IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S313 of 2013

BETWEEN: **DO YOUNG (aka JASON) LEE**
Appellant

AND: **THE QUEEN**
Respondent

Amended

10 **APPELLANT'S ANNOTATED REPLY**

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

2. The appellant notes that the respondent agrees: (1) both trial prosecutors had read the appellant's compelled testimony and the statements compiled from the compelled documents (Respondent's Submissions "RS" [18], [20]-[21]); (2) the appellant had been compelled at the NSWCC [redacted] (3) the contents of the compelled testimony were known to the trial prosecutor who agreed that money (said to be the appellant's) was evidence relied on in support of the drugs and weapons charges, all three were
20 interlinked (RS [24]-[25]); (4) the admission of evidence of the money was objected to at trial by senior counsel for the applicant, including on the basis that it would disclose a defence revealed in the compelled testimony, however the trial judge admitted the evidence (RS [19]); (5) the trial prosecutor nevertheless intended to use evidence in the trial ([redacted] to rebut the defences revealed in the compelled testimony, in the event that the appellant was called to give evidence (RS [20]-[21; (6) the trial was subsequently run by putting the prosecution to proof and not calling the appellant (RS [22]).

3. The respondent seeks to dismiss the argument of erroneous application of the third
30 limb of s6(1) *Criminal Appeal Act* by saying that "Basten JA used the words 'substantial miscarriage' in passing in his discussion of cases involving stays of proceedings" (cf.RS [53]). In fact, Basten JA held that "…the issues raised are not identical with those which arise "…in the present case …it is necessary to ask whether there has been a substantial miscarriage of justice as a result of those events…" (CCA [63], emphasis added). The respondent also relies on CCA [157]- AB2259
[158] to say that the test applied was one of a "possibility of unfairness" not AB2289 - AB2290
"substantial miscarriage", however those paragraphs (CCA [157]-[158]) appear AB2289 - AB2290
under the heading "Seong Won Lee's case" and related to the second appellant's submissions below. In the case of this appellant, the only 'test' applied was one of
40 'practical unfairness' (CCA [147], [149]), a test that does not equate with AB2286
'miscarriage of justice'. This test of 'practical unfairness' was repeated in the AB2287
conclusions in the second appellant's case, which seemed to encompass the

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appellant (CCA [163], [164]). The language in the concluding paragraph, namely, AB2291
"it cannot be said that either appellant lost a possibility of acquittal" (CCA [164]) AB2291
is also language of the proviso and supports the appellant's argument that he bore a heavier, reversed onus on his appeal.

4. The respondent accepts the appellant's proposition that the concept of miscarriage is "wide" and "includes a failure of process" (RS at [44]). However this was not the language of the CCA (cf. RS [44]), nor did the CCA apply this approach. The CCA held that "miscarriage of justice", required a 'causal connection' and a 'but for' test: CCA at [29]-[30], AS at [31]. In cases of irregularity, an analysis of the trial AB2244
'as it in fact ran' and the verdict may have little to say about whether there has been a miscarriage of justice. Whether there is a reasonable apprehension of compromise of the integrity of the accusatorial process is the central question.

5. Where there is an issue as to irregularity in the trial, the question of miscarriage has been framed as whether there is a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that there has been a serious breach of the presuppositions of the trial[1]: *Smith v Western Australia* [2014] HCA 3 (*"Smith"*) at [52]-[55]. A *'possibility'* of an irregularity in procedure which *'could not be excluded'* was *'sufficient by itself to warrant the setting aside of a conviction...'* where a juror was possibly exposed to a prejudicial communication: *Webb and Hay v The Queen* (1994) 181 CLR 41 (*"Webb"*) at 58; *Smith* at [66]. In adopting a test of 'reasonable apprehension or suspicion', also phrased as 'suspicion of unfairness' (pp.49-50), 'risk of unfairness' (p.61), and "possibility" of, for example, bias (pp.53,54, 71-2) in *Webb,* this Court considered and unanimously rejected a "real danger" test and an "actual prejudice" test as placing *"inadequate emphasis on the public perception of the irregular incident"*[2]. Despite irregularity in the process being relied on below, including reliance on *Webb*[3], this was not the test applied to determine whether there had been a miscarriage of justice in the appellant's case.

6. The respondent rephrases the CCA's use of the term 'practical unfairness' as either: a 'possibility of unfairness' (RS [28], [43], [46], [47], [53]); or 'risk of prejudice'; or 'capable of prejudicing his fair trial' (RS [47]). There is also repeated reference to the second appellant's submissions at CCA at [157]-[158] (see eg. RS [45]-[46], AB2289 – AB2290
[50], [53]). This does not demonstrate application of this test to the appellant (or for that matter the second appellant). The appropriate test for miscarriage of justice, of the real possibility of unfairness in the trial, was not applied by the CCA in the appellant's case, the test in its application being stated as one of 'substantial miscarriage', 'lost possibility of acquittal' and 'practical unfairness'.

7. The respondent also seeks to limit the issue for consideration to the 'dissemination... of itself' giving rise to a miscarriage of justice (RS [2], [34], [47]). This reflects the CCA's approach of limiting its consideration of miscarriage to what it described as the 'high point', namely the unlawful 'dissemination' of the transcripts (CCA [164], see also CCA [149], [14]). There are several difficulties AB2291 AB2287 AB2239

[1] *Webb and Hay v The Queen* (1993) 181 CLR 41 at 50, 53, 55-57 per Mason CJ and McHugh J; 68 per Deane J
[2] *Webb and Hay v The Queen* (1993) 181 CLR 41 at 49-53, per Mason CJ and McHugh J (quote at p.51).
[3] Outline of Submissions Filed on behalf of the Appellant in the CCA dated 18.04.12 at [32].

with this approach. First, it is based on erroneously excluding from consideration the argument of the appellant as to the various uses of the material in the appellant's trial: see AS [18]-[22], [35]. These uses were relied on in both written and oral submissions before the CCA[4] and are not a new development: cf. RS [34]. Second, the respondent seems to accept that "evidence that the Crown prosecutor had read and considered the material and used it to prepare for trial may…raise the possibility of prejudice, the remedy for which may be a temporary stay until the trial is re-briefed to a prosecutor who has not read the examination transcript" (RS re Seong Lee [30], referring to *R v Seller* (2013) 273 FLR 155 at 183-4). This manner of 'use', however was not countenanced by the CCA, which held that "use" meant "only that they cannot be proffered in evidence against the person in (relevantly) criminal proceedings" (CCA at [50]). This informed the CCA's determination that there was no 'practical unfairness' from any other 'use' (including 'derivative use') by the prosecuting authorities despite accepting that "The contents of the interviews, though not admissible in evidence, may have assisted the prosecutor…" (CCA at [147])[5]. Thirdly, the CCA held (CCA [162]) that *"There are good reasons which favour release to the prosecution of all potentially relevant material available to the police or other investigating authorities, so that the prosecutor can determine whether steps taken in the past which may affect the fairness of the trial"*. The CCA did not have the benefit of this Court's judgment in *X7 v ACC* (2013) 248 CLR 92 ("X7") at the time of its decision. Contrary to the CCA's finding (CCA [162]), what underpins the ratio in *X7* is the safeguarding of the accusatorial process of trial by that very outcome being avoided. It is submitted that the approach of the CCA is contrary to the ratio underpinning this Court's decision in *X7* at [124], [159]. In the circumstances of the appellant's trial there was a breach of the fundamental presuppositions of the trial.

8. Contrary to the respondent' submission RS [29], Mr O'Connor's concession that the compulsory examination of the appellant touched on matters with which he was about to be charged was not limited to drugs charges (see AS [9], 12/11/12 T22.38-22.43). The trial prosecutor also agreed that the material he had "seemed to disclose their defence case" (12/11/12 T55.50, see also AS [21]-[22], [32]). [redacted] Mr O'Connor also agreed in answer to a question from Beech-Jones J that at the time the warrant was executed in December there was already a strong suspicion that there were likely to be drugs in the unit (T21.10-.13). Contrary to the respondent's submission, the evidence of Mr O'Connor is "correct on the available timeline" (cf RS [29]), it is the respondent's construction that does not fit the time line. The respondent also agrees that the AB2290

[4] In the Outline of Submissions Filed on Behalf of the Appellant in the CCA dated 18.04.12 at [27]-[33], the appellant relied on the prosecuting authorities having had *"unfair advantage in the trial"* including by the prosecutor's knowledge of the appellant's case *"in the form of compelled answers in the NSWCC transcript"; "the prosecution case could be couched or moulded in such a way as to meet its contents (where they were exculpatory) or to highlight facts referred to (where they were inculpatory)"* and further by *"derivative use of the compelled evidence…"* with the result being *"a fundamentally flawed process and trial"*.

[5] See also the 'three ways' contemplated in relation to the second appellant at CCA [159], which were also matters relevantly applicable in the appellant's case. AB1135

earlier extant charges included charges related to cash (RS [6]) and that the appellant was examined on the subject matter of cash (RS [29]). The respondent does not answer the fact that the brief of evidence on those charges was included as part of the brief of evidence in the trial currently under consideration (cf. RS [29]). None of this evidence was referred to by the CCA in making the findings at [70], [85], [86], [147] that neither the extant charges nor the examinations were relevant to the trial. AB2261 - AB2262 AB2267 AB2286

9. The admission of the cash in the trial over objection of senior counsel that it *"raises the very reason that your Honour says the count should be severed"* (T40.29-30) was not addressed by the CCA, on the basis that the evidence was *"most relevant"* to the severed count, and that for that reason *"it is not necessary to address that issue further"* (CCA [137]). However this did not answer the prosecutor's reliance in the trial on the same money to suggest that it was the proceeds of drug supplies. On several occasions in his closing address the prosecutor emphasised *"The drugs, the money, the guns..."* (T1016.32, T1029.35), his closing remarks including *"you have the money in the bag there in the bag there...you have the money in the bed, and it just all fits together as being involved in a drug deal"* (T1064.23-T1064.25, emphasis added). Although specifically relied on below[6], the closing address was not referred to in the CCA judgment, even though the CCA held on the ground of unreasonable verdict that *"...the combination of drugs, money and a gun were strongly indicative of possession of drugs for the purposes of supply"* (CCA [220]). In these circumstances the question was not whether the appellant had proved that the possession of the transcripts influenced "the prosecution's approach to the trial" (cf. RS [37]), but whether the respondent had excluded this real possibility. Nor should the test have been one of whether something happened "as a result of dissemination that was capable of prejudicing his fair trial" (RS [47]). Additionally, as explained above, the evidence before the CCA was not limited to dissemination and the test applied was not capability but actual prejudice causally connected to the verdict. AB40 AB2282 – AB2283 AB697 AB710 AB755 AB2315

10. The respondent also accepts that the CCA misstated the appellant's argument when the CCA said that the appellant had conceded that derivative use (of the compelled testimony and documents) was permissible (CCA [57]) when in fact the opposite was argued (RS [26]). The respondent contends however that this was *"not returned to when considering the question of whether there had been a miscarriage of justice..."* (RS [26]). This is not correct. It was returned to and relied on to hold that the compelled testimony, documents and statements based on the documents were properly provided to the prosecution (CCA [135], [137], [146], [147], [162][7]), and also that the testimony of the appellant could be used to found the execution of a search warrant in turn producing similar copies of the compelled documents (CCA [57], [135], [137]). The location of the copies were then said to have been admissible at trial and to provide a foundation for inferring a defence (CCA [137], [147]): cf.s18B *NSWCC* Act 1985. If this is correct, an authority in the position of the NSWCC may compel a person who is to be imminently charged for questioning, compel production of material, and consequently search for that same material to effectively circumvent any "protective" orders made by the NSWCC, AB2257 AB2282 AB2282 - AB2283 AB2286 AB2257 AB2282 AB2282-2283 AB2282-2283 AB2286

[6] Outline of Further Submissions Filed on Behalf of the Appellant in the CCA at [36], dated 23.10.12.

[7] In relation to the second appellant, see also CCA [160]. AB2290

and protections in the Act. This would circumvent the accusatorial process at trial that would normally apply to all non-compelled accused persons. It is not an answer to the use of the compelled documents that similar documents were subsequently located in the searched apartment. The CCA accepted that it may be inferred that the compelled documents were used in the preparation of the statements (CCA [98]). This was at a time subsequent to charges being laid and subsequent to the unlawful release of the appellant's compelled testimony, without any evidence of any order of the Commissioner that they could be shown to witnesses, police or the prosecution, without any record of dissemination, and in order to rebut the appellant's compelled testimony [redacted] and in knowledge of his defence in this respect.[8] Mr O'Connor agreed that finding the documents on the search warrant was "to a large extent" irrelevant to the decision to investigate the appellant's compelled evidence on this topic.[9] AB2270

11. The CCA also erred in saying that there had been no objection by the appellant to the conduct of the examinations or production of documents (CCA [134]): cf.s18B (2) and (3)(b) *NSWCC* Act 1985. The words "no objection was taken" (CCA [134]) should not be construed as the respondent contends, namely as *"a reference to not challenging or refusing to comply with them"* (RS [27]). A refusal to comply is an offence under the NSWCC Act, and a 'global' objection was taken by the appellant from the outset[10]. Nor should the words *"if Mr Lee objected to production"* (at CCA [137]) be construed as the respondent suggests, namely as saying *"if the appellant had objected to the tender of the compelled documents at trial"* (RS [27]). AB2282 AB2282 AB2282 – AB2283

12. The respondent's submission that a consideration of the strength of the Crown case for the purpose of an unreasonable verdict ground would have been unnecessary if it had already engaged proviso reasoning on Ground One misunderstands the relationship of the proviso with the strength of the Crown case where there is an error of process relied on or consideration of whether there has been a 'serious breach of the presuppositions of the trial': *Weiss v The Queen* (2005) 224 CLR 300 at 317-8; *Smith* at [53].

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[8] Mr Miralis gave unchallenged evidence to this effect. The trial prosecutor, during the trial, described the statements as being relied on to rebut legitimate explanations for the money (20/01/11 T9.31-38). This was confirmed on appeal (T49-50, T55.21-25). The statements were supplied to assist the investigation (Det Hughes at [8]). Mr O'Connor agreed that this was investigated after all of the charges had been laid (12/11/12 T41.16-27). AB67 AB1164 – AB1165 AB1170 AB1862 – AB1863 AB1155

[9] Evidence Mr O'Connor 12/11/12 T42.50-43.10. AB1156 – AB1157

[10] 26 November 2009 examination at p.3, 1 December 2009 at p.2. AB1270 AB1326