HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

GODFREY ZABURONI APPELLANT

AND

THE QUEEN RESPONDENT

Zaburoni v The Queen
[2016] HCA 12
6 April 2016
B69/2015

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 15 April 2014 and, in lieu thereof, allow the appeal to that Court and substitute for the verdict found by the jury a verdict of guilty of unlawfully doing grievous bodily harm to the complainant.*

3. *Remit the proceeding to the District Court of Queensland for sentence.*

On appeal from the Supreme Court of Queensland

Representation

T A Game SC with G E L Huxley for the appellant (instructed by HIV/AIDS Legal Centre)

T A Fuller QC with J A Wooldridge for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Zaburoni v The Queen

Criminal law – Criminal liability – *Criminal Code* (Q), s 317(b) – Intent to cause specific result – Where appellant HIV positive – Where appellant lied to complainant about his HIV status – Where complainant diagnosed with HIV after frequent unprotected sex with appellant – Whether element of intent to cause specific result satisfied – Whether intent could be inferred from frequency of conduct giving rise to risk of specific result – Whether intent proved by evidence of awareness of risk.

Words and phrases – "awareness of risk", "intent", "motive", "proof of intention", "recklessness", "serious disease", "specific intent".

Criminal Code (Q), ss 23, 317(b).

1 KIEFEL, BELL AND KEANE JJ. The appellant was convicted of unlawfully transmitting a serious disease to another with intent to do so following a trial in the District Court of Queensland before Dick DCJ and a jury. The offence is created by s 317(b) of the *Criminal Code* (Q) ("the Code") and carries a maximum penalty of imprisonment for life. The disease that the appellant transmitted to the complainant is the human immunodeficiency virus ("HIV"). It is a serious disease for the purposes of s 317(b)[1].

2 To transmit HIV to another person is to occasion grievous bodily harm to that person[2]. Section 320 of the Code makes it an offence to unlawfully do grievous bodily harm to another and provides a maximum penalty of imprisonment for 14 years for the offence. It is not in issue that a person who knows that he or she has HIV, and who engages in unprotected sexual intercourse without informing the other person of that fact, commits an offence contrary to s 320 in the event that the other person contracts HIV from that sexual contact[3]. In such a case the prosecution is not required to prove that the accused intended to transmit the disease to his or her sexual partner.

3 The indictment presented at the appellant's trial charged him in the alternative with unlawfully doing grievous bodily harm to the complainant pursuant to s 320. The appellant pleaded guilty to this count. The prosecution did not accept the plea in discharge of the indictment and the trial proceeded. The appellant did not give evidence. He made a number of admissions that were consistent with his plea to the alternative count. The sole issue for the jury's determination was proof of the appellant's intention. No complaint is made as to the adequacy of the trial judge's directions on this or any other aspect of criminal liability. The jury returned a verdict of guilty of the principal count, which made it unnecessary to take a verdict on the alternative count. On 18 April 2013, Dick DCJ sentenced the appellant to a term of nine and a half years' imprisonment.

4 The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland (Gotterson and Morrison JJA and Applegarth J), contending, among other grounds, that the verdict was unreasonable or contrary to the evidence. The majority (Gotterson and Morrison JJA) found that it had been open to the jury to be satisfied beyond

---

1 Code, s 1, definition of "serious disease".

2 Code, s 1, definition of "grievous bodily harm".

3 See s 143 of the *Public Health Act* 2005 (Q) and the discussion in *R v Reid* [2007] 1 Qd R 64 at 73-74 [17]-[20] per McPherson JA.

reasonable doubt that the appellant intended to transmit HIV to the complainant, in circumstances in which he had engaged in frequent acts of unprotected sexual intercourse with her knowing that he was HIV positive[4]. Gotterson JA, writing the leading majority reasons, observed that this conduct "defied description as mere recklessness as to the risk of transmission"[5].

5 On 13 November 2015, Kiefel and Bell JJ granted special leave to appeal from the orders of the Court of Appeal. For the reasons to be given, the appeal must be allowed and the orders of the Court of Appeal set aside. In lieu of those orders, a verdict of guilty of the alternative count must be substituted for the verdict of the jury and the proceedings remitted to the District Court to pass sentence for that offence.

Proof of intention

6 As will appear, Applegarth J considered that if the evidence established the appellant's awareness of the probability that his conduct would result in the complainant contracting HIV, the jury's verdict would be unassailable[6]. His Honour dissented in the result because he did not consider the evidence established so much. Nonetheless, his Honour's analysis requires consideration of proof of intention to produce a particular result where it is made an element of liability under the Code[7].

7 The parties are at one in submitting that liability in such a case requires proof of actual intent. The decision of the Court of Criminal Appeal of Queensland in *R v Willmot (No 2)*[8] is cited by each for that proposition.

---

4 *R v Zaburoni* (2014) 239 A Crim R 505 at 515-516 [48] per Gotterson JA (Morrison JA agreeing at 516 [51]).

5 *R v Zaburoni* (2014) 239 A Crim R 505 at 515 [46] (Morrison JA agreeing at 516 [51]).

6 *R v Zaburoni* (2014) 239 A Crim R 505 at 523-524 [90]-[93].

7 Code, s 23(2).

8 [1985] 2 Qd R 413.

8 In *Willmot*, Connolly J explained[9]:

> "The ordinary and natural meaning of the word 'intends' is to mean, to have in mind. Relevant definitions in *The Shorter Oxford English Dictionary* show that what is involved is the directing of the mind, having a purpose or design."

9 His Honour's statement was affirmed by the Court of Appeal in *R v Reid*[10]. Despite the holding that intention requires "directing of the mind, having a purpose or design", Applegarth J's analysis finds support elsewhere in Connolly J's reasons in *Willmot* and in McPherson JA's reasons in *Reid*.

10 In *Willmot*, Connolly J went on to say that if there was direct evidence of the accused's awareness of death or grievous bodily harm as the probable result of his act, the jury might properly be directed that, if they accepted that evidence, it was open to infer from it that the accused intended to kill or to do grievous bodily harm as the case may be[11]. There is an evident tension between this statement and his Honour's earlier embrace of the ordinary meaning of "intent". To engage in conduct knowing that it will probably produce a particular harm is reckless. It is evidence which, taken with other evidence, may support a conclusion that the person intended to produce that harm. Nonetheless, foresight of risk of harm is distinct in law from the intention to produce that harm.

11 In *Reid*, the accused's conviction for a s 317(b) offence was upheld in circumstances in which the inference of intent was based on evidence that the accused entertained malice towards the complainant[12]. The Court of Appeal was divided on the capacity of evidence of awareness of risk to prove intent. Chesterman J said that "the *Code* requires nothing less than proof of intention"[13], rejecting that awareness of the probability that an act will produce a particular result, without more, supports the inference of intent to produce that harm[14]. His Honour explained the content of intent by reference to his earlier analysis in *R v*

---

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

10 [2007] 1 Qd R 64 at 92 [84]-[85] per Keane JA (Chesterman J agreeing at 92 [88]).

11 *R v Willmot (No 2)* [1985] 2 Qd R 413 at 419.

12 [2007] 1 Qd R 64 at 72 [13].

13 *R v Reid* [2007] 1 Qd R 64 at 97 [113].

14 *R v Reid* [2007] 1 Qd R 64 at 96-97 [108]-[112].

Ping that "[t]he prosecution must prove an actual, subjective, intention on the part of the accused to bring about [the particular result] by his conduct."[15]

12 McPherson JA agreed with Chesterman J that the meaning to be ascribed to intent in s 317(b) is that "the accused must be proved to have meant to transmit the disease: his actions must have been designed to bring about that result."[16] However, McPherson JA considered that satisfaction that the accused knew that by having unprotected sex with the complainant, it was probable or likely that the disease would be passed on to him, would establish that intent[17]. His Honour relied on this Court's reasons in *R v Crabbe* for this conclusion[18]. It is to be observed that the analysis in *Crabbe* was of the mental element of the crime of murder under the common law.

13 Keane JA (as his Honour then was) disavowed that common law concepts of foreseeability, likelihood and probability were relevant to proof of the element of intention for the offence created by s 317(b)[19]. That statement should be accepted.

14 Where proof of the intention to produce a particular result is made an element of liability for an offence under the Code, the prosecution is required to establish that the accused meant to produce that result by his or her conduct[20]. As the respondent correctly submits, knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code. In the last-mentioned respect, the Code is distinguished from its Commonwealth counterpart, which allows that a person has intention with respect to a result if the person is aware that the result will occur in the ordinary course of events[21].

---

15 *R v Reid* [2007] 1 Qd R 64 at 93 [93] citing [2006] 2 Qd R 69 at 76 [27].

16 *R v Reid* [2007] 1 Qd R 64 at 71 [10].

17 *R v Reid* [2007] 1 Qd R 64 at 72 [13].

18 *R v Reid* [2007] 1 Qd R 64 at 71 [10] citing (1985) 156 CLR 464; [1985] HCA 22.

19 *R v Reid* [2007] 1 Qd R 64 at 83 [67].

20 *Knight v The Queen* (1992) 175 CLR 495 at 502-503 per Mason CJ, Dawson and Toohey JJ; [1992] HCA 56; *Cutter v The Queen* (1997) 71 ALJR 638 at 647 per Kirby J; 143 ALR 498 at 509-510; [1997] HCA 7.

21 *Criminal Code* (Cth), s 5.2(3).

15 Where the accused is aware that, save for some supervening event, his or her conduct will certainly produce a particular result, the inference that the accused intended, by engaging in that conduct, to produce that particular result is compelling. Nonetheless, foresight that conduct will produce a particular result as a "virtual certainty"[22] is of evidential significance and under the Code it remains that the trier of fact must be satisfied that the accused meant to produce the particular result[23].

16 It is necessary to say something in this context about the concepts of purpose, desire and motive. Discussions of proof of intention sometimes equate desire with motive[24]. The respondent's submissions treat motive and purpose as synonyms. This is in aid of the submission that motive is irrelevant to criminal responsibility under the Code[25].

17 In ordinary parlance, purpose, desire and motive may be used interchangeably. However, in law motive describes the reason that prompts the formation of the accused's intention[26]. The accused may fire a pistol at his business partner. His intention or purpose in pulling the trigger may be to kill. His motive for forming that intention may be to avoid repaying a debt he owes to his partner. Where liability for an offence requires proof of the intention to produce a particular result, the prosecution must establish that the accused had that result as his or her purpose or object at the time of engaging in the conduct. Purpose here is not to be equated with motive.

18 In *Willmot*, Connolly J observed that the notion of desire is not involved in proof of intention[27]. It is true that in law a person may intend to produce a

---

22 *R v Nedrick* [1986] 1 WLR 1025 at 1028 per Lord Lane CJ; [1986] 3 All ER 1 at 4; *R v Woollin* [1999] 1 AC 82 at 96 per Lord Steyn.

23 cf Smith, "R v Woollin", (1998) *Criminal Law Review* 890.

24 *R v Willmot (No 2)* [1985] 2 Qd R 413 at 418 per Connolly J; *R v Moloney* [1985] AC 905 at 926 per Lord Bridge of Harwich.

25 Code, s 23(3).

26 Code, s 23(3). See Howard, Crane and Hochberg, *Phipson on Evidence*, 14th ed (1990) at 356-357 [16-19]; *De Gruchy v The Queen* (2002) 211 CLR 85; [2002] HCA 33.

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

particular result without desiring that result[28]. Nonetheless, as Professor Williams has observed, intention generally does involve desire[29]. Illustrations of the distinction between desire and intention commonly raise a false issue. Thus, Professor Gillies illustrates the proposition that intention in the criminal law does not connote desire by the example of the accused who sets fire to his enemy's house so as to spite the enemy even though he regrets the destruction of the house because it is a masterpiece of period architecture[30]. Accepting the accused's refined sense of regret, it hardly seems apt to say that in setting fire to the house he did not desire to destroy it[31]. A direction that a person may do something, fully intending to do it although the person does not desire to do it[32], may often be confusing. Unless the facts truly raise the issue the direction should not be given.

19 Proof of the s 317(b) offence required the prosecution to establish beyond reasonable doubt that, at the time the appellant engaged in unprotected sexual intercourse with the complainant, he had as a purpose the transmission of HIV to her. A person may engage in conduct having more than one object or purpose. The complainant said the appellant preferred unprotected sexual intercourse because it was more pleasurable. Accepting that the appellant engaged in unprotected sexual intercourse because it gave him pleasure is not necessarily inconsistent with proof that he also had the intention thereby of transmitting HIV to the complainant. It is the identification of evidence from which the latter inference could be drawn to the criminal standard that is the issue in this appeal. Its resolution requires reference to the evidence given at the trial in some detail.

The evidence at the trial

20 Much of the evidence was uncontested. Important facts were admitted in a document titled "Admissions by Defence", which became Exhibit 2. Aspects

---

28 See Simester and Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed (2007) at 123.

29 Williams, "Oblique Intention", (1987) 46 *Cambridge Law Journal* 417 at 417.

30 Gillies, *Criminal Law*, 4th ed (1997) at 50.

31 The same observation applies to the illustration given in *R v Moloney* [1985] AC 905 at 926 of the man who boards a plane to Manchester to escape pursuit even though he has no desire to go to Manchester: see Orchard, "Criminal Intention", (1986) *New Zealand Law Journal* 208 at 209-210.

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

of the complainant's evidence were the subject of challenge but she adhered to her evidence in chief. It was well open to the jury to accept her evidence in each of the respects that were the subject of challenge. What follows is a summary of the evidence which it was open to the jury to find established.

21 In April 1998, the appellant, a Zimbabwean national, was performing as an acrobat with a touring circus in Adelaide. He had concerns that he may be HIV positive and he consulted a general practitioner to arrange for a blood test. A blood test returned a positive result for HIV. The doctor advised the appellant of the result and made an appointment for him to attend an infectious disease consultant at the Royal Adelaide Hospital. The doctor stressed the importance of the appellant using condoms when engaging in sexual intercourse. The doctor considered that the appellant clearly understood this advice and clearly understood that HIV could be transmitted through sexual contact.

22 The appellant consulted an infectious diseases physician on three occasions in April and May 1998. The physician explained that HIV was transmitted by sexual intercourse and that it was likely that the appellant had been infected through sexual contact some years earlier in Zimbabwe. She, too, told the appellant of the need to use a condom during sexual intercourse. She advised the appellant to inform any sexual partner of his HIV positive status. She referred the appellant to doctors in Perth, where the circus was next due to perform, so that he could commence antiretroviral therapy.

23 The appellant and his then girlfriend attended the Department of Clinical Immunology at the Royal Perth Hospital in July 1998. There they were advised about the natural history of HIV, viral loads and the need to constantly monitor cell counts. Again, the appellant was told that HIV is a sexually transmittable disease. He was referred to the Sexual Health Service for screening for other sexually transmitted infections and for a detailed sexual history to be taken so that his sexual partners could be offered HIV testing. He was prescribed antiretroviral medication and a date was arranged for further review. The appellant did not attend the review and had no further contact with the immunology clinic. The appellant did not undertake the antiretroviral therapy.

24 The appellant met the complainant on 31 December 2006. Several weeks later they commenced a sexual relationship. Before commencing the relationship, the complainant asked the appellant whether he had been tested for HIV. The appellant told her that he had been tested and that he was not HIV positive. For about six weeks following the commencement of their sexual relationship, the appellant used condoms during sexual intercourse. After this initial period, they had unprotected sexual intercourse on occasions when they were "caught up in the moment". It became more common to engage in unprotected sexual intercourse as the relationship continued. Unprotected sexual

intercourse took place at a frequency of two or three times per week. The appellant told the complainant that he preferred to not use a condom because intercourse was more pleasurable for him without one. Usually the appellant ejaculated inside the complainant.

25 In mid- to late 2007, the complainant became ill, exhibiting symptoms of light-headedness, tiredness, colds, vomiting and diarrhoea. She was diagnosed as suffering from glandular fever. This episode may have been a response to HIV infection known as seroconversion illness.

26 The appellant and the complainant commenced cohabiting after the complainant first started to experience symptoms of ill-health. The complainant suffered further bouts of ill-health, including vomiting and diarrhoea, at times while they were cohabiting. During the course of the relationship, the appellant told the complainant that his brother had died of HIV/AIDS[33]. The complainant again asked the appellant whether he had HIV and again he said that he did not.

27 The relationship between the appellant and the complainant ended in September 2008.

28 In late August 2009, the complainant requested a sexually transmitted infections test from a general practitioner. On 27 August 2009, she was advised by the practitioner that there was a 60 per cent chance that she was HIV positive. She telephoned the appellant and told him of the possible diagnosis. The appellant said that he definitely did not have HIV. On 1 September 2009, the complainant saw the appellant and told him that she needed to know the truth. On this occasion, the appellant said that he was HIV positive and that he had known of his status for six months. The complainant asked why he had failed to tell her of his condition. He replied that he had not wanted to make her unhappy and that he thought that she was having a good time. He said that he had been told by the doctors that he had had HIV for two years. A friend of the complainant asked the appellant why he had not told the complainant and he responded that "I didn't want to ruin her life".

29 The complainant's diagnosis of HIV was confirmed on 2 September 2009. In November 2009, in the course of a telephone conversation that was recorded by the police, the appellant again told the complainant that he had found out that he had HIV six months after they broke up.

30 In May 2010, the appellant was interviewed by the police. In the course of the interview he gave an account that he and the complainant had engaged in

---

33 Acquired immunodeficiency syndrome.

protected sex. He said that they had engaged in unprotected sex on possibly two occasions. He told the police that when he had been diagnosed with HIV in 1998, he had been given little information about the condition and he had not been told of the need to inform sexual partners of his HIV status. He said that he had taken a blood test in April 2005, which had returned a negative result for HIV. Subsequently, the appellant admitted that for the test, which had been required by the Department of Immigration, he had submitted a blood sample taken from his friend.

31 Among the agreed facts was expert information about HIV. In summary, the risk of contracting HIV from unprotected penile-vaginal intercourse is approximately 0.1 per cent. If a person has high viral loads in the person's genital fluids, the person is generally more infectious. If someone is newly infected, he or she will generally have a very high viral level. Anyone who is not on effective antiretroviral therapy will still have quite high viral levels. It is likely that the appellant was initially infected with HIV a few years prior to 1998. On the basis that the relationship between the complainant and the appellant lasted for a period of 21 months, the expert estimated there was approximately a 14 per cent risk of the appellant transmitting HIV to the complainant. This estimate was made without knowledge of the frequency of sexual intercourse or the possible presence of other factors which may increase the risk substantially.

32 There was no evidence of what the appellant's viral load was in 2007 and 2008. There was no evidence that the appellant was aware of the statistical likelihood of the transmission of HIV as the result of unprotected penile-vaginal intercourse.

The prosecution case at trial

33 It was the prosecution case that proof of the appellant's intention was an inference to be drawn from a combination of facts and circumstances. These were the appellant's knowledge that he was HIV positive; knowledge that he should use condoms during sexual intercourse; conduct in engaging in repeated unprotected sexual intercourse with the complainant; failure to disclose his HIV positive status to her before or during the course of their relationship and, in particular, after the complainant showed signs of ill-health in mid-2007; and lies to the complainant and to the police. The lies which the trial judge left for the jury's consideration as capable of evidencing the appellant's consciousness of guilt of the intentional transmission of HIV to the complainant were: those told to her after she was diagnosed as HIV positive; those told to the police minimising the occasions on which the appellant and the complainant had unprotected sexual intercourse; and denying that he had been instructed to inform his sexual partners that he was HIV positive.

34 There was one further aspect of the appellant's conduct that was said to support the inference of intent. In September 2009, after admitting to the complainant that he was HIV positive, the appellant attended a doctor and requested testing for sexually transmitted diseases. He did not disclose his previous diagnosis to the doctor. When he was advised that the results indicated that he was HIV positive, the appellant falsely represented that he was not previously aware of his status.

The Court of Appeal

35 Gotterson JA's conclusion did not rest on the appellant's lies supporting his guilt of the s 317(b) offence[34]. The critical passage in his Honour's reasons is at [46]:

> "It was open to the jury to reason from [the appellant's knowledge that his condition was transmissible by unprotected sexual intercourse and the frequency of unprotected sexual intercourse] and their own knowledge and experience of human behaviour that whereas one or several acts of unprotected sexual intercourse might be viewed as reckless as to whether infection would be transmitted or not, such acts repeated frequently with the same partner over many months, defied description as mere recklessness as to the risk of transmission."

36 His Honour considered that it was open to the jury to infer that the requisite intent existed from the first act of unprotected sexual intercourse to the last[35].

37 Morrison JA agreed with Gotterson JA's reasons and identified three further factors from which it was open to infer the requisite intent[36]. These were the appellant's failure to (i) take the recommended protective steps during sexual intercourse, merely to suit his own desires, when he knew the danger of transmission; (ii) take the prescribed antiretroviral medication; and (iii) engage in any monitoring of his condition. Added to this was the appellant's comment that "I didn't want to ruin her life"[37]. This was open to be viewed as an

---

34 *R v Zaburoni* (2014) 239 A Crim R 505 at 514-515 [43] (Morrison JA agreeing at 516 [51]).

35 *R v Zaburoni* (2014) 239 A Crim R 505 at 515 [47].

36 *R v Zaburoni* (2014) 239 A Crim R 505 at 516 [51], 518-519 [67].

37 *R v Zaburoni* (2014) 239 A Crim R 505 at 518-519 [67].

acknowledgment of the appellant's understanding of the risk of transmission. The inference that the appellant intended to transmit the disease to the complainant was strengthened, in Morrison JA's analysis, by his failure to alert her to the need for her to take steps to protect herself[38].

38 Applegarth J would have allowed the appeal[39]. His Honour considered that the lies told by the appellant after the complainant's HIV positive diagnosis were not necessarily indicative of a consciousness of guilt of the s 317(b) offence. His Honour observed that the lies might be explained by a desire to escape prosecution for a lesser offence of which intent is not an element[40]. More generally, his Honour observed that not every person who embarks on a course of conduct that regularly exposes another to a risk of injury can be said to have intended the result[41]. In Applegarth J's analysis, the appellant's callous, reckless conduct was not to be equated with a subjective, actual intent to transmit HIV to the complainant[42].

The grounds of appeal

39 The appellant contends that the Court of Appeal conflated recklessness with proof of intent. A discrete challenge is made to the conclusion that it was open to the jury to infer from the protracted duration of the conduct that the requisite intention existed from the first act of unprotected sexual intercourse to the last[43]. Gotterson JA referred to *Reid* for the latter proposition[44]. The appellant submits that no question of temporal concurrence between the act and the intent arose in *Reid* because, in that case, intent was an inference from circumstances that did not depend upon frequency of unprotected sexual intercourse. By contrast, the appellant submits that Gotterson JA's reasoning

---

38 *R v Zaburoni* (2014) 239 A Crim R 505 at 519 [68].

39 *R v Zaburoni* (2014) 239 A Crim R 505 at 526 [104].

40 *R v Zaburoni* (2014) 239 A Crim R 505 at 521 [79]-[80].

41 *R v Zaburoni* (2014) 239 A Crim R 505 at 522 [86].

42 *R v Zaburoni* (2014) 239 A Crim R 505 at 526 [104].

43 *R v Zaburoni* (2014) 239 A Crim R 505 at 515 [47].

44 *R v Zaburoni* (2014) 239 A Crim R 505 at 515 [47]; and see at 519 [69] per Morrison JA.

depended upon the frequency of the appellant's conduct, which "necessarily involved the notion of a passage of time before the requisite intent arose".

40 It is the soundness of the conclusion that the frequency of unprotected sexual relations over many months suffices to establish that the appellant's intent was to transmit HIV to the complainant that is determinative of the appeal. If it is open to infer from that conduct that the appellant had that intention, then it is not illogical to infer that it was present throughout the sexual relationship in circumstances in which there is nothing to suggest that there was any relevant change in the nature of the relationship.

Awareness of risk

41 It is not apparent what, if any, relevance expert evidence of the statistical risk of the transmission of HIV had to proof of the appellant's intention. To the extent that the inference of intent depends upon foresight of the risk of the sexual transmission of HIV, it is the appellant's understanding, whether informed or otherwise, that is material. There was ample evidence from which to find that the appellant was aware of the risk of transmitting HIV to the complainant through unprotected sexual intercourse. Apart from the medical advice that the appellant was given by several doctors in 1998 after he learned of his HIV positive status, his lies to the complainant about that status before their sexual relationship commenced, and during the course of it, point to his awareness of the risk of sexual transmission. So, too, do his lies to the police about the number of times they engaged in unprotected sexual intercourse.

The inference from the frequency of the conduct

42 Gotterson JA did not in terms express himself as satisfied that the evidence was capable of proving that the appellant intended to transmit HIV to the complainant. Instead, his Honour said that the frequency of unprotected sexual intercourse over many months defied description as mere recklessness[45]. Recklessness describes a state of mind in which a person adverts to the risk that particular conduct may result in particular harm and, with that awareness, engages in that conduct. A person may be more or less reckless depending upon the person's awareness of the likelihood of the risk materialising. However, as earlier explained, putting to one side awareness of the virtual certainty that conduct will result in the particular harm, a person's awareness of the risk that his or her conduct may result in harm does not, without more, support the inference that the person intended to produce that harm.

---

45 *R v Zaburoni* (2014) 239 A Crim R 505 at 515 [46].

43 The respondent submits that Gotterson JA's conclusion that the inference of intent was open was not confined to the appellant's awareness of the risk of transmission: it took account of the frequency of unprotected sexual intercourse over many months. The respondent submits that the features of knowledge, frequency and the length of the period over which intercourse took place suffice to support the conclusion of intent. This is because "[i]t 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". Acceptance of this submission cannot sit with the respondent's recognition that foresight of likelihood of outcome cannot be substituted for proof of an accused's intention to cause that outcome.

44 A rational inference open on the evidence is that the appellant engaged in regular unprotected sexual intercourse with the complainant because it enhanced his sexual pleasure and he was reckless of the risk of transmitting HIV to her. The existence of that inference lessens the force of reasoning to a conclusion that the appellant intended to transmit the disease from the fact of frequent unprotected sexual intercourse. Apart from frequent unprotected sexual intercourse, there is no evidence to support the inference that the appellant had that intention. And the evidence fell well short of proving that the appellant believed that it was virtually certain that he would pass on HIV by regular unprotected sexual intercourse.

The further factors identified by Morrison JA

45 The appellant had been given to understand that he had probably contracted HIV through sexual intercourse some years before his diagnosis in 1998. Notwithstanding medical advice about the availability of antiretroviral treatment for HIV, the appellant did not embark upon it. Despite that choice, it would seem that he remained asymptomatic from the time of diagnosis and throughout his relationship with the complainant. His failure to take antiretroviral medication and to have his condition regularly monitored suggests that he was careless of his own health. It may, as his counsel submits, suggest that he had been "putting his head in the sand". This is not to say that the appellant had put out of his mind that he was HIV positive or that he did not understand that HIV is a serious disease. His conduct in 2005 when he was asked by the Department of Immigration to supply a blood sample is a clear demonstration that he remained conscious of his HIV positive status. So, too, did his lies to the complainant about that status before their sexual relationship commenced and throughout it. However, contrary to Morrison JA's analysis[46],

---

46 *R v Zaburoni* (2014) 239 A Crim R 505 at 518-519 [67].

the appellant's careless disregard for his own health does not support an inference that his conduct in having unprotected sexual intercourse with the complainant evinced an intention to infect her with HIV.

46 In *Reid*, the accused said his HIV positive status made him feel like he had a "loaded gun"[47]. The significance of that statement was its capacity to establish that the accused believed there was a very high risk of transmitting HIV through sexual intercourse[48]. The accused's conduct in *Reid*, taunting the complainant after the latter contracted HIV, was found to be eloquent of his intention that his sexual partner should share his misery[49]. The appellant's response when confronted by the complainant's friend that "I didn't want to ruin her life" was offered as a reason for not telling the complainant that he had learned he was HIV positive after the break-up of their relationship. This was yet another lie. However, it cannot support an inference that during their sexual relationship the appellant believed that in having unprotected sexual intercourse with the complainant he was certain to transmit HIV to her.

47 It will be recalled that the appellant's lies to the complainant during their relationship were not left for the jury's consideration as evidence of his consciousness of guilt. Morrison JA proposed another inference from these lies as supporting the conclusion of guilt of the s 317(b) offence: by lying to the complainant about his HIV positive status, the appellant intended to prevent her from taking steps to protect herself[50]. The inference is plainly open that the appellant lied to the complainant about his HIV status in the first instance to obtain her agreement to have sexual intercourse with him. The inference is also plainly open that thereafter he maintained his lie to obtain her agreement to have unprotected sexual intercourse with him. As earlier explained, a rational inference is that the appellant's intention in engaging in unprotected sexual intercourse with the complainant was sexual pleasure. His lies to procure and maintain the complainant's consent to unprotected sexual intercourse do not provide a foundation for the further inference that it was his intention thereby to transmit HIV to her.

---

47 *R v Reid* [2007] 1 Qd R 64 at 72 [11].

48 *R v Reid* [2007] 1 Qd R 64 at 79 [55].

49 cf *R v Reid* [2007] 1 Qd R 64 at 72 [11] per McPherson JA.

50 *R v Zaburoni* (2014) 239 A Crim R 505 at 518 [63].

48 The respondent cites *R v Ciantar*[51], observing that its case on intention was circumstantial and that the appellant's lies to the complainant after she was diagnosed with HIV, and to the police, were material which upon the whole of the evidence supported the inference of guilt. This submission does not address the evident force of Applegarth J's observation that, in the context of this case, it is not open to conclude that the appellant's lies evidence his consciousness of guilt for intentionally transmitting HIV and not his consciousness of guilt for having unlawfully passed on the disease to the complainant[52].

49 Applegarth J was correct to hold that the evidence was not capable of establishing to the criminal standard that the appellant intended to transmit HIV to the complainant[53]. It follows that the appellant's conviction for the s 317(b) offence must be quashed.

Orders

50 Under s 668F(2) of the Code, where it appears to the Court of Appeal that the jury must have been satisfied of facts which proved the appellant's guilt of some other offence, the Court may, instead of allowing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence and pass such sentence as may be warranted in law in substitution for the sentence passed at the trial, not being a sentence of greater severity.

51 The jury must have been satisfied of proof of the facts of the offence of unlawfully doing grievous bodily harm to the complainant[54]. The correct order for the Court of Appeal was to allow the appeal and substitute a verdict of guilty of the alternative offence and impose sentence for it. This Court, in the exercise of its appellate jurisdiction, may make the order that should have been made below[55]; however, it is neither convenient nor appropriate for this Court to determine the sentence that is warranted in law for the alternative offence. The parties were agreed that in the event the appeal is allowed the proceedings should

---

51 (2006) 16 VR 26 at 40 [45].

52 *R v Zaburoni* (2014) 239 A Crim R 505 at 525 [97].

53 *R v Zaburoni* (2014) 239 A Crim R 505 at 525 [99].

54 *Spies v The Queen* (2000) 201 CLR 603 at 611 [23] per Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 43.

55 *Judiciary Act* 1903 (Cth), s 37.

be remitted to the District Court for sentence. For these reasons, there should be the following orders:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 15 April 2014 and, in lieu thereof, allow the appeal to that Court and substitute for the verdict found by the jury a verdict of guilty of unlawfully doing grievous bodily harm to the complainant.

3. Remit the proceeding to the District Court of Queensland for sentence.

52 GAGELER J. The appellant was convicted in the District Court of Queensland of an offence against s 317(b) of the *Criminal Code* (Q) ("the Code") as a consequence of the jury returning a verdict of guilty in a trial on an indictment which alleged that during a specified period of around 21 months the appellant "with intent to transmit a serious disease to [the complainant] unlawfully transmitted a serious disease to [the complainant]". The serious disease was HIV, and the method of transmission was unprotected sexual intercourse at a time when the appellant and the complainant had formed an intimate relationship.

53 The appellant appealed to the Court of Appeal of the Supreme Court of Queensland solely on the ground under s 668E(1) of the Code that the verdict was unreasonable or could not be supported having regard to the evidence, in that it was not reasonably open to the jury to find beyond reasonable doubt that the appellant intended to transmit the disease to the complainant. The appeal was dismissed by majority (Gotterson and Morrison JJA, Applegarth J dissenting)[56].

54 The appellant's sole ground of appeal to this Court is a reflex of his sole ground of appeal to the Court of Appeal. It is that the majority erred in concluding that it was reasonably open to the jury to find beyond reasonable doubt that the appellant intended to transmit the disease to the complainant. No contest of principle is involved in the determination of the appeal.

55 There is no dispute between the parties that the prosecution was required to prove beyond reasonable doubt that the appellant had an intention to transmit the disease. The intention to be proved was an actual subjective intention to achieve that result as distinct from awareness of the probable consequence of his actions[57].

56 There is similarly no dispute that the question which the Court of Appeal had to ask, and which this Court in turn must now ask, is one of fact. The question is whether, having made its own independent assessment of the evidence, the court considers it to have been open to the jury to be satisfied beyond reasonable doubt that the appellant had the requisite subjective intention[58]. Was the inference safely to be drawn beyond reasonable doubt from the facts proved at trial that the appellant engaged in sexual intercourse with the

---

56 *R v Zaburoni* (2014) 239 A Crim R 505.

57 *R v Willmot (No 2)* [1985] 2 Qd R 413 at 418; *R v Reid* [2007] 1 Qd R 64 at 96-97 [108]-[109].

58 *M v The Queen* (1994) 181 CLR 487 at 492-494; [1994] HCA 63; *SKA v The Queen* (2011) 243 CLR 400 at 405-406 [11]-[14]; [2011] HCA 13.

complainant with the actual subjective intention of transmitting the disease to the complainant?

57 In this Court, as in the Court of Appeal, the prosecution relied on two principal features of the appellant's conduct proved at trial in order to justify drawing the requisite inference of intention. One was a series of lies which the appellant told to the complainant, and later to police, when he said that he did not have the disease or was not aware or only recently became aware that he had the disease. The other was the frequency of unprotected sexual intercourse and the protracted period over which that intercourse occurred.

58 No member of the Court of Appeal took the view that the appellant's lies alone were sufficient to justify drawing the inference of intention. That must be so. The lies which the appellant told the complainant during their relationship amounted, as Applegarth J put it, to a form of "callous deception"[59]. They demonstrated an intention to deceive the complainant into having unprotected sexual intercourse. They did not necessarily demonstrate an intention to transmit the disease to her. The lies which the appellant later told the complainant and the police when he said that he had not been aware or had only recently become aware that he had the disease, demonstrated consciousness of wrongdoing, but not necessarily consciousness of guilt of a crime of specific intent.

59 The difference between the members of the Court of Appeal concerned what was able to be inferred, beyond reasonable doubt, about the appellant's state of mind from the frequency and protracted period of the sexual intercourse which the appellant had with the complainant in the context in which the appellant had been shown to have known that he had the disease and to have known that the disease was transmissible by sexual intercourse, but in which the appellant had not been shown to have known the degree of risk of transmission and had not been shown to have had any reason to harbour ill-will against the complainant.

60 The crux of the reasoning of Gotterson JA, and of that of Morrison JA, was contained in the following passage in the reasons for judgment of Gotterson JA[60]:

> "The jury's attention necessarily turned to the appellant's conduct considered in the context of that knowledge. To my mind, what is of singular significance here is that the unprotected sexual intercourse continued over many months. It was the norm for them. It was open to the jury to reason from this and their own knowledge and experience of human behaviour that whereas one or several acts of unprotected sexual

---

59 *R v Zaburoni* (2014) 239 A Crim R 505 at 521 [79].

60 *R v Zaburoni* (2014) 239 A Crim R 505 at 515 [46].

> intercourse might be viewed as reckless as to whether infection would be transmitted or not, such acts repeated frequently with the same partner over many months, defied description as mere recklessness as to the risk of transmission."

61 The crux of the reasoning of Applegarth J was contained in the following passage in his reasons for judgment[61]:

> "The period over which the appellant engaged in unprotected sex with the complainant, having deceived her into allowing such conduct, and the appellant's appreciation that unprotected sex with him carried a risk of transmission, supported an inference of intent. But the evidence was not enough, in all of the circumstances, to prove the intent beyond reasonable doubt. Those circumstances include the fact that the appellant knew infection was a possible, not a probable, outcome, and did not know the degree of risk."

His Honour concluded[62]:

> "The evidence left open the reasonable hypothesis that the appellant, not knowing the degree of risk, was extremely reckless and also callous. As appalling as his selfish recklessness was, it cannot be equated with a subjective, actual intent to transmit the HIV virus. In the absence of evidence of malice or knowledge of the degree of risk, a subjective intent to inflict the HIV virus was not proven beyond reasonable doubt."

62 The reasoning of Applegarth J is, in my opinion, compelling. Expert evidence before the jury was to the effect that the objective measure of the probability of the appellant infecting the complainant during the period in which the unprotected sexual intercourse occurred was in the order of 14%. Nothing in the evidence suggested that the appellant knew of that probability. But equally nothing in the evidence justified the inference that the appellant thought the probability to be higher.

63 Accepting that it was open to the jury to reason from their own knowledge and experience of human behaviour, the frequency and protracted period of unprotected sexual intercourse were insufficient safely to exclude as a reasonable hypothesis that the appellant engaged in that sexual intercourse with the complainant not with an intention to transmit the disease to the complainant but selfishly for his own gratification, being reckless as to whether or not the complainant might become infected.

---

61 *R v Zaburoni* (2014) 239 A Crim R 505 at 526 [103].

62 *R v Zaburoni* (2014) 239 A Crim R 505 at 526 [104].

64 For these reasons, I would allow the appeal and make the consequential orders proposed in the joint reasons for judgment.

65 NETTLE J. I agree that the appeal should be allowed and with the other orders proposed by the plurality. I wish, however, to add some observations concerning the element of intent and the significance of the appellant's lies to the complainant that he did not have HIV.

66 An accused may not be presumed to have intended the probable consequences of his or her acts[63]. But where it is proved that an accused foresaw that his or her actions would have an inevitable or certain consequence, it logically follows that the accused intended to bring about that consequence; and that is so whether or not the accused desired to bring it about. Hence, if an accused puts a loaded gun to the head of a victim and pulls the trigger while foreseeing that it is a certain or inevitable consequence that the victim will be killed or suffer really serious injury, and the victim is killed, it follows that the accused intended to kill or inflict really serious injury upon the victim and so may be convicted of intentional murder; and that is so notwithstanding that the accused may not have borne the victim any personal ill will as such and was motivated solely by a desire to experience the sensation of putting a loaded gun to the head of another human being and pulling the trigger[64].

67 It is the same with the offence of intentionally transmitting a serious disease to another person contrary to s 317(b) of the *Criminal Code* (Q) ("the Code"). Conviction of the offence is dependent on proof beyond reasonable doubt of intent to transmit the disease. But if an accused who is suffering from a serious disease has unprotected sexual intercourse with a victim while foreseeing that it is an inevitable or certain consequence of doing so that he or she will thereby transmit the disease to the victim, it logically follows that the accused intends to transmit the disease to the victim despite that he or she may not wish to do so and despite being motivated solely by the pleasure of having unprotected sexual intercourse with the victim.

68 Of course, in strict logic, nothing is absolutely inevitable or certain. It is invariably a question of degree. But for the purposes of establishing intent to bring about a consequence it may be taken that foresight of the inevitability or certainty of a consequence means that the accused foresees that the consequence is so highly probable that it is, to his or her mind, an inevitability or certainty.

69 In this case, the evidence did not establish that the appellant foresaw that the probability of transmitting HIV to the complainant was as great as that, and in fact it was not as great as that. The furthest it went was to show that the

---

63 *Stapleton v The Queen* (1952) 86 CLR 358 at 365; [1952] HCA 56; *Parker v The Queen* (1963) 111 CLR 610 at 632 per Dixon CJ; [1963] HCA 14.

64 *Stapleton* (1952) 86 CLR 358 at 365; Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 38-42 [18].

appellant foresaw there was a possibility that, by having unprotected sexual intercourse with the complainant, he would infect the complainant with HIV. That meant that he was guilty of a serious offence of doing unlawful grievous bodily harm to the complainant under s 320 of the Code, but it did not establish that he was guilty of an offence under s 317(b).

70 In the Court of Appeal of the Supreme Court of Queensland[65], Morrison JA regarded the appellant's lie to the complainant that the appellant was not HIV positive as founding an inference that the appellant intended to deter the complainant from taking steps to protect herself against the risk of HIV. With respect, that was surely correct. It was an inevitable inference that the appellant lied to the complainant to induce her to have unprotected sexual intercourse with him and so to deter her from protecting herself from the risk of HIV by either declining to have intercourse with him or insisting that he wear a condom. The difficulty for the Crown, however, was that, although that demonstrated an intent to have unprotected sex with the complainant, and foresight that to do so risked infecting her with HIV, it did not demonstrate that the appellant believed that the likelihood of infection was so high as to be in effect inevitable or certain.

71 As counsel for the appellant submitted, this was not a case of two competing inferences, one supportive of innocence and the other redolent of guilt, in which the evidence taken as a whole was insufficient to enable a jury to exclude the inference which is supportive of innocence[66]. In that sense, this was a different kind of circumstantial case from *R v Ciantar*[67], and different, too, from *R v Reid*[68], to which Morrison JA referred, where, although the accused did not necessarily believe that infection was a certainty, it was established *aliunde* that the accused's object in having unprotected sexual intercourse with the victim was to infect the victim.

72 Here the problem for the Crown case was not that it was impossible to exclude the existence of a reasonable possibility consistent with innocence but that the only evidence of the essential element of intent, and in that sense of guilt, was inferential evidence which, even taken at its highest, was insufficient to establish intent. The most it established was foresight of the risk of infection and, therefore, reckless indifference.

---

65 *R v Zaburoni* (2014) 239 A Crim R 505.

66 Cf *Plomp v The Queen* (1963) 110 CLR 234 at 243 per Dixon CJ; [1963] HCA 44.

67 (2006) 16 VR 26.

68 [2007] 1 Qd 64.