IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 87 OF 2012

BETWEEN:

MICHEL BAINI
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1.1 We certify that this submission is in a form suitable for publication on the internet.

Part II: Statement of Issues

2.1 The question for this Court is, what do the words "substantial miscarriage of justice" mean in section 276 of the *Criminal Procedure Act* (CPA)?

2.2 The secondary question is: did the appellant establish that the failure to sever the counts caused a substantial miscarriage of justice.

Part III: Judiciary Act 1903 (CTH) Certification

3.1 It is certified that no notice is required to be given to the Attorney's-General pursuant to section 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Statement of Facts

4.1 The Respondent relies on the findings of facts made by the Court of Appeal and set out in [17] - [35] and [77] – [86] of its judgment.

4.2 As to the matters set out in the appellant's submission under the headings – "pre-trial application", "the ruling", "the verdict", "arguments in the Court of Appeal", "the decision of the Court of Appeal" and "this appeal" the Respondent takes no issue. As to the matters contained under the heading "the trial" the Respondent contends that the statements of fact contained there are incomplete and must be read together with the matters set out in para. 4.1 above.

Filed by: Craig Hyland
Solicitor for Public Prosecutions
565 Lonsdale Street
Melbourne Vic 3000
DX 210290

Date: 12 October 2012
Telephone: (03) 9603 7666
Direct: (03) 9603 7800
Fax: (03) 9603 7460
Reference: K. Thornton

Part V: Summary of Argument

Introduction

5.1 The jurisdiction to appeal against a conviction in respect of an indictable matter in Victoria is entirely a creature of statute. It is now defined in S.276 of the CPA.

5.2 The meaning of a statute begins and end with its words.[1]

5.3 The appellant's argument in this matter is flawed because it commences from the wrong starting point. In para. 44 of his submissions it is said the question is: "whether S.276 of the *Criminal Procedure Act* 2009 imposes the same statutory task as was the case under the old provision?" The question is also asked in the heading above para. 44: "Is this Court's decision in *Weiss* applicable to the determination of an appeal against conviction pursuant to S.276 of the *Criminal Procedures Act* 2009?"

5.4 The rest of the appellant's argument is then a comparison between the old statute, the new statute and *Weiss*. By analyzing S.276 in such a strait jacket the appellant has not allowed the words of the statute to reveal their meaning.

5.5 The true question for the Court is: how do the words of S.276 of the CPA operate where there has been an apparent error or irregularity in or in relation to the trial?

5.6 References to decisions such as *Weiss* about the operation of the previous statutory provisions are only relevant or useful if such reference assists in construing the applicable statutory provisions.[2] An analysis of *Weiss* assists in two ways in that process. First, it shows what problems the new provision was intended to overcome. Second, as will become apparent below, it gives relevant guidance on the interpretation of the key phrase in S.276 – "a substantial miscarriage of justice".

5.7 The meaning of S.276 of the CPA is to be determined by considering:

- the problems with S.568 of the *Crimes Act* 1958 that were desired to be eliminated;
- the text of the legislation;
- the context of the legislation; and
- the purpose Parliament has expressed by the words of the Statute.

Ground 2.2 Application of S.276 of *Criminal Procedure Act* 2009
The Problems with S.568 of the *Crimes Act* 1958

5.8 Section 568 of the *Crimes Act* 1958 was the common form of appeal provision based on S.4(1) of the *Criminal Appeal Act* 1907 (UK). The history of that

---

[1] *The Queen v. Getachew* (2012) 286 ALR 196 [11], the cases listed in footnote 8 to that paragraph, and *Baiada Poultry Pty Ltd v. R.* (2012) 286 ALR 421 [21].
[2] *The Queen v. Getachew* (2012) 286 ALR 196 [11].

provision and its adoption in Victoria and other Australian jurisdictions was clearly set out in *Weiss*.[3]

5.9 Prior to the enactment of the common form criminal appeal provisions, errors of law occurring in criminal trials were remedied by the consultation of judges in the Crown case reserved process. The position was:

> "... At Common Law this right was extremely limited. There was in general no appeal on questions of fact and only a partial appeal on questions of law. The creation in 1848, of the Court of Crown Cases Reserved, did something to improve the position, but the jurisdiction was of this Court was restricted to the determination of points of law reserved for its consideration at the discretion of the trial judge."[4]

5.10 During this period if inadmissible evidence went before a jury in a criminal matter, the appellate courts would order a new trial as a matter of right. It was treated as an absolute rule that the inadmissible evidence vitiated the verdict, and this was known as "the Exchequer Rule".[5]

5.11 The common form appeal provisions were enacted under S.568 to, among other things, allow an appeal on the facts and to do away with the Exchequer Rule.[6]

5.12 The provisions had a two stage test. First it was for the appellant to show that the verdict of the jury should be set aside on one of three bases: it is unreasonable or cannot be supported having regard to the evidence; a wrong decision of any question of law; or on any other ground there was a miscarriage of justice.

5.13 Second, if the court was of the view it might decide in favour of the appellant it nonetheless should dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred."

5.14 There were many criticisms of this form of legislation. First, the provision was considered to be ambiguous because courts did not differentiate between the three available bases or whether the appellant failed at the first stage of the test or the proviso was applied.[7] Second, there was the juxtaposition of "miscarriage of justice" with "substantial miscarriage of justice".[8] Third, in applying the proviso courts would consider the effect of the error from the perspective of the jury in the trial or a hypothetical future jury.[9] Fourth, there was confusion whether

---

[3] *Weiss v. The Queen* (2005) 224 CLR 300, [12] – [17].
[4] *Stephen's Commentaries on the Laws of England, 21st edition*, Vol. IV p.280. See also *D. O'Connor, Criminal Appeals in Australia Before 1912, (1983)* 7 Crim L.J. 262 and *Wrottesley and Jacobs, Law And Practice of Criminal Appeals (1910)*, 187-188.
[5] *Weiss v. The Queen* at [13] – [18].
[6] *Weiss v. The Queen* at [18].
[7] *R. v. Gallagher* [1998] 2 VR 671, 673-74 per Brooking JA.
[8] *Weiss v. The Queen* at [18].
[9] *Weiss v. The Queen* at [35].

"miscarriage of justice" applied to all three bases or only the third.[10] Fifth, what does the term "miscarriage of justice" mean?

5.15 So it was that in the Second Reading Speech of the *Criminal Procedure Bill* the Attorney-General said:

> "Section 568 of the *Crimes Act* provides three grounds of appeal against conviction.
>
> Where a person establishes one of the grounds of appeal, but the prosecution shows that there was no substantial miscarriage of justice, the Court of Appeal may apply a proviso and dismiss the appeal.
>
> 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.
>
> The provision and recent High Court authority also do not operate on the presumption that a trial before a judge and jury was conducted fairly and in accordance with law unless the appellant shows that it was not.
>
> The bill addresses the fundamental problems that have plagued this provision. The Bill will improve the operation and application of appeals against conviction to the Court of Appeal by:
>
> > removing the two stage test and replacing it with a single test;
> >
> > retaining the 'substantial miscarriage of justice' test for determining whether an appeal should be allowed or refused. This is an appropriate test for determining when an appeal should be allowed; and
> >
> > requiring the appellant to satisfy the court that the appeal should be allowed.
>
> The new approach will mean that errors or irregularities in the trial will result in appeals being allowed when 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

[10] *R. v. Gallagher* at 674 per Brooking JA cf. *Simic v. The Queen* (1980) 144 CLR 319.

> appellant of a fair trial. The appeal process will therefore operate to ensure that the accused receives a fair trial.
>
> It will ensure that appeals will not be allowed on technical points that did not affect the outcome of the trial or the fairness of the proceeding."[11]

5.16 Thus the intention expressed in the Second Reading Speech was: to simplify the legislation; retain the test of "substantial miscarriage of justice" as defined in *Weiss*; give primacy to the jury's verdict; require the appellant to show that verdict should be set aside because a substantial miscarriage of justice occurred; and to ensure that only grounds which affected the outcome of the trial or the fairness of the proceeding succeeded.

The text of the Statute

5.17 A reading of the words of S.276 of the CPA show the following.

5.18 First, an appeal must be allowed if the appellant satisfies the Court that one of the three categories in sub-section 1, (a)-(c) is made out. Those three categories are the same ones that previously applied.

5.19 Second, the proviso does not exist. Instead sub-sections (1) (b) and (c) are expressed in such a way that the relevant category has in effect caused a substantial miscarriage of justice. The words give rise to a single test.

5.20 Third, the guiding principle remains "a substantial miscarriage of justice". That is not defined in any part of the Statute and in accordance with the second reading speech is intended to adopt the existing understanding of those words at the time of enactment of the Statute. This means that the decision in *Weiss* insofar as it applies to the way in which the meaning of the phrase "substantial miscarriage of justice" is to be given effect applies to S.276(1) of the CPA.

5.21 Fourth, S.276(2) of the CPA requires any appeal be dismissed if the Court is not satisfied of matter of a matter set out in S.276(1). The effect of this provision is that a jury verdict is presumed to be correct unless the appellant satisfies the appellate court of one or more of the matters in S.276(1).

5.22 Finally, S.276(1) operates to ensure that only substantial errors or matters will vitiate a jury verdict.

Context

5.23 Among the purposes of the CPA, set out in S.1 are: to clarify and simplify the laws of criminal procedure and to clarify the tests relating to determination of appeals by the Court of Appeal.

---

[11] *Victorian Parliamentary Hansard, 4 December 2008,* 4985-86.

5.24 Part 6.3 of the CPA sets out the relevant provisions for appeals to the Court of Appeal in respect of indictable matters. The right of appeal against conviction comes from S.274. Section 275 deals with how an appeal is commenced. Section 276, the subject of this appeal deals with the determination of an appeal against conviction.

5.25 Division 7 of Part 6.3 deals with "Powers and Procedures" of the Court of Appeal. Included in this Division are: S.317 which permits the Court of Appeal to order the production of documents, exhibits and other matters relevant to the appeal; S.318 which allows the Court of Appeal to order witnesses to attend; S.319 allows the Court of Appeal to receive the evidence of any competent but not compellable witness; and S.320 which permits the Court of Appeal to appoint a special commissioner to inquire into and report on any question.

5.26 It can be seen therefore that the power to enquire into facts has been retained in the CPA. This is consistent with a continuing obligation for the Court of Appeal to carry out its own review of the facts when exercising its powers.[12]

Appellant's Arguments

5.27 At paragraphs [62] – [76] the appellant suggests that there are 4 matters that need to be considered by a Court. In doing so, the appellant suggests that "substantial miscarriage of justice" consists of two elements. As made clear in *Weiss*, "miscarriage of justice" and "substantial miscarriage of justice" are two separate tests.[6] There is no logic in separating out the word substantial and adopting the authorities on the question of "miscarriage of justice".

5.28 In addition, at paragraphs 75 and 76 of its submissions, the appellant submits that the word "substantial" when read in conjunction with "miscarriage of justice" must mean the loss of a fair chance of acquittal. The appellant provides no particular rationale for this interpretation, other than, it would appear, a reliance on previous formulations of miscarriage of justice by this Court and others.

5.29 As this Court has repeatedly stated, the relevant test is that set out in the statute. Neither *Weiss* or any other case is to be taken as a compete and sufficient paraphrase of the statute.[7]

5.30 What can be taken from *Weiss*, however, are the three fundamental propositions in [39]:

> "... First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt."

[12] See *Weiss v. The Queen* [23].

5.31 These propositions must now operate in a context where the legislation shows a clear policy intention to give primacy to the jury verdict.

5.32 Insofar as the appellant contends that somehow the new provisions require the appellant to prove his or her innocence, such argument is misconceived. The question for the Court when evaluating the evidence as part of determining whether or not a substantial miscarriage of justice has occurred, requires a determination of whether or not the evidence led at trial proves the relevant charge beyond reasonable doubt. It is within that context that the other matters are taken into account. If the Court of Appeal has a reasonable doubt then a substantial miscarriage of justice is established. This process does not reverse the onus of proof.

The Operation of Section 276(1) of the CPA

5.33 It is submitted that the section operates in the following way. There is a single test that must be met, and that is that the appellant satisfy the Court that one of the matters specified in S.276(1) has resulted in a substantial miscarriage of justice. If the appellant fails to do so the jury verdict is taken as correct.

5.34 In determining whether or not a substantial miscarriage of justice has occurred the Court must bear in mind the three propositions from *Weiss* set out in 5.30.

5.35 The Exchequer Rule no longer applies.

Ground 2.1 Failure to Sever

5.36 The appellant's complaint is that the failure to sever count 50 on the presentment from the remaining counts has resulted in a substantial miscarriage of justice. It is said that the substantial miscarriage of justice arose because prejudicial evidence relevant to count 50, which was not admissible on the remaining counts which related to a different victim, tainted the verdicts reached on those other counts.

5.37 The evidence complained of is conveniently set out in [77] – [81] of this Court of Appeal's Judgment. The argument is that the other counts on the presentment were blackmail counts and that the alleged admission by the appellant to the witness Srour that "he's a standover man" would so sway the jury that they would not determine the other matters on their merits.

5.38 It should be noted at the outset that ground 1 before the Court of Appeal was "the verdicts are unreasonable or cannot be supported by having regard to the evidence." In [102] the Court held that the Crown case was overwhelming and the reasons for that are set out.

5.39 The appellant has not appealed that finding. Thus the enquiry in this Court must begin from the premise that this was an overwhelming Crown case and the evidence properly before the jury established each of the charges on which the appellant was

convicted beyond reasonable doubt as was the finding of the Court of Appeal at [101].

5.40 What effect should this Court give to the admission of the inadmissible evidence in this case?

5.41 In its submissions, the appellant states that "if a separate consideration direction could not save the Srour count it is difficult to see how it saves the Rifat count". This statement ignores the significant difference in the situations. Notably, the Court of Appeal concluded at [43] "most of Srour's evidence would have been admissible on the trial of the counts involving Rifat, even if count 50 had not been on the presentment. In respect of those counts, it was principally Srour's evidence concerning the events the subject of count 50 which would have been inadmissible". As such, the amount of inadmissible evidence effecting the Rifat counts was significantly less than in relation to the Srour count, in which only a "small amount" of the Rifat evidence would have been admissible.

5.42 Essentially, had the trials been severed and the trial on the Rifat counts proceeded, the trial would have appeared much the same as the trial that was, in fact, held. This is not the case on the Srour count.

5.43 In addition, on the Rifat counts, the Court of Appeal could rely on the fact that the jury had, quite demonstrably considered each charge separately and paid heed to the judge's directions as they had acquitted the appellant on some charges, his co-accused on other charges and both of them on others. The fact that *Dupas* is, in law a fact, a different kind of case does not take away from the principle that juries can, and do, follow directions. Whilst it is often said that juries ought not have to undertake "mental gymnastics", a separate consideration warning on a single additional count that ought not to have been joined can hardly said to be outside the capacity of an average jury.

5.44 Put another way, the impugned evidence was such an infinitesimally small part of the total evidence led on the Rifat counts, and given the other evidence amounted to an overwhelming Crown case, it is inconceivable that the strong separate considerations direction would not be effective to ensure the jury acted appropriately. That it did is evidenced by the acquittals on many counts.

Resolution of This Appeal

5.45 The approach and reasons given in [70] of the Court of Appeal's Judgment are impeccable and show no error. This appeal should be dismissed.

Part VI: Applicable Statutory provisions

6.1 In addition to the provisions set out in para. 86 of the appellant's submissions the following are relevant:

Criminal Procedure Act 2009 (Vic) Sections 1, 274, 275, 317, 318, 319 and 320.

Part VII: Time estimate

7.1 It is estimated the Respondent's argument would last 30-45 minutes.

Dated: 12 October, 2012

10

Tom Gyorffy S.C.
Counsel for the Respondent

Elizabeth Ruddle
Counsel for the Respondent

ANNEXURE A

Criminal Procedure Act 2009 (Vic)

Section 1

1 Purposes

The purposes of this Act are –

(a) to clarify, simplify and consolidate the laws relating to criminal procedure in the Magistrates' Court, the County Court and the Supreme Court.

.....

(h) to clarify the tests relating to determination of appeals by the Court of Appeal;

Section 274

274 Right of appeal against conviction

A person convicted of an offence by an originating court may appeal to the Court of Appeal against the conviction on any ground of appeal if the Court of Appeal gives the person leave to appeal.

Note
See the definitions of ***conviction, originating court*** and ***original jurisdiction*** in section 3.

Section 275

275 How appeal is commenced

(1) An application for leave to appeal under section 274 is commenced by filing a notice of application for leave to appeal in accordance with the rules of court within 28 days after the day on which the person is sentenced or any extension of that period granted under section 313.

(2) The Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of application for leave to appeal within 7 days after the day on which the notice of application is filed.

Section 317

317 Production of documents, exhibits or other things

For the purposes of this Part, the Court of Appeal may order the production of any document, exhibit or other thing connected with the proceeding if the Court of Appeal considers that it is in the interests of justice to do so.

Section 318

318 Order for examination of compellable witness

(1) For the purposes of this Part, if the Court of Appeal considers that it is in the interests of justice to do so, the Court of Appeal may order any witness who would have been a compellable witness at the trial to attend and be examined before the court, whether or not the witness was called at the trial.

(2) If the Court of Appeal makes an order under subsection (1), it may order that the examination of the witness be conducted, in accordance with the rules of court, before any person appointed by the Court of Appeal for that purpose.

(3) The Court of Appeal may admit as evidence any deposition of a witness taken in an examination under subsection (2).

Section 319

319 Evidence of competent but not compellable witness

For the purposes of this Part, if the Court of Appeal considers that it is in the interests of justice to do so, the Court of Appeal may receive the evidence of any witness (including the appellant) who is a competent but not compellable witness.

Note

As to competence and compellability of witnesses, see Division 1 of Part 2.1 of Chapter 2 of the **Evidence Act 2008**.

Section 320

320 Reference of question to special commissioner

(1) The Court of Appeal may appoint a special commissioner to inquire into and report on any question referred to the special commissioner by the court if –

(a) the question arises on an appeal under this Part or an application for leave to appeal under this Part; and

(b) the question involves –

(i) prolonged examination of documents or accounts; or

(ii) any scientific or local investigation; and

(c) the court considers that the examination or investigation cannot conveniently be conducted before the court; and

(d) the court considers that it is in the interests of justice to do so.

(2) The Court of Appeal may act on the report of a special commissioner to the extent that the court considers appropriate to adopt the report.

(3) The Court of Appeal may determine the remuneration of a special commissioner.