IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S249 of 2016

BETWEEN:

MALTIMORE SMITH
Appellant

and

10 **THE QUEEN**
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1.1 It is certified that these submissions are in a form suitable for publication on the Internet.

20 ### Part II: Statement of issue

2.1 Where a jury must be satisfied that an accused person "intended" to import packages concealed in his luggage, in the sense that he "meant" to import them, is it erroneous to direct the jury that if they are satisfied the accused was aware of "a significant or real chance" that his luggage contained those concealed packages, they should "go on to consider whether that was sufficient to satisfy you beyond reasonable doubt he intended to import" them?

Part III: Notices

30 3.1 The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and it is considered that no notice should be given.

Filed on behalf of the Appellant
Dated: 17 November 2016
THE APPELLANT'S SOLICITOR IS:
S.E. O'Connor, Deputy CEO
Legal Aid NSW
323 Castlereagh Street, Sydney NSW 2000
DX 5 Sydney

Contact: Madeleine Schneider
Telephone: (02) 9219 5097
Facsimile: (02) 9219 5059
Ref No: 2016076386

Part IV: Citation

4.1 The judgment of the New South Wales Court of Criminal Appeal has not been reported. The medium neutral citation is: [2016] NSWCCA 93.

Part V: Facts

5.1 The appellant was charged with importing a commercial quantity of methamphetamine into Australia on 29 October 2013, an offence contrary to s 307.1 of the Commonwealth *Criminal Code* ("the Code"). He was tried in the District Court of New South Wales before Hock DCJ and a jury in June 2014 and was found guilty by the jury.

5.2. The appellant did not dispute at trial that he brought the drugs into Australia when he entered the country on 29 October 2013 on a flight from India. The drugs were contained in a number of packages secreted into various items in his luggage (including two golf sets, a pair of shoes, and four boxes containing individual soaps). However, it was the defence case that the appellant was unaware that there were drugs in his luggage. The packages containing the drugs were not obvious to the naked eye and were only discovered after the various items in which they were secreted were deconstructed.

5.3. The account the appellant gave the police in a recorded interview (Ex L) and relied upon at his trial may be summarised as follows. He was a citizen of the United States. His trip from the United States to India and Australia was organised by a Nigerian man named "Reverend James Ukaegbu", who was a Nigerian religious figure and bank officer. The appellant said he had known the Reverend for two years but had always communicated with him by phone or email. He said that the Reverend told him that he had friends in New Delhi and Australia and asked the appellant whether he would like to go there and meet them. When the appellant said he would but didn't have the money to go there, the Reverend said he would pay. The appellant took up the offer. He went to New Delhi, where he was looked after by a friend of the Reverend named "John". John asked the appellant to deliver some gifts to his friend "Vernon" in Australia when

he travelled there. These were the golf sets, shoes, boxes of soap and other items. The appellant agreed, notwithstanding that he held some misgivings. The appellant was told that Vernon, who was also a friend of the Reverend, would meet him at his hotel after he arrived in Australia to collect the various gifts. The appellant was not to be paid anything for giving them to Vernon.

5.4. At various points in the police interview, the appellant recounted his misgivings about the gifts he was asked by John to deliver to Vernon in Australia:

> — A 56: "I then had sick feeling in my stomach when he [John] said those were soap. But I said, for the reason that, why would he need to send soap — to Australia? But I didn't voice my thought to him."
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> — A 56: "When I got on the aircraft I begin to think about the whole matter. Okay. And then was really, really sick feeling came across me because I know people that ... pretend to disguise contrabands in soaps and all kind of stuff. And there were two bags of them which were heavy."
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> — A 141: "But the thing that jarred a little bit and I'm being honest here, was in the jar and the soap."
>
> — A 299: "I asked myself, Have I made a gigantic error?"

5.5. However, he stressed to the police that he had "absolutely no intent" (A 56). He emphasised that he would never agree to carry drugs (A 56, 57). He was an ordained Minister in the Masons (A 68) and believed in obeying the law (A 68). He said: "I allowed myself to be misled by not being probative [sic] enough" (A 155). "You know ... you trust someone" (A 157). "You wouldn't think that people would do these things" (A 158). "And believing the man [John] was an honest man. I really believed, only to be used" (A 166-7). Even when told to give the gifts to Vernon, "I didn't think anything was wrong" (A 172). He was not to receive anything for giving them to Vernon (A 196). "I had no intention of breaking the law, would not do it" (A 219). As

regards the "sick feeling", he explained: "... but then I said to myself – I rationalise it by saying if this man is a Minister [Ukaegbu], well, he — he wouldn't be recommend me ... to go" (A 271). As for asking himself whether he had made "a gigantic error", he "prayed about it" and "I hope everything is on the up and up" (A 299).

5.6. Evidence corroborated the existence of a Reverend James Ukaegbu and his involvement in organising the appellant's trip. The police found an email dated 21 October 2013 from "James Ukaegbu (revjamesukaegbu@live.com)" to the appellant (Ex S) in which the author provided details of the appellant's flight to India the following day. There was also an email from "James Ukaegbu" to the appellant informing him of the hotel reservation in New Delhi.

5.7. Further, the appellant was able to point to his age (he was 76 years old) and the absence of any criminal convictions in the United States to support his claim that he had been misled. It should also be noted that the appellant, on repeated occasions, suggested to the authorities that he should be permitted to ring "Reverend James" and organise for Vernon to meet him, so that the police could then question Vernon. That offer was not taken up by the authorities.

Part VI: The argument

The issue at trial

6.1 In essence, the appellant told the authorities he would never knowingly import "contraband" and, while it did occur to him that there might be something concealed inside his luggage, he hoped and prayed that this was not the case. In other words, the appellant informed the authorities that, had he known there was "contraband" concealed inside his luggage, he would not have imported it into Australia.

6.2 It was the prosecution case against the appellant that his account to the authorities was false, in that he *knew* there were concealed packages in his luggage and either knew they contained drugs or was at least reckless as to this fact (see T 147.5, 149.47, 150.15, 152.26, 154.49, 156.27).

6.3 Section 307.1(a) of the Code makes it a physical element of the offence that "the person imports ... a substance". By reason of s 5.6(1) of the Code, "intention" is the fault element for that physical element of conduct. Pursuant to s 5.2(1), "[a] person has intention with respect to conduct if he or she means to engage in that conduct".

6.4 Section 307.1(b) of the Code makes it a physical element of the offence that "the substance is a border controlled drug". Section 307.1(2) provides that the fault element for that physical element is "recklessness". Section 5.4 provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists; and in the circumstances known to the person, it is unjustifiable to take that risk.

6.5 Accordingly, in the present case, in which packages containing border controlled drugs were secreted in items in the appellant's luggage, the appellant had to intend to import those concealed packages (in the sense that he meant to import them), although he need only have been aware of a substantial risk that the substance in the concealed packages was a border controlled drug.

6.6 The Crown Prosecutor correctly stated to the jury, "The real issue in this case is of course whether the accused intended to import the substance which turned out to be methamphetamine" (T 146.45). If, contrary to the appellant's claim to the authorities, he did intend to import the secreted substance, there was no reason to doubt that he was at least aware of a substantial risk that the substance was drugs.

Directions to the jury

6.7 The trial judge correctly directed the jury that it had to be satisfied beyond reasonable doubt the appellant intended to import the concealed packages, in the sense that he meant to import them. However, the jury was not given any assistance as to the meaning of the proposition that the appellant had to "mean" to import the concealed packages.

6.8 Importantly, the following directions were given to the jury (SU 12):

> When you are considering whether you are satisfied beyond reasonable doubt that the accused intended to import the substance and when I say the substance that is a general way of including all those packages which were secreted in all those items, it is the substance but in effect it was a number of packages as you know, you might also consider whether he was aware of the likelihood that those packages were in the items in his suitcase or the briefcase, I think some were found in the briefcase, in the sense that he recognised there was a significant or real chance that the orange containers, the soaps, the golf sets, contained those extra packages in which the substance was located. If you find that he had that state of mind you would go on to consider whether that was sufficient to satisfy you beyond reasonable doubt he intended to import the extra packages which contained the substance in the sense that he meant that those packages would be imported.

These directions instructed the jury that if they found the appellant was aware that there was a significant or real chance his luggage contained the concealed packages, they "would go on to consider whether that was sufficient to satisfy you beyond reasonable doubt he intended to import" those concealed packages.

6.9 The following observations are made about those directions:

(a) The jury was directed that it would be open to it to be satisfied beyond reasonable doubt that the appellant "intended" to import the concealed packages if the jury was satisfied the appellant was aware that there was a significant or real chance his luggage contained the concealed packages.

(b) The directions did not explain *how* the jury might reason from a finding that the appellant was aware of a significant or real chance that his luggage contained the

concealed packages to satisfaction beyond reasonable doubt of the appellant's intention to import the concealed packages.

(c) The directions were apt to leave the jury with the impression that satisfaction of the appellant's awareness of a significant or real chance that his luggage contained the concealed packages was equivalent to establishing intention under the Code.

(d) The directions were apt to leave the jury with the impression that satisfaction of the appellant's awareness of a significant or real chance that his luggage contained the concealed packages could, without more, found an inference that the appellant "intended" to import the concealed packages.

6.10 The Code provides in s 5.2(1) that "[a] person has intention with respect to conduct if he or she means to engage in that conduct", but does not further define the concept "means to engage in that conduct". It should be accepted that a person "means to engage in ... conduct" if the person had that conduct as his or her purpose or object at the time of the engaging in the conduct. In *Zaburoni v The Queen* [2016] HCA 12; (2016) 256 CLR 482, Kiefel, Bell and Keane JJ held (at 490 [14]) that the words "with intent to ... transmit a serious disease to a person" in s 317(b) of the Queensland *Criminal Code* required that the person "meant to produce that result", which, in turn, required that "the accused had that result as his or her purpose or object at the time of engaging in the conduct" (at 490-491 [17]). While that analysis was adopted in respect of an element of the "result" of conduct, it may be applied to the element of "conduct".[1] Thus, where it is alleged that the person "imports a substance", he or she means to engage in that conduct if it is the person's purpose or object to import that substance. Applied to the facts of this case, it was necessary to prove beyond reasonable doubt that it was the appellant's purpose or object to import the concealed packages.

[1] The definition of intention with respect to conduct in s 5.2(1) differs from the definition of intention with respect to a result in s 5.2(3), in that the former does not contain a counterpart to the words "or is aware that it will occur in the ordinary course of events": see *Zaburoni* at 490 [14].

6.11 It would have been desirable for the trial judge to give a direction that the jury had to be satisfied beyond reasonable doubt that it was the appellant's purpose or object to import the concealed packages. However, it is not submitted that the omission to give that direction, on its own, resulted in a miscarriage of justice.

6.12 It is submitted that the direction that was given, with respect to the significance of a finding that the appellant was aware of a significant or real chance that his luggage contained the concealed packages, did constitute a misdirection and resulted in a miscarriage of justice. In considering that direction, it is relevant that it was given in circumstances where the trial judge did not direct the jury that it had to be satisfied beyond reasonable doubt that it was the appellant's purpose or object to import the concealed packages.

Basic requirements of the summing up

6.13 Gaudron A-CJ, Gummow, Kirby and Hayne JJ stated in *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]: "The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. ... Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues." Their Honours cited *Alford v Magee* (1982) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ in support of these propositions. Similarly, in *Fingleton v The Queen* (2005) 227 CLR 166, McHugh J stated (at 197–198 [79]–[80]):

> As Diplock LJ pointed out in *R v Mowatt*, the "function of a summing-up is not to give the jury a general dissertation upon some aspect of the criminal law, but to tell them what are the *issues of fact* on which they must make up their minds in order to determine whether the accused is guilty of a particular offence."
>
> A summing-up is radically defective unless it adequately explains "to the jury the nature and essentials of" the offence with which a person is charged. Where the

> offence involves statutory terms, it is usually "imperative that the jury be specifically directed as to the criteria to be applied and the distinctions to be observed in determining" whether particular conduct is within the terms of the section. (Emphasis in the original; footnotes omitted)

Further, it should be also be noted that Gaudron A-CJ, Gummow, Kirby and Hayne JJ also stated in *RPS v The Queen* (2000) 199 CLR 620 at 637 [43] that "[t]o attempt to instruct the jury about how they may reason towards a verdict of guilt (as distinct from warning the jury about impermissible forms of reasoning) leads only to difficulties of the kind that have arisen in the present case".

6.14 In the present case, the summing up did not direct the jury on "the criteria to be applied and the distinctions to be observed in determining" whether the appellant "meant" to import the concealed packages. The directions failed to make clear that the critical issue of fact for the jury to determine was whether it was the appellant's purpose or object to import the concealed packages. Nor did they make clear that if the jury accepted the appellant's account, or even regarded it as reasonably possible, it could not be satisfied beyond reasonable doubt the appellant intended to import the concealed packages. On the appellant's account, he was at most "reckless" as to whether he was importing the concealed packages, which is not sufficient to establish intention under the Code. The jury were not directed that "recklessness" would not be sufficient to establish "intention". By attempting to instruct the jurors about how they may reason towards being satisfied beyond reasonable doubt that the appellant intended to import the concealed packages, the jury would have been misled as to the critical issue that needed to be determined, resulting in a miscarriage of justice.

6.15 It is accepted that intention, as defined in the Code, may be inferred from the circumstances in which the conduct occurred. However, it is a different thing to infer intention from a state of mind that could be characterised as "recklessness". It is also accepted that what an accused person says about his or her state of mind may be taken into account for the purpose of determining whether intention existed at the relevant time. However, what the appellant said to

the authorities about his state of mind did not support a finding of intention, as this element is defined in the Code. Further, it is accepted that cases might arise in which it might be appropriate to direct a jury that evidence establishing that a person was aware of a significant or real chance his luggage contained concealed packages may support an inference that the person intended to import those packages. For example, there may be evidence that the accused told the authorities words to the effect, "I was told that I would be one of three couriers on the flight, but only one of us would be carrying drugs". In such a case, even though the accused was aware that there was only a one-in-three chance that he or she would be carrying drugs, the accused's purpose or object was to import drugs if he or she happened to be the one carrying the drugs. However, the present was not such a case. While the appellant admitted that it did occur to him that there might be something concealed inside his luggage, he made it clear that it was not his purpose or object to import the concealed packages. Any awareness of a significant or real chance that his luggage contained concealed packages might support a finding of recklessness, but would not support an inference of intention. It would only be if the jury rejected his account, and was satisfied beyond reasonable doubt that he was aware that there were packages concealed in his luggage, that it could be satisfied he intended to import those packages.

Reliance on *Bahri Kural v The Queen* in the court below

6.16 The Court of Criminal Appeal concluded (at [84]) that there was no error in the directions. The Court initially accepted (at [16]) that "the critical question for the jury was whether they were satisfied beyond reasonable doubt that the appellant was *aware*, when he arrived in Australia, that there were packages secreted in the luggage and that directions to that effect were required" (emphasis added). However, the Court proceeded to hold that a passage from the judgment of Mason CJ, Deane and Dawson JJ in *Bahri Kural v The Queen* (1987) 162 CLR 502 at 505 (proof that "the accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved" the forbidden act would "obviously sustain an inference of intention") was applicable to the present case and, in consequence, the directions given by the trial judge did not involve a misdirection.

6.17 It is submitted that, for the following reasons, it was erroneous for the Court of Criminal Appeal to rely on this passage in *Bahri Kural*.

6.18 First, Mason CJ, Deane and Dawson JJ subsequently stated in *Bahri Kural* at 505: "[w]e would emphasise that the foregoing comments are not designed as a direction or instruction to be read by trial judges to juries. They are intended to give guidance to trial judges in order to enable them to formulate such directions *as may be appropriate to the facts and circumstances of particular cases*" (emphasis added). In the present case, the direction given was not "appropriate to the facts and circumstances" of the particular case.

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6.19 Second, the discussion in *Bahri Kural* was in relation to the mental element of intention under the common law. In *R v Crabbe* (1985) 156 CLR 464, two years earlier, the Court observed (at 469): "on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur". Authority was cited for that proposition, although it was stated that it was "unnecessary to enter upon that controversy". In *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1, a year after *Bahri Kural*, it was held (at 3B) that possession of cannabis resin under the common law required only "knowledge that cannabis resin was *or was likely* to be secreted in the parcel" (emphasis added). These authorities indicate that caution is required in applying common law authority to the fault
20 element of intention under the Code, particularly in circumstances where the Code draws a clear distinction between intention (in relation to the importing of the substance) and recklessness (in relation to the circumstance that the substance was a border controlled drug).

6.20 Third, even in respect of the common law, the proper approach to jury directions regarding proof of intention has shifted. Thus, Lord Hope of Craighead observed in *R v Woollin* [1999] 1 AC 82 at 97D that "it is unlikely, if ever, to be helpful" to invite a jury in determining whether there was intention (in relation to murder) to ask whether the defendant appreciated "that death or serious harm was likely to result" or to direct them that, if "the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result
30 from his voluntary act, then that is a fact from which they may find it easy to infer that he

intended to kill or do serious bodily harm". The other members of the House of Lords agreed. Lord Steyn also observed (at 96) that, "in the rare cases" where reference to foresight of consequences is required, the jury should be directed that they are not entitled "to find" the necessary intention "unless they feel sure that death or serious bodily harm was a virtual certainty ... and that the defendant appreciated that such was the case" — rejecting a direction in terms of what the jury was "entitled to infer". The other members of the House of Lords agreed. The approach of the House of Lords is consistent with the wider proposition advanced by Gaudron A-CJ, Gummow, Kirby and Hayne JJ in *RPS* at 637 [43], noted above, that "[t]o attempt to instruct the jury about how they may reason towards a verdict of guilt ... leads only to difficulties ...".

6.21 Fourth, the Criminal Law Officers Committee which advised the Standing Committee of Attorneys-General on a model uniform criminal code, which later came to be known as the Model Criminal Code Officers Committee ("the MCCOC"), produced a Report[2] which recommended what came to be s 5.2 in the Code. The MCCOC noted the decision of *Bahri Kural* (Report at page 23). However, as regards the proposed definition of "intention" in the provision that became s 5.2 of the Code, the Report stated (at page 27):

> The definition is based on the English Draft Code. The addition is the definition of intention in relation to "conduct" which is derived from the Canadian Draft Code. ...The Brisbane Conference and the Committee both disagreed with the Gibbs Committee's decision to define "intention" to include advertence to probability. There are a number of reasons for this. Conceptually, it confused intent and recklessness. Moreover, the legislature and the courts are unduly hampered if they want to require proof of "true intention" — in the sense of meaning an event to occur. ... On the other hand, the definition of "intention"

[2] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility*, Final Report (December 1992).

> should include awareness that the result will occur in the ordinary course of events, or is morally or virtually certain to occur.

The Law Reform Commission of Canada, in its Draft Code, preferred the term "purpose" to "intent", because of the "blurring in the case-law" of the distinction between intention and recklessness.[3] The Commission recommended:

> As applied to conduct, that is, the initiating act, the definition of "purposely" is straightforward: the accused must do the act on purpose, or mean to do it.[4]

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The MCCOC "derived" what became s 5.2(1) from the Canadian Draft Code. The MCCOC expressly rejected a proposed definition of intention in the Gibbs Committee report that included advertence to probability.[5] Reasons for that decision included a concern to avoid confusing intent and recklessness and a desire that "intention" under the Code be "true intention". Only in respect of a result element would it be permissible to establish intention on the basis of advertence to probability (and then only if the probability was extremely high). That view is reflected in s 5.2(3) of the Code, which provides that "[a] person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events".

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6.22 Fifth, the Court of Criminal Appeal erred in its reliance (at [25]) on a passage in the Explanatory Memorandum to the *Law and Justice Legislation Amendment (Serious Drug*

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[3] Law Reform Commission of Canada, Report 31, *Recodifying Criminal Law*, revised edn, 1987, p 22.

[4] Law Reform Commission of Canada, Report 31, *Recodifying Criminal Law*, revised edn, 1987, p 24.

[5] See *Review of Commonwealth Criminal Law, Interim Report, Principles of Criminal Responsibility and Other Matters* (AGPS, Canberra, July 1990) at 44 [5.34]. The Gibbs Committee proposed a definition of "intentionally" as follows: "When he or she means it to exist or occur or knows that it will *probably* exist or occur" (emphasis added). It was proposed that intention or knowledge, not recklessness, should be presumed for all external elements of an offence (at 43 [5.30]). The definition of "recklessly" proposed was expressed in terms the "the person is aware of a risk ..." (at 45 [5.34], 32 [5.11]).

Offences and Other Measures) Bill 2005, to support a proposition that the Code was intended to maintain the position under the common law. The Code offences in Division 307, including s 307.1, were intended to replace offences under the *Customs Act* and, as the Explanatory Memorandum stated, were intended to be "no more difficult to prove than the existing offences in the Customs Act". Since 15 December 2001, the provisions of Part 2 of the Code (including ss 5.2 and 5.6) had applied to all Commonwealth offences, including *Customs Act* offences. Accordingly, the observation that the Code offences were intended to be "no more difficult to prove than the existing offences in the Customs Act" was not directed to the *Customs Act* offences as they applied under the common law, but to the offences as they applied in the context of Part 2 of the Code.

6.23 It should be concluded that the passage in *Bahri Kural* relied upon by the Court of Criminal Appeal had no application to the present case. The Court of Criminal Appeal erred in failing to hold that the trial judge misdirected the jury by directing them to first consider whether the appellant was aware that there was a "significant or real chance" his luggage contained the concealed packages and then "go on to consider whether that was sufficient to satisfy you beyond reasonable doubt he intended to import" those concealed packages.

Absence of objection explained

6.24 The appellant's trial counsel did not object to the direction that is the subject of complaint in this appeal. In those circumstances, rule 4 of the New South Wales *Criminal Appeal Rules* requires a grant of leave to appeal. In support of a grant of leave, the appellant relied on an affidavit from trial counsel which showed that the failure to object was the consequence of a misunderstanding regarding what was in issue in the trial. Trial counsel explained that he did not object to the directions from the trial judge because the he "did not regard the element of proof of knowledge of the substance as in issue" (affidavit at para 13). That was because he confused the question of knowledge of the items (the boxes of soap, for example), which contained "something" (affidavit at para 13), with the question of knowledge of the "concealed package within each item" (affidavit at para 14). Trial counsel's understanding was erroneous. The

appellant did dispute knowing that there were concealed packages in his luggage. In the light of that affidavit, the Crown did not contend before the Court of Criminal Appeal that leave to appeal should be refused. The Court of Criminal Appeal apparently granted leave to appeal, although the appeal was dismissed.

Proviso does not apply

6.25 The Court of Criminal Appeal indicated (at [87]) that the proviso would have been applied had the jury been misdirected. In reaching that conclusion, the Court of Criminal Appeal would "not have placed much, if any, reliance upon the position taken by trial counsel". The Court of Criminal Appeal stated (at [88]) that "having regard to the evidence, we agree with the Crown submission that this was an overwhelming Crown case and the guilty verdict was inevitable". However, the Court did not actually provide any reasons for the view expressed. There was no indication as to the "evidence" the Court had in mind. There was no discussion of the possible effect of the misdirection on the outcome of the trial. It is submitted that a verdict of guilty was not "inevitable" in the sense that the appellant has been "deprived of a chance of acquittal that was fairly open to him or her": *Filippou v The Queen* [2015] HCA 29; (2015) 256 CLR 47 at 55 [15]; *Wilde v The Queen* [1988] HCA 6; (1988) 164 CLR 365 at 371-372; *Lindsay v The Queen* [2015] HCA 16; (2015) 255 CLR 272 at 301-302 [86]. It could not be concluded with any confidence that the misdirection would not have influenced the jury's verdict. The misdirection may have resulted in the jury finding the appellant guilty on the basis of his own account to the authorities. That is, the jury may have believed his account or regarded it as reasonably possible, and still returned a verdict of guilty. The misdirection deprived the appellant of a chance of acquittal open to him on the basis that the jury considered that his account was reasonably possible.

6.26 It should also be noted that the Court of Criminal Appeal failed to address the requirement for application of the proviso that the members of the Court were themselves "persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the [applicant's] guilt of

the offence on which the jury returned its verdict of guilty": *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; see also *Cooper v The Queen* [2012] HCA 50; (2012) 87 ALJR 32 at [20]–[24].

6.27 In any event, it is submitted that the misdirection went to the "root of the proceedings" with the consequence that the appellant did not have a "fair trial according to law" (*Filippou* at 55 [15]) and a substantial miscarriage of justice resulted for that reason alone. The misdirection was in respect of the critical fault element to be proved, with the consequence that the summing up was "radically defective" (McHugh J in *Fingleton* at 197 [80]).

10 **Part VII: Applicable provisions**

7.1 The applicable provisions, which are still in force, are contained in an annexure.

Part VIII: Orders sought

8.1 The orders sought are: appeal allowed, judgment and orders of the Court of Criminal Appeal of New South Wales quashed, the appeal against conviction allowed and a new trial ordered.

Part IX: Time estimate

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9.1 It is estimated that 1–2 hours are required for the presentation of the appellant's oral argument.

Dated: 17 November 2016

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Stephen Odgers
Telephone: (02) 9390 7777
Facsimile: (02) 8998 8560
Email: odgers@forbeschambers.com.au

Simon Buchen
Telephone: (02) 9390 7777
Facsimile: (02) 8998 8560
Email: sbuchen@forbeschambers.com.au

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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BETWEEN:

MALTIMORE SMITH
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ANNEXURE A

Statutory Provisions

The Criminal Code

Division 5—Fault elements

5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

Filed on behalf of the Appellant
Dated: 17 November 2016
THE APPELLANT'S SOLICITOR IS:
S.E. O'Connor, Deputy CEO
Legal Aid NSW
323 Castlereagh Street, Sydney NSW 2000
DX 5 Sydney

Contact: Madeleine Schneider
Telephone: (02) 9219 5097
Facsimile: (02) 9219 5059
Ref No: 2016076386

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

(1) A person commits an offence if:

(a) the person imports or exports a substance; and

(b) the substance is a border controlled drug or border controlled plant; and

(c) the quantity imported or exported is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

* All provisions are still in force as at 17 November 2016.

(All legislation sourced from the Federal Register of Legislation at: www.legislation.gov.au.)