IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S249 of 2016

BETWEEN:

MALTIMORE SMITH
Appellant

and

THE QUEEN
Respondent

HIGH COURT OF AUSTRALIA
FILED
19 DEC 2016
THE REGISTRY SYDNEY

Part I

APPELLANT'S REPLY

The reply is in a form suitable for publication on the internet.

Part II

1. As regards RS [2], it is accepted that cases might occur 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, taken with other evidence, support an inference that the person intended to import those packages. However, the present was not such a case. The appellant does not contend that what was said in *Kural* was erroneous or can never have application to proof of intention under the Code. Nor is it contended that those intermediate appellate decisions that have applied *Kural* in this way are necessarily erroneous. What is contended is that caution is always required in attempting to instruct a jury about how they may reason towards a verdict of guilt and that, in the circumstances of this case, it was erroneous to direct 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.

2. The asserted inconsistencies in the appellant's interviews and arising from documents in his possession (RS [10]) are disputed. The appellant did not say that he "only ever discussed spiritual and religious matters" with Reverend Ukaegbu (c.f. RS [11]). The

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interview answers referenced (at RS note 4) do not support this summary. Answer 228 (AB 317) referred to conversations with the Reverend about, inter alia, "helping people and that kind of stuff". The appellant proceeded to tell police that the Reverend was also an officer of a bank in Nigeria (A233–236; AB 317). The appellant also attempted to explain a financial arrangement that existed as between the Reverend, the appellant's friend in London and "Vernon" (A223; AB 316). At answer 305 (AB 322–333), the appellant indicated that he talked with the Reverend "*mainly* about spiritual matters."

3. In respect of the matters raised at RS [14]–[15], the answers referred to by the respondent (A58, 72; AB 302–303) do not support the assertion that the appellant told police "[h]e was never given the names of any of the friends before his departure". He merely related certain conversations with the Reverend that referred to "friends" in Delhi. The investigators did not question the appellant in any depth, or at all, about these conversations, or the written entries relied on by the respondent. Both notations referred to by the respondent were undated and located amongst a body of notations whose meaning and significance were not explored by the investigation.

4. In respect of RS [18], the appellant told authorities that Vernon was to collect the gifts from his hotel after he arrived in Sydney. He repeatedly asked the authorities to let him ring the Reverend, so that the latter would tell Vernon to come to the hotel, thereby allowing investigators to locate and question Vernon. It follows that the appellant did not have Vernon's contact details in Sydney. The appellant was not asked about the notations recording a phone number for a "Vernon" in London or England. In respect of RS [19(1)], the answers given were consistent with one another, when the appellant's full description of the circumstances of the trip are considered. Further, the evidence given by customs officer Wallace concerning her conversations with the appellant (including that referred to at RS [19(2)]) was largely based on memory, after a lapse of days, without recourse to detailed notes (TT 23–35; AB 44–56). The officer conceded that her record of the conversation was not "word for word" and could not be "100% accurate" (TT 31.46; AB 52).

5. At RS [21]–[22], the respondent contends that it is implausible that the appellant would have undertaken the trip without receiving payment. It is also asserted that the appellant was not the type of person "to be easily tricked or duped". These submissions are directly contradicted by email and documentary evidence located by the police which established that the appellant had been the victim of an elaborate online scam or scams. Exhibit K (documents found on the appellant's laptop computer) included a letter from a person purportedly in South Africa who wanted to donate funds to a "Christian individual" due to a "divine direction from God", and another letter from "The Coca Cola Company" congratulating the recipient for winning $500,000 in an international lottery, with the prize to be claimed from "Reverent Denman". Exhibit Z contained emails between the appellant and "Dr Mark Joe" and others in May 2013. "Mark Joe" wrote that he was "from united nation head office Ghana" and could not "send the document and the payment slip of your fund of $9.6 million" until the appellant made a further payment of $1,500. The appellant replied that he had paid at least US$12,000 in fees over the last year and could not afford to pay further fees to have his funds "released". He complained about the "pattern" for more than a year of being asked, "please send this last fee". There were also dubious "certificates" which related to the claim, including a "Money Launry [sic] Clearance" from "Benin Republic International Money Launry [sic] Clearance Enforcement Agency" naming the appellant as beneficiary of a "consignment box worth of four million eight hundred thousand United States dollars". This evidence showed that the appellant had been "easily tricked or duped" in the relevant timeframe and was highly gullible.

6. The respondent refers at RS [47] to *Tabe v The Queen* (2005) 225 CLR 418 at [10]-[12] per Gleeson CJ, [57] per McHugh J, [101] per Hayne J. That judgment confirms the need for caution in the application of what was said in *Kural* to the Commonwealth *Code*. In *Tabe*, the issue was the applicable fault element for attempting to possess a dangerous drug under the Queensland Criminal Code. It was accepted that this required "knowledge" but Gleeson CJ observed at 424 [10] that it would be sufficient to prove that the accused had a "belief in the likelihood, 'in the sense that there was a significant or real chance' of the fact to be known". Thus, what needed to be proved under Queensland law was that the appellant believed that there was a significant or real chance that the envelope in question contained some kind of

dangerous drug. This was consistent with *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1, where it was held a year after *Kural* 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" (at 3B, column 1) and that what needed to be *inferred* (not what might be used to infer intention) was "knowledge of the actual or likely existence of the relevant matter" (at 3D, column 2). Hayne J stated the same proposition at 446 [101], referring expressly to *Pereira*. However, "knowledge" under the Commonwealth Code, in relation to "a circumstance or result", requires that the person "is aware that it exists or will exist in the ordinary course of events": s 5.3. What is required to be proved for the guilty mind required for "possession" under the common law (and apparently the Queensland Criminal Code) is different from what must be proved for both knowledge and intention under the Commonwealth Code.

7. A decision that is more relevant to the present case is *Fang v The Queen* [2010] NSWCCA254, where the accused was charged under s 307.5 of the Code, which is structured in a similar way to s 307.1. The accused had to intentionally "possess a substance" and be reckless as to whether the substance was a border controlled drug. After referring to directions given by the trial judge, Hodgson JA held at [71]-[72] that the directions erroneously conveyed that it was sufficient that the accused was reckless about the presence of a substance within some boxes and expressed the opinion at [72] that "one could not intend, in possessing a box, to possess a substance contained within the box, unless one had a belief that there was such a substance in it". The appellant accepts that intention under the Code may be inferred from a belief that a substance is present in luggage. It is a very different matter to infer intention from a belief that there is a significant or real chance that a substance is present in luggage.

8. As regards the meaning of "intention" under s 5.2(1), the respondent at RS [70] appears to challenge the appellant's contention that a person only means to engage in conduct if it is that person's purpose or object to engage in that conduct. However, the MCCOC discussion referred to at AS [6.21] clearly understood that what was proposed was "true intention" and that a person means to do an act if the act is done "on purpose". There is no reason why the reasoning in *Zaburoni* at 256 CLR 490-491 in relation to a "result" would not apply equally to "conduct". The fact that the plurality in *Zaburoni* noted at 491 [18] that "a person may intend

to produce a particular result without desiring that result" demonstrates only that a person may have the purpose of importing a substance even if he or she does not actually "desire" that outcome. The fact that the notion of desire is not involved in proof of intention has no bearing on the present appeal.

9. The trial judge may have intended to invite the jury to engage in inference-drawing (RS [30]), but what she said was apt to convey that awareness of a significant or real chance could be regarded as equivalent to intention under the Code. In any event, there was no explanation as how the jury might draw such an inference. The admissions made by the appellant to the authorities regarding his suspicions (see AB 301.45-301.51, 309.30, 322.34) supported a finding that he was aware of a "real chance" that his luggage contained concealed packages, but neither the Court of Criminal Appeal nor the respondent has explained how the jury could properly reason from that finding to a finding that he "meant" to import those concealed packages. The Crown at trial certainly never sought to rely on such an inference, but rather advanced the case that the appellant *knew* there were concealed packages in his luggage.

10. The appellant acknowledges that the jury may not have accepted what the appellant said was his state of mind (and, for that reason, has never contended that the verdict is "unsafe"). The complaint is that the judge's erroneous directions may have led the jury to find that the appellant was guilty on the basis of the admissions he made in his account to the authorities regarding his suspicions, notwithstanding his assertion that he had "absolutely no intent" (see AB 301.52, 316.27). It is for that reason that the order sought is a retrial.

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