BAINI v THE QUEEN (M87/2012)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2011] VSCA 298
Date of judgment:	5 October 2011
Date special leave granted:	17 August 2012

In June 2010, after a trial in the County Court of Victoria, a jury found the appellant guilty of 36 counts of blackmail (and his co-accused guilty of 13 counts). There had been directed acquittals on some counts and on others there had been verdicts of not guilty.

The circumstances of the offending commenced in late 2003 when the victim ("Rifat") was subjected to threats and violence at the hands of a business competitor, one Hakim. A mutual friend of Rifat and the appellant suggested to Rifat that he could introduce him to someone who would protect him from Hakim. Rifat alleged that the appellant told him that Hakim had offered the appellant $1,000 a month to take Hakim's side in the dispute between Hakim and Rifat. The appellant told Rifat that, unless he met certain demands, he would join forces with Hakim. Rifat said that, thereafter, the appellant made regular threats to harm Rifat's family and/or business. As a consequence, Rifat sent money to the appellant on some 35 separate occasions between 4 April 2005 and 15 March 2007.

One count of the indictment ("count 50") related to a different victim ("Srour"). The Crown alleged that in May 2007 the appellant made an unwarranted demand with menaces upon Srour. Srour gave evidence that the appellant had claimed that Srour owed one Capozza $100,000, and that it was the appellant's debt now. The appellant had told Srour that he was coming to collect in a few days. Asked by Srour how he intended doing that, the appellant had replied 'you know how I do that'. Srour alleged that this made him fearful, because the appellant had previously told him that he assaulted people to get what he wanted. At trial it was disputed that the appellant had made any unwarranted demands with menaces on either Rifat or Srour.

Prior to arraignment, the appellant's counsel had, unsuccessfully, applied for severance of count 50. In his appeal to the Court of Appeal (Warren CJ, Nettle and Ashley JJA), the appellant argued, inter alia, that the trial judge had erred by failing to sever count 50 from the presentment. He submitted that the prior personal and business relationships between the parties were not a sufficient nexus to justify joinder. The Court held that the trial judge's refusal to sever count 50 did not cause any substantial miscarriage of justice to the appellant in respect of the Rifat counts. However, the refusal to sever count 50 did bring about a substantial miscarriage of justice with respect to the appellant's conviction on that count: the consequence of the ruling was that a great deal of evidence which had no possible relevance to the appellant's trial on that count, but which was highly prejudicial, went into evidence. The Court therefore allowed the appeal on that ground and directed a retrial on count 50. The appeal against conviction was otherwise dismissed.

In this Court, the appellant contends that the Court below, having found that there was a substantial miscarriage of justice as a result of the trial judge failing to sever

count 50, ought to have ordered a retrial on all counts and not just count 50. The appellant contends that the Court below misinterpreted and misapplied the statutory test now required by s276 of the *Criminal Procedure Act* 2009 (Vic), which replaced s568(1) of the *Crimes Act* 1958 (Vic), in relation to criminal appeals.

The grounds of appeal are:

- The Court below, having determined that the trial judge had erred in his ruling regarding the non-severance of count 50 and that a retrial should be ordered on that count, erred by failing to order a retrial on the "Rifat counts" and in particular erred by:
  (a) finding that the trial judge "…could fairly conclude, in a practical sense, that the non-severance of count 50, albeit involving a second complainant, was very unlikely to make any difference to the outcome on the Rifat counts so long as he gave a separate consideration direction."
  (b) determining that the guilty verdicts on the "Rifat counts" could be "saved" by recourse to the proviso.

- The Court of Appeal erred in deciding that there was a substantial miscarriage of justice by adopting the approach dictated in *Weiss v The Queen* [2005] HCA 81 (2005) 224 CLR 300 and thereby erred in failing to properly apply section 276 of the *Criminal Procedure Act* 2009 (Vic).