HIGH COURT OF AUSTRALIA

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S 139 / 2025

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN

FRANK SAMUEL FARRUGIA
Appellant

AND

THE KING
Respondent

APPELLANT'S SUBMISSIONS

Part I – Form of submissions

1 These submissions are in a form suitable for publication on the internet.

Part II – Concise statement of issues

2 Whether a barrister who represents two co-offenders in a sentencing proceeding has a conflict of duties, which results in a material irregularity and a significant possibility of such irregularity adversely affecting the sentence imposed, in circumstances where there is a real possibility that an issue of parity will produce arguable differences between the two co-offenders and where a favourable submission for one co-offender cannot be made because doing so would adversely affect the interest of the other.

3 Whether the threshold for establishing practical injustice in these circumstances allows an appeal court to find by reference to the record of the court below that a more favourable submission on the issue of parity could realistically have resulted in a different outcome.

Part III – Section 78B notices

4 The appellant does not consider that any notice should be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV – Citation of the judgment of the court below

5 The medium neutral citation for the reasons of the Court of Criminal Appeal of the Supreme Court of New South Wales (**CCA**) is *Farrugia v R* [2025] NSWCCA 49.

Part V – Relevant facts

6 On 28 September 2022, the appellant (Mr Frank Farrugia) and a co-offender (Mr Deniz Kanmaz) pleaded guilty in the Local Court of New South Wales to the following offences – which the Crown accurately summarised in written submissions on sentence to the District Court as follows (**CAB 74-75**):

(a) In relation to the appellant that:

(i) Between 17 April 2013 and 7 October 2015, the appellant conspired with others to traffic a commercial quantity of a controlled drug – namely, **20 kg of MDMA and 3 kg of methamphetamine** contrary to ss 11.5(1) and 302.2(1) of the schedule to the *Criminal Code Act 1995* (Cth) ("the Code"). The maximum penalty was life imprisonment and/or 7,500 penalty units.

(ii) Between 20 March 2014 and 7 October 2015, the appellant dealt with proceeds of crime being money worth $100,000 or more – namely, **$957,218** (across 6 transactions) – contrary to s 400.4(1) of the Code. The maximum penalty was 20 years' imprisonment and/or 1,200 penalty units.

(b) In relation to the co-offender, Mr Kanmaz, that:

(i) Between 17 April 2013 and 7 October 2015, Mr Kanmaz conspired with others to traffic a commercial quantity of a controlled drug – namely, **21 kg of MDMA and 9.18 kg of methamphetamine** contrary to ss 11.5(1) and 302.2(1) of the Code. The maximum penalty was life imprisonment and/or 7,500 penalty units.

(ii) Between 17 April 2013 and 24 April 2015, Mr Kanmaz dealt with proceeds of crime being money worth $1,000,000 or more – namely, **$1,785,000** (across 13 transactions) – contrary to s 400.3(1) of the Code. The maximum penalty was 25 years' imprisonment and/or 1,500 penalty units.

7 In the joint sentence hearing which followed, an issue arose as to which of the two offenders ought to be punished more severely. In other words, a question of parity. This

part of the submissions sets out by reference to the record of the proceedings the circumstances in which the parity issue emerged, how the barrister appearing for both offenders addressed that issue and how it affected the sentencing process.

8 The Crown's written submissions on sentence, dated 18 October 2023, emphasised several sentencing principles, including that: (i) "[t]he maximum penalties serve as a yardstick and a basis for comparison between the present cases before the court and the worst case" (**CAB 76 [9]**); (ii) "[i]n determining the appropriate penalty, the fundamental consideration for the Court is, having regard to the maximum penalty, the degree by which the offender's conduct offends against the legislative object of suppressing the illicit traffic of prohibited drugs" (**CAB 76 [9]**); and (iii) as to dealing with proceeds of crime, "[t]he amount of money involved is a highly significant matter and is the primary identifier of what is the maximum penalty for an offence" and, relatedly, that "[t]he number of transactions and the period over which they occurred are also significant matters as they indicate the extent of an Offender's criminality" (**CAB 77 [13(c)-(d)]**). These general principles provided the context for the Crown's submissions on objective seriousness and parity.

9 As to "[t]he offenders' roles", the Crown's submissions on sentence emphasised that "[i]n determining the appropriate sentence to be imposed, it is necessary to consider what each of the offenders actually did in committing the offences" (**CAB 78 [17]**). The Crown broadly characterised "each offender's role" as follows (**CAB 79 [18]**):

(a) "Kanmaz stored drugs and cash for the group at his residence or at Kings Park. The money and drugs were made available to other group members."

(b) "Farrugia sourced drugs for and received drugs from the group."

10 The Crown then relevantly summarised (at **CAB 79 [19(a)-(b)]**) its position on the objective seriousness of the respective conduct as follows:

> a. The objective seriousness of each of Farrugia's and Kanmaz's conduct for the trafficking offences falls within a broad mid-range for offences of their type, with that of Kanmaz is approaching the higher end of the mid-range and that of Farrugia falling within the mid-point of the mid-range for an offence of its type."
>
> b. In relation to the proceeds of crime offences, it is submitted that the conduct for each offender falls into the high range for an offence of its type, noting the offence to be taken into account in relation to Kanmaz is a more serious offence

than the offence to be taken into account with respect to Farrugia. In the case of Kanmaz, while the quantum involved is 'only' almost twice the statutory for an offence of its type, he has a deep involvement with the criminality of the offending conduct in that he was running the syndicate's money laundering cover business. In the case of Farrugia, the quantum involved is just below the statutory threshold beyond which he would have been guilty of the most serious of the money laundering offences.

11 The Crown's submissions (**CAB 80-84 [20]-[49]**) further emphasised the principle that "[t]he weight of the drugs is a highly important factor because of the direct correlation between its acquisition by criminals and the extent of potential harm to the community" (at [27]). The Crown's submissions (at [23]) identified the appellant's role as being "[i]nvolved in the negotiations of price" for the prohibited drugs, "[r]esponsible for sourcing prohibited drugs from others outside the syndicate members", having "access to funds to pay for prohibited drugs", and having "possession of an encrypted blackberry". In comparing Mr Kanmaz's role, the Crown submitted (at [42]) that "[l]ike Farrugia, Kanmaz" had "access to funds to pay for prohibited drugs" and "possession of an encrypted blackberry". Importantly, the Crown added in relation to Mr Kanmaz (at **CAB 83 [42]**) that:

> 42. **Of significance is that Kanmaz also had control and operation of a business called 'Overstock' for the benefit of the syndicate**. The sole purpose of the business was to store and distribute prohibited drugs and proceeds of crime for the Millstream group. Kanmaz's business concealed the group's criminal activities by having a website, corporately branded uniforms, email accounts, an ABN, bank accounts, back to base alarm monitoring, invoice books and invoices with false customer and work details. (Emphasis added.)

12 These matters culminated in the Crown's submissions on the issue of parity. Under the heading "**<u>PARITY</u>**", the Crown submitted (**CAB 88 [66]**) that "Kanmaz should receive a more substantial penalty than that of Farrugia for a number of reasons", including that:

(a) "Kanmaz is to be sentenced to trafficking 21kg MDMA and 9.18kg Methamphetamine compared to Farrugia 20kg MDMA and 3kg Methamphetamine."

(b) "Kanmaz has pleaded guilty to a proceeds of crime offence which carries a maximum penalty of 25 years imprisonment in contrast to 20 years imprisonment for Farrugia proceeds offence."

(c) "Kanmaz has pleaded guilty to an offence of dealing with $1,785,000 contrary to s 400.3(1) which has a maximum penalty of 25 years' imprisonment. This is

compared Farrugia who has pleaded guilty dealing with $957,217 contrary to 400.4(1) which has a maximum penalty of 20 years' imprisonment."

(d) "Kanmaz was involved in more drug supply and money transactions compared with Farrugia."

(e) "Kanmaz has a more extensive criminal record compared to the relatively minor record of Farrugia."

13 In written submissions dated 26 October 2023, filed on behalf of both the appellant and Mr Kanmaz, senior counsel for both offenders submitted that "contrary to the Crown's written submissions … Kanmaz fell just below the midrange of offending while Farrugia would be placed toward the bottom of the midrange of offending" (**CAB 96 [22]**). Senior counsel for both offenders did not, in terms, address in written submissions the Crown's submission on parity. On 27 October 2023, counsel appeared in the District Court at the hearing on sentence "for both Offenders" (**CAB 109, T1.15**) and addressed orally the issue of parity in the following exchange (**CAB 120, T12.20-35**):

> HIS HONOUR: You agree, though, that Mr Kanmaz is more culpable than Mr Farrugia, don't you?
>
> …
>
> HIS HONOUR: I just want to check I've got your submissions right. In your submissions, don't you agree that Mr Kanmaz is more culpable than Mr Farrugia?
>
> DJEMAL: No, I say the opposite.
>
> HIS HONOUR: Do you? You say the opposite of what the Crown says.
>
> DJEMAL: The Crown says Mr Kanmaz is more culpable than Mr Farrugia, and my submission, unless I've articulated it wrongly, Mr Kanmaz is below.

14 Senior counsel then (at **CAB 121, T13.5 to T15.25**) made detailed oral submissions explaining (on behalf of *both* offenders) why "Mr Kanmaz is below". This included that "as far as the group and the hierarchy goes, Mr Kanmaz is at the bottom, there's no one lower than him" (T13.14-15) and that "Mr Kanmaz doesn't do any sourcing, doesn't do any negotiating, doesn't do any price setting" (T13.19-20). As to the matter "[o]f significance" identified by the Crown – that "Kanmaz also had control and operation of a business called 'Overstock' for the benefit of the syndicate" – senior counsel sought to turn an aggravating factor into a mitigating factor for Mr Kanmaz. The barrister appearing for both offenders did this by emphasising (T13.31-34) that "consistent with

being at the bottom rung … if there's a raid between 2014 and 2015, he's the man. He's the man who has leased Overstock. He's the man that's got the bank account for Overstock." And that (T14.5-7) "if they wanted to investigate Overstock, he's the first person they're going to go to."

15 During the Crown's oral submissions, the sentencing judge (at **CAB 129, T21.17.23**) put to the prosecutor that "you say Kanmaz is objectively worse than Farrugia. Mr Djemal says the opposite … Who's right?" In response, the prosecutor "concede[d] orally … that Mr Djemal is right" (T21.25.-26). The "simple way to describe it", according to the prosecutor, was essentially to adopt "the role that has been attributed to Mr Kanmaz" by his counsel (T21.31-32). The matter was adjourned part-heard.

16 The proceedings resumed on 23 November 2023. As the sentencing judge sought to confirm at the outset, "[w]e're dealing with Mr Farrugia today" (**CAB 137, T1.21**). The Crown confirmed this was correct (T1.23). Senior counsel, on this occasion, only announced his appearance "for Mr Farrugia" (T1.26). The resumed hearing, in substance, did not involve the sentencing of Mr Kanmaz. Nonetheless, in appearing "for Mr Farrugia", the following exchange occurred on the issue of parity (**CAB 153, T17.37-T18.9**):

> HIS HONOUR: Nor have you dealt with parity.
>
> DJEMAL: Well my submission with respect to parity is I think, as I was indicating on a previous occasion, if Mr Farrugia is someone who is towards, as we submit, the bottom end of the mid broad range, Mr Kanmaz is below that for all the reasons that I submitted on the previous occasion. He is a wage earner. And that's categoric. I mean when I brought your Honour to all the messages he was not a person that had a stake in the drugs. And in the agreed facts you'd not find anyone really lower than him as far as the group when you look at Pitt, Guven, Battah, and whoever else may have been involved, it's obvious that the man - and the man that bore the risk with respect to overstock, with respect to holding onto the things, having them available, and it was completely all under direction.
>
> Your Honour is not going to find anything where he's actually stating and doing something unilaterally or with autonomy. And it's for those reasons I say he falls below the mid. I accept that he's not right at the bottom because he is worth of offending. Yes, it's a significant operation, but as far as sophistication goes your Honour's not going to find these men have brought about, managed, administered, or set up the sophistication. Especially Mr Kanmaz, he's someone that operated at the bottom rung of it. And it's for that reason that I submit that he'd be below Mr Farrugia on that. And I think there was an exchange on that particular point on the last occasion.
>
> HIS HONOUR: Yes, the crown has changed its mind from its written submissions.

In short, senior counsel's final submission at the resumed hearing convened for the purpose of addressing Mr Farrugia's case focused, on the issue of parity, on minimising Mr Kanmaz's role and advancing Mr Kanmaz's interests.

17 On 8 December 2023, Judge Berman sentenced the appellant to 11 years' imprisonment, with a non-parole period of 7 years and 6 months. Mr Kanmaz was sentenced to 9 years' imprisonment, with a non-parole period of 6 years and 6 months. His Honour's sentencing remarks largely reflected the position on parity ultimately advanced in senior counsel's submissions outlined above (**CAB 24**) – that is, finding that "Farrugia [was] more deeply involved than Kanmaz, the latter of whom was not a profit sharer" and that "Mr Kanmaz [being] responsible for storing the drugs and money demonstrates his relatively lowly position in the hierarchy".

18 Before the CCA, the appellant sought leave to appeal on the ground that the proceedings miscarried because the two offenders were not separately represented. The appellant did not waive legal professional privilege and sought to establish the irregularity based on the record of proceedings. The appellant's submissions in the CCA identified the barrister's conflict by reference to the parity issue. In particular, the appellant (to demonstrate the existence of a conflict and thereby an irregularity in the sentencing process) relied upon a counterfactual proposition – that an independent lawyer acting for the appellant (and not also acting for Mr Kanmaz) would not have contradicted the Crown's submission on parity (**CAB 206**, T6.47-48) and that the appellant could have received a less severe sentence as a result. In the CCA, the appellant did not challenge the sentencing judge's acceptance of the Crown's eventual submission on relative culpability, which reflected the position advanced by senior counsel for both offenders.

19 The CCA handed down its judgment granting leave but dismissing the appeal on 9 April 2025. Price AJA (at **CAB 39 [3]**) stated that "the concern of this Court is to avoid practice injustice" and concluded that "[t]he applicant's arguments fall well-short of establishing a practical injustice". Justice Hamill gave the leading judgment (Price AJA at [1] and Campbell J at [4] agreeing). The CCA (at **CAB 59 [64]**) framed "the question for determination [as] whether the sentencing proceedings amounted to a miscarriage of justice" and observed that "[t]wo intrinsically connected anterior questions are whether Mr Farrugia should have had separate representation and whether counsel appearing for both offenders had a conflict of interest". The CCA, at [65], found that "[t]he evidence does not support such a conclusion." On this point, the CCA (at [65]) said:

> There is no evidence as to the applicant's instructions to his solicitor and barrister, and no evidence as to the discussions between Mr Farrugia, his solicitor and senior counsel as to what the applicant said about his role, and what submissions were to be made in relation to his role and objective criminality relative to Mr Kanmaz or otherwise. There is no evidence of the advice provided by counsel and nothing to suggest that the applicant was not provided with advice as to his representation.

20 Earlier in the judgment, the CCA (at [60]) held that "[t]here is no rule of practice or ethics that one counsel cannot act for two co-offenders in sentencing proceedings … whether (or not) a parity issue will arise in the case." The CCA then stated that "[a] conflict of interest will not be established merely because appellate counsel can conjure submissions that 'could' have been made" and that "[t]he fact that further or different submissions 'could' have been made establishes little, if anything." The CCA (at [57]) also recorded a concession by counsel appearing for Mr Farrugia in the CCA that the Court was "entitled to proceed on the assumption that there was transparency by the lawyers about the submission that would be put and about continuing to act for the other offender". The CCA (at [58]-[59]) then rejected a submission that the circumstances nonetheless gave rise to a conflict, and a material irregularity, because "the public interest in ensuring … the appearance of justice" based on the "duties of counsel" meant that "consent is no answer" (see also **CAB 229, T29.1-21**). In response to that submission invoking the public interest, the CCA again held (at [59]) that "[t]he evidence does not allow such a finding."

21 The CCA (at [67]) found that the submissions made to the District Court "concerning a relative evaluation of the objective criminality of the two offenders were correct" which explained why the "Prosecutor ultimately agreed with them and why Judge Berman … accepted them". The CCA (at [68]) also concluded that, "[o]n the material before the Court, the sentence was within an appropriate discretionary range and the sentences imposed on the two offenders are not such as to engender a *justifiable* sense of grievance in the applicant" (emphasis in original).

Part VI – Appellant's argument

22 The appellant does not challenge the CCA's conclusion at [68] and this appeal does not concern the correctness of the sentencing judge's acceptance of the parties' ultimate submissions as to relative culpability or how the sentencing discretion was exercised.[1] The argument here fastens upon the flawed process introduced by the barrister's conflict

[1] Cf. *House v The King* (1936) 55 CLR 499.

in appearing for both offenders in the same sentencing proceeding where parity was in issue and where the two offenders had conflicting interests on that issue. The question is whether the real possibility that the parity issue would produce arguable differences as between the two co-offenders represented by the same barrister created a situation of conflicting duties which required the return of one or both briefs and vitiated the process by denying the appellant an opportunity to obtain a better outcome. A ground raising a denial of procedural fairness (or bias) is logically anterior to other "substantive" issues, and generally must be dealt with first, because it "strike[s] at the validity and acceptability of the trial and its outcome."[2] In such cases, "a retrial will be ordered irrespective of possible findings on other issues" because "[e]ven if a judge is found to be correct, this does not assuage the impression that there was an apprehension of bias".[3]

23 Further, although the CCA, the parties, and other sources of case law have often referred to the issue as one of "conflict of interest", it is more accurately described as a barrister's conflict between "competing duties".[4] There is authority recognising that in this context it is preferable to speak of a lawyer's conflict of duty with duty.[5] The present case is a paradigm example of a barrister's conflict of duty, or competing duties, in representing two clients with adverse interests in the same sentencing proceeding. The real possibility of a conflict arose in circumstances where – in the joint representation of the two men – a comparison of each offender's conduct and relative culpability was inevitable. The parity issue in this case illustrates that point.

24 Despite appropriately framing the issue (at CCA [64]), the CCA (at [64]-[65]) then erred by applying the wrong principles for determining whether the barrister appearing for both offenders had a conflict of duty (or conflict of interest) and whether the proper administration of justice required that "Mr Farrugia should have had separate representation" (CCA [64]). The error in the CCA's judgment is also expressed in its conclusion (at [1]) that "the evidence does not support the applicant's contention that senior counsel had a conflict of interest" – including because "[t]here is no evidence as to the applicant's instructions to his solicitor and barrister … about his role, and what submissions were to be made in relation to his role and objective criminality relative to

[2] ***Concrete Pty Ltd*** *v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [117] (Kirby and Crennan JJ) in the analogous context of bias; see *Carl v R* [2023] NSWCCA 190 at [2] (Leeming JA) and *Jamal v Director of Public Prosecutions (NSW)* [2019] NSWCA 121 at [53] (Gleeson JA) which applied this principle in the context of procedural fairness complaints.
[3] *Concrete Pty Ltd* (2006) 229 CLR 577 at [117] citing *Antoun v The Queen* [2006] HCA 2; 80 ALJ 458 at [2] (Gleeson CJ).
[4] See *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165 at [78] (McHugh, Gummow, Hayne and Callinan JJ).
[5] ***Spincode*** *Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 at fn 26 and [41] (Brooking JA) citing Paul Finn, *Fiduciary Obligations* (1977), Chapter 22 titled "Conflict of Duty and Duty".

Mr Kanmaz or otherwise" (CCA [65]). Relatedly, the CCA erred in finding (at [3]) that "[t]he applicant's arguments fall well-short of establishing a practical injustice."

25 For the following reasons, the correct application of principle establishes that counsel had a conflict which caused a material irregularity, and the appropriate relief is remittal.

The principles relevant to identifying the conflict of duty

26 The CCA's error in failing to identify the barrister's conflict in this case flows from its approach (at CCA [65]) which effectively required evidence of a particular character (including confidential and privileged communications between client and lawyer). The correct approach focuses the inquiry upon what is required by the proper administration of justice upon applying an objective standard.

27 As a starting point, "where a miscarriage of justice is said to arise from a failure of process, it is the process itself that is judged, not the individual performance of the participants in the process."[6] Generally, "a complaint that counsel's conduct has resulted in an unfair trial will be considered by reference to an objective standard, and without an investigation of the subjective reasons for that conduct."[7] Further, "[t]o the extent to which it is reasonably possible, the focus of attention should be the objective features of the trial process" and, therefore, "as far as justice permits, the enquiry should be objective."[8]

28 The "objective standard" in this case is informed by several systemic features. The first recognises the role of counsel in the adversarial system of justice and the professional duties of a barrister in that context which require "strict observance".[9] In a practical sense, the advocate's duties are expressed in professional conduct rules[10] (which have the force of statute) as well as coordinate obligations in contract, under the general law, and in equity. The operation of professional conduct rules and other legal principles in this area also recognises that barristers are "in a relationship of intimate collaboration with the judges" and discharge functions in "the service of the law to the community".[11]

29 In expressing one of the core duties, rule 35 of the *Legal Profession Uniform Conduct **(Barristers) Rules** 2015* (NSW) provides that "[a] barrister must promote and protect

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[6] ***Nudd*** *v The Queen* (2006) 80 ALJR 614 at [8] (Gleeson CJ).
[7] *Nudd* (2006) 80 ALJR 614 at [9].
[8] *Nudd* (2006) 80 ALJR 614 at [10].
[9] See *Tuckiar v The King* (1934) 52 CLR 335 at 347 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).
[10] See, in particular, rules 4(e), 8(b)-(c), 23 and 35 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW).
[11] ***Ziems*** *v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298 (Kitto J).

fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person." Also, relevantly to this case, rule 119 provides that a "barrister who is briefed to appear for two or more parties in any case must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict" and that the barrister must return the brief (or briefs) in certain circumstances "so as to remove that possibility of conflict".

30 As this case demonstrates, the professional conduct rules have a coordinate operation – that is to say, where the interests of two clients come into conflict, a barrister may be unable to discharge his or her duty to the court because of the court's concern that it should have the assistance of independent legal representation for the litigating parties.[12] In other words, a barrister's duties to the client and to avoid conflicts are coordinate with (and not siloed from) a barrister's paramount duty to the court. The duty to the court is not "owed to a particular judge" but rather "to the larger community which has a vital public interest in the proper administration of justice."[13] Thus, the integrity of the justice system and the concomitant preservation of public confidence in the administration of justice depend on lawyers acting with perfect good faith, untainted by divided loyalties of any kind.[14]

31 In the context of joint representation in criminal proceedings, intermediate appellate authority in Australia and overseas authority recognise the real risk of conflicts. In the United States Supreme Court decision of ***Holloway*** *v Arkansas*,[15] Burger CJ (writing for the majority) observed that "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing" including because "a conflict may also prevent an attorney from … arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another." Chief Justice Burger also stated that the inquiry into whether there is a conflict may be conducted "without improperly requiring disclosure of the confidential communications of the client."[16]

[12] David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63 at 93.
[13] David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63 at 63.
[14] David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63 at 93; referred to with approval in *Mokbel v The King* [2025] VSCA 243 at [198]. See also *R v Szabo* [2001] 2 Qd R 214 at 215 (de Jersey CJ).
[15] 435 U.S. 475 (1978). See also *R v Baharloo* (2017) 348 CCC (3d) 64 where the Court there identified a concern that a lawyer in a position of conflicting duties may "soft peddle" the defence of one client and thereby prejudice the other.
[16] *Holloway* at 435 U.S. 487 (1978), and footnote 11. The minority opinion, at 435 U.S. 487 (1978) and footnote 2/1, rejected the proposition that "the courts will be unable to pursue a meaningful inquiry without insisting on a breach of confidentiality."

32 Further, the decision of the Ontario Court of Appeal in *R v Silvini*,[17] which referred with apparent approval to *Holloway*, framed the "conflict of interest" issue not merely as a question of fact requiring evidence of a particular type (including privileged communications) but rather as a matter of ensuring "that the adversarial system produces a fair trial". The Court in *Silvini* also gave a further and powerful reason why insisting on waiver of privilege and adducing "evidence as to the applicant's instructions to his solicitor and barrister" including "about his role" (CCA [65]) is irrelevant – namely, that the barrister's conflict itself creates threshold problems because an accused person has a right "to the competent advice of counsel unburdened by a conflict of interest." Consistently with these principles, the Victorian Court of Appeal recently observed in *Mokbel v The King* that "[e]ach person who is charged with a criminal offence is entitled to be represented by counsel who is entirely independent, objective and free of any conflict of interest."[18]

33 The Queensland Court of Appeal in *R v **Pham***[19] noted "the very real danger of a conflict of duties where a firm of solicitors or a legal practitioner acts for two or more clients in the same or related criminal matters" and described it as a "practice fraught with danger".[20] It was then observed that "[u]nanticipated evidence or submissions can result in a conflict of the duties owed to co-defendants, with a risk of real prejudice to one or all co-defendants" – especially where "[o]ne or a number of defendants may be more culpable than others".[21] Ultimately, it was said that the practice of joint representation in criminal proceedings "is apt to undermine public confidence in the legal profession and should be discouraged" and that it should only occur where "there is no possibility of a conflict existing or emerging".[22]

34 In view of these principles, the correct standard for determining whether a barrister has a conflict in appearing for two offenders is not merely a matter for proof by evidence. The inquiry is one that reflects what is necessary "to ensure the due administration of justice and to protect the integrity of the judicial process and in order not only that justice be done but be manifestly and undoubtedly be seen to be done".[23] In *Spincode*,[24] Brooking JA expressed the test as whether "a fair-minded, reasonably informed member

[17] (1991) 5 OR (3d) 545 – referred to with approval by the Canadian Supreme Court in *R v Neil* [2002] 3 SCR 631 at [19], [39].
[18] [2025] VSCA 243 at [710] (McLeish, Kennedy and Kay JJA).
[19] [2017] QCA 43 at [58] (McMurdo P, Morrison JA agreeing at [67] and Philippides JA agreeing at [80]).
[20] *Pham* [2017] QCA 43 at [58] (McMurdo P).
[21] *Pham* [2017] QCA 43 at [59] (McMurdo P).
[22] *Pham* [2017] QCA 43 at [60] (McMurdo P).
[23] ***Grimwade** v Meagher* [1995] 1 VR 446 at 455 (Mandie J).
[24] (2001) 4 VR 501 at [40] (Brooking JA).

of the public would conclude that the proper administration of justice required that the counsel concerned be prevented from appearing in the action because of real risks of lack of objectivity and of conflict of interest and duty."

35 The applicability of this standard to determine the existence of a relevant conflict is not limited to cases where a party to a proceeding applies to restrain a lawyer from acting. In ***Maclean*** *v Brylewski*,[25] the Full Court of the Federal Court (Jackson and Moore JJ) applied this standard in dealing with a ground of appeal asserting a denial of procedural fairness by reason of the conflict of interest of the appellant's lawyer at first instance. The plurality observed that "[t]he jurisdiction concerns independence" and that "[t]he integrity of the judicial process is 'undermined if solicitors or counsel do not possess the objectivity and independence which their professional responsibilities and obligations to the Court require of them'".[26]

36 The corresponding aspect of this principle is that disqualification of a practitioner from acting is "not imposed as a punishment for misconduct" but "[r]ather it is a protection for the parties and for the wider interests of justice" because "[t]he legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice."[27] Thus, as the plurality observed in *Maclean*, "the need to restrain a practitioner from acting in a position of conflict can arise even when the client has consented to the conflict".[28] The plurality explained that "the principle fundamentally concerns the need for a trial that is fair, but also seen to be fair" and that this "arises from the same wellspring as the principles of natural justice or procedural fairness".[29] The appellant's contentions in the present appeal invoke the same principles.

37 As to the specific standard for determining a relevant conflict of duty, the law in Australia was first stated in *Grimwade*. In *Porter v Dyer*,[30] the Court there formulated the test as being whether a fair-minded, reasonably informed member of the public *would* conclude that the proper administration of justice requires that a practitioner be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice.[31] In that case, the Court noted that there was a

[25] [2025] FCAFC 133 (Jackson and Moore JJ).
[26] *Maclean* [2025] FCAFC 133 at [18] citing *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 at 590 (Thomas J).
[27] *Black v Taylor* [1993] 3 NZLR 403 at 412 (Richardson J) cited with approval in *Maclean* [2025] FCAFC 133 at [19].
[28] *Maclean* [2025] FCAFC 133 at [21] citing *Afkos Industries Pty Ltd v Pullinger Stewart (a firm)* [2001] WASCA 372 at [34] (Murray, Anderson and Steytler JJ agreeing) and *Charisteas v Charisteas* [2022] FedCFamC1A 160 at [53] (Alstergren CJ, McClelland DCJ and Aldridge J).
[29] *Maclean* [2025] FCAFC 133 at [22] citing with approval *Black v Taylor* [1993] 3 NZLR 403 at 412 (Richardson J).
[30] [2022] FCAFC 116 at [113] (Lee J, Besanko and Abraham JJ agreeing).
[31] See also *Maclean* [2025] FCAFC 133 at [24].

"difference between the expression of the test" in the authorities as to whether the correct formulation is whether the hypothetical member of the public "would" or "might" form the relevant conclusion. The plurality in *Maclean* identified the issue but held that it was "not necessary to enter into the controversy".[32]

38 This Court should resolve the "controversy" in the authorities by declaring that "might conclude" is the correct formulation. For the purposes of determining whether the barrister who appeared at the sentencing proceeding in this case had a vitiating conflict of duty or conflict of interest, the test should be:

> Whether a fair-minded, reasonably informed member of the public might conclude that the proper administration of justice requires that a practitioner be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice.

39 This formulation coheres with the test for apprehended bias. In those cases, "[t]he 'double might' serves to emphasise that the criterion is concerned with 'possibility (real and not remote), not probability'."[33] That justification for the "might" formulation also highlights the utility and greater coherence of its application to determining a barrister's conflict of duties. In particular, the *Barristers Rules* repeatedly uses the formulation "real possibility" (and not probability) – for example, rule 119 requires a barrister to determine "whether the interests of the clients may, as a real possibility, conflict". The "might" formulation also appropriately and better reflects the caution required in the joint representation of conflicting client interests as well as the general guidance in criminal proceedings that "[a]ny doubt about a conflict should be resolved in favour of separate representation".[34]

40 The effect of these principles and the command in rule 119 is that, in sentencing cases, where there is a real possibility of parity producing arguable differences between the two putative clients, there is already a conflict. The existence of that real possibility forecloses a dual brief. There is no question of waiting to see whether the outcome of the case is in fact affected by the conflict. The administration of justice does not see that this issue depends upon the conflict in fact having influenced the outcome in any

[32] *Maclean* [2025] FCAFC 133 at [24].
[33] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at [37] (Kiefel CJ and Gageler J) quoting from *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [7].
[34] *Criminal Proceedings Manual*, Victoria, 6 May 2025, Chapter 7.1, [30] citing *R v Clark* (1996) 91 A Crim R 46; *R v Mills* [1995] 1 WLR 511.

particular way. This supports, in the context of this case, an understanding of the concept of practical injustice which focuses upon process.

The conflict of duty and practical injustice in this case

41 Having regard to the matters set out above, the appellant's sentencing proceeding miscarried and resulted in practical injustice because the barrister appearing for him and for Mr Kanmaz had a conflict which vitiated the process. The barrister's conflict of duty arose in circumstances where, as a real possibility, the interests of the appellant and Mr Kanmaz were in conflict once the Crown made its submissions on the issue of parity.

42 The barrister in this case, as counsel for appellant, was not necessarily duty bound to adopt the Crown's submission on parity. The duty to the client in this context requires a barrister to form a judgment upon considering the whole case, including the appropriateness or cogency of any submission and whether accepting or adopting a particular concession could adversely impact other aspects of the client's case. Nonetheless, in this case, the Crown's submissions on parity were properly made, and it would have been appropriate for the appellant's counsel to adopt (or, at least, not dispute) them. Indeed, senior counsel's exchanges with the sentencing judge (**CAB 120, T12.20-35**) suggest that doing so would likely have been to the appellant's advantage (and to Mr Kanmaz's disadvantage).

43 In these circumstances, the integrity of the sentencing process required the barrister appearing for the appellant to have the capacity to make a forensic decision about whether to accept the Crown's submission on parity without the distraction or burden of competing duties to two clients who, as a real possibility, had adverse interests on that issue. Consistently with the principles outlined above, the administration of justice and the appearance of justice being done in this case required compliance with rule 119 of the *Barristers Rules*. Once the real possibility of conflicting client interests on the issue of parity arose, rule 119(b) operated without exception to require the barrister to "remove that possibility of conflict" by returning the brief – and neither consent (nor waiver) by the client could provide any other option. The appellant could not waive his barrister's conflict of duties nor the Court's requirement for a procedurally fair hearing. That is the case notwithstanding the appellant's concession about "transparency by the lawyers" (recorded by the CCA at [57]; **CAB 229, T29.4**).

44 The "practical injustice"[35] flows from the appellant's loss of an opportunity to be represented by independent counsel who could make submissions on parity uncomplicated by a conflicting duty to Mr Kanmaz who had an opposing interest on that issue. Appearing for two offenders whose interests are in conflict on a material issue is problematic because it introduces an element in an advocate's decision-making which should not exist. Contrary to the premise of the CCA's holding (at [2]-[3]), this is not a case where a miscarriage of justice was occasioned by a mere flaw in submissions. The defect in process was more fundamental.

45 In *Minister for Immigration and Border Protection v **WZARH***,[36] Gageler and Gordon JJ explained that "[t]he concern of procedural fairness … is with procedures rather than with outcomes". Their Honours observed that, while "the concern of procedural fairness is to 'avoid practical injustice'",[37] "*Lam* is not authority for the proposition that it is incumbent on a person who seeks to establish denial of procedural fairness always to demonstrate what would have occurred if procedural fairness had been observed".[38] And, where the "procedure adopted … can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome".[39] Thus, "[t]he practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given".[40]

46 This Court applied the above statements of principle in ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[41] and relevantly said that "[w]here the error is a denial of procedural fairness … the court may readily be able to infer that, if fairly put on notice of that fact or issue, the applicant might have addressed it by way of further evidence or submissions". And "it is 'no easy task' for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome".[42] Moreover, there are some categories of cases (and the categories are not closed) that will necessarily satisfy the requirement of

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[35] *Re Minister for Immigration and Multicultural and Indigenous Affairs; **Ex parte Lam*** (2003) 214 CLR 1 at [37] (Gleeson CJ).
[36] (2015) 256 CLR 326 at [55].
[37] *WZARH* (2015) 256 CLR 326 at [57].
[38] *WZARH* (2015) 256 CLR 326 at [58].
[39] *WZARH* (2015) 256 CLR 326 at [60].
[40] *WZARH* (2015) 256 CLR 326 at [60].
[41] (2024) 280 CLR 321 at [15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ) citing *WZARH* (2015) 256 CLR 326 at [58]-[60]; ***Nathanson*** *v Minister for Home Affairs* (2022) 276 CLR 80 at [33], [55]-[56], [63], [76].
[42] *LPDT* (2024) 280 CLR 321 at [15] quoting *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146.

materiality "irrespective of any effect that the error might or might not have had on the decision that was made in fact".[43]

47 Although these principles developed in the adjacent context of administrative law rather than criminal law, this Court applied a cognate principle of materiality in ***Brawn*** *v The King*[44] and ***MDP*** *v The King*.[45] Indeed, Edelman J in *MDP* stated that "[i]n principle, the approach to whether an error is material ought to be the same whether the question is being asked for the purposes of a criminal appeal, a civil appeal, or an application for judicial review".[46] The materiality threshold is whether the error or irregularity "could realistically" have affected the outcome – which is a threshold that is "not onerous".[47] Following *Brawn* and *MDP*, there is no substantive difference in the threshold for materiality as stated in those cases and the need to demonstrate "that the failing or error of counsel was a material irregularity and that there is a significant possibility that it affected the outcome".[48] The CCA (at [1] and [64]) framed and determined the issue by reference to the latter standard. Relevantly, the CCA (at [1]) held that the appellant "has not demonstrated that there is a significant possibility senior counsel's joint representation adversely affected the sentence imposed upon him."

48 For the reasons outlined above, the CCA was wrong to make that finding. As noted above, senior counsel appearing for both the appellant and for Mr Kanmaz was placed in a situation of conflicting duties to each client which followed inexorably from the Crown's approach to parity. The existence of those conflicting duties and the impact it had on the proceeding constituted an irregularity in the process. In order to establish "practical injustice" as a result of that irregularity, the appellant did not need "to demonstrate what would have occurred if procedural fairness had been observed".[49] That is, the appellant does not need to establish that, without the irregularity, he *would* have received a lesser sentence than Mr Kanmaz. In determining whether it could realistically have made a difference to the outcome, it is enough that "[a]s a matter of reasonable conjecture … the appellant may have been able to present evidence … and to make submissions that could have led to a different characterisation" of the relevant

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[43] *LPDT* (2024) 280 CLR 321 at [6].
[44] (2025) 99 ALJR 872 at [10] (Gageler CJ; Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).
[45] (2025) 99 ALJR 969.
[46] (2025) 99 ALJR 969 at [64] (Edelman J).
[47] *Brawn* (2025) 99 ALJR 872 at [10].
[48] *TKWJ v The Queen* (2002) 212 CLR 124 at [79] (McHugh J). This Court in *Brawn* (2025) 99 ALJR 872 at [15] did not address the materiality threshold where the asserted error or irregularity involves the conduct of counsel.
[49] *WZARH* (2015) 256 CLR 326 at [58].

issue.[50] Indeed, the appellant's submission to the CCA identified several of the submissions that "could have been made" (**CAB 175-177 [30]-[36]**).

49 A further reason (drawing upon an imperfect but informative analogy) why the appellant in this case does not need to demonstrate that he would have received a different and lower sentence can be observed from the line of authority in ***Lee*** *v The Queen*[51] and *X7 v Australian Crime Commission*.[52] In particular, in *Lee*, this Court stated that where "a case concern[s] the very nature of a criminal trial and its requirements in our system of criminal justice" it "do[es] not fall to be decided by reference to whether there can be shown to be some 'practical unfairness' in the conduct of the appellants' defence affecting the result of the trial".[53] Although appearing in a different forensic context, the underlying principle – and its utility in this case – can be seen in its correspondence to the principle stated in *Brawn*, that "[t]he establishment of a fundamental error or irregularity will necessarily mean that there was a substantial miscarriage of justice".[54]

Remittal is the appropriate relief

50 If this Court accepts the above arguments, the appropriate relief is remittal to the District Court for a fresh hearing, under s 12(2) of the *Criminal Appeal Act 1912* (NSW), which provides that the CCA "may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made." This power has been exercised in many appeals against sentence under s 5(1). In *R v* ***Jacobs Group***,[55] the Court said that "there is no constraint on the ability of the Court of Criminal Appeal to remit a matter for resentencing by a trial court" and that s 12(2) confers a "broad, general discretion".[56] The circumstances in which the power will be exercised "are varied and cannot be predicted in advance".[57]

51 In *Betts v The Queen*,[58] the joint judgment noted an unresolved "tension" between ss 6(3) and s 12(2) but acknowledged "[t]he utility of a power of remitter … where the

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[50] *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at [39] (Kiefel CJ, Keane and Gleeson JJ).
[51] (2014) 253 CLR 455 (French CJ, Crennan, Kiefel, Bell and Keane JJ).
[52] (2013) 248 CLR 92.
[53] *Lee* (2014) 253 CLR 455 at [43].
[54] *Brawn* (2025) 99 ALJR 872 at [9]. See also *MDP* (2025) 99 ALJR 969 at [3] (Gageler CJ), [11] (Gordon and Steward JJ), [56], [60], [65] (Edelman J), [78]-[79], [106] (Gleeson, Jagot and Beech-Jones JJ).
[55] [2023] NSWCCA 280 (Bell CJ, Walton and Davies JJ).
[56] *Jacobs Group* [2023] NSWCCA 280 at [15] and [17]. *Jacobs Group* was a sentence appeal under s 5D. Accordingly, insofar as the remarks in that case might be thought to apply to cases involving appeals under s 5(1), they are *obiter dicta*.
[57] *Jacobs Group* [2023] NSWCCA 280 at [17], citing *Campbell v R* [2018] NSWCCA 87 at [72] (Hamill J, Bathurst CJ and Schmidt J agreeing).
[58] (2016) 258 CLR 420 (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

sentence hearing has been tainted by procedural irregularity".[59] Section 6(3), read literally, requires the court to dismiss the appeal unless of the opinion that a lesser sentence is warranted. However, as Basten JA explained in ***O'Neil-Shaw*** *v R*,[60] such a reading "would deny an applicant the right to an effective appeal against sentence where the sentencing process has miscarried, but this Court is unable to determine what is the appropriate sentence."[61] His Honour explained, at [32], that the power in s 12(2) is not to be understood as inconsistent with the scope of s 6(3). This interpretation promotes the Act's primary purpose: to confer power on the CCA to provide a remedy for miscarriages of justice.

52 In ***Tarrant*** *v R*,[62] the Court upheld a ground alleging apprehended bias and remitted the matter under s 12(2) without deciding the remaining grounds, citing (at [7]) *Concrete Pty Ltd*.[63] The Court accepted (at [8]) that if bias were established, the power in s 6(3) "would not be engaged in circumstances where no valid sentence had yet been determined." The Court set aside the sentence without resort to s 6(3) and made no finding that it was functionally incapable of determining the appropriate sentence for itself. *Tarrant* and *O'Neil-Shaw* demonstrate that the power in s 12(2) to remit a matter to a trial court for determination carries with it a power to set aside orders to facilitate that determination.

53 A range of matters inform the exercise of the broad discretion in s 12(2). In this case, the defect is procedural rather than a defect in the evaluation of the relevant sentencing factors. The nature of the defect calls for remittal. As analysed above, the barrister's conflict here is coextensive with a denial of procedural fairness. In such cases (as with apprehended bias), the appropriate remedy will be the same, namely, a new trial.

54 In *Maclean*, in determining whether the appellant was denied procedural fairness as a result of her lawyer's "incurable conflict",[64] Stellios J found that she was "denied a fair opportunity to present her case."[65] As to whether the Full Court should rehear the annulment application on appeal or remit the matter, his Honour said that the appellant

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[59] *Betts* (2016) 258 CLR 420 at [19] referring to *O'Neil-Shaw v The Queen* [2010] NSWCCA 42 at [30] and [56]. See also *Shi v R* [2017] NSWCCA 126 at [10] (Hoeben CJ at CL, Harrison and Bellew JJ) where remittal was the "preferable course".
[60] [2010] NSWCCA 42 at [30] (Basten JA, Howie and Johnson JJ agreeing).
[61] Cited in *Betts v The Queen* (2016) 258 CLR 420 at [19] and in *R v Jacobs Group* [2023] NSWCCA 280 at [15].
[62] [2018] NSWCCA 21 (Basten JA, R A Hulme J, Hidden AJ).
[63] (2006) 229 CLR 577 (Gummow ACJ) at [2]; see also Kirby and Crennan JJ at [117] and Callinan J at [172].
[64] *Maclean* [2025] FCAFC 133 at [68] and [110].
[65] *Maclean* [2025] FCAFC 133 at [119].

"should not be bound by the forensic decisions that were made … and should be provided with a fresh opportunity to present her case."[66] The matter was remitted.

55 The outcome and reasoning in *Maclean*, in comparable circumstances albeit that *Maclean* was a civil case under a different statutory scheme, supports remitting the present matter for rehearing. This would restore the appearance (as well as the reality) of fairness after an initial hearing vitiated by a conflict which caused a procedural irregularity. The appellant had a right to a fair hearing, and the most effective way to vindicate that right and restore procedural integrity is to remit under s 12(2). This will also restore fairness to the process by preserving the parties' usual appeal rights.[67]

56 In all the circumstances, remittal under s 12(2) is the appropriate discretionary relief.

Part VII – Orders sought

57 The orders sought by the appellant are:

(a) Appeal allowed.

(b) Set aside order 2 made by the CCA on 9 April 2025 and, in lieu thereof, order that the appeal to that Court be allowed, the sentence quashed and that the proceedings be remitted to the District Court of New South Wales.

Part VIII – Estimated time required

58 The appellant estimates that up to 2 hours will be required for oral argument (including reply).

Dated: 23 October 2025

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[66] *Maclean* [2025] FCAFC 133 at [132]. Jackson and Moore JJ also favoured remittal rather than rehearing on appeal, at [45].
[67] *Jacobs Group* [2023] NSWCCA 280 at [19].

ANNEXURE TO APPELLANT'S SUBMISSIONS

No.	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what events(s), if any, does this version apply)
1	*Criminal Appeal Act 1912* (NSW)	Current	5, 6 and 12	In force at all relevant times	All relevant times
2	*Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW)	Current	4, 8, 23, 35 and 119	In force at all relevant times	All relevant times