HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 27 Jul 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M45/2022
File Title:	Tambakakis v. The Queen
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	27 Jul 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

JOHN MICHAEL TAMBAKAKIS

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 arise on this appeal are:

   a. Whether the consequence of a trial judge having given a direction to a jury which has been specifically prohibited by sections 44J & 44K of the *Jury Directions Act 2015* (Vic) is that there has been a "substantial miscarriage of justice" for the purposes of sections 276(1)(b) & (c) of the *Criminal Procedure Act 2009* (Vic).

   b. 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.

   c. 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 deflected from the correct course 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* ("the Judgment below") are reported at (2021) 291 A Crim R 303.

10

Part V: Relevant Facts

5. The Appellant does not take issue with the facts as they were set out by Priest JA in the Court below.

The Judgment below, [8] – [48]. **JCAB 222 – 234**

6. Nor does the Appellant take issue with the facts set out at Part V of Danny Awad's submissions to this Court dated 18 July 2022.

20 **Part VI: Statement of Argument**

<u>Introduction:</u>

7. In the Appellant's trial the Learned Trial Judge gave a direction concerning the approach the jury should take to the Appellant's evidence.

8. Parliament has made it absolutely clear that such a direction must not be given to juries in criminal trials in Victoria.

30 9. The Appellant's whole defence rested on his evidence.

10. The direction given by the Learned Trial Judge had the potential to impact the jury's consideration of the Appellant's evidence in a number of adverse ways. In those

circumstances the majority in the Court below erred in failing to find that a substantial miscarriage of justice had occurred.

11. In order to demonstrate that error it is first necessary to set out the context in which the prohibited direction was given.

The Context:

12. In his evidence the Appellant explained his essential defence that he believed he was in possession of and dealing with copier boxes containing steroids and not cocaine. He also gave explanations as to his movements, his conversations and his association with his co-accused Mr Awad.

Trial transcript, pp 2048 – 2223. **ABFM 4 – 139**

13. The Appellant admitted in his evidence that he had previously been involved in the importation and distribution of steroids. In cross-examination, the Appellant was accused of lying about a number of aspects of his evidence.

14. In his final address the Learned Prosecutor suggested that the Appellant's evidence was largely made up of lies. In that final address of the Learned Prosecutor the issue of the Appellant's motivation in giving evidence was raised in the following way:

> "There are various explanations that can be offered for why an accused person in Mr Tambakakis's position gave evidence in the witness which appeared to be so implausible. …"

Trial transcript, p 2335.11 – 2335.14. **ABFM 143**

15. Prior to the charge the Learned Trial Judge indicated that he would give a direction to the jury about the fact that the Appellant had given evidence.

Trial transcript, p 2194.31 – 2195.6. **ABFM 141 – 142**

Jury Directions Act 2015 (Vic), s 44I.

16. The Appellant's counsel handed up the current and correct version of this direction prior to the commencement of the charge. The Learned Trial Judge indicated that he already had a version of this particular direction. The Appellant's counsel warned the

Learned Trial Judge that there were different versions of this direction and that he hoped "we have the same". The Learned Trial Judge said that he would have a look at the version provided by the Appellant's counsel. The Learned Trial Judge said: "It's a bit of a different one to the one I normally give".

Trial transcript, p 2507.6 – 2507.17. **ABFM 144**

17. In the course of the charge the Learned Trial Judge when dealing with the fact that the Appellant had given evidence gave the following prohibited direction:

> "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 an innocent 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."

Trial transcript, p 2582.13 – 2582.24. **JCAB 32**

18. The Appellant's Senior Counsel objected to this prohibited direction at the first opportunity.

Trial transcript, p 2591.7 – 2597.7. **JCAB 41 – 47**

19. In making that objection the Appellant's Senior Counsel indicated that he was concerned that if the Learned Trial Judge attempted to "correct it", "it is only going to highlight the direction to a jury", and that "it is just going to get worse".

20. The following morning the Appellant's Junior Counsel maintained that position.

Trial transcript, p 2608.3. **JCAB 59**

The Prohibition of this Direction:

21. It is recognised that the impugned direction given by the Learned Trial Judge was a direction that was previously given to juries in Victoria on a regular basis.

22. However, in 2017 the *Jury Directions and Other Acts Amendment Act 2017* (Vic) ("the amending Act") amended the *Jury Directions Act 2015* (Vic) to include sections 44H to 44K.

The Judgment below, [56]. **JCAB 237**

10

23. Section 44J clearly states that a trial judge must not give this impugned direction. Section 44K also clearly states that any common law rule which required or permitted a trial judge to give this impugned direction is abolished. In the notes to section 44K contained in the Act it is again made clear that the directions based on three specified cases – *R v Haggag* [1998] VSC 355; (1998) 101 A Crim R 593, *R v McMahon* [2004] VSCA 64; (2004) 8 VR 101 and *R v Buckley* [2004] VSCA 185; (2004) 10 VR 215 – are to be abolished by section 44K(2).

24. In the extrinsic material accompanying the introduction of the amending Act it was
20 variously stated that the impugned direction:

a. may confuse the jury;
b. may have the unintended consequence of focussing attention on the motivation of an accused to give particular evidence given their interest in the outcome of the trial;
c. was unique to Victoria; and
d. was problematic.

The Judgment below, [65] – [66]. **JCAB 241**

The Reasoning in the Court Below:

30

25. Priest JA was of the view that the ground of appeal dealing with this impugned direction must be upheld in the Appellant's case.

The Judgment below, [86] – [88]. **JCAB 247 – 248**

26. Priest JA considered that the impugned direction, whilst not amounting to a "fundamental departure", had the potential to taint the jury's consideration and evaluation of the Appellant's evidence and thereby undermine his defence. He was satisfied that the impugned direction would have deflected the jury from applying the requisite standard of proof and that it had the very real potential to undermine the presumption of innocence.

27. In all of those circumstances Priest JA found that it was impossible to conclude that the impugned direction was not productive of a substantial miscarriage of justice.

10

28. McLeish and Niall JJA dismissed this relevant ground of appeal. Whilst they were satisfied that the prohibition in section 44J of the *Jury Directions Act 2015* (Vic) had been breached, they were not satisfied that this breach gave rise to a substantial miscarriage of justice in the Appellant's case.

The Judgment below, [178] – [197]. **JCAB 278 – 282**

29. McLeish and Niall JJA did not reach this result by considering the "inevitability of conviction" question. Rather, they reached this result by resolving the "fundamental departure" question adversely to the Appellant and by finding that the impugned
20 direction did not have the capacity to influence the jury in a way that would have deflected them from the correct course.

Hargraves v The Queen [2011] HCA 44; (2011) 245 CLR 257, [42]-[46].

30. In arriving at that conclusion, McLeish and Niall JJA proceeded on the basis that there may be misdirections that:

a. are innocuous;

b. could have made no difference to the trial; and

c. could have no bearing on the outcome of the trial.

The Judgment below, [140] – [154]. **JCAB 265 – 271**

30

31. McLeish and Niall JJA further proceeded on the basis that the prohibited direction in the Appellant's case fell into such a category and as such they were relieved from assessing the whole of the record to determine whether conviction was or was not inevitable.

Kalbasi v Western Australia (2018) 264 CLR 62, [70].

Errors in the Reasoning Process:

32. It is submitted that the conclusion that the prohibited direction in the Appellant's case was the type of innocuous or impotent misdirection that could not have deflected from their task cannot be accepted.

33. Firstly, such a conclusion assumes that each of the jurors would have responded to this direction in exactly the same even-handed way. Whilst McLeish and Niall JJA seemed to allow for the potential that this misdirection might prompt jurors to consider the motivation of an accused to give evidence – it was suggested that such consideration may end with the realisation that such a consideration involved a barren inquiry and was of no use.

The Judgment below, [169]. **JCAB 275**

34. Such a conclusion ignores the potential for jurors to be much more focussed on that part of the prohibited direction that speaks of a guilty man essentially getting into the witness box and attempting to deceive them (the jury).

35. Of course, it did not fall on the Appellant to demonstrate that in fact the jury had been deflected in their approach to the onus of proof and the presumption of innocence. The issue remained whether the prohibited direction created a danger or substantial risk that the jury were deflected or distracted in these ways.

McKell v R [2019] HCA 5; (2019) 264 CLR 307, [42].

36. Secondly, the suggestion of some realisation that this prohibited direction was of no use to the jury in the Appellant's case does not sit comfortably with the admonitions of the Learned Trial Judge that these factors (including the guilty person scenario) were significant and needed to be considered when evaluating the Appellant's evidence.

37. This was all within a framework where the Learned Trial Judge had directed the jury that they must follow his directions of law.

38. Thirdly, any conclusion as to the impotent or innocuous nature of this prohibited direction also does not sit comfortably with the very deliberate efforts of Parliament to abolish this direction.

39. It is to be remembered that those deliberate efforts were made by Parliament in the face of those earlier cases, set out in the notes to section 44K, and a report which spoke of the potential for this direction to balance itself out.

R v Buckley [2004] VSCA 185; (2004) 10 VR 215, [54].

The Judgment below, [65] – [66]. **JCAB 241**

10

40. The fact that Parliament put an end to the giving of this direction is a telling indication of the legislature's perception of the potential harm that such a direction could cause.

41. In this context, any conclusion that this prohibited direction could make no difference to the outcome of a trial – without even a resort to the whole of the record of the trial – has the potential to frustrate the will of Parliament in abolishing this direction.

42. Fourthly, the fact that there were other directions about the presumption of innocence, onus of proof, standard of proof and the four broad conclusions relating to the
20 Appellant's evidence could not mean that the potential dangers associated with this prohibited direction can be seen to have been safely avoided.

The Judgment below, [100] & [125]. **JCAB 251 – 252 & 260 – 261**

43. The structure of the *Jury Directions Act 2015* (Vic) would suggest that Parliament would have had all of these other directions in mind when it was still thought necessary to abolish this impugned direction in unmistakable terms.

44. Fifthly, the fact that counsel are not prohibited from making submissions about the motive of an accused person in giving evidence falls into the same category.

30

45. Clearly Parliament has made a deliberate decision to remove the ability of a trial judge to lend the authority of their office to any comment or submission from counsel relating to the motivation of an accused person to give evidence.

46. The added difficulty in the Appellant's case is that part of this prohibited direction – which the jury were directed to bear in mind – had the very real potential to provide

the answer to the question posed by the Learned Prosecutor in his final address as to why the Appellant would get into the witness box and give such implausible evidence.

47. Sixthly, it is submitted that the reasoning employed by McLeish and Niall JJA fails to deal with the particular context in which this direction was given. To confront the jury with a binary choice between the motivation of an innocent accused person and a guilty accused person was particularly problematic in the Appellant's situation.

48. For the Appellant in his evidence admitted that he was guilty of being involved in the illegal importation and distribution of steroids on a previous occasion and he was guilty of attempting to do the same thing in the events giving rise to the charge that was before the jury.

49. Seventhly, it is submitted that the reliance by McLeish and Niall JJA on the previous cases was also problematic. Three of the four cases referred to in their judgment as providing fortification for their conclusion that no substantial miscarriage of justice had occurred are set out in the notes to section 44K.

50. In circumstances where Parliament has specifically identified those cases and specifically abolished a direction seemingly countenanced in those cases – such cases could not have had any real significance in the consideration of the substantial miscarriage of justice question.

Substantial Miscarriage of Justice:

51. Not every departure from the *Jury Directions Act 2015* (Vic) will give rise to a substantial miscarriage of justice. However, in this case the departure was associated with a truly essential feature of the trial.

52. It is submitted that the jury's ability to give a fair consideration of the evidence of an accused person in his own defence does go to the root of the trial.

53. In turn, and as McLeish and Niall JJA recognised, questions of the onus of proof and presumption of innocence are critical to any criminal trial.

54. It is submitted that in the particular circumstances of this case and where the Appellant's whole defence rested on the jury fairly considering his evidence, this breach of the *Jury Directions Act 2015* (Vic) can be described as involving a fundamental departure from the processes that Parliament has laid down for a fair trial.

55. Alternatively, and accepting that the possible kinds of miscarriage of justice that section 276(1) of the *Criminal Procedure Act 2009* (Vic) deals with are numerous, it is submitted that this was a case in which it really was impossible to conclude that the impugned direction would have made no difference to the outcome of the trial.

10 *Baini v R* [2012] HCA 59; (2012) 246 CLR 469, [26].

56. For this was a case where the resolution of the jury's consideration of the contested credibility of the Appellant was crucial to the outcome of the trial.

Glennon v R [1994] HCA 7, [16]-[17]; (1994) 179 CLR 1, 9-10.

Part VII: Orders Sought

57. The Appellant seeks orders that:

20 a. the appeal be allowed;

b. paragraph (2) of the orders made by the Court below, 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

30 58. The Appellant's time required for oral argument is estimated to be 60 minutes.

Dated: 27 July 2022

D A DANN
Counsel for the Appellant

P J SMALLWOOD
Counsel for the Appellant

Telephone: 03 9225 6593
Email: dermotdann@yahoo.com.au

Telephone: 03 9225 6276
Email: smallwood@vicbar.com.au

Stephen Andrianakis & Associates
19 Lansdowne Street
EAST MELBOURNE VIC 3000
Reference: Stephen Andrianakis
Telephone: 03 9663 9344
Email: s.andrianakis@gmail.com

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

JOHN MICHAEL TAMBAKAKIS

Appellant

- and -

THE QUEEN

Respondent

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

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

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