HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **JOHN MICHAEL TAMBAKAKIS**

Appellant

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 *Awad v The Queen* (M44/2022), 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 relies upon its submissions in the *Awad* matter (**Awad RS**) and responds below to the additional matters raised on behalf of Mr Tambakakis.

PART III SECTION 78B NOTICE

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

PART IV MATERIAL FACTS IN DISPUTE

5. There are no facts in dispute. But for one correction, the respondent does not take issue with **AS [5]-[6]**. At **JCAB 230-231 [43]** Priest JA misstated the prosecution case at trial as being that Mr Rohen was the previous driver of the van when Mr Tambakakis got into

the driver's seat in King Street. The prosecution case was that the previous driver was Mr Kanati. Nothing turns on this for present purposes.

PART V ARGUMENT

A. THE PROSECUTOR'S ADDRESS

6. At **AS [14]**, the appellant quotes from the prosecutor's closing address, and suggests the prosecutor was raising the motive of the accused for giving evidence. Consideration of that quote in its context reveals a different point was being made. A more complete version of the relevant passage from the address is as follows:[1]

> There are various explanations that can be offered for why an accused person in Mr Tambakakis' position gave evidence in the witness box which appeared to be so implausible. It might be suggested with some justification that an accused is under pressure in this environment being cross-examined by a barrister would be stressful. But while the evidence he gave and the manner in which he gave it is fresh in your minds please consider this because you may have this kind of argument by Mr Lloyd, I don't know. Is that really a plausible explanation for the kind of evidence which emerge[d]? Was the tone and style of the cross-examination of Mr Tambakakis that I adopted, bullying or hectoring or prone to elicit answers which were simply the product of pressure? I suggest to you that he was given more than a fair opportunity to tell his story and to give his evidence. The problem was that the story was totally implausible and made no sense. It was largely made up of lies. That was the problem.

7. The prosecutor was anticipating a point which might be made on Mr Tambakakis' behalf, namely that he was under pressure in giving evidence, particularly in cross-examination. This precise point *was* made by senior counsel for Mr Tambakakis in closing.[2] The prosecutor's point was that the manner in which the evidence was given (which the jury had observed very recently) could be explained on the basis that Mr Tambakakis was lying, and not on the basis that he was pressured as a result of the type of cross-examination which was conducted.

8. Far from contributing to any possible confusion in the minds of the jury about how to approach the evidence of Mr Tambakakis fairly, the prosecutor's address reinforced the

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1 T2335:11-31 [**BFM 143**].

2 T2454:23-29 [**RBFM 5**].

correct directions of law the jury later received on the critical topic of what to do if they rejected his evidence. The prosecutor said:[3]

> So what do you do if you find, as I suggest you should, that none of that evidence is to be given any credence at all? You don't convict a person of a criminal offence because you don't believe them and you don't convict a person of a criminal offence because you think they're lying. What you do when you hear evidence like that is you put it to one side and you look back again at the Crown case because the burden is on the Crown to prove these offences beyond reasonable doubt and you look at the strength of the evidence the Crown's presented. When you do that, leaving aside everything Mr Tambakakis said, you'll see that on the strength of it there's no explanation for that evidence consistent with their innocence.

B. EFFECT OF THE ENACTMENT OF SECTION 44J

9. As to **AS [38]-[41], [43]-[45]**, the appellant's argument about what is to be drawn from the insertion of s 44J has been addressed in Awad RS [33]-[41]. The appellant overreads the extrinsic materials and legislative history, and understates the significance of the fact that the points made in s 44J may still be made to a jury.

10. The Act not only permits the parties to make the points referred to in s 44J, but refers (in the note at the foot of s 44J) to the *obligation* on the trial judge in s 65 to refer to the way in which the prosecution and defence put their cases. That obligation, it must be remembered, is also in mandatory terms. The difference between the judge, with the authority of his or her office, reminding the jury to consider the points in s 44J because the parties raised them, and recommending of their own initiative that the jury consider those points, is a subtle one. If that is perfectly permissible, which it is, then the trial judge giving a direction to the effect of s 44J(b) cannot be a substantial miscarriage of justice without more. In both cases, the judge is leaving the arguments to the jury as legitimate views of the evidence they may take, without any suggestion of whether they should accept either or indeed neither of them.

11. As to **AS [44]-[45]**, the relevance of the fact that the parties can address on the topic covered by s 44J is dealt with in Awad RS [17], [31]-[32].

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[3] T2409:12-26 [**RBFM 4**].

C. EFFECT OF THE MISDIRECTON

12. As to **AS [33]-[35]**, the "potential" for jurors to focus upon that part of the charge which "speaks of a guilty man essentially getting into the witness box and attempting to deceive them (the jury)" is speculative. It is not a real prospect when the charge is read as a whole, as it must be. Further, the fact that this direction had been given in Victoria for decades without any experienced judge detecting any unfairness tells against the speculation.

13. As to **AS [36]-[37]**, the respondent has directed the Court to relevant portions of the charge in Awad RS [46]-[52]. In the context of the charge as a whole, this one error could not have affected the jury's function adversely.

14. As to **AS [42]**, the concerns which Mr Awad at least expresses in his written submissions (and which it appears Mr Tambakakis endorses) is that the misdirection could distract from the jury's appreciation of the onus and standard of proof. Given that this is the articulated risk, it is entirely to the point to look at how these subjects were dealt with in the rest of the charge. When that is done, no substantial miscarriage of justice is shown to have resulted from this misdirection.

15. As to **AS [46]**, there is no added difficulty, because the charge as a whole gave no hint or suggestion to the jury as to how to answer the question posed in the prosecution's final address.

16. As to **AS [47]**, reading the charge as a whole the jury was not presented with a binary choice of the kind contended for by the appellant.

17. As to **AS [48]**, the appellant's evidence about having dealt with steroids makes no difference. The jury would well have understood that the issue in his trial concerned his knowledge of cocaine. What he said about steroids has no bearing on how a jury may have been affected by the impugned direction. In any event, the trial judge directed the jury against reasoning that the appellant's evidence of involvement with steroids meant that he was more likely to have committed an offence, or less likely to be truthful: T2585:8-T2586:7 (**JCAB 35-36**).

18. As to **AS [49]-[50]** and the case law, the respondent refers to Awad RS [39].

19. As to **AS [52]**, the respondent refers to Awad RS [14].

20. As to **AS [54]** and **[56]**, it may be accepted that Mr Tambakakis' credibility was in issue and a real issue in the case. It does not follow that any misdirection conceivably touching upon that issue results in a substantial miscarriage of justice. By way of analogy, McHugh J said in ***Krakouer*** *v The Queen*:[4]

> In this case, the trial judge's misdirection took this critical issue out of the jury's hands. It substituted trial by judicial direction for trial by jury by instructing the jury that the law deemed the relevant intent to be present by virtue of the quantity of methylamphetamine at issue. Misdirections of law in a criminal trial can take many forms. Of few of them can it be said that, at all times and in all circumstances, they constitute a miscarriage of justice. Legal error must often give way to cogent evidence of guilt. But on such matters as the standard or onus of proof or the functions of the jury, the position is different. These matters go to the root of a criminal trial according to law. It is difficult to see how the weight of evidence can have any relevance as to whether or not a misdirection on such matters is a miscarriage of justice.
>
> That is not to say that a misdirection as to one of those matters is always a miscarriage of justice. The error may be so trivial that a Court of Criminal Appeal can properly conclude that there has been a trial according to law, notwithstanding the misdirection. But if a direction on the standard or onus of proof or the function of the jury is substantially wrong, I cannot presently conceive of a case where the weight of evidence against the accused could affect the conclusion that a miscarriage of justice has occurred. An accused person is entitled to a trial according to law. Where the law requires that an issue be tried by a jury, the accused does not have a trial in any meaningful sense where the jury is prevented by judicial direction from determining the issue. It is of no relevance in my opinion that a court of criminal appeal thinks that the evidence of guilt is overwhelming. An accused is entitled to be tried by the jury. That is the tribunal that is given the responsibility for determining the guilt of an accused person.

21. Merely because a misdirection might be thought to touch upon an accused's credibility where credit is in issue does not mean that, as a result, a substantial miscarriage of justice has been caused, just as a misdirection as to the standard of onus of proof may not necessarily produce a substantial miscarriage of justice.[5] It remains necessary to examine the nature and extent of the error. When that is done here, reading the charge as a whole, no substantial miscarriage of justice occurred as a result of the misdirection.

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4 (1998) 194 CLR 202 at [74]-[75].

5 See *Krakouer* (1998) 194 CLR 202 at [23] (Gaudron, Gummow, Kirby and Hayne JJ).

PART VI NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

22. There is no notice of contention or notice of cross-appeal. The respondent refers to Awad RS [54].

PART VII ESTIMATE OF TIME FOR ORAL ARGUMENT

23. The respondent will require a total of 90 minutes for the presentation of oral argument in this matter and *Awad v The Queen* (M44/2022).

Dated: 19 August 2022

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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.	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.	276.