IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M87 of 2012

BETWEEN:

MICHEL BAINI
Appellant

and

THE QUEEN
Respondent

AMENDED APPELLANT'S SUBMISSION IN REPLY

Part I: Certification

1. This submission in reply is in a form suitable for publication on the internet.

Part II: Reply to the argument of the Respondent

2. The appellant agrees with the respondent's submissions at paragraphs 5.1 to 5.16 of their submissions. In particular, the appellant agrees with the respondent that the terms of the statute are the guiding light as to the meaning of section 276 of the *Criminal Procedure Act 2009* (Vic).

3. However, the appellant contends that the respondent has failed to engage the major contention advanced by the appellant, that is, that since the onus of proof is now upon the appellant to show a substantial miscarriage of justice, critical aspects of this Court's judgment in *Weiss* can no longer apply.

4. The appellant's argument is not misconceived. The two fundamental differences between the common criminal appeal provision and section 276 are: first, that there is now one composite test; and second, that it is for the appellant to satisfy that test.

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5. The judgment of this Court in *Weiss* established that in applying the common form criminal appeal provision, intermediate courts should examine for themselves whether they are satisfied beyond reasonable doubt of the guilt of the appellant. That approach was all very well in the context of the provision, containing both a two-staged test and "the proviso", where the onus was on the Crown to demonstrate that there had not been a substantial miscarriage of justice. In other words, it was for the Crown to demonstrate to the Court that the Court should be satisfied beyond reasonable doubt of the appellant's guilt.

6. However, that approach must now change. If the approach of this Court in *Weiss* was to apply to the new provision, then it would be for the appellant to satisfy the Court that it should have a reasonable doubt about his or her guilt. Such an approach would be fundamentally flawed because it would be at odds with a basal tenet of our system of criminal justice, the presumption of innocence. Therefore, the application of *Weiss* to the new provision must be re-assessed.

7. Since *Weiss*, there has been a tension in this Court, and intermediate courts, between an "outcome" (or "result") approach and a "process" (or "fair trial") approach to whether appellate intervention is warranted.

8. In other words, there will be cases where it can be said that the error identified would not have made a difference to the result because of the strength of the evidence; the "outcome" approach. On the other hand, there have been cases where, no matter how strong the evidence was, the process has been so flawed that it cannot be said a fair trial has been held; the "process" approach.

9. Section 276 was designed to simplify the approach of intermediate courts to appellate intervention. Given that there was a similar provision under the common form provision stating that unless one of the legs for appellate intervention was made out that the appeal should be dismissed, it might be doubted that the new provision presumes that there has been a trial according to law.

10. So said, what is clear is that, as before, cases where the appellant contends that the jury verdict is against the weight of the evidence, or unsafe and unsatisfactory (in the sense that the jury should have entertained a reasonable doubt about guilt) will be dealt with under the first new leg: sub-section (1) (a).

11. Where the appellant contends that there has been an error or irregularity in relation to the trial such as to result in a substantial miscarriage of justice, then the second leg will be made out: sub-section (1) (b). This provision concerns errors or irregularities within the trial process itself, typically for example, misdirections of law within a Charge or admissibility of evidence issues. The *nature* of the error or irregularity must *result in* a *substantial* miscarriage of justice (our emphasis). In our submission, in this context, "substantial miscarriage of justice" means that that there has been a significant departure from a trial according to law. The concentration is upon the nature of the error or irregularity; the "process", rather than the "outcome". In our submission, where an appeal arises under this leg, it is not appropriate for the Court of Appeal, in applying the statutory test, to ask itself whether it is satisfied of the guilt of the appellant.

12. Such an approach is consistent with that part of this Court's judgment in *Weiss* which directs intermediate courts (consistent with their proper function as courts of criminal appeal) not to concern themselves with speculation as to whether the identified error or irregularity would have "made a difference" to the outcome of the case.

13. Indeed, as this Court said in *Weiss*, such speculation led, in part at least, to the dichotomy between whether a court of criminal appeal should look at the issue of appellate intervention from the viewpoint of whether the trial jury would have convicted (absent error) as distinct from whether a reasonable jury would have convicted.

14. Third, there will be those cases where "for any other reason" there has been a substantial miscarriage of justice: sub-section (1) (c). Examples of such cases are where fresh evidence establishes a substantial miscarriage, or

where there has been an abuse of process. Typically, such cases will arise from events or circumstances extraneous to the trial itself. In such cases, whether there has been "a substantial miscarriage of justice" will depend upon an assessment of whether the matter alleged, whatever its nature, is of such weight that the court is of the view that there has been a significant departure from the proper processes of a trial according to law. Again, in our submission, where this leg arises it will not be appropriate for the Court of Appeal to ask itself whether it is satisfied beyond reasonable doubt of the guilt of the appellant.

15. In this case, it is submitted that the Court of Appeal, having found that count 50 should have been severed, should have ordered a re-trial on all charges. In paragraph 5.41 the respondent recognises that the events concerning count 50 would have been inadmissible on the Rifat counts. In our submission, that means that Srour's evidence - that the appellant had said to him on the occasion of the alleged blackmail the subject of count 50 that "You know what I do" and that Srour became frightened because the appellant had told him that he had assaulted people in the past to get his way – would have been inadmissible on the Rifat counts. It is submitted that Srour's evidence at AB 377-379 was inadmissible in the trial of the Rifat counts because that evidence simply (but strongly) demonstrated that the appellant was of disreputable character.

16. Whilst it is now conceded by the Crown that there ought to have been severance, that was not its position in the courts below. Indeed, on trial, it is apparent that in response to the defence application to sever count 50, the Crown argued that Srour's evidence was admissible in the Rifat trials as similar fact evidence: see for example AB 57 and 61.

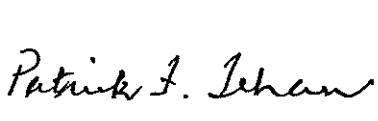
17. The evidence of Srour concerning the appellant's character was highly prejudicial. It is no answer to say that because Srour concerned one count his evidence would be diminished in consideration of the many Rifat counts, because his evidence was so strong as to the appellant's bad character. It is important to emphasise that Srour was a separate but further complainant of the appellant's alleged blackmails.

18. It is further submitted that the separate consideration direction given by the trial judge cannot be called in aid because such a direction does not grapple with Srour's evidence concerning the appellant's bad character. If this evidence was inadmissible in the trial of the Rifat counts, as it now conceded it was, then the Rifat verdicts cannot be saved by a separate consideration direction. The acquittals are explained not so much by the separate consideration direction, as by the fact that on those counts there was an absence of evidence.

19. This matter was considered by the court below in the context of this Court's decision in *Weiss* being applicable to resolution of whether there should be a re-trial on the Rifat counts. That approach was wrong.

20. Therefore there should be an order that the appeal to this Court should be allowed, the appeal heard *instanter* and allowed and the orders of the Court of Appeal upholding the convictions on the Rifat counts be quashed and there be a retrial on those counts.

Dated: 26 October 2012



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