

IN THE COUNTY COURT OF VICTORIA

Revised
(Not) Restricted
Suitable for Publication

AT MELBOURNE
CRIMINAL JURISDICTION

CR 19-00486
CR 19-01299

DIRECTOR OF PUBLIC PROSECUTIONS

v

THI LEE BUI
PHONG TRUONG

JUDGE: HER HONOUR JUDGE GAYNOR
WHERE HELD: Melbourne
DATE OF HEARING: 6 July, 7 July, 8 July, 9 July, 10 July & 13 July 2020
DATE OF JUDGMENT: 17 July 2020
CASE MAY BE CITED AS: DPP v Bui & Anor
MEDIUM NEUTRAL CITATION: [2020] VCC 1063

REASONS FOR JUDGMENT

Subject:
Catchwords:
Legislation Cited:
Cases Cited:
Sentence:

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Director of Public Prosecutions	Mr Z. Menon	Office of Public Prosecutions
For Accused Bui	Mr R. Lawrence	Pica Criminal Law
For Accused Truong	Mr L. Barker	Valos Black & Associates

HER HONOUR:

- 1 The accused Phong Truong and Thi Bui have each pleaded not guilty to one charge of cultivating a narcotic plant, namely cannabis-L in not less than a large commercial quantity applicable to that plant. Mr Truong however pleaded guilty to the alternative charge of cultivating a commercial quantity of cannabis.
- 2 In Ms Bui's case I accepted the defence no-case submissions that the prosecution could not prove beyond reasonable doubt that Ms Bui had cultivated a plant at all or attempted to cultivate a narcotic plant in at least either the large commercial or commercial quantities applicable to that plant.
- 3 Verdicts of not guilty were therefore entered by direction in relation to charges of cultivation of a narcotic plant in not less than a commercial quantity, and the alternative charges of cultivation of a narcotic plant in not less than a commercial quantity and cultivation simpliciter.
- 4 Verdicts of not guilty were also entered by direction on the further alternative charges of attempting to cultivate a narcotic plant in not less than a large commercial quantity and attempting to cultivate a narcotic plant in not less than a commercial quantity.
- 5 Ms Bui still faces one charge of attempting to cultivate a narcotic plant on 10 October 2018 to which she pleaded not guilty.
- 6 This case is being tried by me as judge-alone. The accused applied to be tried by judge-alone pursuant to s.420D of the *Criminal Procedure Act 2009* (the *CPA*) and the application was granted on 15 July 2020.
- 7 In hearing this matter I may make any decision that could have been made by a jury. My decision will have for all purposes the same effect as a verdict of a jury.

8 Pursuant to s.420Z(F) of the *CPA* introduced by the enactment of the *COVID-19 (Emergency Measures) Act 2020*, s.4A of the *Jury Directions Act 2015* (the *JDA*) applies in this case.

9 Section 4A provides that the Court's reasoning with respect to any matter in which Parts 4,5,6 and 7 apply must be consistent with how a jury would be directed in accordance with the *Jury Directions Act*.

Directions of law

10 I must apply all directions of law to myself that would have been given to a jury in this case. I now refer to the general directions given in a criminal trial to which I must have regard.

11 In all criminal trials an accused person is presumed innocent of the charge unless and until a jury determines he or she is guilty.

12 The prosecution bears the burden of proving the case against the accused. No accused person must prove his or her innocence. The prosecution always bears the burden of proof.

13 An accused may be found guilty of a charge only if the prosecution has proved its case beyond reasonable doubt, the highest standard known to our law. Proof to any lesser extent must result in a verdict of not guilty.

14 I must decide the case only on the evidence led in this trial.

15 I must determine the credibility and reliability of each witness called and I may accept all, some or none of a witness' evidence. I must base my verdict only on evidence I find to be credible and reliable.

16 Although their trials are being heard together, I must try each accused separately on the basis of evidence which applies to his or her case. I must not reason if I reach a verdict in relation to one that it therefore applies to the other.

17 I am departing from script here. In particular it should be noted that the record of interview conducted by Mr Truong is not evidence against Ms Bui, nor is the record of interview of Ms Bui evidence against Mr Truong.

18 I will refer to other directions of law as they arise in the course of my reasons for judgement.

The prosecution case.

19 The charges arose from the discovery by police on October 10 2018 of a large hydroponically-grown cannabis crop inside a factory at 31 Efficient Drive, Truganina.

20 The prosecution case consisted of evidence from two witnesses - Susan Fiddian, a botanist with the Victoria Police Forensic Science Department, and the informant Senior Constable Rory Hempton who was then attached to the Altona North Divisional Response Unit. It was not disputed that Ms Fiddian, who has worked as a forensic scientist since 1987, was a witness who could give expert opinion about cannabis, its growth cycle and about illegal hydroponically grown cannabis crops such as that found in the factory.

21 The following uncontested evidence was given by those witnesses.

22 At about 3 pm on 10 October 2018 pursuant to a Level 2 forced entry search warrant about eight police broke into the factory via a back door. Inside they found nine internal timber rooms had been constructed which each contained a cannabis crop.

23 The rooms, numbered 1 to 9 by police were built in three rows, rooms 1 to 5 forming the first row nearest the back door, rooms 6 to 8 forming the second row and the third row consisting of room 9 only. The layout formed corridors between each row and between the factory wall and the side walls of Rooms 1, 8 and 9 which were the end rooms of each row. The prosecution tendered a

diagram of the rooms prepared by the informant, although not to scale, which was marked Exhibit 3, and included in the 'Jury Book' behind Tab C.

- 24 Ms Fiddian attended at the factory that day and examined each room. She counted the number of plants in each, measured and weighed them and took photographs, 133 of which were tendered in evidence, marked Exhibit 1 and included in the Jury Book behind Tab A.
- 25 In short compass Ms Fiddian said she found bushy flowering crops close to maturity in Rooms 2, 3, 5, 6 and 8 comprising 35, 70, 79, 70 and 25 plants respectively. These crops were aged from 10 to 14 weeks, were all grown hydroponically with plants in individual pots of coco peat, which had no nutritional value, to which were fed diluted liquid nutrients pumped from reservoirs through pipes attached to each pot. The crops were grown under lights set to timers and the rooms fitted out with carbon filters, fans and extractors.
- 26 Rooms 4 and 9 contained 70 and 140 plants respectively which were bushy but less mature, aged between 6 and 11 weeks and were also grown via the same hydroponic system.
- 27 Rooms 1 and 7 contained 299 and 268 plants respectively which were seedlings or immature, aged up to 3 weeks and while grown under lights were not attached to a hydroponic system and would, Ms Fiddian said, have been hand watered. She said she observed a pressure sprayer at the factory which was probably used for that purpose.
- 28 The crop ages estimated by Ms Fiddian were their 'post nursery' or post germination age. She said the germination stage took two weeks where a plant grew from a seed and about four weeks when grown from a cutting. She could not distinguish plants grown from seeds from those grown from cuttings.

- 29 She saw and photographed numerous electricity boards which had been installed, into which were plugged the cords to the light management units, fans, filters and pumps comprising the hydroponic growing systems for 7 of the rooms. An electricity bypass was located and photographed. (See Exhibit 5 police photograph 31 Tab D of Jury Book.)
- 30 Bags of coca peat, large containers of varying brands of nutrients, buckets, plastic tubs, empty cardboard boxes and the like were found along the corridors and in the factory's open areas. Instructions and dates in Vietnamese were written on many of the room walls and doors.
- 31 A stack of pot-shaped lumps of used cocoa peat and empty pots containing old roots were also found indicating previous crops had been grown at the factory. (See police Photos 23 and 24 part of Exhibit 5 behind Tab D of the jury book.)
- 32 In total 1047 cannabis plants weighing 402.07 kilograms (minus the roots) were located at the factory.
- 33 In summary, during evidence-in-chief the informant said police using a hux, a large crowbar style instrument, forced open the factory back door and entered in single file yelling loudly and continuously in sync, 'police, don't move!'. They wore plain clothes and full police issue bulletproof vests which he said 'clearly identified us as police, has reflective police little tabards on it,' (T126, L29-31). However no one wore full police uniform (T127, L7-8). They entered with guns drawn, which meant they did not run.
- 34 On entry through the back door police proceeded directly down the corridor between the factory wall and the side walls of Rooms 1, 8 and 9. Mr Hempton said when he approached the corner of Room 1, he saw three people, two men and a woman about five meters away, 'coming from the door of Room 8' which he said was a 'well lit' room. (T127 L14-16). It was accepted one of those men

was Mr Truong, the woman Ms Bui and the second man a man named Bradley Lee. Room 8 was diagonally opposite Room 1.

35 In evidence in chief Mr Hempton was asked what he meant by 'near the doorway of Room 8'? (T127, L 27–29) and replied, 'So, they'd come out of the - they'd come out of Room 8 into that hallway between – between Room 1 and 8.' (T 127, L30-31). He said while there were two men and a woman, and the first to exit was definitely a male he could not recall who that was (T 128, L11–13).

36 Mr Hempton said he called out, 'police don't move' but they kept running towards Room 9. He did not follow them, other members took chase, and eventually arrested both accused outside in the factory carpark. Each was wearing blue plastic gloves.

(See Exhibit 5 police Photographs 33 and 34, Tab D Jury Book).

37 Police found \$1086 in cash in a bum bag worn by Mr Truong.

38 Mr Hempton said Ms Bui had no prior convictions either before or since this incident and that there was no record of her ever being charged with an offence.

Cross examination

Ms Fiddian

39 In cross examination by Mr Lawrence who represented Ms Bui, Ms Fiddian said she did not even attempt to count the number of plants in the unirrigated rooms (Rooms 1 and 7) which were packed closely with plants with little room to move. She instead counted them by moving them out 'because it was too difficult to get an accurate count with them in situ like that.' (T106, L21–27)

40 She also said that estimating the weight of plants by appearance would be, 'extremely difficult to do with any accuracy.' (T111, L2-3)

Mr Hempton

- 41 Mr Hempton's evidence as to the amount of noise accompanying the police entry and whether Mr Hempton saw Ms Bui inside Room 8 was the subject of some dispute by defence.
- 42 In answer to questions from Mr Lawrence, Mr Hempton said the factory door gave way easily to the hux and the door opening made little noise. He did agree in answer to a proposition from myself that general police practice on a Level 2 entry was to make as much noise as possible, 'to make sure there's an element of surprise, an element of shock, stop the destruction of evidence, secure the place, secure offenders as quickly as possible, to make it as safe as possible for police...' (T172, L9) and that police had followed that practice on October 10. (T172, L4).
- 43 Mr Lawrence put to Mr Hempton that his evidence had been that when he first saw the accused, they were in the vicinity of Room 8, as opposed to inside it. In answer Mr Hempton said he 'definitely saw the accused coming from Room 8' (T165, L12-13) and that they were, 'inside the doorway of Room 8' (T165, L18). He said they were in single file running from Room 8. (T166, L5). He did concede they 'weren't that deep inside the room...' (T165, L30-31).
- 44 He said he remembered a male running outside the door as he came round (T165, L11) possibly only a metre from the door of Room 8 (T 166, L3-4) but that, 'the other two were definitely inside that – inside that room, in the doorway of – of that room as I've come around.' (T166 L5-7). He denied seeing three people running and then drawing a conclusion they had come from inside the room. (T 168, L8–12).
- 45 Both accused participated in records of interview that day, Mr Truong's interview starting at 6.37 pm and Ms Bui's at 8 pm. Both were conducted with the assistance of Vietnamese interpreters. It was not disputed that Ms Bui

understood little if any English. Transcripts and recordings of the records of each interview were tendered and marked Exhibit 6 (Truong) and 7 (Ms Bui.)

Truong record of interview

46 Mr Truong made what the informant agreed was a cooperative record of interview which included admissions against his interest.

47 He said he had casual farm work in Korumburra but was waiting for the season to start. He was approached by a woman named Hai while shopping in Sunshine and who offered him work watering the plants. (see Q37 and Q38).

48 He said he had been working at the factory for nearly two months (Q&A 29). He worked there three days a week (Q42) for four to five hours a day (Q45) and was paid \$1000 per week (Q53).

49 He said he worked there with another man called Bradley Lee and a woman called Lang who were both arrested with him that day. (Q33 & Q34). He said he did not harvest the plants (Q24).

50 At Q40 he was asked, 'How many – how many rooms and how many plants do you look after?'

51 Answer: 'Yeah I think everything is there. I think if they count it's maybe about eight – eight rooms there, you know.'

52 He said the number of plants in each room varied from, '30 to 70 plants ...not too sure, yeah around that figure.' (Q41)

53 In answer to Q48 as to why he tried to run off when police entered the factory he said, 'Yeah, yeah you know we were scared. We heard 'bang bang' so, you know, everyone's tried to run off, yeah, 'cause, you know, we were shocked, you know.'

54 He agreed he was arrested wearing latex gloves which he wore to stop getting dirt on his hands. (Q65 & Q66).

55 He agreed he grew the cannabis to make money. (Q&A 51)

Bui record of interview

56 Police were unable to locate a lawyer for Ms Bui but she continued to answer questions. Although it was not clear in my view that she consented to do so in the continuing absence of legal advice no submission was made that I consider the record of interview's admissibility and defence counsel relied on answers given by his client in one of two no case submissions and in his final address.

57 In summary she said she was taken to the factory by Bradley Lee a few times, and that she did not know the address or the route or what time she had arrived there.

58 At Q35 she said she had been there, 'maybe five or six times' before and at Q36 said she, 'just follow his instruction' when she got there (presumably referring to Lee). Asked how long she had been going to the factory Ms Bui said she, 'can't remember for how long.' (Q&A 46.)

59 At Question 39 she said she saw plants in the building, but did not know what they were, asking police 'What – what kind of plants are they?'

60 At Q37 she said, 'I don't - I don't actually know you know, what they are...'

61 At Q40 she described the plants as having green leaves which, 'just keep growing'.

62 In answer to Q46 she said she didn't 'know much about this business...' and when asked at Q47, 'About what business?' replied, 'It's growing plants. I don't know what they are.'

- 63 At Q66–69 Ms Bui again denied knowing the plants were cannabis saying at Q68-69 'No, no, no, no I don't know anything about marijuana'.
- 64 At Q40 and following Ms Bui described having a mental disorder for which she saw a psychologist, psychiatrist and a GP. She said she was on 'so many different medications' prescribed by her psychiatrist. (Q43)
- 65 She said she had had a 'trance disorder' for about two years and that she received a payment from Centrelink. (Q44)
- 66 At Q71 she said she had been in Australia for three or four years, had a mental illness and stayed at home receiving payments 'from the government.' She said her GP told her to exercise and to calm down and relax or she would end up in the hospital. She said she was afraid to go to the hospital, 'people will tie me up, you know, for treatment and things like that.'
- 67 She said she was feeling down, went for a walk and met Lee who she knew from 'the farm' and that he said to her, 'well if you're so – you know, worrying so...you're having to do, why don't you go with me?' (Q36)
- 68 She said that her life was boring, that she had nothing to do and that 'that guy' had known her 'in the farm'. One day he told her, 'why are you so lonely? You have nothing to do. Why don't you come here and do this with me?' (Q45).
- 69 At Q36 was included a passage which both parties agreed had been incorrectly excluded by the interpreter used in the record of interview which ran:
- 70 'I told you I was sad and very sad ... sad in my heart and I went there because I know him, who used to work in the farm in the past and we were close to each other, in order to relieve my sadness. I did not know about these things before if I knew it I would not have dared to go there.'
- 71 In answer to questions about what she did at the factory Ms Bui said she was told to:

- 72 Put on her gloves and 'carry these and move these...'. (Q34)
- 73 '...put this soil onto this and that and things like that.' (Q34)
- 74 '...he asked me to put soil on something...' (Q48)
- 75 '-will tidy up with – the place or cleaning...' (Q48)
- 76 'And then I have to tie up – using a string to tie something...' (Q48)
- 77 '...there's a stick, I have to tie them to something, I – I don't even know what it is yeah.' (Q49)
- 78 She denied tying the plants to a stick saying 'No there are some poles or maybe a stick, you know, and then I have to tie it up to something. I – I – I don't know yeah, I don't know.' (Q50)
- 79 'I just prepare the soil, you know, I just work with the – the soil to make loose – loosen the soil, yeah.' (Q52)
- 80 Questioned further about this she said '...he empty the soil, you know on – onto something, you know and I just rub it'. (Q55)
- 81 '...you know to make it loose, yeah.' (Q56)
- 82 She said she did not know what the loose soil was used for. (Q57)
- 83 At Q75–76 she said her job was to 'prepare the soil'. (Q75) And 'soften the soil'. (Q76)
- 84 She denied ever watering the plants saying 'No, no I don't. If you water the plants, the – the water might splash onto you. No, I'm scared of that, no I wouldn't do it.'
- 85 Asked about running from police Ms Bui said she went to the factory with Bradley, that she put her gloves on when she got there and was 'just standing there' and then heard 'someone screaming, some bangs, you know, some big

noise and I was scared. I thought it was a fight. So I – I was scared so I – I ran off.' (see Q24)

86 At Q32 she said, '...he asked me to put my gloves on so that's why I did. And then someone told me there's a fighting – there's some fighting, you know, the next door so I was scared, so I just went off.'

87 At Q60 police put to her that as they entered the factory, she and two males ran from one of the rooms and out the front where she was arrested, Ms Bui replying at Q61:

88 'Yeah I was standing outside and then I -I ran off. Someone yelling you know, so I was scared, I just ran off. I thought there was a fight you know, yeah', and that she was 'so scared.' (Q62)

89 At Q88 police told her the room she ran from and the rooms generally contained illegal drugs to which she replied, 'I don't know. I was standing outside, I don't know and then someone, you know screaming, yelling, you know, so that's why I – I ran off.'

90 At Q77 Ms Bui said, 'Well today I just put on the gloves. I haven't done anything today, yeah.'

91 At Q80 she said she was told she would be paid.

92 Neither Mr Truong nor Mr Bui gave evidence at the trial or called any other evidence.

93 Applying the jury directions contained in ss.41 and 42 of the *Jury Directions Act* I note that this was their legal right. In a criminal trial the prosecution always bears the onus of proof.

94 Therefore, an accused's failure to give or call evidence cannot be used as evidence against him or her, does not constitute an admission, and cannot be

used to fill gaps in the prosecution case. It does not add to or strengthen the prosecution case in any way. It proves nothing at all.

95 As the decider of fact in this trial I cannot therefore draw any conclusions against either accused because they did not give or call evidence, or even consider that that fact when deciding whether the prosecution has proved its case beyond reasonable doubt.

96 I must not speculate about what either Mr Truong or Ms Bui may have said if they had given evidence. I must decide this case solely on the evidence given here in court.

Mr Truong

97 For convenience sake use of the word 'proved' means 'proved beyond reasonable doubt.'

98 In order to succeed the prosecution must prove beyond reasonable doubt each of the following elements making up the charge of cultivating a narcotic plant in not less than the large commercial quantity applicable to that plant.

99 Those elements are:

(1) that Mr Truong intentionally cultivated a plant; and

(2) that plant was a narcotic plant; and

(3) that Mr Truong intentionally cultivated not less than a large commercial quantity of plants.

100 Pursuant to Part 2 of Schedule 11 of the *Drugs Poisons and Controlled Substances Act 1981* a large commercial quantity of cannabis is defined as a weight of at least 250 kilograms or 1000 plants.

101 By his plea of guilty to cultivating a commercial quantity of cannabis Mr Truong conceded the prosecution had proved the first two elements of the charge, and

that he had intentionally cultivated between 25 and up to but not including 250 kilograms and between 100 and 999 plants which is the legal definition of a commercial quantity of cannabis.

102 The sole issue for determination in Mr Truong's case was therefore whether the prosecution could prove Mr Truong intentionally cultivated not less than 1000 cannabis plants or at least 250 kilograms of cannabis.

103 The prosecution did not have to prove Mr Truong intended to cultivate the 1047 plants, or the cannabis weighing 402.07 kilograms which was found at the factory. It was enough if it proved he intended to cultivate not less than a large commercial quantity, that is at least 1000 cannabis plants or cannabis weighing 250 kilograms or more.

104 Nor did the prosecution have to prove Mr Truong actually knew he was cultivating not less than a large commercial quantity of cannabis. It was sufficient if it could prove he was aware there was a significant or real chance he was doing this.

Inferential reasoning

105 As there is no direct evidence of Mr Truong's intention, the prosecution case against him was a circumstantial case to which I must apply inferential reasoning.

106 Inferential reasoning is an everyday exercise which involves drawing conclusions from facts. For example, if you saw five people go into a room and four come out you might conclude there was one person left in the room.

107 In a criminal trial an inference of guilt may only be drawn if it is the only inference reasonably open. If there is another inference open on the facts which is consistent with innocence, the verdict must be one of not guilty.

108 Going back to my example the conclusion that there was one person left in the room is not the only inference open on those facts. There *might* be one person left in the room or that person might have climbed out a window.

109 So, if in a criminal trial the circumstances relied up on by the prosecution to provide an inference of guilt also support another inference which provides an innocent conclusion, then the prosecution case fails.

110 In other words, in a criminal trial an inference of guilt must be capable of excluding any inference consistent with innocence before it can be used to prove the prosecution case.

Prosecution argument

111 In his final address the prosecutor Mr Menon argued I should draw the inference that Mr Truong intended to cultivate at least a large commercial quantity of cannabis. Alternatively, he submitted he must have been aware there was a real or significant chance he was doing so.

112 Mr Menon said the prosecution relied upon three aspects of the evidence from which that guilty inference could, he submitted, be drawn, for that guilty inference to be drawn.

1. The circumstances in which the cannabis was found at the factory

113 In essence Mr Menon submitted that the construction of the nine rooms, the different stage of crop development from the very immature to almost mature, the extensive hydroponic equipment, the presence of empty pots with root structures inside, the dates written on the walls, some of which preceded the age of the crops found, led to the ultimate inference, 'that this was an operation that that involved regrowth and regeneration of the crops at that location.' (T299 L9–11)

2. The circumstances of Mr Truong's arrest

114 Mr Menon submitted Mr Truong was seen exiting from Room 8, was wearing gloves and had \$1086 in cash on him.

3. Mr Truong's admissions in his record of interview.

115 Mr Menon pointed to Mr Truong's answers in his interview that he was hired to look after and water cannabis, that he worked five hours a day, three days a week, did this to make money and was paid \$1000 per week. He submitted Mr Truong viewed his role at the factory as employment, which on his own admission he had held for the past two months, and that he must have known that he was part of a commercial operation which was the cultivation of cannabis.

116 Overall, Mr Menon submitted that while it was not alleged Mr Truong was an organiser of the operation's set up, the scope of the enterprise was readily discernible as large, sophisticated and profitable.

117 He submitted, 'it must have been clear to Mr Truong that he had been and continued to be part of an operation designed to maximise growth, produce continuous supply of plants and be commercially viable enough to warrant Mr Truong to be regularly paid.'

118 He submitted Mr Truong's role of watering plants would have included attending to the water/nutrients feeding system in seven of the rooms as well as hand watering the plants in Rooms 1 and 7, giving him a reason to go into each room, and that he would not have needed to go deep into every room to get a sense of the quantities of the plants there.

119 Mr Menon submitted I should reject Mr Truong's interview estimation of the number of plants in each room as not credible, that estimation in any event showing he did know there was cannabis in each room.

120 He submitted even if Mr Truong only entered rooms 1 and 7 where the immature plants were, this would be enough – given that he knew there were crops in the

other rooms - to make him aware of the real and significant chance there was not less than a large commercial quantity at the factory.

121 Mr Menon submitted the assertion Mr Truong was only a crop sitter simply meant he had the opportunity to become aware of the extent of the crops there.

Defence argument

122 In closing argument, Mr Barker who represented Mr Truong submitted the following:

123 His client was a crop sitter with no organisational part in the crop set up. It was therefore most unlikely he would have exact knowledge of the number of plants.

124 Ms Fiddian's evidence was that she could only accurately count the plants in the crowded crops rooms 1 and 7 by moving the plants out. It was therefore highly unlikely Mr Truong would have known how many plants were in those rooms.

125 He relied on Ms Fiddian's evidence that assessing weight by appearance would be extremely difficult to do with any accuracy.

126 The total number of plants located amounted to only 48 more than the high-end definition of commercial quantity of 999 plants. In those circumstances one could never definitively conclude Mr Truong either knew or was aware there was a significant or real chance he was cultivating a large commercial quantity of cannabis, as opposed to cultivating a commercial quantity of cannabis.

Conclusion

127 I agree with Mr Barker's submission. In my view the fatal flaw in the prosecution case lies in the total number of plants found at the factory.

- 128 Given that a commercial quantity of cannabis is defined at between 100 and 999 plants the total of 1047 plants found therefore amounted to a large commercial quantity by only 48 plants.
- 129 In those circumstances the prosecution case would require evidence of Mr Truong possessing far more precise knowledge of the total plant numbers and their weight than was able to be demonstrated in the Crown case.
- 130 As Ms Fiddian said she could not count the 567 small immature plants packed into rooms 1 and 7 without moving them out. They comprised more than half the plants found at the factory. As she also said assessing weight by eye was an exercise of 'extreme difficulty.'
- 131 I also agree that Mr Truong's accepted role as crop sitter as opposed to involvement in the factory setup meant it was most unlikely that he knew the exact number of plants.
- 132 Ultimately, in my view whilst it could be inferred Mr Truong did know or was aware there was, 'a real or significant chance' this was a large commercial cannabis crop which he therefore intended to cultivate, it could be equally inferred he intended only to cultivate a commercial quantity instead.
- 133 I am therefore not satisfied the prosecution have proved this element beyond reasonable doubt and find Mr Truong not guilty of cultivating a narcotic plant in not less than a large commercial quantity.
- 134 Mr Truong has entered a plea of guilty to the alternative charge of cultivating cannabis in not less than a commercial quantity. A date for the plea hearing before me will be set shortly.

Ms Bui

135 As the result of successful 'no case' submissions by the defence Ms Bui ultimately faced an alternative charge of attempting to cultivate cannabis on 10 October 2018.

136 The prosecution must therefore prove each of the following elements.

1. That Ms Bui intentionally attempted to cultivate a narcotic plant;
2. That that plant was cannabis.

137 Section 321N(1) and (2) of the *Crimes Act* 1958 sets out the elements that make up an attempted crime, each of which the prosecution must also prove.

138 They are:

1. Section 321(1)(a) - that the conduct is more than merely preparatory to the commission of the offence;
2. Section 321 (1)(b) - that the conduct is immediately and not remotely connected with the commission of the offence;
3. Section 321 (2)(a) - that the accused intended that the offence the subject of the attempt be committed;
4. Section 321(2)(b) - that the accused intended or believed that any fact or circumstance the existence of which is an element of the offence would exist at the time the offence is to take place.

139 Ms Bui ran two defences to this charge:

- (1) that her actions on October 10 were no more than merely preparatory to committing the offence of cultivation;
- (2) that she did not know the plants were cannabis plants.

Knowledge

140 Section 72C of the *Drugs, Poisons and Controlled Substances Act* states that if an accused person relies on the defence that she did not know the plant was a narcotic plant she must prove on the balance of probabilities that, 'she did not know or suspect and could not reasonably have been expected to have known or suspected that the narcotic plant was a narcotic plant.'

141 This is one of the exceptions to the rule that the prosecution always bears the onus of proof. The defence must only prove this issue to the lesser standard of balance of probabilities, sometimes described as being 'more likely than not'. This is clearly a lesser standard than the standard of beyond reasonable doubt.

142 However the operation of s.321N means that the prosecution must prove that Ms Bui intended that the offence of cultivation of a narcotic plant take place on 10 October 2018, (s.321(2)(a)) and that she intended or believed the fact that the narcotic plant was a narcotic plant existed as at 10 October 2018. (s.321(2)(b))

This means the burden shifted back to the prosecution to prove Ms Bui knew or believed the plants at the factory were narcotic plants, and that proof must be established beyond reasonable doubt.

Prosecution argument

More than mere preparation?

143 Mr Menon submitted that based on Ms Bui's answers in her interview that she had attended the factory five or six times in the past, I should find that she was aware there was a business involved with growing plants running from that address.

144 He said she attended those premises on the basis that she would be paid, although that had not yet occurred. He submitted she undertook acts of cultivation including tying plants to stakes.

145 Mr Menon submitted that on 10 October Ms Bui went to the premises, put on gloves as she was told to and was waiting in room 8 to undertake whatever tasks Bradley told her to do as she had in the past. Those tasks included cultivation.

146 He submitted I could therefore infer that Ms Bui had passed the preparatory step as soon as she entered the factory. He said she went there to perform acts of cultivation and that once she was on the premises there was nothing left to do but undertake that.

Knowledge

147 As to the question of Ms Bui's knowledge that the plants were narcotic plants, Mr Menon submitted that her assertions in her interview that she did not know this were not credible.

148 He submitted that her alleged lack of knowledge was inconsistent with her previous farm work, what she was being asked to do at the premises and the promise of remuneration.

149 Mr Menon there was no evidence in the interview that Ms Bui thought the plants were something else such as an edible substance.

150 He also submitted that the question of whether she could reasonably have been expected to know or suspect the plants were cannabis should also be considered.

151 Mr Menon submitted there were multiple aspects of the factory setup including the location of the rooms and the way it was constructed which ought to have triggered a suspicion.

152 I should say at this point that I do not accept that proof of a reasonable expectation of knowledge or suspicion is available to the prosecution on this charge. Mr Menon here was referring to the wording of s.72C which applies to a charge of cultivation where the defence is that the accused did not know it was a narcotic plant.

153 The effect of s.321N is that in a case of attempt the prosecution must prove actual knowledge by the accused which refers only to her subjective state of mind.

Incriminating conduct

154 Mr Menon also relied on Ms Bui's flight when police attended.

155 He submitted I should use evidence of Ms Bui's flight to infer she did so because she knew the plants were cannabis, that is, that this was evidence of incriminating post-offence conduct, and wanted to avoid arrest.

156 Such conduct is defined at s.18 of the *Jury Directions Act 2015* as:

'conduct that amounts to an implied admission by the accused – of having committed an offence charged or an element of an offence charged.'

157 Section 21(1)(a)(ii) of the *Jury Directions Act* directs that a jury may use this evidence in the way sought by the prosecution only if it concludes that:

'the only reasonable explanation of the conduct is that the - accused held that belief'.

158 Defence counsel did not ask that I apply the further jury directions contained in s.22.

159 Again, this involves the use of inferential reasoning. I was asked to infer that the only reason Ms Bui fled from police was because she knew she had been cultivating cannabis.

160 Ms Bui said in her interview that she fled because she was frightened by the yelling and thought there was a fight.

161 Referring to Mr Hempton's evidence I am satisfied beyond reasonable doubt that police made a considerable noise from the time they entered the factory, if not necessarily through forcing the door, then certainly by yelling loudly repetitively and in sync from the time of entry, 'police don't move!'. The informant agreed as I have said that it was part of police procedure on making a Level 2 forced entry to make as much noise as possible.

162 While one explanation for Ms Bui running from police is that she knew the plants were cannabis, it is also possible in my view that she was frightened by the sudden and loud entry of a number of men and that this caused her to run.

163 Her inability to understand English may well have prevented her from being able to read the Victoria Police notations on vests worn by the intruders who were otherwise in plain clothes.

164 I am therefore left with two possible inferences – one pointing to guilty knowledge and the other an innocent explanation. Applying the dictates of s.21 this means I cannot conclude that the only reason Ms Bui ran was because she knew she had been cultivating cannabis and wished to escape capture.

Defence argument

Mere preparation

165 Mr Lawrence submitted that evidence that Ms Bui was at the factory wearing gloves amounted to mere preparation rather than attempt to cultivate cannabis.

166 Mr Lawrence submitted that Ms Bui's presence at the factory and the fact that she had put on gloves was not enough. Essentially it was his submission that to amount to an attempt there should have been evidence of something more – such as Ms Bui holding a hose.

167 I do not agree with that submission. The prosecution is required only to prove that Ms Bui's conduct was more than merely preparatory to the commission of the offence. I agree with Mr Menon's submission that simply by presenting at the factory, as she said she had in her interview, five or six times before, ready to carry out directions, Ms Bui had done all that was necessary before performing the tasks she then described and that there was nothing more for her to do than perform them.

Knowledge

168 This then leaves the question of whether the prosecution has proved Ms Bui knew the plants were narcotic plants.

169 Mr Lawrence submitted there was no evidence that she did and that in fact the evidence that there was, in the form of her record of interview, went the other way.

170 He pointed out that Ms Bui continually said she did not know what the plants were. He said the fact that she never volunteered what she thought the plants were meant nothing as she was never asked that question by police.

171 Mr Lawrence submitted that there was no evidence as to which rooms Ms Bui entered when at the factory amounting to evidence of her opportunity to form a view about the nature of the plants.

172 I should say at this point I am satisfied, despite the defence challenge, that Mr Hempton saw Ms Bui coming from inside Room 8. While in evidence in chief he initially described the three as 'coming from' room 8, when further asked about that by the prosecutor he refined that description to say they 'came out' of it. In my view his later concession that one of the two male accused was out of the room when he first saw the three did not undermine his evidence and he remained positive the other two including Ms Bui were inside room 8. His

- concession that they were 'not that deep' inside the room added in my view to the credibility and reliability of his evidence on that point.
- 173 Rooms 1 and 8 are diagonally opposite each other, only a few paces apart, the raid was in daylight hours and there was nothing to suggest he could not have seen what he said he did, and I see no reason not to accept this part of his evidence.
- 174 Mr Lawrence pointed to the evidence that Ms Bui had no prior or subsequent convictions, meaning that there was nothing to indicate she had previously engaged in offending involving cannabis which would negate her assertion she did not know what it was.
- 175 Mr Lawrence submitted the nature of the tasks described by Ms Bui – and there was no other evidence of what she did at the factory – were not sufficient to allow the conclusion that she was so involved with actually tending the crop that she must have known what it was.
- 176 Those tasks were firstly, loosening or softening the soil. Mr Lawrence submitted this must have referred to the coco peat in which the plants were potted. He submitted Ms Bui must only have done that before it was placed in the pots as it held no nutritional value and simply served to keep the plants in place while they were fed nutrients through the hydroponic system.
- 177 Second, she said she, 'put the soil onto this and that' and, 'he asked me to put the soil on something' and that she rubbed the soil. Mr Lawrence submitted that meant at most that she may have put coco peat in the pots – again a task quite possibly performed outside the growing rooms where the bags of coco peat were stored.
- 178 Third she 'tidied up the place' or undertook cleaning. Mr Lawrence submitted this was unlikely to have been done in the growing rooms where the potted plants were either crammed together or set in fixed lines to be hydroponically

- fed, but more likely occurred in the areas outside the growing rooms where the peat bags, nutrients and other loose equipment were kept.
- 179 Fourth she tied something to sticks, but not the plants. Mr Lawrence pointed out that the mature plants were tied up using a central stake to which were tied strings of raffia. He submitted this meant Ms Bui was most likely referring to a task of tying the string to the stakes for later use on the mature plants – again an activity unlikely to have taken place in the growing rooms.
- 180 Mr Lawrence submitted there was evidence of previous crops, being the roots found in empty pots. As there was no evidence as to exactly when Ms Bui had previously been at the factory (and he submitted the evidence at most established four previous visits and one on October) it was open that she had been at the factory before the setup discovered on 10 October, had been established. That crop and setup may have been far less extensive giving Ms Bui even less chance of knowing the crops were cannabis plants.
- 181 Finally, he submitted the evidence was that Ms Bui had been in Australia only three to four years. There was no evidence she had ever had anything to do with cannabis.
- 182 He further submitted that as a person with no English it would not be reasonable to assume that she would have gained knowledge about illegally grown hydroponic cannabis crops through news reports.

Conclusion

- 183 Again, the prosecution case in relation to Ms Bui's knowledge is a circumstantial one.
- 184 If I reject her record of interview, I must put it to one side and determine whether on its case the prosecution has proved Ms Bui knew the crops were cannabis.

Record of interview

- 185 In her record of interview Ms Bui twice maintained she was 'outside the room' when police arrived. As I have accepted Mr Hempton's evidence that he saw Ms Bui running out from inside room 8 which contained 25 mature heavily flowering plants, I therefore do not accept what Ms Bui said in her interview on that point. This militates against the credibility of her answers in that interview.
- 186 That she gave those answers as she did because of a desire to distance herself from plants which she had just learned were illegal is open as an explanation, which while it does not add to her credit does not persuade me I should reject the interview as a whole.
- 187 In that interview Ms Bui also made admissions against her own interest, particularly that she had been to the factory five or six times before. While I do not accept her answers about where she was when police arrived, I do not reject the rest of her interview.
- 188 I do not accept defence counsel's submission that Ms Bui may have been at the factory at a time when the crop may have been less extensive. This would mean, given the age of the mature plants on 10 October, she started going there at least several months before. Given she was told she would be paid, but seemingly had not been, I find it most unlikely she would have kept going to the factory for so long without payment.
- 189 Ms Bui's explanation of how she came to go to the factory is possible in my view. She described a mental illness which was being treated by a psychiatrist, a psychologist and a GP. Her friend, Bradley Lee, Mr Lee persuaded her that this might relieve her 'sadness' by giving her something to do. Her GP had told her if she did not exercise, calm down and relax, she might have to go to hospital, which frightened her. So, it is possible, in my view, that this was her motivation rather than setting out to make money.

- 190 There was also no direct evidence of what Ms Bui did at the factory beyond what she said in her interview. Nor was there evidence of her being in any of the growing rooms apart from on 10 October.
- 191 I also accept defence counsel's submissions as to the tasks Ms Bui described in her interview. In my view given the nature of the hydroponic feeding system, her reference to soil could only mean coco peat, as everything else used for the plants' growth was liquid.
- 192 I accept it is entirely possible that her description of 'loosening' or 'softening' the soil, 'putting the soil on this and that' and rubbing the soil referred to her manipulating or putting the coco peat in pots before the older cannabis plants were transferred to them and then hooked up to the hydroponic feeding system. I accept it is likely this would take place outside the growing rooms.
- 193 I also accept that the other tasks she performed such as cleaning and tidying more likely took place outside the growing rooms.
- 194 I accept it was possible that the task of 'tying sticks to something' referred to tying raffia string to stakes which were later used in tying up the more mature plants.
- 195 Ultimately I accept that all these tasks could have taken place outside the growing rooms so that Ms Bui's exposure to the plants themselves, notwithstanding that she was clearly in room 8 on 10 October, was limited. Given the lack of evidence it is impossible to say whether she was in the growing rooms many times, or only a few times.
- 196 While it might be argued that Ms Bui's answers in interview on this point were an attempt to put an innocent spin on her presence at the factory, and to minimise her role there, I am unable to conclude that what she said was so unlikely as to be impossible.

197 Further there is no evidence Ms Bui ever had any previous involvement or knowledge of cannabis plants, or that she had the capacity in her time in Australia to learn about illegal hydroponic cannabis crops.

Good character

198 The fact that Ms Bui had never previously been involved with police means that at law she presents as a person of good character. I must have regard to the way this may be used by jury.

199 A judge must direct a jury that if they find a person is of good character this can be used by a them when assessing the credibility of an accused person's denials of the prosecution case.

200 Juries are also directed that because a person of good character is generally thought to be more trustworthy than other people, they can be less willing to accept the prosecution's case than if Ms Bui was not a person of good character.

201 Juries can also use this fact when determining the likelihood that an accused committed the offence charged and are told that as it is generally believed that a person of good character is unlikely to commit a criminal offence, they may be less willing to accept the prosecutor's allegation that the accused committed the offence than if she was a person of good character.

202 Applying those directions to myself, and given there is no evidence to the contrary, I accept that Ms Bui is a person of good character. In my view those directions particularly apply to my decision to accept as possible what she said in her record of interview apart from the answers I have referred to.

203 I have also viewed the video recording of the record of interview and accept that Ms Bui answered questions readily and co-operatively.

204 Therefore, it is my view that the possibility that Ms Bui did not know the plants at the factory were narcotic plants remains open and I cannot be satisfied beyond reasonable doubt that she knew that the plants at the factory were cannabis plants.

205 Finally, even if I had rejected the record of interview, the circumstantial prosecution case in my view did not go far enough for me to conclude that the only inference I could draw was that Ms Bui knew the plants were cannabis.

206 In other words, at its best the prosecution case could only have established a suspicion that Ms Bui knew the plants were cannabis. This is not enough for proof beyond reasonable doubt.

207 I therefore find the prosecution has failed to prove its case and that Ms Bui should therefore be found not guilty of the charges against her.

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