SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gowda; R v Mashru* [2018] QCA 31
PARTIES:	**In CA No 26 of 2017** **R** **v** **GOWDA, Divya Krishne** (appellant) **In CA No 40 of 2017** **R** **v** **MASHRU, Chetan Mohanlal** (appellant)
FILE NO/S:	CA No 26 of 2017 CA No 40 of 2017 DC No 2087 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Convictions
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 16 February 2017 (Martin SC DCJ)
DELIVERED ON:	Date of Orders: 18 December 2017 Date of Publication of Reasons: 9 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2017
JUDGES:	Holmes CJ and Philippides and McMurdo JJA
ORDERS:	**Orders delivered 18 December 2017 in each of CA No 26 of 2017 and CA No 40 of 2017:** **1. The appeal be allowed.** **2. The conviction of the appellant on counts 1, 14, 25-27, 29-34 and 45-49 on the indictment be set aside.** **3. The appellant be acquitted on each of those counts, save for count 32.** **4. The appellant be re-tried on count 32.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE GOVERNMENT – OTHER OFFENCES – where the appellants operated a scheme under which they arranged what they represented to be marriages between foreign nationals and Australian women, in order that the men might obtain visas to remain in Australia – where the appellants were convicted of 16 counts of attempting to

arrange a marriage contrary to s 240(1) of the *Migration Act* 1958 (Cth) – where s 240(1) provides that a person must not 'arrange a marriage … with the intention of assisting … [an applicant] to get a stay visa by satisfying a criterion for the visa because of the marriage' – where, with one possible exception, the transactions arranged by the appellants were not validly solemnised marriages under the *Marriage Act* 1961 (Cth) and were therefore void – whether the appellants had 'arranged a marriage' or acted with the intention of 'satisfying a criterion for the visa because of the marriage' – whether s 240(1) applies only where a person arranges, or attempts to arrange, a marriage valid under the *Marriage Act* 1961 (Cth) – where it was conceded, in relation to 15 of the counts, that if s 240(1) applies only to a valid marriage the appellants were entitled to be acquitted – whether an acquittal should be entered – where, in relation to one count, it would have been open to the jury, properly instructed, to have considered that the marriage was valid under the *Marriage Act* 1961 (Cth) and therefore to have convicted under s 240(1) of the *Migration Act* – whether a retrial should be ordered

Criminal Code (Cth), s 11.1
Marriage Act 1961 (Cth), s 45
Migration Act 1958 (Cth), s 5F, s 237, s 238, s 240
Migration Regulations 1994 (Cth), reg 1.15A, reg 820.11

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D A Holliday for the appellant, Mashru
G R Rice QC, with B J Power, for the respondent

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Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of McMurdo JA.

PHILIPPIDES JA:

[2] I have had the advantage of reading the reasons in draft of McMurdo JA. For the reasons that follow I did not join in the orders made 18 December 2017.

The issues

[3] The issues raised in the grounds of appeal concern the elements of the offence under s 240(1) of the *Migration Act* 1958 (Cth) (the Act) of which the appellants were convicted. That offence is concerned with those who "arrange a marriage" between other persons to assist one of them to obtain permanent residence.

[4] Section 240 of the Act provides:

> "(1) A person must not arrange a marriage between other persons with the intention of assisting one of those other persons to get

a stay visa by satisfying a criterion for the visa because of the marriage.

(2) Subsection (1) applies whether or not the intention is achieved.

(3) It is a defence to an offence against subsection (1) if the defendant proves that, although one purpose of the marriage was to assist a person to get a stay visa, the defendant believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.

Penalty: $100,000 or imprisonment for 10 years, or both.

Note: A defendant bears a legal burden in relation to the matter in subsection (3) (see section 13.4 of the *Criminal Code*)."[1]

[5] A critical issue on the appeal is whether, in order to prove the commission of the offence or an attempt to commit the offence, it is necessary to prove that the marriage arranged was a valid marriage under the *Marriage Act* 1961 (Cth); that is, whether the term "marriage" in s 240 of the Act is intended to mean only a marriage that is valid pursuant to the *Marriage Act*. I have had the advantage of reading the reasons of McMurdo JA but take a different view as to that issue. In my view, for the reasons that follow, the trial judge did not err in ruling that "marriage" for present purposes did not mean valid marriage under the *Marriage Act*, nor did he err in failing to direct the jury that the elements of the offence of attempting to commit the offence in s 240 of the Act required that the marriage be a valid marriage for the purposes of the *Marriage Act*.

The offences in subdivision B of pt 2 div 12 of the Act

[6] The object of the Act is to regulate, in the national interest, the coming into and presence of non-citizens in Australia and, to achieve its object, the Act provides for visas permitting non-citizens to enter or remain in Australia: s 4(1) and s 4(2) of the Act. The Minister may grant a non-citizen permission in the form of a visa for them to enter or remain in Australia: s 29 of the Act. It may be granted on a permanent or a temporary basis: s 30 of the Act. The classes of visas are prescribed by regulation stating the criteria for each specified class: s 31(3) of the Act. The *Migration Regulations* 1994 (Cth) (the Regulations) may provide that visas of a specified class are subject to specified conditions: s 41 of the Act.

[7] Section 240 is one of a number of offences contained in subdivision B of pt 2 div 12 of the Act. That subdivision is entitled "Offences relating to abuse of laws allowing spouses etc. of Australian citizens or of permanent residents to become permanent residents". That subdivision applies in and outside Australia and to marriages wherever they are solemnised: s 239. Section 240 is entitled "Offence to arrange marriage to obtain permanent residence". Other sections deal with the offence of arranging "a pretended de facto relationship" to assist another to obtain permanent residence (s 241); the offence of applying for or nominating another for permanent residence because of marriage or de facto relationship (s 243); and the offence of making false or unsupported statements as to a person's married relationship or de facto relationship (s 245).

[8] The reason for the enactment of the subdivision is explained in s 237 of the Act as follows:

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1 The provisions of ch 2 of the *Criminal Code* (except Part 2.5) which sets out the general principles of criminal responsibility apply to all offences against the Act: s 4A of the Act.

> "(a) under the regulations, **a person satisfies a criterion for certain visas** that give, or might lead to, authorisation for the person's permanent residence in Australia if the person is **the spouse or de facto partner of, and has a genuine and continuing relationship, involving a shared life** to the exclusion of all others with, either an Australian citizen or a permanent resident of Australia; and
>
> (c) some persons attempt to get permanent residence under the regulations by:
>
> (i) **entering into a married relationship that is not intended to be a genuine and continuing relationship** involving a shared life to the exclusion of all others; or
>
> (ii) pretending to be a de facto partner of another person." (emphasis added)

[9] Section 237 of the Act thus explains that the subdivision is directed to the abuse of a visa criterion in the Regulations allowing for permanent residence which is satisfied where an applicant is a "spouse" or "de facto partner" of an Australian citizen or permanent resident **and has a genuine and continuing relationship with that person, involving a shared life to the exclusion of all others**. The mischief the subdivision is aimed at is the obtaining of permanent residency by satisfying "**a criterion**" for a relevant visa under the Regulations by entering into a "married relationship", notwithstanding that it is not intended to be a genuine and continuing relationship involving a shared life to the exclusion of all others or "by pretending to be a de facto partner of another person". It is important to note that "criterion" is defined to include "part of a criterion": s 238 of the Act.

[10] The concepts of "spouse" and "married relationship" are concepts central to the operation of the subdivision and how the subdivision achieves its purpose of preventing abuse of a permanent residency criterion.[2] By s 5F(1) of the Act, a person is a "spouse" of another person, for the purposes of the Act, if the two are in a "married relationship". Persons are in a "married relationship" for the purposes of the Act, if all of the conditions in s 5F(2) of the Act are satisfied, namely:

> "(a) they are married to each other under a marriage that is valid for the purposes of this Act; and
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> (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
>
> (c) the relationship between them is genuine and continuing; and
>
> (d) they:
>
> (i) live together; or
>
> (ii) do not live separately and apart on a permanent basis."

[11] The term "de facto partner" is likewise a key concept in the regulation of abuse of a permanent residency laws. The criterion for being in "a de facto relationship" mirrors those in (b), (c) and (d) above.[3]

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2 The terms "spouse" and "married relationship" are not terms that are used in the *Marriage Act*, which by s 5 of that Act defines "marriage" as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

3 By s 5CB(2) of the Act, "a person is in a ***de facto relationship*** with another person if they are not in a married relationship (for the purposes of section 5F) with each other but: (a) they have a mutual

[12] In the case of both married and de facto relationships, the Act provides that the Regulations may make provision for determining whether one or more of the conditions of being in a married or de facto relationship exist, and that they may make different provision in relation to the determination of different purposes: s 5CB(3), s 5F(3).

[13] It can be seen, therefore, that pursuant to s 5F(2), for the purposes of the Act, those entering into a "married relationship" who, as stated in s 237(a), do "not intend to be in a genuine and continuing relationship involving a shared life to the exclusion of all others", will fail to meet the conditions in s 5F(2)(b) and (c) of the Act. In such circumstances, being in a valid marriage is insufficient. Irrespective of whether the marriage entered into is one that is "valid" for the purposes of the Act, those entering into the marriage are within the contemplation of s 237(c)(i) of the Act, where conditions (b) and (c) are absent. That is, they enter into the marital relationship without intending a genuine and continuing relationship involving a shared life to the exclusion of all others. Similarly, for the purposes of a de facto relationship, if the conditions in s 5CB(3) are not satisfied, the relationship can only be a pretend one.

The offence under s 240 of the Act

[14] The elements of the offence under s 240(1) of the Act are that the defendant:

(a) "arranges a marriage" between other persons (the acts comprising that conduct being the physical element); and

(b) does so with the intention of assisting one of those other persons to get a stay visa by satisfying a criterion for the visa because of the marriage, irrespective of whether the intention is achieved (the fault element).

However, where the defendant proves that he or she believed on reasonable grounds that the marriage arranged would result in a genuine and continuing marital relationship, a defence is provided.

Satisfying the visa criterion because of being a spouse

[15] For the purpose of s 240 of the Act, a "stay visa" means a permanent visa or a preliminary visa that is usually applied for by a person applying or intending to apply for a permanent visa: s 238 of the Act. In the present cases, the pertinent visas contemplated were a subclass 820 "temporary partner visa", for which the relevant criterion under cl 820.211(2)(a) of Sch 2 of the Regulations is that the applicant is a "spouse" of an Australian citizen or permanent resident. A definition of "spouse" is provided in reg 1.15A.

[16] Counsel for the appellant Gowda made submissions concerning the definition of "spouse" which related to a superseded version of reg 1.15A.[4] It provided that "for

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commitment to a shared life to the exclusion of all others; and (b) the relationship between them is genuine and continuing; and (c) they: (i) live together; or (ii) do not live separately and apart on a permanent basis; and (d) they are not related by family (see subsection (4))".

4 The superseded regulation provided:

"**1.15A Spouse**

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

(a) in a married relationship, as described in subregulation (1A)

…

(1A) Persons are in a married relationship if:

the purposes of these Regulations" a person was a "spouse" if in a "married relationship" being "a marriage valid for the purposes of the Act" **and** that the Minister was satisfied that the conditions in s 5F(2)(a) to (c) were satisfied. It is to be noted that that version of the Regulations did not provide that it applied for the purposes of s 5F(3) of the Act, but only that it applied for the purpose of the Regulations. On the basis of the superseded definition, submissions were made that the Regulations specified as a criterion that a spouse was a person in a "married relationship" and that they were such if, as a matter of fact, they were in a marriage recognised as valid for the purposes of the Act **and** that the Minister was satisfied of the matters in s 5F(2)(b), (c) and (d).

[17] The applicable version of reg 1.15A entitled "Spouse" commenced on 1 July 2009[5] and provides:

> "(1) **For subsection 5F (3) of the Act**, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in [sections] 5F(2)(a), (b), (c) and (d) of the Act exist.
>
> (2) If the Minister is considering an application for:
> (a) a Partner (Migrant) (Class BC) visa; or
> (b) a Partner (Provisional) (Class UF) visa; or
> (c) a Partner (Residence) (Class BS) visa; or
> (d) a Partner (Temporary) (Class UK) visa;
>
> the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
>
> (3) The matters for subregulation (2) are:
> (a) the financial aspects of the relationship, including:
> (i) any joint ownership of real estate or other major assets; and
> (ii) any joint liabilities; and
> (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
> (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
> (v) the basis of any sharing of day-to-day household expenses; and
> (b) the nature of the household, including:
> (i) any joint responsibility for the care and support of children; and
> (ii) the living arrangements of the persons; and
> (iii) any sharing of the responsibility for housework; and
> (c) the social aspects of the relationship, including:

> (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
> (b) the Minister is satisfied that:
> (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
> (ii) the relationship between them is genuine and continuing; and
> (iii) they live together; or do not live separately and apart on a permanent basis."

[5] Regulation 1.15A was amended by reg 3 of the *Migration Amendment Regulations* 2009 (Cth), which commenced on 1 July 2009: see reg 2(a).

(i) whether the persons represent themselves to other people as being married to each other; and
(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
(iii) any basis on which the persons plan and undertake joint social activities; and

(d) the nature of the persons' commitment to each other, including:
(i) the duration of the relationship; and
(ii) the length of time during which the persons have lived together; and
(iii) the degree of companionship and emotional support that the persons draw from each other; and
(iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)." (emphasis added)

[18] In the present case, for the purposes of determining the existence of one or more of the conditions in s 5F(2) for the visa in question in the present case, regard is to be had to reg 1.15A(3). It specifies the matters that the Minister is required to consider for certain visa classes (reg 1.15A(3)) or may consider reg 1.15A(2),(4). Regulation 1.15A(3) specifies matters relating to "the financial aspects of the relationship", "the nature of the household", "the social aspects of the relationship", including whether the persons "represent themselves to other people as being married to each other" and the nature of the commitment.

[19] None of those matters identified concern the existence of a marriage that is a "valid marriage" under the Act. There is no definition in the Act of either "marriage" or "valid marriage" and no provision that is directed to what is a "valid marriage for the purposes of the Act", the phrase used in s 5F(2)(a) the Act. There is provision in the Act for determining whether a marriage is one that is "recognised as valid" for the purposes of the Act. Section 12 of the Act provides that, for the purpose of deciding whether a marriage "is to be recognised as valid for the purposes of the Act", it is Part VA of the *Marriage Act* that applies[6] which is concerned with marriages entered into overseas.[7] It was not, however, disputed that the question of the existence of a marriage that is a "valid marriage" under the Act is governed by the *Marriage Act*. However, in any event, for the reasons that follow, the validity of the marriage under the *Marriage Act* is a distraction in the present cases.

Evidence

[20] As McMurdo JA has stated, that, but for two counts, the factual background to the other 14 counts may be considered in terms of the evidence for count 1.

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6 Bar for s 88E of the *Marriage Act* which makes particular provision in relation to the recognition of certain marriages solemnised in a foreign country.

7 The Note to s 5F of the Act states that s 12 also affects the determination of whether s 5F2(a) is met.

The trial judge's directions

[21] The trial judge directed the jury as follows as to the element of arranging a marriage:[8]

> "So the first element that the Crown must prove beyond reasonable doubt is the accused arranged a marriage between other persons. Now, in this context, the term marriage used means a marriage capable of being registered in Births, Deaths & Marriages Registry. It is the Crown case that the marriages were not genuine. So here where 'marriage' is used, we're not talking about a genuine loving, life-long association together. **What you have to be satisfied of here is an arrangement – arranging a marriage between other persons, which involves simply sufficient to have that marriage registered** in the Registry of Births, Death & Marriages. As you'll see, I've pointed out that under the law – under the Marriage Act, a marriage means, 'The union of a man and a woman to the exclusion of all others voluntarily entered into for life'. On the evidence, they weren't those sort of marriages. All right. As to 'arranged' or 'arrange', it has its ordinary meaning, that is to bring about." (emphasis added)

[22] That was in accordance with the written outline provided to the jury:[9]

> "The term 'marriage' used in these charges means a marriage capable of being registered in Births, Deaths and Marriages Registry. It is the Crown case that these 'marriages' were not genuine marriages. At law, under the *Marriage Act*, a 'marriage' means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

[23] The trial judge directed the jury as follows as to the criterion for the stay visa and the intended assistance:[10]

> "Well, one criterion for a stay visa is that an applicant for the visa be the spouse of an Australian citizen – and this is where it all links up. It is not the Crown case that the applicant, the groom, was a spouse in the sense that the parties **were in a genuine married relationship, which involved a shared life as husband and wife. The Crown case is that the accused intended to assist the groom to get the stay visa by making it appear that the groom was a spouse of an Australian citizen**, all right? Are you right with that, ladies and gentlemen? **And make it appear that he was a spouse in a genuine married relationship, and thereby meet the requirement for the stay visa that he be married to an Australian citizen**." (emphasis added)

[24] That accorded with the following statement in the written outline given to the jury:[11]

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8 AB at 1031.
9 AB at 2771.
10 AB at 1031-1032.
11 AB at 2771.

> "'Criterion for the stay visa because of the marriage'. One criterion for a stay visa is that an applicant for the visa be the spouse of an Australian citizen. It is not the Crown case that the applicant (groom) was **a spouse in the sense that the parties were in a genuine married relationship which involved a shared life as husband and wife. The Crown case is that the accused intended to assist the male person (groom) to get the stay visa by making it appear that the applicant (groom) was a spouse of an Australian citizen in a genuine married relationship, thereby meeting a criterion for a stay visa**." (emphasis added)

Was there a misdirection as to s 240 of the Act in relation to whether a valid marriage was required to be arranged?

[25] The focus of s 240 is on the intention to assist another to satisfy the criterion of a stay visa by arranging the marriage in question. Whether or not the marriage arranged by a defendant results in a "valid" marriage (that is, valid under the *Marriage Act*) is not a stated element of s 240(1). Section 240 does not refer to arranging "a marriage that is valid under the *Marriage Act*". The distinction drawn in the *Marriage Act* between a "valid marriage" and an "invalid marriage" (see s 48) or a "void" marriage (see s 23 and s 51(2A)) is not a stated concern of s 240 of the Act.

[26] Nor does the section specify, as an element of the offence, that the marriage arranged should be or result in a marriage that is "valid for the purposes of this Act", an expression used in s 12 of the Act and in the Regulations.[12] Further, the section does not employ the term "spouse" or "married relationship" thereby incorporating the requirement in s 5F(a) of the Act that the marriage be "a valid marriage for the purpose of this Act" as do s 243(1) and (3) and s 245(1) and (3). Moreover, in providing a defence in s 240(3) to the offence, the relevant consideration is whether the defendant reasonably believed that the marriage "would result" in a genuine and continuing "marital relationship" rather than a "married relationship". The use of the terminology "marital relationship" rather than "married relationship" emphasises that it is the "genuine and continuing" aspect of the relationship, the subject of conditions (b), (c) and (d), that is the focus of s 240 of the Act rather than whether the marriage arranged was a marriage that was "valid" under the *Marriage Act* or for the purposes of the Act.

[27] In my view, it is not, therefore, an element of the offence that the "marriage" referred to in s 240 be or result in a valid marriage under the *Marriage Act*. There was no error in directing that, for the purposes of the present case, in relation to the element of arranging a marriage, marriage meant "a marriage capable to being registered as such". It reflected the reality that the marriage arranged included the production of a certificate of marriage being signed by the parties to it, the witnesses and the authorised celebrant.

[28] Under the *Marriage Act*, such a document is required to be issued immediately after the process of solemnisation of a marriage by an authorised celebrant and, when issued by the celebrant, purports that a marriage has taken place which has been solemnised in accordance with the provisions of div 2 of pt IV of the *Marriage Act*. The certificate of marriage issued in the present cases (under s 50 of the Act as a pre-

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12 See reg 2.08E(2)(c) which states "the marriage is recognised as valid for the purposes of the Act". As mentioned, s 12 refers to marriages "recognised" as valid as opposed to marriages that are valid.

condition for the registration of the marriage) as a result of the arrangements allegedly made by the appellants could not be conclusive evidence of a valid marriage, if the fact that the marriage took place was disputed. However, when issued by the appellant Gowda, as an authorised celebrant, the certificate of marriage purported that a marriage solemnised in accordance with the *Marriage Act* had taken place between real people and real witnesses for the solemnisation by the authorised celebrant. The conduct engaged in by the appellants involved the production of a certificate of marriage capable of registration in respect of a genuine married relationship. That the conduct of arranging a marriage in the present cases involved a purported solemnisation that (in all but two cases) could not result in a satisfaction of that part of the criterion in s 5F(2)(a) that the marriage is a valid one for the purposes of the Act is irrelevant.

[29] The trial judge directed that the intended assistance required was assistance in making it appear that the parties were spouses in a genuine married relationship, which involved a shared life as husband and wife. That direction focused on that part of the criteria in s 5F(2)(b), (c) and (d) of the Act, to which s 240 of the Act is addressed.

[30] In those circumstances, it was not an error to direct the jury that the relevant intention was proved if the jury found that the marriage arranged was intended to make "it appear that the person being assisted was a spouse of an Australian citizen in a genuine married relationship". That the intended assistance was not achieved because the marriage arranged was not solemnised as required by the *Marriage Act* and thus not valid under that Act was not to the point, what was critical was that the intended assistance provide the semblance of a genuine relationship.

[31] Even if the "marriage" referred to in s 240 is one that is "valid" under the *Marriage Act*, the offences charged being "attempts" to commit the offence, it was not an error to direct that arranging a marriage capable of being registered (as a purportedly properly solemnised marriage) constituted an attempt to arrange a marriage, thereby intending to assist in the satisfaction of the visa requirement that **a genuine married relationship which involved a shared life as husband and wife had been entered into**. The marriage arranged was conduct done to assist in the satisfaction of a part of a criterion and done with the intention that that part of the criterion would be satisfied. What was arranged was a contract between two people to enter into an arrangement that presented them as having entered into a duly solemnised valid married relationship to which they were mutually committed and which was genuine. The intention required to be proved did not need to be an intention to assist by arranging a valid marriage (that is, one that satisfies all the relevant criterion). Rather, it is sufficient that the intention was to assist in the satisfaction of at least a part of a criterion of being in a married relationship.

[32] I do not consider that the difference in the wording of s 240 and s 241, referred to by McMurdo JA, assists the appellants. The difference reflects that, in s 240(3), there is a reverse onus of proof on a defendant. Section 241 requires proof of knowledge of the pretend relationship as an element of the offence, whereas s 240 requires the defendant to prove an absence of knowledge that the relationship was a sham as a defence. Section 241 thus incorporates knowledge of the pretend de facto relationship as an element of the offence and makes it an offence to intend to assist an applicant get a stay visa by conduct making it appear that the applicant is a de facto partner with the accompanying intention of assisting the person by making that person appear to satisfy a criterion of being a de facto partner. Section 240 does not incorporate knowledge of a pretend relationship (that is that it is not a

genuine and continuing one) as an element of the offence. Rather, it makes it an offence to intend to assist an applicant to get a stay visa by the conduct of arranging a marriage with the accompanying intention of assisting the person to satisfy a spousal criterion because of the marriage. It is for a defendant to prove as a defence a reasonable belief that the marriage arranged would result in a genuine and continuing martial relationship.

[33] I make a further observation that, as mentioned, the criterion of being a spouse, that is, a person in a married relationship, mirrors those of being a person in a de facto relationship in respect of the conditions in s 5F(2)(b), (c) and (d) which may be described as relating to matters of appearance. In addressing those parts of the criterion of being a spouse reflected in s 5F(2)(b), (c) and (d), the trial judge's direction that what was required to be proved was that the "accused intended to assist the male person … to get the stay visa by making it appear that the applicant … was a spouse of an Australian citizen in a genuine married relationship, thereby meeting a criterion for a stay visa" was an apt direction.

[34] There was no misdirection in directing the jury as to the elements of the offence of attempting to commit the offence under s 240 of the Act. In my view, the appropriate order would be to dismiss the appeals.

[35] **McMURDO JA:** These appeals against conviction were heard last November and determined on 18 December, when orders were made with reasons to be published later. In each appeal, it was ordered that the appeal be allowed, the conviction on all counts be set aside, the appellant be acquitted on all counts, save for count 32, and that on that count the appellant be retried. These were my reasons for those orders.

[36] The appellant Mr Mashru was a registered migration agent and the appellant Ms Gowda was an authorised marriage celebrant. Together they operated a scheme, under which they arranged what they represented to be marriages between foreign nationals and Australian women, in order that the men might obtain visas to remain in Australia. This happened 16 times during 2011 and 2012.

[37] Section 240(1) of the *Migration Act* 1958 (Cth) provides:

> "A person must not arrange a marriage between other persons with the intention of assisting one of those other persons to get a stay visa by satisfying a criterion for the visa because of the marriage."

The appellants were not charged with arranging a marriage in contravention of that provision. Rather, they were charged with 16 counts of *attempting* to arrange a marriage, with the intention of assisting the man to get a stay visa by satisfying the criterion of the visa because of the marriage. Section 4A of the *Migration Act* applies the principles of liability in Chapter 2 of the *Criminal Code* (Cth) and thereby s 11 of the *Code*.[13]

[38] After a trial by a jury in the District Court, the appellants were convicted on all counts. Mr Mashru was sentenced to four and a half years' imprisonment with a non-parole period of two years and three months. Ms Gowda was sentenced to three years' imprisonment to be released after serving 18 months. Each appealed against those convictions, upon identical grounds.[14]

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13 By s 11.1, a person attempting to commit an offence thereby commits an offence.

14 In the same trial, Mr Mashru was convicted of offences against other provisions of the *Migration Act*, which are not the subject of this appeal and need not be considered.

[39] The principal question in these appeals was what is meant by a "marriage" in s 240(1). The appellants argued that it means a marriage which is valid, that is to say which has legal effect as a marriage, under the *Marriage Act* 1961 (Cth). It is common ground that at least 15 of these transactions were not valid marriages under that Act (and the appellants say the same about the other count).

[40] At the trial, it was not alleged that the appellants meant to arrange valid marriages. Instead, as the trial judge summarised the prosecutor's closing address, the case was that Ms Gowda "flagrantly ignored her obligations to comply with the Marriage Act to achieve a valid marriage within the sense of what is required under the Marriage Act. There were no vows, no exchanges of anything."

[41] The respondent argued that a marriage under s 240(1) could be either a valid marriage under the *Marriage Act* or a transaction which is described as something of a marriage although nothing of any legal effect. The boundaries of that second category of marriage are unclear, and they were described differently by the respondent's argument in this Court than they were by the judge to the jury. Nevertheless, the respondent argued that these cases were within it and that what the appellants were attempting to arrange was a marriage within s 240. In effect, the respondent argued that the appellants attempted to arrange transactions which, in an application for a visa, could be represented as valid marriages, and that this was sufficient for the offence to be committed.

[42] For the reasons that follow, the appellants' argument was to be preferred. To be guilty, the appellants had to have been attempting to arrange a marriage which was valid under the *Marriage Act*. Such an intention was not alleged at the trial. And it was not suggested that upon the evidence, it would have been open to the jury to find that it was proved.[15]

The *Marriage Act*

[43] The solemnisation of marriages in Australia must be undertaken according to Part IV of the *Marriage Act*. Division 2 of Part IV prescribes certain requirements for the solemnisation of a marriage. Relevantly here, Division 2 includes s 45 which is as follows:

> "(1) Where a marriage is solemnised by or in the presence of an authorised celebrant, being a minister of religion, it may be solemnised according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which he or she is a minister.
>
> (2) Where a marriage is solemnised by or in the presence of an authorised celebrant, not being a minister of religion, it is sufficient if each of the parties says to the other, in the presence of the authorised celebrant and the witnesses, the words:
>
> "I call upon the persons here present to witness that I, A.B. (*or* C.D.), take thee, C.D. (*or* A.B.), to be my lawful wedded wife (*or* husband)";
>
> or words to that effect.

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15 With one exception, which was count 32 on the indictment.

> (3) Where a marriage has been solemnised by or in the presence of an authorised celebrant, a certificate of the marriage prepared and signed in accordance with section 50 is conclusive evidence that the marriage was solemnised in accordance with this section.
>
> (4) Nothing in subsection (3) makes a certificate conclusive:
>
> (a) where the fact that the marriage ceremony took place is in issue--as to that fact; or
>
> (b) where the identity of a party to the marriage is in issue--as to the identity of that party."

[44] In at least 15 of these cases, the respondent conceded that there was no marriage solemnised in compliance with s 45(2). In 14 of those, there was a certificate of marriage prepared and signed in accordance with s 50. However, as I will discuss, there was no marriage ceremony which took place and the respondent did not argue that the certificate of marriage had an evidentiary significance according to s 45(3).

[45] There are other requirements for the solemnisation of a marriage which are within Division 2. A non-compliance with many of them does not invalidate a marriage. But, as is common ground, a non-compliance with s 45 has the consequence that the "marriage … is not a valid marriage": s 48(1). In turn, that means that such a marriage is "void": s 23B. Therefore in at least 15 of these cases, under the *Marriage Act*, there was not a marriage of some kind or effect; rather, there was no marriage at all.

The evidence

[46] It was agreed that with two exceptions, the facts of the various counts were relevantly identical. The facts of those 14 counts are illustrated by the evidence for count 1.

[47] The participants in this transaction were a Mr Singh and a Ms Haig. In 2010, Mr Singh was living in Australia with the permission of a student visa, which was about to expire. He engaged Mr Mashru to apply for an extension of that visa. When that application was refused, Mr Mashru suggested that Mr Singh come to see him at his house, and Mr Singh did so. When they met, Mr Mashru said to him that if he wanted to stay in Australia, he had "one option left" which was to "go for contract marriage". Mr Mashru said that Mr Singh could get a divorce, after perhaps two years, once he had been granted a visa to stay permanently. Mr Mashru said that to procure this marriage, he would charge $10,000 and the woman whom he would marry would charge $5,000 plus $1,000 for every month until he obtained his visa. On the same day, Mr Singh was introduced to the woman whom he was to marry. He did not remember how much he paid that day to Mr Mashru, but he paid $2,000 to the woman on that day and he believed that he paid the rest of the money into her account. On the same occasion he signed the marriage certificate, as did Ms Gowda and Ms Haig. No vows were exchanged. Mr Singh and Ms Haig did exchange telephone numbers. Mr Mashru advised him that he should put some of Ms Haig's belongings in his house in case someone came to inspect it. As Mr Mashru advised, Mr Singh and Ms Haig opened a joint bank account. He met her regularly but only to give her the monthly payment.

[48] Ms Haig gave similar evidence. There were no marriage vows exchanged and there was nothing in the nature of a marriage ceremony. She was simply introduced to Mr Singh and told that he would be the other party to the transaction. There was

a discussion about payments to her and she received some money on the day. She estimated that overall, she received about $15,000 from him. She signed documents as prepared by Ms Gowda.

[49] The respondent submitted that the facts of count 32 were different because, it was said, there was an exchange of vows. The participants were a Mr Payyurayil and a Ms Rodgers. He did not give evidence. Her evidence was as follows. She was in need of money and had heard from her sister of this scheme. She was willing to participate and she was asked to go to the house at Oxley where Mr Mashru lived, and to bring her driver's licence and birth certificate. She arrived and met Mr Mashru. She was there for about 30 minutes before being told that the other party to the transaction would not be coming on that day. A few days later, she was asked to go back to the house which she did. On that occasion she met Ms Gowda. Ms Gowda "explained that she was the lady who would be doing the marriage ceremony and that she needed the documentation to fill in and to sit with us to do the paperwork to fill it in." She then completed some documents as requested by Ms Gowda. She was told that one document was to be sent off to "Births, Deaths and Marriages". She then left. About a week later, she was called and told that "the marriage [was] going to take place on this particular day at this particular time, and it would be at my house."

[50] Ms Rodgers rang Mr Payyurayil and told him where she lived. He and a friend arrived there at about midday. Ms Rodgers's sister was present to act as a witness. Ms Gowda arrived and then "came in and did the proceedings". Ms Gowda then "did the ceremony" which involved "the exchange of vows – wedding vows". Documents were then signed and the "whole thing" took "20 minutes, if that". She received $1,000 on the day. Still in evidence in chief, Ms Rodgers gave this evidence:

> "Okay. And just to be clear about the wedding itself, who took you through the vows? --- The solicitor's wife [a reference to Ms Gowda]
> …
> Did you have to repeat those, repeat the vows? – No."

[51] The jury was not asked to consider whether the evidence for count 32 proved that the marriage was solemnised as required by s 45(2). Nor was the jury asked to consider whether there had in fact been a marriage ceremony. But Ms Rodgers did say that there was an actual ceremony and that it involved the exchange of wedding vows. Her evidence that those vows did not have to be repeated could be interpreted as evidence that the vows were exchanged once but not twice. If there was a ceremony, then the due compliance with s 45(2) would have been proved by the marriage certificate: s 45(3). In my view it was open to the jury to have found, had they been asked the question, that in this case there was a duly solemnised marriage, so that there was a valid marriage under the *Marriage Act*.

[52] In the respondent's argument, the completion by the parties to these transactions of documents which could be registered in the Registry of Births, Deaths and Marriages, was evidence that there was an interaction between them sufficient to constitute some type of marriage. The respondent pointed out that the transaction the subject of count 47 was an exception, in that no certificate of marriage which was capable of being registered was produced. In that transaction, there was a form of certificate which is in blank, save for the signatures of the bridegroom and his witness.

The *Migration Act*

[53] By s 4, the object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. To advance that object, the Act provides for the grant by the Minister of visas permitting non-citizens to enter or remain in Australia.[16] A visa to remain in Australia may be granted as a permanent or as a temporary visa.[17] Classes of visas may be prescribed by a regulation.[18]

[54] The type of visa which was relevant in these cases was what was prescribed by the *Migration Regulations* 1994 (Cth) as a subclass 820 temporary partner visa. Clause 820.211 of Schedule 2 of the *Regulations* prescribes the criteria to be satisfied when applying for such a visa. Relevantly, it provides as follows:

> "(2) An applicant meets the requirements of this subclause if:
>
> (a) the applicant is the spouse or de facto partner of a person who:
>
> (i) is an Australian citizen, [or] an Australian permanent resident …"

The word "spouse" is defined by s 5F of the Act[19] as follows:

> "(1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.
>
> (2) For the purposes of subsection (1), persons are in a married relationship if:
>
> (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
>
> (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
>
> (c) the relationship between them is genuine and continuing; and
>
> (d) they:
>
> (i) live together; or
>
> (ii) do not live separately and apart on a permanent basis.
>
> (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist."

Pursuant to s 5F(3), regulation 1.15A of the *Regulations* sets out "arrangements for the purpose of determining whether 1 or more of the conditions in s 5F(2)(a), (b), (c) and (d) exist". However, regulation 1.15A does not affect the content of those conditions (most importantly, that there be a "marriage that is valid for the purposes

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16 s 4(2), s 29(1).

17 s 30.

18 s 31(3).

19 At any relevant time, there was no definition of "spouse" in the Regulations. By s 13(1)(b) of the *Legislation Act* 2003 (Cth), the word has its meaning as defined in s 5F.

of this Act"); rather, it specifies what the minister is to consider in deciding whether those conditions have been satisfied.

[55] The relevance of a marriage to the grant of such a visa thereby appears: the visa may be granted only if the two persons are married to each other and under a marriage that is recognised as valid for the purposes of the *Migration Act*. Where such a marriage exists, of itself it will not make the applicant the "spouse" of the Australian citizen or resident. A further condition, in order for the applicant to be a spouse, will be the existence of a personal relationship between them.

[56] Section 240 is within Subdivision B of Division 12, which is headed "Offences relating to abuse of laws allowing spouses etc of Australian citizens or of permanent residents to become permanent residents." Section 237 sets out the reason for this Subdivision:

> "This Subdivision was enacted because:
>
> (a) under the regulations, a person satisfies a criterion for certain visas that give, or might lead to, authorisation for the person's permanent residence in Australia if the person is the spouse or de facto partner of, and has a genuine and continuing relationship, involving a shared life to the exclusion of all others with, either an Australian citizen or a permanent resident of Australia; and
>
> (c) some persons attempt to get permanent residence under the regulations by:
>
> (i) entering into a married relationship that is not intended to be a genuine and continuing relationship involving a shared life to the exclusion of all others; or
>
> (ii) pretending to be a de facto partner of another person."

[57] It can be seen then that an essential ingredient of a "married relationship", as it is defined for the *Migration Act*, is that the parties are married to each other under a marriage that is valid for the purposes of the Act. What is a marriage which is valid for that purpose? The answer is indicated by s 12 which provides:

> "For the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the *Marriage Act 1961* applies as if section 88E of that Act were omitted."

As s 12 indicates, it is the *Marriage Act* which determines the validity or otherwise of a marriage for the purposes of the *Migration Act*. There is no provision within the *Migration Act* which could do so. The respondent's argument concedes that the answer can be found only in the *Marriage Act*.

[58] Yet the respondent's argument was that a purported marriage, which is expressed to be void by the *Marriage* Act, could be a marriage under s 240 of the *Migration Act*.

[59] The full terms of s 240 are as follows:

> "(1) A person must not arrange a marriage between other persons with the intention of assisting one of those other persons to get a stay visa by satisfying a criterion for the visa because of the marriage.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) Subsection (1) applies whether or not the intention is achieved.

(3) It is a defence to an offence against subsection (1) if the defendant proves that, although one purpose of the marriage was to assist a person to get a stay visa, the defendant believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship."[20]

[60] A necessary element of an offence under s 240 is an intention to assist a person to get a visa by satisfying a criterion for the visa because of the marriage. If the relevant criterion is that the applicant be a "spouse", a valid marriage would not, of itself, satisfy that criterion. However s 238 provides that within Subdivision B, the word criterion includes "part of a criterion". A marriage which is valid for the purposes of the *Migration Act*, is at least "part of a criterion", because it is an essential condition for the satisfaction of the criterion. Alternatively, the existence of a valid marriage could be regarded as a criterion for the visa.

[61] Either way, that criterion, or that part of a criterion, could be satisfied only by something which is a valid marriage. It could not be satisfied simply by a person causing the Minister to believe that the applicant is a party to a valid marriage. It follows that to commit an offence under s 240, a person must act with the intention of arranging a valid marriage.

[62] Section 240(3) provides a defence, where a defendant believes on reasonable grounds that the marriage would result in a genuine and continuing marital relationship. That defence reflects the reason for Subdivision B which is expressed in s 237, namely to prevent attempts to get permanent residence by something which "is not intended to be genuine and continuing relationship involving a shared life to the exclusion of all others". The circumstance which is sought to be addressed by s 240 is where the legal relationship of a marriage is used to represent that, in fact, there is a personal relationship between the participants which has the elements of a "married relationship" as set out in s 5F.

[63] By s 239, Subdivision B applies to marriages solemnised outside Australia as well as solemnised in Australia. An offence against s 240 might be committed by arranging, with the requisite intent, a marriage which was solemnised outside Australia. The *Marriage Act* treats some foreign marriages as valid and some as invalid. For example, marriages solemnised under Part V, which are marriages between members of the Australian Defence Force solemnised in an overseas country, are expressed to be valid marriages by s 73. A marriage purportedly conducted under Part V, which does not comply with certain requirements of the Act, will be treated as a void marriage under s 23B.[21] Other marriages solemnised overseas will be valid or invalid for the *Marriage Act* according to s 88D. Consequently, for marriages both solemnised in Australia and outside of Australia, the *Marriage Act* determines whether there is a marriage that is valid for the purposes of that Act, and thereby for the *Migration Act*.

[64] The respondent argued that there were features of these transactions from which it should be concluded there was a marriage as that term should be understood in

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20 At the time of the alleged offences, s 240 prescribed a penalty of imprisonment for 10 years or $100,000 but the section was otherwise in the same terms.

21 By the application of Division 2 of Part III to marriages under Part V by s 23A.

s 240: the participants believed that they were marrying each other, they manifested that understanding by signing the documents necessary to record a marriage, this was recorded on "the official stationery" and the process was managed by Ms Gowda as an authorised celebrant. On the basis of those facts, the physical element of an offence under s 240, the conduct of arranging a marriage, was said to have been satisfied here by "some manifestation of solemnisation as a form of marriage". So in this way, it was said that a void marriage is nevertheless, in some way, a marriage.

[65] The respondent further argued that an offence might be committed by conduct in the nature of planning a marriage although nothing in the nature of a marriage resulted. It was said that this supported the interpretation of "marriage" in s 240 as extending beyond valid marriages.

[66] If the word "marriage", where it twice appears in s 240(1), could mean something less than a marriage which is valid in law, then the definition of "marriage" in s 5 of the *Marriage Act* should be considered. At relevant times, the word was there defined to mean, for the purposes of the *Marriage Act*, "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life." That is not a relationship which the parties to these transactions were undertaking, as is shown by the absence of wedding vows in these cases.

[67] The respondent's submissions did not correspond with the direction given by the trial judge. The trial judge held that there was a case to go to the jury, rejecting the submission that s 240 referred to a legally valid marriage. He directed the jury that "the term 'marriage' used in these charges means a marriage capable of being registered in Births, Deaths and Marriages Registry". He explained that proposition to the jury as follows:

> "It is the Crown case that the marriages were not genuine. So here where "marriage" is used, we're not talking about a genuine loving, life-long association together. What you have to be satisfied of here is an arrangement – arranging a marriage between other persons, which involves simply sufficient to have that marriage registered in the Registry of Births, Deaths & Marriages. … [U]nder the *Marriage Act*, a marriage means "[t]he union of a man and a woman to the exclusion of all others voluntarily entered into for life". On the evidence, they weren't those sort of marriages. …
>
> The second element that must be proved beyond reasonable doubt, with the intention of assisting the male person, the groom, to get a stay visa by satisfying a criterion for the visa because of the marriage…
>
> Well, one criterion for a stay visa is that an applicant for the visa be the spouse of an Australian citizen – and this is where it all links up. It's not the Crown case that the applicant, the groom, was a spouse in the sense that the parties were in a genuine married relationship, which involved a shared life as husband and wife. The Crown case is that the accused intended to assist the groom to get the stay visa by making it appear that the groom was a spouse of an Australian citizen … [a]nd make it appear that he was a spouse in a genuine married relationship, and thereby meet the requirement for the stay visa that he be married to an Australian citizen."

[68] The jury was thereby directed that there was a marriage in the required sense if there was the appearance of a marriage, by documents purporting to record a marriage, most particularly the certificate to be placed upon a public register of marriages. In effect, the judge directed the jury that the appellants were guilty if they attempted to make it look as if these were valid marriages, with the intention of assisting the groom to get a visa by appearing to satisfy a criterion for the visa. In my view, that involved a substantial departure from the terms of s 240, which can be seen by a comparison with s 241(1) which is as follows:

> "If a person knows or believes on reasonable grounds that 2 other persons are not de facto partners of each other, the person must not make arrangements that make, or help to make, it look as if those other persons are such de facto partners with the intention of assisting one of those other persons to get a stay visa by appearing to satisfy a criterion for the visa because of being such de facto partners."

Section 241 proscribes conduct with an intention that the relevant criterion for a visa would appear to be satisfied. Section 240 is differently worded, proscribing conduct with an intention that the criterion would be satisfied.

[69] In my view, neither the respondent's argument nor the trial judge's directions accorded with the proper interpretation of s 240. The physical element of an offence against s 240 is the arrangement of a marriage. As the respondent said, the fault element is the intention of assisting a person to obtain a visa *by satisfying the spousal criterion of a marriage*. The words which I have emphasised cannot be overlooked. The satisfaction of that criterion could be achieved only by a valid marriage. The fault element thereby requires an intention to arrange a valid marriage. As the respondent conceded, that was not the prosecution case.

[70] That interpretation is supported by a comparison of s 240 and s 241. It is also supported by a comparison of sub-paragraphs (i) and (ii) within paragraph (c) of s 237. Notably, the relevant mischief which is expressed within s 237 is not the attempt by some persons to get permanent residence by pretending to be legally married.

[71] That interpretation is also supported by s 239 and its references to marriages which are solemnised. It is consistent with a marriage in s 240 being something which is an actual marriage, rather than what has been falsely claimed as a marriage. Despite the circumstances which were relied upon by the respondent, in each of these cases (apart from that the subject of count 32), there was nothing in the nature of a solemnisation. The word "solemnised", according to the shorter Oxford English Dictionary means to "dignify or honour by formal ceremony". In these instances, there was no ceremony, as the respondent appeared to agree when disavowing any reliance upon the marriage certificates and the operation of s 45(3) of the *Marriage Act*.

[72] The appellants were not charged with offences against s 240, but with the distinct offence of attempting to commit a s 240 offence. Their criminal responsibility fell to be considered according s 11.1 of the *Criminal Code* (Cth), relevantly as follows:

> "(1) A person who attempts to commit an offence commits the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.
>
> (2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence. The

question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

(4) A person may be found guilty even if:

(a) committing the offence attempted is impossible; or

(b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence…."

[73] On these charges, the prosecution did not have to prove that a valid marriage had resulted. But it did have to prove, against each appellant, that he or she intended that a valid marriage should result. As I have said, that was not the way in which the prosecution argued its case. Rather, its case was that the appellants had meant to create only the appearance of a valid marriage. In turn, the judge did not direct the jury to consider whether the appellants meant to arrange a valid marriage.

[74] Consequently, the appeals had to be allowed on each of these counts because the jury was not directed to consider essential questions and instead were directed that they could convict upon proof of something short of the elements of the offence. But further, in this Court it was conceded that if a marriage under s 240 means a valid marriage under the *Marriage Act*, with one exception (count 32), the case was not proved on the evidence at the trial, and the appellants were entitled to be acquitted.