HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

JOHN MICHAEL TAMBAKAKIS

Appellant

- and -

THE QUEEN

Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Argument in Reply

2. Each of the Judges in the Court below recognised that the possible kinds of miscarriage of justice which section 276 of the *Criminal Procedure Act 2009* (Vic) deals with are too numerous and too different to permit of a single test.

3. Each of the Judges also recognised that the Learned Trial Judge in the Appellant's case had contravened section 44J of the *Jury Directions Act 2015* (Vic).

4. As such, and whilst the Respondent has made some fleeting reference to the use of the word "observation" by the Learned Trial Judge, each of the Judges in the Court below recognised that in the Appellant's case the jury had been provided with a direction that is prohibited at law.

Respondent's Submissions ("RS") (*Awad*), [47.2].

5. The Respondent's submission that in considering a substantial miscarriage of justice in any of its many forms there is only a "subtle" difference between the repetition of an argument of counsel and a direction of law is untenable.

RS (*Tambakakis*), [10].

6. Rather than being subtle, the distinction between a direction of law and the reference to an argument made by counsel is fundamental.

Domican v The Queen [1992] HCA 13, [9]; (1992) 173 CLR 555, 560.

7. In the Appellant's case the Learned Trial Judge repeatedly directed the jury that whilst they were free to leave the arguments of counsel to one side they had to follow his directions of law.

8. It should be accepted that this fundamental distinction was not lost on Parliament when sections 44J and 44K of the *Jury Directions Act 2015* (Vic) were introduced.

9. That Parliament would intervene in such a way and specifically identify the Victorian cases that previously considered this impugned direction tells against any attempt to preserve any sense of supposed subtlety in this area.

10. In considering the substantial miscarriage of justice question, in any of its many forms, it will be necessary to consider what the prohibited direction goes to.

11. In a criminal trial the approach of the jury to the evidence of an accused person will often lay at the heart of the trial.

12. This was a trial where the contest as to the Appellant's credibility was critical to the outcome of the trial.

13. The Learned Prosecutor had attacked the Appellant's credibility and submitted to the jury that his evidence was largely made up of lies.

14. The Appellant's counsel had submitted that the Appellant's evidence had the ring of truth about it. It was submitted that in the face of strenuous cross-examination the Appellant had not been shaken at all in his evidence that he thought there were steroids in the copiers and not cocaine.

15. This was a trial where the Appellant's credibility was also put squarely in issue by his co-accused Danny Awad.

16. In his final address Mr Awad's counsel had submitted that the Appellant's evidence was demonstrably true. He went on to point to four features of the evidence that demonstrated that the Appellant's evidence was demonstrably true.

17. The Respondent has argued that a misdirection touching upon an accused's credibility, where that credibility is in issue, does not necessarily mean that a substantial miscarriage of justice has occurred.

RS (*Tambakakis*), [21].

10 18. However, the fact remains that there is a substantial body of authority establishing that where the error in a trial goes to the contested credibility of a crucial witness the nature of that error can stand in the way of any finding that there has not been a substantial miscarriage of justice.

Orreal v The Queen [2021] HCA 44, [20] and [41]; (2021) 96 ALJR 78, 82 and 86-7.

Kalbasi v Western Australia [2018] HCA 7, [15]; (2018) 264 CLR 62, 71.

Castle v The Queen [2016] HCA 46, [65]-[68]; (2016) 259 CLR 449, 472-3.

Collins v The Queen [2018] HCA 18, [36]-[37]; (2018) 265 CLR 178, 191-2.

19. The Respondent has now abandoned any attempt to demonstrate that, notwithstanding
20 the error in the Appellant's trial, the conviction was inevitable.

RS (*Awad*), [54]; RS (*Tambakakis*), [22].

20. The Respondent is now left in a position where reliance has to be placed on the reasoning by the majority of the Court below, that this prohibited direction was the type of harmless or innocuous error that relieved the majority of the task of considering the whole of the record of the trial.

21. However, just as that substantial body of authority demonstrates an error in a trial going to the contested credibility of a crucial witness can stand in the way of a finding
30 as to inevitability of conviction, so too should that substantial body of authority point to an error of this kind standing in the way of any finding that the error in the Appellant's trial was harmless or innocuous.

22. Particularly where the Appellant's credibility was so much in issue.

23. Any suggestion that the introduction of sections 44J and 44K of the *Jury Directions Act 2015* (Vic) was just an exercise in simplification should also be rejected.

24. The fact that Parliament thought it necessary to intervene in circumstances where this impugned direction had been identified as being "problematic" should also stand in the way of any finding that the error in the Appellant's trial was harmless or innocuous.

The Judgment below, [66] – [69]. **JCAB 241 – 242**

25. The continued reliance by the Respondent on those cases which previously gave consideration to the place of this impugned direction in a criminal trial is in itself problematic.

26. Those cases were dealing with a direction which, when given in the associated trials, had not yet attained its character as a prohibited direction and which had not yet been exposed to the criticism identified in the extrinsic materials.

27. One of the areas of concern with this impugned direction, identified in the extrinsic materials, is the potential for a jury to be distracted by an enquiry into the motivation of an accused person to give evidence.

28. It is submitted that this concern was a real one in the Appellant's case, given both the content of the Learned Prosecutor's final address and the impugned direction.

29. The Respondent has attempted to explain what was meant by the submission made in the final address as to the reasons why an accused person would give "evidence in the witness box which appeared to be so implausible".

RS (*Tambakakis*), [6]-[7].

30. However, whatever was intended is not really the point. The point is what the jury would have taken out of the submission raising the question of why an accused person would get into the witness box and tell lies.

31. If that submission was married with the impugned direction the potential for distraction and for inroads to be made into the presumption of innocence and the onus of proof was even greater.

Remittal:

32. The Respondent has raised the prospect of this matter being remitted in the event that this Court were "otherwise persuaded to allow the appeal".

RS (*Awad*), [54]; RS (*Tambakakis*), [22].

33. However, if this Court were "otherwise persuaded to allow the appeal" that would be on the basis that the majority in the Court below erred in failing to find that a substantial miscarriage of justice has occurred.

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34. The appropriate remedy in those circumstances would be to order a re-trial.

Dated: 26 August 2022

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BETWEEN:

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Appellant

- and -

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

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

2. *Criminal Procedure Act 2009* (Vic), section 276 (as in force from 1 January 2010 to the present) – Authorised Version No. 83 dated 1 July 2021.