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The common form statutory 'proviso' in criminal appeals: *Weiss v R* affirmed

Helen Roberts reports on *Kalbasi v Western Australia* [2018] HCA 7; 92 ALJR 305; 352 ALR 1

Introduction

Under Western Australia's criminal appeal statute, the Court of Appeal must allow an appeal against a conviction by an offender where the court is of the view that there has been a miscarriage of justice, subject to the proviso that the court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.[1] This case considered the application of that proviso, which closely mirrors the common form proviso and which in NSW is expressed as follows: '[t]he court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'[2]

The appellant was convicted for the attempted possession of 5kg of methylamphetamine with intent to sell or supply to another. The trial judge incorrectly directed the jury in accordance with a statutory presumption of intent to sell or supply upon proof of possession. The Western Australian Court of Appeal dismissed the appeal, holding that although the direction was incorrect, the proviso applied.

On appeal to the High Court, the appellant sought to have the High Court reconsider its earlier decision in *Weiss v R*[3], submitting that *Weiss* had left uncertain the principles that engage the proviso, and the uncertainty had not been resolved by subsequent decisions of the court.[4] The High Court, by a narrow majority (Kiefel CJ, Bell, Keane and Gordon JJ; Gageler, Nettle and Edelman JJ dissenting) dismissed the appeal[5] and held that there was no reason to depart from *Weiss*.[6]

The facts and error in the trial

Police had intercepted a drug shipment, replaced the drugs with a substitute, and then relied upon various forms of surveillance to establish that the drugs were unpacked in front of, and with the involvement of, the appellant.[7] The appellant did not give evidence. The issue at trial was whether the Crown could establish that the appellant possessed the drugs, that is, that he relevantly had 'control' over them rather than simply being present at the premises with the drugs.[8]

With the concurrence of counsel for both the Crown and the accused at trial, the jury was incorrectly directed on the basis that proof of possession was sufficient to prove possession for the purposes of sale or supply.[9] However, as this was an attempt offence, the deeming provision did not apply.[10] The WA Court of Appeal held that the misdirection was an error of law, but dismissed the appeal on the basis that no substantial miscarriage of justice had occurred.

Application of the proviso

The only question on appeal was the correctness of the application of the proviso. The majority of the High Court held at [12]:

> *Weiss* settled the debate in an analysis that is grounded in the text of the common form provision. The apparent tension between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, subject to the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, is resolved by reference to history and legislative purpose. Consistently with the long tradition of the criminal law, any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision (here s 30(3)(c)). The determination of whether, notwithstanding the error, there has been no substantial miscarriage of justice is committed to the appellate court. The appellate court's assessment does not turn on its estimate of the verdict that a hypothetical jury, whether 'this jury' or a 'reasonable jury' might have returned had the error not occurred. The concepts of a 'lost chance of acquittal' and its converse the 'inevitability of conviction' do not serve as tests because the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had. (footnotes omitted)

Their Honours held that approaching the proviso by attempting to identify classes of cases in which the proviso can or cannot be applied is 'distracting' and not possible.[11] Nevertheless there may be some errors, the nature of which will prevent the appellate court from being able to assess whether guilt was proved to the criminal standard.[12] These may include, but are not limited to, cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence.[13] As was established in Weiss, the fundamental question remains whether there has been a substantial miscarriage of justice.[14]

The majority held that the Court of Appeal did not err by rejecting the submission that the misdirection was an error of a kind that precluded the application of the proviso. Further, the Court of Appeal was correct to reason that proof beyond reasonable doubt that the appellant attempted to possess nearly 5kg of 84 per cent methylamphetamine compelled the conclusion that it was his intent to sell or supply it to another. There was no basis in the evidence or the way the defence case was run which left open the possibility that he may have been in possession of some smaller amount of the substitute drugs with a view to purchasing it for personal use. In those circumstances, the misdirection did not occasion a substantial miscarriage of justice.[15]

The issue at trial was whether the Crown could establish that the appellant possessed the drugs, that is, that he relevantly had 'control' over them rather than simply being present at the premises with the drugs.

In dissent, Gageler J held that the manner in which the trial judge had directed the jury upon possession left open to the jury a pathway of reasoning which allowed the jury to be satisfied that the appellant possessed the drugs but which would not necessarily compel a conclusion that he did so with an intent to sell or supply.[16] Thus the Court of Appeal's own satisfaction that the evidence at trial established beyond reasonable doubt that the appellant exercised control over the whole of the 'methylamphetamine' with the intention to sell or supply it to another was insufficient to allow the Court of Appeal to be satisfied that the jury would have returned a verdict of guilty if the proper direction had been given, and the Court of Appeal was wrong to conclude that no substantial miscarriage of justice had occurred.[17] Justice Nettle, also addressing the very broad definition of possession that the trial judge left to the jury, held that it was possible that the jury convicted the appellant on the basis of a form of possession which would not have satisfied the definition of possession for the purposes of sale or supply,[18] and therefore despite a powerful circumstantial case it could not be said that no substantial miscarriage of justice had occurred.[19] His Honour would have allowed the appeal. Justice Edelman agreed with the reasons of Nettle J and held that the case was one to which the proviso could never apply because the direction removed an element of the offence from the jury and was therefore 'a fundamental defect, amounting to a serious breach of the presuppositions of the trial'.[20]

END NOTE

1 Section 30(3)(c) *Criminal Appeals Act* 2004 (WA).
2 Section 6(1) *Criminal Appeal Act* 1912 (NSW); see *Reeves v R* [2013] HCA 57; 88 ALJR 215; 304 ALR 251 at [9]. The WA provision does not include the qualifier 'actually', but nothing turned on its absence for the purposes of the argument: *Kalbasi* at [4].
3 (2005) 224 CLR 300.
4 *Kalbasi* at [8].
5 Kiefel CJ, Bell, Keane and Gordon JJ; Gageler, Nettle and Edelman JJ each dissenting in separate judgments.
6 At [9].
7 At [19]-[23].
8 At [29]-[30].
9 Section 11 *Misuse of Drugs Act* 1981 (WA).
10 *Krakouer v R* (1998) 194 CLR 202.
11 At [16].
12 At [15].
13 At [15].
14 At [16].
15 At [60].
16 At [76]-[81].
17 At [82]-[83].
18 At [138]-[139].
19 At [140]-[144].
20 *Wilde v R* (1988) 164 CLR 365 at 373; at [162].