IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M87 of 2012

BETWEEN:

MICHEL BAINI
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part 1: Certification

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

Part II: Statement of Issue

2. There are two issues in this appeal.

3. The first issue is whether the Court below, pursuant to section 276 of the *Criminal Procedure Act 2009* (Vic), erred in deciding that there was no substantial miscarriage of justice by applying the approach set out by this Court in *Weiss v The Queen* (2005) 224 CLR 300 ('*Weiss*'). This issue arises under Ground 2.2.

4. The second issue is whether the Court below, having determined that the trial judge erred in his ruling in respect of the non-severance of count 50 ('the Srour count') and ordering a retrial on that count, erred by failing to order a retrial on the remaining counts (the 'Rifat counts'). This issue arises under Ground 2.1.

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5. This appeal presents the following matters for consideration:

A. The scope and content of section 276 of the *Criminal Procedure Act 2009* (Vic);

B. Whether this Court's decision in *Weiss* remains applicable to the determination of an appeal against conviction pursuant to section 276 of the *Criminal Procedure Act 2009* (Vic);

C. How, if *Weiss* no longer applies, section 276(1)(b), and in particular the meaning of "a substantial miscarriage of justice", is to be construed in an appeal against conviction.

Part II: *JUDICIARY ACT* 1903 (CTH) CERTIFICATION

6. The issues raised by this Appeal do not require notice to be given to the Attorneys-General pursuant to section 78B of the *Judiciary Act 1903* (Cth).

Part III: Citation

7. The reasons for decision of the Court of Appeal (Warren CJ, Nettle and Ashley JJA) are unreported and designated by the citation: *Michel Baini v The Queen* [2011] VSCA 298 (5 October 2011). The reasons are located in the Appeal Book.

Part IV: Narrative Statement of Facts

Pre-trial application

8. Prior to arraignment, the appellant's counsel applied for severance of count 50 pursuant to sections 371 and 372 of the *Crimes Act 1958* (Vic) ("the Act").

9. First, it was argued that count 50 was not properly joined with the other counts within the meaning of the presentment rules because it was factually discrete.

10. Second, it was argued that the discretion in section 372(3) of the Act to sever the counts should be exercised because of the potential prejudice to the fair trials of the appellant. It was common ground that the evidence to be lead in proof of count 50 was not admissible in proof of the other counts. This position did not alter during the course of the trial.

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The Ruling

11. In refusing to sever count 50, the learned trial judge ruled that he did so for the reasons expressed in the course of the application.

The Trial

12. At trial, it was disputed that the appellant had made any unwarranted demands with menaces on either Hasan Rifat or Nicholas Srour.

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13. In respect of Rifat, it was alleged that the appellant obtained (on the counts of which he was convicted) $143,681.00 as a result of persistent threats to harm Rifat's family, business and horses (**the 'Rifat counts'**).

14. It was not disputed that the appellant had received monies from Rifat; that he had been provided with a Mercedes Benz by Rifat (count 1, on which the appellant was acquitted); or that Rifat had signed a Deed of Partnership (count 8) and Terms of Settlement (count 18). The defence case was that the monies were paid in consideration of services provided by the appellant
30 to Rifat and, following the execution of the Terms of Settlement (count 18), pursuant to a legal agreement.

15. The reliability of Rifat's evidence was strongly contested. In particular, Rifat first made a complaint to the police alleging blackmail on 5 November 2007,

sometime after the appellant had issued a letter of demand alleging a breach of the Terms of Settlement.

16. In respect of Srour, it was alleged that the appellant made threats to him that he would be killed or injured unless he surrendered 50% of his business, Australian Financial Services, to the appellant (**the 'Srour count'**).

17. Again, it was disputed that the appellant had made any unwarranted demand with a menace.

The Verdict

18. By verdict of the jury, the appellant was convicted on 35 counts of blackmailing Rifat between April 2005 and March 2007.

19. The circumstances of the offences are described in the reasons of Ashley JA at paragraphs [17] – [24].

20. The appellant was also convicted on a single count (count 50) of blackmailing Srour in May 2007. The basis of this count is outlined in the reasons of Ashley JA at paragraphs [25] – [28].

Argument in the Court of Appeal

21. The submissions of trial counsel were adopted in support of ground 1 in the Court of Appeal.

22. First, it was argued that if count 50 was not properly joined, then retrials should be ordered on all counts if the unsafe grounds failed. Second, it was argued that the trial judge had erred in the exercise of his discretion by refusing to sever count 50.

23. Emphasis was placed on the primary concern of trial counsel – that where the evidence to be led in proof of the Srour count came from a separate

person there was a real risk that the evidence would be improperly used in assessing the Rifat counts.

24. The nature of the evidence lead from Srour, some of it over objection from the appellant's counsel, was highly prejudicial. Having given evidence that the appellant had told him he would be seeing him on Friday to claim 50% of the business, Srour's evidence in proof of the element of menace was that the appellant had previously told him he was a *"standover man"* who *"bullied and assaulted"* people to get what he wanted.

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25. The effect of this evidence was, so it was argued, to contaminate the jury and prejudice them in respect of all counts against the accused. It is for that reason that a retrial on all counts was required.

Decision of the Court of Appeal

26. Ashley JA, with whom Warren CJ and Nettle JA agreed, did not decide (though he doubted) whether the joinder was proper.

20 27. The Court did find that the trial judge had erred in his discretion not to sever count 50 and that there was a substantial miscarriage of justice on that count: paragraph [71] of reasons.

28. However, applying this Court's reasoning in *Weiss*[1], the Court decided there was no substantial miscarriage of justice with respect to the appellant's convictions on the Rifat counts[2] and therefore declined to order a retrial in respect of those counts.

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[1] Ashley JA stated that the question as to whether a failure to sever produced a miscarriage of justice which was substantial had to be considered in accordance with this Court's decision in *Weiss*; [49] of reasons of Court below.

[2] [63] – [70] and [95] – [102] of reasons of Court below.

This Appeal

29. For the purposes of this appeal, the facts as found by Ashley JA are accepted.

30. In addition, the respondent does not challenge the decision of the Court of Appeal that the trial judge erred by failing to sever count 50 and that there was a substantial miscarriage of justice on that count.

Part V: Summary of Argument

31. The appellant contends that the failure to sever the charges resulted in a substantial miscarriage of justice vitiating the verdicts in respect of both the Rifat counts and the Srour count. He contends *ipso facto* that a retrial on all counts is required.

32. The appellant contends that the decision of the Court of Appeal to order a retrial on the Srour count only and not the Rifat counts was an error. The Court of Appeal fell into error because it misinterpreted and misapplied the statutory test now dictated by section 276.

33. These contentions require consideration of three matters relevant to resolution of the issues in this appeal.

The scope and content of section 276 of the *Criminal Procedure Act 2009* (Vic)

34. The determination of the appeal by the Court of Appeal in this case was governed by section 276 of the *Criminal Procedure Act 2009* (Vic).[3] The section provides:

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[3] Clause 9(4) holds that Division 1 of Part 6.3 (which includes sections 274 and 276) apply to an appeal where sentence is imposed on or after the commencement day. The commencement day was 1 January 2010: see *Government Gazette* 10 December 2009, page 3215. The sentence in this matter was imposed on 16 July 2010: see reasons of Court below at [11].

(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the Court that-

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or,

(b) as the result of an error or irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or,

(c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

35. This provision replaced section 568(1) of the *Crimes Act 1958* (Vic) which was the common form of criminal appeal provision. The history of that provision is traced by this Court in *Weiss*.[4]

36. Section 568 (1) provided:

> The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any case shall dismiss the appeal:
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> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of

[4] At [12] – [30] in that case.

> the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

37. The new provision under section 276 replaces the two-staged test of the old provision. There is now a single-staged test.

38. Now it is for the appellant to satisfy the Court that one of the three bases for appellate intervention has been made out. If so satisfied, the Court is compelled to allow the appeal.

39. The concept of "a substantial miscarriage of justice" is retained, but it is now restricted in its application to sub-sections (1)(b) and (1)(c). This change may have reflected the uncertainty that was inherent in the old provision in respect of the application of the proviso to the first leg (unsafe and unsatisfactory ground).[5]

40. Sub-section (1)(a) retains the ground that an appeal against conviction must be allowed where the verdict of the jury is unreasonable or cannot be supported having regard to the evidence.

41. Sub-section (1)(b) adopts different language to that of the previous second leg. It speaks of "an error or irregularity in, or in relation to the trial" rather than "a wrong decision of any question of law".

42. Likewise, the language of sub-section (1)(c) is different from the previous third leg for appellate intervention, incorporating, as it did, the binary concepts of "miscarriage of justice" and "substantial miscarriage of justice".

43. These changes were intended to bring clarity to the law. As the then Attorney-General Mr Hulls said:

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[5] Brooking JA noted that it was pointed out that the proviso cannot be applied where the first ground of appeal has been established: *R v Gallagher* [1998] 2 VR 671, 675

> The grounds of appeal and the proviso were drafted approximately 100 years ago. The meaning of some words in the provision is unclear and the provision is internally inconsistent. Differing judicial interpretations of section 568 and its counterparts in other jurisdictions have arisen over the years. This occurred in the High Court decision in *Weiss v R* (2005) 224 CLR 300, which added a level of complexity and uncertainty to the application of the provision.[6]

Is this Court's decision in *Weiss* applicable to the determination of an appeal against conviction pursuant to section 276 of the *Criminal Procedure Act 2009* (Vic)?

44. In light of the recasting of the provision by Parliament, the question is whether section 276 of the *Criminal Procedure Act 2009* imposes the same statutory task on an appellate court as was the case under the old provision.

45. The appellant contends that for four reasons, the *Weiss* test no longer applies.

46. First, the new provision introduces a different structure to criminal appeals and ought be interpreted afresh. Indeed, the *Criminal Procedure Act*, as with the uniform evidence legislation in Victoria, introduced a new statutory regime requiring interpretation in accordance with the usual principles of statutory construction commencing with the natural and ordinary meaning of the words of the section.

47. In *Papakosmas* (albeit speaking in terms of the *Evidence Act* but equally apposite in respect of the *Criminal Procedure Act*) Gleeson CJ and Hayne J said:[7]

> It is clear from the language of the Act, and from its legislative history, that it was intended to make, and that it has made, substantial changes to the law of evidence...Section 9 of the Act provides that it does not affect the operation of the common law except so far as the Act provides otherwise expressly or by

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[6] Parliament of Victoria, *Statement of Compatibility*, 4 December 2008, Page 4985

[7] *Papakosmas v The Queen* (1999) 196 CLR 297, 302 at [49]

necessary intendment. Even so, the sections of the Act relevant to this case undoubtedly make express provision different from the common law. It is the language of the statute which now determines the manner in which evidence of the kind presently in question is to be treated.

48. This view is also consistent with the legislative intent as divined from various extrinsic materials.[8]

49. For example, the *Legislative Guide to the Criminal Procedure Act*[9] observes that the single-staged test was intended to remove much of the complexity that had developed through judicial interpretation of section 568(1). It observes that the phrase "substantial miscarriage of justice" should remain the ultimate test for determining whether an appeal should be allowed or dismissed. It states that there should be a presumption that, until the contrary is shown, a trial before judge and jury was fair and according to law. It follows that the onus to persuade the court of the matters required for a successful appeal should be on the appellant.

50. It further observes that errors or irregularities in the trial should result in appeals being allowed if the problem could have reasonably made a difference to the trial outcome or if the error or irregularity was of a fundamental kind depriving the appellant of a fair trial or amounting to an abuse of process (regardless of whether it could have made a difference to the trial outcome).

51. These observations are consistent with observations in the *Harmonisation of Criminal Appeals Legislation Discussion Paper*[10] that considered the new provision and those of the Victorian Attorney-General in the second reading speech on the *Criminal Procedure Bill.*[11]

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[8] This Court affirmed in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 that regard could be had to extrinsic materials in interpreting legislation.
[9] State of Victoria, Department of Justice, March 2010, at 257
[10] Prepared by the Harmonisation of Criminal Procedure Working Group of the Standing Committee of Attorneys-General, July 2010.
[11] *Hansard*, Legislative Assembly, 4 December 2008 at 4986, 4987

52. Second, the *Weiss* test cannot be interpreted consistently with the new provision and therefore cannot apply because the burden to show substantial miscarriage of justice is now on the convicted person.

53. The approach in *Weiss* requires an appellate court to dismiss an appeal where no substantial miscarriage of justice has actually occurred. In *Weiss* this Court said that this task is to be undertaken in much the same way as an appellate court does in asking itself whether a conviction is unsafe and unsatisfactory.[12] This task may make sense where the two-staged approach to the provision requires the Crown to satisfy the court that the accused was guilty and hence there was no substantial miscarriage of justice.

54. In *Weiss* it was said that the permissive nature of the provision and the way in which the power contained within were expressed were important.[13] But now that the provision is differently expressed and the onus is no longer on the Crown, there is a real issue as to whether the *Weiss* approach applies.

55. Since the new provision now places the burden on the appellant to persuade the court that there was a substantial miscarriage of justice, it would be unjust for the appellant, as part of that task, to be required to persuade the court that he or she was not guilty. Such an approach would clearly infringe the presumption of innocence.

56. There is perhaps no more fundamental principle of the common law than the presumption of innocence. Indeed, in this Court it has been said that the presumption of innocence is the only presumption that a jury may call in aid when deciding facts.[14] This Court has emphasized the continuing importance of the presumption of innocence in the criminal law.[15]

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[12] [41]

[13] [44]

[14] *Burns v R* (1975) 132 CLR 258 at 262 per Barwick CJ, Gibbs and Mason JJ.

[15] See for example, *Robinson v.R (No 2)* (1991) 180 CLR 531 at 535; and *RPS v The Queen* (2000) 199 CLR 620 at 630 – 632 [22] – [30] per Gaudron ACJ, Gummow, Kirby and Hayne JJ (although doubting whether it was strictly a "presumption").

57. The presumption of innocence is enshrined in section 25 (1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In introducing the Criminal Procedure Bill into the Parliament, the Attorney-General stated that the bill was compatible with the human rights protected by the Charter.[16]

58. Third, as this Court said in *Weiss* and in cases since *Weiss*, the fundamental approach to determination of a criminal appeal against conviction is to apply the test described in the words of the statute. To read the new provision in a way which would require the convicted person to prove that he was not guilty would infringe the principle of legality in statutory interpretation. That principle is that statutes should not be construed, absent clear language, so as to infringe upon fundamental common law principles, rights and freedoms. The principle was affirmed and applied by this Court in *Lacey v. Attorney-General (Queensland)*.[17]

59. Fourth, the ultimate test for appellate intervention is now clearly stated as being substantial miscarriage of justice. Any confusion as to differences between miscarriage of justice and substantial miscarriage of justice and to the way in which the proviso thereby operated, has been removed. The test of substantial miscarriage of justice is directly linked to the ground of appeal, whether that ground asserts error or otherwise, and it is for the appellant to demonstrate that that test has been positively satisfied.

60. Therefore, since this Court's decision in *Weiss* was given in the context of substantial miscarriage of justice as it appeared in the old provision, that decision at least needs to be revisited, in so far it relates the approach to be taken to the substantial miscarriage of justice test under the new provision.

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[16] Ibid n 6.

[17] (2011) 242 CLR 573 at 582-3 [17]-[20] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

How, if *Weiss* no longer applies, is the test of "substantial miscarriage of justice" to be construed in an appeal against conviction under section 276(1)(b) and (c)?

61. Notwithstanding that the new test is a single-staged test, the construction of the provision suggests that four premises must be satisfied before the Court 'must' allow the appeal.

62. Thus under section 276(1)(b) (and interpreted consistently in (c)):

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(a) the appellant must satisfy the Court;

(b) that as the result of an error or irregularity in, or in relation to the trial;

(c) there has a been a miscarriage of justice;

(d) which is substantial.

The burden of proof is on the appellant

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63. The new provision clearly imposes the burden of proof on the appellant. In its terms, it assumes that the initial trial was fair and according to law. The question then arises as to what standard the appellant must satisfy the court: the criminal standard? the civil standard? or some other standard?

64. In *Mraz*[18], Fullagar J said, in speaking of the proviso, that: "It is for the Crown to make it clear that there is no real possibility that justice has miscarried." And in *Driscoll*[19], Barwick CJ put the test as being one of whether the Court was satisfied that the appellant can "fairly or reasonably
30 to have been said to have had a chance of acquittal". So the test seems to be one of fair, real or reasonable (presumably as distinct from fanciful)

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[18] *Mraz v R* (1955) 93 CLR 493, 514

[19] *Driscoll v R* (1977) 137 CLR 517, 525

possibility. That is, the appellant must satisfy the court to this standard that one of the grounds of appeal has been made out.

An 'error or irregularity' in relation to the trial

65. The new provision requires the appellant to demonstrate an error or irregularity in or in relation to the trial. It is unclear whether, as a matter of construction, there is any meaningful distinction between 'in' a trial and 'in relation to' a trial; although it may be that 'in relation to' extends the occurrence of the error or irregularity to matters preliminary or subsequent to the trial.

66. What constitutes an error or irregularity is not defined in the *Criminal Procedure Act*.

A miscarriage of justice

67. The meaning of 'miscarriage of justice' was elucidated by French CJ in *Cesan v R*[20] as follows:

> In the second edition of the Oxford English Dictionary 'miscarriage of justice; is defined as 'a failure of a court to attain the ends of justice'. Applied to a system of laws the end of justice will incorporate normative requirements relating to the way in which laws are applied and dispositions made under them. The conviction of an innocent person would be recognized by all observers as a miscarriage of justice. But the concept goes beyond that, particularly in a criminal justice system that is committed to fair process.

68. In this context it must be remembered that the enduring approach to appellate review by intermediate courts in this country has long been governed by two clear statements by this Court:

> From the beginning, that Court has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria.

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[20] (2008) 236 CLR 358, 378 at [66]

> For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because of some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.[21]

69. And further:

> It ought be read, and it has in fact always been read, in the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may have thereby lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says he shall have, and justice is justice according to law.[22]

70. While it is obvious to observe that a miscarriage of justice can take a myriad of forms in the context of a criminal trial, there appears to be two consistent trends in the circumstances where a failure to attain the ends of justice will give rise to appellate intervention.

71. The first trend is evident in appeals where there has been a departure from the principles of a fair trial according to law.

72. The second trend is evident in appeals where the error is such that it would not have made a difference to the outcome of the case.

73. Kirby J recognized this duality of circumstances in his interpretation of what constitutes a miscarriage of justice in *Nudd v R*[23] as follows:

> Taking the criterion, relevantly, as the establishment of a "miscarriage of justice," the question remains: is the miscarriage spoken of confined to a case where,

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[21] *Davies and Cody v The King* (1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ.

[22] *Mraz v R* (1955) 93 CLR 493, 514 per Fullagar J

[23] (2006) 225 ALR 161, 183

> directly or indirectly, the incompetence of counsel has led to a verdict that, judged on the evidence, is unsafe and cannot be left to stand? Or are there exceptional cases where, although the appellate court may be convinced fro the whole of the evidence that the conviction is not unsafe, that affront to the appearance of justice in the trial is such that a fair trial was not had, requiring a retrial, in effect to uphold the integrity of the judicial process.

74. What constitutes a miscarriage of justice can thus be said to be some failure, whether by misdirection or otherwise, as a result of which the trial process does not attain the ends of justice, whether by process or by outcome.

Determining 'substantiality'

75. The word 'substantial' clearly means something which is significant and not trivial. As this Court has said elsewhere, it means 'no mere ornamentation.'

76. In the context of this provision, substantial must at least mean the loss of a fair chance of an acquittal. Applying this meaning, the word 'substantial' has real work to do in terms of the application of it to the concept of miscarriage of justice in the disposition of a criminal appeal.

Resolution of the appeal in this case

77. The appellant's submission in this appeal is that the Court below ought to have ordered re-trials on all counts, in other words the Court should have found that as a result of the failure to sever count 50, there was a substantial miscarriage of justice on all counts. The Court below seemed to reason that because the trial judge gave a separate consideration direction then the jury would not have been distracted by the inadmissible material contained within the Srour count: [70] of judgment. They further reasoned that because there was only one count concerning Srour there was a substantial miscarriage of justice on that count but not so on the others.[24]

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[24] [71] of reasons of Court below.

78. An order should have been made on retrials on all counts for the following three reasons:

79. First, if a separate consideration direction could not save the Srour count it is difficult to see how it could save the Rifat counts.

80. The attempt by the Court below to save the Rifat counts by recourse to what this court said in *Dupas*[25] regarding the ability of juries to follow judicial directions had no application.

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81. In *Dupas* this Court decided that, in considering whether a permanent stay of criminal proceedings will be ordered, a court must consider whether an apprehended defect in a trial is "of such a nature that there is nothing a trial judge can do in the conduct of the trial to relieve against its unfair consequences".[26] *Dupas* case bears no resemblance in law or fact to the present case.

82. The Court below acknowledged, by allowing the appeal in part, that the prejudicial effect of Srour's evidence on the Rifat counts was such that there
20 ought to have been a separate trial of count 50. The appellant contends, that the logical corollary of that conclusion is that, in this case the trials on the Rifat counts also miscarried because of the infection into those trials of the evidence relating to count 50.

83. Second, it is submitted that the nature of the error as a matter of law was significant. Joint trials had occurred in breach of mandatory legislative provisions, that is, sections 371 and 372 and rule 2 of the sixth schedule to the Act. Count 50 was not founded on the same facts as the other counts. Nor was it of the same or similar character. There was no cross
30 admissibility. The ordinary principle that the court should order separate trials where there are different alleged victims, where the evidence in respect of one victim is not relevant with respect to the charge of the other

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[25] (2010) 241 CLR 237

[26] 250 at [35] per the court

and where the joinder of charges creates a risk of prejudice, applied in this case.[27]

84. Third, the effect of the error was significant. The jury heard evidence from Srour that the appellant had described himself as a "standover man". It was the prosecution case that the appellant had acted in this way to Rifat. There was a real risk that Srour's evidence impermissibly corroborated Rifat's uncorroborated allegations. Here the one jury had to (in the Srour trial) carefully consider Srour's evidence of a demand with menace but (in the Rifat trials for the same type of offence) ignore that same evidence. The law recognises that in the case of inadmissible similar fact evidence juries cannot be expected to "perform mental gymnastics of this sort."[28] The discretion to sever ought to have been exercised to ensure fair trials on both the Srour counts and the Rifat counts. It was irrelevant that there was only a single count in relation to Srour.

85. Finally, it is submitted that, for the reasons argued above, the nature and the effect of the error in this case is such that it is inappropriate to consider whether the failure to sever would have made a difference to the outcomes on the Rifat counts. It is submitted that in this case it is not possible to make that determination.

Part VII: Applicable statutory provisions

86. *Charter of Human Rights and Responsibilities Act 2006* (Vic)
Section 25(1)

Crimes Act 1958 (Vic)
Sections 371, 372(1)-(3) and 568(1) and Rule 2 of the Sixth Schedule

Criminal Procedure Act 2009 (Vic)
Section 276

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[27] *KRM v R* (2001) 206 CLR 221, 235 [38] per McHugh J
[28] Gibbs CJ in *De Jesus v The Queen* [1986] 61 ALJR 1 at 536 quoting Lord Cross of Chelsea in *Regina v Boardman* [1975] AC 421 at 459

Part VIII: Orders sought

87. The appellant seeks orders that:

(a) The appeal is allowed;
(b) The appellant's convictions be quashed; and,
(c) A new trial is ordered on all counts.

Part IX: Time estimate

88. It is estimated that the appellant's argument would last two hours.

Dated: 21 September 2012

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ANNEXURE A

(Text of applicable statutory provisions)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Section 25(1)

25. Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Note: this section commenced operation on 1 January 2007 and is still in force.

Crimes Act 1958 (Vic)

Section 371

371 Joinder of charges in the same presentment

Subject to the provisions of the rules under this Act charges for more than one indictable offence may be joined in the same presentment.

Note: this section commenced operation on 1 April 1959 and was repealed by section 422(2)(a) of the *Criminal Procedure Act 2009* (Vic) on 1 January 2010.

Section 372(1)-(3)

372 Orders for amendment of presentment, separate trial etc.

(1) Where before trial or at any stage of a trial it appears to the court that the presentment is defective the court shall make such order for the amendment of the presentment as the court thinks necessary to meet the circumstances of the case unless having

regard to the merits of the case the required amendments cannot be made without injustice.

(2) Where a presentment is so amended a note of the order for amendment shall be indorsed on the presentment and the presentment shall be treated for the purposes of the trial and for the purposes of all proceedings in connexion therewith as having been made in the amended form.

(3) Where before trial or at any stage of a trial the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same presentment or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in a presentment the court may order a separate trial of any count or counts of such presentment.

Note: this section commenced operation on 1 April 1959 and was repealed by section 422(2)(a) of the *Criminal Procedure Act 2009* (Vic) on 1 January 2010.

Section 568(1)

The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any case shall dismiss the appeal:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Note: this section commenced operation on 1 April 1959 and was repealed by section 422(4) of the *Criminal Procedure Act 2009* (Vic) on 1 January 2010.

Rule 2 of the Sixth Schedule

2 Joining of charges in one presentment

Charges for any offences may be joined in the same presentment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character.

Note: this schedule commenced operation on 1 April 1959 and was repealed by section 422(7) of the *Criminal Procedure Act 2009* (Vic) on 1 January 2010.

Criminal Procedure Act 2009 (Vic)
Section 276

276. Determination of appeal against conviction

(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that-

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

Note: this section commenced operation on 1 January 2010 and is still in force.