Charging Importation Cases involving substitution of Drugs or Precursors

Instruction Number: 5
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Instruction for Charging where there is a Substitution of Drugs or Precursors:

1.) Evidence that the defendant has been involved in importing drugs prior to substitution

Where there is evidence that a defendant has been involved in importing drugs within the extended definition of 'import' in the Code prior to the substitution, then it is appropriate to charge an importation offence pursuant to sections 307.1 – 307.3 of the *Code*, even if the drugs are substituted by the police after arriving in Australia.

2.) Evidence that limits the defendant's involvement to after the full substitution has taken place

Border controlled drugs

Where the evidence shows that the defendant's involvement is limited to conduct after the substitution has taken place, it is recommended that consideration be given to either charging an attempt to import offence or attempt to possess offence under the Code (noting that when attempt is charged, the fault required to be proved in relation to the physical elements of the offence attempted changes to knowledge or intention (s11.1(3)).

In relation to the attempt to import offence, it is not without doubt, but although the importation ceases on the substitution of the drugs and therefore prior to the involvement of the defendant, an attempt may be available utilising the impossibility provision in s 11.1(4) of the Code.

Border controlled precursors

Where the evidence shows that the defendant's involvement is limited to conduct after the substitution has taken place, it is recommended that consideration be given to either charging:

- an attempt to import offence or attempt to possess offence pursuant to section 308.2 of the Code, noting:
    - that when attempt is charged, the fault required to be proved in relation to the physical elements of the offence attempted changes to knowledge or intention (s11.1(3)); and
    - that the presumptions will not be available, so evidence must be available that the defendant intended to use any of the substance to manufacture a controlled drug (or for an import, believed that another person intended to do so);
- an attempt to commit a Customs Act offence; or
- a relevant State/Territory offence

instead of an importation offence or a Customs offence.

In relation to the attempt to import offence (whether Code or Customs Act), it is not without doubt, but although the importation ceases on the substitution of the drugs and therefore prior to the involvement of the defendant, an attempt may be available utilising the impossibility provision in s 11.1(4) of the Code.

3.) *Evidence that limits the defendant's involvement to after the partial substitution has taken place*

Where a partial substitution of the drugs/precursors has taken place, there are a few options:

- charge an attempt to import the full amount of the drugs/precursors with an alternative charge of importing the partial or remaining amount;
- charge an attempt to possess the full amount of the drugs/precursors with a charge of importing the partial or remaining amount.

It should be noted that the AFP's current policy is to fully substitute drugs in all cases rather than to partially substitute them.

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Background

Code Offences

The Commonwealth serious drug offences in Part 9.1 of the *Criminal Code* commenced on 6 December 2005. The import/export offences in Division 307 were based on the offences previously set out in the *Customs Act 1901* and were designed to accord as closely as possible to the offences they are replacing.

At that time the provisions commenced, the definition of 'import' in the Code was:

> ***import*** includes bring into Australia.

It was anticipated that the existing case law would apply to the new offences in Division 307. For example, the degree of a person's involvement in the importation is relevant to establishing the objective seriousness of the offending (*R v Olbrich* 103 A Crim R 149). However, the courts did not apply the cases on the concept of 'importation' because of the change to using the word 'imports' (see *Campbell v R* [2008] NSWCCA 214).

In particular, in the Campbell case Spigelman J said (at paragraph 128):

> *In my opinion, the purpose of the Act requires the border controlled drugs and precursors "to arrive in Australia from abroad" and to be delivered at a point which, in the words of Isaacs J in Wilson v Chambers, would "result in the goods remaining in Australia". That occurred when the goods were picked up by the appellant's agent or, at the latest, when the container arrived at her premises and before it was unpacked.*

The CCA held that the statutory context of the 307.11 offence, in contrast with earlier offence provisions *"suggests a precise rather than expansive, sense of the word 'imports'".*

Amended definition of import – 20 February 2010

On 20 February 2010, as a result of the decision in *Campbell v R,* the definition of 'import' in the Code was repealed and replaced with the following:

> ***import*** in relation to a substance, means import the substance into Australia and includes:
>
> ***(a)*** bring the substance into Australia, and
>
> ***(b)*** deal with the substance in connection with its importation.

The explanatory memorandum explained the amendment as follows:

> *This amendment extends the definition of import to bring the current drug importation offences into line with earlier drug importation offences. The amendment reverses any inadvertent narrowing of the provisions that occurred when the previous drug offences in the Customs Act 1901 were replaced by new drug*

offences inserted into Division 300 of the Criminal Code Act 1995 through the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005 (Cth).

The definition of import has been extended to include dealing with a substance in connection with its importation. As such, the new definition of import relates to a process that extends before and beyond the period of the goods being landed in Australia.

The effect of this amendment is that the Commonwealth drug importation offences will capture criminal activity related to the bringing of drugs into Australia *and/or* subsequent criminal activity connected with the importation of drugs.

The terms 'deal with the substance in connection with its importation' paragraph (b) of the definition are intended to be broad in their application. For example, paragraph (b) would capture the following dealings with the substance:

(a) packaging the goods for importation into Australia

(b) transporting the goods into Australia

(c) recovering the imported goods after landing in Australia

(d) making the imported goods available to another person

(e) clearing the imported goods

(f) transferring the imported goods into storage

(g) unpacking the imported goods

(h) arranging for payment of those involved in the importation process.

The examples above are not exhaustive.

<u>Precursor Offences</u>

Importing precursor offences involve a further step of requiring the prosecution to prove either or both of the following:

- that the defendant intended to use any of the substance to manufacture a controlled drug;
- the defendant believed that another person intended to use any of the substance to manufacture a controlled drug.

Section 307.14 of the Code assists in proving these elements by providing a presumption in the following terms:

if (a) a person has imported or exported a substance; and

(b)) a law of the Commonwealth required the import or export to be authorised; and

(c) the import or export was not so authorised;

the person is taken to have imported or exported the substance with the intention of using (or believing that another person intends to use) some or all of the substance to manufacture a controlled drug.

However, these presumptions do not apply when the offence involves aid & abet.

In *R v Campbell, Campbell & Baka (No 2)*[2007] NSWDC 168, Berman SC DCJ squarely considered the issue of whether or not the presumptions contained in section 307.14 applied to aiders and abettors. He considered in some detail whether or not section 307.14 is a special liability provision within the meaning of the Code, and found for the following reasons that it was not:

- Section 307.14 is not a 'special liability provision' within the meaning defined in the Code, therefore section 11.6(2) does not apply section 307.14 to the case of an aider and abettor;
- It is unlikely that the legislature would have intended that the special liability provision would have covered the case of an aider and abettor where the Crown is relying on the importer's belief, but not where the Crown was relying on the importer's intention;
- The Crown argument would allow an aider and abettor to be convicted when the principal should be acquitted.

Therefore subsection 11.2(6) did not operate to apply the presumption to an offence of aiding or abetting the import of a border controlled precursor.

In relation to attempt, this would be the same issue. Subsection 11.1(6A) is in exactly the same terms as 11.2(6) and therefore, based upon this case, the Crown would not be entitled to take advantage of the presumption in section 307.14 against a person charged with attempt based upon this section.

This office has also considered the possibility of using section 11.6(1) of the Code to apply the presumptions to precursor import offences involving attempt, incitement or conspiracy.

Section 11.6(1) states:

> *A reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.*

The argument would be that s11.6 applies to s307.14 so that the provision reads:

(1) For the purposes of proving an **offence against section 11.1 (attempt)**, if:
  (a) A person has imported or exported a substance; and
  (b) A law of the Commonwealth required the import or export to be authorised (however described); and
  (c) The import or export was not so authorised

> The person is taken to have imported or exported the substance with the intention of using some or all of the substance to manufacture a controlled drug

However, while s11.6 allows the phrase "offence against this Subdivision" to be read as a reference to the offence of attempt, the first limb of the presumption cannot be met in the case of attempt, because the person has not imported the substance (otherwise the import offence would be available rather than relying on attempt). For the presumption to apply, paragraph (a) would need to be "amended" by s11.6 to refer to the substance being attempted to be imported rather than imported. The terms of s11.6 do not extend to this. Accordingly, after much consideration it was decided that applying section 11.6(1) in this way required too much creative redrafting of the presumption section and would not be a strong argument in court.

> Therefore, it is current office policy that the precursor presumptions contained in section 307.14 of the *Code* do not apply when the offence involves an extension of criminal responsibility such as aid & abet or attempt.

Substitution of Drugs

***Code offences - R v Toe* [2010] SASC 39**

On 26 February 2010, the South Australian Supreme Court handed down its decision in *R v Toe* [2010] SASC 39. That decision was an appeal against conviction for two separate offences of importing a marketable quantity of a border controlled drug being cocaine concealed in parcel containing a photo album and heroin concealed in another parcel containing a wooden picture frame.

The heroin and cocaine were removed from the parcels, with the latter being fully substituted with icing sugar and two attempts were made to deliver the parcels. The defendant later sent a courier to collect the parcels and deliver them to him at his girlfriend's address.

On appeal, the defendant contended, among other things, that 'import' referred to the act of crossing the border and no more and did not extend to the alleged activities of the defendant and, also, the removal of the drugs by the authorities broke the chain of continuity and that this should have led to acquittals on the import charges.

The Court accepted that a narrow definition of 'import' should be applied and followed the reasoning in *Campbell v R*. By majority, the court also refused to enter verdicts on the alternative charges of attempt to possess a marketable quantity of border controlled drugs reasonably suspected of having been unlawfully imported.

Consideration of full substitution in *Toe*

While the issues raised in *R v Toe* and *Campbell v R* concerning the definition of 'imports' have been addressed by the amendment (discussed below), there remains an issue about the effect of a full substitution of an inert substance for the drugs.

Although the observations of the court in *R v Toe* were *obiter*, the court considered that a full substitution ended the importation. Bleby J (at p 22) stated that:

> *If it were necessary to do so in this case I would be constrained to hold that the importing of the border controlled drugs ceased at the time when they were removed in their entirety by the police. They had arrived in Australia from abroad. They had reached the point which would "result in the goods remaining in Australia", albeit that, without the intervention of the police, the importing may have continued until delivery to the person who claimed to be the consignee. However, in the circumstances of this case it is not necessary to decide.*

The situation in *Toe* was that there was only evidence of the defendant's activities (including TI material) after the parcels were landed in Australia. Accordingly, there was no evidence that the defendant imported the drugs in the sense explained by Bleby J (at p 22) as follows:

> *If I import an article I may merely sign a request of authority to a consignor, or merely make a telephone call or request a shipper to despatch the goods to an address in Australia. On the other hand, I may request that the goods be sent to someone else or authorise someone else to collect the goods. In any of those cases all I have done is make a request to a consignor, a transport company or an airline to bring the goods into Australia and to arrange for their collection or delivery. In any of those cases, if the goods are brought into Australia, I have imported the goods. I am the importer.*
>
> *It does not matter if or when, after physical importation, the process is interrupted. I am still the importer, having caused the goods to be imported.*
>
> *Mere proof of my involvement in collection of the goods, if that be the case, does not prove that I am the importer, although my activity in that regard may be circumstantial evidence tending to prove that I was the importer. Therefore, attempts to define when importation ceases are somewhat artificial and irrelevant.*

Interestingly, Bleby J went on to say (at p 24):

> *I do not underestimate the difficulty in proving an offence against s 307.2 of the Code [importing a marketable quantity of controlled drugs] in some cases where the only evidence proves receipt of the substance or an attempt to receive it. It may be more appropriate in some cases to rely on the complicity provisions of s 11.2 of the Code [Aid, abet, counsel or procure] or some alternative offence, as was charged in this case [Attempt to possess].*

***Custom Act offences - R v Nolan* [2012] NSWCCA 126**

This matter involved a single charge of aiding and abetting an importation of pseudoephedrine pursuant to section 233BAA(4) of the *Customs Act 1901* with section 11.2(1) of the *Criminal Code* that proceeded to trial in the District Court of NSW in August 2011.

The facts of the case involved a full substitution of the precursor and evidence of the defendant's involvement in the importation was limited to after the precursor had arrived in Australia, been fully substituted and cleared by Customs.

The judge directed an acquittal following a defence submission of 'no case to answer'.

The court found that the definition of importation in *Calderwood v The Queen* (2007) 172 ACrimR 208 applied (that is *"the act of importation can embrace activities that follow the arrival of goods in Australia provided they are related, proximate and incidental to the bringing of the goods into Australia*"), but found that it was impossible for the defendant to have committed the offence as his involvement began after the full substitution.

The CDPP appealed the matter to the NSWCCA. McCellan CJ (with whom Davis J agreed) found that the broad definition in *Calderwood* continues to apply for Custom Act offences, but that as the drugs had been substituted prior to Nolan becoming involved, it was impossible for him to have aided and abetted the commission of the offence.