IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA586/2017
[2018] NZCA 377

BETWEEN	JIRI KUPEC Appellant
AND	THE QUEEN Respondent

Hearing: 14 June 2018

Court: Brown, Clifford and Williams JJ

Counsel: P L Borich QC and J N Olsen for Appellant
K S Grau and M L Wong for Respondent

Judgment: 19 September 2018 at 12.30 pm

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] On 3 August 2017 a jury in the District Court at Manukau found Jiri Kupec guilty of one charge of importing into New Zealand a class A controlled drug, namely methamphetamine.[1] He was convicted and sentenced to 17 years' imprisonment with

[1] Misuse of Drugs Act 1975, s 6(1)(a). See also s 6(2)(a).

a minimum period of imprisonment of eight and a half years.[2] Mr Kupec now appeals his conviction and sentence.

Background

The importation

[2] Mr Kupec and his mother, who were Czech citizens, travelled from the Czech Republic to New Zealand via Thailand. Whilst in a hotel in Thailand third persons visited their hotel room and as pre-arranged replaced the suitcases brought to Thailand by the appellant with other suitcases. The swapped suitcases each contained approximately 10 kilograms of methamphetamine built into compartments within those suitcases. The appellant and his mother left Thailand, transiting through Sydney, and arrived at Auckland International Airport on 12 May 2016. Upon arrival a search by New Zealand Customs officers revealed almost 10 kilograms of methamphetamine hidden within a false lining in both Mr Kupec's and his mother's suitcases.

[3] In an interview which was recorded on DVD Mr Kupec told investigators that an unknown person in Bangkok had given him $5,000 and the two suitcases, exchanging them for the very similar looking but much lighter suitcases he had purchased in the Czech Republic. Mr Kupec said he had met a Polish man called Richard in a bar in Prague who had offered him a holiday with a chance to make some money at the same time. Richard had instructed him to buy two suitcases with a particular appearance and to take another person on the trip with him. Mr Kupec was also in contact with Richard via cell phone using what the Crown said was a code to confirm his arrival.

[4] Mr Kupec denied any knowledge that there were drugs in the suitcases. He said he believed he was illegally smuggling currency to the United States where he and his mother planned to travel after an eight day stay in Auckland at an Otahuhu motel.

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2 *R v Kupec* [2017] NZDC 22632.

The trial

[5] The trial was scheduled to commence on 31 July 2017. On 19 June 2017 the Supreme Court's decision in *Cameron v R*[3] was released which held that the mens rea component of the offences in that case encompassed recklessness.[4]

[6] No amendment was made to the charge against Mr Kupec but the Crown opening made it clear that the Crown case included an allegation of recklessness:

> So, the Crown case in this trial is that the defendant knew he was importing illegal drugs into New Zealand or, at the very least, he was reckless about that. He knew there was a real possibility that what he had in his suitcase was drugs and yet despite that he pushed on and brought the suitcases in anyway, and that's why he's charged with importing methamphetamine today.

[7] The question trail which Judge McGuire prepared addressed the issue of recklessness in the following manner:

> [3] Are you sure that at the time he brought the suitcases into New Zealand, the defendant knew that the suitcases contained an illegal drug?
>
> If Yes, find him Guilty
>
> If No, go to [4]
>
> [4] Are you sure that at the time he brought the suitcases into New Zealand, the defendant believed that it was a real possibility that the suitcases contained an illegal drug?
>
> If Yes, go to [5]
>
> If No, find him Not Guilty
>
> [5] Are you sure that knowing there was a real possibility that the suitcases contained an illegal drug, he unreasonably disregarded that risk?
>
> If Yes, find him Guilty
>
> If No, find him Not Guilty

[8] Late in the afternoon of 1 August 2017 counsel met with the Judge in chambers and discussed in some detail the implications of *Cameron v R*, in particular the

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3 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161.

4 The charges were of importing, selling and having possession for sale of the Class C controlled drug 4-methylethcathinone, also known as 4-MEC.

constraints it might place on counsels' closing addresses and the manner in which the Judge might direct the jury. The detail of that discussion is addressed in the analysis below.

Grounds of appeal

[9] Mr Borich QC formulated five points on appeal:

(a) Did comments of the Supreme Court in *Cameron v R*, said to be obiter, overrule the previous law as set out in decisions of this Court in *R v Martin*[5] and *Soles v R*?[6]

(b) If *Cameron* applied, did the trial Judge interpret it correctly when directing the jury?

(c) Was the trial Judge correct to rule out a defence submission that, if the appellant proved an innocent state of mind, an acquittal should follow? Further if such an entirely innocent state of mind was proven, would the jury still need to go on to consider *Cameron* recklessness?

(d) Did the Judge give an adequate direction on the appellant's out of court DVD statement?

(e) Was the sentence manifestly excessive?

Did *Cameron* apply to this case?

Martin and Soles

[10] In *Martin* and *Soles*, both of which involved the importation of class A drugs hidden in luggage, this Court held that to establish criminal liability actual knowledge that the luggage contained controlled drugs was required and that recklessness would not suffice. This first ground of appeal concerns the breadth of the ratio of *Cameron*, in particular whether it extends beyond the particular context of that case, which was

5 *R v Martin* [2007] NZCA 386.
6 *Soles v R* [2015] NZCA 32.

whether certain compounds were analogues of controlled drugs, and overruled *Martin* and *Soles*.

[11] The issue in *Martin* was whether the defendant knew three kilograms of cocaine were hidden in her suitcase. Ms Martin appealed her conviction on the ground that the Judge's direction that wilful blindness would suffice was incorrect. This Court held:[7]

> [10] … In a case such as this, it will suffice *if the Crown can prove beyond reasonable doubt that the accused (importer) had her suspicions aroused as to what she was carrying, but deliberately refrained from making further inquiries or confirming her suspicion because she wanted to remain in ignorance*. If that is proved, the law presumes knowledge on the part of the accused. The fault lies in the deliberate failure to inquire when the accused knows there is reason for inquiry.

[12] The Court went on to distinguish wilful blindness from recklessness:

> [12] We should make clear that the concept of wilful blindness is to be distinguished from recklessness, which involves actual knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur: … Recklessness in this sense is not sufficient to establish knowledge of the illicit nature of the drugs. If the possibility of recklessness arises on the facts, trial judges will need to make this distinction clear to the jury and give appropriate directions.

[13] In *Soles* this Court allowed an appeal against conviction on the basis that recklessness had been left to the jury as sufficient to establish knowledge on the part of Mr Soles as to methamphetamine hidden in his suitcase. The Court said:

> [16] There is no dispute that recklessness does not suffice to establish knowledge of the presence of controlled drugs in s 6(1)(a) of the Misuse of Drugs Act. This Court in *R v Martin* stated that "[r]ecklessness in this sense is not sufficient to establish knowledge of the illicit nature of the drugs." Recklessness in this context means "actual knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur."
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> [17] The relevant directions show the matter was left to the jury on the basis recklessness was sufficient to establish knowledge. The foreperson asked whether it was sufficient for Mr Soles to be thinking "what's in the suitcase, it could be this, this or this and one of those things could be drugs?" The answer should have been "no". Although qualified, the answer was "yes".
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> (Footnotes omitted.)

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7 Italics in original.

The appellant's submission

[14] The appeal to the Supreme Court in *Cameron* primarily involved the issue of the mens rea element in offences involving controlled drug analogues. A controlled drug analogue, which is defined in the Misuse of Drugs Act 1975 as encompassing any substance "that has a structure substantially similar to that of any controlled drug",[8] is a class C controlled drug.[9] At trial the defendants argued that the Crown must prove illegality knowledge, in other words that the appellant knew that the product was a controlled drug analogue. While not argued in the Courts below the Supreme Court requested argument on whether the mens rea for the offences extended to recklessness.

[15] Mr Borich submitted that *Cameron* should be viewed as confined to the issue of identity knowledge and whether certain compounds are analogues of controlled drugs. He argued that, if the Supreme Court had intended to go further and overrule the principles laid down in *Martin* and *Soles*, it should have done so expressly. Hence observations in *Cameron* regarding the law in relation to the importation of class A drugs, which would appear to be a substantial shift regarding mens rea and recklessness, were said to be obiter dicta. Consequently Mr Borich submitted that the trial Judge in the present case should have directed the jury in terms of *Martin* and *Soles* and the failure to do so had resulted in a miscarriage of justice.

The Crown's submission

[16] The Crown's rejoinder was that the Supreme Court made it clear that its approach was not confined to the issue of class C controlled drug analogues. The Court had expressly overruled the principles in *Martin* and *Soles* and hence there could be no criticism of the trial Judge who was bound by *Cameron*.

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8 Misuse of Drugs Act 1975, s 2(1), definition of "controlled drug analogue".

9 Section 2(1), definition of "Class C controlled drug"; see also schedule 3.

Analysis

[17] There can be no doubt that the Crown submission is correct. The Supreme Court commenced its lengthy judgment with what was described as an overview of its approach as follows:

> [11] The indeterminacy of the definition of "controlled drug analogue" and the appellants' mistaken belief the drug they were dealing with was 4-MMC and not 4-MEC suggest that the case raises very particular problems. While this is so, these problems must be resolved in (a) a way which is consistent with an approach which is appropriate for all serious drug offending under the Misuse of Drugs Act; and (b) the broader context of the mens rea principles applicable to serious offending where knowledge (or intention) are not specifically provided for in the definition of the crime.
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> [12] As will be apparent by now, the case involves dealing in illicit material. In such a case, full knowledge of the illicit character of the material (complete knowledge) and honest belief that it is innocent (innocent belief) represent different ends of the states of mind continuum. To date, comparatively little attention has been paid to the culpability of those who deal in illicit material with knowledge that there is a real possibility that it is illicit. Instead, the working assumptions have become that lack of complete knowledge is to be equated with innocent belief or, and more recently, that complete knowledge is required for criminal liability as was the view of the Court of Appeal in *R v Martin* and *Soles v R*. Those cases concerned people who had brought suitcases into New Zealand which contained cocaine and methamphetamine. In each instance the Court (a) concluded that the importers incurred no criminal liability unless they knew that the suitcases contained controlled drugs; and (b) specifically rejected the view that the importers were liable if they had known that it was likely that the suitcases contained controlled drugs.
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> [13] As will become apparent, we disagree with the approach adopted in *Martin* and *Soles*. The Misuse of Drugs Act does not identify knowledge of the illicit character of the drugs as an element of offences it creates. In accordance with the general principles of mens rea, recklessness (that is recognition of the likelihood that the material in question is illicit and an unreasonable disregard of that risk) should suffice to constitute mens rea. Such an approach is also consistent with what we see as the policy of that Act.
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> (Footnotes omitted.)

[18] Hence, as the Crown submitted, from the outset the Supreme Court made it clear that its approach was not confined to the issue of class C controlled drug analogues. The Court observed that New Zealand courts had tended either to equate lack of complete knowledge with innocent belief or to hold that complete knowledge is required for criminal liability, the latter being the approach adopted in *Martin* and

Soles. The Court did not see this as consistent with the general principles of criminal law as to recklessness.[10]

[19] The Court went on to discuss both those cases,[11] observing in the context of a discussion of wilful blindness:

> [77] Properly understood, wilful blindness principles do not equate recklessness with knowledge; rather they provide a method by which knowledge may be inferred. In saying this we recognise the complication that notions of wilful blindness have sometimes been invoked where knowledge was not an express element of the offence. Such cases, which we consider include *Martin* and *Soles*, could have been dealt with more easily on the basis that recklessness sufficed for mens rea purposes. More generally, and as with recklessness and intention, we think it best not to conflate recklessness with knowledge. In particular, where actual knowledge is not an element of the offence, there should be no need to resort to wilful blindness.

[20] We agree with the Crown submission that the suggestion that *Martin* and *Soles* could have been resolved with regard to recklessness is illustrative of the Court's view that the law had taken a wrong turning in either equating lack of complete knowledge with innocent belief or requiring complete knowledge for criminal liability. That the Supreme Court intended that recklessness will suffice in all classes of drug offending, no matter what class of drugs was involved, is clearly stated:

> [73] In cases such as the present in which the offence is not defined in terms which require actual knowledge or intention and nothing less, we consider that recklessness as explained in *G* will (at least usually and perhaps always) be sufficient to satisfy mens rea requirements as to circumstance and result. For these purposes, recklessness is established if:
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> (a) the defendant recognised that there was a real possibility that:
>
> (i) his or her actions would bring about the proscribed result; and/or
>
> (ii) that the proscribed circumstances existed; and
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> (b) having regard to that risk those actions were unreasonable.

[21] This ground of appeal is consequently rejected.

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10 *Cameron v R,* above n 3, at [39].
11 At [57]–[60] and [77].

Did the Judge's direction to the jury interpret *Cameron* correctly?

[22] The second ground of appeal is more controversial than the first. While expressed as focussed on the Judge's direction, in reality it challenges the correctness of *Cameron* itself.

The appellant's submission

[23] The starting point is *R v G*[12] where the House of Lords departed from its earlier decision in *Commissioner of Police of the Metropolis v Caldwell*[13] on the basis the position taken there was too objective as it failed to adequately take into account the subjective characteristics of the person whose actions were under consideration. In *R v G* it was held that in order to convict of an offence of recklessly causing damage to property it had to be shown that the defendant's state of mind was culpable in that the defendant acted recklessly in respect of:

- a circumstance if he was aware of a risk which did or would exist;
- a result if he was aware of a risk that it would occur and it was in the circumstances known to him unreasonable to take the risk.[14]

The introduction of the phrase "in the circumstances known to" the defendant effectively restored the test for recklessness to that prior to *Caldwell*.

[24] Mr Borich submitted that while the Supreme Court had endeavoured to draw on Lord Bingham's formulation in *Cameron* at [73], in doing so it had lost the essence of *R v G* which was to restate the subjective requirements for recklessness. The key change in *R v G*, namely the introduction of "in the circumstances known to", was not reflected in [73]. That error was said to be reinforced at [74] where the Supreme Court referred to the issue being whether a reasonable and prudent person would have taken the risk:

> [74] There is comparatively little discussion in the cases or in the literature about the unreasonableness element of recklessness. Often enough, no question of reasonableness will arise. Thus if the actions of the offender have no social utility (for instance as involving personal violence with a risk of

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12 *R v G* [2003] UKHL 50, [2004] 1 AC 1034.
13 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341 (HL).
14 *R v G,* above n 12, at [41].

> serious injury or death) the running of any appreciated risk is necessarily unreasonable and thus reckless. … In contradistinction, where there was some social utility to the actions of the defendant, a more nuanced approach will be necessary. In such a case, the issue will be whether a reasonable and prudent person would have taken the risk. This may require consideration of the level of the risk involved counterbalanced by the utility of the actions of the defendant. …

[25] Consequently, consistent with *Cameron*, both the question trail and the Judge's directions omitted any reference to the circumstances known to the defendant. This feature was critical for the defence in view of Mr Kupec's explanation in his DVD interview that he thought he was carrying currency. Such a direction which omitted reference to a subjective assessment resulted in a miscarriage of justice.

The Crown's submission

[26] In response the Crown advances three propositions:

- The formation of recklessness adopted by the Supreme Court was consistent with authority.

- The absence of an explicit reference to the circumstances known to the defendant is immaterial because the requirement that the defendant actually recognised the risk (the *Cameron* formulation) or is aware of the risk (as in *R v G*) necessarily imports a subjective assessment of the defendant's knowledge.

- In any case this Court is not the proper forum to question the correctness of *Cameron*.

Analysis

[27] The Crown's third point must halt the argument in its tracks. Even if we considered that the argument had merit, it is not the role of this Court to question decisions of the Supreme Court.[15] The law in New Zealand is as stated in *Cameron*.

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[15] See *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [41].

However, to quiet any inference which might unjustifiably be drawn, we record our agreement with the Crown's first and second points.

Was the Judge's ruling correct concerning an innocent state of mind?

[28] The third point on appeal was formulated in this way:

> Was the trial Judge correct to rule out a defence submission that, if the appellant proved an innocent state of mind, an acquittal should follow. Further if such an entirely innocent state of mind was proven, would the jury still need to go on to consider *Cameron* recklessness?

[29] While the subject of the point on appeal was the relevance of a defendant's assertion of innocent belief, on analysis it involved two limbs: the first concerned with a particular direction given by the trial Judge during the in chambers discussion; the second was directed more generally to the structure of the question trail in such cases.

The appellant's submission

[30] Mr Borich considered that prior to *Cameron* a defendant in Mr Kupec's shoes would have been entitled to an acquittal if the jury was satisfied the defendant had an entirely innocent belief that the suitcases contained currency. However in the course of the trial he was concerned whether that remained the case following *Cameron*. In view of the structure of the question trail, he wished to ascertain how the Judge would direct the jury on the issue and thereby to avoid any risk of contradiction by the Judge in his summing up of Mr Borich's closing address.

[31] Consequently at the meeting in chambers on 1 August 2017 he outlined both his view and his apprehension of the Judge's view in light of the structure of the question trail. It is not necessary to recite the reasonably lengthy discussion which ensued among Mr Borich, the Crown prosecutor and the Judge. It will suffice to record the conclusion to the discussion:

> **MR BORICH:**
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> Can I say this, what I want to say to the jury is that if you believe [Mr Kupec] you must find him not guilty. Now that would be the position under the old

law. My question is, is that the position under the new law. I suspect not. I am really asking Your Honour to tell me if I say that will Your Honour say to the jury Mr Borich is wrong about that. So I want to avoid Your Honour's ire, and it is probably not the right word. I am happy for Your Honour to indicate that to us tomorrow but it is something I want to say. I would have been able to say pre *Cameron*. If Your Honour's view is that I cannot say it post-*Cameron* then I would invite Your Honour to tell me as much in a ruling and I will not. If Your Honour is of the view that I cannot, and I expect my learned friend's position is no you cannot, and if you say it I will be asking the Judge to correct you. If Your Honour says no I cannot then I will not.

…

MR KAYES:

… I do respectfully submit that whilst you might have been able to say that previously he cannot make that submission now, because even if the jury feel that his client has proven he had no knowledge, and obviously he is not required to do that, but even if he had they would still have to consider whether to find that he was reckless. It will no doubt inform their considerations of questions four and five, whether he really did subjectively think it was a real possibility and it might inform their view of whether it was unreasonable in the circumstances, but it does not answer the question. So they would, in the Crown's submission, have to go on to question four and five. So the Crown's submission [is] that would not be a proper submission or direction.

THE COURT:

I think Mr Borich if we look at these offences where recklessness/wilful blindness or however else is phrased is held up to the light you are right in identifying a certain lack of logic in the law, and this may have been said rather more eloquently in the Supreme Court or elsewhere, but my hunch or my belief is that the law has developed this way as a matter of pragmatic policy.

MR BORICH:

Understandable sir.

THE COURT:

So that every person arriving at Mangere with a suitcase with a false bottom cannot get off the hook simply by saying "look it was given to me. I didn't know what to think but I was told it wasn't drugs, I'm off the hook". I think because of that policy consideration I think underpins this type of offending I can indicate to you now that—

MR BORICH:

I shouldn't say it and I will not.

THE COURT:

You shouldn't say it.

[32] Mr Borich contended that the ruling prevented him from presenting to the jury an available complete defence that would have avoided consideration of the recklessness issue. He submitted that if the appellant had a subjective, honest, entirely innocent belief (proved to the satisfaction of jury) that he thought that the suitcases contained foreign currency, then he was entitled to be acquitted and the jury should have been told as much. A miscarriage of justice had resulted from his being prevented from putting that defence to the jury.

[33] While arguing that, if the jury believed the appellant's statement that he thought he was carrying currency, then the jury did not need to progress down the recklessness route, Mr Borich did not accept that the question trail necessarily required amendment to accommodate that scenario. He submitted that it could be achieved by a form of tripartite direction, explaining that it was necessary for the innocent belief contention to be "up in lights". Mr Borich emphasised that for it to be properly considered, the jury needed to have both his assistance in closing and the Judge's endorsement of the points in the summing-up.

The Crown's submission

[34] In response the Crown first says there no longer exists in law a stark choice between complete knowledge and innocent belief in cases such as this and that acceptance of Mr Borich's submission would require this Court to decline to apply *Cameron*.

[35] In any event the Crown further submits that Mr Kupec was not prevented from running a defence of innocent belief and in fact did so. Ms Grau argues if the jury had considered Mr Kupec had a positive belief that the suitcases contained illegal currency, then he would have been acquitted. She makes the point that question 4 in the question trail required the jury to be sure Mr Kupec believed there was a real possibility the suitcases contained an illegal drug.

[36] As a matter of logic, if the jury had accepted his defence that he believed the suitcases contained currency, the jury could not have answered that question in the affirmative and acquittal would have followed. Ms Grau contended that in closing the defence made strong submissions as to Mr Kupec's innocent belief he was carrying

currency but the jury clearly rejected that account because it was satisfied he was at least reckless.

Analysis

[37] We consider that the Crown submission as to the absence of a stark choice between complete knowledge and innocent belief following *Cameron* is sound. In its overview at [12] the Supreme Court introduced the analysis of complete knowledge and innocent belief representing different ends of the states of mind continuum.[16] Observing that comparatively little attention had been paid to the culpability of those who deal in illicit material with knowledge that there is a real possibility that it is illicit, the Court said a working assumption had become that lack of complete knowledge was to be equated with innocent belief.

[38] The Court revisited the mind continuum theme in a section of the judgment described as an overview of the mens rea problem in respect of possession and supply of illicit material:[17]

> [37] As we have noted, full knowledge of the illicit character of the material (complete knowledge) and honest belief that it is innocent (innocent belief) represent different ends of a continuum. Within this continuum there are two other relevant possibilities. First, in relation to drug offending, *R v Strawbridge* held that once the actus reus was proved, the Crown did not have to prove guilty knowledge as part of its prima facie case. Instead, guilty knowledge would be presumed unless there was evidence that the defendant honestly believed on reasonable grounds that the act was innocent, in which case, the Crown had the onus of establishing beyond a reasonable doubt that it should not be accepted. Secondly, there are states of mind involving suspicion rather than complete knowledge.
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> [38] From *R v Ewart* in 1905 until the early 1980s, it was only a reasonable innocent belief which was seen as excluding mens rea. But, starting with *R v Wood* in 1982, New Zealand courts dispensed with the reasonableness requirement, seeing the reasonableness (or otherwise) of a postulated innocent belief as having only evidential significance. This approach was confirmed in 1985 in *R v Metuariki*.
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> [39] As we have also noted, New Zealand courts have tended either to equate lack of complete knowledge with innocent belief (which seems to have been the approach in *Metuariki*) or to hold that complete knowledge is required for criminal liability, which was the approach adopted in *R v Martin* and *Soles v R,* two cases to which we will shortly revert. As will be apparent,

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16 At [17] above.
17 Footnotes omitted.

> we do not see this as consistent with the general principles of criminal law as to recklessness. As well, and very much for the reasons referred to by the Court of Appeal at [93]–[95] of its judgment, such an approach is not consistent with the policy of the controlled drug analogue regime.

[39] Then, after discussing several authorities including *Police v Taggart*[18] and *R v Metuariki*[19] the Court commented, albeit in the context of the mens rea element of the particular offences in *Cameron*, as follows:[20]

> The difficulties highlighted by the different approaches taken in *Taggart* and *Metuariki* suggest that it is not practicable for the law to continue to be applied on the basis of the complete knowledge/innocent belief dichotomy.

The question trail

[40] Prior to *Cameron* a negative answer to question 3 would have resulted in an acquittal. However there is no doubt that since *Cameron* a question trail will need to follow the general structure in [7] above.

[41] However it was Mr Borich's contention that, if the jury answered "No" to question 3, and if the reason why they were not sure that the appellant knew the suitcases contained an illegal drug was because they accepted that he believed that the suitcases contained currency, then there would have been no need for the jury to be invited to consider questions 4 and 5 relating to recklessness at all.

[42] Nevertheless because of the structure of the question trail, it was submitted that following a negative answer to question 3, the jury were driven to consider the recklessness issues. That state of affairs was reflected in the following paragraphs in the Judge's summing-up:

> [11] Going back to [3]. If you are sure that at the time he brought the suitcases into New Zealand he knew the suitcases contained an illegal drug, you find him guilty. If you are not sure you go to [4]. Because our law says you are guilty of importing if you know you are importing illegal drugs or if you are reckless. They are two different things and our law says either will suffice.
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> [12] So let's talk about reckless, and that takes us to [4]. Are you sure that at the time he brought the suitcases into New Zealand the [defendant] believed

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18 *Police v Taggart* [1973] 1 NZLR 732 (SC).
19 *R v Metuariki* [1986] 1 NZLR 488 (CA).
20 At [91].

> it was a "real possibility", these are the important words, that it was a real possibility that the suitcases contained an illegal drug. So what is a real possibility? The Oxford English Dictionary says a possibility is a thing that may happen or be the case. A possibility is a likelihood. A possibility is a thing that may happen out of several possible alternatives. That is what a possibility is. A real possibility, now focusing on the real, real is actually existing as a thing or occurring in fact. Real means relating to something that is. If you are sure that he believed it was a real possibility that the suitcases contained an illegal drug you go to [5]. If you are not sure that he believed it was a real possibility that the suitcases contained an illegal drug you find him not guilty. So if yes to [4] that takes us to [5] and the question you ask yourself under [5], are you sure that knowing there was a real possibility that the suitcases contained an illegal drug he unreasonably disregarded that risk. Again the focus is on these words, "Are you sure that he unreasonably disregarded the risk?" Well to disregard something is to pay no attention to it or to ignore it and when you unreasonably disregard something unreasonably means in a way that is not guided by or based on good sense. So you ignore something and you do it in a way that is not guided by or based on good sense.
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> [13] Ladies and gentlemen if you find that he did, if you are sure that he did unreasonably disregard the risk you find him guilty. If you are not sure that he unreasonably disregarded the risk you find him not guilty.

[43] Despite his disclaimer, we consider that, on analysis, Mr Borich's argument was in effect requiring the introduction into the question trail after question 3 of a notional further step to the effect: "If you believe the defendant thought he was carrying currency you must find him not guilty." The rationale for that notional question would be that, if the jury accepted that the defendant believed he was carrying currency, then consideration of the question trail should stop there as it would be unnecessary for the jury to progress down the route of consideration of recklessness.

[44] Quite apart from the difficulty in constructing a suitable question which would reflect the burden of proof on the Crown, we do not consider that there was any deficiency in the structure of the question trail. Since *Cameron* the consideration of mens rea in cases of this kind involves both actual knowledge and recklessness. We accept the Crown submission that if the jury had accepted Mr Kupec's evidence that he believed the suitcases contained currency, then the jury could not have answered question 4 in the affirmative and an acquittal would have followed.

The trial Judge's direction

[45] However it remains to consider the risk of a miscarriage of justice in this case arising from the exchanges between Mr Borich and the Judge in chambers which

culminated in the Judge's direction that Mr Borich should not include in his closing address a statement to the effect that, if the jury believed Mr Kupec's statement that he believed he was carrying currency, then the jury was obliged to find him not guilty.

[46] As it happens, and as the Crown submitted, Mr Borich did make a submission to the jury that they should find Mr Kupec not guilty if they accepted his evidence that he believed he was carrying currency, albeit in the context of answering question 4. His closing address included the following:

> When interviewed he answered each and every question that was put to him, even the ones that were not accurate about what he said. And I suggest to you what comes through in his interview is a clear and consistent explanation, from start to finish, and it fits with the other known facts. At all times he thought he was smuggling currency. There's no evidence in that interview whatsoever that he'd even turned his mind to a possibility of smuggling drugs, let alone a real possibility that he might be carrying drugs. And so that's why I say to you it dies at question 4, you don't get to question 5, because simply there is no evidence to support this notion that he had given it any thought.
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> All right. Assume — I want to suggest to you that there's perhaps a couple of ways you can look at his explanation. Firstly you can say, "Well look I believe him when he says he thought he was smuggling [currency]."[21] And if you're in that situation then obviously you'll answer that question 3, which is, "Have the Crown proved he knew he was smuggling drugs?" You'll answer that, "No, they haven't proved that." There's a second way you could look at that explanation and you can say to yourself, "Well I'm not saying I believe him but equally I'm in that situation where I'm not sure." …
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> And I want to suggest to you that that's one way you could probably look at his video interview as well and say, "Well look, I'm not saying I believe it, on the other hand I can't exclude it." And if that is your position as it were, then on that question 3 you'll answer, "No," as well and move on to question 4.
>
> The third way you can look at question 3 is you can say, "Well I, I disregard what he's got to say. I don't believe him," and as my learned friend quite rightly says, you don't need to say he's therefore guilty. You have then got to go back to the rest of the evidence and say, "Well does it prove in any way?"
>
> I want to suggest to you that you'll either be state 1, or state 2. And the reason for that is that the rest of the "No" evidence that you have supports that.
>
> If you're in state 1 or state 2 then I suggest to you that perhaps maybe that then answers that state 4 question, because there's no evidence he ever turned his mind to the fact he might be carrying drugs. He was focused on smuggling currency, sorting out Mum and not getting caught in relation to that, and I suggest to you that that's very clear in what you heard.

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[21] While the transcript refers to "drugs", Mr Borich clearly intended to refer to "currency".

[47] The Judge's summing up also conveyed the essence of this theme. After reminding the jury of Mr Borich's submission about the standard of proof the Judge said:

> [22] … The issue is whether the Crown has proved the charge against the defendant beyond reasonable doubt. Mr Borich says there is no evidence here of his state of mind at the time and he says all the things that the Crown says in this case are consistent with smuggling money and if you look at the interview, his explanations fit with the known facts and he is therefore telling the truth. Admittedly he was not honest regarding his mother and he did not fill in the arrival card truthfully, but he says people lie for all sorts of reasons and he is right about that, and I will talk to you a little later about lies and that the place they have or do not have when you, the jury, are considering the evidence.
>
> [23] Mr Borich says in the interview he was clear and consistent. He gave a clear and consistent explanation that he was smuggling currency. Mr Borich says he is not saying that you necessarily have to believe him completely, but he says, "Does the rest of the evidence prove the charge against the defendant?" He says, "It does not." …

[48] Then, after summarising Mr Borich's closing submission concerning the Crown's allegation of the use of a code word and certain internet communications, the Judge said:

> [25] So, Mr Borich said there is no evidence he knew that he was carrying an illegal drug because he thought it was currency. He admits some people get caught up in scams and he says it's only when he was shown the Customs swab drug detected that the penny drops and he says, "Fuck."
>
> [26] So he says the Crown have not dragged you to where you need to be in this case, where you are sure that he either knew or was reckless about knowledge of drugs and that therefore the proper verdict is one of not guilty.

[49] In our view the ruling which the Judge gave in chambers in response to Mr Borich's request for clarification was correct. It was not appropriate for Mr Borich to submit to the jury that, if they answered question 3 in the negative, nevertheless if they were of the view that Mr Kupec believed that he was smuggling currency, then the jury was entitled to acquit him on the charge without proceeding to address question 4 in the question trial. We consider that the direction was consistent with the law following *Cameron*. It was a rejection of what in our view was in effect an implicit submission that the question trail should be treated as incorporating an intermediate step between questions 3 and 4 of the nature referred to at [43] above.

[50] Mr Borich was entitled to put to the jury, as strongly as he considered appropriate, the proposition that Mr Kupec honestly believed that he was smuggling currency. The Judge's direction did not preclude that. However following *Cameron* and the recognition of the impracticability of the law continuing to be applied on the basis of the complete knowledge/innocent belief dichotomy,[22] the point at which that factual contention on Mr Kupec's behalf assumed significance was at question 4. It was in that context that Mr Borich advanced the submission to the jury, a submission which was fairly reflected in the Judge's comments on the defence in the course of the summing-up.

[51] We do not consider there was any error either in the structure of the question trail or in the Judge's direction in chambers. No miscarriage of justice occurred in this case in the manner contended.

Was the direction on the appellant's DVD statement adequate?

[52] Mr Borich's argument on this issue involved two propositions. First he contrasted this Court's ruling in *Martin,*[23] that it is not mandatory for the trial Judge to give a tripartite direction in relation to a defendant's out of court statement, with the position in Canada which requires a tripartite direction for exculpatory out of court statements.[24] He submitted that in view of the introduction of *Cameron* recklessness this Court should reconsider whether a tripartite direction should be given in relation to exculpatory out of court statements.

[53] As Ms Grau observed, it was not explained why recognition of recklessness as sufficient proof of mens rea warranted a departure from *Martin*. This Court there held that it was not mandatory for a trial Judge to give the tripartite direction even where a defendant had given evidence, still less when the defendant had not.[25]

[54] In the absence of any sound reason why it should be so, we do not accept the submission that *Cameron* warrants any change to that practice.

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22 At [37] above.
23 *R v Martin*, above n 5, at [31]. See also *Tere v R* [2013] NZCA 282, (2013) 26 CRNZ 442 at [67].
24 *R v BD* 2011 ONCA 51, 266 CCC (3d) 197 at [105].
25 *R v Martin,* above n 5, at [31].

[55] Secondly Mr Borich took issue with the Judge's direction relating to Mr Kupec's statement. The Judge explained that the evidence included all the exhibits, the photographs, the text messages, the interview the defendant had with the Customs officers and the agreed facts. With reference to the witnesses the Judge then said:

> [31] So in deciding what happened, you assess the witnesses in this case. It is for you entirely to decide who you believe and who you do not, having regard to the impression the witnesses have made on you. At one extreme you can accept everything a witness tells you. At the other extreme you can disbelieve (sic) a witness tells you. But you are absolutely to (sic) entitled to accept some things a witness tells you and reject other things a witness tells you. It depends entirely on your assessment of that witness.

[56] At a later point the Judge turned to address the fact that the defendant had not given evidence, stating:

> [40] In this case the defendant has not given evidence in Court. There is no burden on him to do so at any stage to prove his innocence. He can require the Crown to prove its case and that is what he has done here. It is a right that everyone has. The result is you have not heard directly from him on oath in this Court what he says happened and you have not heard his account tested in cross-examination. But what you do have of course is the interview with the customs officers and that as I have told you is part of the evidence and it is a matter for you. Again you weigh that up, the truthfulness, the accuracy and the weight of it is entirely a matter for you but please remember the fact that he has not gone into the witness box and given evidence does not prove anything. You must not assume he is guilty because he has not gone into the witness box.

[57] Mr Borich emphasised the omission from [40] of a direction drawing the jury's attention (as the Judge had done in relation to Crown "witnesses") to the fact that the jury could accept or reject, wholly or in part, the appellant's DVD statement. He drew attention to the High Court Judge's direction approved in *Martin*:[26]

> In the same way that you may accept parts of what a witness said in evidence, and not accept other parts, you may accept parts of what was said in statements and not other parts.

[58] Consequently, he submitted, the jury was not aware that the evidence of the witnesses and the DVD statement should have been treated in the same way. Reliance was placed on this Court's statement in *R v F* that a failure by the Judge to

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[26] At [29] and [31].

direct a jury as to the evidential significance of exculpatory statements meant the defence was not fairly placed before the jury.[27]

[59] The Crown response was that the appellant's argument is an exercise in semantics. Ms Grau submitted the direction was entirely orthodox and that it would have been obvious to the jury that its acceptance or rejection of Mr Kupec's account recorded in the DVD was not an all or nothing proposition.

[60] We agree with the Crown submission. We note that in his summing-up at [40] the Judge referred to the interview, reiterating his earlier comment at [30] that it was part of the evidence and stating, to the same effect as in [31], that "it is a matter for you". He then prefaced with the word "again" his direction to the jury to weigh up the truthfulness, accuracy and weight of the statement, commenting again that those matters were entirely a matter for the jury.

[61] We consider that the use of "again" was a further reference back to his observations at [31] and, while not an express statement, it was a reiteration of the direction earlier in respect of witnesses that the jury was entitled to accept some things and reject others. Read in context we do not consider that the jury would have been left with the impression that they did not have the same freedom of choice in relation to Mr Kupec's statement as they had with reference to the Crown witnesses.

Was the sentence manifestly excessive?

[62] Mr Olsen's argument that the sentence of 17 years' imprisonment was excessive was directed to the fact that the Judge proceeded on the footing that Mr Kupec knew he was importing illegal drugs and consequently failed to allow a discount on the basis of the lesser culpability of a conclusion based on recklessness.

[63] In the sentencing notes the Judge said:

> [12] Counsel have rightly highlighted an important issue as to whether the jury found you guilty on a count of actual knowledge of illegal drugs or whether they found you on the basis of recklessness as described in *Cameron's case.* Namely, that you knew there was a real possibility of illegal drugs but

[27] *R v F (CA402/05)* CA402/05, 23 March 2006 at [34].

> you unreasonably disregarded that risk. Both counsel acknowledge that to some limited extent recklessness in this context is less culpable than actual knowledge. That proposition in itself is tempered by the fact that the overwhelming response to importation cases of Class A drugs, in particular methamphetamine, is deterrence.
>
> …
>
> [14] My own conclusion, regrettably for you, is that you knew you were importing illegal drugs and that you cynically involved your mother, as perhaps a further makeweight thing to suggest to customs and other officials that you were doing legitimate overseas travel.
>
> …
>
> [33] Mr Borich in effect says that the Crown were having a bet both ways by also placing before the jury the issue of recklessness and that it is unfair that the Crown is now relying on knowledge rather than recklessness. In fairness to Mr Kayes the Crown case was primarily run on knowledge and that is what I have concluded was the case here.

[64] Mr Olsen submitted that the Crown ran its case and the jury was directed on two possible constructs of mens rea: actual knowledge or recklessness. A finding on either of those mens rea would have resulted in a guilty verdict. However the trial Judge had no way of knowing on which of the two alternative bases of mens rea the jury had reached its guilty verdict. He submitted that the Judge should have sentenced Mr Kupec on the basis of a recklessness mens rea, the starting point for which should have been 15 years' imprisonment to reflect the lower culpability, with a minimum period of imprisonment reflecting 50 per cent of the lower end point.

[65] As this Court said in *R v Connelly* and has often repeated:[28]

> The Judge in a jury trial is effectively the *thirteenth fact finder*. Where, following a verdict(s) of guilty the Judge is required to sentence a prisoner the Judge is entitled, where the evidence supports it, to reach his or her own view of the facts relevant to sentencing provided that such view is not inconsistent with the verdict … The Judge is not bound to accept the version of facts most favourable to the prisoner.

[66] We accept the Crown submission the Judge was entitled to draw the inference of knowledge on the part of Mr Kupec. The Crown case was a strong one and the inference of knowledge was readily available. As the Judge noted, the Crown case was primarily run on the basis of knowledge.

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[28] *R v Connelly* [2008] NZCA 550 at [14]. Emphasis added.

Result

[67] The appeal against conviction is dismissed.

[68] The appeal against sentence is dismissed.

Solicitors:
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