge made no ruling; the evidence was lead without objection. There was no error of law and no miscarriage of justice. I reject this ground of appeal.

Ground 1.9

106 By this ground the appellant complains about the evidence given in re-examination by the prosecution witness, Mr Thompson, that Bloomin' Hydro sold nutrients, pots and tubing used to pump water. The ground itself does not provide a reason for the exclusion of this evidence and does not describe it as being "irrelevant, inadmissible or highly prejudicial" as is the case with various of the other grounds. However, in the appellant's submissions, the contention is put that the topic of products supplied by Bloomin' Hydro during examination in chief was left in an unambiguous and complete state such that re-examination on this topic, over the objection of defence counsel, should not have been permitted. None of the traditional justifications for re-examination applied. If the prosecutor had considered evidence of the kind adduced to have been relevant and admissible it ought to have been led in chief.

107 During her examination in chief of Mr Thompson, the prosecutor did not ask any questions on the topic of the products supplied by Bloomin' Hydro. Perhaps the prosecutor wanted to steer clear of any potential for propensity reasoning by the jury. Mr Thompson worked for Bench Excavations from 2007 until early January 2010 at its then Royal Park premises. In mid-late 2010, he commenced working at Bloomin' Hydro and was working there in 2013. He did not recall the appellant to have been a customer he served at Bloomin' Hydro.

108 The burden of the examination in chief was for Mr Thompson to provide an explanation for the finding of his fingerprint on a plastic shopping bag containing cannabis in the shipping container. In this respect, the following exchange occurred.[23]

> Q Have you got any explanation as to how your fingerprint could be located on that plastic bag containing cannabis.
>
> A I sold a lot of bags at the shop.
>
> Q Was that the shop Bloomin' Hydro.
>
> A Yes. Many plastic bags, yes.
>
> Q Any other explanation.
>
> A I don't know much about this bag. I haven't really been told a lot about it. I doubt whether there would be the bag there when I worked with Barry, it was that long ago. Definitely left the shop somehow.

That exchange concluded the examination in chief.

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[23] Trial transcript at 399.

109 The cross-examination was brief. The burden of the cross-examination is contained in the following exchange.[24]

Q You told us that you worked at Bloomin' Hydro. Bloomin' Hydro do not sell, and have not sold whilst you have been working there, hydroponic equipment, have they.

A They have not sold what, sorry?

Q Hydroponic equipment.

A No.

The re-examination, which was challenged at trial and is now challenged on appeal, was as follows.[25]

Q Does Bloomin' Hydro sell nutrients for growing things hydroponically.

OBJECTION: [DEFENCE COUNSEL] OBJECTS

D/C: It doesn't arise out of anything I put in cross-examination.

HH: I'll allow the question.

REXN

Q Mr Thompson.

A What was the question?

Q The question was does Bloomin' Hydro sell nutrients that are used for growing things hydroponically.

A Yes, they do.

Q Does it sell pots.

A Yes.

Q Does it sell tubing that's used for pumping water.

A Yes.

D/C: For the record I obtain my objection for each of these questions. Not only do they not arise from the cross-examination, each question was leading and impermissible.

P/C: I have no further questions.

110 The questions were not leading. They were open enquiries which admitted of a yes or no answer. Mr Thompson, as a former employee, was well placed to provide one of those answers according to the truthfulness and reliability of his

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[24] Trial transcript at 399-400.
[25] Trial transcript at 400.

recollection. The cross-examiner introduced the topic of what was sold at the shop and introduced the topic no doubt for a forensic purpose envisaged by defence counsel. The topic was left ambiguous in the sense that the notion "hydroponic equipment" – a protean concept – was not explored or explained either for the assistance of the witness or the benefit of the jury. The questions in re-examination demonstrate the ambiguous and incomplete state of the evidence on this topic following the cross-examination. The answers were relevant for a non-propensity purpose. The Judge was correct to permit the re-examination.

111 The evidence did not have a prejudicial effect apart from any detrimental effect on the defence case caused by its probative value. The fact that the appellant had a connection with Mr Morley, the proprietor of Bloomin' Hydro, provided some, albeit limited, relevance to the evidence that Bloomin' Hydro sold nutrients, pots and tubing, where items of that nature were found in the Walkerville premises or, in the case of nutrients, it could be inferred had been used at the Walkerville premises.

112 Given that the appellant had at his Walkerville premises hydroponic equipment in the process of being dismantled on the day of the search, the fact that he had a connection with a shop from which he may have obtained some of that equipment could hardly be described as prejudicial. I would reject ground 1.9.

Ground 2

113 By this ground the appellant complains that the Judge misdirected the jury on the elements of trafficking in a controlled drug in that he failed to instruct the jury that it was necessary for the prosecution to prove that the appellant knowingly took part in a process of selling at least two kilograms of cannabis.

114 *R v Parisi*[26] stands for the proposition that on a charge of trafficking in a large commercial quantity of cannabis contrary to section 32(1) of the *Controlled Substances Act*, where the basis relied upon for the charge is that of having possession of a large commercial quantity of cannabis with intent to sell, it is an element of the offence and necessary for the prosecution to prove that the defendant intended to sell not less than a large commercial quantity, that is, two kilograms of the amount of cannabis found in the defendant's possession.

115 The appellant contends that the same requirement with respect to the necessary mental element also applies where the basis of the charge is an allegation that a defendant took part in the process of sale of the drug (as amplified by subsections 4(4) and 4(5) of the *Controlled Substances Act*). The appellant submitted as follows.

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[26] [2014] SASCFC 57; (2014) 119 SASR 277 (Peek J with whose reasons Sulan and Bampton JJ agreed).

> It must follow [from the approach adopted in *R v Parisi* with respect to being in possession with an intention to sell] ... that proof of an offence against s 32(1) by taking part in the process of sale of "the drug" under consideration, requires proof that the defendant knowingly did an act having the character of "taking part" with a co-existent intention to act for the purpose of the sale of *at least 2 kg of the drug*, or believing that *not less than 2 kg of the drug* were to be sold.
>
> [emphasis added]

116 The respondent does not dispute that the reasoning in *Parisi* leads to this conclusion with respect to the second limb of the trafficking charge relied upon by the prosecution in this case. Whilst this Court is bound only by the ratio of *Parisi*, that is, that the mental element of the offence where possession with the intention to sell is relied upon requires an intention to sell at least two kilograms, my strong inclination is to accept that the reasoning including the approach to the construction of section 32(1), adopted in *Parisi* supports the further contention argued for by the appellant and not disputed by the respondent that the same mental element is required where there is reliance on an allegation of taking part in the process of sale of the drug.

117 The appellant complains about the Judge's direction in this respect which was in the following terms. Again, I have numbered each paragraph for ease of reference.

> (1) In relation to the second element, the prosecution must prove beyond reasonable doubt that the accused trafficked in the controlled drug. The verb "to traffic" is not one in everyday use but in the *Controlled Substances Act* which creates this and other offences, Parliament has provided a broad definition of what it means.
>
> (2) For our purposes the Act says that a person "traffics" in a drug if, amongst other things, he has possession of the drug intending to sell it or he knowingly takes part in the process of sale of a drug.
>
> (3) In this case on this element in order for you to be satisfied beyond reasonable doubt, the prosecution must prove either that he was in possession of the drug *intending to sell at least 2 kg of it*, or that he knowingly took part in the *process of sale of the drug*.
>
> (4) I mention that figure 2 kg because, and again I'll direct you, Parliament has declared a large commercial quantity of cannabis to be 2 kg or more. Accordingly, if the accused is to be found guilty of the charge, you must be satisfied beyond reasonable doubt that he was in possession, *intending to sell at least 2 kg or more*, or he was knowingly *taking part in the process of sale*.
>
> [emphasis supplied]

118 The jury were explicitly directed, with respect to the first pathway towards guilt, that the appellant had to have an intention to sell at least two kilograms (a commercial quantity) of the drug. However, the appellant complains that the jury were not explicitly directed, in the case of the second pathway towards guilt,

that the appellant had to have knowingly taken part in the process of sale of at least two kilograms (a commercial quantity) of the drug.

119 *Read* literally, the direction may be seen as a misdirection. However, it must be remembered that this is not a direction that the jury had before them in writing where the failure to refer to at least two kilograms of the drug with respect to the second pathway *might* present itself in such a stark or literal fashion. The direction was given orally and both pathways were dealt with in the one spoken sentence. In my view, there was little risk that the jury would have failed to understand the second part of each direction as containing implicitly the same requirement that the mental element had to concern at least two kilograms of the cannabis. In other words, the qualifier of "at least 2 kg" carried over, implicitly, to the statement of the mental element with respect to the second pathway. As such, the failure to expressly state again something like "of 2 kg of the drug" at the end of paragraphs (3) and (4) of the direction would have been of no moment to the jury when hearing the direction given orally.

120 In addition, as far as paragraph (3) is concerned, the Judge said with reference to the alternative pathway, "that he knowingly took part in the process of sale of *the drug*". If any misunderstanding had followed from this statement, it would be a misunderstanding to the benefit of the appellant in that "the reference to the drug" could only have been a reference to the 38.2 kilograms said to have been in possession of the appellant. In other words, the more natural misunderstanding, if any, by the jury would be that they had to be satisfied beyond reasonable doubt that the appellant knowingly took part in the process of sale of the whole of the 38.2 kilograms. Again, whilst the phrase "the drug" was not used at the end of paragraph (4), there is no suggestion in the formulation used that anything less than two kilograms would suffice. Rather, and again, if the jury were to have been misled, they would have been misled into thinking that the appellant had to have been knowingly taking part in the process of sale of all of the 38.2 kilograms said to have been in his possession.

121 Furthermore, the direction has to be read as a whole and in the context of the statement included at the beginning of paragraph (4). This added clarity to the direction given in paragraph (3) and also to what followed in paragraph (4) that statement being, "I mention that figure 2 kg because, and I direct you, parliament has declared a large commercial quantity of cannabis to be 2 kg or more. Accordingly, if the accused is to be found guilty of the charge ...".

122 Finally, if the jury were satisfied that the appellant had been in possession of the cannabis in the container they would have been satisfied that he was in possession of 38.2 kilograms of cannabis – a very substantial quantity well in excess of the two kilograms required for a large commercial quantity. The notion that the jury might have taken the view that he was in possession of that quantity but was only knowingly taking part in the process of sale of something less than two kilograms is fanciful. There was no prospect of the jury being

misled by the language employed by the Judge and whilst, out of an abundance of caution, more precise language might have been used, I am not satisfied that there was a misdirection. I would dismiss appeal ground 2.

Appeal ground 4

123 By this ground the appellant complains that the Judge erred in failing to direct the jury that they could not use evidence concerning the presence of the hydroponic equipment at the Walkerville premises to infer that at least some of the cannabis found in the shipping container was grown at the Walkerville premises unless first satisfied beyond reasonable doubt that the hydroponic equipment was so used.

124 I have already canvassed this issue. A finding by way of inference (with greater or lesser cogency according to the jury's view of the circumstantial evidence tending to the inference) that some of the cannabis found in the shipping container might have been grown at the Walkerville premises is not an essential link in the chain of reasoning to guilt and does not require a *Shepherd* direction requiring proof beyond reasonable doubt. I would reject this ground of appeal.

Appeal grounds 6 and 7.1

125 By ground 6 the appellant contends that the trial miscarried as a result of the jury being invited to return a verdict of guilty on one of two alternative and mutually exclusive legal and factual pathways. By ground 7.1 the appellant contends, in the alternative, that the trial miscarried as a result of the Judge's failure to give to the jury an extended unanimity direction as to the legal and factual basis upon which any finding of guilt might be arrived.

126 Matters of principle and the law concerning circumstances in a criminal trial which might give rise to the need for an extended unanimity direction have recently been discussed by members of this Court in *R v McCarthy*.[27] The discussion was tailored to the facts before the Court in that case which involved a charge of murder based, on one view of the matter, on two alternative factual bases (although not necessarily mutually exclusive factual bases) and various alternative pathways to the alternative offence of manslaughter. Nevertheless, Peek J provided a particularly comprehensive and illuminating discussion of the leading overseas and Australian authorities bearing on this issue. It is unnecessary to traverse here the analyses propounded in *McCarthy*.

127 The present is not a case within the category of alternative party type liability nor, in my view, is it a case raising alternative factual bases for liability. Rather, the prosecution here propounded two alternative but not necessarily

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[27] [2015] SASCFC 177; (2015) 124 SASR 190 at [2]-[10] (Kourakis CJ), [114]-[124] (Gray J) and, particularly comprehensively, at [205]-[323] (Peek J).

mutually exclusive legal bases for liability founded on essentially the same factual substratum.

128 The appellant contends that the factual bases for the alternative pathways to guilt relied upon by the prosecution, are, in fact, different. The appellant submits that the evidence of and relevant to the grow room at the Walkerville premises was not or should not have been left to the jury as part of the prosecution case with respect to its second pathway to guilt, that is, that the appellant was trafficking in a controlled drug by way of taking part in the process of sale of the drug through having stored, or concealed the drug or having provided or allowed the use of premises for the purpose of sale. I disagree. The grow room evidence was relevant to this second legal basis for liability relied upon by the prosecution. The inferences available to the jury that the appellant had the knowledge and means to produce cannabis and had shortly prior to the relevant time engaged in the production of cannabis were inferences upon which the jury could rely in determining whether the appellant had contributed some of the cannabis found in the container and, as a consequence, was taking part in the process of sale of the cannabis by way of having stored or concealed it or having provided or allowed the use of premises for the purpose of its sale.

129 In general, the authorities suggest that where there are alternative legal bases for liability, there will be no need for jury unanimity with respect to a particular legal basis where each is based on the same or substantially the same facts. Ordinarily, this will be because the alternative bases do not involve materially different issues or consequences. In my view, this is so in the present case.

130 In *R v Leivers & Ballinger*,[28] Fitzgerald P and Moynihan J observed:

> When more than one basis of criminal liability is relied on against an accused, it is, in our opinion, necessary for the jury to be unanimously satisfied that the requirements of at least one basis of liability are proved beyond reasonable doubt. It will not necessarily be sufficient for some members of the jury to be satisfied that the requirements of one basis of liability are established and for other members of the jury to be satisfied that the requirements of another basis of liability are established. *However, that will be sufficient if the alternative bases of criminal liability do not involve materially different issues or consequences*. ...
>
> [emphasis supplied]

In *R v Cramp*,[29] Barr J speaking on behalf of the New South Wales Court of Criminal Appeal said this.

> A distinction is to be made between alternative factual bases of liability and alternative legal formulations of liability based on the same or substantially the same facts. The cases to which I have referred speak about the former. This appeal is about the latter.

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[28] (1998) 101 A Crim R 175 at 188.
[29] (1999) 110 A Crim R 198 at [65]-[68].

> The jury were obliged to consider the whole of the conduct of the appellant for the purpose of considering whether he caused the death of the deceased by his unlawful and dangerous act or by his gross negligence. Each process of reasoning invited by the Crown rested on substantially the same factual basis.
>
> Of course, there were differences between the ways the Crown put the case factually on each basis. The main one was that the appellant was said for the purposes of his gross negligence (but not for the purposes of his unlawful and dangerous act) to have permitted the deceased to drive the car whilst she was not wearing a seatbelt. But that fact was not irrelevant to the jury's consideration of the appellant's unlawful and dangerous act. Whether the deceased was wearing a seatbelt was relevant to the questions whether she drove negligently, furiously or recklessly or in a manner dangerous to the public or whilst under the influence of alcohol.
>
> It follows from what I have said that the jury must have agreed upon the basis upon which they found the appellant guilty. Using the terminology of *Leivers*, the alternative bases did not involve materially different issues or consequences. The appellant knew the case he had to meet.

131 The two pathways to guilt in the present case are based on the same or, at least, *substantially* the same factual basis. There would be nothing to be served by the giving of an extended unanimity direction but added complexity and potential confusion for the jury would follow. There would be nothing served because jury unanimity (or unanimity within the statutory majority, as necessary)[30] will have occurred in any event.

132 The issue concerns the two pathways relied on by the prosecution with respect to element (ii) of the offence, that is, that the appellant trafficked in the substance (found in the container).[31] The first pathway is that the appellant was in possession of some or all of the cannabis found in the container either alone or jointly with some other person, with an intention to sell. The second pathway is that the appellant took part in the process of sale of the controlled substance found in the container by way of: storing it for the purpose of its sale, concealing it for the purpose of its sale, or providing or allowing the use of premises for the purpose of its sale.

133 Those members of the jury who were satisfied of the first pathway would not be precluded from being, and on the facts of this case necessarily would have been, satisfied of at least one of the aspects of the second pathway. The converse does not follow. Nevertheless, in the event that, following retiring, a verdict of guilty was to be reached, the alternative outcomes could only have been:

(1) that all members of the jury in favour of a guilty verdict were satisfied with respect to the first pathway; or

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30 In this case there was a unanimous verdict but the same principles apply with respect to cases where a statutory majority verdict is available and arrived at.

31 Of course, other matters need to be proved in order to establish the large commercial quantity aspects of the offence in element (iv).

(2) that all members of the jury in favour of a guilty verdict were only satisfied with respect to the second pathway, or

(3) that a proportion of all members of the jury in favour of a guilty verdict were satisfied with respect to the first pathway and a proportion were satisfied only with respect to the second pathway.

The alternatives in (1) and (2) necessarily result in a unanimous verdict and in unanimity as to the legal pathway towards that verdict.

134 In this case, alternative (3) will also satisfy unanimity as to the legal pathway. Those members of the jury who were satisfied with respect to the first legal pathway, that is, that the appellant was in possession of the cannabis in the container with an intention to sell it will also necessarily, given the facts of this case, be satisfied that he was storing the cannabis or concealing the cannabis or providing or allowing for the use of premises (with respect to the cannabis) for the purpose of its sale. As such, those members of the jury who were satisfied with respect to the first legal pathway would also be satisfied with respect to the second legal pathway and extended unanimity will be achieved.

135 The alternative bases for liability do not involve "materially different issues or consequences" and, as such, an extended unanimity direction was not required.[32]

136 I would reject appeal grounds 6 and 7.2.

Appeal ground 8

137 By this ground the appellant complains about the failure of the trial Judge to properly direct the jury as to the proper use of the telephone contact evidence concerning Karen Rutland, John Winslett, Damien Morley and Simon Jones. To a large extent this matter has already been dealt with. Under ground 8 the appellant contends that the jury could not use that evidence unless first satisfied beyond reasonable doubt that the appellant knew the police were at the Port Adelaide premises and were attempting to gain access to the shipping container. This contention is misconceived. The purpose of the evidence was to form an evidentiary basis upon which the jury might draw an inference as to those very matters, albeit, an inference of more or less cogency, according to the jury's view of the evidence, and to be weighed in the context of the whole of the prosecution circumstantial evidence case.

138 The appellant also complains that the Judge erred by not directing the jury that they had to be satisfied that the applicant had in fact made telephone contact with these persons. Again, this contention fails to pay proper regard to the nature of a circumstantial evidence case. The third complaint by the appellant (subground 8.3) fails for the same reason.

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[32] *R v Leivers & Ballinger* (1998) 101 A Crim R 175 at 188 (Fitzgerald P and Moynihan J).

139 I would reject ground 8 of the appeal.

Appeal ground 9

140 Appeal ground 9 is to the effect that the verdict of guilty was unreasonable or unsupportable, having regard to the appellant's various criticisms of the evidence as summarised in paragraphs 9.1 to 9.6. Given my reasons to this point, there is nothing in paragraphs 9.1 to 9.6 that lends support to the contention that the verdict was unreasonable or unsupportable.

141 In *Libke v The Queen*,[33] Hayne J (with whose reasons Gleeson CJ and Heydon J agreed) described the test approved of by the High Court in *M v The Queen*[34] in these terms.

> [T]he question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. In the present case, the critical question for the jury was what assessment they made of the whole of the evidence that the complainant and the appellant gave that was relevant to the issue of consent to the digital penetration that had occurred in the park. That evidence did not require the conclusion that the jury should necessarily have entertained a doubt about the appellant's guilt.
>
> [citation omitted]

I agree with the following written submission by the respondent.

> The appellant's submission attempts to isolate individual aspects of the Crown case and fails to consider the combined effect of the evidence led against him at the trial. Such an approach is erroneous.
>
> Even when considered in isolation it is submitted the criticisms made by the appellant fail to have any regard to the following:
>
> a. his ownership of the premises, his ownership of the business operating from the premises, its prominent position at the premises, the nature of the documents inside the container, the calls made from his phone at relevant times that afternoon and the subsequent arrival of Jones at his house in relation to the "grow room" was all evidence relevant to whether the applicant was "responsible for the shipping container" and whether he "had access to the shipping container";
>
> b. the fact others may have been involved in the trafficking of the 90 pounds of cannabis neither weakened nor undermined the evidence proving the appellant's involvement with and connection to that cannabis;
>
> c. regardless of the fact there is no obvious explanation why someone would place boxes of documents addressed to the appellant into the container after police had seized the cannabis. The appellant's submission also fails to acknowledge the

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[33] [2007] HCA 30; (2007) 230 CLR 559 at [113], 596-597.
[34] [1994] HCA 63; (1994) 181 CLR 487.

evidence of Flavel to the effect he saw documents relating to the business when he was inside the container on 14 June 2013;

d. whilst the appellant raised issues as to the integrity of this scene and 'the reliability of the evidence of the investigating police officers" this evidence did not "raise serious questions" about such matters. In any event these were issues for the jury;

If the appellant was not involved it meant the real cannabis trader was prepared to risk storing cannabis worth between $190,000 and $480,000 in a container:

a. alongside documents from a business owned by someone else;

b. in plain sight on a business premises owned by someone else; and

c. in a container owned by someone else,

without informing the appellant or involving the appellant in the storage of those drugs. It was open for the jury to find this was implausible.

142 I have reviewed the admissible evidence relied on by the prosecution. In my view, it was open for the jury to be satisfied of the appellant's guilt beyond reasonable doubt in the sense explained in *M v The Queen* and *Libke v The Queen*. The admissible evidence in this case when considered as a whole was not such that the jury should *necessarily* have entertained a doubt about the appellant's guilt. I would reject ground 9.

Conclusion

143 Permission to appeal has previously been granted with respect to grounds 6 and 7 and permission with respect to ground 2 is unnecessary. I would refuse permission with respect to grounds 1.6, 1.7, 1.9, 4, 8 and 9 and grant permission with respect to grounds 1.1, 1.2, 1.3, 1.4, 1.5, 3, 5 and 6.

144 I would allow the appeal for the reason that there has been a miscarriage of justice as a consequence of the Judge's failure to fully comply with section 34R of the *Evidence Act* in conjunction with the misstatement of the standard of proof, earlier identified (grounds 3, 5 and 7.2). I would order that the conviction be set aside and the matter remitted to the District Court for a new trial.

HINTON J.

145 I have had the benefit of reading the judgment of Nicholson J for which I am grateful. I agree that the appeal should be allowed for the reasons given by his Honour.

146 With respect to grounds 3, 5 and 7.2. I add the following.

147 I agree that the evidence relating to the grow room at the Walkerville premises was relevant and admissible for the purposes that Nicholson J identifies. I would add that that evidence was also probative of the fact of possession and storage of the cannabis at the Port Adelaide premises on the part of the appellant. If the jury accepted the evidence of Senior Constables Marsh and McFarlane it would have been open to them to conclude that cannabis had recently been grown and harvested at the Walkerville premises shared by the appellant, his partner and daughter. When this is added to the results of the search of the container at the Port Adelaide premises, the evidence connecting the appellant to those premises and the container (including the evidence of the invoices found in the container and the fingerprint of Mr Thompson on the "Bloomin Hydro" plastic shopping bag), the quantity of cannabis located and the evidence of Sergeant Nguyen, it renders it more likely that the appellant not only knew that the cannabis was present in the container but was storing it, and or, was in possession of it. That conclusion gains strength from the inference to be drawn from the timing of the telephone contact between the appellant and Mr Jones and the subsequent discovery of Mr Jones dismantling the grow room at the Walkerville premises. Shortly put, the evidence of a recent crop grown at the Walkerville premises and the dismantling of the grow room in the wake of the police discovery at Port Adelaide, rendered it highly unlikely that the cannabis in the container at the Port Adelaide premises, bearing in mind the connection between the appellant and the premises and the container, belonged to someone else or was being stored in the container by someone else.

148 I pause here to make a brief comment regarding the evidence of Senior Constables Marsh and McFarlane. That evidence was the product of specialist knowledge acquired by the officers as a consequence of the experience they had gained in the investigation of cannabis related offending. The nature of evidence of this kind was dealt with by this Court in *R v Cluse*.[35] It is to be distinguished from the evidence of an expert whose specialist knowledge is the product of a course of systematic training and study.[36] It is also to be distinguished from the opinion evidence that may be lead from any lay witness necessary to that witness conveying what they had experienced.[37] The rules governing the admissibility of each of these types of evidence differ.

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[35] (2014) 120 SASR 268 at [1]-[6] (Kourakis CJ; Kelly J agreeing), [43]-[47] (Vanstone J).

[36] *R v Cluse* (2014) 120 SASR 268; see also, Wigmore, *Evidence in Trials at Common Law*, 3rd ed, Chadbourn Revision, Little Brown and Co., Vol II, 1979 at 751.

[37] *Lithgow City Council v Jackson* (2011) 244 CLR 352 at [45] (French CJ, Heydon and Bell JJ).

149 In *Martin v Osborne* Dixon J summarised the process of thinking undertaken in circumstantial reasoning.[38] He said:[39]

> If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omissions or a particular description, their reputations and their associations are in general not matters which it is lawful to take into account, and evidence disclosing them, if not otherwise relevant, is rigidly excluded. But the class of acts and occurrences that may be considered includes circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed.

150 Respectfully, I would add that subsidiary facts forming the class of acts and occurrences to which Dixon J refers, may themselves be facts established by inference.[40] Consequently, in cases involving inferential reasoning, it is not uncommon for a judge in summing up to refer to inferences as rendering a fact more likely where the fact inferred is a subsidiary or intermediate fact. Doing so is not to reverse the onus of proof provided that the fact inferred is not an indispensable step in the chain of reasoning to guilt and that it is made plain that the main or material fact, namely an element or elements of the offence charged, must be proven beyond reasonable doubt.[41] It follows then that in cases involving circumstantial reasoning trial judges must be alive to the process of reasoning to guilt that the jury is invited to follow and to whether a fact to be inferred is an indispensable link in the chain of reasoning to guilt. But more than that, wherever crafting a summing up involves dissecting the chain of reasoning, such as is required in the application of s 34P of the *Evidence Act 1929* (SA), care must be taken to ensure that any reference to the likelihood or probability of a fact occurring does not dilute the appropriate direction to be given on the standard of proof. If a fact to be inferred is not an indispensable link in the chain of reasoning to guilt it is permissible to refer to the inferential chain as rendering the occurrence of a fact more likely, however, any direction should then make plain that the likelihood of such fact occurring must then be considered with the facts surrounding it and ultimately the question asked whether, taken together, the occurrence of the main or material fact to be proved is "so high that the contrary cannot be reasonably supposed".

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38 (1936) 55 CLR 367.

39 *Martin v Osborne* (1936) 55 CLR 367 at 375.

40 *Shepherd v The Queen* (1990) 170 CLR 573 at 579 (Dawson J). See Wigmore, *The Science of Judicial Proof*, 3rd ed, Pt 1, Little, Brown and Co., 1937 at 13.

41 *Shepherd v The Queen* (1990) 170 CLR 573 at 579-80 (Dawson J; Mason CJ, Toohey and Gaudron JJ agreeing), 592-3 (McHugh J; Mason CJ agreeing).

151 In this case, in purported compliance with s 34R of the *Evidence Act 1929* (SA) the trial Judge gave the jury the following directions:[42]

(1) I now turn to the direction that I mentioned earlier about the equipment, the hydroponic equipment, found at the accused's house which is commonly used, you heard, for the cultivation of cannabis.

(2) The fact that the accused has such equipment in his house is not the subject of any criminal charge. Usually in a criminal trial evidence of another alleged crime which is not the subject of an actual charge is not admissible because it is only the evidence relating to the actual charge which is relevant for a jury to hear and evaluate.

(3) You in this trial have been permitted to hear this evidence, but I need to give you a direction as to the purpose for which this evidence may be used. You may use the evidence, if you are prepared to accept it, to show first that the accused owned property, domestic property in which there was hydroponic equipment.

(4) You may use the fact of the accused's fingerprints being found on the light shade in the room to show that he was aware that the equipment was there, and you may use the evidence to show that as a result the accused had both the knowledge and the means to produce cannabis.

(5) You may also use the evidence of Officer Marsh with respect to detecting a smell of growing cannabis and Officers Marsh and McFarlane with respect to seeing leaf material that they believed bore a resemblance to cannabis leaf, even though there was no evidence to prove it actually was cannabis. If you accept that evidence, you may use it to show that this room was being used, or was recently used for the growing of cannabis.

(6) In summary, you may use this evidence, if you accept it, to conclude what the accused was doing at his domestic premises at the time drugs were found in the container, that he was combining his knowledge of cannabis with the means to produce it.

(7) If you accept that he was acting in this way in his domestic premises, you may think it more likely than not that he was knowingly in possession for the purposes of the sale of the cannabis at his commercial premises.

(8) Alternatively, you may think these facts make it more likely he was taking a step in the process of selling cannabis by storing or otherwise providing his premises for it, or guarding it, or concealing it.

(9) These then are the uses which you may make of that evidence. There are, however, uses which you are not permitted to make of the evidence. You are not permitted to use the evidence to reason that because the accused may have been involved in the cultivation of cannabis at his home, that, accordingly he is the sort of person who would traffic in illicit drugs in the ways alleged by the Crown, and that he is therefore guilty of the charge before the court.

(10) You must not use the evidence in that way because that would be to reason that because he may have done something unlawful in the past, he must have

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[42] Paragraph numbers added per Nicholson J's approach.

committed and be guilty of this offence, and that is a form of reasoning which is not permitted.

152 I agree with Nicholson J that the seventh and eighth paragraphs overstate the inferences that may be drawn from the subsidiary or intermediate facts subject of the fourth, fifth and sixth paragraphs. What is missing is reference to the other evidence which, taken with the subsidiary or intermediate facts subject of the fourth, fifth and sixth paragraphs, render it more likely that the appellant was knowingly in possession of the cannabis or was storing or otherwise providing his premises for it, or guarding it, or concealing it.[43] The missing evidence is that referred to in opening this judgment, namely, connecting the appellant to the Port Adelaide premises and the container (including the evidence of the invoices found in the container and the fingerprint of Mr Thompson on the "Bloomin Hydro" plastic shopping bag), the quantity of cannabis located, the evidence of Sergeant Nguyen, the evidence of the appellant's contact with Mr Jones and the evidence of Mr Jones being found in the process of dismantling the grow room. Absent the further dissection of the process of reasoning to the conclusions referred to the in the seventh and eighth paragraphs, those paragraphs invite the jury to jump to the conclusions therein articulated from the conclusion as to what had taken place at the Walkerville premises. As Nicholson J points out, that is to do exactly what the ninth and tenth paragraphs tell the jury not to do. In such circumstances the trial Judge did not correctly discharge the duty imposed by s 34R of the *Evidence Act 1929* (SA).

153 With respect to ground five, I agree that paragraphs seven and eight invite the jury to reason from the overstated inferences that a main or material fact, an element, is more likely than not to have occurred. As indicated above, such direction without more offends the standard of proof. I appreciate that in this case the trial Judge did subsequently correctly direct the jury as to the standard of proof and that it applied to each element of each of the offences charged. Nowhere, however, did the trial Judge revisit his directions as to the use of the evidence of the grow room and the inferences it gave rise to. His directions as to the permissible and impermissible use of that evidence remain hanging complete with the invitation to reason to satisfaction as to proof of the elements of possession or storage on the basis of those facts being more likely. In those circumstances there arises a perceptible risk of a miscarriage of justice. Whilst the prosecution case may be considered strong, I agree that this is not a case where it would be appropriate to apply the proviso.

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[43] I agree with Nicholson J that to the extent that the second permissible use identified by the trial Judge in the eighth paragraph of the passage taken from the summing up did not fall within his ruling is of no consequence. The inference as to possession, if drawn, could not sensibly be separated out from an inference as to storage.