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:

DANNY AWAD

Appellant

- and -

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These Submissions are in a form suitable for publication on the Internet.

Part II: Statement of the Issues Presented by the Appeal

2. The issues which are presented on this Appeal are:

(i) whether the consequence of a trial judge having given a direction to a jury which has been specifically prohibited by statute is that there has been a "substantial miscarriage of justice" for the purposes of s. 276(1)(b) & (c) of the Criminal Procedure Act, 2009 (Vic.);

(ii) whether the Court below was correct to conclude that the giving of the prohibited direction to the jury did not amount to a serious departure from the prescribed processes for the Appellant's criminal trial, sufficient in itself to constitute a "substantial miscarriage of justice" requiring, without more, the conviction of the Appellant to be set aside;

(iii) whether the majority of the Court below was correct to conclude that the practical effect of the prohibited direction having been given by the trial judge to the jury was that, in the context of the trial judge's charge to the jury as a whole, the jury were not distracted from their task and, as a consequence, its content was not such as to give rise to a substantial miscarriage of justice.

Part III: Section 78B of the Judiciary Act, 1903 (Cth.)

3. The Appellant considers that notice is not required under s. 78B of the Judiciary Act, 1903 (Cth.).

Part IV: Citation of the Judgment of the Court Below

4. The reasons of the Court below in Awad v R; Tambakakis v R are reported at (2021) 291 A.Crim.R. 303.

Part V: Relevant Facts

Background – the Appellant's trial

5. On their arraignment before a jury panel on 13 August, 2019, each of the three then accused, John Tambakakis ("Tambakakis"), the Appellant and Charbel Kanati, pleaded not guilty to the one charge specified on the indictment which had been filed on that day, namely, one charge alleging the commission of the offence of attempt to possess a commercial quantity of an unlawfully imported border controlled drug, namely, cocaine, contrary to ss. 11.1(1) & 307.5(1) of the Criminal Code Act, 1995 (Comm.).

6. In order to prove the commission of the offence charged, the Crown did not rely upon the principles of complicity in the case of any one of the three then accused. **JCAB 230**

7. Subsequently, on 12 September, 2019, the jury, having deliberated since 10 September, 2019, returned verdicts of guilty against both Tambakakis and the Appellant. (The jury was discharged without verdict in the case of Charbel Kanati.) **JCAB 190**

8. Subsequent to pleas in mitigation being conducted on behalf of both Tambakakis and the Appellant, they were both sentenced on 12 November, 2019 to 15 years' imprisonment, in respect of which a non-parole period of 10 years was fixed. **JCAB 202**

The evidence adduced in support of the Crown case

9. The evidence adduced by the Crown during the course of the Crown case has been summarised in the judgment of Priest JA; see the Judgment below at paras. [8] – [33].

JCAB 222 - 227

The Crown case

10. At trial, the Crown sought to prove that each of the three then accused men took possession of the consignment at (and from) different points in time.

11. The Crown case against Tambakakis was that he was in possession of the consignment from when he collected it at Overall Auto Care, had it loaded onto his skip truck and driven to the yard at Randor Street until he unloaded the consignment from the Kia van in the warehouse at 27 Halsey Road on the evening of 10 May, 2017.

12. The Crown case against the Appellant was that, together with Tambakakis, he entered into the Kia van outside 11 King Street at 6:25 p.m. on 10 May, 2017, was driven in the Kia van to the warehouse at 27 Halsey Road and helped unload the consignment in the warehouse, prior to exiting from the warehouse with Tambakakis in the Kia van at 6:55 p.m.

13. And so the Crown case against the Appellant was that he was in possession of the substance inside the consignment from when he got into the Kia van (with Tambakakis) outside 11 King Street at 6:25 p.m. on 10 May, 2017 and was driven to the warehouse at 27 Halsey Road until he exited from the warehouse (with Tambakakis) at 6:55 p.m. During this period, the Appellant was in joint possession with Tambakakis.

14. To be clear, the Crown case against the Appellant was that he was not in possession of the consignment at any time before he got into the Kia van at 6:25 p.m. on 10 May, 2017. And so, in order to convict the Appellant, it was necessary for the jury to find beyond reasonable doubt that at 6:25 p.m. on 10 May, 2017 the Appellant entered into the Kia van, was driven (in the Kia van) to the warehouse at 27 Halsey Road and there unloaded the consignment from the Kia van, until exiting from the warehouse (in the Kia van) at 6:55 p.m. In these circumstances, it was necessary for the jury to exclude beyond reasonable doubt the hypothesis that the Appellant had not entered into the Kia van, but had instead merely remained in King Street until meeting again with Tambakakis (upon the return of Tambakakis in the Kia van) at approximately 7:00 p.m.

The sworn evidence given by Tambakakis

15. Tambakakis was affirmed and gave evidence, a summary of which has been set out within the judgment of Priest JA; see the Judgment below at paras. [34] – [48]. **JCAB 227 - 234**

16. Within his evidence, Tambakakis stated that, having approached the Kia van in King Street, he grabbed the Appellant's backpack (containing the cryovac machine), placed it in the van and got into the driver's seat. He stated that the Appellant did not enter the van, the Appellant saying that if Mark did not want his boys to know where the warehouse was, then Mark would not want the Appellant to know. He further stated that the Appellant had said that he would wait (in King Street), although prior to that, the Appellant had intended to go with Tambakakis to the warehouse to get some samples of steroids.

17. Tambakakis then described driving Jacob Rohen in the Kia van to the warehouse at 27 Halsey Road to unpack the boxes, what then occurred within the warehouse, fleeing from the warehouse in the Kia van and driving the Kia van to the carpark at 22 King Street where he met the Appellant, from which place they both then walked to the Appellant's parked car and drove away.

The defence of the Appellant

18. In summary, the defence of the Appellant was that at no stage did he enter the Kia van in King Street. Nor did he subsequently travel in the Kia van to the warehouse at the rear of 27 Halsey Road. It was in these circumstances, that the Appellant, by reference to the manner in which the Crown had put its case against the Appellant, was never in possession of the consignment.

19. The Appellant did not give evidence at the trial. In these circumstances, the defence of the Appellant relied, in substantial part, upon the evidence which had been given by Tambakakis. That is to say, the evidence given by Tambakakis that the Appellant did not enter into the Kia van whilst parked at 11 King Street and then travel in that Kia van to the warehouse at the rear of 27 Halsey Road was expressly and heavily relied upon by the Appellant in defending the Crown case as put on the charge against him. Thus if, in the light of the evidence given by Tambakakis, the jury entertained a reasonable doubt about whether the Appellant had

entered the Kia van, then the Crown case against the Appellant would necessarily fail, and the Appellant would be acquitted.

The directions given by the learned trial judge to the jury

20. Within his Charge to the jury, the learned trial judge directed the jury concerning the evidence given by Tambakakis. Within those directions, he stated:

> *"Now, there are two factors that are significant that you should have regard to when you are assessing Mr. Tambakakis' evidence. Firstly, in a criminal trial, there is nothing more than [sic] an innocent [person] can do than give evidence in his own defence and subject himself to cross-examination, and that is what occurred here. On the other hand, secondly, a guilty person might decide to tough out cross-examination in the hope or belief that he will be more likely to be believed and his defence accepted if he takes the risk of giving evidence. You should consider both of these observations when evaluating Mr. Tambakakis' evidence."*

- See trial transcript at page 2582 and the Judgment below at paras. [50] & [125].

JCAB 234 – 236 & 260 - 261

21. Subsequent to the impugned direction being given (see at para. 20 above), and at the first opportunity available to him, counsel for Tambakakis drew attention to the fact that the said direction was prohibited by s. 44J of the Jury Directions Act, but, in order not to have the error highlighted, he preferred that the issue not be revisited. The prosecutor agreed, stating that it would be "better [if it was] simply left alone".

- See trial transcript at pages 2591 – 2597 & 2607 – 2609 and the Judgment below at paras. [51] – [54] & [127] – [133]. **JCAB 236 – 237 & 261 - 263**

The Appellant's challenge to his conviction in the Court below

22. On his application for leave to appeal against conviction to the Court below, the Appellant contended that the learned trial judge, in giving the impugned direction (see at para. 21 above) had erred, such a direction being prohibited by s. 44J of the Jury Directions Act, with the

consequence that there had been a substantial miscarriage of justice requiring the conviction of the Appellant to be quashed; see, for example, the Judgment below at para. [4].

23. Although leave to appeal against conviction was granted, the Appellant's challenge in the Court below failed. By majority (McLeish and Niall JJA; Priest JA dissenting), the Court below held that the impugned direction did not result in a substantial miscarriage of justice in either the trial of Tambakakis or the Appellant.

10 ***The reasoning within the Judgment below***

24. In their joint judgment, the majority of the Court below, McLeish and Niall JJA, held:

(a) there had been a clear contravention of the prohibitions in s. 44J of the Jury Directions Act; see the Judgment below at para. [142]; **JCAB 266**

(b) the contravention of s. 44J(b) did not constitute a fundamental departure from the processes of a criminal trial that in and of itself amounted to a substantial miscarriage of justice; see the Judgment below at paras. [158] & [190] – [196];

20 **JCAB 272 & 281 - 282**

(c) although the impugned direction invited consideration as to why the accused may have chosen to give evidence and, citing R v Storey (1978) 140 CLR 364, the direction given provided no hint as to which alternative may have applied in the trial; see the Judgment below at paras. [166] – [173]; **JCAB 274 - 276**

(d) the combination of both alternatives being given within the impugned direction ruled out any suggestion that the impugned direction favoured either alternative; see the Judgment below at para. [168]; **JCAB 274 - 275**

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(e) the jury could not have taken the impugned direction as an instruction or invitation to discount or closely scrutinise the evidence of Tambakakis because he was the accused; see the Judgment below at paras. [175] – [177]; **JCAB 277**

(f) taken as a whole, the jury were appropriately and fairly directed on the onus and standard of proof and would not have been distracted by the impugned direction; see the Judgment below at paras. [172] – [174] & [177]; **JCAB 276 - 277**

(g) directions in the form of the impugned direction have been previously considered, but not deprecated, by the Court of Appeal; see the Judgment below at paras. [178] – [189]; and **JCAB 278 - 281**

(h) the contravention of s. 44J(b) in relation to Tambakakis did not result in a substantial miscarriage of justice in the trial of the Appellant; see the Judgment below at paras. [201] – [202]. **JCAB 283**

25. In his dissenting judgment, Priest JA accepted some of the contentions made on behalf of the Appellant, concluding that there had been a substantial miscarriage of justice, with the consequence that the Appellant's conviction should be set aside and a new trial ordered; see the Judgment below at paras. [83] – [84] & [118] – [120]. **JCAB 247 & 258**

26. More precisely, Priest JA held:

(a) the impugned direction had the potential to both undermine the presumption of innocence and the onus of proof; see the Judgment below at paras. [70] – [71]; **JCAB 242 - 243**

(b) by confronting the jury with two possibilities, and by necessary implication inviting the jury to choose one of those two possibilities, the impugned direction may have operated as an invitation to disbelieve the accused, thereby in effect striking at the way in which an accused person's evidence is to be assessed by the jury; see the Judgment below at paras. [72] & [83]; **JCAB 243 & 247**

(c) the trial judge had given a direction which had been abolished by, and prohibited by, s. 44J(b) of the Jury Directions Act, such a direction having been seen by the Legislature to be "problematic"; see the Judgment below at paras. [65] – [68], [73] & [83]; **JCAB 241 – 242, 243 – 244 & 247**

(d) the [mere] giving of the impugned direction did not mean that there had been a serious departure from the prescribed processes for the Appellant's trial, sufficient in itself to constitute a "substantial miscarriage of justice", thereby requiring the Appellant's conviction to be set aside; see the Judgment below at paras. [74] – [80];

JCAB 244 - 246

(e) the impugned direction undermined the credibility of the evidence given by Tambakakis, that evidence providing the Appellant with his defence and having the potential to exculpate the Appellant; see the Judgment below at paras. [81] – [82];

JCAB 246 - 247

(f) the impugned direction had the potential to undermine the jury's consideration and evaluation of crucial evidence which founded the Appellant's defence; see the Judgment below at para. [83]; **JCAB 247**

(g) the two "factors" or "observations" within the impugned direction do not balance each other out or neutralise each other; see the Judgment below at para. [83]; and

JCAB 247

(h) it was not possible to conclude that, absent the giving of the prohibited direction, the Appellant's conviction was inevitable; see the Judgment below at paras. [81] – [83].

JCAB 246 - 247

Part VI: Statement of Argument

27. The Court below was correct to hold that, in giving the impugned direction, the learned trial judge gave a direction to the jury which had been expressly prohibited by s. 44J(b) of the Jury Directions Act; see the Judgment below at paras. [73], [83] & [142]; also see at paras. 24(a) & 26(c) above. **JCAB 243 – 244, 247 & 266**

28. In (unequivocally) prohibiting the giving of such a direction, the Legislature has given effect to its determination that such a direction is "problematic" and "unhelpful"; see the Judgment below at paras. [65] – [68]. In regarding it as an essential requirement of a properly conducted trial that such a direction not be given, the Legislature has thereby determined that the giving

of such a direction is not merely erroneous, but wholly impermissible, with the consequence that the Court below was not entitled to form a different view. **JCAB 241 - 242**

29. By reason of the manner in which the prohibition contained within s. 44J(b) is expressed, it is not open to the court to disregard that prohibition. Moreover, it is not open to the court to question the reason for, and policy soundness of, that prohibition. The language of s. 44J(b) is mandatory and must be given effect.

- See, for example, Subramaniam v R (2004) 79 ALJR 116; 211 ALR 1, at paras. [41] – [44].

30. Although there were several decisions of the Victorian Court of Appeal which had held that such a direction did not, at common law, constitute a misdirection (and was "acceptable"), the rule of the common law established by those decisions was expressly abolished by s. 44K(2) of the Jury Directions Act, a provision enacted together with s. 44J. Section 44J is to be read together with s. 44K, with the consequence that a court, in considering the effect of the giving of a direction prohibited by s. 44J(b), must not refer to and rely upon the holdings of those decisions (some of which are listed within the "Notes" under s. 44K) in order to conclude that such a direction has caused no prejudice to an accused person who has given sworn evidence in his/her defence. That is to say, it is impermissible for a court to have recourse to those common law decisions for the purpose of deciding that the giving of a direction in breach of s. 44J(b) has caused no unfairness or prejudice to an accused.

31. The Legislature, in its enactment of the prohibition contained within s. 44J, has thereby prescribed in detail aspects of the process for criminal trials conducted in the State of Victoria. Compliance with s. 44J(b)(i) is an essential means of securing a fair trial according to law for the accused. Self-evidently the legislated policy is focused on a legislative judgment as to this aspect of a fair and balanced trial. The Appellant was not tried in accordance with, but was tried in a manner contrary to, the requirements of s. 44J. In these circumstances, the effect of the impugned direction having been given is that the Appellant's trial ceased to be what the Legislature has determined constitutes a fair trial according to law, such that there has been a serious departure from the prescribed process for the Appellant's trial, that departure being sufficient in itself to constitute a "substantial miscarriage of justice" for the purposes of s. 276(1)(b) & (c) of the Criminal Procedure Act, 2009, requiring, without more, the conviction of the Appellant to be set aside.

- *AK v R* (2008) 232 CLR 438, at paras. [55] – [56], [57] & [58] – [59];

- *Baini v R* (2012) 246 CLR 469, at paras. [12], [26], [27] & [33];

- *Subramaniam v R* (2004) 79 ALJR 116; 211 ALR 1, at paras. [41] – [48].

32. By reason of the matters set out in paras. 27 – 31 above, the Court below has erred in holding that the contravention of s. 44J did not constitute a fundamental or serious departure from the prescribed processes for the Appellant's trial; see the Judgment below at paras. [74] – [80], [158] & [190] – [196]; also see at paras. 24(b) & 26(d) above.

JCAB 244 – 246, 272 & 281 - 282

33. Further, and in the alternative, for the reasons set out in paras. 34 – 41 below, the impugned direction (which had the authority of the trial judge's office behind it) had the clear potential not only to adversely affect the jury's assessment of both the truthfulness and the reliability of the evidence given by Tambakakis in circumstances where his credit was crucial to his defence but also, in circumstances where the defence of the Appellant relied upon some of the evidence given by Tambakakis (see at paras. 18 – 19 above), to undermine and cause prejudice to the defence of the Appellant, thereby having a real bearing upon the outcome of the Appellant's trial.

34. The impugned direction contained two "alternatives" or "possibilities" with respect to the evidence given by Tambakakis, the jury, by necessary implication, thereby being directed, invited or permitted to choose one over the other.

35. The two "factors" or "observations" described within the impugned direction do not necessarily neutralise each other or cancel or balance each other out because the jury were not directed to that effect. (And with respect to the reliance placed upon R v Storey (1978) 140 CLR 364 in the joint judgment of the majority at para. [167], this was not a matter considered or referred to in that case and it is unclear what passage in the Charge to the jury in that case is said to have had the effect described in para. [167].) In fact, these two "factors" or "observations" do not, inherently, cancel or balance each other out given that the direction presented the jury with a supposedly available choice between one or the other. That is the very possibility (sought to be) prohibited by s. 44J(b). **JCAB 274**

36. With respect to these two "factors" or "observations", the latter "alternative" or "possibility" had the potential either to disparage, or to invite the jury to be sceptical of, the evidence given by Tambakakis. As a consequence, had the jury chosen the latter "alternative" or "possibility", then the jury would have evaluated (or tested) the evidence given by Tambakakis by reference to an irrelevant consideration. That is to say, the impugned direction may have operated as a direction, or as an invitation, by the trial judge to the jury to "discount" the evidence given by Tambakakis, simply because he was an accused person. Had the impugned direction operated in that manner, then the direction impermissibly impugned not only the credibility of the evidence given by Tambakakis, but also the evidence which constituted the evidentiary foundation of the Appellant's defence.

37. Moreover, the impugned direction had the effect of posing the question for the jury's determination with respect to the evidence given by Tambakakis as the question whether he was "an innocent [person]" or "a guilty person". And as the issue for the jury's determination was not whether Tambakakis was "innocent" or "guilty", but whether the Crown had negatived his evidence as a reasonable possibility, the impugned direction mis-stated the issue for determination in a manner that relieved the Crown of proving its case beyond reasonable doubt. Put simply, in circumstances where the Appellant's defence relied upon the evidence given by Tambakakis, the impugned direction had the potential to undermine the accusatorial nature of the Appellant's trial and diminish the standard of proof.

38. Finally, any contention to the effect that, in the light of the trial judge's Charge to the jury as a whole, the giving of the prohibited direction could have caused no prejudice to Tambakakis and/or the Appellant must fail; see at paras. 39 – 41 below.

39. Such a contention would necessarily assume that any potential adverse effect of the prohibited direction given was negated, neutralised or ameliorated by the other directions given to the jury.

40. The impugned direction given was simply and clearly expressed and was seductive in effect. And in circumstances where the remainder of the Charge to the jury was expressed in general terms, no part of which referred to the prohibited direction, it cannot be concluded that the effect of the giving of the prohibited direction has been negated, neutralised or ameliorated.

41. That is to say, there is nothing within the remainder of the Charge to the jury which would, or might, have been understood by the jury as bearing upon, qualifying, negating, neutralising or ameliorating the prohibited direction, a direction which would, and could only, have been understood by the jury to be "a stand alone direction", specifically dealing with a specific mode of jury reasoning.

42. By reason of the matters set out in paras. 27 – 41 above, the Court below has erred in failing to determine that there has been a "substantial miscarriage of justice" such that there should be a re-trial.

Part VII: Orders Sought

43. The Appellant seeks orders that:

(a) the appeal be allowed;

(b) paragraph (2) of the orders made by the Court of Appeal of the Supreme Court of Victoria, which dismissed the appeal against conviction, be set aside, and in its place it be ordered that:

(i) the appeal to that Court against conviction be allowed;

(ii) the Appellant's conviction be set aside; and

(iii) there be a new trial.

Part VIII: Time for Oral Argument

44. The Appellant's time required for oral argument is estimated to be 90 minutes.

Dated: 18 July, 2022.

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

DANNY AWAD

Appellant

- and -

THE QUEEN

Respondent

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

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

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

3. Criminal Code Act, 1995 (Comm.), ss. 11.1 & 307.5 (as in force between 8 May, 2017 – 10 May, 2017) – Compilation No. 110, compilation date 8 December, 2016 and registered 19 December, 2016.