SUPREME COURT OF QUEENSLAND

CITATION:	*R v Razak* [2012] QCA 244
PARTIES:	**R** **v** **RAZAK, Rian Abdul** (appellant)
FILE NO/S:	CA No 271 of 2011 DC No 1048 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 June 2012
JUDGES:	Muir, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL – DISMISSED – where appellant found guilty by jury of facilitating bringing a group of non-citizens to Australia and sentenced to mandatory minimum of five years imprisonment with three year non-parole period – where intention to facilitate the bringing of the passengers to Australia was element of offence – where appellant argued Crown case consistent with hypothesis that appellant was involved in clandestine movement of passengers within Indonesia, contrary to Indonesian law – where appellant argued that evidence did not allow jury to exclude that hypothesis beyond reasonable doubt – where recklessness as to whether passengers had lawful right to come to Australia was element of offence – where appellant argued that he would not have been aware of the passengers' visa status because he did not understand the language they spoke and there was no evidence that he had any knowledge about immigration or any passport held by any passenger – where appellant argued that no adverse inference could be drawn from evidence of passengers retreating below deck, apparently to avoid detection, because that was explicable by hypothesis that

appellant was engaged in clandestine movement of passengers within Indonesia – where respondent argued it was reasonably open for jury to conclude that a crew member in the appellant's position would realise, even if not told directly, that there was a substantial risk that the passengers undertook the journey in that way and under those conditions because they had no right to come to Australia – whether open to jury on the evidence to be satisfied beyond reasonable doubt that appellant was guilty of offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant argued that as he was not involved in pre-travel arrangements, evidence of those arrangements given by the witnesses who were passengers was inadmissible – where respondent argued evidence of arrangements between passengers and smuggler contacts for travel to Australia was relevant to question whether it should be inferred that the appellant was aware that purpose of voyage was to take passengers to Australia – whether evidence admissible

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where defence counsel asked trial judge to direct jury that evidence of arrangements with smuggler contacts was irrelevant to determination of appellant's guilt – where trial judge did not give such a direction – where appellant argued trial judge should have directed jury as to the use to be made of the passengers' evidence of arrangements with smuggler contacts for travel to Australia – whether trial judge erred

Criminal Code Act 1995 (Cth), s 5.2(1), s 5.4(1), s 5.6(1)
Migration Act 1958 (Cth), s 42(1), s 232A

Fonseka v The Queen (2003) 140 A Crim R 395; [2003] WASCA 111, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Ahmad (2012) 31 NTLR 38; [2012] NTCCA 1, cited

COUNSEL: N V Weston for the appellant
G R Rice SC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MUIR JA**: I agree that the appeal should be dismissed for the reasons given by Fraser JA.

[2] **FRASER JA:** The appellant was found guilty by a jury of an offence against s 232A(1) of the *Migration Act* 1958 (Cth) ("the Act") of facilitating bringing a group of non-citizens to Australia. He was sentenced to the mandatory minimum penalty of five years imprisonment with a three year non-parole period.

[3] The grounds in the appellant's amended notice of appeal against his conviction are that:

> "1. The trial judge erred in declining to rule that evidence from the passenger witnesses relating to arrangements entered into, payments made and movements from their countries of origin up until the point of embarking upon the "Sumber Rejeki" offshore from Surabaya, Indonesia, was inadmissible in the trial of the appellant.
> 2. The trial judge erred in declining to direct the jury as to the use to be made of evidence…[f]rom the passenger witnesses of the earlier arrangements referred to in ground 1 above.
> 3. The verdict is unreasonable or alternatively, cannot be supported having regard to the evidence."

Ground 3: the verdict is unreasonable or alternatively cannot be supported having regard to the evidence

[4] It is useful first to consider the third ground of appeal. Under that ground the Court must review the record of the trial and determine whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence.[1]

[5] Section 232A(1) of the Act provides:

> "(1) A person who:
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;
> is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both."

[6] The effect of s 5.6(1) of the *Criminal Code* (Cth) is that, because the Act does not specify a "fault element" for the conduct described in s 232A(1)(a) of the Act, the fault element is intention.[2] Subsection 5.2(1) of the *Code* provides that "a person has intention with respect to conduct if he or she means to engage in that conduct". Accordingly, the elements of the offence in s 232A(1) have been described as follows:[3]

> "1. … [T]he accused facilitated the bringing or coming to Australia of a group of five or more people… .

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1 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.
2 *Criminal Code* (Cth), s 5.6(1).
3 See *R v Ahmad* [2012] NTCCA 1 at [47].

2. The accused meant to facilitate the bringing of the passengers…to Australia.
3. At least five of the passengers…were people to whom s 42(1) of the *Migration Act* 1958 (Cth) applied. That is, the passengers were not Australian citizens; and at the relevant time they did not have valid visas permitting them to enter Australia.
4. The accused was reckless as to whether the passengers…had a lawful right to come to Australia."

[7] Elements (1) and (2) were proved beyond reasonable doubt. As to (1), the appellant did not challenge evidence in the Crown case that he worked as a cook on a vessel which carried four crew members (including the appellant) and 31 passengers into Australia from Surabaya in Indonesia. As to (3), an employee of the Department of Immigration and Citizenship gave evidence, which was also not challenged, that none of the passengers on the vessel upon which the appellant was present at the time of the alleged offence were Australian citizens and none had a visa that was in effect. The appellant admitted that each of the passengers was a person to whom subsection 42(1) of the *Migration Act* applied. For the purposes of s 232A(1)(b), those people did not have a lawful right to come to Australia. That is so notwithstanding the fact that, as the trial judge was informed, by the time of the trial 26 of the 31 passengers had been granted protection visas and the other five passengers' applications had not been finalised.

[8] The appellant's case on appeal was that the evidence upon which the respondent relied to prove elements (2) and (4) "…displays inadequacies…or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted…"[4] The respondent accepted that there was no direct proof of the necessary intention in element (2) and recklessness in element (4), but argued that those necessary elements of the Crown case were proved beyond reasonable doubt by inferences drawn from the evidence.

[9] The evidence in the Crown case was largely uncontentious. The appellant admitted that he was one of the Indonesian crewmen aboard the "Sumber Rejeki" when it was intercepted by an Australian naval ship in the Contiguous Zone off Australian territorial waters near Ashmore Reef on 11 April 2010. The effect of other admissions was that the vessel, which was apparently heading towards Ashmore Island, crossed into Australia's Contiguous Zone early in the afternoon of 11 April 2010 and was intercepted shortly afterwards. Lieutenant Beumer, the officer in command of the naval ship, gave evidence that Ashmore Island was an unoccupied reef system consisting of several very small islets or sand "caves" [sic: presumably meaning "cays"]. The area was a traditional fishing ground for Indonesian fishermen. The only infrastructure comprised several graves and a well on the largest of the islets, which had been visited by generations of Indonesian fisherman.

[10] The appellant admitted that he was on the Sumber Rejeki between 6 and 11 April 2010. He admitted that when that vessel was intercepted by the naval ship there were 35 people on board, comprised of Burmese, Iranian and Afghani people and

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4 *M v The Queen* (1994) 181 CLR 487 at 494.

four Indonesian citizens (including the appellant). The nominal roll for the vessel showed that all but three of the thirty-one passengers spoke the Kurdish language. The appellant and the other Indonesians, who were the crew members, spoke Indonesian. There was no evidence that the appellant could speak or understand any language spoken by any of the passengers. The appellant admitted that when naval officers searched the Sumber Rejeki on 11 April 2010 they found a fixed compass, three diesel engines, approximately 550 litres of diesel, approximately eight litres of engine oil, approximately 50 kilograms of rice, and various biscuits and noodles. It was also admitted that the 122,000 rupiah in the appellant's possession was currently worth about $13.24.

[11] A former lieutenant in the Royal Australian Navy, Mr Griffith, who was in the party which boarded the Sumber Rejeki, gave evidence that it was a wooden vessel about 15 metres long. A rough sketch of the vessel and photographs taken after it was boarded give the impression that it was a fishing boat. On the evidence there was no fishing gear aboard apart from some hooks on lines. The vessel had one cabin constructed above decks towards the stern of the vessel, with a temporary canopy erected as an awning about that cabin's roof. Mr Griffith described the cabin as the "wheelhouse". It contained some basic controls, including a steering wheel and a compass. Photographs showed some of the passengers on top of the wheelhouse underneath the blue canopy. There was an opening in the middle of the deck. Mr Griffith gave evidence that the opening led straight down into the keel. A person standing below the opening would be standing in the bilge. This was apparently the fish hold, although there were no fish in it. There were no bunks or seats to accommodate the passengers.

[12] The evidence of the part played by the appellant came from five of the passengers. They gave evidence in Kurdish. Each passenger gave evidence of having been assisted by someone to leave Iran on a journey which ended in Surabaya, where they were transferred from a beach to the Sumber Rejeki. No witness gave evidence that the appellant had any role in relation to those journeys or of having seen the appellant at any time before he was onboard the Sumber Rejeki in Surabaya.

[13] Applying the scale marked on a small map tendered in the prosecution case, Surabaya appears to be about 1,200 kilometres to the north-west of Ashmore Island. The witnesses gave estimates of the duration of the trip on the Sumber Rejeki which ranged between five and seven days. No witness gave evidence that the appellant steered or in any way participated in the operation of the vessel. Four witnesses gave evidence that the appellant's role on the boat was to cook. The evidence was to the effect that the appellant cooked in an area near the stern. One witness, Eisanejad, gave evidence that, "I don't know what his duties or job was because he was always in that cabin, inside that cabin, and then he would sit outside and just be looking. Maybe he was doing cooking also, but I wasn't getting up around to see." Four witnesses gave evidence that a man who had been in charge of the boat had left the boat before it was intercepted. No witness gave evidence of having any communication with the appellant or of seeing or hearing any particular communication between the appellant and other crew members. One witness, Shahidi, gave evidence (in cross-examination) that the appellant spent most of his time by himself in the engine room and that the appellant talked to the other crew members only when told to do something by the captain. Another witness, Ahmadi, agreed in cross-examination that the appellant mostly kept to himself. One witness, Hamidi, gave evidence in chief that the four crew members "were cooperating and

working with one another". He also gave evidence that he did not notice which particular person had which role or duties and that, for some of the time, it was one person who was mostly giving the passengers food, and that the person he identified on a photograph (the appellant) was "mostly cooking". The witnesses gave evidence of other crew members steering and attending to matters such as the fuel.

[14] Three of the witnesses, gave evidence that when the vessel passed a boat (Ahmadi), an island or another boat (Movahedian), or a light (Eisanejad), the passengers would retreat into the hold below the deck.

Proof beyond reasonable doubt that the appellant meant to facilitate the bringing of the passengers to Australia?

[15] The appellant argued that the evidence in the Crown case demonstrated that his role on the vessel was a menial one and that he took no part in the steering, navigation, management or control of the vessel. The evidence suggested that he did not associate with other crew members, was unable to communicate with the passengers, and was not a party to any pre-embarkation arrangements. There was no evidence about his background, level of education or knowledge of the world. Nothing was found on the vessel which should have suggested to the appellant that the ultimate destination of the vessel was Australia. Since the vessel's point of departure was Surabaya and it was intercepted much closer to Indonesia than to the Australian mainland, the conclusion was open on the evidence that the appellant could have believed that the vessel was sailing to another place within the Indonesian archipelago. That is so even though the evidence demonstrated that the vessel was at sea for five days and had been provisioned accordingly. The Crown case was consistent with the hypothesis that the appellant was involved in the clandestine movement of the passengers within Indonesia, contrary to Indonesian law. In the appellant's submission the evidence did not allow the jury to exclude that hypothesis beyond reasonable doubt.

[16] The respondent argued that the following circumstances justified the jury in drawing the inference that the appellant intended to facilitate the bringing of the passengers to Australia:

(i) The passengers knew they were to be taken to some part of Australia. They had contractual arrangements to be taken to Australia.

(ii) The passengers were in fact brought to the vicinity of Australia near Ashmore Island.

(iii) The persons onboard were mostly of Middle-Eastern appearance. Having regard to the size and nature of the vessel, the duration of the journey, the number of passengers and conditions on board, there was obviously a commercial purpose behind the journey.

(iv) That purpose was in fact to take the passengers to Ashmore Island.

(v) Given that Ashmore Island consists of just a few sand cays, there was no evident purpose in transporting passengers from Indonesia to Ashmore Island other than to make Australian landfall.

(vi) It would be every juror's everyday experience to accept, in the absence of any reason to think otherwise, that in a commercial contract of carriage of goods or people, the crew of a boat, plane, train etc would be aware of the purpose and destination behind the contract. There was no evidence to cause a juror to doubt his/her natural inclination of the mind to accept that proposition.

(vii) It is reasonable to infer that the Indonesian crew members, being the persons responsible for implementing the passengers' contractual arrangements, would be aware of the destination. Put another way, it is unlikely that the crew were the only ones onboard unaware of the object of the voyage.

[17] This issue initially caused me some concern, but on reflection I was persuaded that it was open to the jury to find that the prosecution had proved this mental element of the offence beyond reasonable doubt. The thesis advanced by the appellant that the vessel might have been sailing to another place within Indonesia makes little sense in light of the evidence of the passengers' uniform belief that they were being taken to Australia and the evidence that they were in fact brought over a great distance to within the vicinity of Australia near the remote and deserted Ashmore Island. The evidence certainly justified an inference that at least the member or members of the crew in control of the vessel's movements must have known that the vessel's destination was within Australia. Bearing that in mind, a variety of circumstances justified the inference that the appellant knew that the destination of the vessel was within Australia: the evidence that the appellant was employed as a cook and was one of only four crew members working together on this small vessel, the evidence that the appellant and the other crew members spoke the same language, the evidence of Ahmadi that the four crew members cooperated and worked with one another, the evidence of Eisanejad that the appellant was regularly inside the wheelhouse from which the vessel must have been navigated, and that natural human curiosity which, the jury could find, would have led the appellant to enquire about the vessel's destination if that information was not volunteered to him.[5] None of this evidence was necessarily inconsistent with the evidence of other passengers that they did not see the appellant communicating with other crew members.

[18] Accordingly, I accept the respondent's submission that it was reasonable for the jury to infer that the Indonesian crew members, as the persons who implemented the contractual arrangements which the passengers presumably entered into to be carried to Australia, would have been aware that Australia was their destination. It was then for the jury to decide whether the inference should be drawn from the combination of circumstances proved in evidence that the appellant intended, by his participation in the crew as a cook, to facilitate the bringing of the passengers of the vessel to Australia. The jury evidently drew that inference. I conclude that the evidence was sufficiently cogent to allow the jury to find beyond reasonable doubt that the appellant had the requisite intention.

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5 cf *Fonseka v The Queen* [2003] WASCA 111 at [15] in which Wheeler J considered that evidence of the state of mind of persons on a vessel which travelled from Sri Lanka to Australia that their destination was Australia was capable of being circumstantial evidence against a fellow occupant of the vessel who was accused of an offence against s 232A. (The evidence was found to be inadmissible on the different ground, which is not applicable here, that it was hearsay.)

Proof beyond reasonable doubt that the appellant was reckless as to whether the passengers had a lawful right to come to Australia?

[19] Section 5.4(1) of the *Code* provides that "[a] person is reckless with respect to a circumstance if…he…is aware of a substantial risk that the circumstance exists or will exist…and…having regard to the circumstances known to him…it is unjustifiable to take the risk". The appellant's argument focussed upon the first aspect of that provision, concerning awareness of a substantial risk that the relevant circumstance existed. The appellant argued that the appellant would not have been aware of the passengers' visa status because he did not understand the language they spoke and there was no evidence that he had any knowledge about immigration or any passport held by any passenger. He argued that no adverse inference could be drawn from the evidence of the passengers retreating below deck, apparently to avoid detection, because that was explicable by the hypothesis that the appellant was engaged in a clandestine activity of moving the passengers from one place within Indonesia to another. In the appellant's submission, it was not open to the jury to find that the Crown had excluded that hypothesis beyond reasonable doubt.

[20] The respondent argued that it was not necessary to prove that the appellant had knowledge of the passengers' particular visa status. It was sufficient that the evidence justified the jury in concluding beyond reasonable doubt that the appellant must have been aware of a substantial risk that the passengers were coming to Australia without a right to do so. The respondent relied upon the following matters:

i. The vessel was a fishing boat, obviously not designed or equipped for passenger carriage.
ii. The number of passengers was substantial having regard to the size of the boat.
iii. Conditions for the passengers were rudimentary, housed as they were either on the deck or under the canopy structure above the cabin. There was no bedding for a journey of 5-7 days. There was no evident facility for washing. The kitchen was a makeshift one at best, consisting of a stove at the rear of the vessel. There was one toilet for all.
iv. There was a relative absence of navigational aids, which comprised compass and GPS and some kind of stick for navigating by the stars.
v. The place of boarding was apparently a remote one, not at any jetty or facility for boarding.
vi. There was a procedure followed, when the boat passed an island or another boat, whereby the passengers would retreat to the fish hold below deck. No one on board could have failed to be aware of this.
vii. The persons on board were generally of Middle Eastern appearance.
viii. None of the passengers was asked about passports or Australian visas.

[21] The respondent argued that it was reasonably open for the jury to conclude that a crew member in the appellant's position would realise, even if not told directly, that there was a substantial risk that the passengers undertook the journey in that way and under those conditions because they had no right to come to Australia.

[22] There is a good case that the jury could not have concluded beyond reasonable doubt that the appellant knew anything about the precise visa status of any of the passengers, but that is not decisive. That follows from the unambiguous text of s 232A(1)(b). That provision identifies the relevant circumstance for the purpose of s 5.4(1) of the *Code* as being the absence of "a lawful right to come to Australia" in the group of five or more people to whom subsection 42(1) of the *Act* applies. The issue raised by the parties' submissions is whether the Crown proved beyond reasonable doubt that the appellant was aware of a substantial risk that the passengers did not have a lawful right to come to Australia. It was also necessary for the prosecution to prove beyond reasonable doubt that, having regard to the circumstances known to the appellant, it was unjustifiable for him to take that risk, but the appellant's challenge was focussed upon the preceding element of awareness of the risk.

[23] The possibility that Indonesian authorities might have detained the vessel if they discovered that it was carrying its 31 passengers through Indonesian waters[6] could explain the passengers' conduct in retreating below deck to avoid detection, but the combination of the circumstances proved in evidence nevertheless allowed the jury to conclude beyond reasonable doubt that the appellant must have been aware that there was at least a substantial risk that the passengers had no lawful right to come to Australia. The relevant circumstances are those already identified as justifying an inference that the appellant intended to facilitate the bringing of the passengers to Australia and, in particular, the use of a fishing boat, which was manifestly not designed to carry passengers, to carry a group of passengers, who had apparently arrived in Indonesia from distant countries, from Surabaya over the high seas towards a remote and deserted island within Australian waters. Whether the inference should be drawn was again a matter for the jury, but the circumstances proved in the prosecution case made it safely open to the jury to draw that inference. Once the jury drew that inference, it was open to them to find that, having regard to the circumstances known to the appellant, it was unjustifiable for him to take the risk that the passengers did not have any such lawful right.

[24] It follows that it was open to the jury on the evidence to be satisfied beyond reasonable doubt that the appellant was guilty of the offence. This ground of appeal has not been established.

Ground 1: the trial judge erred in declining to rule that evidence from the passenger witnesses relating to arrangements entered into, payments made and movements from their countries of origin up until the point of embarking upon the "Sumber Rejeki" offshore from Surabaya, Indonesia, was inadmissible in the trial of the appellant

[25] The appellant argued that, because he was not involved in any of the arrangements made by any of the passengers to travel from Iran to Surabaya where they embarked upon the "Sumber Rejeki", the evidence of those arrangements given by the five witnesses who were passengers was inadmissible. It was not adduced as evidence of actions by co-conspirators and it was not necessary to make the evidence of the witnesses intelligible. It was submitted that the evidence was irrelevant to the only real issues raised by the defence, namely, whether the appellant intended to facilitate the bringing of the passengers to Australia and

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6 The appellant's submission assumed that Indonesian authorities might have had and acted upon such a power. That would seem unsurprising, but it was not the subject of evidence.

whether the appellant was reckless as to whether those passengers had a lawful right to come to Australia.

[26] The respondent argued that the evidence of the commercial arrangements between the passengers and their smuggler contacts for their travel to Australia was relevant to the question whether it should be inferred that the crew of the vessel, including the appellant, were aware that the purpose of the voyage was to take the passengers to Australia.

[27] The evidence of the passengers' travel arrangements was adduced to prove their uniform states of mind that their destination was Australia. The passengers' payments and their movements before they arrived in Surabaya were not themselves significant, and they were appropriately given little emphasis in the evidence, but the evidence of those aspects of the passengers' travel arrangements was practically inextricable from the evidence of the passengers' beliefs that the vessel was taking them to Australia. That was one of the circumstances upon which the prosecution relied to prove that the appellant was aware that the destination of the vessel was Australia: see [17] of these reasons. The evidence was therefore admissible.

Ground 2: the trial judge erred in declining to direct the jury as to the use to be made of evidence from the passenger witnesses of the earlier arrangements referred to in ground 1 above

[28] The appellant argued that the trial judge should have directed the jury as to the use to be made of the passengers' evidence of the commercial arrangements between them and their smuggler contacts for travel to Australia. Immediately before the trial judge summed up, defence counsel asked the trial judge to direct the jury that the evidence of those arrangements was irrelevant to the determination of the appellant's guilt. The trial judge did not give such a direction. The appellant argued that, in the absence of that direction, there was a real risk that the jury might reason that, because the passengers had arranged to travel to Australia, the appellant must have known of that fact.

[29] It seems most unlikely that the jury would have adopted any such mode of reasoning. The trial judge directed the jury to take into account that the appellant "…had nothing to do with the initial arrangements". The trial judge gave that direction after referring to the argument by defence counsel that the jury could not be satisfied beyond reasonable doubt that the appellant was aware of a substantial risk that the person did not have a lawful right to come to Australia. The trial judge referred to the submissions by defence counsel that nothing was said by the passengers to the appellant about their intentions and visa status, that he had a lonely role on the boat, that he was merely the cook, and that he was impoverished and would not be aware of a substantial risk that the passengers did not have a lawful right to come to Australia. After directing the jury to take into account that the appellant had nothing to do with the initial arrangements, the trial judge continued the summary of defence counsel's submission, referring to various matters including the submission that the jury could not be satisfied beyond reasonable doubt that the appellant was reckless as to whether the passengers had a lawful right to come to Australia.

[30] The fact that the appellant was not involved in any of the arrangements of which the passengers gave evidence emerged from the evidence in chief and it was

unequivocally confirmed by answers by each of the passenger witnesses in cross-examination. As was submitted for the respondent, the jury could not have failed to appreciate that the arrangements did not directly implicate the appellant and no direction to that effect was necessary. For reasons given earlier, this body of evidence was relevant to the jury's assessment of the circumstantial case against the appellant. It would therefore have been wrong for the trial judge to give the direction which was sought by defence counsel or the direction contended for on appeal.

Proposed order

[31] I would dismiss the appeal.

[32] **GOTTERSON JA**: I agree with the order proposed by Fraser JA and with his Honour's reasons for making it.