IN THE HIGH COURT OF AUSTRALIA

MELBOURNE OFFICE OF THE REGISTRY No. M144 of 2016

BETWEEN

THE QUEEN

Appellant

And

STEVEN LAKAMU SIOSIUA AFFORD

Respondent

APPELLANT'S REPLY

Part I – INTERNET PUBLICATION

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

Part II – FACTUAL ISSUES IN CONTENTION

1. While the Respondent asserts that the Appellant's summary of evidence is "*not without error*" (RS [4.1]), he has not identified any such error.

2. The Respondent adopts (RS [4.1]) the facts as summarised in the majority judgment but makes no reference to the more detailed evidence summarised by Maxwell P (at [61] – [76]). That summary refers to evidence not referred to in the majority judgment.

3. In relation to the submission at first instance (RS [4.2] – [4.6]), the position taken by counsel below is detailed in the judgment of Maxwell P (at [41] – [59]). The Respondent took no exception to the formulation of the direction used in the charge (at [57]).

Part III – ARGUMENT

Grounds 1 and 2

4. The Respondent's submission does not address or consider the reasoning in *Kural v The Queen*[1]. Rather it is based on an erroneous interpretation of *R v Saengsai-Or*[2] and following cases. The effect of the submission is to assert that the majority in *Afford* were entitled to distinguish those previous authorities for the reasons they did. However, the Respondent does so without addressing any of the Appellant's submissions as to why

[1] (1987) 162 CLR 502 at 504 - 505 (*"Kural"*)
[2] (2004) 61 NSWLR 135 (*"Saengsai-Or"*)

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that reasoning is incorrect. Nor does the Respondent address or challenge the correctness of the reasoning of Maxwell P (in dissent).

5. *First,* underpinning the Respondent's submission is the erroneous contention that the Court was addressing the true construction of s 307.1 of the *Code* (RS [6.1]). No issue of construction of the provision arose for resolution in the appeal. Nor, not surprisingly, is any issue of construction of the provision referred to in the judgment. The elements of that offence are well established and were not in dispute. Rather, the issue which underlies this ground of appeal was whether proof of the fault element of intention under Chapter 2 of the *Code* could be inferred from the factual reasoning referred to in *Kural.*

10 6. *Second, Kural* does not alter in any way the elements of the offence in s 307.1. The Respondent's submission provides no analysis of the reasoning in *Kural.* It fails to address that the discussion in *Kural,* as recognised by this Court in *Tabe v The Queen,*[3] relates to a factual line of reasoning which may give rise to an inference of intention. As such, although *Kural* related to a Commonwealth offence the reasoning is capable of being equally applicable to State offences.[4]

7. *Third,* nothing in *Zaburoni v The Queen*[5] alters the applicability of that factual reasoning process referred to in *Kural* to proof of intention in Chapter 2 of the *Code.* Contrary to the Respondent's contention (RS [6.12]), *Zaburoni* does not give rise to the conclusion that in this matter it was necessary to prove that the Respondent "*had that result as his*
20 *or her purpose or object*" at the time of engaging in the conduct. The Court in *Zaburoni* 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 the *Criminal Code* (Qld). 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.[6] Indeed, the Respondent's submission (RS
30 [61.2]) is inconsistent with the Commonwealth *Code.* In this case the element of

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[3] (2005) 255 CLR 418 at [12] per Gleeson CJ, [101] per Hayne J (*"Tabe"*)
[4] AS [18]
[5] [2016] HCA 12; 90 ALJR 492 (*"Zaburoni"*)
[6] *Zaburoni* (supra) at [17]

intention is as to conduct not result. The conclusion in *Zaburoni* cannot simply be transposed to the different fault element of intention as to conduct under the *Code*. The Court in *Maltimore Smith v R*[7] correctly concluded that *Zaburoni* did not relevantly touch upon the meaning of intention with respect to conduct in s 5.2(1). The Appellant does not address, or challenge, this conclusion.

8. *Fourth*, the Respondent's reliance (RS [6.3]) on the obiter comments of one McLure P in *Karamitsios v The Queen,*[8] (with which the other judges did not join) in which her Honour raises that the correctness of *Luong v R*[9] may be open to challenge, does not assist his argument. That Court was not called upon to decide the issue now under consideration.[10] The observations were made without any oral or written submissions by the parties on the issue.[11] The Court appears not to have been referred to *Saengsai-Or*, *R v Cao*[12] and other relevant authority. In any event, to suggest that the reasoning applies equally here (RS [6.4]) ignores the nature of the concern raised by her Honour which related to s 11.1(3) of the *Code* (the attempt provision), which has no application in this case.

9. *Fifth*, the Respondent's contention (AS [6.34]) that the Appellant's argument is flawed because *Saengsai-Or* (and *Cao*) involved an element of "*intention to prove importation of narcotic goods not merely to import a substance*" is without foundation. A proper reading of *Saengsai-Or* reflects that it was a considered decision, which addressed amongst other things, the meaning of intention (as to conduct) in Chapter 2 of the *Code*. The submission (RS [6.32] – [6.36]) that *Saengsai-Or* is distinguishable on the basis that while an inference could be drawn that the offender intended to import narcotic goods (one element) an inference could not be drawn that the offender intended to import a substance (one element) is unsustainable (AS [51] – [56]). The Respondent has not addressed any of the Appellant's submission in this regard. Nor has the Respondent explained how, as a matter of logic, the distinction he contends for can exist. The argument also fails to refer to *Maltimore Smith* in which the New South Wales Court of Criminal Appeal rejected the existence of such a distinction.[13]

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[7] [2016] NSWCCA 93 at 84 (*"Maltimore Smith"*)
[8] [2005] WASCA 214
[9] (2013) 236 A Crim R 85 ("*Luong*")
[10] *Karamitsios v The Queen* (supra) at [11][16][94]
[11] *Karamitsios v The Queen* (supra) at [16]
[12] (2006) 65 NSWLR 552 (*"Cao"*)
[13] *Maltimore Smith* (supra) at

10. *Sixth,* it follows that contrary to the Respondent's submission (RS [6.21]), the Appellant is not saying that the authorities, for example *Saengsai-Or* and *Cao* "*inform authoritatively the construction of the offence in s 307.1*". Rather, the Appellant's submission is that the elements of the offence are determined by an application of Chapter 2 of the *Code* to the offence provision.[14] The relevant fault element for the first physical element is intention to import the substance. That element can be proved, and most frequently is proved, by inference. The inferential reasoning referred to in *Kural* is capable of giving rise to that inference.

Ground 3

11. Even if the Respondent had been, to some degree, the victim of a scam that is not inconsistent with his guilt of this offence. The two concepts are not mutually exclusive. He was nevertheless capable of possessing the requisite state of mind to be found guilty of the offence.

12. The Respondent's submission is significant for what it does not address. The Respondent has not addressed the nature of the Crown case (AS [20]); the evidence referred to by the Appellant in support of that case; or the fact that the majority of the Court below did not summarise or analyse any of the evidence when considering this ground of appeal.

13. Moreover, while the Respondent attempts to lessen the significance of the evidence of his doubts about the legitimacy of the trip by asserting they had disappeared once his airfare and accommodation was paid for (RS [6.42]), he does not address the evidence referred to by Maxwell P which clearly dispels that claim (AS [74]) (or at the very least leaves it open to the jury to reject the claim).

14. Primarily the Respondent's submission is based on an assertion that there is support for his belief in the legitimacy of the venture (RS [6.43] – [6.47]) in his diary and exercise book, and in documents and emails. However, that does not address the distinction to be drawn between the Respondent's belief regarding the hotel project and the importation of the suitcase containing the so-called "separation oil" (at [61]). The submission does not refer to the evidence to the contrary. In any event, the emails and the Respondent's answers in his interview with police show that he had doubts both of the legitimacy of the project and the side trip to the Philippines to collect the separation oil (at [77]). As

[14] Section 3.1 of the Code; *The Queen v Tang* (2008) 237 CLR 1 at [46] – [49]

Maxwell, P correctly concluded (at [77]) even if the Respondent was convinced of the legitimacy of the project there is nothing in the evidence to suggest his fears about the legitimacy of the trip to collect the oil were ever allayed (at [78]). Rather, it was open to the jury to be satisfied that the documentation provided strong support for the Crown case.

15. The submission is also based on the factual proposition that the jury accepted what the Respondent told authorities was his state of mind and, on that basis, the offence could not be proved (RS [6.41] - [6.42]). However, the submission does not refer to much of the evidence. For example, even the Respondent in his interview with the police admits that he was given no assurance about the legality of the contents of the bag (at [74]):

> *Q. "...did they give you any assurances as to the contents of the suitcase that [the woman in Manila] gave you didn't contain anything illegal?*
>
> *A. No, sir, no assurance it was just half a billion dollar deal... ".*

16. Further, it is to be remembered that the Respondent did not give evidence. He gave answers to Customs prior to the drugs being located which, even on his own story, are plainly false (AS [21(8)]).[15] For example, that he had packed his own bags, and the only thing he was carrying for anyone else was a gift for his wife, was clearly inconsistent with the version he gave police which was that "Jenna" gave him the suitcase which she said contained the two bottles of oil and some presents.[16] The prosecution did rely on lies (AS [21(8)], cf: RS [6.47]), which were left to the jury on the basis of credit.[17]

17. There was ample evidence from which the jurors were entitled to be satisfied of the fault element of intention. However importantly, as Maxwell P recognised, while a reasonable juror might have a doubt about whether intention had been established there is nothing from a consideration of the evidence which meant the jury must have had a doubt. The verdict is not unsafe.

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Krista Breckweg

[15] TT 53 line 14; 54 line 4
[16] The trial judge directed the jury that lies were relevant to credit: TT 460 - 463
[17] The learned trial judge refused an application by the Crown that they be left as lies told out of a consciousness of guilt: T 288 - 310