HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN: **DANNY AWAD**

Applicant

and

THE QUEEN

Respondent

SUBMISSIONS OF THE RESPONDENT

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II CONCISE STATEMENT OF ISSUES

2. The issue raised by this appeal, and the related appeal in *Tambakakis v The Queen* (M45/2022), is whether the giving by a trial judge of a direction contrary to s 44J of the *Jury Directions Act 2015* (Vic) (**JDA**) results in a substantial miscarriage of justice within the meaning of s 276(1)(b) and/or (c) of the *Criminal Procedure Act 2009* (Vic) (**CPA**).

3. The respondent advances two propositions. ***First***, there is not a substantial miscarriage of justice merely because the trial judge did not comply with s 44J of the JDA. Compliance with that provision is not one of "the essential requirements of the law" that "goes to the root of the proceedings".[1] ***Second***, once the misdirection is read in the context of the charge as a whole, the appellant cannot demonstrate that it resulted in a substantial miscarriage of justice by distracting the jury from their task.

PART III SECTION 78B NOTICE

4. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

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[1] ***Wilde*** *v The Queen* (1988) 164 CLR 365 at 373 (Brennan, Dawson and Toohey JJ); ***Weiss*** *v The Queen* (2005) 224 CLR 300 at [46] (the Court).

PART IV MATERIAL FACTS IN DISPUTE

5. There are no facts in dispute.[2] The respondent does not take issue with **AS [5]-[23]**, although the respondent will draw the Court's attention to further aspects of the charge.

PART V ARGUMENT

A. SECTION 276 OF THE CPA

6. Section 274 of the CPA permits a person convicted of an offence to appeal to the Court of Appeal against that conviction on any ground if the Court of Appeal grants leave to do so. Section 276 of the CPA has then taken the place of the common form criminal appeal provision in Victoria. It provides as follows:

> **276 Determination of appeal against conviction**
>
> (1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—
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> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
>
> (c) for any other reason there has been a substantial miscarriage of justice.
>
> (2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

7. This Court considered this section in ***Baini*** *v The Queen*.[3] For present purposes, it is sufficient to note that the Court acknowledged that a "substantial miscarriage of justice" could arise within the meaning of s 276(1)(b) and/or (c) where there had been "a serious departure from the prescribed processes for trial"[4] or where the Court of Appeal "cannot

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2 Though there is a need to note one correction to the facts as recounted in the judgment of the court below. At **JCAB 230-231 [43]**, Priest JA misstated the prosecution case at trial as being that Rohen was the previous driver of the van when Mr Tambakakis got into it in King Street and had to move the driver's seat backwards. The prosecution case was that the previous driver was Kanati.

3 (2012) 246 CLR 469.

4 (2012) 246 CLR 469 at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [65] (Gageler J).

be satisfied that the error or irregularity did not make a difference to the outcome of the trial".[5] These two formulations reflect the two ways in which the appellant puts his case.

B. A SERIOUS DEPARTURE FROM TRIAL PROCESS

8. The appellant's primary argument is that any breach of s 44J of the JDA results in a substantial miscarriage of justice "without more": see **AS [2(ii)], [31]-[32]**.

B.1 *Wilde* and this Court's authorities

9. In so contending, the appellant invokes those authorities which are typically traced to the judgment of Brennan, Dawson and Toohey JJ in *Wilde*.[6] In the context of the common form criminal appeal provision, their Honours said:[7]

10 > The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso.

10. To attempt to define the precise boundaries of this category of case is as impossible, and unwise, as seeking to define a "substantial miscarriage of justice" exhaustively.[8] In ***Glennon*** *v The Queen*, Mason CJ, Brennan and Toohey JJ observed of *Wilde* that "the 20 majority stressed that there is no mechanical formula or rigid test to be applied to determine whether an irregularity is of this nature".[9] Their Honours went on to explain the judicial technique to be applied: "each case will depend on its own circumstances and, in determining the question, it will be appropriate to have regard to the strengths and

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5 (2012) 246 CLR 469 at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also [66] (Gageler J).

6 (1988) 164 CLR 365.

7 (1988) 164 CLR 365 at 373.

8 See *Baini* (2012) 246 CLR 469 at [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [65] (Gageler J); ***Kalbasi*** *v Western Australia* (2018) 264 CLR 62 at [16] (Kiefel CJ, Bell, Keane and Gordon JJ); ***Krakouer*** *v The Queen* (1998) 194 CLR 202 at [23] (Gaudron, Gummow, Kirby and Hayne JJ).

9 (1994) 179 CLR 1 at 8.

weaknesses of the prosecution and defence cases in order to assess the gravity and significance of the error".[10] Their Honours' reasoning focused heavily on an assessment of the charge as a whole.[11]

11. If there is a touchstone, it is that the accused must have had a "fair trial according to law",[12] and one in which the jury (if there is a jury) has not been "prevented by judicial direction" from discharging its function.[13] These are examples of "fundamental" irregularities "which demonstrate that no proper trial has taken place".[14] As such language suggests, this category of case is "relatively narrow in compass".[15] It is a "rare case where there has been a denial of the presuppositions of the trial".[16]

10 12. To observe that this kind of error is rarely encountered is not only to state an empirical fact that fundamental departures from trial process occur infrequently. There is also a normative dimension. The important innovation of the common form criminal appeal provision was to recognise that errors and irregularities occur in criminal trials and that a retrial should not be ordered on each occasion.[17] To apply this category too broadly would be to subvert the tolerance for errors and irregularities which animated the enactment of the proviso in the first place, and which continues to inform s 276 of the CPA.

13. In *Glennon*, none of the judges of this Court accepted the appellant's submission that a misdirection which wrongly impugned the credibility of the accused would necessarily result in a substantial miscarriage of justice.[18] Their Honours' approach was to assess the
20 error in light of the conduct of the trial. *Glennon* is an illustration of the broader principle that, ordinarily, there is no departure from fundamental process where there is only a

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10 (1994) 179 CLR 1 at 8.

11 (1994) 179 CLR 1 at 8.

12 (1994) 179 CLR 1 at 12 (Deane and Gaudron JJ).

13 *Krakouer* (1998) 194 CLR 202 at [74]-[76] (McHugh J).

14 *Green v The Queen* (1997) 191 CLR 334 at 346-347 (Brennan CJ).

15 *Baini* (2012) 246 CLR 469 at [65].

16 *Hofer v The Queen* (2021) 96 ALJR 937 at [74] (Kiefel CJ, Keane and Gleeson CJ).

17 See generally *Weiss* (2005) 224 CLR 307 at [18]-[19] (the Court).

18 (1994) 179 CLR 1 at 9-10 (Mason CJ, Brennan and Toohey JJ), 12 (Deane and Gaudron JJ).

"misdirection on a particular point of fact or law arising in the trial".[19] A misdirection as to the elements of the offence, for example, is not ordinarily an error that means that there was, in truth, no trial at all.[20]

14. On ordinary principles, the appellant would have had no prospect of establishing that the misdirection was fundamental error of the kind described in *Wilde*. Here, as in *Glennon*, the error consists in a misdirection. The authorities are clear that the significance of a misdirection must be evaluated in the context of the record of the trial, including any other directions given to the jury in the charge.[21] "The question is always whether there has been a substantial miscarriage of justice, and the resolution of that question depends on the particular misdirection and the context in which it occurred".[22] The appellant's invitation for this Court to ignore the remainder of the charge to the jury is incompatible with this settled approach, and must be rejected for this reason alone. Assertion that an error goes to the root of the trial provides no warrant to view the error in isolation.

B.2 Section 44J of the JDA

15. The appellant seeks to sidestep the authorities by contending that it was the Parliament's intent that compliance with s 44J of the JDA was an essential feature of a fair trial in Victoria, such that non-compliance results in a substantial miscarriage of justice without more.

16. ***Statutory text.*** The appellant emphasises the text of s 44 J of the JDA. It provides:

> **44J Prohibited directions in relation to evidence of an accused**
>
> The trial judge must not direct the jury about any of the following matters in relation to the evidence of an accused—

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19 *Green v The Queen* (1997) 191 CLR 334 at 347 (Brennan CJ).

20 See, eg, *Darkan v The Queen* (2006) 227 CLR 373 at [83], [94], [96] (Gleeson CJ, Gummow, Heydon and Crennan JJ); *Reeves v The Queen* (2013) 88 ALJR 215 at [51] (French CJ, Crennan, Bell and Keane JJ).

21 *Jones v The Queen* (2009) 83 ALJR 671 at [30] (French CJ, Heydon, Kiefel and Bell JJ; Hayne J agreeing); *Pollock v The Queen* (2010) 242 CLR 233 at [69]-[70] (the Court); *Hargraves v The Queen* (2011) 245 CLR 257 at [46]-[50] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *R v Abdirahman-Khalif* (2020) 271 CLR 265 at [77], [79] (Bell, Keane, Nettle and Gordon JJ).

22 *Kalbasi* (2018) 264 CLR 62 at [57] (Kiefel CJ, Bell, Keane and Gordon JJ).

(a) whether the accused is under more stress than any other witness;

(b) that the accused gave evidence because—

(i) a guilty person who gives evidence will more likely be believed; or

(ii) an innocent person can do nothing more than give evidence.

Note

This section prohibits the trial judge from giving directions to the jury about particular matters. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial—see section 65.

17. The statutory note at the foot of the section confirms that the parties may make the points in s 44J in addressing the jury, and the trial judge may be obliged to remind the jury of these arguments. This distinguishes the comments in s 44J from comments which are prohibited outright by the JDA, and which require correction by the trial judge if they are made by the parties.[23] This note forms part of the Act,[24] and its significance is explained below: see **RS [31]-[32]**.

18. In terms, s 44J provides what the trial judge "must not" do. This being mandatory language, the appellant contends that it necessarily follows that non-compliance with the provision produces a substantial miscarriage of justice: **AS [29]**. The mandatory language used in s 44J is, of itself, plainly insufficient as a basis on which to conclude, without more, that non-compliance with the section necessarily gives rise to a substantial miscarriage of justice. Before turning to consider the authorities on which the appellant relies, and the statutory context which makes his primary argument untenable, four preliminary points should be made about the statutory language.

19. *First*, s 44J is stated in mandatory language because it directs trial judges as to what they are not to do. Mandatory language is the natural language of prohibition. But it does not

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[23] See JDA, s 7. Examples include any suggestion the evidence of an accused is less credible because of their interest in the outcome of the trial (s 44H), or an invitation to draw inferences against the accused based on their silence (s 42).

[24] *Interpretation of Legislation Act 1984* (Vic) s 36(3A)(a).

dictate the consequences of non-compliance. That is a separate question.[25] Put another way, the mandatory language of s 44J is decisive in determining whether there has been an error, but it is not decisive in determining whether that error is, without more, a substantial miscarriage of justice.

20. Some common law principles about how a trial should be conducted could also be described as 'mandatory'.[26] There is no necessary reason to distinguish between statutory and common law demands of trial judges. Errors or irregularities do not fall into any different category for the purposes of s 276(1)(b) and (c) of the CPA merely because they involve contraventions of statutes, rather than common law principles.

21. *Second*, the only part of the misdirection about which the appellant complains is the contravention of s 44J(b)(i). Plainly, there would be no miscarriage of justice if a judge were to invite the jury to consider only that the accused was under more stress than other witnesses contrary to s 44J(a), or that there is nothing more an innocent person can do than give evidence in their own defence contrary to s 44J(b)(ii). Yet these directions are proscribed using the same mandatory language, which can equally be described as creating requirements for criminal trials in Victoria. On the appellant's primary argument, it is difficult to see why they would not also give rise to a substantial miscarriage of justice. If the answer is that these directions, unlike that in s 44J(b)(i), are favourable to an accused, then this suggests that at least some evaluation of the substance and effect of the directions is necessary beyond merely noticing that they are proscribed in mandatory language. Yet mandatory language is all that matters on the appellant's primary case.

22. *Third*, there are decisions of the Victorian Court of Appeal which consider s 276 of the CPA in the context of failures to comply with s 21 of the JDA.[27] That section prescribes, in mandatory language, a direction on the limited use a jury may make of evidence of

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25 See, eg, *Douglass v The Queen* (2012) 86 ALJR 1086 at [14] (the Court). See also *Accident Compensation Commission v Murphy* [1988] VR 444 at 447 (the Court).

26 See, eg, *Domican v R* (1992) 173 CLR 555 at 561-562; *Crampton v R* (2000) 206 CLR 161 at [45].

27 See *Saddik v The Queen* [2018] VSCA 249 at[141]-[156] (Kaye and Niall JJA; Whelan JA agreeing) (non-compliance with s 21); *Di Giorgio v The Queen* [2016] VSCA 335 at [51], [57]-[59] (the Court) (obiter, non-compliance with s 21). See also *Yannic (a pseudonym) v The Queen* [2021] VSCA 150 at [93]-[95] (Niall JA; Priest and Sifris JJA agreeing) (non-compliance with s 37AA of the *Crimes Act 1958* (Vic)).

incriminating conduct. These decisions have rejected the argument that a substantial miscarriage of justice arises from a failure to comply with s 21. The appellant does not contend these cases were wrongly decided. The Parliament has not amended the CPA or the JDA to reverse the Court of Appeal's approach.

23. *Fourth*, where the consequences of breach of a statutory requirement are assessed for the purposes of determining the validity of executive action, it is now commonplace to recognise that this depends upon a full inquiry into legislative intention rather than a narrow focus on the use of imperative language.[28] There is no reason why the same judicial method should not be applied here, where the appellant's argument is that the legislative intention as embodied in the word "must" is that any breach results in a substantial miscarriage of justice.

24. ***The appellant's authorities.*** The cases relied upon by the appellant concern omissions to comply with statutory requirements which define the character of certain *sui generis* criminal proceedings. They do not support his argument in the context of this case.

25. ***Subramaniam*** *v The Queen* concerned the special hearing procedure for persons unfit to be tried.[29] This Court held that non-compliance by the District Court of New South Wales with s 21(4) of the *Mental Health (Criminal Procedure) Act 1990* (NSW) resulted in a substantial miscarriage of justice. Section 21(4) provided:

> **21 Nature and conduct of special hearing**
>
> …
>
> (4) At the commencement of a special hearing, the Court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts.

26. In one of the paragraphs cited in **AS [29],** this Court said: "the language of s 21(4) is mandatory and must be given effect".[30] But this was in the context of identifying error,

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28 See, eg, *Adams v Lambert* (2006) 228 CLR 409 at [26]-[29] (the Court); *Accident Compensation Commission v Murphy* [1988] VR 444 at 447 (the Court); *Davis (a pseudonym) v The Queen* (2016) 55 VR 1 at [61] (the Court).

29 (2004) 79 ALJR 116.

30 (2004) 79 ALJR 116 at [41] (the Court).

and was not the full extent of the Court's explanation for why there was a substantial miscarriage of justice. On this point, this Court pointed to more than the mandatory language of s 21(4), saying (emphasis added):[31]

> … The mandatory requirements of s 21(4) cannot be and were not met by the explanations offered piecemeal over the course of the hearing or in statements by counsel. The explanations required are both limited and specific. They must be given at the commencement of the trial. That requirement *and the content of the explanations* indicate that the explanations that the judge must give are essential to the special hearing. A departure from any one of the elements identified in sub-ss (2) to (4) deprives the hearing of its fundamental character. Such a departure itself constitutes a miscarriage of justice for the purpose of the *Criminal Appeal Act 1912* (NSW) and therefore requires the quashing of any conviction entered after such a departure.

27. The Court's reference to the *content* of the explanations a judge is obliged to give at the outset of a special hearing is significant. It must be understood in light of the model direction the Court set out.[32] The information in that model direction has the clear potential to be of great assistance to a jury in understanding the nature of a special hearing, and in acquitting its task in determining such a hearing fairly. To take an example, without that information, a jury may not have a fair appreciation of why the defence in a special hearing might fail to challenge certain parts of the evidence. With the mandatory explanation, however, the jury would understand that the defendant may be unable to provide certain instructions, or meaningfully engage with the evidence. Given the potential significance of such matters to the jury's approach to its task, this Court's view that the *content* of the explanation made it essential to a properly conducted special hearing may be readily understood.

28. The second case relied on by the appellant is ***AK*** *v Western Australia*,[33] which concerned an obligation in s 120(2) of the *Criminal Procedure Act 2004* (WA) that "[t]he judgment of the judge in a trial by a judge alone must include the principles of law that he or she has applied and the findings of fact on which he or she has relied". Gummow and Hayne JJ did emphasise that s 120(2) required the reasons to satisfy certain conditions,[34]

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31 (2004) 79 ALJR 116 at [44] (the Court).

32 (2004) 79 ALJR 116 at [40].

33 (2008) 232 CLR 438.

34 (2008) 232 CLR 438 at [55]-[56].

but underlying their Honours' approach was a deeper appreciation of the importance of reasons in judge only trials. Specifically, their Honours identified the error as the same kind of error considered by this Court in ***Fleming*** *v The Queen*.[35] In *Fleming*, this Court explained that the principle underlying the mandatory requirement for reasons in judge alone trials is that justice must be seen to be done.[36] Despite the importance of this principle, and the mandatory statutory language, the Court did not regard the failure to give adequate reasons as automatically resulting in a substantial miscarriage of justice.[37]

29. In *AK*, Gummow and Hayne JJ followed *Fleming* in considering the relative importance of the error to the trial that was had, noting there was a complete failure to articulate any reasoning on the central issue in that trial.[38] Their Honours cannot sensibly be understood as regarding the mandatory statutory language of s 120 as in itself sufficient to ground a substantial miscarriage of justice.

30. Both *Subramanium* and *AK* concerned omissions on the part of the trial judge to state certain matters. In cases of that kind, there may be little scope for other directions to ameliorate the consequences of the omission. In this case, there is much the trial judge said to the jury which neutralised any danger of unfairness created by the prohibited comment. It would be an error to treat cases like *AK* and *Subramaniam* as authorities for the proposition that a charge to a jury should not be considered in its entirety where part of what was said in the charge contravenes a statutory provision.

31. ***Statutory context***. The appellant's primary argument cannot be sustained in light of the statutory context for s 44J. As observed above, it is open to the parties to make submissions to the precise effect of those prohibited as directions by s 44J. Moreover, those submissions to the jury *must* then be summarised by the trial judge.[39] One may accept that comments from a trial judge are not the same as submissions from the parties. But the statute is plainly contemplating that there is nothing wrong with the points in s 44J as submissions, and as points which the judge may refer the jury for its consideration.

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35 (2008) 232 CLR 438 at [47] and [51], citing *Fleming* (1998) 197 CLR 250.

36 (1998) 197 CLR 250 at [22]. See also *AK* (2008) 232 CLR 438 at [108] (Heydon J).

37 (1998) 197 CLR 250 at [39].

38 (2008) 232 CLR 438 at [56]. See also at [110] (Heydon J).

39 JDA, s 65 (as the statutory note at the foot of s 44J indicates).

Plainly enough, as McLeish and Niall JJA observed, the rhetorical statements in s 44J are not "inherently poisonous to the trial process" (**JCAB 282 [195]**). If the prosecutor can address the jury on a matter in s 44J without correction from the trial judge, it is implausible that the Parliament regarded that subject matter as antithetical to a fair trial. Prosecutors also have a duty to ensure an accused receives a fair trial.

32. The statements in s 44J are to be contrasted with other comments which are prohibited outright by the JDA, and which must be corrected by the trial judge if made by a party.[40] Examples include any suggestion the evidence of an accused is less credible because of their interest in the outcome of the trial (s 44H), or an invitation to draw inferences against the accused based on their failure to give or call evidence (s 42). This is a textual indication that the matters in s 44J were regarded less seriously than these other matters.

33. ***Legislative history***. Section 44J was inserted into the JDA by the *Jury Directions and Other Acts Amendment Act 2017* (Vic). For the appellant, this amendment reflects a legislative determination that the prohibition on trial judges giving the directions in s 44J was essential to ensure a fair trial. The appellant's argument assumes, rather than demonstrates, that the Parliament took this view of the direction.[41] A closer reading of the legislative history, given its prominence in the appellant's argument, is required.

34. The Criminal Law Review of the Department of Justice and Regulation released a report (**Criminal Law Review Report**) the purpose of which was described as follows:[42]

> This report is designed to guide the interpretation and application of the proposed Jury Directions and Other Acts Amendment Bill 2017 (if enacted) by providing detailed information on how the reforms were developed, and their intent. It is intended as both an explanation of the reasons for the reforms, which may assist in the interpretation of the provisions, and as an informational resource following the commencement of the Bill, which is designed to assist courts and practitioners to be ready for the changes when they commence

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40 JDA, s 7.

41 See *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26] (French CJ and Hayne J).

42 Criminal Law Review, Department of Justice and Regulation, *Jury Directions: A Jury-Centric Approach Part 2* (2017) at ii. This is a relevant aid in the interpretation of s 44J: see *Interpretation of Legislation Act 1984* (Vic) s 35(b)(iv).

35. The Criminal Law Review Report described various directions, including that prohibited by s 44J(b) as "problematic",[43] but only in the sense that it was regarded as unhelpful, rather than unfair. The Criminal Law Review Report said:[44]

> The direction on assessing evidence (i.e. a guilty person may tough out cross-examination, but there's nothing more an innocent person may do) contains two competing propositions that arguably neutralise each other. The competing nature of the directions may confuse the jury and have the unintended consequence of focusing attention on the motivation of an accused to give particular evidence given their interest in the outcome of a trial. This direction appears to be unique to Victoria. For example, it does not appear in the model directions in Queensland, New South Wales, the United Kingdom or Canada.

36. This is to be contrasted with what the Criminal Law Review Report said about the direction in s 44J(a) (which was also incorrectly given by the trial judge in this case and about which no complaint has been made):[45]

> Under the second direction, the jury is directed to treat the accused in the same way as other witnesses, but then is immediately directed to treat the accused differently, because he or she is probably under more stress. This is both confusing and potentially inaccurate. It is not necessarily the case that the accused is under more stress than other witnesses. Victims, witnesses and accused people are all likely to be stressed, to varying degrees, by the process of giving evidence. This direction appears inconsistent with directions commonly given about how to assess the evidence of witnesses generally (which provide that giving evidence is stressful and that people giving evidence react and appear differently).
>
> The direction is also potentially unfair, particularly in 'oath on oath' cases where a jury must assess the evidence of the alleged victim and the accused where there is little other relevant evidence. Whilst to convict, the jury will need to be satisfied of every element of the offence beyond reasonable doubt, the direction to consider the stress of the accused may tip the balance inappropriately in favour of the accused. Again, this direction appears to be unique to Victoria. For example, model directions in Canada tell the jury to treat the accused's evidence in the same way as any other witness, and the UK, NSW and Queensland do not differentiate the accused's evidence from evidence of other witnesses.

37. The point to notice is that the Criminal Law Review Report described the direction prohibited in s 44J(a) as confusing, potentially inaccurate and potentially unfair. It did not say the same of the direction prohibited in s 44J(b).

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43 Criminal Law Review Report at i, ii, vii, viii, 1, 3, 13, 15.

44 Criminal Law Review Report at 12.

45 Criminal Law Review Report at 12.

38. The Criminal Law Review Report sheds light on how to read the accompanying explanatory memorandum and second reading speech. Neither described the direction a unfair to the accused. The explanatory memorandum said of s 44J generally that "[n]ew section 44J prohibits certain common law directions relating to the evidence of an accused that are confusing, unhelpful and arguably inaccurate", and it said of the direction in s 44J(b) that it was "likely to confuse jurors rather than adding to their understanding of this issue".[46] The Attorney-General in his second reading speech said nothing to suggest that the directions prohibited by s 44J were unfair to the accused.[47]

39. This is a striking omission, given the direction was orthodox in Victoria for decades. Over a number of cases, experienced criminal law judges in Victoria Callaway JA,[48] Winneke P,[49] Nettle JA,[50] Whelan and Priest JJA[51] evidently saw nothing unfair in it. It was described by the Court of Appeal as Court as "scrupulously fair".[52] Had the Parliament considered the direction fundamentally unfair, it would follow that decades of cases had been unfairly conducted, and one would expect some extrinsic material to have said so. This argument does not involve attempting to use common law decisions to frustrate the legislative intention of s 44J: cf **AS [30]**. Rather, the pre-existing common law is helpful to identify the mischief, purpose, and operation of s 44J.

40. The broader history of the JDA is also important, because an amendment such as the introduction of s 44J ultimately takes its place within the fabric of the Act as a whole.[53] The origin of the JDA can be traced to a report of the Victorian law Reform Commission in May 2009 entitled *Jury Directions*. In implementing the recommendations of the report

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46 Explanatory Memorandum, Jury Directions and Other Acts Amendment Bill 2017 (Vic) at 8.

47 Victoria, Parliamentary Debates, Legislative Assembly, 22 February 2017 at 297.

48 *R v Haggag* (1998) 101 A Crim R 593 at 598.

49 *R v McMahon* (2004) 4 VR 101 at [26], [28]-[29].

50 *R v Buckley* (2004) 10 VR 215 at [54], [56]. It was in this case that the trial judge commented that the two parts of the direction "balance themselves out". This was referred to by Niall and McLeish JJA at [186] (**JCAB 280**). It appears their Honours intended to refer to *Buckley* at [167] (**JCAB 274**), rather than to *R v Storey* (19978) 140 CLR 364.

51 *Brown v The Queen* [2020] VSCA 20.

52 *R v Franco* [2006] VSCA 302 at [87] (Maxwell P; Buchanan and Vincent JJA agreeing).

53 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463.

by introducing the *Jury Directions Bill 2012* (Vic), the Attorney-General made it clear that reducing the length and complexity of jury directions in Victoria were primary objectives of the new legislation.[54] These objectives are reflected in the purposes of the JDA are set out in s 1, which include:

> (a) to reduce the complexity of jury directions in criminal trials; and
>
> (b) to simplify and clarify the issues that juries must determine in criminal trials; …

41. Clarity, simplicity and brevity have been pursued in further amendments to the JDA ever since. Given that the parties are permitted to make the points mentioned in s 44J, the better view is that they were culled from the directions to be given in Victoria for the sake of the simplicity and clarity of the judge's charge.

42. For these reasons, the appellant's primary argument should be rejected. Non-compliance with s 44J(b) does not, without more, result in a substantial miscarriage of justice.

C. DISTRACTION OF THE JURY FROM ITS TASK

43. If a misdirection distracts the jury from its task, then that error or irregularity may have caused a substantial miscarriage of justice. But in considering whether this occurred, the Court must assess the charge as a whole.[55] To do so is not to "necessarily assume" that the direction was "negated, neutralised or ameliorated": **cf AS [39]**. Rather, it is to assess "the nature and effect of the error" as the court must do in every case.[56]

44. In this case, the charge as a whole ensured that the jury understood its task as being to determine whether the Crown had discharged its onus to exclude all reasonable hypotheses consistent with innocence. **AS [34] and [37]** are wrong in contending that the jury was being invited or permitted to choose between the two possibilities in the

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54 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012 at 5556-5557.

55 *Hargraves v The Queen* (2011) 245 CLR 257 at [46]; *McKell v The Queen* (2019) 264 CLR 307 at [39] (Bell, Keane, Gordon and Edelman JJ); *Mule v The Queen* (2005) 79 ALJR 1573 at [25] (the Court); *Green v The Queen* (1971) 126 CLR 28 at 34 (Barwick CJ, McTiernan and Owen JJ); *B v The Queen* (1992) 175 CLR 599 at 606 (Brennan J).

56 *Kalbasi* (2018) 264 CLR 62 at [15]-[16], [57] (Kiefel CJ, Bell, Keane and Gordon JJ); *Hofer v The Queen* (2021) 95 ALJR 937 at [60] (Kiefel CJ, Keane and Gleeson JJ).

direction. Neither the direction taken in isolation nor the charge as a whole suggested that the jury was simply to choose between the two possibilities. The repeated and emphatic directions the jury were given made it clear this was *not* their task. The trial judge did not suggest that Mr Tambakakis was guilty and just "toughing it out": cf **AS [36]**.

45. More particularly, it cannot be said that the charge as a whole left the jury in any doubt that the Crown had to negative Mr Tambakakis' evidence as a reasonable possibility or as to the accusatorial nature of the appellant's trial or the standard of proof: **AS [37]**. The appellant's submission that the "remainder of the Charge to the jury was expressed in general terms" is wrong: **AS [40]**. The opposite is true: the misdirection was entirely general in nature, whereas the rest of the charge was specific and, on all points relevant to this appeal, accurate. The only reason why no part referred to the prohibited direction was that all the parties concurred that the trial judge ought not redirect on it (see T2608:2-T2609:22 (**JCAB 59-60**)): cf **AS [40]**.

46. The respondent draws attention to the following parts of the charge.

47. *First*, the jury can have been in no doubt that the assessment of evidence, including Mr Tambakakis' evidence, was a matter for them.

47.1. At T2560:30-31 (**JCAB 10**), the trial judge noted at the very outset of the charge that "[t]he evidence is your province, of course". In conventional terms, his Honour told the jury that the significance of individual pieces of evidence was a matter for them T2561:2-6 (**JCAB 11**).

47.2. At T2564:9-12 (**JCAB 14**), the trial judge said "You are bound, as I have said, by my directions of law, but you are not bound by any comment that I may make about the facts in this case". The trial judge elaborated on this at T2564:15-26 (**JCAB 14**). Among other things, his Honour emphasised that "You are not bound in any way by any comment or observation that I may make about the evidence or the facts of the case" (T2564:23-25 (**JCAB 14**)). The misdirection in this case contained what the trial judge told the jury were "observations when evaluating Mr Tambakakis' evidence" (T2582:22-24 (**JCAB 32**)).

47.3. At T2565:9-11 (**JCAB 15**), the trial judge repeated that "it is your role to decide what the fact are in this case based upon the evidence that is before you".

47.4. At T2577:2-6 (**JCAB 27**), the trial judge said "no one can tell you how to approach any particular witness' evidence in this regard, although I will give you directions about Mr Tambakakis' evidence, specific direction about the accused as a witness".

47.5. Another reference is T2579:6-8 (**JCAB 29**)

48. *Second*, the jury could have had no doubt about the onus of proof (see also **JCAB 274 [165]-[177])**.

48.1. At T2570:27-T2571:6 (**JCAB 21-22**), the trial judge said that:

> Now, I wish to emphasise, ladies and gentlemen, that under our justice system people are presumed innocent unless and until they are proved guilty. So, before you may return a verdict of guilty in the case of the accused you are then considering, the prosecution must satisfy you that that particular accused is guilty of the charge he is facing. The accused does not have to prove anything. And even though Mr Tambakakis gave evidence in the case, he does not in any way assume some evidentiary onus in doing so …

48.2. Shortly after the misdirection, at T2583:12-15 (**JCAB 22**), the trial judge reiterated "It is also essential, and this is very important, that it is for the prosecution to prove its case beyond reasonable doubt". The trial judge went on to elaborate that "It is not for Mr Tambakakis to prove his innocence. Now, this has not changed simply because he has decided to give evidence": T2583:16-18 (**JCAB 22**).

48.3. The trial judge further reiterated that "The burden of proof remains on the prosecution irrespective of what you make of Mr Tambakakis' evidence": T2584:9-10 (**JCAB 34**).

48.4. Other references are: T2572:4-10 (**JCAB 22**), T2638:4-5, 20-21 (**JCAB 89**), T2639:8-14 (**JCAB 90**).

49. *Third*, the jury could have had no doubt about the standard of proof.

49.1. At T2571:7-26 (**JCAB 21**), the trial judge explained "beyond reasonable doubt".

49.2. At T2574:29-T2575:28 (**JCAB 24-25**), the trial judge explained this in the context of circumstantial reasoning.

49.3. Shortly after the misdirection, at T2583:12-15 (**JCAB 33**), the trial judge reiterated "It is also essential, and this is very important, that it is for the prosecution to prove its case beyond reasonable doubt".

49.4. Other references are: T2563:4-7 (**JCAB 13**), T2636:29-30 (**JCAB 87**), T2637:22-23 (**JCAB 88**), T2638:20-21 (**JCAB 89**), T2639:8-14 (**JCAB 90**), T2702:17-18 (**JCAB 153**)

50. *Fourth*, the jury could have had no doubt that they were to approach Mr Tambakakis' evidence as they would any other witness (see also **JCAB 277 [175]-[176]**).

50.1. Immediately after the misdirection in this case, the trial judge said (T2582:25-T2583:1 (**JCAB 32-33**)):

> In the end, it is for you to determine whether or not you accept it and what weight you give to it. In making this determination, you should treat the accused's evidence in exactly the same way as you would treat the evidence of any other witness. However, you must bear in mind, ladies and gentlemen, that an accused giving evidence in his own defence is probably under more stress than any other witness giving evidence in a trial. …

The latter part contravenes s 44J(a) and is favourable to the accused. No objection to it has ever been taken by the appellant.

51. *Fifth*, the jury were specifically directed about how to approach the Crown case in circumstances were Mr Tambakakis had given evidence (see also **JCAB 276 [173]**).

51.1. Shortly after the misdirection, the trial judge directed (T2583:18-T2584:8 (**JCAB 33-34**)):

> … This means that you must not find him guilty if you reject his evidence. If you say to yourselves, "We do not believe a word of what he said," you would simply put that to one side, or, "We do not believe Mr Tambakakis on important factual issues and therefore we are not prepared to act on his evidence," all of it, simply because you think on particular topic you do not accept it and you think that his evidence is unreliable, or untruthful, one or the other, or both.
>
> If you arrive at those conclusions, and I am not suggesting you should one way or the other, it is entirely a matter for you by reference to all of the evidence in the case, but if you do arrive at that conclusion, then you simply put his evidence to one side and you then consider whether or not the prosecution has proved its case beyond reasonable doubt against him. Now, as I say, it is essential that you

> understand that. It would be perfectly open to you to say, "Well, we don't believe a word of what Mr Tambakakis has said, and his evidence is unreliable. But we're not satisfied that the prosecution has proved its case beyond reasonable doubt.

This direction specifically addressed what the jury should do if they thought Mr Tambakakis was lying. They were not to find him guilty simply on that basis.

51.2. The trial judge went on to explain (T2584:11-17 (**JCAB 34**)):

> … Of course, however, if you do accept Mr Tambakakis' evidence, you do not have to be satisfied of its truth beyond reasonable doubt. If you are satisfied that the evidence of Mr Tambakakis, that is, his evidence as to what took place, is reasonably possible, then you would have a reasonable doubt as to his guilt and you would find him not guilty. …

51.3. In the context of summarising Mr Tambakakis' evidence, the trial judge said this (T2585:1-8 (**JCAB 35**):

> And as I have said to you, if you find that the account that he gave is reasonably possible, then you would find him not guilty. But if you do not, simply because you do not find it is reasonably possible, as I have said, you find that it is untruthful or unreliable, you put it to one side and you then consider whether the prosecution has proved its case against him beyond reasonable doubt.

51.4. On the next day, the trial judge gave further directions on Mr Tambakakis' evidence, which followed the model directions proposed in *De Silva v The Queen*[57] (T2641:8-T2642:17 (**JCAB 92-93**)):

> Now as I told you yesterday, Mr Tambakakis gave sworn evidence in his own defence. And there are four broad conclusions that you may reach about this evidence. And these are directions of law. If you think that his evidence is true, that is if you accept the truthfulness of Mr Tambakakis' evidence then you would find him not guilty because you would accept that he did not know that the consignment contained a border controlled drug, namely cocaine.
>
> If you're not sure whether Mr Tambakakis' evidence is true but you think it might be, then you'll have a reasonable doubt about the prosecution's case. And, again, you would find him not guilty.
>
> Similarly, if you merely prefer the evidence of the prosecution witnesses to Mr Tambakakis' evidence, and his account, then you would also find him not guilty.

[57] (2019) 268 CLR 57.

> It's not sufficient for you to merely find the prosecution case to be preferable to the defence case. In other words, it's not a question for you of simply balancing one case against the other. As I said to you, at all times, you must – the prosecution, I should say, must establish Mr Tambakakis' guilt beyond reasonable doubt.
>
> So, therefore, if you conclude that the account that Mr Tambakakis has given, that is, that at all times he believed, up until the box was opened in the warehouse by Sam, he believed it contained steroids. If you believe that it's reasonably possible that that's what he believed, then you would find him not guilty of the charge. Because you would have a reasonable doubt that he knew it contained a border controlled drug. In this case, cocaine.
>
> As I explained to yesterday [sic], if you reject Mr Tambakakis' evidence, simply put it to one side. If you're not satisfied of its truthfulness and reliability, you put it to one side. Simply because you reached that conclusion it does not mean that you therefore find him guilty. You still have to examine the case relied upon by the prosecution and be satisfied of the issue, the element in his case beyond reasonable doubt before you could find him guilty.

51.5. In relation to the appellant's case and Mr Tambakakis' evidence, see T2647:21-T2648:4 (**JCAB 98-99**). The trial judge later said (T2650:16-25 (**JCAB 101**)):

> As I've explained to you, ladies and gentlemen, even if you reject Mr Tambakakis' evidence, you put it to one side. If you reject Mr Tambakakis' evidence it does not follow that Mr Awad is guilty of the offence that he is charge [sic] with. You need to consider the evidence a summarised by me which is relied upon by the prosecution before – you'd have to be satisfied on the basis of the evidence relied upon by the prosecution of his guilt beyond reasonable doubt, even if you don't accept what Mr Tambakakis has said.

51.6. In summarising Mr Tambakakis' evidence as part of the trial judge's summary of all the evidence, his Honour reminded the jury (T2711:7-22 (**JCAB 162**)):

> … And as I have explained to you, you will approach his evidence – it's important that you understand, ladies and gentlemen, that having regard to the fact that Mr Tambakakis has given evidence, the prosecution have to establish beyond reasonable doubt that his account of the evidence, that his account of the events is not a reasonable possibility. Or, put another way, if it's reasonably possible, if you regard it as reasonably possible that Mr Tambakakis believed that the consignment contained steroids up until the time that the surveillance device was located in the warehouse, if you are satisfied of that, that is, that it is reasonably possible, you would not be satisfied that the prosecution has proved its case against him beyond reasonable doubt and you would find him not guilty.

52. In the circumstances, it cannot be said that the jury was distracted from their task or may have misunderstood their task as a choice between binary options, without applying the

onus or standard of proof. Nor could the jury have any doubt that they could not conclude Mr Tambakakis was guilty simply if they thought he was lying. As in *Mule v The Queen*, these conclusions are "reinforced by the consideration that experienced trial counsel made no complaint at the end of the summing-up",[58] and that immediately after the misdirection senior counsel for Mr Tambakakis acknowledged that the misdirection was "balanced": T2596:30 (**JCAB 46**).

53. The majority below was right so to conclude. Their Honours, unlike Priest JA in dissent, examined the charge as a whole, and reached the correct conclusion after doing so.

PART VI NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

54. There is no notice of contention or cross-appeal. At special leave, the respondent had foreshadowed an intention to file a notice of contention to contend that the orders should be upheld because conviction was inevitable having regard to the entire record. Because inevitability was not determined by that Court in that manner, the respondent accepts it would be inappropriate for this Court to do so at first instance. If this Court considers that a substantial miscarriage of justice might not be demonstrated if the conviction was inevitable having regard to the entire record, then the appropriate order, if the Court were otherwise persuaded to allow the appeal, would be for the matter then to be remitted.

PART VII ESTIMATE OF TIME FOR ORAL ARGUMENT

55. The respondent will require a total of 90 minutes for the presentation of oral argument in this matter and *Tambakakis v The Queen* (M45/2022).

Dated: 19 August 2022

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[58] (2005) 79 ALJR 1573 at [24] (the Court). Cf *Krakouer* [36] (Gaudron, Gummow, Kirby and Hayne JJ); *Kalbasi* at [50] (Kiefel CJ, Bell, Keane and Gordon JJ).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **DANNY AWAD**

Appellant

and

THE QUEEN

Respondent

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ANNEXURE OF STATUTORY PROVISIONS REFERRED TO IN THE RESPONDENT'S SUBMISSIONS

No.	Description	Version	Provisions
1.	*Jury Directions Act 2015* (Vic)	As in force from 1 October 2017 to the present – Authorised Version No. 11 dated 29 October 2018.	44H, 44J.
2.	*Criminal Procedure Act 2009* (Vic)	As in force from 1 January 2010 to the present – Authorised Version No. 83 dated 1 July 2021.	274, 276.