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“Judge not, lest ye be judged”

The Corby case - can it happen in Australia?

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Introduction

To the media contingent encamped both inside and outside the Denpasar courtroom, she was “doe-eyed” and “tearful”. To the judges and court officials, she came across as a prize drama queen. To the millions of ordinary Australians absorbing what they could of the case vicariously through media releases, she was an ordinary, likeable Aussie girl caught up in a nightmare that could easily have been theirs. Trapped in a country whose language was alien, whose legal system was different, and whose attitude to drug smugglers seemed almost barbaric, Schapelle Corby brought to life a silent fear we have all experienced – that of being falsely accused of something that we cannot conclusively prove that we did not do.

Many Australians – while appalled by the eventual verdict – have assumed that it occurred simply because the Indonesian law, and the legal system which enforces it, are in some way inferior to ours. In fact, there is more than a distinct possibility that were such an event to occur in Australia, the eventual legal outcome could well be precisely the same, although the sentence passed would probably be less than the 20 years handed out to Schapelle Corby in Denpasar. What is more, it has already happened – in reverse – to a group of “innocent” Japanese tourists, in 1994, and we in Australia have nothing to feel superior about.

The Indonesian system

A preliminary observation should be made regarding the role of the judges in the Corby case, and the comments which the chief judge is reported to have made during the course of the trial. Many people were concerned to learn that the chief judge was a former police chief, and were enraged to hear him proudly ‘boasting’ (as they understood it) that in all the years that he had been a judge, no drug trafficker appearing before him had ever been found not guilty. Naturally, people unfamiliar with the system under which he was operating took this to be a sign of ‘bias’ on his part, and a determination to make sure that Schapelle Corby was eventually convicted.

Even under our Australian system, it is not at all unusual to have former prosecutors (some of whom were also once

police officers) appointed to the Bench, and indeed it is regarded as preferable for someone who becomes a judge to have had experience at both defending and prosecuting. What made the role of the Indonesian judges different was that they operate under what lawyers call a “civil” system of justice, which they inherited from the Europeans who originally colonised Indonesia. The “civil” system employs what is called an “inquisitorial” rather than “adversarial” system of trial. By that is meant that instead of legal counsel arguing for the defence and prosecution respectively in front of a jury, with the judge occupying a benign “umpire” type of role (which is the system we are familiar with in Australia), the lawyers under a “civil” system argue before a judge, whose function is to enquire into the “truth” of the situation, and get to the bottom of what actually happened.

The relevant charges

Basically, Schapelle Corby was charged with having imported illegal drugs into Indonesia, a nation which takes the drug problem so seriously that it still maintains the death penalty in appropriate cases. In fact, for most of the trial, it was being suggested that Ms. Corby might ultimately be sentenced to death herself, which helped to give the case more “edge”, both for the squadrons of journalists in attendance, and for the public who were hanging out for every word of what they wrote or said.

Indonesia has a very good reason for taking the drug problem so seriously, and that is that the nation is awash in the stuff. In fact, one of the curious features of the Corby case was why anyone would be taking cannabis into the country, when it is so easy – and relatively cheap – to acquire once you are there. But every ‘sovereign nation’ is entitled to punish serious social problems with maximum severity, and even in Australia we have a maximum penalty of life imprisonment for heroin importation or trafficking. That is the most severe sentence which can be passed on anyone under Australian law since we abolished the death penalty, and even murderers do not ordinarily receive any higher than a life sentence. So Indonesia is not alone in dealing severely with those who deal in drugs.

The relevant facts

Schapelle Corby always maintained that she knew nothing about the drugs in her boogie board bag, and she insisted that someone (by implication, a baggage handler at an Australian airport) must have put them there without her knowledge. This is, of course, one of the reasons why we are all urged, when we fly abroad, to make sure that we pack our own bags, and keep a close watch on them before we hand them over at the check-in desk.

But what happens if someone on the other side of that desk (someone “airside”, to use the popular expression) takes the opportunity to slip something into our bag, leaving us to run the risk of carrying it through Customs at the other end, and retrieving it from us by stealth once we have got through? That’s what Schapelle Corby claims happened to her, and one of the main reasons why she attracted so much popular sympathy back in Australia is that we all realise that it could so easily happen to us. Some enterprising firms are now making money out of supplying a cling-wrap service for your bags at international airports, in an effort to prevent tampering with luggage once it goes airside. After Ms. Corby’s experience, they are reported to be doing a lot of

business.

Schapelle Corby's story gained even more credence over here because of recent reports alleging that some baggage handlers at our airports do indeed interfere with luggage once it has gone "airside", and after the owner of that baggage has no further control over it. Once you pick it up innocently from the baggage carousel at your destination, it is too late. The luggage is undeniably yours, and the drugs are undeniably there in your luggage.

Those familiar with the basic precepts of criminal law would probably respond with something along the lines of "Hang on a minute. You can't be convicted of any crime unless the prosecution can prove that you committed the act with 'guilty knowledge', or "mens rea", as we criminal lawyers call it. It's one thing to prove the wrongful action, but you can't get a conviction unless you can prove the guilty intent, right?

Wrong, both in Denpasar and in Australia.

The de facto "reverse onus of proof" in Commonwealth drugs cases

Viewed from the perspective of the investigating authorities, and the prosecution, it would be far too easy for anyone caught carrying drugs through an airport to throw up their hands in horror and claim "That's the first I've seen of those terrible substances in my luggage, and they certainly weren't in my bag when I checked it in". The Customs Officers who've just discovered them, and who've heard it all before, just nod their heads and reply "Yeah, right! Everybody says that".

But if you are prosecuting the case, how do you get round these pious protestations of innocence? How can you get into the mind of the suspect, and actually prove that they were intentionally smuggling? And if you can't, and the law insists that you do, then just about anyone who's a half-decent actor, or who can do a convincing imitation of a sweet little old lady, could walk into this country with enough drugs to debilitate an entire regiment, smile sweetly at the camera and tell the same old "I had no idea they were there" story.

On the other hand, if you are as innocent as Schapelle Corby claimed to be, how do you prove that you had no idea that something had been slipped into your luggage without your knowledge, at a time when you could not have known, and could have done nothing about it?

In the end, like so much of our criminal law, it becomes a balancing act between, on the one hand, the need to protect the community against international drug trafficking, and on the other the presumption of innocence of each individual. Under Commonwealth law, the scales are currently well down on the side of the "white hats" of law enforcement.

The Commonwealth offence

Commonwealth law is responsible for "border security" issues, which include Customs protection against harmful importations, and hardly surprisingly, we find that anyone caught with a large quantity of drugs in their possession at an airport faces possible prosecution under the *Customs Act 1901* (Cth) Prosecutions under that Act will in practice proceed on the basis that once you are found with the drugs in your possession, it is for you to talk your way out of it. This is what Schapelle Corby failed to do in Denpasar, and that is what anyone entering Australia will be required to do if they

are caught with 4.1 kilos of cannabis on the way in.

In practice, such a person would most likely be prosecuted for the Commonwealth offence of "importing a prohibited import", contrary to s. 233(B)(1) of the *Customs Act*. In respect of an amount in excess of 4 kilos of cannabis, which is classed as a "trafficable quantity" of "narcotics" (the word employed under Commonwealth law to describe all forms of illegal drugs), the maximum penalty under s.235 of that Act is 10 years imprisonment. This is only half of what Schapelle Corby received, but, as already indicated, each nation is entitled to fix its criminal penalties in line with what it regards as the "seriousness" of the problem it is seeking to eradicate. We obviously consider that we have less of a drug problem than the Indonesians, to judge by the difference in maximum sentences, but otherwise our Commonwealth offence is very similar to the Indonesian offence with which Schapelle Corby was charged.

The leading case under Australian *Customs Act* law regarding how much a person must "know" about what is in their luggage before they may be convicted of importing drugs into Australia was the High Court of Australia majority decision in *He Kaw The v The Queen* (1985) 157 CLR 523, in which H had been discovered attempting to enter Australia from Kuala Lumpur via Melbourne International Airport with a suitcase which had a false bottom, in which was located almost 3 kilos of heroin. He claimed to know nothing about these drugs, and the question on appeal was whether it was for the prosecution to prove that he did know, or for the defendant to prove that he did not know. This clearly raises some fundamental issues regarding burdens of proof in drug importation cases, and it was hardly surprising that the appeal went all the way to the High Court.

After holding that "importing" consists simply of the physical act of bringing goods into Australia, and that this can occur without the defendant knowing anything about them, the majority of the Court conceded that s.233B(1) had to be interpreted in the context of what it called "... the general principles of the common law which govern criminal responsibility".

One of these common law principles is that one may not be convicted of a criminal offence without 'mens rea', or "a knowledge of the wrongfulness of an act", and it was the opinion of the majority (per Gibbs CJ at p.529) that in laying down severe penalties against drug importation, "*Parliament did not intend to displace the presumption of the common law that a blameworthy state of mind is an ingredient of the offence*". Not only that, but (p. 530) "*It is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so*".

If, therefore, one does require a "blameworthy state of mind" before one may be convicted of importing drugs into Australia, what can that consist of? Does one have to be shown to have acted intentionally, or recklessly, or is it enough simply to be stupid?

In dismissing the suggestion that negligence alone might be a sufficient mens rea for conviction under s.233B(1), Gibbs CJ nevertheless opined (at p. 536) that

"... if the suspicions of an incoming traveller are aroused, and he deliberately refrains from making any inquiries for fear that he may learn the truth, his

wilful blindness may be treated as equivalent to knowledge. If he is given a bag or parcel to carry into Australia in suspicious circumstances, or if there is something suspicious about the appearance, feel or weight of his own baggage, and he deliberately fails to inquire further, the jury may well be satisfied that he wilfully shut his eyes to the probability that he was carrying narcotics and for that reason should be treated as having the necessary guilty knowledge. If he is innocent of complicity in any attempt to import narcotics, and there is nothing to arouse his suspicions, it is difficult to see what action he could be reasonably expected to take to prevent a stranger from secreting narcotics in his baggage. It would have little point to make negligence a ground of liability".

In short, pure negligence will not suffice for a conviction, but wilful blindness will. But what about what we might call the "middle ground", in which a traveller, without wilfully turning a blind eye to what might be happening, nevertheless behaves so recklessly with regard to leaving their luggage unattended that they may be regarded as having invited the consequences?

In respect of those Commonwealth criminal offences which do not specify the level of "fault" required for a conviction, the *Criminal Code Act 1995* (Cth) lays down (in s.5.6) a requirement of either "intention" or "recklessness", and following the decision in *He Kaw The* it may be taken to be the case that one may, in law, import narcotics into Australia either "knowingly" or "recklessly".

So far as concerns what might be termed "recklessness as to circumstances", s.5.4(1) of the Code specifies that it is enough if the accused person was aware of a "substantial risk" that the circumstances would occur, but nevertheless took that risk. For example, if one were to leave one's bags unattended on a luggage trolley in an airport lounge for any period of time in excess of five minutes, it would no doubt be concluded that one had thereby acted "recklessly" with regard to the possibility that someone might take the opportunity of those bags being unattended in order to slip drugs into them.

Equally, if traveller is persuaded by a perfect stranger who accosts him in the airport lounge to take luggage through Customs on his behalf, it is not unreasonable to expect that traveller to have to live with the criminal consequences. In both cases, one would be regarded as having been "reckless" because of the obvious risks attendant upon such behaviour.

Following "the Corby Affair", most people are now aware of the risk of luggage being tampered with once it goes "air-side", but short of having it cling-wrapped, it is difficult to see what steps one can take to protect one's luggage from such tampering before one is reunited with it at the airport of destination. According to Schapelle Corby's version of events, that is what happened to her, and by the time she got to the arrivals baggage carousel to pick up her boogie board, it had already been singled out by Customs officials.

There was much criticism of the procedure adopted by those Customs officials in Denpasar, in not video-recording their conversation with Corby, and not having the plastic bag containing the cannabis either fingerprinted or weighed, but how would that have helped Ms. Corby herself? Even if her fingerprints were not on the cannabis bag, and even if she gave the most convincing on-camera display of total surprise

and shock, so that one became convinced that she knew nothing of the drugs in her luggage, does that eliminate the allegation that she should have known, and that she herself had in some way "recklessly" invited the circumstances in which her luggage had been tampered with?

Even the weighing of her luggage as soon as it came off the carousel would only have been of assistance if she still had the receipt which was handed to her in Brisbane, showing the weight of all her luggage upon departure. In one sense Ms. Corby was lucky that the cannabis weighed so much, so that if prompt action had been taken at the time, it might have been possible to show the weight discrepancy which must have occurred "air-side". What chance does a person stand, however, if the only weight difference is a few grams of heroin, a small amount in weight, but a huge amount in street value? And what happens if the baggage slip has been lost during the flight?

The really scary aspect of the majority High Court decision in the *He Kaw The* case were certain off-the-point comments made by Their Honours which suggest that once the fact of importation is proved, it is for the accused to convince the jury that it happened unintentionally, and without recklessness. As Gibbs CJ put it (pp.536-7, the majority adopting his position on this),

"If a person enters Australia carrying a suitcase which has narcotics concealed in it, and offers no convincing explanation of the presence of the narcotics, I should be surprised if a jury would draw any inference other than that he knew that the narcotics were in the case".

This is tantamount to reversing the burden of proof once the presence of the drugs is proved. His Honour was in reality laying down a rule to the effect that it is for the owner of the bag to come up with some "convincing explanation" for the presence of the drugs in his bag which is consistent with his innocence, or risk being convicted.

This may have been intended merely to highlight nothing more than what criminal trial lawyers refer to as the "tactical burden" of countering evidence suggestive of guilt, but expressed the way his Honour expressed it, in the context of a question regarding proof of "guilty intent" on the part of the accused, it could equally be taken as establishing a "reversed onus of proof" of innocence, once the bare act of importation has been proved by the prosecution.

Nor was this an isolated observation. In the same case, Dawson J. observed (at p.597) that

". . . the fact that an accused has been found bringing narcotic goods into the country may ordinarily found an inference that the goods are being imported intentionally, notwithstanding protestations by the accused that he was unaware of their presence or of their nature or quality. At the very least, proof that the goods were brought into the country by the accused will ordinarily mean that there is a case to answer".

Clearly, like Gibbs CJ, His Honour was of the opinion that the proof of the actions of the accused in physically bringing the goods into Australia would be enough to raise a factual presumption that the importation was intentional, which it would be for the accused himself to rebut. In short, a de facto reversed onus of proof.

The *He Kaw The* case itself was dealing with the issue of whether or not an accused could be said to have been acting

“knowingly”, and it was being suggested that this could occur simply as the result of the mere possession of the offending items, with the jury drawing the necessary inference from the accused’s failure to come up with a convincing explanation for his ignorance of the true facts. If all that is required is in fact proof of “recklessness”, then the accused is in even greater peril from the jury being allowed to ‘join up the dots’ in this manner.

Could it really happen here? It already has!

So if, say, an Indonesian tourist enters Australia in “constructive possession” of a boogie board which Customs inspection discloses contains 4.1 kilos of cannabis, what are their chances of an acquittal? History suggests that they are probably no better than Schapelle Corby’s chances in Indonesia.

Some 13 years ago, in 1992, a group of four Japanese tourists flew into Melbourne Airport on a flight from Kuala Lumpur, and were found to have heroin in concealed compartments in their suitcases. Each of them vehemently denied knowing anything about the concealed compartments, let alone the heroin, but two years later, in 1994, they were convicted of importing heroin into Australia, and received 15 years apiece. Their subsequent appeals to the Victorian Court of Appeal were unsuccessful, on the ground that “it was open on the facts” for the jury to have convicted them. This is basically lawyer’s shorthand for “The jury didn’t believe you”, and given the story which each of them told, one can understand why, at the end of the day, they must have been convicted for being gullible, even stupid, but certainly “reckless”, even if the jury were not necessarily convinced that they were professional drug “mules”.

The background to the group’s arrival in Melbourne was hardly auspicious, seen through the eyes of a cynical prosecutor. The group organisers included a former Japanese Mafia (“Yakuso”) member and a Malaysian “business contact” of his with a criminal record, who financed the trip. He was known simply as “Charlie”, and he apparently owed some sort of favour to the Yakuso.



The party members who claimed that they became unwitting “mules” were all Japanese friends who simply believed that they had been invited on a cheap trip “Down Under”, flying via Kuala Lumpur. In K.L., their host Charlie announced that their luggage had been stolen from a van parked outside a restaurant while they were all having a meal. Later, Charlie announced that their luggage had been recovered, but in a damaged condition, and he took it upon himself to replace their old cases with new ones into which their belongings had been repacked. Each of the group noted (and commented on) the fact that their new cases seemed heavier than their old ones had been, but made no further investigation.

To add to their difficulties, the “innocent” members of the party spoke no English, and were not well served by the translators supplied by the Commonwealth authorities. Their inherently implausible story that they were simply gullible tourists who had been exploited was made even less plausible by the fact that between them they had just one camera and no film, the prosecution comparing them unfavourably with the stereotypical Japanese tourist, who always has lots of camera equipment.

The accused consistently told the same story about how they came to be in possession of the suitcases with false compartments, but on ‘legal advice’ which may well have been influenced by other members of the party, none of them gave evidence at trial. This cannot have made a very good impression on the jury, and resulted in their “story” drifting out to the jury members second-hand. The prosecution maintained the stance throughout that the version of events told by the ‘mules’ lacked plausibility, and it may well be that the jury agreed. But even if the jurors had believed their story, would it have resulted in an acquittal?

Put bluntly, and perhaps unkindly, it could be argued that anyone who allows their luggage to be ‘replaced’ in circumstances such as those narrated by the Japanese defendants, and then notes that this luggage weighs more, without investigating why, is “turning a blind eye” to the possibility that such luggage has been tampered with, and has had things added to it. That, according to the High Court in *He Kaw The*, is tantamount to acting “consciously” or “knowingly”, and satisfies the “guilty knowledge” test under s.233B(1).

Even if it cannot be so characterised, such behaviour is surely tantamount to “reckless” indifference to the possibility that drugs have been slipped into one’s luggage, which under Commonwealth criminal law is itself sufficient for a conviction. Finally, if neither of those states of mind can be established, it still asks an awful lot of a jury to believe that one could, innocently, be so gullible.

Repeating the words of Gibbs CJ only nine years previously in *He Kaw The*

“If a person enters Australia carrying a suitcase which has narcotics concealed in it, and offers no convincing explanation of the presence of the narcotics, I should be surprised if a jury would draw any inference other than that he knew that the narcotics were in the case”.

His Honour was speaking from a career-long experience of juries, and the factors which influence them. We feel sorry for Schapelle Corby because we can relate to her, we can appreciate the predicament in which she found herself, and we instinctively believe her. Before an Australian jury, she might well have been acquitted; before Indonesian judges

there was no such cultural harmony, precisely the same factors which led to the conviction of the Japanese tourists in Melbourne.

For as long as we maintain laws which allow a prosecutor simply to prove a set of bare facts, and leave it to the accused to explain them in a manner consistent with their innocence, unsuspecting, trusting, and perhaps over-naive travellers will always be at risk of being convicted as drug mules. Particularly if we do not fully understand their culture, and

are prepared to stereotype them.

And for as long as it could happen here, we are in no strong position to criticise the Indonesian legal system.

Discussion Point: Why do you think that Shappelle Corby's trial created so much controversy in Australia?