



Transcript of Proceedings

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DISTRICT COURT

CRIMINAL JURISDICTION

JUDGE GRIFFIN QC

Indictment No 1209 of 2011

THE QUEEN

v.

ALBAHRULIILMI

BRISBANE

..DATE 22/03/2012

..DAY 4

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THE COURT RESUMED AT 10.00 A.M.

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HIS HONOUR: I was hoping to start at 9.45.

MS BAIN: Yes. Can I apologise. I completely forgot until I walked into the courtroom at 5 to 10 and saw everybody here ready to go.

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HIS HONOUR: Did you get a terrible fright?

MS BAIN: Yes, I did.

HIS HONOUR: It happened to me once too.

MS BAIN: So I can only apologise and I can't even say that I was running late because when I - it was only when I walked in that it even dawned on me, so thank you.

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HIS HONOUR: That's all right, Ms Bain.

MR HOARE: Can I hand up a bundle of cases? I've had a discussion with my friend. The propositions of law that are referred to in my submission don't appear to be in contention, but-----

HIS HONOUR: This is not in contention, is it: that even though on the evidence the defendant only intended to take people to Ashmore Reef, never to mainland Australia, absent any argument about Ashmore Reef really at law being part of Australia, but even though the intention was only to take people to what I'll call the staging post and no further, not to mainland Australia, then he could be convicted of the offence if the prosecution could prove that his intention was to facilitate people coming to Australia, even though his facilitation was only part of the journey.

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MR HOARE: That's so, but there would need to have that - well, the starting point is they need to intend that he - yes, that he was facilitating people to come to Australia.

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HIS HONOUR: Yes. It doesn't mean that he had to be part of a continuing journey to Australia, wherever he thought Australia was.

MR HOARE: No, that's so.

HIS HONOUR: It has to be specifically to Australia.

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MR HOARE: That's so. They would still need to demonstrate that he had an intention.

HIS HONOUR: Yes. I'm more interested in the issue of the staging post and the length of the journey and how far it went and so on-----

MR HOARE: Yes.

HIS HONOUR: -----you agree, and no doubt you'd agree too
Ms Bain.

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MS BAIN: Yes, I do.

MR HOARE: And he has to have a comprehension that the end
destination of those passengers was Australia.

HIS HONOUR: That seems to me to be the issue that arises in
this no case submission that I understand you're making now,
that you've forewarned me about yesterday and it's been hinted
at during the trial. I have difficulty seeing how you can
argue that there's no evidence of - no evidence in relation to
the last ingredient, which is the reckless ingredient, and I
think we can - for the purposes of argument this morning can
we all just use shorthand terms knowing what the reckless
ingredient includes or is required to prove?

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MR HOARE: Look-----

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HIS HONOUR: And so you might - I'll tell you both that as far
as I'm concerned it seems to me that there is evidence upon
which an inference or inferences are properly drawn that there
was - it was reckless, the reckless element is demonstrated by
the prosecution submission for it to go to the jury.

MR HOARE: Well, I can only repeat what I've said in my
submissions.

HIS HONOUR: Yes, I've read your submissions.

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MR HOARE: Well, I won't take your Honour to anything beyond
that. If I could then deal with that first aspect which is
the knowledge. If I can speak briefly as to the no case
submission which was before her Honour Justice Philippides.

HIS HONOUR: Yes, well, Her Honour found - again all of these
cases, it seems to me when one reads the facts, are really
quite similar. Factual variations which may, according to
nuances perhaps even in the evidence, provide reasons for
different results, but Justice Philippides took the view that
as a combination of circumstances of the involvement of that
offender, the nature of the voyage, the number of passengers,
the type of voyage that it was and its length together with
the fact that there was proximity to Christmas Island, that
because Christmas Island was near or the next largest land
mass, I think she used the phrase, was Australia, therefore,
that gave rise to a proper inference that the intention was to
take people to - the passengers to Australia.

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MR HOARE: Yes, and it's that destination point which is
distinguishable in this case.

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HIS HONOUR: And may I say that that is the point at which I
have given deep consideration to but have not reached a final
conclusion and it seems to me it is on that evidence that the
question turns, quite frankly, on whether it is proper to make
that next step or whether there is a gap in the evidence.

MR HOARE: Well, this is what I'll address, and it's not in my submissions but it's a statement of relatively trite law which comes from a case of Barker which cites - if I could just find a copy of that for your Honour. I'm hoping I've brought enough. I'll hand up a copy. It's Barker v. The Queen, which is [1975] 133 CLR. The passage I'm referring to is at page 104.

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HIS HONOUR: Yes, I know Barker.

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MR HOARE: Yes.

HIS HONOUR: 104?

MR HOARE: 104. The paragraph which is almost exactly halfway down the page which states, "When the case against an accused rests substantially upon circumstantial evidence".

HIS HONOUR: Yes, and that principle there is that - there his Honour, of course, was talking about the proper approach by a jury and there is that small window where in proceedings where a no case submission is made that small window where a trial Judge has - is called upon to consider that very question, whether there is any inference such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused. It's expressed slightly differently and the test which I would apply is the test expressed by Chief Justice King in Bilick and Starke, but nonetheless it seems to me that the same approach is taken at least.

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MR HOARE: Yes, and the proposition which I'm relying upon is that a reasonable inference is not one which is based upon conjecture.

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HIS HONOUR: Yes.

MR HOARE: So dealing with the Crown case-----

HIS HONOUR: May I say this, in my view: rigorous caution must be employed to avoid intrusion of speculative assumptions, guesswork or mere unfounded supposition intruding into the evaluation of what proper inferences are open on the Crown case where there is a case that's founded upon circumstantial evidence wholly or in large part.

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MR HOARE: Yes. Now, the starting point is that there is no evidence that my client knew or intended that he was travelling to Australia. Now, I take your Honour's point in respect to the staging post, but that's still a material feature in considering where the Crown goes and whether the Crown can prove a case from there at its highest without relying upon-----

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HIS HONOUR: Yes - yes, I understand. Can I just stop you and ask, for I had planned to ask Ms Bain as well and you can address me on this, what - I understand what your submissions are in relation to it for you've included some submissions on this topic in your outline. As I understand it you say

because the Crown has led evidence that the defendant sd the end point, the destination and therefore the intention of taking passengers was to a place he understood to be called Ashmore Island, without anything further, then there's no reason why the jury shouldn't accept that and that should be one of the ingredients in considering overall whether there's evidence of an intention to take the passengers to Australia. That's your submission, isn't it? 1

MR HOARE: Yes, and it is - the submission, just to clarify the evidence, it's to Ashmore Reef. 10

HIS HONOUR: Ashmore Reef.

MR HOARE: Ashmore Reef, which is - has a particular - which is translated from Indonesian and, of course, there's no - it's material that it doesn't have an English word as part of its descriptor in the translation, and he also describes it as to a border, and it's material he doesn't describe it as a border to another country, just to an Indonesian border, and it is material that he has not - and this is unqualified in the evidence. He has not been to this place before. He's aware it's to a border and he's aware it has a particular destination and he's informed it's to the border and no further, and that is his belief and his intention so far as it can be formed on the evidence and so far as it can be implied on the evidence. 20

HIS HONOUR: But cannot the jury, merely because the evidence is placed before the jury by the prosecution - are the jury required to utilise that as a statement of fact or in the normal course like any other evidence cannot the jury say he knew he was taking them somewhere? He says Ashmore Island, but we don't accept that that was the end point of the journey because there are other things in the evidence that suggest he - which we accept that he was likely, or we accept beyond reasonable doubt that he must have known. You don't as a crewmen even get on a boat for what turned out to be quite a lengthy journey in those circumstances without knowing your destination. Absent any issues of cultural significance, looking at life through a cultural lens, the deference to a captain of the Indonesian culture, et cetera, et cetera, et cetera, human beings will all in those circumstances want to know where they're going. 30 40

MR HOARE: All right. Well, let me take that point and respectfully I think that's putting the Crown-----

HIS HONOUR: First of all, do you accept that the jury don't have to accept his answer Ashmore Island? 50

MR HOARE: All right. Well, I'll take to that point they reject everything that's said in his evidence. So that's it. It's put to one side. You then have the objective evidence which is left which is a boat travelling east, most proximate to the Indonesian archipelago and at the point of interception the closest continent-----

HIS HONOUR: That is the evidence, isn't it, Ms Bain, in terms of its position in relation to what Justice Philippides called the next largest land mass? The evidence is that it was actually most proximate to the Indonesian archipelago. 1

MS BAIN: Oh, yes, yes.

HIS HONOUR: I think 80 - was it 80 nautical miles - 88 nautical miles from Indonesia? 10

MR HOARE: Yes.

HIS HONOUR: And how far from Australia?

MR HOARE: 440, and that's the objective evidence that they're then left with-----

HIS HONOUR: Yes. That's my recollection.

MR HOARE: -----and to get to the - to get to the point of a finding, even in a circumstantial case, will necessarily involve an aspect of pure conjecture with that evidence as it faces them. It is - and what's absent is----- 20

HIS HONOUR: Maybe it's an interesting point now that I think of it, and because you've raised it, that where he believed he was going had an Indonesian name as opposed to Ashmore Island.

MR HOARE: Or, for example, Pulau Christmas, and that remains the evidence, so you have an Indonesian designation. There's also - there's an Indonesian designation for the destination. There is a proximity to the Indonesian coastline and there is some movement south, but the movement basically is easterly, which is towards----- 30

HIS HONOUR: It's east south-east, I suppose.

MR HOARE: It is, but in terms of the nature of the tracking in those - those terms, it's - from its commencement in Surabaya it's heading east with a southerly aspect, but it's - the predominantly - the predominant vector is easterly, which has then necessarily proximate to that general direction a point in the ocean which has an Indonesian designation, Timor, and West Timor, of course, is Indonesian and then further you have Irian Jaya which is also Indonesian and the islands to the east of East Timor in that archipelago are also Indonesian. 40

HIS HONOUR: And one can't speculate that Australia must be the most - is a preferred destination. 50

MR HOARE: No, not with that, not with that heading. That's where it becomes conjectural and not a reasonable inference.

HIS HONOUR: Are you saying that the collective ingredients Justice Philippides used included some conjecture?

MR HOARE: I say the first aspect of her reasoning which

appears at 38 is conjecture in that it says you would imply there is a contractual relationship on the crew such that they're effectively agents of people smugglers. I said that's conjecture. I don't know, however, what was presented-----

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HIS HONOUR: Well, I think what her Honour was talking about was the likelihood of payment and so on. In this case we do have payment from someone, not the captain.

MR HOARE: Yes.

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HIS HONOUR: So I think it would be fair for me to conclude that there was some sort of contractual relationship if I wanted to develop a view of the facts in that form. I must say to you, Mr Hoare, because I started off having you address me on the issue of the facilitation to Australia and the evidence of that, the intention of facilitating the passage of the passengers to Australia, I've come to the conclusion there's very clear evidence that the jury could act on that your client is a people smuggler, a person smuggler. I don't want to use that to the jury, but it's a shorthand form of saying-----

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MR HOARE: In terms of the facilitation element?

HIS HONOUR: Yes. No, of his whole activity. The issue is what can the Crown prove about what his intention was about taking people to Australia, and again it is relevant and should these reasons go elsewhere if I don't repeat them, one of the concerns that I've had and that I've factored into some of the considerations I've given, although I haven't reached a final view, is this: it seems to me wrong in judging this matter, certainly from the jury's point of view and perhaps from mine when I'm required to look at the evidence and assess it, which I must - it seems wrong, and I will direct the jury that they mustn't do this - they must not say "but where else could he have been going but Australia?" You actually could answer that by making other suggestions, but be that as it may, that seems to me to be the wrong question. It is the wrong question because by asking that question it reverses the onus of proof.

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MR HOARE: I had the same consideration in respect of how the proposition was put and my consideration was it offends the comments in Palmer at least in respect to that reversal, because it encourages - it encourages the jury, as your Honour has said, to reverse the onus and retrospectively engineer the case, and the point I've made, and I'm not sure - could I just have a moment? I'm not sure when the arguments refined to the point as your Honour has noted that I can go much beyond the evidence at its highest which if I can deal with some aspects of it. The evidence of my client's control is limited to sometimes being at the wheelhouse. The GPS does not have a land mass or a designation beyond points. He is - the interception is at sea. The waypoints are not historical but - they don't put a historical event on where the vessels had gone. The nature of the vessel's journey and its proximity to the Indonesian archipelago as intercepted does not lead to the

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- a reasonable inference that the intention was to facilitate a journey to Australia and for the Crown case to maintain beyond that, which is an intentional journey to Australia, would require a speculative feat to take it that step.

HIS HONOUR: Well, the passengers knew. Rather, it probably doesn't matter what was actually going to happen, I suspect. Perhaps the passengers were on the evidence not being given the complete picture, but the passengers believed they were coming to Australia.

MR HOARE: Yes.

HIS HONOUR: There is no evidence of any ability for the defendant and the passengers to communicate, nor was there any evidence of any of the other crew members, including the captain, being able or actually communicating with the passengers, and by directly or by communication between the crew through other communications. There's simply no evidence of that. In fact, the evidence seems to be quite clearly that there couldn't be communication apart from some reference to GPS.

MR HOARE: GPS as merely a phrase, and in that context the witness did not know what GPS was until after the event and there doesn't have in this case what is frequently the case is an intercession of a passenger making use of the term "Australia" and just that word as between the crew members and the passengers.

HIS HONOUR: What about if there was evidence that the defendant had a degree of education-----

MR HOARE: If they were called by-----

HIS HONOUR: -----such that one could infer or through the evidence some knowledge of matters of geography, for example, proximate to the country of Indonesia? That might be sufficient for the prosecution to argue that there was an inference open.

MR HOARE: Yes.

HIS HONOUR: That's not so in this case, though, is it?

MR HOARE: No, it's not-----

HIS HONOUR: And the evidence is not - it's simply silent on all things like that and you say because of the absence of any proof of those sorts of things you can't pull together a case showing intention, and it must be not - it must be an intention specifically to go to Australia.

MR HOARE: That's so, and it's not a - there is that evidence that he was schooled to year five, but there's no evidence as to what that means in context of an Indonesian education.

HIS HONOUR: Yes.

MR HOARE: And the Crown - well, I agree with your Honour's proposition and it could be called. There could, for example, have been evidence from people who knew him in Probolinggo. There could be evidence which is general as to an Indonesian fisherman who works in that subsistence type environment as to their general comprehension of world affairs, but the evidence is just not there. It's evidence that the Crown could have led but it's not there and again it requires a conceptual leap to import that evidence into my client's mind.

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HIS HONOUR: The only evidence about direction, maps or anything like that is that there were some maps in the cabin-----

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MR HOARE: Yes.

HIS HONOUR: -----this wheelhouse, and no evidence about this defendant having any access to them.

MR HOARE: And, in fact, Mr Rahimi saying, "I never saw anyone looking at maps."

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HIS HONOUR: Yes, and no evidence that your client had anything to do with the GPS plotting.

MR HOARE: Yes, GPS plotting or navigation or waypoints.

HIS HONOUR: Yes, thank you. Ms Bain, first of all, would you care to make some submissions about that evidence of going to Ashmore Reef? Can you tell me the basis upon which you lead it or are there - do you say the jury can make use of it in whatever way they want? It might be evidence which they could accept that that's actually where he was going, or they might reject that and say they're not satisfied to use that evidence. After all he's a defendant giving evidence and he might not be being entirely truthful, or another possibility is that the statement made that he was going to Ashmore Reef might be regarded by the jury as a partial admission that he wasn't prepared - he was prepared to be half truthful. They can accept such parts of the evidence and reject such parts, accept some of his other evidence and reject parts of the evidence, or they could use the Ashmore Reef as a partial admission of something greater.

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MS BAIN: Yes. I have to - if this were a multiple choice question I think I would have to take option D, all of the above. I think that it's open to the jury to-----

HIS HONOUR: Except, I suppose, the difficulty with Ashmore Reef being a partial admission. Where do they go from that? Isn't it speculation to say what else that might mean?

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MS BAIN: Whilst trying to avoid-----

HIS HONOUR: I might tell you to cut things short. I don't need to hear you on the issue of the reckless aspect.

MS BAIN: Yes.

HIS HONOUR: I think the issue for me is the issue of can the prosecution prove - is there a case to go to the jury where there is evidence of his intention, or evidence directly or by inference, proper inference, that his intention was to facilitate a journey to Australia? It has to be that specific. There's no doubt about that. That's where I see this argument has come, where its focus is.

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MS BAIN: Can I try to perhaps reformat the question of where else but Australia in this way: that the combination of circumstances of being paid a significant amount of money, the circumstances of the boarding, the nature of the boat, that is it not being equipped to carry passengers, et cetera, that it would-----

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HIS HONOUR: That it turned out to be a substantial sea voyage.

MS BAIN: Yes, lengthy sea voyage.

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HIS HONOUR: That he steered the boat, although it's relatively unspecific about what he did.

MS BAIN: Yes.

HIS HONOUR: The passengers believed that they were going to Australia.

MS BAIN: Yes.

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HIS HONOUR: The proximity of Ashmore Island to Australia. Ashmore Island not suggesting a destination in itself.

MS BAIN: Yes.

HIS HONOUR: That's an inference that could well be open. That comes from the evidence of Mr Watkins in chief who described as Ashmore Reef and islands and-----

MS BAIN: Yes.

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HIS HONOUR: -----it's hardly in inhabited spot.

MS BAIN: No, it's not the Club Med of the Indian ocean, and that it - the evidence as I understand it now is that-----

HIS HONOUR: And perhaps I can add to your argument the fact that the captain must have known the destination-----

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MS BAIN: Yes. 1

HIS HONOUR: -----and that in the circumstances - in all of those circumstances of his involvement and the voyage you could draw an inference that someone on that voyage, in those circumstances, having been paid a year's wage, must have known the destination, and if he knew - if the captain knew the destination, which you could infer as a very proper inference, surely the crew must have known as well----- 10

MS BAIN: Yes.

HIS HONOUR: -----and that gets you there.

MS BAIN: And that it would defy commonsense that he might be the only person on board who wouldn't ask or know where they were going.

HIS HONOUR: Well, that's where I think----- 20

MS BAIN: I'm trespassing.

HIS HONOUR: No, no, that's where I think - that's where I think the difficulties that I'm experiencing in looking at the evidence, the difficulties that Mr Hoare points to that he needs to neutralise and the difficulties that you need to speak to, this is - this is the crux of the matter, I think. All those circumstances of his involvement, his being a crew member, but what is the evidence of - actually of his role, what is the evidence of his connection with the captain, of the hierarchy and the relationship between the two? Really nothing more than when the captain left the wheel - this seems to be the evidence. When the captain left the wheel other crew members would take hold of the wheel - the evidence to my mind wasn't and they took over the direction of the boat or they took over the navigation of the boat, someone took hold of the wheel while the captain was out of the wheelhouse. That's to me what the effect of the evidence was. And minor though it is I am of the view that that amounts to facilitation, even being a crew member in the circumstances of that voyage----- 30 40

MS BAIN: Yes.

HIS HONOUR: -----with those people, in my view, is sufficient evidence to demonstrate a facilitation. The question is facilitation to where and can you demonstrate beyond reasonable doubt that it was to Australia?

MS BAIN: The other feature perhaps in keeping in mind the nature of - well, the features of hierarchy, captain, crew member and such, is that this is only a boat of some 18 to 20 metres----- 50

HIS HONOUR: Yes, I'm not suggesting it's a aircraft carrier. But, nonetheless, there is nothing known of - of what, if anything, that took place between the captain and the crew. One can perhaps draw some inferences that there must - there

was obviously communication, and I know there's no evidence of what the captain was paid, the Crown hasn't led that, and nor do the defence sought for it to be led, that may have been something of interest in determining the relative relationships and responsibilities and the likelihood of what the respective roles and perhaps therefore from respective roles by means of that payment the likelihood of what lower-order crew would have known from the captain. Anyway, there's no evidence of that.

MS BAIN: No there's not. There's again - I'm just trying to think now what's in evidence with respect to the defendant's now edited version of the evidence.

HIS HONOUR: I don't remember seeing anything in the original transcript-----

MS BAIN: No, no, not - not about the payment to the captain, sorry, I was just thinking about the nature of the hierarchy, but again it has to be kept in mind-----

HIS HONOUR: There was nothing terribly specific.

MS BAIN: No.

HIS HONOUR: There was some evidence about his contact with the captain at or just before the beginning of the voyage. And did he say he'd known the captain for 18 months?

MS BAIN: Yes. I don't know that that ended up in the evidence.

HIS HONOUR: Is that in the evidence? No, I don't think it was in evidence.

MS BAIN: I think it's gone.

HIS HONOUR: Yes. Can you take me to the passage about Ashmore Reef and what's in the evidence about Ashmore Reef? Do you have that edited-----

MS BAIN: The edited version?

HIS HONOUR: Yes, why don't we use that. That should be an item for identification.

MS BAIN: I'll hand up a copy for your Honour and I'll tender a copy for the record.

HIS HONOUR: Item F for identification and Mr Hoare's outline will be item G. Do you have a spare copy of your outline, Mr Hoare?

MR HOARE: Yes, I do, your Honour.

HIS HONOUR: Thank you. "E" will be the outline, I think. I'll amend that. Item E for identification will be Mr Hoare's written outline and item F will be the transcript proposed to

be - that has been read to the jury and proposed to be given to them.

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MARKED "E" AND "F" FOR IDENTIFICATION

MS BAIN: Excuse me, your Honour.

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HIS HONOUR: If the jury accepted what the defendant says, that he was enticed into this to bring goods, contraband perhaps, somewhere, they could come to a conclusion, couldn't they, that he was duped into getting on the boat and that may then change the perception of his involvement?

MS BAIN: Yes.

HIS HONOUR: But, nonetheless, it seems to me there's still evidence that while on board the boat his presence as a crew member, his involvement in activities on the boat, including, on a view of the evidence, that he may have taken the steering wheel on one occasion, then that's sufficient for the fulfillment of the facilitation, nonetheless.

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MS BAIN: Yes.

HIS HONOUR: Perhaps a view which could be formed that he was duped into getting on the boat might also then cloud the issue about whether - whether and what he was told and about the issue of destination, but that's a jury question really, isn't it?

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MS BAIN: Yes, it is, and-----

HIS HONOUR: I've got to determine whether there is - effectively - although I'm not stating the test, this test is more elegantly stated, but the mechanics of it, of looking at the test is, is there any evidence? Is there any evidence really in this case through inference, combined with the facts that have been proven, to demonstrate beyond reasonable doubt that he intended to take the passengers, to facilitate the passengers coming to Australia? I think that's stating-----

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MS BAIN: Yes, I accept that.

HIS HONOUR: -----where we're at.

MS BAIN: Yes.

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HIS HONOUR: The translator would like a break. How long would you like? Oh, you just want to swap? The other translator will have to be sworn in.

MR HOARE: Certainly, your Honour.

HIS HONOUR: Could I have your full name, please?

INTERPRETER: Stuart Raj, R-A-J.

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STUART RAJ, SWORN AS INTERPRETER:

MS BAIN: There's an initial reference, your Honour, to "Ashmore Reef" in the evidence in chief at the top of page 3. That the defendant knew that he was going to Ashmore Reef before he boarded the boat, that's at page 7, about halfway through. And I think that's all we're left with-----

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HIS HONOUR: Yes.

MS BAIN: -----with respect to actual references to "Ashmore Reef".

HIS HONOUR: And, as you say, some of the other evidence that you might have thought was suitable was affected by - was contaminated by the issue of the use of tense and therefore-----

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MS BAIN: Yes.

HIS HONOUR: -----as you've accepted, there were difficulties about its use.

MS BAIN: Your Honour, with - can I digress perhaps with respect to Mr Hoare's submissions about the - either Ashmore Reef or Ashmore Island having - I think the expression he used was having an Indonesian designation. There's no evidence in this matter so far that this defendant knew the destination by any other name other than "Ashmore Reef". For example, there's no suggestion that he was told to go to a place that had an Indonesian-sounding name. I'm just not sure whether I was on the right track with respect to that.

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HIS HONOUR: Well, you see, the transcript, and I have to accept the transcript and that the interpreter well and truly interpreted, the question was asked, "Ashmore Reef," it was responded to in that same way, but I think it's common ground, isn't it, although not evidence in the trial, that it is referred to by another name? It does have an Indonesian name.

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MS BAIN: I honestly don't know about that.

HIS HONOUR: Well, you might make some inquiries, but as I understand it that's the case, and then it would not be impossible to believe that, having been apprehended there, that he is speaking about it in its English name from that point, and perhaps he was questioned about it in that way, but I understand the point that you make. There's no actual evidence that he said, "I knew it by" - "I only knew it by its Indonesian name."

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MS BAIN: Yes. I don't know that I can take the argument any further. It really - this is a fairly useless submission to make, but it really is, of course, just a combination of the various circumstances.

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HIS HONOUR: It's not useless at all, that really is exactly - that's the very point. That's the point of argument. You say it's the combination of all those circumstances. Mr Hoare says, even looking at that combination of circumstances, taken at its highest, you can't get to the Australia idea, the Australia ingredient. You say you can.

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MS BAIN: I say that you can and that the trip otherwise of bringing Afghani men from one part of Indonesia to another part of Indonesia or to the border of Indonesia defies commonsense.

HIS HONOUR: Yes, perhaps that's right, but then can you take the next step and say, "and therefore the intended place to take them known to the defendant beyond reasonable doubt was Australia"? You - I know you're making these arguments and this is where I'm having some difficulty. I see the force of the submissions that you make.

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MS BAIN: And the - again the elicit nature of what must be and what can be inferred, the payment of a significant amount of money, and I'm repeating myself, of course, but-----

HIS HONOUR: And not only, as I understand your submission, and if it is your submission I accept it, not only do those things, the nature of the journey, the arrangements, the way they were made, the payment of money, all point to him being a people smuggler, a smuggler of persons, but you say with that evidence, as well as it pointing to the recklessness issue, which I've accepted, it also points to the - what I'll call the "destination issue".

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MS BAIN: Yes. There's really nothing else that I can usefully add.

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HIS HONOUR: We do need to ventilate something else, and that's the Ashmore Reef part of Australia. First of all, the case wasn't put in that way. You didn't put your case, "If we get evidence that he was coming to Ashmore Reef that's proved that ingredient". Do you still adhere to that argument that, "If we can prove that he was going to Ashmore Reef," point one, point two, "if we prove that Ashmore Reef was part of Australia" - and that's accepted, that's common ground, isn't it?

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MR HOARE: That's so, your Honour.

HIS HONOUR: "Then QED we've proved that ingredient"?

MS BAIN: Yes.

HIS HONOUR: You argue that?

MS BAIN: Yes.

HIS HONOUR: I'm against you. All right, I'll adjourn-----

MS BAIN: Thank you.

HIS HONOUR: I'll give reasons why.

MS BAIN: Thank you.

HIS HONOUR: I don't know whether it's been argued before anywhere else in Australia or whether there is any appellate decision, I haven't been referred to it, but in my view that is entirely wrong. What must be proved by the prosecution is the element of intentionally facilitating people to come to Australia. The fact that Ashmore Island is part of Australia is irrelevant, it must be demonstrated that his intention was to take people to Australia. In other words, that he knew -

MS BAIN: Yes.

HIS HONOUR: -----Ashmore Island was part of Australia.

MS BAIN: Yes, your Honour.

HIS HONOUR: Yes, I will adjourn. What time did I ask the jury to come back?

MS BAIN: Half past 11, your Honour.

HIS HONOUR: Have you your witness ready to-----

MR HOARE: Yes, I'm going to speak to him now-----

HIS HONOUR: Yes, I think you should.

MR HOARE: -----and ventilate some matters with my friend.

HIS HONOUR: How long will the evidence take?

MR HOARE: I wouldn't have thought much longer than half an hour.

HIS HONOUR: And what about addresses?

MR HOARE: I should be - I'd like to have, prior to me commencing my address, some discussions with your Honour as to the directions which will be given to the jury to ensure that the nature of my submissions don't impinge upon the elements that your Honour decides necessarily must be found.

HIS HONOUR: I had in mind perhaps a handout to the jury. I'll give this to you. I'll give that to you, you can share it. I would very much like, if you're not successful in your application, to deal as swiftly as we can with the issues of how I'll direct the jury-----

MR HOARE: Yes.

HIS HONOUR: -----and try to get addresses started. I think the jury will need time by the time I've finished directing them to have - to give real consideration to this matter.

I've already indicated one of the things I propose to say about how improper it would be to approach their task by asking the question, "But where else could he have been going?" and I've explained that to some extent.

The other matter is this: there's evidence that one of the witnesses was provided with an indemnity of some description. I don't know about the other. Should the jury be warned in respect of the first witness in a sort of accomplice-type direction? In other words, they - a witness who is given such an indemnity is, perhaps, in accordance with a statement or what's expected by the prosecution, perhaps likely to find themselves or need to tie themselves to their original evidence and the jury should scrutinise that evidence carefully, something along those - I don't know.

MR HOARE: I was considering that but, as your Honour would note, in the cross-examination there were no particular-----

HIS HONOUR: Well, it's a matter for you but I raise it.

MR HOARE: -----departure - yes, I'll consider that.

HIS HONOUR: You might give some consideration to it. I'll be back when I'm ready. When I've decided what I'm going to do.

THE COURT ADJOURNED AT 10.53 A.M.

THE COURT RESUMED AT 12.01 P.M.

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HIS HONOUR: I'm told the jury are available and ready to commence-----

MR HOARE: Thank you, your Honour.

HIS HONOUR: -----but I'll deliver some reasons in relation to the application first.

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TAKE IN ORDER

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MR HOARE: I would ask for a directed verdict.

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HIS HONOUR: Is that the course I should take, Ms Bain?

MS BAIN: Yes, it is, your Honour, according to the policy of the Commonwealth. Thank you.

HIS HONOUR: Would you bring the jury back, please, and they should go into the jury box.

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BAILIFF: Yes, your Honour.

MS BAIN: Your Honour, can I just raise this point with respect to the actual - I don't mean to trespass into your Honour's area, but I appeared before her Honour Judge Clare recently in a matter - a Commonwealth matter where there was no case to answer and she suggested that the rules had changed in that it wasn't the artificiality of actually taking from the jury a verdict of not guilty, is that-----

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HIS HONOUR: I know, I've heard that and I'm not sure about that.

MS BAIN: Yes.

HIS HONOUR: I think it's simply that the Judge may simply say, "I'm directing you to render a verdict of not guilty," but-----

MS BAIN: Not require the foreman to actually say that?

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HIS HONOUR: Yes, but I'm not sure about that so I should really-----

MS BAIN: Yes, I just-----

HIS HONOUR: I've seen this artificial process in the past-----

MS BAIN: Yes.

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HIS HONOUR: -----it is not often, and I should say I'm keenly aware of the step I've taken today, and it has not been, you will guess, without considerable thought.

MS BAIN: Oh, I don't - I don't cavil with that at all, it was simply the technical aspect of -----

HIS HONOUR: Yes.

MS BAIN: -----the process that I raised concerns about.

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HIS HONOUR: Yes, well-----

MS BAIN: I don't have an answer, I just thought I would raise it with you-----

HIS HONOUR: I might try to move it along swiftly rather than make it too theatrical and drawn out.

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MS BAIN: Thank you.

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HIS HONOUR: I think I should say something - without repeating my ruling I should say something to the jury about why this has happened.

MR HOARE: Yes. After the patience they've demonstrated I don't disagree with that.

HIS HONOUR: I'm sorry?

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MR HOARE: After the patience that they've demonstrated I don't disagree with that, and they should be given an explanation as to what has occurred. Thank you, your Honour.

HIS HONOUR: What are the practical consequence of my directing a verdict in terms of the defendant? He will still be in custody, I suppose, and be removed elsewhere?

MS BAIN: Yes. The Commonwealth has to inform the Department of Immigration and there's a changeover, effectively.

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MR HOARE: Yes. Well, there's a summary matter which relates to the possession of money.

HIS HONOUR: I'm going to tell the jury how long he has been in custody.

MR HOARE: Yes.

HIS HONOUR: Two years and one month?

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MR HOARE: Yes, your Honour. Since the 18th of February.

HIS HONOUR: Yes, almost exactly two years and one month.

MS BAIN: Yes. Yes.

HIS HONOUR: And what was the mandatory penalty?

MS BAIN: Maximum five years with a mandatory non-parole period of-----

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HIS HONOUR: Three.

MS BAIN: -----three.

HIS HONOUR: I should have a corrected transcript in the relative near future.

MR HOARE: Thank you, your Honour.

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HIS HONOUR: I haven't expressed myself as felicitously as I wanted to and so you will see that as I spoke I made some corrections as I went and the transcript will be corrected to that extent.

MR HOARE: Thank you, your Honour.

HIS HONOUR: I don't intend to add any further reasons which I haven't given in open Court. 1

THE JURY RETURNED AT 12.40 P.M.

HIS HONOUR: Ladies and gentlemen, once again you've been outside the courtroom for some time. I can tell you now that the reason why you've been outside the courtroom for so long during the course of this trial has been to do with quite complex, difficult and extensive legal argument about the law that applies in this case. You might appreciate that this is fair - relatively new - these are relatively new laws in Australia. 10

I have been required to consider and to make rulings of law in relation to matters concerning the case. Those rulings did not intrude upon your function of deciding the facts but I was required to consider whether the prosecution could prove all of the elements of the charge it had to prove. 20

It had to prove all sorts of things. That the defendant was reckless in not - effectively not checking to see whether the people on the boat had proper visas, proper papers to come to Australia. I can tell you I decided there was sufficient evidence for you to consider whether that was - whether that was the case or not. 30

I came to the conclusion also that the evidence demonstrated that this defendant was clearly involved in what emotively is called "people smuggling". That is, that he was involved in taking people in a boat across the sea out of Indonesia, but what the prosecution also had to prove was that he knew that he was bringing the people to Australia, and the prosecution had to prove that beyond a reasonable doubt. I have ruled the prosecution didn't have that evidence. Suspicious though it was, suspicious though the circumstances of the voyage and the payment of the money, and taking into account the fact, though, that although the passengers believed they were going to Australia, there was no common language between them and there was simply no ability to communicate, the prosecution accepted that, and for all the reasons when all the evidence was put together it was not possible, I ruled, the prosecution could prove beyond reasonable doubt that he knew he was coming to Australia. 40

That element was founded upon inferences, and to go further, I concluded the inferences that were capable of being drawn were likely to be speculative or guesswork. Now, ladies and gentlemen, one of the fundamental things, if you've ever sat on a jury before, is that every Judge will tell you as a juror you must not indulge in speculation or guesswork, and whilst it may have been highly suspicious, perhaps even probable, to get to the point of proof beyond reasonable doubt on the view I formed would have required that next step of speculation or 50

guesswork and that is simply something that cannot be done, so I've made the ruling - I haven't usurped your function, I've made a ruling as a matter of law guided by strict legal principles, but it means that because the defendant is in your charge you need to render the verdict of not guilty.

Could I inquire who your spokesperson is, please? My associate will ask - will call over your names. We need to do that, that's a proper process. He will then ask whether you find the defendant guilty or not guilty of the charge. You all say "not guilty" and he will say, "So says your speaker so say you all?" then you will all assent.

So will you please do that, associate. Members of the jury, are you agreed upon your verdict?

JURORS: Yes.

SPEAKER: We are.

ASSOCIATE: Do you find the accused Albahruliilmi guilty or not guilty of the offence of facilitating bringing a group of non-citizens to Australia?

SPEAKER: Not guilty.

ASSOCIATE: Not guilty, your Honour. So says your speaker so say you all?

JURORS: Yes.

HIS HONOUR: Ladies and gentlemen, perhaps you should also know, this man's been in custody for over two years.

The second thing is that in this legislation Judges are deprived of the right to pass any particular sentence. Judges are directed by the law that there is a minimum sentence of three years. So for someone in defendant's position he would have been required to spend three years in gaol had there been proof.

So the lowliest of a crew member or the most money-grabbing of sea captains who direct the voyage, they're all rather lumped by the legislation into the same boat. You may draw your own conclusions about what it does to the right of Judges to make discretionary decisions about the roles of people in the commission of offences.

I understand how difficult it is for people to sit on juries, and not the least in this case where you had to stay in that room - that dreadful room for some time. I hope I've explained something about the process. You have been part of it, of course, because all of this producing of evidence in Court, in the end it was directed to you for you to make the decision, so I thank you for your involvement.

The jury can go, thank you.

Mr Albahruliilmi, you're discharged.

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Now, anything further?

MR HOARE: No, thank you, your Honour.

HIS HONOUR: Nothing further? I should make an order for the return of the exhibits.

MR HOARE: Yes.

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HIS HONOUR: Adjourn the Court.

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