

# HIGH COURT OF AUSTRALIA

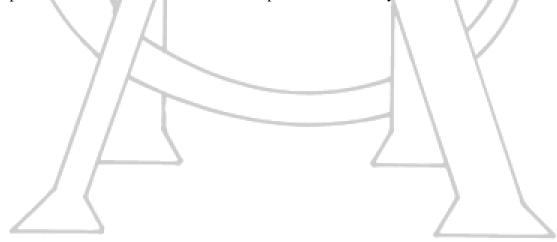
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	Details of Filing
File Number: File Title:	M45/2022 Tambakakis v. The Queen
Registry:	Melbourne
Document filed:	Form 27F - Respondent's Outline of oral argument
Filing party:	Respondent
Date filed:	13 Sep 2022

# **Important Information**

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#### IN THE HIGH COURT OF AUSTRALIA MELBOURNE REGISTRY

#### **BETWEEN:**

DANNY AWAD Appellant

and

THE QUEEN Respondent

JOHN TAMBAKAKIS Appellant

and

THE QUEEN Respondent

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## OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

#### PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

#### PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

#### The effect of the misdirection

- 2. The appellants' complaints that the misdirection had the potential to (a) invite scepticism or disparagement of Mr Tambakakis' evidence, simply because he was the accused (Awad [33], [36]), (b) define the question for the jury's determination as whether Mr Tambakakis was an innocent or a guilty person (Awad [37]) and (c) undermine the presumption of innocence and onus of proof (Tambakakis [35], [53]; Tambakakis Reply [31]) all raise the fundamental question this Court posed in *Hargraves* (2011) 245 CLR 257 at [46]: did the judge's instructions deflect the jury from its fundamental task of deciding whether the prosecution proved the elements of the offence beyond reasonable doubt?
- 3. To answer this question, it is necessary to read the charge as a whole and to consider whether the jury was deflected from its task.
  - *Hargraves* (2011) 245 CLR 257 at [46]-[49] (**JBA 3, Tab 20**).

Respondent

1

- 4. The misdirection does not create a material risk of (a) the jury assuming the accused is guilty or (b) disparaging their evidence.
  - See JCAB 32, lines 13-24
  - See *Hyatt* [1998] 4 VR 182 at 191-192 (Supp, Tab 1); *Taafe* (1998) 102 A Crim R 472 at 483-484 (Supp, Tab 4); *Haggag* (1998) 101 A Crim R 593 at 598 (JBA 4, Tab 33); *Iliovski* (2002) 135 A Crim R 117 at [15]-[16] (Supp, Tab 2); *Buckley* (2004) 10 VR 215 at [55]-[56] (JBA 4, Tab 31); *McMahon* (2004) 8 VR 101 at [28]-[29] (JBA 4, Tab 34); *Franco* [2006] VSC 32 at [87]-[88] (JBA 4, Tab 32).
- 5. Any risk is neutralised by the trial judge immediately emphasising that (a)
  Mr Tambakakis was to be treated like (or more favourably than) any other witness; (b) the burden remains with the Crown at all times; and (c) that burden is to be discharged beyond reasonable doubt.
  - See JCAB 32 line 25 to JCAB 34 line 17.
  - 6. The clear and repeated directions the jury received would have left the jury in no doubt as to their task. (**RS (Awad) [44]-[45]**).
  - By the conclusion of the charge, there was no exception taken. This supports the view that no further direction was required to ameliorate any risk created by the misdirection. (RS (Awad) [52]).
    - *Krakouer* (1998) 194 CLR 202 at [36] (JBA 3, Tab 22); *Kalbasi* (2018) 264 CLR 62 at [50], [57] (JBA 3, Tab 21); *Mule* (2005) 79 ALJR 1573 at [3], [10], [12], [24]-[25] (JBA 4, Tab 29).

# The misdirection did not, in and of itself and without more, result in a substantial miscarriage of justice (RS (Awad) [8]-[42]; RS (Tambakakis) [9]-[11])

- 8. The text, context and purpose of s 44J of the *Jury Directions Act* do not evince an intention that any non-compliance results in a substantial miscarriage of justice.
  - (a) The use of mandatory language is not determinative.
  - (b) The fact that the parties can address on the subject is significant.
  - (c) The extrinsic materials do not support the view that the directions were abolished because they undermined the fundamental precepts of a criminal trial.

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- Criminal Law Review Report at 12 (**JBA 5, Tab 38**) Explanatory Memorandum, Jury Directions and Other Acts Amendment Bill 2017 (Vic) at 8 (**JBA 5, Tab 39**).
- Subramaniam (2004) 79 ALJR 116 (JBA 4, Tab 37) and AK (2008) 232 CLR 438 (JBA 3, Tab 13) are distinguishable, and do not state any principle which determines whether a contravention of s 44J necessarily results in a substantial miscarriage of justice.
- 10. A misdirection is traditionally not something that produces a substantial miscarriage of justice without more. Had the Parliament intended non-compliance with s 44J to result in a substantial miscarriage of justice in every case, one would expect it to have said so.
  - Glennon (1994) 179 CLR 1 at 9-10, 12 (JBA 3, Tab 18); Green (1997) 191 CLR 334 at 347 (JBA 3, Tab 19); Kalbasi (2018) 264 CLR 62 at [57] (JBA 3, Tab 21)

## Orders (RS (Awad) [54]; RS (Tambakakis) [22])

11. If the appeal is allowed, the matter should be remitted to the Court of Appeal to assess whether a substantial miscarriage did not occur because conviction was inevitable having regard to the entirety of the record. That was in issue before the Court of Appeal, and it remains undetermined.

### Dated: 13 September 2022

ph

Pat Doyle

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Christopher Tran

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