The Queen v Cant [2001] NTSC 43

PARTIES:	THE QUEEN
	v
	CRAIG CANT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	9900592
DELIVERED:	14 June 2001
HEARING DATES:	20-24, 28-30 November 2000, 1, 4-8, 12-15, 18-19, 21-22 December 2000, 9 March 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW – EVIDENCE

Application under section 26L of the Evidence Act 1939 (NT) – admissibility of evidence at trial – documents relevant to weight of two steel cylinders – more prejudicial then probative – exercise of discretion as to admissibility

Evidence Act 1939 (NT), s 35(1), s 35(2) and s 35(3)
Evidence (Business Records) Interim Arrangements Act 1984 (NT), s 5 and s 7(2)(b)

Shepherd v The Queen (1990) 170 CLR 573, cited

REPRESENTATION:

Counsel:

Applicant:	D Dalrymple
Respondent:	J Lawrence and M Hassall

Solicitors:

Applicant:	Dalrymple & Associates
Respondent:	Commonwealth Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200116 (Ruling on Weight)
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Cant [2001] NTSC 43
No. 9900592

BETWEEN:

THE QUEEN

AND:

CRAIG CANT

CORAM: THOMAS J

REASONS FOR RULING

(Delivered 14 June 2001)

[1] This is a ruling following upon a hearing pursuant to s 26L of the Evidence Act 1939 (NT). The hearing proceeded on application made on behalf of Craig Cant that certain documentary evidence the Crown proposed to lead relevant to the weight of two steel cylinders upon their arrival at Darwin Airport, should be ruled as not admissible on the trial of Mr Cant.

[2] Mr Cant has entered a plea of not guilty to a charge that:

> "Between about 25 November 1998 and about 29 December 1998 at Darwin in the Northern Territory of Australia was knowingly concerned in the importation into Australia of a prohibited import to which section 233B of the Customs Act 1901 applies, namely, narcotic goods consisting of a quantity of 3, 4-methylenedioxymeth-amphetamine ('MDMA'), being not less than the commercial quantity of MDMA.
>
> Contrary to paragraph 233B(1)(d) of the Customs Act 1901"

[3] The Crown case is that the commercial quantity of ecstasy was imported into Australia in two custom built steel cylinders. It is further alleged that these cylinders were seized from the home of Mr Cant on 6 January 1999. The Crown case will be that subsequent tests showed there were traces of ecstasy tablets in the steel cylinders at the time they were seized.

[4] A brief summary of the documentary evidence as to the arrival of the two oil rig spare parts (also referred to as steel cylinders) in Australia, is as follows:

[5] Mr Mulyardi, whose address is Bandar Lampung in Indonesia, forwarded these items addressed to Mr Richard Silk, Falcon Engineering, Winnellie Northern Territory of Australia, to Mega Kargo in Jakarta. The person handling the supervision of the consignment at Mega Kargo was Mr Rudi Simatupang. It appears the consignment was weighed by Mega Kargo and then delivered to Garuda Airlines (Exhibits P13, P24 & P26). There is no evidence the consignment was check weighed by Garuda Airlines (Exhibit P25). The consignment was flown from Jakarta to Darwin Airport.

[6] The Crown seek to call evidence to establish at the trial of Mr Cant the weight of these cylinders on arrival in Australia in December 1998. The Crown purpose in establishing the weight of the consignment on arrival is the starting point of a chain of inferential reasoning pursuant to which the weight of the empty cylinders would be deducted from the weight of the consignment on arrival, purported to be 146 kg, to give a differential amount

which the Crown state represents the weight of the commercial quantity of imported ecstasy.

[7] I have listed the documents which were tendered on the voir dire hearing and which the Crown seek to tender on the trial of Mr Cant relevant to this issue.

1. Mega Kargo invoice – Exhibit P13, Document 3.
2. House Waybill – Exhibit P26.
3. Master Air Waybill – Exhibit P24.
4. Garuda Airlines cargo manifest (computer generated history of consignment) – Exhibit P25.
5. Australian Customs Service Entry – Exhibit P22.
6. P.J's invoice – Exhibit P2 and P13 – Document 17.

[8] Mr Dalrymple, counsel for Mr Cant, concedes that those documents which satisfy the definition of a bill of lading, are admissible pursuant to s 35 of the Evidence Act which provides as follows:

> "35. Bills of lading
>
> (1) Any document which purports to be a bill of lading and to relate to any property which is or has been shipped and which appears to the Court to which it is tendered to be a genuine document, may be admitted in evidence on production without further proof, and when so admitted shall be prima facie evidence that the ownership of the property referred to in the document is in the consignee named therein or his assignee, and of any other relevant facts or particulars stated or referred to therein.
>
> (2) In this section -
>
> "bill of lading" includes manifest, shipping receipt, consignment note, delivery order or invoice, and any specification, schedule or packing list annexed thereto or incorporated by reference therein;

"shipped" means shipped or carried, or received for shipment or carriage by water, rail, road or air, to or from any port, railway station or place in Australia."

[9] The documents covered by s 35 of the Evidence Act are (1), (2) and (3) as set out in paragraph 7 of this reasons for ruling.

[10] However, it is Mr Dalrymple's further submission that even though these documents are admissible pursuant to s 35 of the Evidence Act as prima facie evidence of the relevant facts or particulars stated thereon that this Court should exercise a discretion to exclude such evidence from being presented to the jury because the prejudicial effect of such evidence outweighs the probative value.

[11] It is Mr Dalrymples's further submission that s 5 and s 7 of the Evidence (Business Records) Interim Arrangements Act 1984 (NT) are relevant in the consideration of this discretion. The submission on behalf of Mr Cant is that the party or appropriately authorised representative of the party that created the Mega Kargo invoice (Exhibit P13 – Document 3) should have given evidence as to the reliability of the systems in place at Mega Kargo for weighing the consignment, the meaning of the information or particulars that appear on the documentation and whether it was accompanied by a pallet – see Exhibit P19. It is submitted that it is relevant to the issue of admissibility to consider what steps have been taken by the prosecution to present such evidence either in person or by video link-up.

[12] Mr Dalrymple made reference to the evidence given by Federal Agent Detective Constable Curtis on 14 December 2000 relating to the information in Exhibit 25 having generated from a computer terminal which is used by more than one person. Detective Curtis agreed (t/p 1015 – 1025) that he had not made inquiries of Mega Kargo about their practice in relation to the recording of documents. The evidence of Detective Curtis is that he made inquiries at the Sydney office of Garuda Airways concerning the Garuda Airlines cargo manifest (Exhibit P25). The information received from these inquiries was that the office staff could ascertain that the document had been inputted at a specific computer terminal in Indonesia. Detective Curtis gave the terminal number T86885A. The evidence is that it is not possible to identify the specific individual who had entered the information because the terminal could have been used by a number of persons. There is no evidence on this document that the cylinders were check weighed by Garuda Airlines before the items were loaded onto the flight.

[13] The submission on behalf of the applicant, is that the Crown have sought to rely on second or third hand documentation received in Australia as to the accuracy and reliability of information which was generated in Indonesia from large companies such as Garuda and Mega Kargo. There has been no explanation from the companies to explain the information that has been made available through the police investigation in Australia.

[14] Mr Dalrymple then referred to the evidence of Mr Graham (t/p 1080) who gave evidence that it is the forwarder acting as an agent of the carrier in this

case an agent of the airline who creates the master air waybill. It is Mr Dalrymple's submission that this makes the requirement or obligation on the Crown to pursue inquiries with Mega Kargo to verify the meaning and authenticity of the information all the more important. The weight that is designated in the master air waybill is not a check weight but is the weight filled in by Mega Kargo, by the forwarder, not by Garuda.

[15] It is the Crown submission that Garuda is an airline which operates internationally on a regular basis. The Crown made reference to s 5(1) of the Evidence (Business Records) Interim Arrangements Act which provides as follows:

> "5. **Admissibility generally**
>
> (1) Subject to this Act, where in a legal proceeding evidence of a fact or of an opinion is admissible, a statement of the fact or opinion in a document is admissible as evidence of the fact or opinion if -
>
> (a) the document forms part of a record of a business, whether or not the business existed at the time when the question of admissibility arises;
>
> (b) the statement was made in the course of or for the purposes of the business; and
>
> (c) the statement was -
>
> (i) made by a qualified person; or
>
> (ii) reproduced or derived from information -
>
> (A) in one or more statements, each made by a qualified person in the course of or for the purposes of the business; or
>
> (B) from one or more devices designed for, and used for the purposes of the business in or for, recording, measuring, counting or identifying information, not being information based on information supplied by a person,
>
> or both."

[16] In s 4 “qualified person” is defined as:

> “‘qualified person’, in relation to a statement made in the course of or for the purposes of a business, means a person who, at the time when the statement was made -
>
> (a) was -
>
> (i) an owner of the business or a person carrying on the business;
>
> (ii) a servant or agent employed or engaged in the business;
>
> (iii) a person retained for the purposes of the business; or
>
> (iv) a person associated with the business in the course of another business; and
>
> (b) public administration of the Territory -
>
> (i) where the statement is not admissible in evidence unless made by an expert on the subject matter of the statement, was such an expert; or
>
> (ii) in any other case, had, or may reasonably be supposed to have had, personal knowledge of the facts stated;”

[17] It is the Crown submission that Mr Graham comes within the definition of a qualified person by virtue of the provisions of subsection (b)(ii) of that definition.

[18] I accept Mr Graham is qualified to give evidence of such practices within Australia and on Australian Airlines. However, I agree with the submission made by Mr Dalrymple that Mr Graham is not an expert in relation to Garuda documents or Mega Kargo documents. I also agree that the document relating to weight has been sourced back to Mega Kargo and the only document which can be sourced exclusively to Garuda being the computer generated history (Exhibit P25) has no reference to any check weight procedure being done by Garuda. Mr Graham did give evidence

(t/p 1074) as to the procedure in relation to weighing of items to be forwarded by aircraft. However, Mr Graham has never worked for Garuda nor has he worked at Jakarta Airport. Mr Graham stated Garuda is an IATA airline and is required by IATA to have certain codes of practice. In cross examination, Mr Graham was asked if he were able to point to any IATA rule or guideline that required the carrier to check weigh the consignment. Mr Graham was not able to refer to any such rule or guideline. His evidence as an expert is essentially that this is the practice on Australian Airlines.

[19] A considerable time was spent in cross examination of Mr Graham and Mr Smith about the possibility of the steel cylinders arriving on a pallet. The point of the cross examination being that the weight of the pallet may account for the difference in weight when the empty cylinders were weighed by police officers in the Northern Territory.

[20] Mr Graham stated that it was not normal practice to put a consignment weighing approximately 150 kg on a 45 kg pallet but he could not say it has never happened. Mr Graham did concede pallets could be of different weight. Mr Dalrymple referred to the evidence of Mr Graham at the committal hearing when he stated that if an item is palletised the weight of the pallet is included. Mr Dalrymple points to the difference in the evidence given by Mr Graham at the committal hearing when he stated he had no recollection of the items; to his evidence on the voir dire hearing when he stated that he was sure the items were not on a pallet. Reference was also made to the evidence of Mr Graham that he had a recollection of handling

something very heavy off the Garuda flight but agreed he could not be 100 percent sure that it was this particular Garuda flight to which his recollection related. Mr Graham gave evidence (t/p 1077) that he first saw the "cylinders sitting on a freight barrow at the rear of my shed". He conceded that he could not categorically state the cylinders were not attached to a pallet when they came off a plane. It was Mr Graham's belief that to have a pallet attached to the two cylinders becomes from a work health point of view, a nightmare. Mr Graham gave evidence (t/p 1103) that there was nothing on the documentation to suggest there was a pallet. The documentation he stated describes two pieces 146 kg which would suggest there was no pallet.

[21] Reference was also made to the evidence of Mr Smith who gave evidence in the committal proceedings in April 1999 that he thought there was a small square wooden pallet. At the voir dire hearing he gave evidence in December 2000 that he had no clear recollection of any such pallet. I agree that in all probability Mr Smith's recollection of events in April 1999 was better than his recollection in December 2000. Reference was also made to Exhibit P3 a diagram prepared by Mr Silk of the two cylinders with an interconnecting piece. Mr Dalrymple submits that if there was such a interconnecting piece that could also affect the weight of the cylinders.

[22] It is the Crown submission that the suggestion a pallet existed with the two cylinders is remote; the state of the evidence is that on the balance of

probabilities there was no such pallet. The Crown say that this must ultimately be a question for the jury to decide.

[23] I note Exhibit 19, a shipping and customs document, includes a packing list which makes reference to a pallet.

[24] There is no evidence from Mega Kargo as to their practices in relation to the weighing of cargo, the reliability of their weighing equipment and their practice as to the recording of information on documents as to other items such as pallets which may be included in the total weight. It is the submission on behalf of the applicant that tendering these documents would be asking the jury to speculate as to the internal procedure of businesses in Indonesia. Mr Dalrymple submitted that the Crown have had plenty of time to obtain evidence from Mega Kargo to put before this Court and they have not done so.

[25] The difference in weight between the recorded weight in the documentation and the weight of the cylinders as found by the police is approximately 29 kilograms. Mr Dalrymple refers to the evidence of a pallet weighing 32 kilograms. The submission is that the difference in weight could be attributable to a pallet being included with the steel cylinders in the consignment. Mr Dalrymple further submitted that there appears to be a discrepancy on Exhibit P25 as to the 1.216 cubic metres and the two cylinders which are he states no where near 1.216 cubic metres in volume. Mr Hassall, counsel for the Crown, was in agreement that the volume of the

two cylinders would have been less than the 1.216 cubic metres as described in Exhibit P25. The two steel cylinders are described in Exhibit P13 Document 3 as having a volume of 82 centimetres by 30 centimetres by 30 centimetres. Certain calculations made on behalf of the Crown and submitted to the Court, indicate that including a pallet would not explain the difference in volume. There is no explanation on the evidence before this Court as to the stated volume on Exhibit P25 which both parties agree exceeds the volume of these two cylinders.

[26] Mr Hassall, counsel for the Crown, referred to the photographs in Exhibit W28 in particular photograph 3 and 5 showing the two cylinders marked separately 73 and 72.65 which adds up to 145.65 or very close to 146 kilograms. It is Mr Hassall's argument that these numbers were placed on the cylinders prior to the outer packaging and is compelling evidence as to their weight when they arrived in Australia. These photographs do not address the crucial issue raised by the defence which is the inability to cross examine in respect of the system of weighing the items, the reliability of such systems and the method of recording information.

[27] Mr Hassall referred to the evidence of Detective Curtis and his effort to obtain evidence from the person in Indonesia who weighed the cylinders prior to consignment. These inquiries had to be made through a liaison officer in Jakarta. Reference was made to the political turmoil that existed in Indonesia at that time. Despite persistent efforts Australian Federal

Police have not been successful in identifying such a person or obtaining the evidence (t/p 1401).

[28] The Crown submit that the provisions of s 7(2)(b)(ii) and (iii) of the Evidence (Business Records) Interim Arrangements Act have been satisfied and that subsections (v) and (vi) would also apply. Section 7(2) of this Act provides as follows:

> "(2) A statement is not admissible under section 5 unless, in relation to each person concerned in the making of the statement tendered -
>
> (a) the tendering party calls the person as a witness in the proceeding if an opposing party so requires; or
>
> (b) it appears to the Court that -
>
> (i) the person is dead or is unfit by reason of his bodily or mental condition to attend as a witness;
>
> (ii) the person is outside the Territory and it is not reasonably practicable to secure his attendance;
>
> (iii) all reasonable steps have been taken to identify the person and he cannot be identified;
>
> (iv) the person's identity being known, all reasonable steps have been taken to find him and he cannot be found;
>
> (v) having regard to the time which has elapsed since the person supplied the information and to all the circumstances, he cannot reasonably be expected to have a recollection of the matters dealt with in the statement; or
>
> (vi) having regard to all the circumstances, undue delay or expense would be caused by calling the person as a witness."

[29] I accept that these provisions are to facilitate proof of matters which otherwise could not be proved in a Court of law (see *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 544). However, I do not

consider in these circumstances where the Crown have not been able to obtain a statement from the relevant person at Mega Kargo who actually weighed the cylinders or an appropriate person who could explain the documentation that the statement of Mr Graham should be admitted pursuant to these provisions.

[30] With respect to document 3 in Exhibit P13, the Crown say that on the balance of probabilities the document was made by a person who may be reasonably suspected had personal knowledge of the actual weight; that the person was an employee of Mega Kargo; and that the document was created for the purpose of the business. It is the Crown submission that s 7(2) of the Evidence (Business Records) Interim Arrangements Act also applies to this document.

[31] I do not accept this submission, it involves a considerable amount of speculation in respect of matters that the applicant will have no opportunity to cross examine the author of the document or test the methods of recording information. In this sense the tendering of such a document is more prejudicial than probative.

[32] The Crown seek to put before the jury documentary evidence as to the weight of the cylinders when they arrived in Australia compared with evidence of their weight after the cylinders had been seized and weighed by police to demonstrate there was something in the cylinders when they arrived in Australia. It is the Crown submission that this is another piece of

circumstantial evidence the jury are entitled to consider and draw the inference that the steel cylinders were used to bring something into Australia. It is the Crown submission that the documentary evidence together with other evidence to be presented would be sufficient for the jury to infer that the steel cylinder contained ecstasy tablets when they arrived in Australia.

[33] It is the Crown case that the evidence on the documentation and the photograph of the cylinders is that the cylinders weighed approximately 146 kg on arrival in Australia. By comparison the empty cylinders weighed by police following their seizure on 6 January 1999 was 116 kg (taking into account the end plates and grade screws and the subtraction of the welding-on the lifting handles). The apparent difference in weight is in the vicinity of 29.4 kg. The weight of 29.4 kg is almost identical (allowing for packaging) to the calculated weight of 115,000 tablets of the same kind as the 12,034 tablets seized from Mr Godbier in Western Australia. The Crown submits that their hypothesis as to the number of tablets is internally consistent with other evidence particularly evidence to be given by Mr Godbier. The Crown further submit that the precise weight of the cylinders on entry to Australia is not an "intermediate fact" which the Crown must prove beyond reasonable doubt. It is merely a "strand" of evidence which goes to proving the issue of commercial quantity (*Shepherd v The Queen* (1990) 170 CLR 573).

[34] I accept that Exhibit P13 – Document 3, Exhibit P26 and Exhibit P24 are all documents admissible pursuant to s 35 of the Evidence Act.

[35] I accept the Crown have made efforts to interview and call to give evidence an appropriate person who can give evidence as to the methods and systems for weighing cargo which is flown out of Indonesia. The information of the weight of the consignment as recorded by Mega Kargo is carried through on other documents. There is no evidence the cylinders were weighed again. Accordingly the fact that the weight is repeated a number of times does not give it any greater reliability as that information is all based on the information as recorded by Mega Kargo. Mega Kargo is based in Jakarta Indonesia. Conditions existing in Indonesia have thwarted the Crown attempts to locate and interview the appropriate employee of Mega Kargo. I accept that s 7(2)(b)(ii) of the Evidence (Business Records) Interim Arrangements Act enables the Court to admit these documents in criminal proceedings in circumstances where the person making the statement "is outside the Territory and it is not reasonably practicable to secure his attendance."

[36] I agree with the submission made by Mr Dalrymple that the applicant is considerably disadvantaged because he is not able to cross examine the appropriate person from Mega Kargo as to the reliability of the systems in place at Mega Kargo for weighing the consignment, the meaning of the information or particulars that appear on the documentation and whether it was accompanied by a pallet. Reference to the existence of a pallet having

been made in Exhibit P19. In addition to this, Exhibit P25 is a computer generated history of the consignment obtained from Garuda. This document refers to the weight being 146 kg and the volume being 1.216 cubic metres. Both parties are in agreement that these two cylinders do not have a volume of 1.216 cubic metres. Mr Hassall states this does not explain the presence or absence of a pallet. I accept that is correct. However, it is information which in itself would appear to be incorrect and this has not been satisfactorily explained. It is a piece of information on the documents which is clearly wrong if it is referable only to the two steel cylinders. This must affect the confidence that could be placed in the correctness of other information.

[37] Mr Graham has given evidence from his own experience as to what the information on the relevant documents mean. Mr Graham is not giving evidence about his document or the document of a company by whom he is employed or associated. In his evidence, he is extrapolating from his experience working in Australia as to what he believes the Garuda or Mega Kargo documents mean. That does not address the disadvantage to the applicant to which I have already referred. I have concluded that in these circumstances I should exercise a discretion in favour of the applicant to exclude the documentary evidence which would otherwise be admissible under s 35 of the Evidence Act.

[38] I have come to the conclusion that the documents relevant to the weight of the steel cylinders on arrival in Australia are more prejudicial than

probative. In the exercise of a discretion as to their admissibility I would rule that they are not admissible on the trial of Mr Cant.

_____