IN THE HIGH COURT OF AUSTRALIA

BRISBANE OFFICE OF THE REGISTRY

No. B69 of 2015

BETWEEN:

GODFREY ZABURONI
(Appellant)

and

THE QUEEN
(Respondent)

# RESPONDENT'S SUBMISSIONS

## Part I: Internet Publication

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

## Part II: Issues on the Appeal

2.1 The appellant pleaded guilty before the jury at the commencement of the trial to the alternative offence of having caused grievous bodily harm to the complainant, arising from him transmitting HIV to her. The Crown proceeded against him alleging an offence pursuant to Section 317 *Criminal Code* (Qld). The sole additional element which the Crown was required to satisfy the jury of beyond reasonable doubt was that that the transmission of the HIV had occurred with intent to transmit HIV to the complainant.

2.2 The issue for determination on this Appeal is whether the Court of Appeal (by majority) erred in finding that there was sufficient evidence on which it was open to the jury to be satisfied beyond a reasonable doubt of the element of intent.

## Part III: Notice of Constitutional Matter

3.1 The respondent has considered whether notice should be given in compliance with section 78B of the *Judiciary Act 1903(Cth)*, and has concluded is it not necessary.



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**Part IV: Factual Matters**

4.1 The factual summary in Part 5 of the appellant's Submissions is accepted to be accurate, with the following further matters noted:

i) Further to paragraph [6], the appellant was prescribed antiretroviral medication in addition to being advised to start it.[1] He did not in fact take the medication;[2]

ii) Further to paragraph [8], the complainant gave evidence that she and the appellant had sexual intercourse at a frequency of two to three times a week.[3] The complainant stated that it became more common for the appellant and the complainant to have unprotected sexual intercourse as the relationship continued;[4]

iii) Further to paragraph [9], the appellant and the complainant commenced cohabitating after the complainant first started to experience symptoms of ill-health. The complainant had further bouts of ill-health, including vomiting and diahorrea, at times while they were cohabitating. The appellant did not disclose his HIV positive diagnosis;[5]

iv) Further to paragraph [14] when interviewed by police on 24 May 2010, the appellant told police that he had taken a blood test in April 2005, which had yielded a negative result for HIV. On 26 May 2010 he admitted that he had submitted a blood sample of his friend for the test,[6] and not his own blood;[7]

v) In September 2009, after admitting his diagnosis to the complainant, the appellant attended to see a medical practitioner and requested he be tested for STDs. He did not disclose his previous diagnosis. When ultimately advised that the results indicated that he was HIV positive, the appellant falsely represented that he was not previously aware that he was HIV positive.[8]

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[1] At QCA [6] per Gotterson JA, and [52] per Morrison JA: AB287 and AB297, respectively.
[2] At QCA [42] per Gotterson JA, and [67] per Morrison JA: AB295 and AB299, respectively.
[3] Evidence of the complainant at AB38.55 to AB39.
[4] At QCA [8] per Gotterson JA: AB288. See also the complainant's evidence at AB39.46-49.
[5] At QCA [10] per Gotterson JA: AB288.
[6] The test was required by the Department of Immigration.
[7] At QCA [13] per Gotterson JA, and [54] per Morrison JA: AB289 and AB297, respectively. The circumstances of the blood test are referred to by the appellant at [57] of the appellant's outline.
[8] Exhibit 2, Admissions 22, 27, 28, 33: AB82-84. See also Transcript of Proceedings at AB33.21 to AB34.20.

## Part V: Applicable Statutory Provisions

5.1 *Criminal Code (Qld)*, Section 23(3) is also applicable.

## Part VI: Respondent's Argument

*Intention/Recklessness (Ground 1(i))*

6.1 The respondent accepts that proof of the offence required proof of actual intent. The respondent does not submit knowledge or foresight of outcome, whether possible, probable or certain can be substituted for proof of actual intent in a prosecution of a charge in which a specific intent is an element under the Queensland *Criminal Code*.

6.2 Proof that an offender possessed knowledge of certainty or near certainty of outcome will almost always be highly compelling evidence on its own from which intent may be inferred, and may be so compelling that the distinction between it being evidence from which intent can be inferred and evidence of the intent itself is negligible.[9] Nonetheless it is submitted that the better approach is to view it as evidence from which intent can be inferred.[10] So too then, evidence that an offender possessed knowledge of a possible or probable outcome is evidence from which a specific intent can be inferred. Whether that inference should be drawn will depend upon what evidence is accepted by the jury and whether the cumulative effect of that evidence, in the individual circumstances of the case, satisfies them beyond reasonable doubt that the prosecution has satisfied them of that element of the charge.

6.3 Evidence of repetition of the relevant act or conduct, in the context of the offender's awareness, the protracted period over which such conduct was engaged in, and the frequency of repetition of that act and conduct, are matters of relevance to a jury's assessment of subjective intent. Each are one of possibly many factors that may be relevant to a factual determination of intent, rather than a legal test for intent, in any particular case.

6.4 The issues on this appeal are to be determined with reference to the meaning of "intent" and how it can be proven in the context of prosecutions under the *Criminal Code (Qld)* and not in the context of the common law or *Criminal Code (Cth)*. The appellant's submissions on the development of the body of jurisprudence in Australia and overseas concerning knowledge or foresight of the consequences of one's actions are concerned with concepts, including that of "reckless indifference",

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[9] *R v Willmot (No 2)* [1985] 2 Qd R 413 at 418.

[10] *R v Hughes* (1994) 76 A Crim R 177 per Davies JA at 182 and Cullinane JA at 185, (referring to *Willmot (No 2)* ). *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 570 per Brennan J; *R v Reid* [2007] 1 Qd R 64 per Keane JA at [66] - [70] and per Chesterman JA at [111]; *R v Moloney* [1985] AC 905; *R v Matthews & Alleyne* [2003] 2 Cr App R 30.

which have no application to offences containing an element of specific intent under the *Criminal Code (Qld)*.

6.5 Reference to them helps to illustrate the difference between what is required in proof of an offence of specific intent under the *Criminal Code (Qld)* and at common law or under the *Criminal Code (Cth)*. It is otherwise unhelpful to consider them in the context of the codified offence found at section 317 of the *Criminal Code (Qld)* in the present matter. As was observed by Keane JA, as he then was, in *R v Reid* [2007] 1 Qd R 64 at [67], "*the language of the Criminal Code and in particular s.317(b), obviates the need for any elaboration of the meaning of intent, in the Criminal Code, by reference to common law concepts of foreseeability*". As much appears to be accepted by the appellant.[11]

6.6 The legal principles relating to the mental element of intent under the *Criminal Code (Qld)* are well established. All members of the Court of Appeal approached the issue on the correct footing – that an actual and contemporaneous intent was required to be proven, and the reasonableness of the verdict was assessed against those principles. The difference between the majority on the one hand and Applegarth J in dissent related to the differing assessment of the reasonableness of the jury's verdict given the evidence presented at trial.

*The reasoning of Gotterson JA*

6.7 The ground of appeal before the Court of Appeal, was that "the verdict was unreasonable or contrary to the evidence." The relevant principles for determining whether a verdict is unreasonable are well established.[12] As his Honour correctly identified at QCA [39][13], the enquiry for the court was whether upon the whole of the evidence it was open to the jury to be satisfied beyond a reasonable doubt of the guilt of the appellant. The reasoning of his Honour is consistent with this approach.

6.8 In light of that test, the appellant's complaint at [40] of his submissions that Gotterson JA failed to make a finding of his satisfaction beyond reasonable doubt is, with respect, not to the point.

6.9 His Honour's finding that it was open to the jury to convict is found at QCA [46][14]. The phraseology adopted therein is set against the background of the issue before the Court of Appeal given the manner it was argued, as noted at QCA [40][15]. It is a finding that it was open to the jury to be satisfied that the appellant held the requisite intent and is fashioned by the issues and the manner in which the argument was conducted before the Court of Appeal.

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[11] This passage is cited at [43] of the appellant's outline of submissions.

[12] *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 493, 494-495; *SKA v The Queen* (2011) 243 CLR 400 per French CJ, Gummow and Kiefel JJ at [11], [12].

[13] AB295.

[14] AB296.

[15] AB295.

6.10 The finding at QCA [46] is described by the appellant at [19] as the "critical passage" of Gotterson JA's judgment. It is set against the earlier finding that the appellant had an appreciation (not more specifically qualified or quantified than that general terminology) that *"his disease was infectious and transmissible through unprotected sexual activity"* (QCA [43]:AB295) and that the issue for the jury was whether *"the conduct of the appellant which resulted in the transmission of the disease was informed by an intent to transmit it"*.[16] (QCA [45]:AB295)

6.11 The finding at QCA [46] contains three factors; namely the appreciation of risk of transmission, the frequency of unprotected intercourse and the period of time over which that occurred. That is, the finding was based on more than the awareness of risk of transmission.[17]

6.12 Even if those three factors were all that were involved in the finding, and it is not conceded that they were, it is a sufficient basis for jury to apply their collective commonsense and experience to consider whether the element of intent had been proven beyond reasonable doubt. There would have been insufficient evidence to found the inference if the appellant did not have the appreciation (which finding has not been taken issue with by the appellant in the contest of whether it was open to the jury to make that finding). A single episode of unprotected intercourse would also not, without more, have been sufficient as probably would have been repeated conduct over a short period of time, especially if there was evidence that the appellant had desisted from the conduct entirely of his own volition. But the combination of all three factors, in the circumstances of this matter, meant that it was an inference which was open to the jury to properly draw.

6.13 It is a fact of human dynamics and experience that the more often something is done which is dangerous to human health, particularly of another, the more readily it can be inferred that the potential outcome is intended. Whether or not it is inferred is a matter for the collective experience of the jury. As was observed by Brennan J in *Chamberlain v The Queen* (1984) 153 CLR 521 at 599:

> *"[t]he drawing of an inference is not a matter of evidence: It is solely a function of the jury's critical judgment of men and affairs, their experience and reason".*

6.14 In *Doney v The Queen* (1990) 171 CLR 207, at 214 the Court stated:

> *"It is usual not to so categorize the inferences involved in the acceptance of direct or testimonial evidence and to treat the process of inference as confined to circumstantial evidence. But it is appropriate here to draw attention to the fact that the drawing of inferences extends beyond circumstantial evidence because the purpose and the genius of the jury*

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[16] Citing Keane JA in *R v Reid* at [57].
[17] *cf* [27] appellant's submissions.

*system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters."*

6.15 Correctly understood, there is no error in his Honour's reasoning at QCA [46]. The finding that it was open to the jury to draw the inference must be assessed in light of the acceptance that the jury were entitled to apply their collective experience in determining whether they were unanimously satisfied that the subject intention was held.

6.16 While an appellant court "*must consider the evidence in order to determine whether it was open to the jury to convict... the appellate court does not substitute its assessment to the significance and weight of the evidence for the assessment which the jury, appreciating its function, was entitled to make.*"[18]

6.17 The phraseology of his Honour at QCA [46] is consistent with having recognised these principles. It was not to import an objective test for intention as contended by the appellant at [59]. Rather his Honour was referring to the objective assessment of the jury of the appellant's conduct in determining his subjective intention.

6.18 It follows from that which has thus far been written that the respondent does not accept the appellant's submission at [20] and [21] that Gotterson JA conflated concepts of knowledge or awareness with that of intent, nor the submission at [27] that whether an inference of intent should be drawn in any given case depends on the level of the awareness.

6.19 The submission at [28] that in addition to evidence of awareness to a very high degree, evidence of purpose (i.e. motive) would be required before the inference could be properly drawn is also not accepted. Evidence of motive is irrelevant as a matter of law – see section 29(3) *Criminal Code (Qld).* Concepts of purpose or motive cannot be confused with an inference of intent. That is not to deny the utility of evidence of motive when it can be shown to be an operative factor,[19] but the proposition expressed as widely as it is by the appellant cannot be accepted. There may well be a motive without there being any evidence of one. It may be that, to adopt the observation of McPherson JA in *R v Reid*, "*it is not unknown for some individuals to derive satisfaction from knowing that others are being reduced to their level of unhappiness*".[20]

6.20 Further, in that respect, the appellant's submissions that unprotected sex occurred only because it was more pleasurable are derived from his recorded interviews with

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[18] See *Carr v The Queen* (1988) 165 CLR 314 at 331 per Brennan J, cited in *Knight v The Queen* (1992) 175 CLR 495 per Brennan and Gaudron JJ at [14].

[19] Observations about the use of, and limitations of, evidence of motive are found in the judgments in *de Gruchy v The Queen* (2002) 211 CLR 85, reproduced by Keane JA in *R v Reid* at [76]-[77].

[20] *R v Reid* at 72, [11].

police. It was a matter for the jury whether they accepted that or not, and it was open on the evidence to reject it.

6.21 It has been earlier submitted that Gotterson JA's finding at [46] was not limited to the three factors earlier referred to in these submissions. There were three categories of lies that were left to the jury as being capable of revealing a consciousness of guilt to the charged offence.[21] The lies were left as being capable of evidencing a consciousness of guilt, and if found to be so were part of the circumstantial case going to the proof of intent. Whether one or more of the lies relied upon by the prosecution was evidence from which a consciousness of guilt might be drawn, is not a matter to be considered in isolation, but in light of the totality of the circumstantial evidence in the case.[22]

6.22 Despite some submissions in this Court by the appellant suggesting that they could not be so used, there is no ground of appeal concerning the leaving of them and no complaint about the contents of the directions, either here or in the Court of Appeal. Specifically it is notable that they were not left for some limited purpose. Applegarth J at QCA [81] and [82][23] accepted that the lies to police minimizing the frequency of unprotected sex was capable of being used in assessing the issue of intent, although his Honour considered that the lies were not necessarily explained by a consciousness of guilt of the charged offence. Whilst the respondent does not accept the ultimate conclusion of Applegarth J as being correct, he was right to recognize that the lies were capable of going to the proof of intent. In that respect the respondent relies upon the argument put before the Court of Appeal. (T1-5.36-.44; 1-9.17-.28).

6.23 As with other forms of circumstantial evidence, said to be indicative of guilt, the jury were entitled to accept and act upon the evidence of lies and other post-offence conduct, as being relevant to the issue of the appellant's subjective intent, without being satisfied that the evidence itself proves guilt. That is to say it is not necessary that the jury be satisfied that there is no other explanation for the lies and conduct reasonably open on the facts, in order for the facts to be left to and properly considered by the jury as part of its circumstantial case. [24]

6.24 The respondent does not accept the appellant's assertion at [56] of his submissions that Gotterson JA did not use the lies told by appellant as evidence open to the jury to be used as consciousness of guilt of the charged offence. It is accepted that at QCA [43][25] Gotterson JA used two of the three categories of lies as going to proof of the appreciation of risk of transmission that the appellant held, but that did not

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[21] The jury directions are at AB252 to AB254 and AB257 to AB259. See also QCA [23] and [24] at AB292.
[22] *R v Ciantar* (2006) 16 VR 26 at [40], [67]–[72].
[23] AB302.
[24] *R v Ciantar* (2006) 16 VR 26 at [45].
[25] AB295.

necessarily exhaust the use to be made of them. He had at QCA [39][26] recognized a need to consider the whole of the evidence in assessing the reasonableness of the verdict and at QCA [48][27] again referred to the jury directions as to the use to be made of the lies as evidence of consciousness of guilt.

6.25 The appellant's submissions at [49] are accepted in the so far as the last sentence is concerned. If the jury were satisfied beyond reasonable doubt that the appellant held the requisite intent, the possibility of the appellant acting recklessly, or with some other state of knowledge or awareness, was necessarily excluded. The two states of mind cannot co-exist.

10 6.26 Thus the jury direction that referred to "two equally competing hypotheses"[28] was erroneous. But it is submitted that it was an error that favoured the appellant in that it suggested that the two states of mind could co-exist, and if the jury considered it possible they did, then they should acquit. Further, the terms of the direction appear to have been found in the terms of the submission made to the jury by defence Counsel at trial. (See AB263 where Counsel is quoted[29] as twice using the term in his address to the jury). Further trial defence Counsel disavowed[30] any need for a re-direction on the use of the term.

*The reasoning of Morrison JA*

20 6.27 Morrison JA agreed with the reasons of Gotterson JA. He supplemented those reasons with some further observations about the evidence and concluded for the following reasons it was open to the jury to conclude that the appellant had the requisite intent:

i) There was no doubt that it was the appellant who infected the complainant.[31]

ii) That the complainant became infected with HIV was a natural consequence of the appellant's deception.[32]

iii) The evidence of the advice that the appellant had received as to the risk of transmission, and the considerable efforts the appellant had gone to, to keep
30 his condition a secret, meant that it was open to the jury to conclude that the applicant well understood that by engaging in unprotected sex with the complainant he was deliberately putting the complainant at risk of being

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[26] AB295.
[27] AB296.
[28] AB248.1
[29] At lines 12 to 21.
[30] AB265.12.
[31] At QCA [61]: AB298.
[32] At QCA [63]: AB298.

infected by the virus, and that he was likely to infect the complainant with HIV.[33]

iv) The jury were entitled to conclude that the appellant intended to ensure that he complainant was unaware to the risk to which the appellant was exposing her.[34]

6.28 Further on the issue of intent his Honour identified at QCA [67]-[68][35] a number of factors which could reasonably permit an inference of the intent being actually held. These included the appellant's failure to take medication as prescribed, and monitor his own condition, and that he nonetheless knowing the danger of transmission, failed to take preventative steps during the sexual intercourse he engaged in with the complainant, or forewarn the complainant of the need for her to so protect herself. As concerns the understanding of the level of that risk, his Honour saw as significant the statement that the appellant had made that he "*didn't want to ruin her life*" by way of his explanation of why he had not disclosed his HIV status to the complainant. This statement his Honour saw to be equivalent to the comment by *Reid* that he felt "*like I am carrying a loaded gun with me*".[36] Those factors were additional to the period of and frequency of the unprotected sexual intercourse.

6.29 It is submitted that the features of the appellant's conduct identified by Morrison JA were indicative of a degree of callousness and a lack of compassion on the part of the appellant towards the complainant, which was in itself relevant to an assessment of the appellant's state of mind and whether he held the requisite intent.

6.30 The reasons of Morrison JA do not reveal any dissatisfaction with the basis of the conclusions reached by Gotterson JA. However they do serve to further demonstrate that in terms of the sufficiency of evidence, there was no identifiable miscarriage of justice in this case.

6.31 The conclusion that there has been no miscarriage of justice occasioned by the manner of consideration by Gotterson JA is strengthened if this Court has regard to the contested evidence, but evidence that it was nonetheless open to accept, that the appellant had told the complainant that his brother had died of HIV AIDS.[37]

*Temporal Concurrence (Ground 1(ii))*

6.32 The manner in which the prosecution case was framed meant that the prosecution did not allege any one specific act of intercourse was the means by which the

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[33] At QCA [62]: AB298.
[34] At QCA [64]: AB298.
[35] AB299.
[36] *R v Reid* [2006] QCA 202 at [11], referred to by Morrison JA at [66] and [67].
[37] Evidence of the complainant at AB41.46-57.

disease was transmitted. In that sense there were marked similarities between the present matter and that in *R v Reid* [2007] 1 Qd R 71.

6.33 As Keane JA stated in *R v Reid* at [57]:

> *"The relevant offence consists of transmitting the disease with intent to do so. Thus, the issue was not what the appellant's intent was at the time of any particular act of sexual intercourse, but whether it can be said that the conduct of the appellant which resulted in the transmission of the disease was informed by the necessary intent".*

6.34 The jury were directed consistent with that observation[38] and the Court of Appeal also proceeded on that basis.[39] The directions were consistent with the manner in which the trial was conducted. No issue was taken with that direction at trial nor in the Court of Appeal. The issue was more concerned with the point in time at which the appellant could be proven to hold the requisite intent.

6.35 The appellant's contentions[40] to the effect that the reasoning of Gotterson JA meant that the most that could be said was that at the commencement of the sexual relationship the appellant acted recklessly are not, for the reasons earlier expressed, accepted. Nor then, can it be accepted that Gotterson and Morrison JJA effectively backdated the time from which the intent was held.[41]

6.36 From the time that unprotected intercourse commenced until the cessation of the relationship there was no material change in the relationship between the complainant and the appellant ascertainable from the evidence. There was no event or events from which a new found malice from the appellant to the complainant could be attributed. Nor was there any material change in the level of awareness of the appellant of the risk of transmission from his conduct. It was open to the jury to conclude that the appellant's intention was the same at the time of the first act of intercourse as at the last – see the reasoning of Keane JA in *R v Reid* at [56].

6.37 The longer the period of repetition of the conduct the more readily the jury may be able to infer subjective intent. However that should not be confused with a proposition that it is only open to the jury to find that the appellant in fact held that intent after some imprecise point in time within that period of conduct, determined as a point of sufficient repetition in order for the jury to be satisfied of the element of intent beyond a reasonable doubt.

6.38 The point was addressed by Gotterson JA at QCA [47][42] and Morrison JA separately at QCA [69].[43] Each adopted the reasoning of Keane JA in *Reid* at [56].

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[38] AB251.31.
[39] QCA [47] per Gotterson JA, AB296, Morrison JA agreeing
[40] See [62]-[63] in particular of the written submissions.
[41] See [65] of the written submissions.
[42] AB296.
[43] AB299.

Applegarth J, although in dissent on the issue of whether possession of the requisite intent had been proven, appears to have accepted that this was a legitimate approach if it had been proven.[44]

*Orders sought*

6.39 The appeal should be dismissed.

6.40 Alternatively, the matter should be remitted to the Court of Appeal, Supreme Court of Queensland to be dealt with according to law.

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**Part VII: Oral Submissions**

It is estimated that the presentation of the Respondent's oral submissions at the hearing will be of approximately 45 minutes duration.

Dated: 15 January 2016

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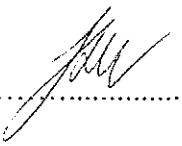

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[44] QCA [100] and [101]: AB306.