



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 Aug 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: M44/2022  
File Title: Awad v. The Queen  
Registry: Melbourne  
Document filed: Form 27E - Reply  
Filing party: Appellant  
Date filed: 24 Aug 2022

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

BETWEEN:

**DANNY AWAD**

Appellant

- and -

**THE QUEEN**

Respondent

10

**APPELLANT'S REPLY**

**Part I: Certification**

1. These Submissions are in a form suitable for publication on the Internet.

**Part II: Argument in Reply**

**B. A serious departure from trial process**

20

***Wilde* and this Court's authorities**

2. It is common ground that there is a category of case where there has been a "substantial miscarriage of justice" by reason of a fundamental or serious departure from the prescribed processes for a criminal trial.
3. An example of such a case is where there has been non-observance of some condition essential to a satisfactory trial; see, for example, *Baini v R* (2012) 246 CLR 469, at para. [65] per Gageler J.
4. It has been said that there is no rigid formula to determine what constitutes such a case and, in the end, no mechanical approach can be adopted and each case must be determined upon its own circumstances; see, for example, *Wilde v R* (1988) 164 CLR 365, at p. 373 and *Glennon v R* (1994) 179 CLR 1, at p. 8.
5. It is in this context that where a trial judge has given an erroneous or prohibited direction to the jury, as in this case, a court, in determining whether the giving of such a direction constitutes a fundamental or serious departure from the prescribed processes for a criminal trial, is required to have regard to the reason(s) why such a direction is prohibited.

30

40

6. With respect to this case, which involves a contravention of s. 44J(b)(i) of the *Jury Directions Act*, 2015, the reasons for the statutory prohibition are set out within the Appellant's Submissions dated 18 July, 2022 herein at paras. 27 – 31, the two decisions of this Court in *AK v WA* (2008) 232 CLR 438 and *Subramaniam v R* (2004) 79 ALJR 116; 211 ALR 1 being two examples of those cases where regard has been had by the court to the reason for the enactment of the statutory provision or requirement held to have been contravened.

### **The Appellant's authorities**

10

7. The Respondent contends that the cases relied upon by the Appellant (*AK v WA* and *Subramaniam v R*) do not support the Appellant's argument in the context of this case; see the Submissions of the Respondent at paras. 24 – 30.
8. The Respondent's contention is wrong. Although those cases are not concerned with jury directions concerning the evaluation or assessment of evidence, those cases are authority for the principles summarised in paras. 29 – 31 of the Appellant's Submissions which, when applied to the circumstances of this case, support the Appellant's contention. Those principles are not limited in their application to "certain *sui generis* criminal proceedings".

20

### **Section 44J of the *Jury Directions Act* – Statutory context**

9. The Respondent's contention within the Submissions of the Respondent at paras. 31 – 32 which is based upon the proposition that it is open to the parties to make submissions to the precise effect of those prohibited as directions by s. 44J must be rejected in circumstances where, as in this case, the prohibited direction is a direction given with the authority of the trial judge's office by which the jury is bound, unlike a submission or argument made by counsel for a party which, whether or not summarised by the trial judge, may be rejected by the jury.

30

### **Section 44J of the *Jury Directions Act* – Legislative history**

10. The Respondent has made several submissions concerning the legislative history to s. 44J and the extrinsic materials; see the Submissions of the Respondent at paras. 33 – 42.

11. Keeping in mind the fact that this Court is here engaged in the task of the construction of ss. 44J & 44K, rather than the construction of the extrinsic materials, an examination of the extrinsic materials supports the submissions which have been made by the Appellant that the prohibited direction, when given, has the undoubted potential to cause an unfairness to the accused; see at paras. 12 – 14 below.

10 12. First, as is clear from the passage within the Criminal Law Review Report quoted within both para. 35 of the Submissions of the Respondent and para. [66] of the judgment of Priest JA in the Court below, the impugned direction was described (in summary form) as being such that it may confuse the jury and focus the attention of the jury on the motivation of an accused to give evidence, and suggests that the “two competing propositions” do not “neutralise each other”.

**JCAB 241**

13. Secondly, as is clear from the quotes from the Explanatory Memorandum quoted within para. 38 of the Submissions of the Respondent, the directions prohibited by s. 44J are “confusing, unhelpful and arguably inaccurate”.

20 14. Thirdly, as is clear from the passage within the Second Reading Speech quoted within para. [67] of the judgment of Priest JA in the Court below, the prohibited direction was “problematic”.

**JCAB 241 - 242**

**C. Distraction of the jury from its task**

30 15. Although at one point described by the learned trial judge as an “observation” to be considered by the jury “when evaluating Mr. Tambakakis’ evidence”, the impugned direction was a direction of law, and could only have been so understood by the jury, thereby binding the jury in the performance of its function, rather than a mere comment which the jury would or could simply disregard; see the Charge to the jury at p. 2582 (22-24).

**JCAB 32**

16. That it was a direction of law is made clear when regard is had to the manner in which the impugned direction was introduced or prefaced by the learned trial judge in stating that it was a “factor” that was “significant” that “[the jury] should have regard to when [the jury is] assessing Mr. Tambakakis’ evidence”; see the Charge to the jury at p. 2582 (13-15).

**JCAB 32**

17. In these circumstances, and without repeating the Appellant's Submissions, the learned trial judge, in giving the impugned direction, legitimised or authorised the taking into account, in the assessment or evaluation of the evidence which had been given by Tambakakis, the fact that Tambakakis may be a guilty person who had determined to tough it out as a witness in the witness box in the hope that his evidence and his defence would be accepted by the jury.

18. That is to say, the effect of the impugned direction was not merely to inform, but to instruct, the jury that it might use the fact that Tambakakis had given evidence in his defence as a means by which the jury might test the truth of his evidence, and thereby disbelieve, be sceptical of, or give reduced weight to the evidence which he had given in his defence, thereby making it more probable that his evidence and his defence would be rejected by the jury and, in circumstances where the Appellant had, in his defence, relied upon passages within the evidence which had been given by Tambakakis, make it more probable that the Appellant's defence would likewise be rejected by the jury.

19. In these circumstances, the impugned direction operated as an erroneous qualification to the other directions given by the learned trial judge in his Charge to the jury.

20. The propositions set out in paras. 15 – 19 above are neither negated nor undermined by the Respondent's contention that the other directions given to the jury were accurate and did not distract the jury from its task.

21. With respect to the entirety of the directions to the jury cited by the Respondent in the Submissions of the Respondent at paras. 47 – 51.5, none of those directions could have been understood by the jury as bearing upon the content of, or undoing the effect of, the impugned direction as described by the Appellant. See further at paras. 22 – 26 below.

22. With respect to the directions to the jury cited by the Respondent at paras. 47 – 47.5, although making it clear that the assessment of evidence was a matter for the jury, the impugned direction erroneously instructed the jury as to the manner in which the jury might undertake its evaluation or assessment of the evidence given by Tambakakis.

23. With respect to the directions to the jury cited by the Respondent at paras. 48 – 49.4 concerning the onus and standard of proof, the impugned direction had the potential to undermine those directions; see the Appellant’s Submissions at para. 37.

24. With respect to the direction to the jury cited by the Respondent at paras. 50 – 50.1, that direction dealt with a different topic, namely stress felt by an accused, before then making reference to demeanour generally; see the Charge to the jury at pp. 2582 (25) – 2583 (12).

**JCAB 32 – 33**

10

25. With respect to the directions to the jury cited by the Respondent at paras. 51 – 51.6, those directions could have had no bearing upon the impugned direction because those directions are not concerned with the manner in which the jury might evaluate or assess the evidence which had been given by Tambakakis, but are confined to what the jury must do after the jury has conducted that evaluation or assessment.

26. Finally, the two “factors” or components to the prohibited direction do not cancel each other out.

20 Dated: 24 August, 2022.



.....  
BRET WALKER  
Counsel for the Appellant  
Tel: 02 8257 2527



.....  
O P HOLDENSON  
Counsel for the Appellant  
Tel: 03 9225 7231  
email: [ophqc@vicbar.com.au](mailto:ophqc@vicbar.com.au)



.....  
Milides Lawyers,  
Suite 410, Level 4,  
235 Queen Street,  
MELBOURNE VIC 3000  
Reference: Thea Milides  
Tel: 03 9010 6187  
Email: [thea@milideslawyers.com](mailto:thea@milideslawyers.com)

30

BETWEEN:

**DANNY AWAD**

Appellant

- and -

**THE QUEEN**

Respondent

10

**ANNEXURE OF STATUTORY PROVISIONS REFERRED TO  
IN THE APPELLANT'S REPLY**

20

1. Jury Directions Act, 2015 (Vic.), ss. 44J & 44K (as in force from 1 October, 2017 to the present) – Authorised Version No. 11 dated 29 October, 2018;