HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	M131/2020
File Title:	Director of Public Prosecutions Reference No 1 of 2019
Registry:	Melbourne
Document filed:	Form 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	14 May 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

IN THE MATTER OF:
THE DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO. 1 OF 2019

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. Recklessness in recklessly cause injury offences in the state of Victoria has been interpreted as requiring the "foresight of *probability*" of the relevant outcome, be it injury or serious injury.

ORIGIN OF VICTORIAN DEFINITION IN CRABBE

3. This came about by way of the misapplication of the decision of this Court in *The Queen v Crabbe* (1985) 156 CLR 464 (*'Crabbe*') to offences other than murder. This was done without analysis of the history of the meaning of recklessness but on the assumption that the principle (or '*spirit*') in *Crabbe* applied to other offences.

4. The Victorian Court of Appeal applied *Crabbe* in *R v Nuri* [1990] V.R. 641 (*'Nuri'*) and *R v Campbell* [1997] 2 VR 585 (*'Campbell*'). *Nuri* simply asserted (JBA 722) that presumably conduct is reckless if there is foresight of the probable consequences and a display of indifference and cited *Crabbe.* The Court in *Campbell*, although acknowledging the existence of the previous line of authority which established recklessness by foresight of the possibility of the relevant consequence, instead relied on *Crabbe* or the "spirit of *Crabbe*" and *Nuri.*

5. In this way Victoria became lumbered with a definition of recklessness for offences other than murder that was just below the level required to demonstrate actual intent. Indeed, as is noted in the history set out in *R v G* [2004] 1 AC 1034 (JBA 640), the decision of the House of Lords that readjusted the law relating to recklessness in the United Kingdom, intent required a desire for consequences or the foresight of probable consequences.

INTENTION OF PARLIAMENT IN MODERNISING THE LAW

6. This outcome was contrary to Parliament's intention in modernising the language of maliciousness. As noted in the appellant's written case, the change was not intended to reduce the coverage of the offences, the Attorney-General specifically referred to recklessness as an awareness that an injury might result – the language of possibility. Whilst reference was made in *Campbell* to the second reading speech (JBA 546) and earlier authorities were dismissed because of the 'spirit' of *Crabbe.*

DECISION IN AUBREY

7. It is apparent following the decision in *Aubrey v The Queen* (2017) 260 CLR 305 (*'Aubrey'*) (JBA 92) that it was never intended that *Crabbe* apply to offences other than murder. So much was recognized in NSW in *R v Coleman* (1990) 19 NSWLR 467 and then in *Blackwell v The Queen* (2011) 81 NSWLR 119 ('*Blackwell*') where there was a refusal to follow *Campbell*. It should be noted that *Blackwell* related to the definition of recklessness rather than maliciousness.

RE-ENACTMENT PRINCIPLE OR CLAIM OF SETTLED LAW

8. What is submitted on behalf of the Acquitted Person is not that this analysis is wrong or that anything said by this Court in *Aubrey* assists them. What is submitted is that it is no longer possible for the courts to correct this position as Parliament in Victoria has re-enacted the "settled" law that recklessness in Victoria means foresight of probability. This argument fails for a number of reasons.

PRINCIPLE DOUBTFUL

9. Firstly, the principle is of doubtful application and scope. In *Salvation Army (Vic) Property Trust v Fern Gully Corporation* (1952) 85 C.L.R 96 (*'Salvation Army*') the plurality described it as "at most a valuable presumption", noting "[i]t should not lead the Court to perpetuate the construction of a statutory provision which it considers to be erroneous." Fullagar J thought it could only lend support to a view already supported by independent argument.

RE-ENACTMENTS RELATE TO PENALTY

10. Secondly, Parliament has never enacted a definition of recklessness. It has always been silent on it and has left it to the courts. This silence cannot take away the courts' ability to correct an error.

11. When the so-called re-enactments are examined, they all relate to penalty.

12. In 1997 there was a wholesale review of penalties across 60 offences. This says nothing about the definition of recklessness. In 2013 aggravated forms of various offences were introduced. The maximum penalty remained the same, the changed provisions related principally to sentencing with the introduction of mandatory sentencing provisions applicable in certain circumstances.

RE-ENACTMENT CANNOT PERPETUATE ERRONEOUS INTERPRETATION

13. Thirdly, as was pointed out in *Salvation Army* (JBA 446) and cases which followed it cannot be used to perpetuate construction of a statutory provision which the Court considers erroneous. The 'settled interpretation' traces its roots to *Crabbe*, there is no legal principle which requires an erroneous interpretation to stand simply because of the effluxion of time.

COURTS SHOULD RETAIN ABILITY TO CORRECT ERROR

14. The idea that Parliament, having never defined recklessness at any stage and having always left it to the courts, is now the only body that can fix an incorrect interpretation of this definition should be rejected.

NO RETROSPECTIVE APPLICATION

15. Although it is accepted that this is a significant change it would not as asserted lead to a retrospective expansion of the criminal law. The realignment of the test will mean that some who have escaped conviction in the past may no longer escape. Those convicted to date will have been convicted on a more onerous test.

SOCIAL UTILITY

16. The Court in *Aubrey* explained how social utility could be properly taken into account. The Court of Appeal's approach was overly reliant on this as a major change whereas this Court considered that the concept would rarely require a separate direction.

Dated: 14 May 2021

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