The aftermath of Teh's case

Public Defender, J.L.Glissan QC suggests practitioners move quickly to safeguard the rights of clients convicted before the decision in Teh's *case.*

On 11 July, 1985, in *He Kaw Teh v R. (60 ALR 449)* the High Court, by majority, overruled the decisions of the Court of Criminal Appeal (NSW) in *Bush* and *Rawcliffe*, as to what constitutes "possession" for the purposes of the offences contemplated by S.233B of the Customs Act (1901) Commonwealth and, by implication, under the Poisons Act in New South Wales; and reasserted both common sense and common law, approving (per Gibbs CJ at 458-9, and per Brennan J at 494) Lord Diplock's formulation in *D.P.P. v. Brooks* (1974) AC 862 at 866:

> "In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control".

This, it can confidently be asserted, now represents the law of possession, and also the correct direction to be given to jurors charged with the duty of determining the factual situation where the Crown alleges possession. As Brennan J said in *Teh* (at 495):

> "Nagle J expressed his understanding of possession having regard to the context of the provision which allows for acquittals on proof of a reasonable excuse. His Honour found in the phrase 'without reasonable excuse' the source of relief for innocent possessors. I find the source of relief in the notion of possession itself".

A question next arises as to the consequences of such a decision as this.

On the day after the decision of the High Court was pronounced, its effect was fully felt: His Honour Judge Knoblanche, QC, discharged a jury without verdict during his summing-up (after a trial which had lasted some five weeks) on the basis that the whole of the Crown case and of his Honour's summing-up had been predicated on the law as it stood when the trial had begun — ie the law as stated in *Bush* confirmed by *Rawcliffe.*

There have, however, in the dozen years since the decision in *Bush*, been many convicted of "possessing" drugs or contraband in circumstances which would no longer amount to proof of the kind required to found a conviction. What, one may ask, of them? Are there, for those "wrongly" convicted any avenues of appeal against conviction opened by the decision in *Teh's* case?

In New South Wales, at least, the answer appears to be in the negative, although not resoundingly so; for there are two competing lines of authority. One, (*Piening v Wanless* (1968) 117 CLR 498; *R. v Unger* (1977) 2 NSWLR 990) seems to rest on a kind of extension of the principle of finality and public policy and partly on the so-called doctrine of merger.

The other, to moderate that restrictive attitude by taking into account "all the circumstances of (an) application (for leave to appeal out of time"), and whether "on the particular facts (of the) case, the jury were misdirected" (*R. v Holden; R. v Tyrell*). In any event, the matter is clearly discretionary.

In *Unger*, (1977) 2 NSWLR 990; the Court of Criminal Appeal held (per Street CJ, who gave the judgment of the court) that:

> "There has always been an unwillingness to permit the reopening of past decisions. This finality of decision in each individual case leaves the courts free to permit a judicious flexibility in the development of principle in later cases, free from inhibition lest such development may set at large disputes that have previously been resolved. The concept of merger in judgment, both in the civil and in the criminal field, ... equally with the doctrine of res judicata, serves this requirement of flexibility for potential development of the law". (P.995-6).

The Chief Justice held in *Unger* that the conviction:

> "depends ultimately upon the authority belonging to the District Court at the time of his trial, and not upon the factual and legal material relied upon by the District Court". (P.996).

This decision, in my view, represents an extension of the principle on which it is founded. Whereas the common law rule (expressed by Lord Green MR in *re Berkeley* (1945) Ch. 1) was that:

> "It is not necessarily a ground for enlarging time that in some subsequent case a different view is taken of the construction of an act of Parliament".

The principle expressed in *Unger* is that the establishment of such a different view is not sufficient. Ultimately, the question is one of discretion:

> "to be exercised by regard not only to all of the facts and circumstances of the particular application, but also to what the Court of Appeal in *R. v Ramsden* described as the alarming consequences flowing from a general policy of permitting the re-opening of cases in consequence of the subsequent exposure of a misconception as to the prior state of the law". (P.994-5).

In *R. v Holden* (17/12/79 — unreported — Court of Criminal Appeal, NSW) *Unger* was distinguished in a situation similar to the one which arises after *Teh.* In *Piening v Wanless*, Menzies J had said:

> "In my opinion the verdict in the trial which was conducted upon one basis cannot be set aside merely because the decision, upon which counsel presumably relied in determining how he would conduct his case, has been overruled subsequently.
>
> It is not for counsel to determine whether or not he will challenge or accept a decision which stands in his way, and, having accepted it, his mistake and acceptance cannot be made the basis for setting aside any verdict which is returned by the jury upon the case submitted to them in order that a new, and in some ways inconsistent case — as the course of argument would seem to indicate — can be submitted to another jury".

Holden's case was one which depended upon the admissibility of certain similar fact evidence received at a joint trial with one *Markby.* His counsel advised — wrongly as the High Court ultimately held (in relation to

the co-accused) — that the similar fact evidence was legally admisible. In dealing with Holden's Application for Extension of Time to Appeal, the court (Nagle CJ at CL, Carmichael and Hunt JJ) held:

> "(Counsel's) belief could not, in the circumstances be thought to have been unreasonable and Holden's failure to take any step until the High Court over-ruled the unanimous decision of this court supporting (counsel's) belief should not, in our view, prejudice his application for an extension of time.
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> That is not to say, however, that this court is prepared to grant an extension of time in which to appeal whenever a subsequent decision by a superior court demonstrates an error in the advice given or a decision made by counsel in relation to the conduct of a criminal trial. The grant of such an extension of time must depend upon all the circumstances of the case.
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> Such an extension of time will not be granted *merely* because that subsequent decision overrules some principle of law mistakenly accepted as correct by counsel at the trial ...."

The Court of Criminal Appeal in *Holden* seems to have proceeded on the basis that the question was one of discretion, and that two considerations were of prime significance:

> "whether in the light of all the circumstances of the present application it is just that an extension of time should be granted";
>
> and
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> "the real issue in this application, as we see it, is *Holden's* delay between learning of *Markby's* success in the High Court and his own application some four months later".

Any question of prejudice in the proper presentation of the Crown case at a new trial is a matter which will go to the exercise of the discretion.

The decision in *Teh* has already led to at least one new trial being ordered.

Rabih (Court of Criminal Appeal — November 1985) was convicted of supplying heroin prior to the decision of the High Court in *Teh*, the Crown case depending upon proof of Rabih's possession of the contents of a bag found in his shop.

Counsel for Rabih at trial made submissions as to the judge's directions on possession although these fell short of arguing that *Bush* and *Rawcliff* were wrongly decided. The appeal against conviction was brought within time and was pending when the High Court's judgment was delivered.

Following its decisions in *Unger* and *Ruana*, the Court of Criminal Appeal allowed the appeal and ordered a new trial. This decision highlights the distinction that the Courts make between a change in the law after the time for appeal has expired and all proceedings on the indictment are at an end, and such a change when an appeal is pending and not disposed of.

Thus it can be seen that should the change in the law, brought about by the decision of the High Court in *Teh's* case, encourage the bringing of appellate proceedings although out of time, there are a number of obstacles to be overcome, and any delay in approaching them may well prove fatal to the prospects of the contemplated appeal.


I MUCH PREFER
THE JABOT
MASTER - HIDES
COLLAR AND TIE.