IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B 48 of 2017

BETWEEN:

MICHAEL JAMES IRWIN

Appellant

and

10

THE QUEEN

Respondent

APPELLANT'S REPLY

Part I:

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

Part II:

20 1. This reply addresses three submissions made by the Respondent:

a. That McMurdo P was not purporting to apply the s 23(1)(b) test in paragraph [51] of the judgment;

b. That, in any event, McMurdo P applied the correct legal test in its use of the word "could"; and

c. That no error of fact was made in respect of the effect of the medical evidence.

30 2. The Appellant otherwise relies on his primary submissions.

The Court of Appeal did apply the wrong statutory test

3. The Respondent fails to grapple with the significance of the actual words of the statute. Putting matters shortly, "would" does not mean "could".

4. This Court has consistently deprecated the substitution of paraphrases for the words of a statute:

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> "As the Court said in *Fleming v The Queen*, "[t]he fundamental point is that close attention must be paid to the language" of the relevant provision because "[t]here is no substitute for giving attention to the precise terms" in which that provision is expressed. Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text. These paraphrases do not, and cannot, stand in the place of the words used in the statute." [1]

5. Nothing in the judgment suggests that McMurdo P applied a test other than that which her Honour unambiguously said that she applied in the two formulations at [51].

6. This was a plain error which is not explained by the respondent's contention at [6]-[11] that McMurdo P was not attempting to state the test set by section s 23(1)(b).

7. The task that her Honour was engaged in at paragraph [51] was precisely the application of the s 23(1)(b) test because the court's function was to decide whether the verdict was unreasonable. It could not do that without applying the test on s 23(1)(b) to the facts as found. Given that McMurdo P used – save for the error – the words of the section almost verbatim it can only be concluded that her Honour was purporting to apply the section.

8. Separately, the Respondent contends at [14]-[23] that the use of "could" was correct in law (or possibly – at least – not incorrect). This proposition is flawed for the reasons advanced in the Appellant's primary submissions.

9. The Respondent analyses authorities that pre-date the current wording of s 23(1)(b). It is trite that the exercise of statutory construction must start and end with the text of the provision. In the absence of any genuine question as to whether "would" can mean "could" (it cannot) there is no need for recourse to earlier judgments construing a differently worded provision. This is so notwithstanding the note to the section indicating that it is Parliament's intention not to change the law.

10. The following analysis should not be taken as a concession that there is utility in the review of these cases. However, it demonstrates the problems with the Respondent's submission that the form of words used in paragraph [51] of the judgment is correct in law.

11. In *R v Van Den Bemd*[2] the test under the former wording of s 23(1)(b) expressed the test using *could*. Special leave was refused in *The Queen v Van Den Bemd*.[3]

12. In the later decision in *R v Taiters; ex parte Attorney-General (Qld)*[4] the Court of Appeal cited with approval earlier authority from this Court which confirms the use of

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[1] *Baini v The Queen* (2012) 246 CLR 469 at 476 [14].
[2] [1995] 1 Qd R 401, at 405 (*"R v Van Den Bemd"*).
[3] *The Queen v Van Den Bemd* (1994) 179 CLR 137 (*"The Queen v Van Den Bemd"*).
[4] [1997] 1 Qd R 333 (*"Taiters"*).

"would".[5] The Court of Appeal took the opportunity to formulate an appropriate positive form of direction.[6] That is, the Court expressed the test without the use of double negatives used in *R v Van Den Bemd.*[7]

13. In any event, any ambiguity in the authorities is resolved by the plain words of s 23.

14. Subsequent cases have consistently adopted the words of the section put as a positive proposition.

15. Holmes JA (as her Honour then was) observed in *R v Hung*[8] that "the effect of the amendment[9] is simply to reflect the common-law test of accident in *R v Taiters; ex parte Attorney-General.*" Moreover, it was said in *R v Trieu*[10] by de Jersey CJ, with whom McMurdo P and Fryberg J agreed, that:

> "The question to be addressed under s 23 is would an ordinary person in the position of the appellant reasonably have foreseen the suffering of this grievous bodily harm (the "event") as a possible outcome of the circumstances briefly summarized in the last paragraph – that is, something which could happen, excluding remote or speculative possibilities. See *R v Van Den Bemd* [1995] 1 Qd R 401, 404; (1994) 179 CLR 137; *R v Taiters* [1997] 1 Qd R 333, 338; *Stevens v R* (2005) 227 CLR 319, 368. The answer would necessarily have been "yes", so that s 23 did not arise."

16. Separately, in *R v Reid*,[11] McPherson JA said, albeit in dissent but on a different issue that:

> "So far as this Court is concerned the meaning of that phrase has been authoritatively settled by the decision in *R v Taiters, ex p Attorney-General* [1997] 1 Qd R 333, following and applying *Kaporonovski v The Queen* (1973) 133 CLR 209 and *R v Van Den Bemd* (1994) 179 CLR 137, affirming [1995] 1 Qd R 401. It is that, stating it at its lowest level, an ordinary person in the position of the accused "would have foreseen the event as a possible outcome".

The Court of Appeal erred in finding that the medical evidence permitted the conclusion that the push to the complainant was with a "considerable degree of force"

17. The Respondent's submissions at [27]-[29] continue the error made by the Court of Appeal.

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[5] *Taiters*, at 335, 337-338, approving *Kaporonoviski v The Queen* (1973) 133 CLR 209, at 231 per Gibbs J (as his Honour then was), with whom Stephens J agreed ("*Kaporonovski*").
[6] *Taiters*, at 336.
[7] Taiters, at 337-338.
[8] [2013] 2 Qd R 64 at 68 [7], with whom Muir JA and Daubney J agreed.
[9] The section was amended, with effect from 4 April 2011, by s 4 of the *Criminal Code and Other Legislation Amendment Act 2011*.
[10] [2008] QCA 28 at [32].
[11] [2007] 1 Qd R 64 at 73 [16].

18. The "additional energy" raised by the respondent at [28] is explained by the accelerated fall i.e. "moving or stumbling backwards". It does not, as the Respondent submits, say anything about the force from the push. The push only needed to be sufficient to induce a fall following a "moving or stumbling backwards".

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