SUPREME COURT OF QUEENSLAND

CITATION:	*R v Alif*; *R v Amin; R v Zolmin* [2012] QCA 355
PARTIES:	**R** **v** **ALIF** (appellant) **R** **v** **AMIN** (appellant) **R** **v** **ZOLMIN** (appellant)
FILE NO/S:	CA No 303 of 2011 CA No 307 of 2011 CA No 308 of 2011 DC No 917 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Convictions
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2012
JUDGES:	Margaret McMurdo P and Holmes and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In each appeal, leave is given to make the further submissions filed on 18 and 24 September 2012.** **2. In each appeal, the application to make further submissions on 17 December 2012 is refused.** **3. In CA No 303 of 2011, the appeal is dismissed.** **4. In CA No 307 of 2011, the appeal is dismissed.** **5. In CA No 308 of 2011, the appeal is allowed, the guilty verdict is set aside and a verdict of acquittal is entered.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where three appellants were Indonesian fisherman on a small, traditional fishing vessel – where ship was carrying 24 passengers and was over-crowded and provisioned with food, water, engine oil and cooking equipment – where the captain navigated the ship southwards from Indonesia with a compass and map over about five days – where compass and map not tendered in evidence – where the engines had failed and the vessel was drifting outside Australia's territorial sea – where appellants were convicted of facilitating the bringing to Australia of a group of non-citizens in Indonesia and on the seas between Indonesia and Australia – where the appellants were the captain, the engineer and cook/helper respectively – where the engineer and cook/helper sometimes relieved the captain by steering – where the captain told the passengers to lower their heads or hide whenever an Indonesian vessel was sighted until he ascertained if it was a police boat – where the appellants did not share a common language with the passengers – where there was no evidence of any conversation between the passengers and the appellants, or amongst the appellants as to the boat's destination, where the passengers were from or the need for visas to enter Australia – where the engineer pointed to a plane and told one passenger "Look, that's the airline of Australia. It's an Australian airline." – where the passengers paid another man for passage to Australia – where passengers did not pay the appellants – whether the guilty verdicts were unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the fishing vessel was found outside Australia's territorial sea – whether conviction pursuant s 232A *Migration Act* 1958 (Cth) (as it then was) requires proof that the group of people actually arrived in Australian territory

Acts Interpretation Act 1901 (Cth), s 15B
Migration Act 1958 (Cth), s 228A, s 232A
Seas and Submerged Lands Act 1973 (Cth)

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; [1993] HCA 15, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited
Fonseka v The Queen (2003) 140 A Crim R 395; [2003] WASCA 111, considered
Hann v Director of Public Prosecutions (Cth) (2004) 88 SASR 99; (2004) 144 A Crim R 534; [2004] SASC 86, followed
McKnoulty v R (1995) 77 A Crim R 333, distinguished
PJ v R [2012] VSCA 146, discussed

R v Ahmad (2012) 31 NTLR 38; (2012) 256 FLR 423; [2012] NTCCA 1, discussed
R v Jufri; R v Nasir [2012] QCA 248, distinguished
R v Razak [2012] QCA 244, distinguished
R v Zainudin [2012] SASCFC 133, considered
Sunada v R; Jaru v R [2012] NSWCCA 187, cited

COUNSEL: M J Byrne QC for the appellant, Alif
E Mac Giolla Ri for the appellant, Amin
M J McCarthy for the appellant, Zolmin
W J Abraham QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellants, Alif and Amin
Fisher Dore Lawyers for the appellant, Zolmin
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MARGARET McMURDO P:** The appellants are Amin, Alif and Zolmin. They are Indonesian subsistence fishermen. They were convicted on 13 October 2011 after a nine day trial in the Brisbane District Court of facilitating the bringing to Australia of a group of non-citizens between about 4 and 12 March 2010 in Indonesia and on the seas between Indonesia and Australia. The indictment charged each of them by only one name. The five non-citizens who gave evidence at the trial were of the Muslim Rohingya minority in Burma. The charge was brought under s 232A(1) *Migration Act* 1958 (Cth) (as it was at March 2010).[1] Each appellant was sentenced to the minimum mandatory sentence: five years imprisonment with a non-parole period of three years. They have each appealed against their conviction on grounds which were amended at the hearing.

[2] Alif's present grounds of appeal are:

> "2.1 The conviction is unsafe and unsatisfactory in that there was insufficient evidence available for the jury to conclude that the Appellant had any awareness of a risk that the passengers on the vessel had no lawful right to come to Australia. The jury could therefore not have found that the Appellant was reckless as to whether the passengers had a lawful right to come to Australia.
> 2.6 The learned trial judge misled the jury as to the essential fault element of recklessness."

[3] Amin's present grounds of appeal are:

> "Ground 1: The conviction is unsafe and unsatisfactory because there was insufficient evidence to conclude that the appellant intended to bring the passengers to a place he understood to be Australia.
> Ground 2: The conviction is unsafe and unsatisfactory because there was insufficient evidence to conclude that [the] appellant was aware of a substantial risk that the passengers had no lawful right to come to Australia;

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1 The relevant version is that valid from 9 November 2009 to 31 May 2010, that is, Act No 62 of 1958 as amended, taking into account amendments up to Act No 91 of 2009.

Ground 3: The conviction is unsafe and unsatisfactory because there was insufficient evidence to conclude that if the appellant knew of such a substantial risk, that he was not justified in taking that risk.

Ground 4: The appellant could not be guilty of 'bringing unlawful non-citizens to Australia' unless those unlawful non-citizens actually arrive in Australia's territory."

[4] Zolmin's present grounds of appeal are that his conviction was unsafe and unsatisfactory for two reasons. The first of these is that argued by Alif in his ground 2.1 above and Amin in his grounds 2 and 3 above. The second is that argued by Amin in his ground 1 above.

[5] I will set out the relevant statutory scheme under the *Migration Act* and summarise the relevant evidence at trial, for these must be understood to comprehend the appellants' various contentions.

The relevant scheme of the *Migration* Act.

[6] The long title of the *Migration Act* is: "An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons". Part 1 of the *Migration Act* headed "Preliminary" contains ss 1-12. The object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.[2] To advance its object, the Act provides for visas permitting non-citizens to enter or remain in Australia and the parliament intends that this Act is the only source of the right of non-citizens to so enter or remain.[3] The Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are non-citizens so entering.[4] The Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.[5]

[7] The following terms are defined in the interpretation section (s 5(1)). The phrase "'***enter Australia***', in relation to a person, means enter the migration zone." The phrase "***migration zone***" relevantly means:

> "the area consisting of the States, the Territories, … and, to avoid doubt, includes:
> (a) land that is part of a State or Territory at mean low water; and
> (b) sea within the limits of both a State or a Territory and a port; …
> but does not include sea within the limits of a State or Territory but not in a port."

[8] Under the *Seas and Submerged Lands Act* 1973 (Cth) (which adopts arts 3 and 4 of the United Nations Convention on the Law of the Sea), the territorial sea is the limit of 12 nautical miles from land that is part of a State or Territory. It follows that the migration zone at the relevant time included both the land of Australian States and

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2 *Migration Act* 1958 (Cth) s 4(1).
3 Above, s 4(2).
4 Above, s 4(3).
5 Above, s 4(4).

Territories, and also the sea within 12 nautical miles bordering that land and territory. See also s 15B *Acts Interpretation Act* 1901 (Cth).

[9] Section 6 of the *Migration Act* relevantly provides:

> "**6. Effect of limited meaning of enter Australia etc.**
> To avoid doubt, although subsection 5(1) limits, for the purposes of this Act, the meanings of ***enter Australia*** ... and as well, because of section 18A of the *Acts Interpretation Act* 1901,[6] the meaning of parts of speech and grammatical forms of those phrases, this does not mean:
> (a) that, for those purposes, the meaning of ***in Australia***, ***to Australia*** or any other phrase is limited; or
> (b) that this Act does not extend to parts of Australia outside the migration zone; or
> (c) that this Act does not apply to persons in those parts."

[10] Part 2 of the *Migration Act* is headed "Control of arrival and presence of non-citizens". Division 3 is headed "Visas for non-citizens". Its sub-div A, "General Provisions about visas" contains s 42 which relevantly provides:

> "**42. Visa essential for travel**
> (1) … [A] non-citizen must not travel to Australia without a visa that is in effect.
> …
> (2A) Subsection (1) does not apply to a non-citizen in relation to travel to Australia:
> …
> (c) if:
> (i) the non-citizen is brought to the migration zone under subsection 245F(9) of this Act. …"

[11] Part 2 div 12 is headed "Offences in relation to entry into, and remaining in, Australia". Its sub-div A is headed "General offences". Section 228A applies sub-div A in and outside Australia. It includes the provision under which the appellants were charged, s 232A, which relevantly provides:

> "**232A Organising bringing groups of non-citizens into Australia**
> (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.
> …"

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[6] *Acts Interpretation Act* 1901 (Cth) s 18A provides:
"**18A Parts of speech and grammatical forms**
In any Act where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings."

[12] Part 2 div 12A is headed "Chasing, boarding etc. ships and aircraft. The definitions for this division include " '***territorial sea***', in relation to Australia, has the same meaning as in the *Seas and Submerged Lands Act 1973*". This division contains s 245F which relevantly provides:

> "**245F Power to board and search etc. ships and aircraft**
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> *Application of section to ships*
>
> (1) This section applies to a ship that is outside the territorial sea of a foreign country if:
>
> (a) a request to board the ship has been made under section 245B;
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> …
>
> *Power to detain and move ship or aircraft*
>
> (8) An officer may detain the ship … and bring it, or cause it to be brought, to a port, or to another place … that he or she considers appropriate if:
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> …
>
> (c) in the case of a foreign ship that is outside Australia – the officer reasonably suspects that the ship is, will be or has been involved in contravention in Australia of this Act.
>
> …
>
> *Powers of officers in respect of people found on detained ships or aircraft*
>
> (9) If an officer detains a ship … under this section, the officer may:
>
> (a) detain any person found on the ship … and bring the person, or cause the person to be brought, to the migration zone;
>
> …"

Does s 232A require proof that the group of people actually arrived in Australian territory?

[13] Having set out the relevant provisions of the *Migration Act*, it is convenient to deal with Amin's fourth ground of appeal. In *R v Ahmad*[7] the Northern Territory Court of Criminal Appeal held that it is unnecessary in establishing a charge against s 232A that the group of non-citizens without Australian visas entered Australia. Amin's counsel contends that the court's reasoning in *Ahmad* in this respect is plainly wrong and should not be followed by this Court. In *Ahmad*, the judges ascribed the wrong meaning to the words "proposed entry into Australia" in s 232A. They did not refer to the definition in the *Migration Act* of "enter Australia". Instead, the court gave the word "entry" its ordinary English language meaning. The phrase "migration zone" is defined to exclude most of the Australian territorial sea and all the contiguous zone. To enter Australia in terms of s 232A, a person must physically enter the Australian territorial sea. The wording of s 232A(1) clearly anticipates different scenarios including entry of passengers into Australia and proposed entry of passengers into Australia. It is significant that s 232A does not refer to the "proposed bringing or coming to Australia" of a group of five or more people.

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7 (2012) 256 FLR 423, 426-427 [17] (Mildren J), 431-432 [42]-[46] (Southwood and B R Martin JJ).

[14] The trial of the present case preceded the decision of the Northern Territory Court of Criminal Appeal in *Ahmad*, but the trial judge determined that s 232A(1) did not require proof that the people travelled to Australia, that is, that they at least crossed the outer boundary of the Australian territorial sea. His Honour held that the term "the bringing to Australia" in s 232A is a process. What must be proved beyond reasonable doubt is that the appellants facilitated that process. To prove the facilitation of that process, it is unnecessary to prove that the process achieved its ultimate goal. There is a distinction between organising or facilitating the bringing or coming to Australia (a process) and the entry or proposed entry into Australia (an event or a proposed event).

[15] Amin's counsel contends that it follows from the trial judge's construction of s 232A that, if what was facilitated was an event, then the prosecution must establish arrival in Australian territory. But if what was facilitated was a process, then it was unnecessary to establish arrival in Australia. He contends that this is an error of law; that an accused person cannot facilitate the bringing of people to Australia unless the passengers actually arrive in Australia. The word "to", immediately before the word "Australia", shows that s 232A contemplates actual entry into Australia. By way of example, he submitted that a police officer who has unsuccessfully tried to facilitate the bringing of an offender to justice has not facilitated the bringing of the offender to justice because the offender has never been brought to justice. He contends that construing s 232A to require proof that the group of people actually arrived in Australia best meets both the plain meaning of the terms of s 232A and the purpose of the *Migration Act*. Those who tried to facilitate the bringing or coming to Australia of unlawful entrants but were thwarted before doing so could be charged under the attempt provisions of the *Criminal Code* 1995 (Cth), s 11.1. Section 228A which gives extra-territorial effect to s 232A does not detract from this contention.

[16] He also submits that his contended construction is consistent with the Victorian Court of Appeal's recent decision in *PJ v The Queen*.[8] There the court held that to be found guilty of this offence, the prosecution must show that the defendant intended the relevant group be brought to a destination that was part of Australia and which the defendant knew was part of Australia.

Conclusion on this ground of appeal

[17] Amin's contentions are not without force. The trial judge in *Ahmad* ruled that the prosecution had not made out the charge under s 232A: the passengers were not people to whom s 42(1) applied because there was no evidence that they had crossed the boundary of Australia's territorial sea.

[18] But the Northern Territory Court of Criminal Appeal reversed that ruling. Mildren J stated:

> "In my opinion s 232A does not create separate offences. It creates one offence which may be committed in a number of different ways, including the 'bringing or coming to Australia' or facilitating the 'entry or proposed entry into Australia'. I agree with the appellant's contention that the use of such terminology plainly indicates that the offence can be committed without the people entering into Australia.

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8 [2012] VSCA 146, [5], [19], [44], [46]-[52], [85].

> I also agree that there is no scope for the expression 'to whom subsection 42(1) applies' to be interpreted or applied differently according to which of the various ways in which the offence created by s 232A may be committed. If there were a requirement to prove that the people entered Australia, the concept of 'proposed entry' would have no work to do and be otiose. Similarly, the expression 'coming to Australia' in its ordinary meaning refers to the journey to Australia rather than actual entry. In my opinion, on the plain construction of s 232A proof that the people concerned entered Australia is not required."[9]

[19] Southwood and B R Martin JJ stated:

> "We agree with the appellant's contention that the offence created by s 232A of the *Migration Act* can be committed in a variety of ways, including by conduct that falls short of the subject persons actually entering Australia. The words, 'bringing or coming to Australia', do not equate to entry. Nor do the words, 'proposed entry into Australia', equate to entry. The offence can be committed provided that the relevant conduct of an accused person was carried out with the intention that the subject people would be brought to, or come to, or would enter Australia. Such conduct can occur outside Australia and does not require that the subject persons enter Australia before the offence is complete."[10]

[20] Whilst aspects of *Ahmad* have been applied by other intermediate courts of appeal (see, for example, *R v Razak*[11]and *R v Jufri; R v Nasir*[12]) the observations quoted above have not been directly considered. Nonetheless, this Court would accept and apply the reasoning and conclusions in *Ahmad* set out above unless persuaded they were plainly wrong.[13]

[21] For the following reasons, I consider the construction of s 232A(1) taken by the Northern Territory Court of Criminal Appeal is correct. Section 232A(1) anticipates various ways in which an offence against it can be committed and charged. It requires that the defendant: (a) either organises or facilitates (b) the bringing to Australia, or the coming to Australia, or the entry into Australia, or the proposed entry into Australia, (c) of a group of five or more people to whom sub-s 42(1) applies. I accept Amin's contention that "Australia" when twice used in s 232A(1) has the meaning he attributes to it. Section 42(1) and the definition of "enter Australia" in s 5(1) has the effect that "Australia" in s 232A(1) means entry or proposed entry onto Australian land or into its territorial sea, that is, within 12 nautical miles of that land. But this does not mean Amin's contended construction of s 232A(1) is correct.

[22] The verbs, the action words, in s 232A(1) are "organises" and "facilitates". Those words are not defined in the *Migration Act* and have their ordinary meanings. They are broad concepts. The Macquarie Dictionary defines the verb "organise" as

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9 *R v Ahmad* (2012) 31 NTLR 38, 43-44 [17].

10 Above, 47 [40].

11 [2012] QCA 244, [6].

12 [2012] QCA 248, [6].

13 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-152.

including "**1.** to form as or into a whole consisting of interdependent or coordinated parts, especially for harmonious or united action: *to organise a party*. **2.** to systematise: *to organise facts*. **3.** to give organic structure or character to … ." The Macquarie Dictionary defines the verb "facilitate" as "to make easier or less difficult; help forward (an action, a process etc)". To use the dictionary example, a person may organise a party but the party may never take place because it is cancelled on account of rain or unexpected illness. The person has still organised the party. Similarly, using the analogy of Amin's counsel in this appeal, a police officer may facilitate the bringing of an offender to justice by passing on information to others even though the offender is not ultimately brought to justice. The police officer has still facilitated the bringing of that offender to justice. My view as to the meaning of "organises and facilitates" in s 232A is not changed by the fact that a facilitation or organisation which is ultimately unsuccessful could be described as someone trying or attempting to organise or facilitate. And nor do I consider that Amin's contended construction of s 232A is assisted by the fact that the *Criminal Code* (Cth) contains attempt provisions. Applying the meaning I take of "facilitates" to s 232A(1), a person may make the bringing to Australia of a group of people without Australian visas less difficult and help to move forward the bringing of them to Australia without the group ever successfully entering Australia.

[23] Amin's counsel emphasises that "to" precedes "Australia". But the phrase "to Australia" is attached to the preceding phrase "the bringing or coming" which are continuing concepts capable of encompassing conduct which precedes any actual entry to Australia. Amin's counsel also emphasises the use of the phrase "proposed entry" and the absence of the word "proposed" before the words "bringing or coming to Australia". But the absence of the word "proposed" before the words "bringing or coming to Australia" does not alter the fact that the concept of "bringing or coming to Australia" is a continuing one capable of encompassing conduct which precedes entry into Australia. The word "to" preceding "Australia" and the absence of the word "proposed" before "bringing or coming" does not alter the meaning of "organises or facilitates".

[24] The construction I prefer of s 232A(1) has the advantage of giving the words "organises or facilitates" their ordinary meaning. It also fits comfortably with the object of the *Migration Act* which is concerned with the coming into and presence in Australia of non-citizens (s 4(1)). As I have explained, the coming into Australia is a continuing process which includes actions preceding actual entry. This construction also sits comfortably with the extra-territoriality envisaged by s 6 and s 228A. Section 232A is in pt 2 which is headed "Control of arrival … of non-citizens", not merely with their arrival. Part 2 div 2 deals with "[o]ffences *in relation to* entry into … Australia" *(my emphasis)*, not merely with offences of entry into Australia. The concept of control of arrival suggests the division aims to control conduct relating to non-citizens before their arrival. To organise or to facilitate the bringing or coming to Australia of a group of people without Australian visas is conduct *in relation to* their entry into Australia and is not limited to offences of entry into Australia. To make such conduct, including pre-entry conduct, an offence is to control the arrival of non-citizens.

[25] I am unpersuaded that the construction I prefer is inconsistent with the approach taken to offences of this kind in *PJ* upon which Amin's counsel places emphasis. It is true that the focus there is on the essence of an offence against this provision

being to prevent the entry into Australia of persons without Australian visas.[14] But prevention of entry may involve making pre-entry conduct unlawful so that the offender's entry can be thwarted. There is nothing in *PJ* which is inconsistent with the notion that an offence of this kind can be established without an actual entry of the prohibited persons into Australia. As the court noted:

> "[47] … Though the accused need have no knowledge of their (lack of) citizenship status, he must be shown to have had an awareness of a substantial risk that they had no right to enter Australia. In that context, the language … means what it says, in our view. It prohibits the intentional organisation, or facilitation, of conduct directed at conveying the non-citizens to, or into, Australia, the accused being aware of the substantial risk that they have no lawful right to enter that country.
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> [48] The conduct defined … is purposive conduct. It is conduct directed at achieving a particular result (or one of a number of possible results). Both the word 'organise' and the word 'facilitate' are active verbs, describing conduct directed at producing a result or outcome." [15] (footnotes omitted)

[26] Conduct directed at conveying non-citizens to or into Australia incorporates conduct preceding any arrival into Australia.

[27] For these reasons, I reject the submission that the construction of s 232A(1) taken by the Northern Territory Court of Criminal Appeal in *Ahmad* is wrong. To establish an offence against s 232A, the prosecution need not always prove that the group of people without Australian visas entered Australia. If, however, entry is alleged in the charge, this would need to be established beyond reasonable doubt. It follows that Amin's fourth ground of appeal is not made out.

The evidence

[28] I will next summarise aspects of the evidence relevant to those grounds of appeal which contend the convictions are unsafe and unsatisfactory, that is, they are unreasonable and cannot be supported having regard to the evidence: s 668E *Criminal Code* 1899 (Qld).

[29] The appellants admitted the following facts. Between 4 and 11 March 2010 they were on board a vessel, subsequently designated *Ridgewood*. At approximately 1940 hours on 10 March 2010 *Ridgewood* was at 10°19'S 128°30'E in the Timor Sea. At approximately 0810 hours on 11 March 2010 an Australian Customs and Border Protection Service vessel, *Arnhem Bay*, approached *Ridgewood* in the vicinity of 10°23.27'S 128°25.27'E in the Timor Sea. The 27 people on board *Ridgewood* (the appellants and 24 passengers) were transferred to *HMAS Glenelg*. All 27 people were subsequently transferred to Christmas Island.[16] Twenty-two passengers were granted protection visas. The decision in respect of the other two passengers' visa status was still pending at trial. The appellants did not apply for protection visas.[17]

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14 See, for example, *PJ v The Queen* [2012] VSCA 146, [49].

15 Above, [47]-[48].

16 Ex 10.

17 Ex 11.

[30] *Ridgewood* was a small motorised traditional wooden fishing vessel, about 12 to 15 metres long and about 2.5 metres wide. When approached by the Australian authorities, its two engines were not working and it was drifting. One passenger spoke English and asked for assistance. *Ridgewood* was then in Australia's exclusive economic zone approximately 180 nautical miles north west of Darwin and the same distance from Indonesia, well outside Australia's territorial sea. It carried no fishing equipment. It was transporting 24 passengers, a purpose for which it was not designed. It was over-crowded and provisioned with sacks of rice, gallons of water, "maggi" noodles, bread, dried fish and cooking equipment, together with drums of engine oil.

[31] Amin, who was about 81 years old, was *Ridgewood's* captain. He had a compass and a map in a book which he used when steering. The compass, map and book were not tendered and nor were they described. One passenger gave evidence that Amin used old binoculars but this was inconsistent with his evidence at committal and none of the other four passengers who gave evidence referred to binoculars.

[32] Alif, who was about 28 years old, looked after the engines and sometimes steered the vessel. One passenger described Alif as the person who would "drive the engine". MT gave evidence that later when *Ridgewood* was drifting in the middle of the sea "the driver" (whom he said was not the captain) pointed to an aeroplane. The driver said, "Look, that's the airline of Australia. It's an Australian airline." MT inferred that *Ridgewood* was then inside the sea of Australia.

[33] Zolmin, who was about 22 years old, cooked and served food, and showed the passengers where to sit and place their bags when they boarded. He sometimes bailed out water from the vessel and helped steer whilst the captain slept. There was no evidence that Zolmin, in these periods when he relieved Amin and steered the vessel, used the compass or map.

[34] Whenever the crew saw an Indonesian vessel, Amin told the passengers to lower their heads or hide until he ascertained if it was a police boat. The appellants spoke amongst themselves during the trip but there was no evidence as to the frequency, content or tone of these conversations. That was probably because, other than a few words of Malay for food and cigarettes, the appellants and the passengers did not share a common language. There was no evidence of any other conversation between the passengers and the appellants, or amongst the appellants, as to *Ridgewood's* destination, where the passengers were from or the need for visas to enter Australia.

[35] The passengers had paid money for their passage to Australia to a man in Indonesia called 'Din'. They travelled by bus, car and speed boat to somewhere in rural Indonesia where they stayed with 'Din's people' for four days. They then travelled by taxi and 'a big ship' (an inter-island ferry) for five days to Bau-Bau. They next travelled in a small boat to an island where they stayed for two or three days. They were told they would be taken by another boat to Australia and gathered on a beach at night. An old Indonesian man in the presence of about 50 villagers prayed for a safe journey. The appellants did not ask the passengers for passports or papers. They were transferred by small boat to *Ridgewood*. The passengers did not give evidence of paying the appellants or of any observed link between the appellants and Din. The five passengers who gave evidence understood they were travelling to Australia on *Ridgewood* in return for their payment to Din.

[36] *Ridgewood* travelled for somewhere between four and seven days. After one engine broke down, it stopped at an island where the appellants unsuccessfully tried to fix it. They continued their journey with one engine. The second engine broke down and they were drifting for more than a day and a night when found by the Australian authorities well outside Australia's territorial sea limits. Upon first seeing the Australian authorities, both the passengers and the appellants waved and tried to gain their attention. They all seemed happy to see the Australians. The appellants were not in possession of any significant sums of money.

[37] Mr Donald Hicks, a Customs officer and second in command of *Arnhem Bay*, stated that, unusually, *Ridgewood* was not flying its national flag even though it was on the high seas. This meant that under the law of the high seas he had the right to board to ascertain its nationality. By contrast, vessels travelling in domestic waters do not need to display their national flag.

[38] Lieutenant-Commander Jeffrey Williams, who was amongst the group from *HMAS Glenelg* which first made contact with *Ridgewood*, considered that it was capable of moving at six or seven knots with a "maximum flat chat" of 10 knots. It could have sailed for days within the Indonesian archipelago without leaving Indonesian waters. The visibility from *Ridgewood* would have been about six or seven miles, at best. He had intercepted over 50 vessels carrying asylum seekers trying to reach Australia. Very few made it into Australian territorial waters. Most, like *Ridgewood*, were intercepted on the high seas.

[39] Ms Gessica Bellia, an employee of the Department of Immigration and Citizenship gave evidence that the passengers did not hold valid Australian visas. In cross-examination, she agreed that Australia issued 2,215,234 offshore visas electronically, approximately two-thirds of all visitor visas granted outside Australia.

The elements of an offence against s 232A(1) *Migration Act*

[40] It is helpful to next set out the elements of the offence with which the appellants were charged. *Ahmad*,[18] as informed by *PJ v The Queen*[19] (followed by the New South Wales Court of Criminal Appeal in *Sunada v R; Jaru v R*[20]), makes clear that the elements of the present offence, which must all exist contemporaneously, are:

1. Between 4 and 12 March 2010, in Indonesia and on the seas between Indonesia and Australia, each appellant facilitated the bringing to Australia of a group of five or more people (namely, the passengers on *Ridgewood*).

2. Each appellant intended to facilitate the bringing of those passengers to a destination that was part of Australia and that each appellant knew was part of Australia.

3. At least five of those passengers were people to whom s 42(1) *Migration Act* applied, that is, they were not Australian citizens and did not have valid visas permitting them to enter Australia.

4. Each appellant:

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18 (2012) 31 NTLR 38, 49 [47].

19 [2012] VSCA 146, [5], [19], [44], [46]-[52], [85].

20 [2012] NSWCCA 187, [5], [7].

(a) was aware of a substantial risk that those passengers had no lawful right to come to Australia, and

(b) having regard to the circumstances known to him, it was unjustifiable to take that risk.

[41] As the trial in this case preceded the decision in *PJ*, it is not surprising that the trial judge's directions to the jury as to the second and fourth elements did not incorporate the directions identified in *PJ*. His Honour did not make clear that the prosecution must establish beyond reasonable doubt that each appellant was aware that the destination of the journey which he was alleged to have facilitated was one which was, and which he knew to be, part of Australia. The appellants did not contend, however, that the judge's directions as to the second element amounted to an error of law and a miscarriage of justice.

Was the guilty verdict unreasonable?

[42] It is not contentious that elements 1 and 3 were established beyond reasonable doubt.

[43] The appellants contend the guilty verdict was unreasonable on three bases. The first is that there was insufficient evidence for the jury to conclude that Amin and Zolmin intended to bring the passengers to a place they understood to be Australia (Amin's and first ground of appeal and Zolmin's second ground of appeal). The second is that there was insufficient evidence for the jury to conclude that each appellant knew of a substantial risk that the passengers had no lawful right to come to Australia (Alif's ground of appeal 2.1 and Amin's and Zolmin's first grounds of appeal). The third is that there was insufficient evidence to conclude that if Amin and Zolmin knew of such a substantial risk that they were not justified in taking that risk (Amin's ground of appeal 3 and Zolmin's first ground of appeal). I will deal with each of these grounds in turn, although they overlap to a degree.

[44] A consideration of these grounds of appeal requires this Court to review the whole of the evidence and to determine whether it was open to the jury to be satisfied beyond reasonable doubt of each appellant's guilt. See *M v The Queen*[21] and *SKA v The Queen*.[22] The evidence against each appellant was circumstantial. This means the jury could only convict each appellant if there was no reasonable hypothesis other than one of guilt: *Barca v The Queen*.[23] But in determining this question, evidence should not be considered in isolation or piecemeal; the court must look at the whole of the evidence in determining whether it was open to the jury to be persuaded beyond reasonable doubt of the appellants' guilt: *R v Hillier*.[24]

Applications to make further submissions after the appeal hearing

[45] This Court's recent decisions concerning appeals against convictions under s 232A(1) in *R v Razak*[25] and *R v Jufri; R v Nasir*[26] were handed down after the hearing of this appeal. Amin and Zolmin applied for leave to make further submissions in respect of those decisions. That application should be granted. *Razak* and *Jufri*, however, are of no real assistance in this case. First, questions of

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21 (1994) 181 CLR 487, 493-495.
22 (2011) 243 CLR 400, 406-408 (French CJ, Gummow and Kiefel JJ).
23 (1975) 133 CLR 82, 104 (Gibbs, Stephen and Mason JJ).
24 (2007) 228 CLR 618, 638 [48]-[49] (Gummow, Hayne and Crennan JJ).
25 [2012] QCA 244.
26 [2012] QCA 248.

whether jury verdicts are unreasonable necessarily turn on the evidence and issues in each individual case. The evidence and issues in those cases was by no means identical to the evidence and issues in the present case. The resolution of the disputed issues in this case will not be helped by a comparison of similarities with and differences from those cases. Second, *Razak* and *Jufri* were delivered after *PJ* was decided but neither considered *PJ* and its contribution to the incremental development of the law relating to charges of this kind.

[46] The respondent applied to make further submissions on 17 December 2012. Its application concerned the decision of the South Australian Court of Criminal Appeal in *R v Zainudin*[27] which was handed down on 14 December 2012. It is true that *Zainudin* refers to *Razak*. But the reasoning in *Zainudin* as to whether a jury could conclude beyond reasonable doubt on the whole of the evidence that the appellant in that case had the requisite knowledge the passengers were being brought to Australia is unhelpful in resolving that issue in this case. The respondent's application should be refused.

> *Is there sufficient evidence for the jury to find that either Amin or Zolmin intended to bring the passengers to a place that was and that he understood to be Australia?*

[47] The appellants Amin and Zolmin contend that the prosecution did not establish beyond reasonable doubt that either intended to facilitate the bringing of the passengers to a destination that was part of Australia and that they knew was part of Australia.[28]

[48] As I have explained, the prosecution did not have to establish that the passengers actually entered part of Australia: *Ahmad*.[29] And it is true, as the respondent contends, that the five passengers who gave evidence at trial all believed they were travelling to Australia after paying money to Din for this purpose. The respondent places reliance on Wheeler J's observations in determining an appeal from a conviction on a charge against s 232A in *Fonseka v The Queen*:[30]

> "In my view, evidence as to the state of mind of persons on the vessel about their destination was capable of being circumstantial evidence against the appellant. As his Honour pointed out during the course of argument, if 68 people on a bus had a view that the bus has Claremont as its destination, it is a reasonable inference that the 69th person shares that view. So with the vessel, the understanding of others on the vessel was capable of giving rise to an inference about the appellant's state of mind in relation to that issue. Where the evidence related to the state of mind only of one other person on the vessel, it was obviously of less weight, but it could not in my view be said to have no weight whatever. The understanding of the person Gray as to the vessel's destination was therefore in my view a relevant fact. For this reason I would not accept ground (ii)."[31]

[49] Murray and Hasluck JJ agreed with Wheeler J that Fonseka's appeal should be allowed but on another ground. They did not join in Wheeler J's observations set

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27 [2012] SASCFC 133.

28 See *PJ v The Queen* [2012] VSCA 146, [50], [85].

29 (2012) 31 NTLR 38, 43-44 [17] (Mildren J), 48-49 [42]-[46] (Southward and B R Martin JJ).

30 (2003) 140 A Crim R 395.

31 Above, 398 [15].

out above. Those observations are therefore obiter and this Court is not bound by them. Whether evidence is admissible as a piece of circumstantial evidence will depend on the admissible relevant evidence in each particular case. In the present case the passengers and the appellants spoke different languages and were unable to and did not communicate with each other about their destination or any issue other than food and cigarettes. The fact that five passengers believed they were travelling to Australia does nothing in this case to prove the appellants' state of knowledge as to the voyage's destination.

[50] The respondent relies on the following matters to prove this element beyond reasonable doubt. *Ridgewood*, a small traditional fishing vessel, was being used to transport 24 passengers. It had provisions for a voyage of some length and its fishing gear was removed. It was crowded with passengers and their bags. The voyage commenced from an isolated Indonesian village at night and proceeded for about a week in the direction of Australia.

[51] In Amin's case, he captained and navigated the vessel using a compass and map in the direction of Australia. Amin and the other members of the crew told the passengers to hide when they saw other Indonesian vessels. The respondent contends the only rational inference from this combined evidence was that Amin knew that the purpose of the trip was to bring the passengers to a destination that was part of Australia and that he knew was part of Australia.

[52] In Zolmin's case, *Ridgewood* was heading in the direction of Australia. He was a member of the crew doing what was necessary to achieve that purpose. The circumstances surrounding *Ridgewood's* voyage and the fact that Zolmin was working on *Ridgewood* gave rise to the inference that his purpose in doing so was to successfully undertake the voyage. Zolmin told the passengers where to sit and where to store their bags, cooked for them and tended to their needs, sometimes helping Amin to steer the vessel. He assisted the other crew members in telling the passengers to crouch down and hide when Amin saw Indonesian vessels. The three appellants spoke amongst themselves during the trip. They were clearly working together. The only rational inference was that Zolmin knew the vessel was travelling to Australia.

[53] Counsel for Amin submitted that the offence is not established if all that Amin was intending was to bring the passengers to somewhere off Australia that was not part of Australian land or territorial sea to be rescued by an Australian ship which would then take the passengers to Australia lawfully under s 245F[32] (as in fact happened here).

[54] I reject that contention. In those circumstances, the appellants would be facilitating the bringing of passengers to a destination that was Australia knowing that the ultimate destination was to be Australia. It would not matter that the final leg of that journey was to be undertaken lawfully under s 245F in a vessel belonging to the Australian authorities.

[55] In Amin's case, it is true that the evidence was by no means overwhelming. *Ridgewood* was found by the Australian authorities midway between Australia and Indonesia after drifting for some time. It was not flying the Indonesian flag which may have been consistent with Amin believing it was in Indonesian waters. It may also have been consistent with an intention to remain as anonymous as possible in undertaking an unlawful voyage into Australian waters. But after taking into

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32 Set out at [12] of these reasons.

account the evidence of the circumstances of the passengers, the voyage, and the arrangements on board *Ridgewood* upon which the respondent relies, I consider that the jury were entitled to be satisfied beyond reasonable doubt that the only rational inference was that Amin intended to facilitate the bringing of the passengers to a destination which was part of Australia and which he knew was part of Australia. The critical factor in reaching that conclusion is Amin's role as captain and his use of the compass and map as he navigated *Ridgewood* and its 24 passengers in the direction of Australia purposefully over a period of some days, at least before the second engine failed. Whilst it is not known what was on the map, the only rational inference is that it included information on the seas and land masses in the direction in which *Ridgewood* was heading. It follows that Amin has not made out his first ground of appeal.

[56] The evidence as to Zolmin's role was, however, considerably less persuasive. He was the youngest of the three crew members and appeared to be at the lowest level of hierarchy, cooking, serving basic food and bailing out water. He occasionally steered the vessel but there is no evidence that he used the map or compass to do so. There is no evidence as to the extent, content or tone of his conversations with Amin and Alif. Whilst it is improbable that even junior Australian crew members would not know the destination of a voyage they were undertaking, there was no evidence of the standard practice amongst crews of Indonesian fishing vessels. It was reasonably possible that Zolmin simply carried out instructions from his elderly captain, Amin, without knowing the intended destination of *Ridgewood*. Accepting that Amin was intending to bring the passengers to Australia illegally, he may have considered it prudent for Zolmin to know as little as possible about the scheme. The absence of the Indonesian flag was a factor which may have led Zolmin to believe they were sailing in Indonesian waters. The language barrier prevented the passengers speaking to Zolmin about their planned destination. Zolmin would certainly have apprehended from his role in hiding the passengers when Indonesian vessels approached that there was some unlawful activity involved in transporting the passengers southwards. But after considering the whole of the evidence, I am not persuaded that the only rational inference was that Zolmin intended to facilitate the bringing of the passengers to a destination that was part of Australia and that he knew was part of Australia. He must have known he was involved in some unlawful undertaking but he may not have apprehended that it involved bringing the passengers to Australia.

[57] Zolmin's position may be contrasted with that of the appellant in *Zainudin* who took on the role as captain steering the vessel on its course from Indonesia towards Christmas Island after the original captain left the vessel for another.

[58] It follows that, after reviewing the whole of the evidence, I am persuaded the jury verdict of guilty in respect of Zolmin is unreasonable and not supported by the evidence. I would allow his appeal, set aside his conviction and direct a verdict of acquittal. It is unnecessary to consider his remaining grounds of appeal.

> *Was there sufficient evidence to prove that Alif and Amin were reckless as to whether the passengers had no lawful right to come to Australia?*

[59] Each appellant contends that their convictions are unreasonable because the jury could not be satisfied beyond reasonable doubt that each was reckless as to whether the passengers had a lawful right to enter Australia (Alif's ground of appeal 2.1 and Amin's grounds of appeal 2 and 3).

[60] This involves a consideration of whether each appellant was both aware of a substantial risk that the passengers had no lawful right to come to Australia and that, having regard to the circumstances known to him, it was unjustifiable to take that risk. They contend that the jury could not exclude the reasonable hypothesis that they were each merely doing their job as a member of the crew without any regard as to whether the passengers had a lawful right to come to Australia.

[61] There was no evidence that they understood the voyage was destined for Australia or even that they appreciated that Australia was a different country to Indonesia. There was no evidence that they knew about any system of regulating entry into countries generally or into Australia in particular. There was no evidence that they knew that passports regulated entry in countries and should contain a visa indicating that entry was allowed. In any case, many visas are issued electronically and not recorded in a passport. The appellants emphasised that there was no evidence of conversations between the passengers and the appellants about the destination or the passengers' visa status. There was no evidence that they received any payment from Din or from any passenger, or that they were associated with Din. They did not share a common language with the passengers and did not communicate with them before or during the trip.

[62] The appellants' directions to the passengers to hide whenever an Indonesian vessel came into view led to the inference that the passengers were doing something illegal. But, the appellants contend, it did not establish that they knew the passengers had no lawful right to come to Australia. For all the appellants knew, the passengers may have been from a different part of Indonesia travelling to another part of Indonesia because of some illegal activity. Alternatively, the passengers may have been Australians returning to Australia.

[63] The appellants further contended that a determination of whether, having regard to the circumstances known to them, it was justifiable for them to undertake the voyage and the risk that the passengers had no lawful right to come to Australia, turned on each appellant's state of mind. There was insufficient evidence of either appellant's state of mind to conclude beyond reasonable doubt that he was not justified in taking that risk.

[64] The respondent contends that the only rational inference from the evidence was that each appellant was aware of a substantial risk that the passengers had no lawful right to come to Australia and, having regard to the circumstances known to him, it was unjustified for the appellant to take that risk.

[65] As I have found, Amin as captain knowingly navigated *Ridgewood* and its passengers towards Australia. I have previously set out the details of the evidence concerning *Ridgewood's* human cargo, Amin's involvement in hiding the passengers from Indonesian vessels and the other circumstantial evidence concerning the voyage. The jury were entitled to be satisfied beyond reasonable doubt from that finding and evidence that the only rational inference was that Amin knew he was bringing the passengers to Australia in this risky and surreptitious way because he was aware of a substantial risk that the passengers had no lawful right to come to Australia. They were also entitled to be satisfied beyond reasonable doubt that, having regard to the circumstances known to him, it was unjustifiable to take that risk. It follows that Amin's grounds of appeal 2 and 3 fail. His appeal against conviction must be refused.

[66] Alif did not contend that the second element of the offence was not made out, and for sound reasons. He was not the captain but he had a significant though ultimately unsuccessful role in attempting to keep *Ridgewood's* engines operating. He also steered from time to time. I would infer from MT's evidence that Alif pointed out an Australian plane to him late in the voyage and that this demonstrated Alif's belief that they were now in Australian waters. The only rational inference from this evidence when considered with the other evidence relied on by the respondent was that Alif intended to facilitate the bringing of the passengers to a destination that was part of Australia and which he knew was part of Australia. That conclusion is highly relevant to a consideration of whether the fourth element of the offence is established.

[67] That circumstance, combined with the evidence of *Ridgewood's* human cargo which he helped hide from Indonesian authorities and the other circumstances surrounding the voyage, were sufficient to allow the jury to conclude beyond reasonable doubt that the only rational inference was that he knew he was bringing the passengers to Australia in this risky and surreptitious way because he was aware of a substantial risk that the passengers had no lawful right to come to Australia. The jury were also entitled to find that the only rational inference was that, having regard to the circumstances known to him, it was unjustifiable to take that risk. It follows that Alif's ground of appeal 2.1 is not made out.

The judge's directions on recklessness

[68] Alif contends in his ground of appeal 2.6 that the judge misdirected the jury in stating that it would have been obvious to the appellants that the people they were carrying were not Australians; they did not ask for documents; did not ask to see visas and at best the appellants just ignored the reality. This, Alif's counsel contends, was inconsistent with the requirement that in order to establish recklessness under the *Criminal Code* (Cth) the prosecution must show that each appellant was aware the passengers had no lawful right to come to Australia; conscious awareness of the risk is required; it is not enough to show that the risk was obvious or well known: *Hann v Director of Public Prosecutions (Cth)*.[33] The primary judge's comment left open to the jury that the necessary fault element of conscious awareness could be satisfied by reckless indifference. This is a misdirection that could well have resulted in a miscarriage of justice: *McKnoulty v R*.[34]

[69] In determining whether the impugned words were an error of law amounting to a miscarriage of justice it is important to consider them in context. Early in his jury directions, the primary judge stated:

> "The lawyers' final addresses are not evidence. The addresses are the arguments that each barrister puts before you about how you might deal with the evidence in the light of the legal ingredients that I am to tell you about. You can take those arguments into account. The extent to which you do is entirely a matter for you."

[70] The next morning the judge continued his directions, dealing with matters of law including the elements of the offence, during which he gave appropriate directions on the element of recklessness, consistent with *Hann*. There is rightly no complaint

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33 (2004) 144 A Crim R 534, 542 [26] (Gray J).

34 (1995) 77 A Crim R 333, 344.

about those directions. The judge then made clear that he was summarising the competing contentions of counsel.

[71] In summarising the prosecutor's contentions, his Honour said:

> "As to the next element, the recklessness, the argument was that the [appellants] were reckless as to whether the passengers had no lawful right to come to Australia, and he discussed what that might mean, that they were aware of the risk, that each of the persons was a non-citizen without a visa, and the [appellants] proceeded unjustifiably to take the risk that they were people who did not have a lawful right to come to Australia.
>
> He gave you an example from outside the case to help illustrate what reckless might mean. You will recall the story of driving somebody and driving the robber to the bank. Well, [the prosecutor] submitted that *it would have been obvious to the [appellants] that the people they were carrying were not Australians, they never asked for documents, never asked to see visas and at most it could be said or at best the [appellants] just ignored the reality*.
>
> [The prosecutor] asked you to infer that the [appellants] must have been part of a larger organisation and you can take that, among other things, from the fact that the passengers didn't pay to get on to the boat. So, [the prosecutor's] arguing that if you're satisfied the [appellants] were doing this for money, somebody was giving them the money and it wasn't passengers, they were part of a larger organisation, and that the argument, as I understand it goes, would demonstrate to you at least an awareness of the risk that they were dealing with people who had no lawful right to come to Australia and they carried on unjustifiably to take that risk.
>
> He referred, as I said, to the evidence of the people being told to put their heads down when Indonesian vessels passed and the inference that you are being asked to draw from that is that there was an awareness in the crew that these were people without a lawful right to go to Australia, and [the prosecutor] submitted that no-one with a lawful right to enter Australia would travel in this way. The relevance of that isn't whether you and I might think that, the point is it's an argument that the [appellants] must have been aware of the risk that I have talked about." *(my emphasis)*

[72] His Honour then went on to fairly, accurately and fully summarise the contentions of each appellant's counsel.

[73] The impugned sentence is in italics. In *McKnoulty*,[35] upon which Alif's counsel relies, the judge wrongly gave a positive direction that reckless indifference was sufficient to establish this element of the offence. By contrast, in the present case the judge gave a correct direction as to the element of recklessness. When the impugned sentence is considered in context, it is clear that the judge was merely summarising the prosecution's submissions as to the inference that the jury should draw from the evidence. The judge earlier explained that counsel's addresses were

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35 (1995) 77 A Crim R 333, 344.

arguments, not evidence, and it was a matter for the jury what weight they gave them. After completing his summary of the prosecutor's submissions, the judge summarised the competing contentions of each appellant's counsel. The impugned sentence was not a direction of law from the judge and I do not consider the jury would have understood it to be a direction as to the law. The judge's summing up considered as a whole was balanced and appropriate. His Honour was not required to repeat the clear direction so recently given as to what constituted the element of recklessness which the prosecution had to prove beyond reasonable doubt. Nor was his Honour required to explain or qualify the prosecutor's submissions on the evidence. That is why no such direction was sought by any of the experienced trial counsel. I do not consider that the impugned sentence amounts to an error of law and nor do I consider that it has caused any miscarriage of justice. This ground of appeal is not made out. It follows that Alif's appeal against conviction fails.

Summary

[74] Alif's and Amin's grounds of appeal are not made out. Their appeals against conviction must be dismissed. Zolmin, however, has succeeded on the ground of appeal that his conviction is unreasonable and not supported by the evidence. His appeal should be allowed, the conviction set aside and a verdict of acquittal ordered.

ORDERS:

1. In each appeal, leave is given to make the further submissions filed on 18 and 24 September 2012.

2. In each appeal, the application to make further submissions on 17 December 2012 is refused.

3. In CA No 303 of 2011, the appeal is dismissed.

4. In CA No 307 of 2011, the appeal is dismissed.

5. In CA No 308 of 2011, the appeal is allowed, the guilty verdict is set aside and a verdict of acquittal is entered.

[75] **HOLMES JA:** I agree with the reasons of McMurdo P and the orders she proposes.

[76] **WHITE JA:** I have read the reasons for judgment of the President and agree with her Honour’s reasons and the orders which she proposes.