IN THE HIGH COURT OF AUSTRALIA **No. B11 of 2012**
BRISBANE REGISTRY

BETWEEN

JAYANT MUKUNDRAY PATEL Appellant

and

THE QUEEN Respondent

10 **APPELLANT'S REPLY**

Part I: Internet publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

2. The miscarriage of justice that occurred in this case is more pervasive and grave than paragraphs 2 to 5 of the Crown's submissions, insofar as they refer to problems with the case, indicate. The wider problems are addressed in the appellant's submissions in chief and below. However, the Crown has essentially not engaged with the substance of the case made by the appellant.

3. The Crown seeks to avoid the ineluctable fact that the case that the learned trial judge
20 put to the jury only concerned allegedly negligent decisions to operate. The Crown diverts attention from the case as it was put to the jury under s. 288 having as its central element the allegedly negligent decisions to operate. Instead the Crown seeks to argue about a case not put to the jury, involving the way in which surgery was performed, namely, the acts of performing surgery on the patients.[1]

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[1] See paras 38 and 39

4. The Crown's submissions are thus deflective and involve a mischaracterisation of the case put to the jury. In a sense the Crown is driven to this approach to justify the verdicts.

5. The case left to the jury was one that required the jury to consider only the lawfulness of the appellant's decisions to operate as being a matter purportedly within the scope of s. 288 of the Code.

6. In summing up the Crown case against the appellant, the learned trial judge clearly instructed the jury that:

> "*what matters is [the appellant's] judgment in* ***deciding to commend the surgery to a patient*** *and, having obtained the patient's consent, in taking the patient to theatre to perform it.*"[2] (emphasis added)

7. And in addressing the elements of s. 288, the learned trial judge directed the jury that:

> "*Importantly, you must also be satisfied beyond reasonable doubt that* ***his decision to perform the surgery in question*** *involved such a great falling short of the standard to have been expected, and showed such serious disregard for the patient's welfare, that he should be punished as a criminal: in other words, that* ***his decision to operate*** *was so thoroughly reprehensible, involving such grave moral guilt, that it should be treated as a crime deserving of punishment.*"[3] (emphasis added)

8. There are further references to the appellant's decisions to operate in the summing up.[4] What was made clear in express, positive terms in the trial Judge's directions to the jury was that this was not a trial about incompetent surgery.[5]

9. In direct contradistinction to the Crown's submissions, the trial judge directed the jury to focus its attention on the appellant's decisions to operate (not the performance of the surgery) as an integral component of the case against him under s. 288. It is undeniable that the appellant was convicted for offences involving criminally negligent decisions held by the trial Judge and Court of Appeal to be within the purview of s. 288. This involved a misconstruction of the provision with the result

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[2] T52.59 L49 – T52.60 L50
[3] T52.67 L49 – T52.68 L3
[4] An example is cited in paragraph [28] of the Crown's submissions. In the passage of the summing up there cited (at T52.155 L30-31), the learned trial judge said that "*Dr O'Loughlin considers that* ***the decision to undertake the surgery*** *fell well below the standard to be expected of a competent surgeon.*" (emphasis added)
[5] T52.59 L 49 - T 2.60 L50

that the appellant was tried under the wrong sections of the Code. The Crown's submissions do not squarely confront this problem and do not answer it.

10. Statements in the Crown's submissions to the effect that the appellant was advantaged by the course of events taken at trial are not just simplistic but also incorrect as they fail to address the prejudice suffered by the appellant.

11. The Crown submits, in paragraphs 55 to 57 and 78 of its submissions, that the burden on the Crown in prosecuting a case against the appellant under s. 288 of the Code was greater than the burden to be discharged by way of the case advocated by the Solicitor-General on day 40 of the trial. While this position may have been accepted by all parties, and the trial Judge at the trial, it is not clear that it is correct. It is not clear, if the prosecution had proceeded under s. 282, that the burden on the Crown to negative that requirement in s. 282 that the performance of the surgical operation was reasonable having regard to the patient's state at the time and to all the circumstances of the case, would not require the Crown to establish a lack of reasonableness in a gross sense (mirroring its obligations under s. 288). But whatever the answer to this question may be it is not the case that the appellant was "advantaged" by the events of the trial and by his being convicted only by means of s. 288.

12. In truth, the irregular way in which the trial proceeded worked injustice on the appellant, because it denied to him the safeguards and advantages which he was entitled to enjoy as an accused person by means of an orthodox trial under the correct law.

13. If the trial had proceeded on a proper footing from the outset, the Crown would have proceeded upon comprehensible particulars (as distinct from incoherent particulars) of a case against the appellant under the correct provisions of the Code. That case would have been particularised as the narrower one ultimately put to the jury and would have had no reference to s. 288 and would have required the jury to consider an available defence under s. 282 which it was not asked to consider. The appellant would then have been in a position to take objections and make other tactical decisions about how to structure his defence on a proper basis from the commencement of the trial. Instead the appellant had to contend with ambulatory and incoherent particulars until day 44 of the trial, when the case against him was dramatically narrowed and in any event was left to the jury under the wrong provisions. A miscarriage of justice thereby occurred.

14. The proviso in s. 668E(1A) of the Code ought not be applied.

15. The appellant agrees with the propositions in paragraph 61 of the Crown's submissions. The appellant's case concerning the miscarriage of justice is articulated in the appellant's written submissions in chief. The appellant relies on an aggregation of matters that together constitute a miscarriage of justice. This is not surprising given the way the trial proceeded which the trial judge correctly described as a "mud slinging" exercise. It is not simply a case of misdirection on the elements of the offences.[6]

16. The proposition urged in paragraph 62 of the Crown's submissions requires qualification.

17. It is a necessary but not sufficient condition for the application of the proviso that the appellate court is satisfied that there was sufficient evidence at trial to prove the guilt of the accused beyond reasonable doubt.[7] But this condition is not determinative of a case such as the present where the trial process is fundamentally flawed and much other evidence has been admitted which is prejudicial or irrelevant in terms of the ultimate narrow case put to the jury.

18. There are situations where this condition is satisfied yet the proviso is not engaged. The proviso is open-textured and it is not possible to be definitive about the circumstances in which such a result will obtain. But it is clear that where there has been a significant failure of process, it cannot be said that there has not been a substantial miscarriage of justice, irrespective of the weight of the evidence against the accused.[8]

19. In particular, the proviso ought not operate to sanitise a trial process where the accused has been tried under the wrong law and has not had a trial according to law.[9]

20. A "process failure" of this nature gives rise to a substantial miscarriage of justice where the accused loses a chance fairly open to him of being acquitted.[10]

21. Here the appellant lost a chance fairly open to him of being acquitted because he was tried under the wrong provisions and was thereby unable to make decisions on a properly informed basis about how to conduct his defence under the correct

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[6] Cf. para [77] of the Crown's submissions and *Darkan v The Queen* (2006) 227 CLR 373

[7] *Weiss v The Queen* (2005) 224 CLR 300 at 317 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon J; *Nudd v The Queen* (2006) 80 ALJR 614 at 618 per Gleeson CJ; *Cesan v The Queen* (2008) 236 CLR 358 at 394 per Hayne, Crennan and Kiefel JJ

[8] *Cesan v The Queen* (2008) 236 CLR 358 at 383 per French CJ; *Weiss v The Queen* (2005) 224 CLR 300 at 317 per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon J

[9] *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *Handlen v The Queen* (2011) 86 ALJR 145 at [42] – [47] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

[10] Ibid.

provisions. If the appellant had been tried under the correct provisions according to law the conduct of his defence may have been different, and potentially radically so. An acquittal may have resulted.

22. The contention expressed in paragraph 83 of the Crown's submissions does not resolve this problem. An array of choices would have been available to the accused, and one cannot say what the appellant would have done and what would have happened. The appellant may have elected to give evidence. He may have called additional evidence. He may have admitted causation. If he had done the latter then evidence of the performance of the operations and the pathos associated with their aftermaths would have been irrelevant. And he may have made out the defence in s. 282 and been acquitted. No matter how much the Crown strains to do so, it is speculation to guess at what could have happened under a correct and fair trial in this case.

23. In connection with the proviso, the Crown challenges the appellant's submissions concerning the reshaping of the particulars of the indictment and the reception of controversial evidence. But the Crown's submissions, again, do not engage with or overcome the problems identified by the appellant.

24. The ambulatory particulars, and significantly their radical narrowing from the broad (incoherent) case to the narrow one after all of the Crown's evidence had been called, must be considered in light of the related problem that the appellant was tried under the wrong provisions.[11] The two problems are not able to be compartmentalised.

25. Until day 43 of the trial, evidence was admitted on the basis of very wide particulars involving a case of botched surgery under s. 288, as well as a case alleging a lack of good faith by the appellant and a failure to provide adequate post-operative care. If the Crown had run its narrowed case from the outset under the correct provisions of the Code – including by way of s. 282 rather than under s. 288 – much of the evidence would not have been admissible or else would have taken on a different complexion such that it may have been excluded on the basis that its prejudicial effect outweighed its probative value.

26. Take as examples the evidence concerning operative technique and post-operative treatment and the tragic evidence of suffering of patients, by way of comparison between the wide case under s. 288 and the narrow case under s. 282.

[11] The Crown's submissions make arguments for the reception of evidence based on a case under s. 288: see, for example, para 89(b)

27. There are two considerations.

28. *First*, evidence of operative technique is inadmissible for want of relevance because the narrow case does not involve criticism of the conduct of the operations as distinct from a contention that the anterior decisions to operate were inappropriate.[12]

29. *Secondly*, absent a Crown case of botched surgery and "morally grave" breaches of duty sufficient to engage s. 288, the appellant had much stronger grounds upon which to object to the admission of the evidence on the basis that it was more prejudicial than probative. Even assuming causation remained in issue (and it may not have), if the Crown's case against the appellant did not concern negligent performance of surgery but had always focused on the legitimacy of his decisions to operate, good arguments were available to the appellant that graphic and emotive evidence of post-operative treatment and the suffering of patients had a prejudicial effect that so far outweighed its probative value that it ought be excluded. It is no answer to say that the appellant's Counsel did not object to admission of the evidence.[13] Lack of objection to the evidence on the wide case says little about whether objection would have been taken – and upheld – on the narrow case had it been particularised and prosecuted on a proper basis from the outset. Further, counsel for the accused correctly sought the discharge of the jury on day 10 and the application ought to have been acceded to, as should have occurred with the second application on day 44.

30. The appellant seeks orders that his convictions be quashed and that there be a new trial. By seeking the latter order he does not intend to abandon or waive his right, should such an order be made by this Court, to contend in the Supreme Court of Queensland that there should not be a new trial as it would not be possible for there to be a fair trial. This Court is not seized of that issue but the appellant wishes to be clear that he reserves the right to make that contention at a later time should it be appropriate to do so.

L.F. Kelly SC P.F. Myrne D.M. Turner

Counsel for the Appellant
26 April 2012

[12] The basis for admissibility advanced in paragraph [124] of the reasons of the Court of Appeal is unsustainable
[13] See the reasons of the learned trial judge in dismissing the application to discharge the jury on Day 44 (T44.29); the reasons of the Court of Appeal at para [92]; and the submissions of the Crown at para [92]