IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY No. S249 of 2016

BETWEEN

MALTIMORE SMITH

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S SUBMISSION

Part I – INTERNET PUBLICATION

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

Part II – STATEMENT OF ISSUES

2. Whether the factual inferential reasoning espoused in *Kural v The Queen*[1] (*"Kural"*) is capable of giving rise to an inference of intention under s 5.2(1) of the *Criminal Code* (Cth) 1995 (the "*Code*") as held by *Saengsai v R*[2] and later authority?

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3. Was the direction to the jury in this case in respect to the fault element of intention a misdirection?

Part III – NOTICES UNDER s 78B OF THE JUDICIARY ACT

4. The Respondent considers that no notice is required to be given pursuant to s 78B of the *Judiciary Act 1903 (Cth).*

Part IV – FACTUAL BACKGROUND

5. The facts are accurately, albeit briefly summarised in the judgment of the Court below (at [3] – [5]).

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[1] (1987) 162 CLR 502 at 504 - 505

[2] (2004) 61 NSWLR 135 at [67][69][74] (*"Saengsai-Or"*)

Date of Document: 9 December 2016
Filed on behalf of the Respondent, Commonwealth Director of Public Prosecutions
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6. It was not in dispute that on 29 October 2013, the Appellant, a citizen of the United States of America, arrived in Sydney on a flight from India with luggage in which a number of packages were found to be secreted inside two executive golf sets, two orange containers, a pair of shoes, four boxes of soap each containing 12 soaps, and 16 additional oval shaped hand and foot soaps. The packages secreted inside the preceding items contained 1,945.5 grams of pure methamphetamine.

7. At the airport following the detection of the anomalies in his luggage, the Appellant was asked questions by Customs officers. On 30 October 2013, the Appellant was interviewed by the Australian Federal Police.

8. The Respondent did not give evidence at his trial. His defence, which was based on what he had said to Customs Officers and the Australian Federal Police when interviewed, was that whilst he was aware that the golf sets, shoes, vitamin jars and cakes of soap were in his luggage, he did not know there were packages containing drugs concealed within those items.

9. The issue at trial was whether the Crown had established that the Appellant intended to import the substance in the suitcase. If the jury were so satisfied there could really be no issue as to him being at least reckless that the substance was a border controlled drug.

10. For proof of intention the Crown relied on the inference to be drawn from all facts and circumstances, including actually importing the substance in items in his possession, the circumstances surrounding that importation and the sheer implausibility of the Appellant's version of events. There were also inconsistencies between the version of events he gave to Customs and the Police. The versions given were also inconsistent with documents found in the Appellant's possession.

<u>The Reverend and the Trip to Australia</u>

11. The Appellant told police that he was given an all-expenses paid vacation by a person named Reverend Ukaegbu whom he had never met and who he had only ever had email and telephone contact with for two years.[3] He said that he and the Reverend only ever discussed spiritual and religious matters together.[4]

12. Documents in the Appellant's possession in his briefcase[5] showed however, some kind of financial relationship between the pair. For instance, on the top of the first document it read "*From Rev James Ukaegbu*" and directly under that was details for a Deutsche Bank account and a mobile number which was a contact number for the Reverend. On the second page the words "*Receiver for Rev James Ukaegbu*" were written, along with

[3] ROI Q 58, 65-70, 227
[4] ROI Q 61, 228, 305
[5] Exhibit W1

the Reverend's contact number and then "Nkwoma", a reference to Nigeria, an amount of money, some questions and answers and the word "sender". There were similar entries on the last page of the documents.

13. The Appellant told police that the Reverend offered him the trip and paid for it because of friendship[6] and he said *"...I have some friends in New Delhi in India and others in Australia, you like to go there and meet them and so forth"*[7], so he agreed to go on the trip. He said that there were no conditions attached to the trip and the Reverend told him to just go and enjoy himself as the Appellant had never been to India or Australia.[8] Significantly, the Appellant did not tell police that this was not the initial travel proposal and the trip to Australia had not been included until *after* he was in Delhi. As shown in Exhibits S and T, when the Appellant was first given his travel itinerary on 21 October 2013 he was to travel from New York to Delhi and back to New York. There was never any reference in those documents to travelling to Australia. Rather, the documentation showed the Appellant's hotel reservation at the All is Well Hotel in Delhi where he was to stay for 19 nights from 23 October to 11 November 2013 before returning to New York.[9] When he arrived in Australia the Appellant was in possession of an email outlining his itinerary for his travel to Sydney.[10] This had been sent from Maharani Travel on 26 October 2013, when the Appellant was already in Delhi and outlined travel from Delhi on 28 October and arriving in Sydney on 29 October 2013. The Crown case was that the Appellant did not tell the police of the travel change to avoid telling them what had really happened.[11]

Events in Delhi

14. The Appellant told police that the Reverend said he had friends in Delhi and when the Appellant arrived in Delhi he should call the Reverend and his friends would come and see him. He was never given the names of any of the friends before his departure and he did not have any pre-planned arrangements to meet anyone in particular in Delhi.[12] When he arrived in Delhi, he said he was visited by a person named "John" whose surname he did not know and whose contact details he did not have despite asking him for them nine times.

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[6] ROI Q 166 - 169
[7] ROI Q 71-72
[8] ROI Q 75, 79 - 81
[9] Exhibit T
[10] Exhibit U
[11] TT 148 L1-10, 37-42
[12] ROI Q 58, 72, TT 151 L5-6

15. Despite telling police that he had no plans to meet anyone in particular at the All is Well Hotel in Delhi the Appellant had contact details for a person he was to meet in a handwritten diary in his possession.[13] The diary contained the notations "*All is well hotel*", "*friend*", "*Karan*"[14] and a phone number. In another document titled "Memorandum from the desk of Maltimore Smith",[15] also in the Appellant's possession, were handwritten entries that read "*Central Bank of India*"; "*Name of A/C*"; "*Mr*"; "*Vishay Karan*"; "*Yaday*" and "*phone*"; beneath which was a telephone number that was the same as the number in the handwritten diary as the contact at the All is Well Hotel.[16]

16. Additional documents[17] located with the Appellant also included references to the All is Well Hotel and were indicative of financial dealings; listing two names and sending cash for those people via Western Union. The Appellant did not tell police about any such dealings.

17. The Appellant told police that when it was time to leave Delhi "John" collected him from his hotel, and he believed he was being taken to the airport. When he got to "John's" home, "John" said the Appellant needed to deliver some things to his friend named Vernon in Sydney.[18] "John" opened the Appellant's suitcase and put some items in it[19] at which time the Appellant expressed clear concerns about what was going on and what he was being asked to do. For example: *"So I said, what are those? He said, soap....I then had sick feeling in my stomach when he said those were soap...for the reason that, why would he need to send soap to – to Australia. But I didn't voice my thought to him"*[20]; he said he asked himself *"Have I made a gigantic error? That's what I asked myself, you know. Had my hand on my head and prayed about it, you know. I said, I hope everything is on the up – up – up and up, you know especially when – when I got here this – yesterday evening and with all of those things in my bag*;[21] and: when he asked what the items were *"He said to me soap. Maybe if I had spoken up then... I would've avoided"*;[22] and he observed that the suitcase felt very heavy after the items were placed inside.[23]

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[13] Exhibit O
[14] TT 121
[15] Exhibit M
[16] Exhibit O
[17] Exhibit W2
[18] ROI Q 56, 106 -107, 126
[19] ROI Q 56, 124, 126
[20] ROI Q 56
[21] ROI Q 299
[22] ROI Q 360-362
[23] ROI Q 126

18. When he arrived at Delhi airport to travel to Australia the Appellant said he again asked for "John's" number so he could call him when he arrived, but "John" said the Appellant should call the Reverend who would call Vernon.[24] Whilst the Appellant repeatedly said he had no contact details for Vernon, there were references to the name Vernon at the bottom of the first page of the Appellant's diary[25] with a telephone number and the word "*London*". On the third page of the diary there was a further reference to *"Vernon in England*" with the same or very similar telephone number.

Arrival in Sydney

19. There were clear inconsistencies in what the Appellant told Customs upon his arrival into Sydney and what he later told police in his interview. For example:

(1) He told Customs on arrival he had been in India to visit a friend, whereas to the police he said he was in India for a vacation and someone named "John" just came to see him;[26]

(2) He told Customs that the Reverend did not pay him any money to come to Australia and *"I'll have to pay him back for my trip"*[27], whereas he told police that the trip was a vacation provided to him solely out of "friendship" and the Reverend paid for all the expenses; and

(3) The Appellant was booked to depart Sydney on 1 November 2013, arriving in New York on 2 November 2013[28]. He was booked into a Hotel in Sydney for three days from 29 October to 1 November 2013.[29] However, on his Incoming Passenger Card[30] he wrote that he would be staying in Australia for 10 or 11 days. When asked by Customs about this discrepancy, he told Customs he was staying in Australia for *"a few days."* He later told police he would be staying *"No more than 11 days"*.[31]

20. It was the Crown case that the answers given to Customs were deliberately designed to avoid Customs becoming suspicious about the purpose of his trip to Australia,[32] in particular as to why a holiday would only be for three days.[33]

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[24] ROI Q 168
[25] Exhibit O
[26] TT 15 at L 9-10; ROI Q 75, 79, 83, 90
[27] TT at L11-18
[28] Exhibit U
[29] Exhibit R
[30] Exhibit A
[31] ROI Q 197
[32] TT 147 at L23 – 24, 30 - 31
[33] TT 149 at L40 - 46

Context of the trip

21. As at 21 August 2013 the Appellant owed a debt of $85,998.42 to the US Department of Education.[34] This was owed at a time contemporaneous with his taking the trip. In addition, banking records[35] revealed that the Appellant's financial situation was not strong. It is implausible that the Appellant would not have received any payment for the trip in circumstances where he flew to Delhi, collected packages from a stranger and then took these with him to Sydney where he was to meet another person he did not know.

22. The Appellant was not the type of person to be easily tricked or duped into unknowingly bringing drugs into the country. He told police he worked as a consultant for the finance industry having degrees in finance and development.[36] He was a seasoned traveller[37] and he told police he had previously lived in Asia. Additional documents in his possession[38] indicated involvement in some form of financial dealings, including a letterhead from "Busa Enterprises and Financial Services Inc" which appeared to be the Appellant's financial company where he described himself as having a PhD. In other documents he represented himself as having an MBA and as the CEO of a company.

23. The street value of the imported drugs was over $2 million. It was a commodity of such value that it would not be given to someone, who was unaware it was in his possession, to deliver.

24. On 4 July 2014, the Appellant was found guilty of importing a commercial quantity of a border controlled drug contrary to s 307.1(1) of the *Code*. On 26 September 2014, the Appellant was sentenced to 10 years imprisonment with a non-parole period of 5 years.

25. On 24 September 2015, the Appellant filed a Notice of Appeal against conviction with the Supreme Court of New South Wales, Court of Criminal Appeal. On 20 May 2016, the Appeal was heard by Beazley P and Harrison and R A Hulme, JJ.

26. The appeal against conviction involved one ground, namely that the trial judge misdirected the jury with respect to the fault element of intention in s 307.1(1) *Criminal Code* (Cth). This ground centred on whether the trial judge erred in directing the jury that, in determining the Appellant's intention, they might consider whether he was aware of the likelihood, in the sense that there was a "*significant or real chance*", that the secreted packages were contained in the luggage. The argument concerned the process of inferential reasoning espoused in *Kural* to prove the fault element of intention and

[34] Exhibit W1
[35] Exhibit W2
[36] ROI Q 341 – 348
[37] Exhibits P and Q
[38] Exhibits N, O, V1-V5, W1 and W2

whether this was applicable in a prosecution pursuant to s 307.1(1) *Code* (Cth). The Appellant submitted below that the trial judge should have directed the jury that, for an offence pursuant to s 307.1(1) *Code* (Cth), the Crown needed to prove intention to import the packages and that the direction given was akin to recklessness as to whether the packages were contained within the luggage.

27. The impugned direction of the trial judge is set out in the judgment below at [13] (and see [9] – [12] for the context in which it was given) (cf: AS [6.9]). Briefly, the trial judge directed the jury that in determining whether the Appellant intended or meant to import the secreted packages into Australia they could consider what the Appellant knew or believed about the contents of the luggage. If the Crown had proved the Appellant knew or believed there were extra packages in the luggage they should then consider whether he intended to import these packages.[39] Further, to determine whether the Appellant had the requisite intention, the jury were directed that they might also consider whether the Appellant was aware of the likelihood, in the sense of there being a significant or real chance, that his luggage contained the secreted packages.[40] If they were so satisfied, they should then go on to consider whether they were satisfied that he intended or meant to import those extra packages.

28. The elements of the offence contrary to s 307.1 are:

(1) a person imports a substance (physical element - conduct, fault element - intention)

(2) the substance is a border controlled drug (physical element - circumstance, fault element - recklessness); and

(3) the quantity imported is a commercial quantity (physical element - circumstance, fault element – absolute liability).

Section 5.2(1) provides that a person "*has intention with respect to conduct if he or she means to engage in that conduct*".

The judgment below

29. On 20 May 2016, the Court below dismissed the appeal against conviction. The Court concluded there was no error in the trial judge's direction to the jury in relation to how the fault element of intention could be proved in an offence contrary to s 307.1(1) *Criminal Code* (Cth).

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[39] *Maltimore Smith* (supra) at [77]
[40] *Maltimore Smith* (supra) at [77]

30. The Court held that the direction that the jury "*might also consider*" the Appellant's awareness of the likelihood of secreted packages being in his luggage when determining whether he had the requisite intention to import the concealed packages, made it explicit that this was a path of reasoning from which the relevant intention could be inferred.[41] The jury were directed that a determination by them that the Appellant was aware of the likelihood of the secreted items being in his luggage was not the end of the enquiry. If they determined that the Appellant was aware of the likelihood of the presence of the concealed packages, they were required to go on to consider whether they were satisfied beyond reasonable doubt that the element of intention had been proven – that is, that the Appellant intended to import those packages.[42]

Part V: APPLICABLE STATUTORY PROVISIONS

31. The Appellant's statement of the relevant provisions is correct.

Part VI– SUMMARY OF ARGUMENT

32. The Court below correctly concluded that there was no error in her Honour's directions to the jury in relation to the fault element of intention in respect to importing the substance (the first physical element). The directions were clear that the jury must be satisfied that the Appellant intended to import the substance in question; that the Appellant *meant* to import the substance in question.[43]

33. The Appellant's argument is as follows:

(1) based on this Court's decision in *Zaburoni v The Queen*,[44] intention under s 5.2(1) of the *Code* should be interpreted as requiring proof beyond reasonable doubt that it was the Appellant's purpose or object to import the concealed packages (AS [6.12]);

(2) the directions in this case did not make it clear that the critical issue of fact was whether it was the Appellant's purpose or object to import the concealed packages (AS [6.14]);

(3) the evidence of what the Appellant said to the authorities did not support a finding of intention, at best it would be a finding of recklessness (AS [6.15]);

(4) it was erroneous for the Court below to rely on *Kural* to support the correctness of the direction given in this case (AS [6.16] – [6.23]) – the direction in this case was akin to recklessness (AS [6.15); and

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[41] *Maltimore Smith* (supra) at [82] – [83]
[42] *Maltimore Smith* (supra) at [83]
[43] Section 5.2(1) of the *Code* provides that a person has intention with respect to conduct if he or she means to engage in that conduct.
[44] (2016) 256 CLR 482

(5) it was not open to the Court in this case to take the alternate position, that if there was a misdirection that the proviso would apply (AS [6.25] – [6.27]).

34. The propositions are misconceived; they are not supported by a proper reading of the authorities, the direction given or the evidence at trial.

35. *First,* the inferential reasoning process referred to in *Kural* is capable of giving rise to an inference of intention under the *Code*.

36. *Second,* this Court's decision in *Zaburoni* does not alter the correctness of that proposition.

37. *Third,* the direction given in this case made it clear to the jury that they must be satisfied that the Appellant intended to import the packages, that he meant to do so.

38. *Fourth,* in any event, the Court's conclusion that if, contrary to their view there had been a misdirection, they would have concluded that no substantial miscarriage of justice had occurred, was correct.

39. It is to be observed that the Appellant's submission does not make clear whether he contends that the inferential reasoning referred to in *Kural* is capable of being applied to the fault element of intention under s 5.2(1) of the *Code*.[45] The submission appears to take conflicting positions on this issue.[46] However the Appellant does contend that the *Kural* reasoning equates to *"inferring intention from a state of mind that could be characterised as recklessness"* (AS [6.15]). The submission does not address (or even refer to) the correctness of the decisions which have applied *Kural* to the *Code*, including *Saengsai-Or* and *Cao,*[47] which were relied on by the Court below[48] and which directly addressed and rejected the arguments now advanced. Rather the submission has pointedly ignored those authorities (cf: AS [6.19]).

40. Moreover, the entire submission is based on the factual proposition that the jury accepted what the Appellant said was his state of mind and that, on that basis, the offence could not be proved (AS [5.3] - [5.5]). This is so despite the fact that it has never been contended that the verdict was unsafe, and the orders sought on this appeal are for a retrial. The Crown argued at trial that the Appellant's account to the authorities in that regard was false.

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[45] This is to be contrasted to the written submission filed by the Appellant below which explicitly contends that *Kural* does not apply to the *Code*: submission filed 30 March 2016 at [2] ff

[46] For example, the Appellant's submission at [6.19] – [6.22] appears to imply that the reasoning could never apply. Although the submission at [6.15] appears to accept the reasoning might apply but in very limited circumstances.

[47] (2006) 65 NSWLR 552; 198 FLR 200

[48] *Maltimore Smith* (supra) at [66]

Proof of intention

41. Section 5.2(1) of the *Code* provides that a person "*has intention with respect to conduct if he or she means to engage in that conduct*".

42. This Court in *Kural*[49] considered the issue of how one proves the existence of an intention. While the offence there under consideration was s 233B(1)(b) of the *Customs Act 1901* (Cth), the observations as to proof of intention have general application.

43. The Court correctly recognised that more often intention is "*a matter of inference from what the accused has actually done. The intention may be inferred from the doing of the proscribed act and the circumstances in which it was done.*" The Court relevantly held:

> *"Where, as here, it is necessary to show an intention on the part of the accused to import a narcotic drug, that intent is established if the accused knew or was aware that an article which he intentionally brought into Australia comprised or contained narcotic drugs. But that is not to say that actual knowledge or awareness is an essential element in the guilty mind required for the commission of the offence. It is only to say that knowledge or awareness is relevant to the existence of the necessary intent. Belief, falling short of actual knowledge, that the article comprised or contained narcotic drugs would obviously sustain an inference of intention. So also would proof that the forbidden act was done in circumstances where it appears beyond reasonable doubt that the accused was aware of the likelihood, in the sense that there was a significant or real chance, that his conduct involved that act and nevertheless persisted in that conduct. As a practical matter, the inference of mens rea or a guilty mind will ordinarily be irresistible in cases involving the importation of narcotic drugs if it is proved beyond reasonable doubt that the accused actually imported the drugs and that he was aware, at the time of the alleged commission of the offence, of the likelihood of the existence of the substance in question in what he was importing and of the likelihood that it was a narcotic drug."* [emphasis added]

44. Those comments were made to give guidance to trial judges in formulating appropriate directions in light of the facts and circumstances of a given case, to provide assistance to a jury on proof of intention.[50]

45. This approach was affirmed by this Court in *Saad* and *Pereira v DPP (Cth),*[51] although the Court emphasised that the existence of intention is a question of fact and will, in most cases, be proved by an inference drawn from evidence. As it did in *Kural,* the Court warned against the temptation of transforming a factual matter into a legal proposition.[52]

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[49] *Kural* (supra) at 504-505 per Mason CJ, Deane and Dawson JJ
[50] *Saad* (supra) at 244
[51] (1988) 63 ALJR 1 ("*Pereira*")
[52] *Pereira* (supra) at 3; *Saad* (supra) at 244

46. *Kural* refers to an inferential reasoning process which may, depending on the facts, lead the jury to draw an inference that the accused intended the act alleged. *Kural* does not change the requirement that the element of intention must be proved. Nor does it alter the meaning of intention; that is, in relation to conduct, means to engage in that conduct.

47. This reasoning process has been held to be capable of applying to proof of intention under the *Code*, and to offences under other Commonwealth and State legislation. So much is reflected by the fact that *Kural* was referred to with apparent approval in *Tabe v The Queen*,[53] which involved a prosecution for an offence under the *Drugs Misuse Act* 1986 (Qld).

48. The existence of recklessness as a fault element under the *Code* (and the definition thereof) does not alter the applicability of the observation in *Kural* as to proof of intention. The argument to the contrary, and the argument that *Kural* reasoning is akin to recklessness, were rejected by the NSW Court of Criminal Appeal in both *Saengsai-Or* and *Cao*.[54]

49. In *R v Saengsai-Or* the NSW Court of Criminal Appeal squarely addressed the issue of proof of intention under Chapter 2 of the *Code*. While the offence under consideration was that of importing a prohibited import contrary to s 233B of the *Customs Act,* the elements of that offence were determined by the application of Chapter 2 of the *Code* to that offence provision. The Court concluded that the offence involved only one physical and one fault element; that the offender imported a prohibited import (the physical element of conduct) and that he did so intentionally (the fault element of intention). The Court concluded that a re-direction given to the jury as to the fault element which involved the concept of recklessness was therefore a misdirection.

50. However, Bell J (with whom Wood CJ at CL and Simpson J agreed) concluded that the direction on intention as first framed which was given to the jury (which involved the *Kural* reasoning) was not an error. The Court concluded that:[55]

> *"It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of an admission) the Crown may establish intention by inferential reasoning in the same way as intention may be proved at common law. Intention to import narcotic goods into Australia may be the inference to be drawn from circumstances that include the person's awareness of the likelihood that the thing imported contained narcotic goods."*

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[53] *Tabe v The Queen* (2005) 225 CLR 418 at [10] - [12] per Gleeson CJ, [57] per McHugh J, [101] per Hayne J
[54] (2006) 65 NSWLR 552; 198 FLR 200
[55] *Saengsai-Or* (supra) at [74]

51. The Court also rejected the argument that as Chapter 2 of the *Code* includes recklessness as a fault element for some Commonwealth offences, the reasoning in *Kural* cannot apply to intention as defined under the *Code*. The Court concluded that:[56]

> *"The distinction between proof that an accused person intended to import narcotic goods and proof that he or she was reckless as to the circumstance that the thing imported contained narcotic goods is to my mind a real one. The joint judgment in Kural contains discussion of how the Crown might prove the existence of the intention to import the prohibited imports by a process of inferential reasoning. The inquiry remains one of proof of intention. Their Honours emphasised that their comments were not designed as a direction to be given to juries but rather as guidance for trial judges in formulating directions appropriate to a given case to assist the jury in determining this factual question."* [emphasis added]

52. Similarly, in *Cao*, a case involving an offence of attempting to possess prohibited imports contrary to s 233B(1)(c) of the *Customs Act 1901* (Cth), Howie J (with whom Spigelman CJ and Barr J agreed) considered the application of the *Kural* process of reasoning to offences pursuant to the *Code* and concluded:[57]

> *"In my opinion, the decisions of the High Court to which I have referred [Kural, Saad and Pereira] are still applicable, notwithstanding that this was a prosecution to which the Code applied. They simply set out a process of reasoning that the jury might follow in order to find the mental, or fault, element of the offence proved. That process of reasoning seems to me to be as applicable to proof of intention under the Code as to proof of intention under the Common Law. I have already pointed out that this Court in R v Saengsai-Or accepted that this line of authority was applicable to an offence of importation to which the Code applied. There is no reason in logic or law, that I can see why it should not also apply to a case of possession or attempted possession of imported goods.*
>
> *The fact that the Code defines recklessness in terms of a circumstance as "an awareness of a substantial risk that the circumstance will exist" is not to the point. As was acknowledged in R v Saengsai-Or, proof of intention is more difficult for the prosecution than proof of recklessness. In a case where there is some other inference open from a finding of a belief in the likelihood of drugs being present other than that the accused intended to possess the drugs, the Crown will have to negative that inference beyond reasonable doubt before the jury can convict the accused. The fact that in the usual case there will be no other inference available, does not mean that the process of reasoning should*

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[56] *Saengsai-Or* (supra) at [69]

[57] *Cao* (supra) at [62] An application for special leave to the High Court was refused: *Cao v The Queen* [2015] HCATrans 529

not apply under the Code simply because it may have some superficial similarity to how the Code defines recklessness." [emphasis added]

53. It is clear from *Saengsai-Or* and *Cao* that the Court's conclusion as to the application of *Kural* related to proof of the fault element of intention under the *Code*. Those decisions have been followed in relation to proving intention for offences under the *Code* including[58] in *Luong v DPP (Cth)*[59] and *Weng v The Queen,*[60] which involved offences of attempting to possess border controlled drugs under the *Code*. Regardless of the offence provision, in each of those cases the fault element was intention. In so far as the Victorian Court of Appeal in *Afford v The Queen*[61] decided (by majority) to the contrary, that judgment is incorrect. The Appellant does not rely on the reasoning of the majority in *Afford* to support his argument.

54. As is obvious from the passage cited above, the Court in *Cao* also concluded that the fact that recklessness is a fault element under the *Code* does not alter the correctness of the direction given in this case, or the applicability of the inferential reasoning process referred to in *Kural.* As the Court recognised in *Saengsai-Or*, there is a *"real"* distinction between proving recklessness under the *Code* and proving intention using the reasoning process in *Kural*, as the latter involved a process of *"inferential reasoning"* whereas recklessness required *"moral or value judgment".*[62]

55. While the Appellant relies on observations in the MCCOC Report (AS [6.21]) to support his argument, he has not addressed the correctness of the decisions which have applied *Kural* to the *Code,* which rejected the argument now being propounded. Nor has the Appellant addressed this Court's decision in *Tabe* (cf: [6.20]). Rather, ignoring those decisions and the reasoning contained therein he simply asserts that *Kural* does not apply at all (or does not apply here).

56. The reasons given by the Appellant as to why the Court below ought not to have relied on *Kural* do not withstand scrutiny (AS [6.17] – [6.22]). Those reasons, at the very least imply, that the reasoning referred to in *Kural* involves a conclusion that is something less than intention. It does not; the element that must be proved is that of intention.

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[58] And see for example: *R v Zhang* (2005) 158 A Crim R 504; *R v Kaldor* (2004) 150 A Crim R 277 at [54]; the reasoning in *Kural* has also been applied to proof of intention in relation to State offences: see footnote 52 above
[59] (2013) 236 A Crim R 85 at [61] – [75]
[60] (2013) 236 A Crim R 299 at [59] – [63]
[61] [2016] VSCA 56, (2016) 308 FLR 1
[62] *Saengsai-Or* (supra) at [74]

57. Where intention is the fault element of an offence it is uncontroversial that knowledge or *belief* of the offender may factually be relevant in proving that element,[63] - that knowledge or belief *may* give rise to an inference of intention. In some circumstances that inference is irresistible. *Kural* (and later cases) are no more than a reflection of that inferential reasoning process (in the context of a drug offence). Whether an inference to prove intention can be drawn will depend on the facts in the particular case.

58. As Gleeson CJ observed in *Tabe* (citing *Saad*):[64]

> *"...knowledge, is not limited to knowledge gained from personal observation, or certainty based upon belief in information obtained from a third party, although those states of mind would suffice. The word 'awareness' is sometimes used as a synonym. A belief in the likelihood, 'in the sense that there was a significant or real chance', of the fact to be known, will suffice."*

59. Contrary to the Appellant's contention (AS [6.17]), the Court below was entitled to rely on *Kural* and later authorities. None of the matters relied on by the Appellant (AS [6.18] – [6.22]) assist his argument.

<u>*Zaburoni* does not alter the applicability of *Kural*</u>

60. In *Zaburoni*[65] the Court was considering proof of intention for the offence contrary to s 317(b) of the *Criminal Code* (Qld) in circumstances where the element of the offence to be proved was an intention to produce *a particular result* (that is, an intention to cause grievous bodily harm by the transmission of HIV). The conclusion was in a context where it was argued, and accepted as correct, that knowledge or foresight of a result would be insufficient to prove that intention as to result under that Code. That is why the plurality drew the distinction in relation to the Commonwealth *Code* by referring to s 5.2(3), which does allow intention to be drawn as to result, if the person is aware that the result will occur in the ordinary course of events.[66] The conclusion in that decision cannot simply be transposed to the different fault element of intention as to conduct (not result) under the Commonwealth *Code*.

61. The Court below correctly concluded that *Zaburoni* did not relevantly touch upon the meaning of intention with respect to conduct in s 5.2(1) (at [72]). The Appellant does not address, or challenge, this conclusion.

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[63] *The Queen v Tang* (supra) at [47] – [51] per Gleeson CJ (Gummow, Hayne, Heydon, Crennan and Kiefel JJ agreeing); *Tabe* (supra) at [12]; *The Queen v LK* (2010) 241 CLR 177 at [117]; *Ansari v The Queen* (2010) 241 CLR 299 at [59]

[64] *Tabe v The Queen* (supra) at [10] and see [101]

[65] [2016] HCA 12; (2016) 256 CLR 482

[66] *Zaburoni* (supra) at [17]

62. Intention may be inferred from the doing of the proscribed act and the circumstances in which it was done. The discussion in *Kural* reflected that. It relates to a factual line of reasoning which *may* give rise to an inference of intention and as such is capable of applying in relation to both Commonwealth and State offences.[67] Nothing in *Zaburoni* alters the applicability of that reasoning process to proof of intention in respect to this intention in Chapter 2 of the *Code*.

Directions to the jury

63. Contrary to the Appellant's contention (AS [6.7]) the directions made clear that what the jury must be satisfied about in respect of this element was that the Appellant intended to import the packages, that is, he meant to bring them to Australia.

64. The directions to the jury included that:[68]

(1) the Crown was required to prove that the accused intended to import the packages to Australia (CCA [75]);[69]

(2) this means that the accused meant to bring them into Australia (CCA [75]);[70]

(3) it might be helpful to look at what the accused knew or believed was in his luggage (CCA [76]);[71]

(4) if it was satisfied that the Crown had proved that the accused knew or believed the packages were in his luggage they were to go on and consider whether the accused intended to import those packages – in the sense that he meant that the packages would be imported (CCA [77]);[72] and

(5) that the question was the accused's state of mind and not what a hypothetical person would have known or intended (CCA [78]).[73]

65. After the impugned passage (CCA [79]) the learned trial judge directed that if the jury were satisfied of that state of mind they would need to go on to consider:

> *"whether that was sufficient to satisfy them beyond reasonable doubt he intended to import the extra packages which contained the substance in the sense he meant those packages to be imported"* (CCA [80]).[74]

66. Her Honour also directed the jury that:

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[67] See for example, *Tabe v The Queen* (2005) 255 CLR 418; *DPP Reference No 1* (2005) 12 VR 299, 310 at [28]
[68] Summing Up at pp 11-13
[69] Summing Up at p 11
[70] Summing Up at p. 11, and at p. 12
[71] Summing Up at p. 11 - 12
[72] Summing Up at p. 12
[73] Summing Up at p. 12 - 13
[74] Summing Up at p. 12

> *"a person's intention can be determined by their action, that is, their conduct and also you are able to draw a conclusion about what a person intended from what he says as well both at the time of the alleged offence and after the alleged offence,"*[75]

before again reiterating that the Crown had to prove that the accused intended to import the substance.

67. While the jury were informed that the reasoning process now challenged is one it might consider, as the Court below correctly recognised, it was clearly directed that if they were satisfied of that awareness they still had to go on and determine whether they were satisfied that the Applicant intended to import the substance, that is meant to import the concealed packages.

68. The written directions provided to the jury also made it clear that it was required to be satisfied beyond reasonable doubt that the accused intended, that is, meant to import the packages (CCA [9]).

69. These directions were also in the context where the jury were accurately directed as to circumstantial evidence and the standard of proof. For example, the circumstantial direction included that:

> *"you must be satisfied that the conclusion that the accused is guilty can actually be drawn from the facts which you find proved by the Crown...you must bear in mind that the conclusion that I am discussing with you is not a matter of speculation or a guess. The conclusion must be the result of a rational and logical process of reasoning based on the facts which you have found proved."*[76]

70. That Appellant's argument, based on *Zaburoni*, is that the phrase "*means to engage*" in the conduct, should be interpreted to mean that it was the Appellant's purpose or object to import the concealed packages, and that the jury ought to have been directed accordingly. That direction would not be in the terms of the *Code*. It is to be noted that a person may mean to engage in conduct and be held criminally responsible for an occurrence, even though he or she does not want it to happen.[77]

71. In any event, the jury were clearly and repeatedly directed that it must be satisfied that the Appellant intended to import the extra packages which contained the substance in the sense that he meant those packages to be imported.[78] That direction correctly reflects the element of the offence. There is no requirement or need to give the jury any further direction as to the meaning of the term "meant" or "means" (cf: AS [6.12], [6.14]).

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[75] Summing Up at p. 13 and see the directions on circumstantial evidence: Summing Up at pp. 16-17
[76] Summing Up at p. 16
[77] *Zaburoni* (supra) at [18]; *R v Willmot (No 2)* [1985] 2 Qd R 413 at [418]
[78] Summing Up at p. 12

Proviso

72. The Court below only addressed this issue on the basis that even if the jury had been misdirected, which they were not, this was a case where it would have applied the proviso. That is clearly open in the circumstances of this case.

73. However, given the circumstances in which the Court below considered the proviso, it was unnecessary for them to further articulate their reasoning underlying that conclusion. In any event, if the Respondent's submission is accepted, whether the Court's reasons as to the proviso should have been more fulsome is of no moment.

74. This aspect of the argument only arises for consideration if, contrary to the Respondent's submission, this Court concluded that there had been an error in the direction given. In those circumstances the Respondent contends the proviso should be applied, no substantial miscarriage of justice occurred.

Part VII: NOTICE OF CONTENTION OR CROSS APPEAL

75. Not applicable.

Part VIII: TIME ESTIMATE

76. The Respondent estimates that the oral argument will take approximately 1-2 hours.

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