IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B69 of 2015

BETWEEN:

GODFREY ZABURONI
Appellant

and

THE QUEEN
Respondent

10

APPELLANT'S REPLY

PART I: Certification

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

PART II: Reply

Ground 1(i)

2. The respondent concedes that the prosecution was required to prove beyond reasonable doubt that the appellant had an actual intent to transmit the disease and awareness of the likelihood (no matter how high) of the impugned consequence of one's act does not amount to intention to achieve a specific result at law (Respondent's Submissions ("RS") at [6.1]).

20

3. In light of the respondent's concession as to the correct test for intent under the *Criminal Code 1899* (Qld) ("the *Code*") there appear to be two issues arising for determination on this appeal. The first issue is whether or not Gotterson JA (Morrison JA agreeing) applied the correct test for intent when determining whether the verdict was unreasonable or could not be supported having regard to the evidence (s668E the *Code*). The second issue is whether or not, applying the correct test for intent, it was open to the jury to be satisfied beyond reasonable doubt that the appellant had the requisite intent (*SKA v The Queen* (2011) 243 CLR 400).

30

4. Although Gotterson JA referred to the trial judge's directions on the element of intent at [2014] QCA 77 ("QCA") [22] **AB 291** (which reflected the correct test) his Honour did not apply the correct test for intent under the *Code* (QCA at [46], [48] **AB 296**; see AS at [40]-[41]; cf. RS at [6.6]). The complaint made by the appellant at AS [40] is a complaint that his Honour did not apply the correct test for intent not a complaint about the standard of proof (cf. RS at [6.8]).

40

5. Gotterson JA found that it was open to the jury to reject "*mere recklessness*" based on the three factors identified therein (at QCA [46] **AB 296**). However, rejection of what was described as "*mere recklessness*" did not compel the conclusion that the appellant intended to transmit the disease. His Honour's conclusion was based on the appellant's appreciation of risk(s) of transmission through unprotected sexual intercourse (accepted by the respondent as not quantified – RS [6.10]) combined with frequent engagement in that conduct over a period of time (see also RS [6.11]). This analysis and the language used at QCA [46] **AB 296** is that of recklessness not intent (cf. RS at [6.15], [6.17], [6.18]). These three factors

50

HIV/AIDS Legal Centre
414 Elizabeth St
Surry Hills NSW 2010

Telephone: (02) 9206 2060
Fax: (02) 9206 2053
Ref: ZAB0710

identified by Gotterson JA at QCA [46] **AB 296** are not sufficient to establish the requisite intent in the appellant's case (see AS at [20]-[21], [39]-[41]; cf. RS at [6.12]).

6. These three factors were the only factors involved in the finding of Gotterson JA that it was open to the jury to reject "*mere recklessness*" (QCA at [46] **AB 296**; cf. 6.12]). Gotterson JA described the frequent engagement in sexual intercourse as of "*singular significance*" (QCA at [46], **AB 296**). Apart from an appreciation of risk(s) of transmission associated with unprotected sexual intercourse no other evidence or factor is identified by Gotterson JA as supporting an inference that the appellant had the requisite intent. Nor is there any such evidence.

7. The appellant does not accept that the more often something is done which is dangerous to human health, particularly of another, the more readily it can be inferred the potential outcome is intended (cf. RS at [6.13]). Frequent engagement in dangerous conduct does not mean (of itself) that a person intends to bring about a (possible or probable) negative consequence of that conduct (see Applegarth J at [83]-[88] **AB 302-303**). This is particularly so where the likelihood of the negative outcome occurring is low and the reason for engaging in the impugned conduct is the pursuit of sexual pleasure.

8. The appellant should not be understood as submitting that evidence of motive is required before the requisite intent can be inferred (cf. RS at [6.19]). The submission at AS [28] reflects the test for intent under the Code, namely that the person had a purpose or design (see *R v Ping* [2006] 2 Qd R 69 at [35], [38] and *R v Willmott (No 2)* at 418; cf. RS at [6.19]). Motive as it is understood in the criminal law (as to which see *De Gruchy v The Queen* (2002) 211 CLR 85) should not be confused with a person's purpose (cf. RS at [6.19]). The complainant also gave evidence that the appellant had told her unprotected sexual intercourse was more pleasurable for him (T1-38.10-.12, T1.38.56-.59, **AB 39**; cf. RS at [6.20]).

9. The respondent submits that the finding of Gotterson JA at QCA [46] **AB 296** was also based on the appellant's lies and that his Honour used these lies as evidence which was open to the jury to be used as consciousness of guilt for the offence charged (RS at [6.21]-[6.24]). No member of the Court of Appeal used the appellant's lies as evidence of a consciousness of guilt on the part of the appellant for the intent offence (cf. RS at [6.24]).

10. The appellant's submission with respect to the lies relates to how the lies could be used when determining whether the verdict was unreasonable or could not be supported having regard to the evidence. The directions that were given to the jury on the subject of lies cannot change the probity of that evidence when consideration is given as to whether or not the verdict is unreasonable (cf. RS at [6.22]).

11. The respondent appears to rely on lies as part of the circumstantial case against the appellant separate from their asserted possible use as a consciousness of guilt in relation to the offence of transmit a serious disease with intent (RS at [6.23]). It is submitted that Gotterson JA used the lies relied upon by the prosecution at trial in the only way it was open to do so, namely as evidence of an appreciation of the risk(s) of transmission associated with unprotected sexual intercourse (QCA at [43]

AB 295). The appellant's lies could not be used to distinguish between whether the appellant intended to transmit the disease or was reckless as to its transmission (through consciousness of guilt reasoning or otherwise).

12. The direction (accepted by the respondent to be erroneous) to the jury that referred to two equally competing hypotheses was not an error that favoured the appellant (cf. RS [6.26]). The respondent's submission at RS [6.26] has as its premise that the requisite intent was a reasonable inference to draw (see AS at [50]). Likewise, the direction to the jury on this subject implied that an inference of an intent to transmit the disease was a reasonable inference to draw (SU 3-8, **AB 248**). The direction and the respondent's submission ignores the difficulties associated with applying traditional circumstantial evidence reasoning to states of mind in a case like this where the question is whether it can be inferred that a person had a particular state of mind indicating a higher culpability (see AS at [49]-[50]).

13. The respondent seeks to defend the outcome of the appeal on the basis of the additional reasons given by Morrison JA (RS at [6.27]-[6.30]). Notably, Morrison JA agreed with the reasons given by Gotterson JA (QCA at [51], [71] **AB 297, 299**). The matters relied upon by Morrison JA and the respondent do not support an inference that the appellant intended to transmit the disease to the complainant (cf. QCA at [61]-[64], [67]-[68] **AB 298-299**, RS at [6.27] – [6.28]). Further, the additional reasons of Morrison JA are largely a comparison between the evidence in the appellant's case and the evidence in *R v Reid* [2007] 1 Qd R 64. However, *R v Reid* does not set *"a factual minimum for the exclusion of recklessness"* or the presence of intent (QCA at [48] **AB 296**). Further, in *R v Reid* there were other matters from which the requisite intent could be inferred (see AS at [45]).

14. The appellant need not show that there has been a miscarriage of justice (cf. RS at [6.30]-[6.31]). The question for the court below was whether the verdict of the jury was unreasonable or could not be supported having regard to the evidence (see s668E of the Code). The question for this Court is whether the Queensland Court of Appeal erred by holding the verdict was not unreasonable and could be supported having regard to the evidence (**AB 313**).

Ground 1(ii)

15. The appellant does not accept that it could be inferred that the appellant had the requisite intent at the commencement of the relationship (cf. RS at [6.35]). For the reasons given at AS [63] it cannot be said that the appellant knew at the commencement of the conduct that the conduct would be engaged in frequently in the continuous future.

16. Unlike the appellant's case, in *R v Reid* it could be inferred that the requisite intent existed at the commencement of the relationship and the inference did not depend on the passage of time (see AS at [61]; cf. RS at [6.36], [6.38]).

17. Gotterson JA inferred that the appellant had the requisite intent from his frequent engagement in the impugned conduct over a period of time aware of risk(s) associated with that conduct (QCA [46] **AB 296**, RS [6.9] and [6.12].). This finding necessarily involves the proposition that at some earlier point of time the appellant was simply reckless (cf. RS at [6.35], [6.37]). It was therefore necessary to identify

the time at which the intent arose and the time at which the transmission occurred to ensure the mental and physical elements of the offence coincided (see AS at [61], cf. RS at [6.35], [6.37]).

Dated: 22 January 2016

10 **Tim Game**
Forbes Chambers
Tel: (02) 9390 7777
Fax: (02) 9261 4600
Email: ryan@forbeschambers.com.au

Georgia Huxley
Sixth Floor Selborne Wentworth Chambers
Tel: (02) 8915 2658
Fax: (02) 9232 1069
ghuxley@sixthfloor.com.au