THE ROLE OF THE JURY IN CRIMINAL CASES—ENTRENCHED OR VULNERABLE?

KINGSWELL v. *R.*

In Australia, in an attempt to control the illicit trade in drugs, the Commonwealth parliament has created under s. 233B(1) of the Customs Act 1901 (Cth) a series of indictable offences relating to the importation and possession of narcotic goods. Under s. 235 of the Customs Act, the maximum term of imprisonment which may be imposed ranges from two years to life depending on the gravity of the offence. The proper construction and constitutional validity of these provisions were considered by the Full High Court in *Kingswell* v. *R.*[1] The significance of the decision in *Kingswell*, however, extends far beyond the interpretation of Commonwealth drug legislation to fundamental aspects of criminal procedure.

Foremost among these is the role of the jury in criminal trials. As long ago as 1769, Blackstone warned that:

> . . . inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.[2]

The drug trafficking provisions of the Customs Act provide a striking example of criminal legislation which erodes the role of the jury. Ostensibly, the determination of factual issues which decide the appropriate penalty range is allocated to the trial judge alone. These issues include the quantity of the drug involved and the purpose for which the offence was committed, factors clearly crucial to the seriousness of the offence. The effect is to deprive the jury of a great part of its fact-finding role.

Two arguments were advanced in *Kingswell* to avoid this result. The first was that stratified penalty schemes of the kind contained in the Customs Act, on a proper construction, actually created several distinct offences. Consequently, the fact or circumstance which attracted the particular maximum penalty was an element of the offence which had to be charged in the indictment and proved to the jury. The second argument

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[1] (1985) 60 A.L.J.R. 17.
[2] Blackstone's *Commentaries* (1769), Book IV, 344.

was that this legislative arrangement, by purporting to remove the determination of factual issues from the jury, contravened s. 80 of the Constitution (Cth) which guarantees that the trial on indictment of any federal offence shall be by jury. Previous decisions of the High Court on the interpretation of s. 80 turned on whether the expression "trial on indictment" ensured a trial by jury in serious criminal cases.[3] In *Kingswell*, the High Court considered for the first time the content of the guarantee in s. 80 when the offence is prosecuted on indictment.

Important issues relating to criminal procedure were thus raised in *Kingswell*, concerning the limits, both constitutional and otherwise, to legislation which undermines the role of the jury. The two arguments outlined above formed the basis of the first two submissions by the applicant to the High Court. In addition, the practical question whether circumstances aggravating the penalty must be charged in an indictment was addressed.

The construction and validity of certain provisions of the Customs Act were central to the decision of the High Court in *Kingswell*. It is therefore convenient, before recounting the facts of the case, to summarise the effect of the relevant sections.

Statutory Scheme

Section 233B(1) of the Customs Act creates a number of offences which are defined in general terms and embrace the full range of conceivable offenders from commercial drug traffickers to individual users seeking small quantities for personal consumption. To distinguish between offences of different gravity caught by s. 233B(1), s. 235 provides three levels of maximum penalty. The liability of an offender to a particular maximum penalty depends on the satisfaction of the court[4] as to the facts prescribed by s. 235(2) and (3): the quantity of the narcotic substance,[5] the existence of a prior conviction[6] for a serious drug offence[7] and the purpose for which the offence was committed.

Two quantities—commercial and trafficable—are defined by s. 4 of the Customs Act and specified for each narcotic substance in Schedules VI and VIII. For example, the trafficable quantity of heroin is 2 grams and the commercial quantity is 1.5 kg.

The provisions of s. 235 may be summarised as follows:

1. If the offence is heard summarily, the maximum penalty is imprisonment for two years, or a fine of $2,000.00 or both.[8]

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[3] *R.* v. *Archdall and Roskruge; ex parte Carrigan* (1928) 41 C.L.R. 128; *R.* v. *Federal Court of Bankruptcy ex parte Lowenstein* (1938) 59 C.L.R. 556; *Sachter* v. *Attorney-General for the Commonwealth* (1954) 94 C.L.R. 86; *Zarb* v. *Kennedy* (1968) 121 C.L.R. 283; *Li Chia Hsing* v. *Rankin* (1978) 141 C.L.R. 182.

[4] *Id.* 19 (*per* Gibbs, C.J., Wilson and Dawson, JJ.), 23 (*per* Brennan, J.), 30 (*per* Deane, J.).

[5] This is the amount which can be extracted from the narcotic goods to which the offence relates: s. 4(4).

[6] Or any curial finding: s. 235(2)(c)(ii)(B).

[7] The previous offence must involve an amount more than the trafficable quantity: s. 235(2)(c)(ii).

[8] S. 235(7).

2. If the offence is tried on indictment, three levels of maximum penalty may be imposed depending primarily on the quantity of the drug. Where: –
   (a) less than a trafficable quantity is involved, the maximum penalty is imprisonment for two years, or a fine of $2,000.00, or both.[9]
   (b) more than a commercial quantity is involved, the maximum penalty is life imprisonment.[10]
   (c) less than a commercial quantity, but more than a trafficable quantity, is involved, the maximum penalty is generally imprisonment for 25 years, or a fine of $100,000.00, or both,[11] unless: –
      (i) the defendant has a prior conviction for a serious drug offence, in which case the maximum penalty is life imprisonment.[12]
      (ii) the defendant has no prior conviction for a serious drug offence, and succeeds in disproving commercial purpose, in which case the maximum penalty is imprisonment for two years, or a fine of $2,000.00, or both.[13]

The Facts

The applicant, Kingswell, a man Lowe, and a third man Drury conspired to import heroin from Bangkok into Australia using a courier, an offence under s. 233B(1)(cb) of the Customs Act. The applicant was convicted after a trial on indictment and sentenced to imprisonment for 11 years.

There was uncontested evidence presented at the trial that the amount of heroin involved was 1.332 kg, a quantity exceeding trafficable but less than commercial. This quantity was not in dispute, but was not alleged in the indictment. In addition, the applicant had previously been convicted under s. 233B(1)(c) of possessing not less than a trafficable quantity of cannabis – 20.6 kg in the form of buddha sticks. The trial judge proceeded on the basis that where the Court was satisfied of these two circumstances, the maximum penalty available was that provided by s. 235(2)(c)(ii): imprisonment for 25 years, or a fine of $100,000.00 or both. The applicant was sentenced to imprisonment for 11 years.

The New South Wales Court of Criminal Appeal dismissed an appeal against the harshness of the sentence, and upheld an appeal by the Crown against the inadequacy of the sentence, substituting a sentence of imprisonment for 18 years.[14] The applicant then sought leave to appeal to the High Court.

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[9] S. 235(2)(d).
[10] S. 235(2)(c)(i).
[11] S. 235(2)(d)(i). Where the narcotic substance is cannabis, the maximum penalty is imprisonment for 10 years, or a fine of $4,000,000 or both: s. 235(2)(d)(ii).
[12] S. 235(2)(c)(ii).
[13] S. 235(3).
[14] *R.* v. *Kingswell* [1984] 3 N.S.W.L.R. 273.

The Submissions

In the High Court, three principal submissions were made on behalf of the applicant. The first was that s. 233B(1)(cb) and s. 235(2) combined to create a number of separate offences, including one created by s. 233B(1)(cb) and s. 235(2)(c)(ii), and another by s. 233B(1)(cb) and s. 235(2)(e). The former and more serious offence required as factual elements not only those prescribed by s. 233B(1)(cb) but also those prescribed by s. 235(2)(c)(ii) relating to quantity and prior conviction. Since the indictment was silent on these additional facts, the applicant was not charged with the offence created by s. 233B(1)(cb) and s. 235(2)(c)(ii), and therefore was liable only to the lowest scale of penalty provided by s. 235(2)(e).

The second submission was that if, on the proper construction of these provisions of the Customs Act, the issues arising under s. 235(2)(c)(ii) were to be determined by the judge and not the jury, s. 235 would be invalid as contravening s. 80 of the Constitution.

Finally, it was argued that, if the preceding submissions were rejected, the two matters referred to in s. 235(2)(c)(ii) were nevertheless aggravating circumstances and should have been charged in the indictment and found by the jury.

The Decision

The application for special leave to appeal was granted. The majority[15] of the High Court rejected the first two submissions, while a statutory majority[16] upheld the third but concluded that no miscarriage of justice had occurred. Consequently, the appeal was dismissed.

The decision in *Kingswell* may be analysed in terms of the three principal submissions discussed above.

ANALYSIS OF THE JUDGMENTS

The decision of the Court of Criminal Appeal in *Kingswell*[17] turned solely on the question whether the sentencing judge was permitted to take into account aggravating circumstances not alleged in the indictment. While the issues therein raised provided the basis of the third submission presented to the High Court on appeal, the case assumed a new significance, and the complexion of arguments changed dramatically, as a consequence of the intervening House of Lords decision in *R.* v. *Courtie.*[18] The first submission of the applicant relied principally on this case.

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[15] Gibbs, C.J., Mason, Wilson and Dawson, JJ.
[16] Gibbs, C.J., Wilson and Dawson, JJ.
[17] *Supra* n. 14.
[18] [1984] A.C. 463.

First Submission: Single and Multiple Statutory Offences

The relevance of the decision in *R.* v. *Courtie* was that it focused on whether a particular statutory scheme created a single offence with a range of maximum penalties or several distinct offences. In the circumstances of *Courtie*, the appellant, after a somewhat bizarre incident, pleaded guilty to a single count of buggery with a male person under 21 years. After conviction, although the indictment contained no allegation that the act was committed without the consent of the other person, the trial judge, sitting with two justices of the peace, purported to try the issue of consent. They found that there had been no consent, and the judge sentenced on that basis.

In allowing an appeal against the sentence, the House of Lords held that s. 12(1) of the Sexual Offences Act 1956 (U.K.) as modified by ss. 1 and 3 of the Sexual Offences Act 1967 (U.K.) created a number of distinct offences, including two which could be distinguished by the presence or absence of consent as a factual ingredient.[19] Absence of consent, an ingredient of the more serious offence, should have been alleged in the indictment and proved to the jury.[20] Where this had not occurred, the judge could not usurp the role of the jury, decide the issue of consent, and sentence the offender as though found guilty of the more serious offence.[21]

In s. 3(1) of the Sexual Offences Act 1967 (U.K.), the existence or absence of particular elements critically determines the maximum penalty to which the accused person, if convicted, is liable, a situation analogous to s. 235 of the Customs Act. Of such legislation, Lord Diplock, with whom the rest of the House concurred, pronounced:

> My Lords, where it is provided by a statute that an accused person's liability to have inflicted upon him a maximum punishment which, if the prosecution are successful in establishing the existence in his case of a particular ingredient, is greater than the maximum punishment that could be inflicted on him if the existence of that particular factual ingredient were not established, it seems to me to be plain beyond argument that parliament has thereby created two distinct offences . . . .[22]

The majority of the High Court in *Kingswell* regarded this statement as a rule of construction, or an indication of judicial approach to a question of this kind, rather than an absolute rule of law.[23] As a rule of construction, albeit salutary, it had to yield to an expression of contrary intention by the parliament.[24] The majority concluded that a contrary

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[19] *Id.* 471.
[20] *Id.* 467.
[21] *Id.* 472-473.
[22] *Id.* 471.
[23] *Supra* n. 1 at 20.
[24] *Ibid.*

intention appeared in the relevant provisions of the Customs Act.[25] The principal reason cited was the clear demarcation between the offence-creating and punishment provisions. The words of s. 233B(1) indicated that each paragraph was intended to create an offence punishable under the separate s. 235. Consistently with such an intention, s. 235(2) referred to "an offence against . . . sub-section (1) of s. 233B." It is submitted, however that if the presumption in *Courtie* of distinct offences is to be reconciled with the decision in *Kingswell*, such indicia cannot be conclusive. For it is in precisely such situations of textual and linguistic demarcation between offence-creating and punishment provisions that the presumption operates.

Instead, it is suggested that a preferable basis of distinction between *Courtie* and *Kingswell* is that in the latter case the legislature expressly allocated the function of finding the additional facts which attract the particular maximum penalty to the judge. All members of the High Court held that the words "where the Court is satisfied" in s. 235 allocated this task to the judge alone.[26] As a matter of statutory construction, therefore, the additional matters specified in s. 235(2) and (3), while relevant to the maximum penalty applicable, were not intended by parliament to be elements of separate offences. Consequently, the first submission failed.

Second Submission: Impact of s. 80 of the Constitution

It was contended by both Brennan, J. and Deane, J., that there was a more fundamental constraint on parliament than the presumption of distinct offences in *Courtie*—s. 80 of the Constitution. According to Deane, J.:

> While the parliament was competent to define the elements of an offence under the provisions of the Act for the limited purpose of the proper statutory construction of the provisions which it had enacted, such a definition cannot exclude the effective operation of a fundamental law of the Constitution from which it derives both its existence and its legislative purposes.[27]

(i) *Interpretation of s. 80 of the Constitution*

Section 80 of the Constitution provides, *inter alia*, "The trial on indictment of any offence against any law of the Commonwealth shall be by jury . . .". Although expressed as a constitutional guarantee of a trial by jury, s. 80 has been given a narrow interpretation by the High Court in a series of decisions commencing with *R.* v. *Archdall and Roskruge; ex parte Carrigan.*[28] In that case, Higgins, J. attributed to

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[25] *Ibid.*
[26] *Supra* n. 4.
[27] *Id.* 39.
[28] *Supra* n. 3.

s. 80 the following effect: "if there be an indictment, there must be a trial by jury; but there is nothing to compel procedure by indictment . . .".[29] On this view, which has been consistently applied by the High Court,[30] the federal parliament has a discretion unfettered by s. 80 to decide that a particular offence, however serious, may be tried summarily. Consequently: "What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision."[31]

This approach has been criticised as rendering s. 80 "in practice worthless"[32] since it provides no guarantee of a trial by jury in serious criminal cases. An alternative, broader interpretation was proposed by Dixon and Evatt, JJ. in *R.* v. *Federal Court of Bankruptcy; ex parte Lowenstein*[33] and subsequently championed by Murphy, J. in a number of cases.[34] In their joint judgment in *Lowenstein*, Dixon and Evatt, JJ. construed s. 80 as guaranteeing the right to a trial by jury where the person charged, if convicted, would be liable to a term of imprisonment.[35]

As the trial in *Kingswell* had proceeded on indictment, the High Court was not strictly required to decide whether s. 80 guaranteed a trial by jury where a convicted offender is liable to serious punishment. Nevertheless, the majority clearly regarded the statement of Higgins, J. in *Archdall* as the settled interpretation.[36] The sole dissentient on this point was Deane, J., who preferred the broader construction of s. 80 suggested by Dixon and Evatt, JJ. in *Lowenstein*, with the qualification that the maximum term of imprisonment should exceed one year for the offence to be sufficiently serious to attract the right to a trial by jury.[37]

In his judgment, Deane, J. analysed the functions and practical benefits of trial by jury.[38] Fundamental, in his view, was the protection of the accused against those who exercise the authority of the government;[39] a trial by jury provides "an inestimable safeguard against the corrupt or over-zealous prosecutor and the compliant, biased, or eccentric judge".[40] The institution of trial by jury also assisted greatly the administration of criminal justice by maintaining the appearance, as well as the substance, of impartial justice.[41]

From this perspective, Deane, J. scrutinised the authorities which, in his opinion, transformed the fundamental guarantee of s. 80 into a mischievous mockery.[42] His review of the cases revealed that there was no actual decision of the High Court inconsistent with the proposition that

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[29] (1928) 41 C.L.R. 128, 139-40.
[30] *Supra* n. 3.
[31] *Spratt* v. *Hermes* (1965) 114 C.L.R. 226, 244 (per Barwick, C.J.).
[32] G. Sawer, *Australian Federalism in the Courts* (1967), 19.
[33] (1938) 59 C.L.R. 556 (hereafter *Lowenstein*).
[34] E.g. *Beckwith* v. *R.* (1977) 51 A.L.J.R. 247, 254; *Li Chia Hsing* v. *Rankin* (1978) 141 C.L.R. 182.
[35] *Supra* n. 33 at 583.
[36] *Supra* n. 1 at 21.
[37] *Id.* 39.
[38] *Id.* 31-32.
[39] *Id.* 31.
[40] *Duncan* v. *Louisiana* (1968) 391 U.S. 145, 156.
[41] *Supra* n. 1 at 31.
[42] *Id.* 34-39.

s. 80 requires a trial by jury where the accused, if convicted, is liable to a term of imprisonment exceeding one year.[43] Given the paramount importance of the right to a trial by jury, Deane, J. argued that cogent reasoning is necessary to support a construction which would render the s. 80 guarantee illusory.[44] In the absence of such reasoning in the majority judgment in *Archdall*,[45] the decision could be restricted to the legislative provisions there involved. Furthermore, *Lowenstein* and subsequent decisions[46] could be distinguished as involving less serious offences attracting lower penalties.[47]

The reliance on the choice of the one year term seems rather artificial, as none of the decisions Deane, J. sought to distinguish on this basis suggested that a more serious punishment would have altered the position. Indeed, Latham, C.J. in *Lowenstein*[48] and Barwick, C.J. in *Zarb* v. *Kennedy*[49] and *Li Chia Hsing* v. *Rankin*[50] argued the opposite. While the complete discretion of the parliament to avoid s. 80 by procedural means may, with Deane, J. and his illustrious predecessors, be deplored, it is submitted that the fault lies substantially with the drafting and not the judicial interpretation.[51] The amendment of "[t]he trial of all indictable offences" which appeared in the section as originally drafted to "[t]he trial on indictment of any offence" has resulted in the interpretation that s. 80 requires a trial by jury only if the offence, by legislative enactment (or prosecutorial discretion), is prosecuted on indictment.

A later decision of the High Court in *Brown* v. *R.*,[52] however, portended a possible change of attitude. Dawson, J., a member of the majority in *Kingswell*, indicated that his acceptance of the settled interpretation of s. 80 was based on the observation that since federation no law of the Commonwealth has taken advantage of the interpretation in order to avoid trial by jury.[53] A blatant legislative attempt to make a serious offence triable summarily could therefore conceivably lead a majority of the High Court to support the wider view of s. 80 advocated by Deane, J. in *Kingswell*.

(ii) *Extent of the Guarantee in s. 80 of the Constitution*

It is clear even on a narrow interpretation that s. 80 serves to entrench the jury as an essential constituent of any court[54] where a person is

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[43] *Id.* 38.

[44] *Id.* 36.

[45] Knox, C.J., Isaacs, Gavan Duffy and Powers, JJ. dismissed the argument based on s. 80 peremptorily.

[46] *Supra* n. 3.

[47] *Supra* n. 1 at 38.

[48] *Supra* n. 33 at 571.

[49] (1968) 121 C.L.R. 283, 294.

[50] (1978) 141 C.L.R. 182, 190.

[51] See C. L. Pannam, "Trial by Jury and Section 80 of the Australian Constitution", (1968) 6 *Syd. Law Rev.* 1, 6; *Brown* v. *R.* (1986) 60 A.L.J.R. 257, 260 (*per* Gibbs, C.J.).

[52] (1986) 60 A.L.J.R. 257.

[53] *Id.* 275.

[54] Jurisdiction to try persons charged on indictment with federal offences is conferred on State courts by s. 68(2) of the Judiciary Act 1903 (Cth).

charged on indictment with a federal offence. The critical question in *Kingswell*, where the trial had proceeded on indictment, was what precisely the guarantee of a trial by jury embraced. Criminal procedure at common law dictates that an indictment must charge all the substantive elements of the offence;[55] where the accused pleads not guilty to an indictment, the issues on which liability depends are joined between the Crown and the accused, and these issues are determined by the jury.[56] Section 80, by guaranteeing that a trial on indictment of any offence shall be by jury, thus requires that all the substantive elements of the offence are tried by a jury.

In his judgment, Brennan, J. emphasised that the scope of the guarantee depended on the meaning of "offence" in s. 80. His Honour argued that the term "offence" was not left to be defined by the parliament, but had the meaning it bore in criminal jurisprudence.[57]

What, then, is a criminal offence? According to Brennan, J., a criminal offence could be identified by its factual elements *and* the punishment which the combination of elements attracts.[58] This conclusion was based on the principle that an offender's liability to punishment or to a particular maximum penalty depends on the facts determined by his plea of guilty or the verdict of the jury.[59] Where the accused pleads not guilty to an indictment, the result flowing from this principle is an exclusive correspondence between the factual elements triable by the jury and the particular penalty which may be imposed. Thus:

> If a particular combination of elements attracting a particular penalty is one offence, a different combination of elements attracting a different penalty is another offence.[60]

It is clear that Brennan, J. arrived at the same view of the criminal offence as Lord Diplock in *Courtie*:[61] a fact which attracts a greater maximum penalty becomes an element of a separate, more serious offence.

Brennan, J. accepted that a legislature unfettered by s. 80 could create a single offence and prescribe different penalties based on specific facts or circumstances to be determined by the judge alone.[62] In his view, however, where any federal offence is tried on indictment, s. 80 prohibits the parliament from withdrawing from the jury's determination issues of fact on which liability to a criminal penalty or a particular maximum penalty depends. Brennan, J. therefore concluded that s. 235(2) and (3), by purporting to vest in the judge the function of finding facts rendering the accused liable to a particular maximum penalty, contravened s. 80 and

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[55] *R.* v. *Horne* (1777) 98 E.R. 1300; *R.* v. *Jones* (1831) 109 E.R. 1270.
[56] Chitty's *Criminal Law* (2nd ed., 1826) Vol. 1, 470-471, 532.
[57] *Supra* n. 1 at 27.
[58] *Ibid.*
[59] *Id.* 26-28.
[60] *Id.* 27.
[61] *Ibid.* Brennan, J. expressly endorses the passage cited *supra* n. 22.
[62] *Id.* 26.

was invalid.[63] Accordingly, Brennan, J. allowed the appeal and set aside the sentence, imposing instead the penalty for the basic offence for which the applicant was convicted.[64]

Although supported by Deane, J.,[65] this argument was expressly rejected by a majority of the High Court in *Kingswell* as importing into s. 80 restrictions on legislative power which it does not express.[66] In their view, since an offence against the law of the Commonwealth is a creature of that law, it is the law alone which defines the elements of the offence.[67] The approach to s. 80 adopted by Brennan, J. was criticised as serving no useful constitutional purpose.[68]

This assertion is, with respect, questionable. For it is only by adopting the approach of Brennan, J. that the guarantee provided by s. 80 would be saved from being nugatory, surely a useful constitutional purpose. The construction of s. 80 favoured by the majority guarantees nothing—in a prosecution or indictment, no issues would be tried by jury except those parliament ordained to be tried by jury.[69]

Moreover, the construction of s. 80 proposed by Brennan, J. would offer valuable protection to the accused and the administration of criminal justice. The legislation involved in *Kingswell* clearly distorts the traditional relationship between the judge and jury in a criminal trial.[70] Not only is the determination of factual issues classically the province of the jury assigned to the judge, but the facts are then used to establish the liability of an offender to a particular maximum penalty, normally the consequence of a plea or a jury's verdict of guilty. Also, whereas the customary procedure at the dispositional stage of a trial is for the judge to impose sentence utilising facts implied in the plea or verdict of guilty,[71] no such implication is possible concerning quantity or purpose under a legislative arrangement which removes these facts from the determination of the jury. As a result, the usual constraint on the judge preventing findings by him in conflict with the verdict or plea[72] becomes largely irrelevant. This dangerous encroachment on the role of the jury in criminal trials would be avoided if s. 80 were to be given the effect attributed to it by Brennan J.

Further benefits flow from the interpretation of s. 80 which would invalidate stratified penalty legislation. The accused and, equally, the judge would know what maximum sentence is applicable upon plea or conviction.[73] In addition, as rules relating to admissibility of evidence are

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[63] *Id.* 29.
[64] *Ibid.*
[65] *Id.* 39-40.
[66] *Id.* 20-21.
[67] *Id.* 21.
[68] *Ibid.*
[69] *Id.* 28.
[70] J. Willis, "The declining role of the jury", in J. Basten *et. al.* (eds.), *The Criminal Justice System* (1982), 234; J. Willis, "To What Extent is s. 235 of the Customs Act 1901-1975 Invalid as Contravening s. 80 of the Constitution?" (1978) 52 *A.L.J.* 502, 508-509.
[71] R. G. Fox and B. M. O'Brien, "Fact-finding for Sentencers" (1975) 10 *M.U.L.R.* 163.
[72] *R.* v. *Harris* [1961] V.R. 236; *R.* v. *Haselich* [1967] Qd. R. 183; *R.* v. *Boyd* [1975] V.R. 168.
[73] This argument was advanced by counsel for the appellant in *Courtie, supra* n. 18 at 465.

less strict at the dispositional stage,[74] greater protection to the accused is afforded by a construction of s. 80 which requires facts increasing the maximum penalty available to be tried by the jury.

One further advantage is alluded to by Brennan, J., and may be illustrated by an example. Assume X conspires with Y to import into Australia a quantity of lysergic acid diethylamide (LSD) less than the prescribed trafficable quantity. They arrange to conceal the substance in X's camera, but Y, unknown to X, increases the amount of LSD to a quantity over the prescribed commercial quantity. X and Y are subsequently arrested in Australia. Should X be liable to the maximum penalty of life imprisonment provided by s. 235(c)(i) where the quantity involved is commercial? By a logical extension of the recent High Court decision in *He Kaw Teh* v. *R.*,[75] if the quantity of drug involved were treated as an element of a distinct offence as Brennan, J. insists it should be, it would be accompanied by a mental element such as knowledge. In the above example, X would then not be liable to the high maximum penalty due to his lack of knowledge. It is submitted that this is a more just result than that provided by the construction of the provisions adopted by the majority, under which the *He Kaw Teh* presumption is irrelevant and X is liable to life imprisonment.

Third Submission: What must be charged in an indictment?

The first argument advanced to support the third submission by the applicant in *Kingswell* was that the common law required circumstances aggravating the penalty, although not elements of the offence, to be specified in the indictment and proved to the jury. In the cases[76] relied on to establish this requirement, however, the circumstance would have elevated the offence to another more serious offence, so that the strict *ratio decidendi* of these cases was no more than the principle that an indictment must allege all the elements of an offence. Accordingly, both the Court of Criminal Appeal[77] and the High Court[78] in *Kingswell* held that there was no common law rule that an indictment must include matters referable only to the quantum of penalty. This is consistent with the well established position at common law that in an indictment matters other than elements are mere surplusage.[79]

The second ground for the final submission was that the practice under the Queensland Criminal Code should be followed to ensure comity in the administration of a Commonwealth statute. Section 564 of the Code provides that any circumstance of aggravation intended to be relied upon must be charged in the indictment, and applies to trials in Queensland of federal offences under s. 68(1) of the Judiciary Act 1903 (Cth). Gibbs,

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[74] *Supra* n. 71 at 277.
[75] (1985) 59 A.L.J.R. 620.
[76] *R.* v. *Bright* [1916] 2 K.B. 441; *Lovegrove* v. *R.* [1961] Tas. S.R. 106.
[77] *Supra* n. 14 at 276-277 (*per* Street, C.J.).
[78] *Supra* n. 1 at 22.
[79] *Supra* n. 55.

C.J., Wilson and Dawson, JJ. accepted the comity argument and held that the Code practice should be followed in all States.

This conclusion was criticised by Mason, J., who regarded it as difficult to reconcile with the clear intention of parliament that the aggravating circumstances in s. 235(2) and (3) be proved to the satisfaction of the judge.[80] In his view, if the legislation itself was valid, a finding by jury on these matters was precluded.[81] According to the majority, however, there was no reason why the satisfaction of the judge should not be founded upon facts determined by the jury.[82] Yet as Mason, J. emphasised, this interpretation posed difficulties where there was a conflict of opinion between the judge and the jury: which finding should prevail?[83] It also represented a *volte-face* by Gibbs, C.J., Wilson and Dawson, JJ. who relied on the express allocation of the function of fact-finding to distinguish *Courtie* and reject the first submission. In contrast, the approach taken by Mason, J. was more consistent with the earlier line of reasoning by the majority in *Kingswell.*

Nevertheless, the practice endorsed in *Kingswell* has been subsequently affirmed by the same majority in *R.* v. *Meaton.*[84] The minority in *Meaton*, Brennan and Deane JJ., criticised the commended practice as conflicting with the principle established in *Kingswell* that the function of determining s. 235 matters was vested in the judge alone.[85] This accorded with the view of Mason, J. in *Kingswell* but for the moment the practice of including aggravating circumstances in an indictment prevails.

In the context of *Kingswell*, the disagreement between Mason, J. and the statutory majority was inconsequential. Mason, J. refused to adopt the Code practice of including aggravating circumstances in an indictment and on that basis dispensed with the third submission.[86] Gibbs, C.J., Wilson and Dawson, JJ., although endorsing the Code practice, did not import the corresponding consequences attending omission under the Code. Although the third submission was accepted by the statutory majority, because no suggestion of a miscarriage of justice could be entertained, the appeal was dismissed.[87]

Conclusions

The conclusions of the High Court on the three principal submissions advanced in *Kingswell* may be summarised as follows:

1. Where a statute provides that an accused person is liable to a maximum punishment due to the existence of a particular factual ingredient

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[80] *Supra* n. 26.
[81] *Supra* n. 1 at 24.
[82] *Id.* 22.
[83] *Id.* 23.
[84] (1986) 60 A.L.J.R. 417.
[85] *Id.* 420-421.
[86] *Id.* 23-24.
[87] *Id.* 23.

which is greater than the maximum punishment without this ingredient, the statute is presumed to have created two distinct offences. This presumption may be rebutted by an expression of contrary intention by the legislature.

2. There is virtually no constitutional limitation on federal legislation which erodes the role of the jury in criminal trials. A majority of the High Court in *Kingswell* supported the orthodox *Archdall* interpretation of s. 80 which gives parliament the discretion to make any offence, however serious, triable summarily. Moreover, *Kingswell* established that even where the trial proceeds on indictment the guarantee of a trial by jury under s. 80 is nugatory. Parliament can effectively divide offences into elements to be tried by the jury and elements to be tried by the judge, and by denoting the former elements the "offence" avoid the constraints of the Constitution. The drug trafficking provisions of the Customs Act are an archetypal example of this legislative technique.

3. Additional facts which attract a higher maximum penalty but are not elements of an offence should be charged in an indictment. Although difficult to reconcile with the proposition that s. 235 matters are determined by the judge alone, this practice was endorsed by the statutory majority in *Kingswell* and subsequently affirmed in *Meaton*.

The High Court in *Kingswell* upheld a statutory regime which seriously undermines the function of the jury even where the trial proceeds on indictment. Corresponding to a decline in function is a decline in the benefits which the institution of a trial by jury confers on the administration of criminal justice and the accused. The decision in *Kingswell* thus highlighted a disturbing phenomenon. Unless the approach of Brennan, J. and Deane, J. to the meaning of "offence" in s. 80 ultimately prevails, parliament will remain free to enact legislation which removes from the determination of the jury issues which attract a particular maximum punishment. In the final analysis, it is to be hoped that parliament heeds Blackstone's warning and preserves the integrity of the jury trial.

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