



## Summary of Judgment

### JOHN (JAN) VISSER v THE QUEEN

[2020] VSCA 327

18 December 2020

The Court of Appeal (McLeish, Emerton and R Osborn JJA) today dismissed an appeal brought by John (Jan) Visser against his conviction in April 2014 for conspiracy to possess a commercial quantity of an unlawfully imported border controlled drug, being more than 15 million ecstasy tablets containing in excess of 1.4 tonnes of pure MDMA. The tablets were concealed in 3,000 large tins purporting to be ‘peeled tomatoes’ found in a shipping container that had been loaded on board the ‘MV Monica’ in Naples, Italy, in late May 2007.

At trial, Mr Visser’s defence was that he believed that the container held a large quantity of illicit tobacco (‘chop-chop’).

The appeal was brought on two principal bases:

- a) the availability of fresh or new evidence in the form of affidavits from two of Mr Visser’s co-conspirators (Mr Pasquale Barbaro and Mr Saverio Zirilli) attesting to what Mr Visser was told about the contents of the ‘tomato tins’ container; and
- b) the availability of fresh or new evidence as to the circumstances in which the drugs were detected by the authorities, which included barrister Ms Nicola Gobbo’s provision to Victoria Police of a copy of the bill of lading for the ‘tomato tins’ consignment.

Ms Gobbo did not act for Mr Visser at any time. Ms Gobbo obtained the bill of lading from one of Mr Visser’s co-conspirators, Mr Rob Karam, for whom she was acting at the time.

The grounds of appeal were that the Commonwealth Director of Public Prosecutions and the Australian Federal Police failed to comply with their obligations of disclosure resulting in an unfair trial and a substantial miscarriage of justice, that the prosecution was malicious and that there existed fresh evidence of an exculpatory nature from Mr Barbaro and Mr Zirilli.

The information that Mr Visser argued ought to have been disclosed to him for the purposes of his trial related principally to Ms Gobbo's status as a registered informer, the fact that she had provided information about her clients to Victoria Police and her role in passing on the bill of lading for the 'tomato tins' container.

Assuming that the provision of the bill of lading to Victoria Police involved impropriety by Ms Gobbo (which it was unnecessary for the Court to decide), the Court concluded that the evidence obtained as a result would not have been excluded from Mr Visser's trial under s 138 of the *Evidence Act 2008* having regard to the following factors:

- a) The crime which the alleged impropriety exposed was extremely serious;
- b) Any impropriety did not affect the reliability or probative value of the evidence;
- c) The non-disclosure of the source of the bill of lading by the Commonwealth Director of Public Prosecutions and the Australian Federal Police was constructive rather than knowing or deliberate; and
- d) The evidence of the container and its contents derived from the bill of lading did not go to the only issue raised at trial by Mr Visser, namely, his belief as to the contents of the container.

The Court concluded that the evidence would have been permitted to be adduced on the basis that the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in those circumstances.

The Court found that the conduct of Ms Gobbo and Victoria Police would not have caused Mr Visser's trial to have been permanently stayed. Mr Visser's complaints were centred upon the receipt of evidence obtained as the result of information provided by Ms Gobbo to Victoria Police and the mechanism of s 138 of the *Evidence Act* provides the proper vehicle for the ventilation of such complaints. It enables the public interest in the due prosecution of criminal offending to be weighed in the balance.

The Court found no factual basis for characterising Mr Visser's prosecution as a malicious prosecution.

As for the new affidavits from Mr Barbaro and Mr Zirilli, the Court did not consider that Mr Barbaro's affidavit advanced Mr Visser's case in any way because it said nothing about Mr Barbaro telling Mr Visser that the 'tomato tins' container contained tobacco as Mr Visser alleged. While Mr Zirilli's evidence could be construed as supporting Mr Visser's description of his conversation with Mr Barbaro, Mr Zirilli is neither a credible nor a reliable witness. Both Mr Barbaro and Mr Zirilli are convicted criminals, identified by Mr Visser as members of the Calabrian Mafia, who belatedly agreed to provide statements nine years after the relevant events, having previously refused to do so.

The Court also found that, when viewed in the context of the evidence at trial as a whole, the new affidavits were not persuasive.

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**NOTE:** This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.