10 **IN THE HIGH COURT OF AUSTRALIA**
SYDNEY REGISTRY

No S314 of 2013

BETWEEN: **SEONG WON LEE**
Second Appellant

AND: **THE QUEEN**
Respondent

~~SECOND~~ APPELLANT'S REPLY

20 1. The reply is in a form suitable for publication on the internet.

2. The respondent argues (RS [17], [33]) that the relevant evidence of the prosecutor Mr Barr concerned reading the transcripts of examination of the first appellant alone and not the second. Basten JA did not address, and made no findings, on the subject. Although the questions asked of Mr Barr came from counsel for the first appellant and concerned his case, it is tolerably clear that the answers encompassed both appellants.

3. First, and notwithstanding an absence of a specific recollection of reading the
30 second appellant's transcript (para [3] of Mr Barr's affidavit at AB 2108) it is apparent from that paragraph that, according to his own practices, Mr Barr did read both sets of transcripts.

4. Further, the answers given by him in cross examination strongly suggest that the answers given were not (somehow) limited to the first appellant (see particularly AB 1166 Lns 20-30, AB 1170 Lns 20-30). Cross examination of the witness concluded with very short questioning by counsel for the second appellant. The answer given (AB 1170 Ln 50 – 1171 Ln 5):-

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"... I had material that [redacted] ..."

also strongly suggests that the witness was not limiting himself in the way suggested by the respondent.

5. Nor is it correct to say (at RS [33] and [40]) that Basten JA's consideration of the three possible "uses" somehow encompassed an assumption that the transcripts had been read (at RS [33] and [40] referring to Basten JA at [159] AB 2290). It is the second appellant's case that the absence of any consideration of the evidence of Mr Barr and Mr Stewart supports a conclusion that the CCA thought that reading and consideration of the account by the prosecutor was not a relevant "use". The respondent goes further and brings Mr Stewart's evidence to account in the analysis by the CCA (at RS [40]). The respondent accepts, earlier in its submissions (at RS [20]), that an argument was put addressed to Mr Stewart's evidence. That evidence was not addressed in the judgment. The only proper inference to draw is that Basten JA did not bring this subject to account because it was also thought to be irrelevant. The second appellant's argument on that subject (AS [34]) is maintained.

6. The respondent also accepts (at RS [41]) that questioning of the second appellant in his examination [redacted] and for this reason makes the concession of impropriety in dissemination of his transcripts. Referring to *R v CB, R v MP* [2011] NSWCCA 264 and *R v Seller, R v McCarthy* (2013) 273 FLR 155 the respondent also accepts that reading and consideration of such material would, or might, warrant a temporary stay to replace the prosecutor with another (at RS [30]).

7. After having cited *Glennon v R* (1992) 173 CLR 592 (at RS [31]), the respondent develops an argument similar to that articulated by Basten JA to the effect that in terms of "practical unfairness" the appellants could not establish a causal knowledge between the impropriety, namely the dissemination of the material, and the outcome of the trial (see, for example, at RS [32] et seq, particularly at [41]-[44]).

8. The argument is set out under a heading, "no possibility of unfairness". Despite one reference to this in the judgment (at [158] AB 2289) neither the content of the analysis by the CCA, nor the language of the judgment, suggest that such a formulation indicated the approach taken, or applied, by the CCA. The focus of the judgment is on "cause" or "outcome" (at [29]-[30] AB 2244), hence the posing of a test requiring proof of "practical unfairness", (at [147] AB 2286, [149] AB 2287, [163]-[164] AB 2291) apparently directed towards whether there was a substantial miscarriage of justice (at [63] AB 2259, [164] AB 2291), such that it was concluded that the second appellant had not "lost a possibility of acquittal" (at [164] AB 2291).

9. *Glennon, Webb and Hay v R* (1994) 181 CLR 41 and other cases in this line of authority, including the recent decision in *Smith v R* [2014] HCA 3, point in another direction. That line of cases is concerned with protection of the integrity of the fact finding process from extraneous influences (and appearances in relation thereto). In these cases the "risk" in relation to a fair trial is not measured against the strength of the evidence or the negative proposition in *Weiss* (at [44]), but against the nature and character of the breach.

10. Cases which cover quite similar territory such as *Crofts v R* (1996) 186 CLR 427 involving impermissible and prejudicial material coming before a jury (and often a refusal to discharge), are analysed in a different way: there the proviso question is framed in terms of whether conviction was inevitable (see at 441, fn 31); hence the reliance on *Maric v R* (1978) 52 ALJR 631 which was a case about inadmissible evidence and the proviso. The rationale for these different approaches must lie in characterising the significance of the breach in question.

11. Had the inquiry in this case focused on whether or not there had been a breach of a "fundamental presupposition" of the trial, namely, the central place of the accusatory system in that trial process, then the analysis would have been different and would necessarily have been directed towards the unauthorised possession (reading and consideration) of the material by the prosecutor. Obviously enough, the

CCA did not have the benefit of this Court's decision in *X7 v Australian Crime Commission* (2013) 248 CLR 92.

12. Cases such as *Glennon, Webb and Hay* and *Smith* also suggest a consistency of approach within the different stages of the criminal justice system. To the extent possible there should be a unity of approach. Thus *Glennon* speaks to both a stay application and the proviso in a coherent, unified way. *CB, MP,* and *Sellar, McCarthy* suggest a similar approach should be taken in this area. Procedurally anterior intervention involving administrative law remedies and no common supervisory jurisdiction, of which cases such as *X7 v Australian Crime Commission* and *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 are examples, also invite a similar coherent approach.

13. Yet, essentially what is envisaged by the judgment of the CCA and further articulated by the respondent in its submissions is a different approach said to be mandated by the terms of the common form appeal provisions. It is to be recalled that s.13(9) of the *NSWCC Act* is intended to protect against prejudice to a "fair trial", the content of which protection has been developed and articulated almost wholly within the context of the common form appeal provisions themselves; cf, eg, *Dietrich v R* (1992) 177 CLR 292 at 299 at 230. *Cesan v R* (2008) 236 CLR 358 at [89].

14. It would be anomalous if at the point of conviction some different and more onerous standard fell on an appellant where there had been a breach of the kind that occurred here.

15. Further, a disinclination to examine the reasons for decisions made, and steps taken, by counsel and solicitors (Basten JA at [158] AB 2289, citing *TKWJ v R* (2002) 212 CLR 124), would not be appropriate if it were necessary to establish a causal connection between the impropriety/illegality and the outcome. What would suffice? Even if, (as the respondent puts), the prosecutor could not cross examine on the transcript itself (at RS [35] citing s.18B(2) of the *NSWCC Act*) that does not sanction

something less, such as reading of the document by the prosecutor and preparation for trial based on such knowledge. Further, it is not clear that the effect of s.18B(2) is to prohibit cross examination based on the transcripts: *Bartlett v The Queen [No.6]* [2013] WASC 304 at [68], [77], citing the decision under appeal in this case, holds otherwise.

16. Nor would an accused (at trial or on appeal) normally be in any position to establish what the prosecution had or hadn't done with the transcripts of an examination, (or indeed the fact of unauthorised dissemination). Yet, the three potential "uses" (at [159] AB 2290) all focus on the prosecution obtaining some actual (measurable) forensic advantage from its possession of the material. In fact, the import of the judgment in its consideration of the three identified uses is that there is nothing wrong with possession and knowledge of such material (at [161] AB 2290) or the making of further investigations and inquiries based on this knowledge (at [160] AB 2290). Given the suggested restraints on cross examination by virtue of s.18D(2) what then would suffice and how could an accused person possibly establish it? How could the strength of the prosecution case be relevant to this inquiry?

17. It is submitted that considerations of this kind strongly favour an approach whereby unauthorised possession and knowledge of the contents of examination transcripts of the kind that occurred here is itself sufficient to establish a miscarriage of justice and that beyond that no further inquiry is required or warranted.

Dated: 14 March, 2014.

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