



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Sep 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: M45/2022
File Title: Tambakakis v. The Queen
Registry: Melbourne
Document filed: Form 27F - Respondent's Outline of oral argument
Filing party: Respondent
Date filed: 13 Sep 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.

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

BETWEEN:

DANNY AWAD
Appellant

and

10

THE QUEEN
Respondent

JOHN TAMBAKAKIS
Appellant

and

THE QUEEN
Respondent

20

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The effect of the misdirection

30

2. The appellants' complaints that the misdirection had the potential to (a) invite scepticism or disparagement of Mr Tambakakis' evidence, simply because he was the accused (**Awad [33], [36]**), (b) define the question for the jury's determination as whether Mr Tambakakis was an innocent or a guilty person (**Awad [37]**) and (c) undermine the presumption of innocence and onus of proof (**Tambakakis [35], [53]; Tambakakis Reply [31]**) all raise the fundamental question this Court posed in *Hargraves* (2011) 245 CLR 257 at [46]: did the judge's instructions deflect the jury from its fundamental task of deciding whether the prosecution proved the elements of the offence beyond reasonable doubt?
3. To answer this question, it is necessary to read the charge as a whole and to consider whether the jury was deflected from its task.
 - *Hargraves* (2011) 245 CLR 257 at [46]-[49] (**JBA 3, Tab 20**).

4. The misdirection does not create a material risk of (a) the jury assuming the accused is guilty or (b) disparaging their evidence.
- See **JCAB 32, lines 13-24**
 - See *Hyatt* [1998] 4 VR 182 at 191-192 (**Supp, Tab 1**); *Taafe* (1998) 102 A Crim R 472 at 483-484 (**Supp, Tab 4**); *Haggag* (1998) 101 A Crim R 593 at 598 (**JBA 4, Tab 33**); *Iliovski* (2002) 135 A Crim R 117 at [15]-[16] (**Supp, Tab 2**); *Buckley* (2004) 10 VR 215 at [55]-[56] (**JBA 4, Tab 31**); *McMahon* (2004) 8 VR 101 at [28]-[29] (**JBA 4, Tab 34**); *Franco* [2006] VSC 32 at [87]-[88] (**JBA 4, Tab 32**).
5. Any risk is neutralised by the trial judge immediately emphasising that (a) Mr Tambakakis was to be treated like (or more favourably than) any other witness; (b) the burden remains with the Crown at all times; and (c) that burden is to be discharged beyond reasonable doubt.
- See **JCAB 32 line 25 to JCAB 34 line 17**.
6. The clear and repeated directions the jury received would have left the jury in no doubt as to their task. (**RS (Awad) [44]-[45]**).
7. By the conclusion of the charge, there was no exception taken. This supports the view that no further direction was required to ameliorate any risk created by the misdirection. (**RS (Awad) [52]**).
- *Krakouer* (1998) 194 CLR 202 at [36] (**JBA 3, Tab 22**); *Kalbasi* (2018) 264 CLR 62 at [50], [57] (**JBA 3, Tab 21**); *Mule* (2005) 79 ALJR 1573 at [3], [10], [12], [24]-[25] (**JBA 4, Tab 29**).

The misdirection did not, in and of itself and without more, result in a substantial miscarriage of justice (RS (Awad) [8]-[42]; RS (Tambakakis) [9]-[11])

8. The text, context and purpose of s 44J of the *Jury Directions Act* do not evince an intention that any non-compliance results in a substantial miscarriage of justice.
- (a) The use of mandatory language is not determinative.
 - (b) The fact that the parties can address on the subject is significant.
 - (c) The extrinsic materials do not support the view that the directions were abolished because they undermined the fundamental precepts of a criminal trial.

- Criminal Law Review Report at 12 (**JBA 5, Tab 38**) Explanatory Memorandum, Jury Directions and Other Acts Amendment Bill 2017 (Vic) at 8 (**JBA 5, Tab 39**).
9. *Subramaniam* (2004) 79 ALJR 116 (**JBA 4, Tab 37**) and *AK* (2008) 232 CLR 438 (**JBA 3, Tab 13**) are distinguishable, and do not state any principle which determines whether a contravention of s 44J necessarily results in a substantial miscarriage of justice.
10. A misdirection is traditionally not something that produces a substantial miscarriage of justice without more. Had the Parliament intended non-compliance with s 44J to result in a substantial miscarriage of justice in every case, one would expect it to have said so.
- *Glennon* (1994) 179 CLR 1 at 9-10, 12 (**JBA 3, Tab 18**); *Green* (1997) 191 CLR 334 at 347 (**JBA 3, Tab 19**); *Kalbasi* (2018) 264 CLR 62 at [57] (**JBA 3, Tab 21**)

Orders (RS (Awad) [54]; RS (Tambakakis) [22])

11. If the appeal is allowed, the matter should be remitted to the Court of Appeal to assess whether a substantial miscarriage did not occur because conviction was inevitable having regard to the entirety of the record. That was in issue before the Court of Appeal, and it remains undetermined.

Dated: 13 September 2022



Pat Doyle

Christopher Tran