20/98

SUPREME COURT OF VICTORIA

MUTEMERI v CHEESEMAN

Mandie J

17, 18 March, 29 April 1998 — [1998] 4 VR 484; (1998) 100 A Crim R 397

CRIMINAL LAW – RECKLESSLY ENDANGERING DEATH – HAVING UNPROTECTED SEX WHILST HIV POSITIVE – WHETHER SECTION 22 OF *CRIMES ACT* 1958 DEALS WITH CONSEQUENTIAL DEATH OR DANGER OF DEATH – JUDICIAL NOTICE – WHETHER MAGISTRATE COULD BE SATISFIED THAT DEFENDANT'S CONDUCT PLACED ANOTHER IN DANGER OF DEATH – APPLICATION FOR SUPPRESSION ORDER – REFUSED: *CRIMES ACT* 1958, S22; *HEALTH ACT* 1958, S129(1).

Section 22 of the *Crimes Act* 1958 ('Act') provides:

> "A person who, without lawful excuse, recklessly engages in conduct that places another person in danger of death is guilty of an indictable offence."

M. was charged with 12 counts of recklessly engaging in conduct (having unprotected sexual intercourse whilst HIV positive) that placed another person in danger of death. In convicting M., the magistrate decided that the prosecution had to prove that M., at the time of intentionally engaging in his conduct, foresaw that a probable consequence of that conduct would be to place another in danger of death. The magistrate also took judicial notice of the fact that the contracting of HIV results in a life endangering situation. Upon appeal—

HELD: Appeal allowed. Convictions, sentences and orders set aside. All charges dismissed.
1. The magistrate applied the correct test of recklessness. Section 22 of the Act required the prosecution to prove that M. acted recklessly in relation to conduct that placed another in danger of death. Recklessness involves acting with indifference towards or in disregard of what is realised or foreseen to be the probable consequences of the relevant conduct. Acting recklessly under s22 does not involve the realisation or foresight of the probability of the other person's death. The section is concerned with the realisation or foresight of the probability of the other person's exposure to the danger of death or an appreciable risk of death.

2. In relation to the proof of the endangering conduct itself, a court would be well justified and entitled in an appropriate case to take judicial notice of the fact that HIV is a life endangering disease – a fact made notorious by wide publicity in Australia over a number of years. However, it was not open to the magistrate to find beyond reasonable doubt, without evidence, that M.'s conduct placed another in danger of death, that is, that it exposed another to an "appreciable risk" of death, something more than a "mere possibility".

3. In refusing the application made by M. for an order under s129(1) of the *Health Act* 1958 prohibiting the publication of M.'s name or any information which would reveal his identity, M.'s reprehensible conduct pointed to the well-being of others as the paramount factor together with the powerful public interest in the open conduct of court proceedings.

MANDIE J: [1] This is an appeal pursuant to s92(1) of the *Magistrates' Court Act* 1989 from final orders of the Magistrates' Court of Victoria at Prahran made on 2 December 1997. By those orders the appellant was convicted of 12 charges in relation to his conduct at Elwood between 9 March 1997 and 19 March 1997, namely, that he "did, without lawful excuse, recklessly engage in conduct, being having unprotected sexual intercourse whilst being HIV positive, that placed ["Ms AB"] in danger of death" in breach of s22 of the *Crimes Act* 1958. He was sentenced on each charge to imprisonment for a term of 6 months, 3 months of which was suspended for 24 months. All sentences were ordered to be concurrent.

The appellant lodged an appeal to the County Court on 2 December 1997 which is said to be listed for 18 May 1998 but, by virtue of his appeal to this Court, the appellant is deemed to have abandoned finally and conclusively any right to appeal to the County Court (s83(2) *Magistrates' Court Act*). By the Master's order dated 19 December 1997 the following questions of law are raised:

"(a) Was there any evidence upon which it was open for the magistrate to find that the appellant's conduct carried with it an appreciable risk of the death of [Ms AB] in respect of each charge?

(b) Did the learned magistrate apply the correct test in determining that the appellant by engaging in unprotected sexual intercourse whilst being HIV positive had engaged in conduct that was capable of being and in fact was reckless?

(c) If the learned magistrate did apply the correct test in determining whether the conduct of the appellant was capable of being and in fact was reckless, was it open to the learned magistrate on the evidence to find that the conduct of engaging in unprotected sexual intercourse whilst being HIV positive was capable of establishing recklessness?

(d) Did the learned magistrate err in taking judicial notice that contracting HIV is a life endangering situation?

(e) Were the sentences imposed on the appellant manifestly excessive?"

[2] The appellant had pleaded not guilty to the charges and consented to a summary hearing, the alleged offences being indictable offences triable summarily (s53(1)(1A)) *Magistrates' Court Act*). A number of witnesses were called by the respondent (informant) on 17 November 1997. Save as referred to below, it is unnecessary to summarise that evidence. The magistrate dismissed a no case submission. On 18 November 1997 no evidence was called for the appellant and, after addresses, the magistrate reserved his decision. On 2 December 1997 the learned magistrate announced that he found the charges proved and handed down written reasons for his decision. After a plea in mitigation by counsel for the appellant, the magistrate passed sentence. In his reasons for decision, the magistrate found that acts of unprotected sexual intercourse between the appellant and Ms AB did in fact take place on 12 occasions between the dates specified. The magistrate found that the evidence was compelling that the appellant both knew of his status as HIV positive and that he was counselled as to the risks concerning the transmission of the HIV virus by unprotected sex well before those dates. The magistrate further found that the appellant had acted with the belief that his said acts would place Ms AB in danger of death and that he acted with disregard to such a foreseen outcome. It was not contended on this appeal that any of the foregoing findings of fact was not open to the magistrate on the evidence. I turn to the appellant's submissions as to the errors of law said to have been made by the magistrate.

Section 22 of the *Crimes Act* 1958 provides:

"A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence."

Counsel for the appellant submitted that the learned magistrate had not applied the correct test in determining that the appellant had engaged in conduct "that was capable of being and was in fact reckless". This submission as made was directed to the precise nature of the subjective intention which had to be proved to **[3]** establish that the appellant had acted recklessly. It was contended that it had to be proved that the appellant, at the time of intentionally engaging in his conduct, foresaw that a probable consequence of that conduct would be the death of Ms AB whereas the magistrate decided that it had to be proved that the appellant, at the time of intentionally engaging in his conduct, foresaw that a probable consequence of that conduct would be to place Ms AB in danger of death. It was common ground that it had to be proved that the appellant had intentionally engaged in his conduct and that he foresaw at the time a relevant probable consequence of that conduct and acted with indifference to that consequence. The issue raised related only to the nature of the probable consequence which the prosecution must prove he had foreseen and so disregarded.

It seems to me to be clear from the language of the section, apart from authority, that an accused must be shown to have acted recklessly in relation to conduct that placed another in danger of death. The alternative ("may place") is irrelevant in the present appeal because none of the charges were so framed and the magistrate refused an application by the respondent for leave to amend the charges by inserting the words "or that may have placed" after the words "that placed". It is convenient at this point to refer to a number of cases which bear upon this submission and upon the issues in this appeal generally. In *R v Nuri* [1990] VicRp 55; [1990] VR 641; (1989) 49 A Crim R 253, the Court of Criminal Appeal (Young CJ, Crockett and Nathan JJ) dealt with

an application for leave to appeal against a conviction of recklessly engaging in conduct which placed or may have placed a policeman in danger of death in that "Nuri grappled for possession of a loaded police service revolver" contrary to s22 of the *Crimes Act*. In a joint reserved judgment (at 643-4), the Full Court said:

> "That offence was created by the *Crimes (Amendment) Act* 1985. It has no predecessor....
> Its enactment was designed to create a general endangerment offence to replace a large number of offences that previously were to be found in the *Crimes Act*. Sections repealed were ss17, 21, **[4]** 22, 29, 32, 197(2) and 197(5). The problem is that, in an endeavour to subsume all life-endangering behaviour in one offence, the very generality of that offence has given rise to difficulties of construction and interpretation.
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> For example, does the expression 'may have placed' mean that the impugned conduct had the potential to endanger life; or does it mean that that conduct was such that it possibly did place another in danger of death? *Hansard's* record of the debate upon the second reading of the Bill suggests it was the former conduct against which the section was designed to strike. Then is the count duplicitous — notwithstanding the presentment rules?
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> The expression 'recklessly' may not give rise to difficulty. It has for long been employed in statutory offences. Presumably conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his actions and he displays indifference as to whether or not those consequences occur: see *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464; 58 ALR 417; (1985) 59 ALJR 417; 16 A Crim R 19. This is the meaning which the judge directed the jury they should give the expression. However, his Honour undertook no explanation of what in law was required to be established as the necessary guilty intent. (He thought that that would have to await consideration by the Full Court which has not before had occasion to examine the sections.) Counsel for the director (who conceded that on any view the direction was inadequate) contended that there should be imported into the section an objective as well as a subjective intent. An analogy with manslaughter by an unlawful and dangerous act was drawn: see *R v Holzer* [1968] VicRp 61; [1968] VR 481.
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> In that case Smith J, in a ruling which has since in this State been regarded as correct, determined that in a case of manslaughter constituted by death caused by an unlawful and dangerous act the Crown was required to establish that the act was a breach of the criminal law. However, it did not have to prove that the accused knew or believed that his act was dangerous. What must be shown is no more than that a reasonable man in the accused's position, performing the very act which the accused performed, would have realised that he was exposing another or others to an appreciable risk of really serious injury. The *mens rea* necessary to be established is satisfied by proof of an intention to commit the unlawful act.
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> Doubtless, it is tempting to transpose to the somewhat analogous offence of engaging in conduct which placed or may have placed the victim in danger of death the same combination of objective and subjective intents. The subjective intent constituting the *mens rea* was said to be satisfied if the accused had the intention to engage in the conduct (the recklessness being the disregard of the foreseen probable consequences of that conduct). The objective **[5]** intent required to be established involved proof that a reasonable man in the accused's position engaging in the very conduct in which the accused engaged would have realised that he had placed or might have placed another in danger of death.
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> We think that the submission to this effect has considerable merit. The analogy between the offence with respect to which Smith J was concerned and that which we have to consider is a striking one. An analysis of the components of the offence of endangerment suggests that it is the intent to engage in the relevant conduct which must be established subjectively. The logical interpretation of the elements of the offence does, it seems to us, point to an analysis of the conduct to determine its endangerment to life qualities being tested objectively. The adoption of directions to this effect on the question of intent is not only sensible but we think should avoid difficulties which we could envisage arising if the judge were required to instruct the jury on the basis that an objective test as to intent or realisation had no part to play in proof of commission of the offence. This conclusion which commends itself to us is, we think consistent with modern developments in this area of the criminal law: see, eg *Nydam v R* [1977] VicRp 50; [1977] VR 430, at pp439-40. As no such direction was given the conviction and sentence on the second count must be set aside." (Emphases added)

Although the Court in *Nuri* decided that it was necessary to prove both a "subjective intent" – intention to engage in the conduct – and an "objective intent" – the hypothetical realisation of endangerment by a reasonable person, in the position of the accused, engaging in that conduct – the Court also indicated that the element of recklessness was constituted by "foresight on the part of the accused" – a further subjective element. The parties accepted this analysis of

the Full Court's reasons. I should here note that in *Wilson v R* [1992] HCA 31; (1992) 174 CLR 313; (1992) 107 ALR 257; (1992) 66 ALJR 517; 61 A Crim R 63, an appeal from a conviction of manslaughter by unlawful and dangerous act, the High Court (by majority: Mason CJ, Toohey, Gaudron, McHugh JJ) largely adopted the test laid down by Smith J in *R v Holzer* [1968] VicRp 61; [1968] VR 481. An objective element of the offence was said to be whether a reasonable person in the position of the accused would have realised that his conduct was exposing the deceased "to an appreciable risk of serious injury."

In *Filmer v Barclay* [1994] VicRp 59; [1994] 2 VR 269, McDonald J heard appeals against convictions of recklessly engaging in conduct that placed or may have **[6]** placed other persons in danger of serious injury contrary to s23 of the *Crimes Act*. In relation to the subjective intent which must be proved McDonald J adopted the same analysis of *Nuri* as that set out above and also referred to a similar analysis in *R v McCarthy* (unreported, Court of Criminal Appeal, 4 November 1993) in which Teague J approved the directions of the trial Judge to the effect that the subjective element involved proof that the accused acted recklessly in that, having foreseen that his action would probably place the other person in danger of death, he went ahead being indifferent to that consequence, or willing to run the risk of that consequence. McDonald J said that a person was guilty of an offence against s23 "if that person intentionally engages in conduct which a reasonable person in the position of the accused would realise had placed or may place another in danger of serious injury" and "[t]o establish that the conduct ... is engaged in recklessly it must be proved that the accused engaged in the same having foreseen or realised that the probable consequences of engaging in such conduct would result in another person sustaining serious injury" (emphases added). The appellant relied on these latter words which, it was submitted, when transposed to the present case, meant that it must be proved that the appellant foresaw or realised that the probable consequences of his conduct would be the death of the other person rather than the placing of the other person in danger of death.

The learned magistrate considered that the appellant's argument was "misconceived, and not supported by weight of authority or indeed the logic of the statute". He considered that the subjective foresight of the accused must go "only to those consequences prohibited by the statute which is not the death of the victim, but the placing of his life in danger". He considered that if *Filmer v Barclay* decided otherwise it was contrary to *Nuri*. In *Filmer v Barclay* the appellants had placed three explosive devices comprising a mixture of chlorine and brake fluid in a playground. They were placed there late at night in the expectation that they would then explode. The devices did not explode then but two of them did so the following morning when children were in the vicinity. The magistrate had asked himself, as a test of recklessness, whether **[7]** the appellants had acted in disregard of the foreseen probable consequences of their conduct, namely, that the devices would explode. McDonald J, in rejecting that test and allowing the appeals, decided that the probable consequences to be foreseen and disregarded had to relate not to "explosion" but to "serious injury".

In *Campbell* [1997] 2 VR 585; (1995) 80 A Crim R 461, a decision of the Court of Appeal of this Court (Phillips CJ, Hayne JA and Crockett AJA), the Court referred to the accepted meaning of "recklessly" in the *Crimes Act* as involving "possession of foresight that injury probably will result" (at 468). However, that was in the context of a conviction of recklessly causing serious injury. *Nuri* was referred to as supporting a "probability" test for intent, but the term "danger" was irrelevant to the particular offence charged.

In *R v "B"* (unreported, Supreme Court of Victoria, 3 July 1995) Teague, J made a ruling in relation to the meaning of the words "in danger of death" in s22 of the *Crimes Act*. In "B", there was evidence that the accused was infected with HIV, that he had unprotected anal intercourse with another person not so infected and that the chance of the infection being transmitted by one such act was one in 200 or less. Teague J considered what "level of dangerousness" had to be proved and adopted the "appreciable risk" test derived from *Wilson* and stated that this meant something more than a "remote" possibility or "mere" possibility that the conduct might cause death. Teague J decided that the chance of infection in that case (let alone the chance of death) was a remote possibility. It is convenient to note here that before reaching this conclusion Teague J also considered certain other High Court decisions in which it was said that 'reckless indifference' to constitute malice aforethought must involve foresight of or advertence to the probability of death or of grievous bodily harm (*Pemble v R* [1971] HCA 20; (1971) 124 CLR 107;

[1971] ALR 762; (1971) 45 ALJR 333; *La Fontaine v R* [1976] HCA 52; (1976) 136 CLR 62); and that knowledge that an act was "likely to cause death" in relation to murder under s157(1)(c) of the *Criminal Code* (Tas.) conveyed by use of the word "likely" a notion of "a substantial - a real and not remote – chance regardless of whether it is less or more than 50 per **[8]** cent" (*Boughey v R* [1986] HCA 29; (1986) 161 CLR 10, 21; 65 ALR 609; (1986) 60 ALJR 422; (1986) 20 A Crim R 156 per Mason, Wilson, Deane, JJ).

In *R v "D"* (unreported, Supreme Court of Victoria, 3 July 1995) an HIV infected accused was charged with a number of counts under s22, alternatively s23 of the *Crimes Act*, constituted by alleged unprotected vaginal intercourse with two women on four separate occasions. The evidence in that case was that the risk of transmitting HIV infection by vaginal intercourse was less than by anal intercourse, about 1 in 1000 to 2000 occasions. Hampel J, whilst agreeing with Teague J in *"B"* that the test of dangerousness was that of "appreciable risk", considered that the case should go to the jury (although the chance of infection was less). He went on to say that recklessness in the context involved "the subjective foresight of a probability of the objectively assessed possibility described as an 'appreciable risk'." Hampel J then said:

> "This is a difficult if not impossible concept to apply particularly where criminal conduct is involved. In order to make some sense of these counts I propose to direct the jury that the subjective test involves the foresight of a probability of death (or serious injury) and the objective test as one of 'appreciable' risk of danger rather than a mere remote possibility."

The appellant relied upon Hampel J's form of direction to the jury as supporting the contention that it was the probability of death, not the danger of death, which an accused must have foreseen and disregarded by the conduct engaged in. It seems to me, with respect, that Hampel J was only saying that this (favourable) form of direction to the jury is a more comprehensible substitute for the test required by the statute, namely, foresight of the probability of the danger or "appreciable risk". In *R v Adams* (unreported, Supreme Court of Victoria, Court of Appeal, 15/2/96) Callaway JA said (in an appeal against sentence) that:

> "... it is important to bear in mind that the applicant pleaded guilty to an offence against s23, not s22, of the *Crimes Act*. Section 22 is concerned with a person who without lawful excuse recklessly engages in conduct that places or may place another person in danger of death. Section 23, by contrast, is concerned with a **[9]** person who without lawful excuse recklessly engages in conduct that places or may place another person in danger of serious injury. In a strangling case, it is easy to fall into the trap of punishing the applicant as if he had subjectively appreciated the danger of death, when the relevant element of the offence charged and to which he pleaded guilty is concerned with foresight of serious injury. Cf. *R v Nuri* [1990] VicRp 55; [1990] VR 641 at p644; (1989) 49 A Crim R 253."

In *R v Totivan* (unreported, Supreme Court of Victoria, Court of Appeal, 15/8/96) Callaway JA (with whom Phillips CJ and Smith AJA agreed), in an appeal against, inter alia, a conviction of recklessly causing injury, said:

> "the judge told the jury that 'recklessly' in s18 of the *Crimes Act* meant being aware that it may happen that the person is injured by the acts - which are going to be done and you proceed to do it, indifferent as to whether or not that person is injured ... Miss Douglas, who appeared for the respondent, conceded that that was a misdirection, because injury must be foreseen as a probable and not merely a possible consequence. See *R v Nuri* [1990] VicRp 55; [1990] VR 641; (1989) 49 A Crim R 253."

I do not think that the authorities support the appellant's submission, although some phrases used in some cases may at first blush appear to do so. In my view, the magistrate applied the correct test of recklessness. *Nuri* does not support the appellant's submission although it does not unambiguously contradict it. The reference in *Nuri* to "recklessness being the disregard of the foreseen probable consequences" of the conduct is immediately followed by the reference to the objective intent which involves realisation by a reasonable person that the conduct would (or might) place another in danger of death. It would be a surprising interpretation if the consequences which were foreseen as probable by the reckless accused were to be characterised as "death" whereas the reasonable person test were to look to the "danger of death". I do not think that McDonald J in *Filmer v Barclay* should be taken to have adverted to the distinction between foresight of the probability of serious injury to a person and foresight of the probability

of placing a person in danger of serious injury. It was unnecessary in that case to do so where the test rejected was foresight of the probability of an explosion. On the facts of that case, perhaps, there would be little practical difference between foresight of the probability of serious injury to a person and foresight of the probability that some **[10]** person might be placed in danger of serious injury. In *Adams*, I would understand Callaway JA to be contrasting the subjective appreciation of the danger of death with the subjective appreciation of the danger of serious injury – shorthand for the latter being "foresight of serious injury".

In any case, it seems to me that, in the absence of binding authority to the contrary, the language of the section dictates that the probable consequences to be realised or foreseen but disregarded under the rubric "recklessly" are the precise consequences referred to or indicated in the section. Perhaps any confusion which exists has stemmed to a considerable extent from the juxtaposition of the accepted meaning of recklessness with the phrase "in danger of death". Recklessness involves acting with indifference towards or in disregard of what is realised or foreseen to be the probable consequences of the relevant conduct. Danger has a meaning in this context of "liability or exposure to harm or injury; the condition of being exposed to the chance of evil; risk, peril" and is ordinarily construed with "the evil that threatens or impends" (*Oxford English Dictionary*). Thus, to be placed "in danger of death" is to be put in the position of liability or exposure to death or in the condition of being exposed to the chance, risk or peril of death. Because danger of itself carries the notion of chance or risk, this aspect of chance or risk may tend to be equated or conflated with the notion of chance or risk involved in the "probability" of harm which, it is said, must be foreseen or realised by the reckless accused. This confusion may lead to the conclusion that acting recklessly under this section involves the realisation or foresight of the probability of the other person's death whereas, as I have said, I consider that the section is concerned with the realisation or foresight of the probability of the other person's exposure to the risk of death. I should add that I would respectfully agree that danger of death in this context means an "appreciable risk" of death. For the reasons which I have given, the appellant's first submission is rejected.

In addition to the subjective intent to engage in the conduct coupled with recklessness as so defined, and the objective intent of the reasonable person **[11]** as expressed in *Nuri*, the offence involves the further element of proof of the endangering conduct itself. In *R v Anderson* (unreported, Supreme Court of Victoria, 5/12/97) a nurse at a hospital "extubated" a gravely ill and comatose patient. Hampel J ruled that "in addition to the intent of the accused it is an element [of the offence under s22 of the *Crimes Act*] that there be actual or possible endangering of the life" of a person nominated (if any). (The unusual aspect in that particular case was that the victim had to be proved to have been alive at the time of the reckless conduct).

It was to this general element of the proof of endangering conduct that the appellant directed his second submission. It was submitted that it was not open to the magistrate to find that the appellant's conduct placed Ms AB in danger of death because there was no evidence that contracting HIV was a "life endangering situation" and that the magistrate was not entitled to take judicial notice of this fact. The learned magistrate had said that "[g]iven the considerable notoriety and public concern regarding the impact of HIV at all levels of public life, national and international, I am of the opinion that if 'judicial notice' be the issue, not only can judicial notice be taken of the fact that the contracting of HIV results in a life endangering situation, but also that this is a fact and matter of which the reasonable man would be aware". As is apparent, the issue raised is also relevant to the element of objective intent – would a reasonable man in the appellant's position have realised that by his conduct he had placed Ms AB in danger of death (or exposed her to an appreciable risk of death)?

As to judicial notice, "[t]he only guiding principle ... appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court 'notices' it ... the basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it" (per Isaacs, J *Holland v Jones* [1917] HCA 26; (1917) 23 CLR **[12]** 149, 153; 23 ALR 165). Or as was said by Owen J in *Malone v Smith* (1946) 63 WN (NSW) 54, 55:

> "I think the general principle is that a court may take judicial notice of a fact which is so notorious that proof of it is unnecessary and the Court is therefore 'justified by general considerations in assuming the truth of the proposition without requiring evidence from the party': *Wigmore on*

Evidence, para. 2565. The same learned author in para. 2580 says:

> 'Applying the general principle, especially in regard to the element of notoriousness, Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history and natural science. It is unprofitable, as well as impracticable, to seek to connect them by generalities and distinctions; for the notoriousness of a truth varies much with difference of period and of place. It is even erroneous, in many if not in most instances, to regard them as precedents. It is the spirit and example of the rulings, rather than their precise tenor, that is to be useful in guidance.'
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> ...
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> The notoriousness of some facts is world-wide. For example, any British court would take judicial notice of the fact that the sun rises in the east. Other facts may be notorious in some places and not in others."

In my view, a court would be well justified and entitled in an appropriate case to take judicial notice of the fact that HIV is a life endangering disease – a fact made notorious by wide publicity in Australia over a number of years. In that regard, I note also that s19A of the *Crimes Act* makes it an offence to intentionally cause another to be infected with a "very serious disease" which is defined to mean HIV. Nevertheless, I have concluded that it was not open to the magistrate to find beyond reasonable doubt, without evidence, that the appellant's conduct placed Ms AB in danger of death, that is, that it exposed her to an "appreciable risk" of death, something more than a "mere possibility".

Expert evidence was given by Dr A. Mijch, a medical practitioner employed in the Department of Infectious Diseases and Microbiology at the Alfred **[13]** Hospital. Dr Mijch testified that the risk of transmission of the HIV virus by unprotected sex in the case of an infected male and an uninfected female was between 1 in 667 and 1 in 2,000 based on published epidemiological studies and that where the risk fell in that range depended on a number of factors. Apart from that evidence, there was no evidence at all before the magistrate as to the degree of risk of Ms AB dying if she had contracted HIV. The essential questions relate to the chance of contracting HIV and then the chance of Ms AB dying as a result and within what period of months or years. No doubt there are a number of factors which ought be the subject of evidence in order that the degree of risk might be assessed. The chance of outright survival would be one factor to be considered in assessing the risk of death. The length of the period of possible survival would also be a relevant factor because regard would need to be had to the chance, during that period, of the development of a cure or life-prolonging treatment in relation to AIDS or other AIDS or HIV related illnesses (and indeed the chance of dying as a result of some unrelated cause or event, the longer that period was). Expert evidence of a scientific, medical and statistical nature may have put the matter beyond doubt but it was not open to a magistrate, without some such evidence, to be satisfied that the appellant's conduct had placed Ms AB in danger of death.

For these reasons, I think that the appeal should succeed. I should say that the application of the test of objective intent might give rise to further difficulties which I need not elaborate and that I have some doubt as to whether the offence created by s22 of the *Crimes Act* is properly to be construed as applicable to cases other than those where a person is exposed to the risk of a death of some immediacy or imminence, having regard to the thrust or intent of the words "places in danger of death". However, argument was not advanced along those lines and I need not consider the matter further.

It was further submitted by the appellant that the sentences imposed on the appellant were manifestly excessive. The question of adequacy of sentence has been held to raise a question of law (see *Stratton v Bestaburgh Pty Ltd* **[14]** (unreported, Supreme Court of Victoria, Hansen J, 9/9/94) and cases therein cited) but see *Phillips v Estate Agents Board* [1988] VicRp 24; [1988] VR 179 in which the Full Court (Young CJ, McGarvie and Nicholson JJ) said that a ground that a penalty imposed by the Administrative Appeals Tribunal was manifestly excessive did not raise a question of law within s52(1) of the *Administrative Appeals Tribunal Act* 1984. It is not necessary in the circumstances to resolve the apparent conflict. I will say, however, that it does not seem to me that the sentences passed would have been at all excessive had the convictions stood - a matter which, as is often said, does not admit of much argument.

Before turning to the orders which should be made, it is necessary to refer to the application made by the appellant at the outset of the hearing of this appeal pursuant to s129(1) of the *Health Act* 1958 for an order prohibiting the publication of the name of the appellant or any information which would reveal the identity of the appellant. After hearing the appellant and the solicitors for the Herald and Weekly Times Ltd and David Syme Ltd I refused to make such an order and indicated that I would give my reasons at the same time as giving reasons for judgment on the appeal. The appellant's application was supported by an affidavit which deposed to the facts that he had been refused such an order by the magistrate and had received publicity in the newspaper and on television (including his picture) at that time; he had been identified in that publicity as having HIV or AIDS and had subsequently suffered in his personal life, his employment and his residential tenancy.

Section 129(1) of the *Health Act* empowers the Court, if evidence is to be given of any matter in relation to HIV, to make an order of the kind sought "if it is of the opinion that it is necessary to do so because of the social or economic consequences to a person if the information is disclosed". The section is to be found in Part Vl of the Act dealing with the management and control of infectious diseases. Section 119 lays down a number of principles which apply for the purposes of the application, operation and interpretation of Part Vl which I will not **[15]** set out but which emphasise, *inter alia*, the values (to some extent competing) of the protection of public health on the one hand and of personal liberty and privacy on the other, including that "a person with an infectious disease" has a right “to have his or her privacy respected" so long as that right does "not infringe on the well-being of others". (S119(e)).

Having regard to the previous publicity and attention which the appellant and this case had received, I was not satisfied on the evidence that there were any significant social and economic consequences threatened to the appellant by further publicity and disclosure of these matters. In any event, even if there were, it seemed to me that the uncontradicted evidence as to the reprehensible conduct of the appellant (whatever its criminality) pointed to the protection of the well-being of others as the paramount factor to be taken into account, together with the powerful public interest in the open conduct of court proceedings (see *Re Herald and Weekly Times Ltd v Braun* [1994] VicRp 50; [1994] 1 VR 705, 712-5 per Beach J; see too *Herald and Weekly Times Ltd v Barrow* (unreported, Supreme Court of Victoria, Harper J, 29/6/93). I therefore refused the order sought.

Returning to this appeal, I will make the following orders:

1. Appeal allowed.

2. Convictions, sentences and orders of the Magistrates' Court set aside and in lieu thereof all charges dismissed.

APPEARANCES: For the appellant: RJ Williams, counsel. Palombo & Forster, solicitors. For the respondent: WH Morgan-Payler QC, counsel. Peter Wood, Solicitor for Public Prosecutions.
