Judicial College of Victoria

The Queen v Falzon (2018) 264 CLR 361

Outline

The Queen v Falzon [2018] HCA 29 concerned the admissibility of a large quantity of cash as evidence that the accused possessed certain quantities of cannabis for the purpose of sale.

The High Court affirmed a long line of intermediate appeals' court cases holding that possession of an unexplained and large amount of cash can be used as circumstantial evidence that the accused has been and continues to be involved in the business of trafficking. In cases where a fact in issue is whether the accused possesses drugs for personal use or for sale, the 'accoutrements of trafficking' are admissible to prove that the accused possesses the drugs for sale.

Facts

On 17 December 2013, police executed search warrants at four properties owned by or connected to the accused. Police discovered cannabis growing operations at three of the properties, along with dried cannabis, scales, snap-lock bags, and cultivation charts and instructions. At the fourth property, the respondent's home, police found dried cannabis, snap-lock bags, keys to the other properties and, secreted around the house, $120,800 in cash. That $120,800 in cash became the focus of the appeals.

The accused was arrested later that day and interviewed. During the interview, he admitted possession of the cannabis, but claimed that it was for personal use.

Judgments

At trial, the accused argued that the $120,800 was not admissible, as it was either irrelevant or unduly prejudicial. The trial judge ruled the evidence was admissible on the basis that, in the circumstances, it was part of the indicia of trafficking. At the trial, the Crown led expert evidence that drug transactions are often conducted in cash and provided tax records to show that the accused had not declared the cash as assessable income.[1]

Court of Appeal

The decision to admit the cash was challenged in the Court of Appeal. Priest and Beach JJA held that, due to the way the prosecution had structured its case, by alleging trafficking by possession for sale on a single day, the cash could not be evidence of trafficking activity on that day and was irrelevant. Further, the prosecution had not attempted to show a relationship between the cash and the trafficking at the other premises. The majority contended that this distinguished the present case from earlier decisions regarding the indicia of trafficking.[2] While the cash may have demonstrated past trafficking, it was either tendency evidence or 'rank propensity' evidence and was not admissible on either basis.[3] In the alternative, the majority held that the evidence was of low probative value and should have been excluded under *Evidence Act 2008* s.137.[4] Whelan JA, in dissent, held that the cash was circumstantial evidence that could properly be used to assess whether, on 17 December 2013, the accused was conducting a business of trafficking,[5] and that the probative value of the evidence was not outweighed by the danger of unfair prejudice.[6]

[1] *The Queen v Falzon* (2018) 264 CCR 361, 370-371 [23] ('*Falzon HCA*').
[2] *Falzon v The Queen* [2017] VSCA 74, [131]-[146].
[3] *Ibid* [2017] VSCA 74, [147].
[4] *Ibid* [2017] VSCA 74, [148].
[5] *Ibid* [2017] VSCA 74, [66] –[69].
[6] *Ibid* [2017] VSCA 74, [72].

High Court

The High Court unanimously allowed the appeal. The Court reviewed a number of decisions of intermediate appellate courts which had established that the accoutrements of trafficking were admissible to prove that the accused possessed a drug of dependence for the purpose of trafficking.[7]

The High Court held that the possibility that the cash came from previous trafficking activity did not detract from the strength of the evidence in proof that the accused was carrying on a business of trafficking on 17 December. Instead, the fact that the cash likely came from previous trafficking supported the probability that the accused was making regular sales of cannabis and so, on 17 December, that he had been carrying on a continuing business of trafficking. The fact that the charge related to trafficking on a single day did not affect this conclusion.[8]

The High Court also rejected the conclusion that the evidence could only be used for rank propensity reasoning or tendency reasoning. The High Court said the evidence was admissible:

> to establish that the respondent was in fact carrying on a business of trafficking and, therefore, that the respondent's purpose in possessing the cannabis of which he was found to be in possession on 17 December 2013 was the purpose of sale.[9]

Further, there was no significance in the fact that the cash was found at a different property to where the cannabis was grown.[10]

Having established that the evidence of the cash was relevant and was not subject to an exclusionary rule, the High Court turned to consider whether it needed to be excluded under *Evidence Act 2008* s 137. There, the Court held that that the evidence had high probative value and that the risk of the jury misusing the evidence was minimal.[11]

The Court finally noted that under the *Jury Directions Act 2015*, given that there had not been a request for a direction warning the jury not to use the evidence for a tendency purpose the judge was precluded from doing so unless the judge found substantial and compelling reasons. In relation to such reasons, the High Court noted:

> And given, as is conceded, that such a direction had the potential to be more detrimental to the respondent than saying nothing further about the subject, the trial judge could not properly have concluded that there were substantial and compelling reasons to override defence counsel's judgment.[12]

[7] *R v McGhee* (1993) 61 SASR 2018; *R v Sultana* (1994) 74 A Crim R 27; *R v Blackwell* (1996) 87 A Crim R 289; *R v Edwards* [1998] 2 VR 354; *Evans v The Queen* [1999] WASCA 252.
[8] *Falzon* HCA (2018) 264 CLR 361, 377 [41].
[9] *Ibid* (2018) 264 CLR 361, 377-378 [42].
[10] *Ibid* (2018) 264 CLR 361, 378-379 [44].
[11] *Ibid* (2018) 264 CLR 361, 379 [45].
[12] *Ibid* (2018) 264 CLR 361, 380 [48].

Conclusion

Falzon makes two significant contributions to the state of the law.

First, it affirms the line of decisions from intermediate appellate courts about admissibility of the accoutrements of evidence of trafficking as circumstantial evidence of an accused's purpose in possessing a drug of dependence. The Court emphasised that those decisions are not to be distinguished due to physical separation between the drugs and the accoutrements of trafficking.[13]

Second, the High Court noted the stringency of the test for a judge giving unrequested directions under the *Jury Directions Act 2015*, and that the potential for a direction to backfire on an accused may prevent a judge from finding substantial and compelling reasons for giving that direction. This is the first High Court decision which considered the operation of the test for jury directions and it is consistent with the approach the Victorian Court of Appeal has taken so far.[14]

[13] See *Falzon HCA (2018)* 264 CLR 380-381 [49].
[14] See *Dunn & Watts v R* [2017] VSCA 371, [78]-[89]; *Keogh v R* [2018] VSCA 145, [74]-[82].