



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN

**FRANK SAMUEL FARRUGIA**

Appellant

AND

**THE KING**

Respondent

### **APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

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

- 1 This appeal raises the issue whether counsel appearing for two co-offenders has a conflict in circumstances where a favourable submission as to parity for one co-offender cannot be made because doing so would adversely affect the interests of the other, and whether such a conflict constitutes a material irregularity in the sentencing process.
- 2 *The CCA's error.* This case is an obvious and simple one of a barrister's conflict of duties (AS[23]). There was a clear forensic opportunity for the appellant by his counsel to embrace (or, at least, not dispute) the Crown's initial submission on parity, and there would have been no professional impropriety in counsel doing so. The disadvantage suffered by the appellant is that, because of the barrister's conflicting duties, that argument was not put on the appellant's behalf, and so he lost the chance of a less severe sentence being imposed.
- 3 The CCA (at [65]) was wrong to effectively require the disclosure of privileged advice and instructions. What is necessary to protect the due administration of justice appears from the record, including the Agreed Facts and the Crown's written submissions (AS[34]). In the context of jurisdiction to restrain a conflicted lawyer from acting, the need to do so "can arise even when the client has consented to the conflict" (*Maclean*, AS[36]).

- 4 In sentencing cases, where there is a real possibility of parity arguments that could sensibly produce relevant differences between the two putative clients, there is already a conflict. The interests of justice do not require that the conflict in fact has actually influenced the outcome in any particular way (AS[40]). The focus is on process.
- 5 There was practical injustice as a result of the conflict (AS[41]). The integrity of the sentencing process required the barrister to have the capacity to make a forensic decision on the issue of parity without the distraction or burden of competing duties (AS[43]). Appearing for two offenders whose interests conflict on a material issue is fatally problematic because it introduces an element in an advocate's decision-making which should not exist (AS[44]).
- 6 There may well be no absolute prohibition upon the same advocate appearing for more than one client in a sentence proceeding. But in a case where parity requires appropriate comparisons between co-offenders, the potential for available arguments tending in opposite directions between the two offenders is enough to present a real possibility of conflict for which no informed consent will suffice to remove the conflict and somehow cure the irregularity.
- 7 ***Informed consent is not a universal solvent.*** There is no onus on the appellant to prove that he did not give "fully informed" consent (Rep[4]). "[E]ven if informed consents are obtained, they will not absolve the fiduciary from liability to one master if he cannot properly discharge his duties because of conflicting duties owed to the other" (Finn, Rep[5]).
- 8 It is insufficient to frame consideration of the effect of counsel conflict on a fair hearing in criminal proceedings by reference to general conceptions of the nature of the relationship between counsel and client – some aspects of which may give rise to fiduciary obligations (Rep[2]). The correct approach is that formulated in *Silvini* (Rep[3]), namely requiring the appellant to demonstrate (a) an actual conflict between the respective interests represented by counsel, and (b) as a result of that conflict, some impairment of counsel's ability to represent the interests of the appellant.
- 9 This is not a case where the raising of certain allegations is, of itself, enough to constitute a waiver of legal professional privilege – such as an allegation by an offender that he or she was improperly pressured to plead guilty. There, an approach requiring disclosure

of instructions may be apt: cf. *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347 at 359. But this case is different in that the objective record clearly reveals the irregularity, and any informed consent that might or might not have been given could not have removed the conflict. Any privileged communication is irrelevant.

- 10 **Materiality.** The existence of counsel's conflicting duties and its impact on the proceeding constituted a material irregularity in the process. To establish practical injustice, the appellant did not have to establish what would have occurred but for the irregularity, i.e., that he *would* have received a lesser sentence (*WZARH*, AS[45]-[48]). All that must be shown is that the proper process "could realistically" have produced a different outcome (*LPDT*, *Brawn* and *MDP*, AS[47]).
- 11 **Relief.** On any re-sentence, the appellant should not be bound by the forensic judgments of senior counsel with the conflict. A fresh hearing before the sentencing court under s 12(2) is appropriate relief. The CCA authorities (e.g., *O'Neil-Shaw*) correctly construe the statute. *Kentwell* at [42] does not stand against resort to a section 12(2) remitter. That construction is consistent with the approach to remedy in civil cases where a denial of procedural fairness has occurred (*Maclean*) or where there is bias. *Contra* RS[55], the CCA has not assessed the proper sentence on the premise of counsel having been conflicted, pursuant to s 6(3).
- 12 *Contra* NSW DPP, s 6(3) does not preclude s 12(2) remitter, on the better reading of ss 6(3) and 12(2) together. A sentence following appearance by conflicted counsel cannot be "warranted in law", and the general terms of s 12(2) are available in cases such as this case where this material irregularity requires a new argument on the significant issue of parity (AS[52], *Tarrant* [8]). Even if s 6(3) accommodates such a wholesale rehearing, its terms and those of s 12(2) can be read so as to permit recourse to a s 12(2) remitter in such a case.

11 February 2026



**Bret Walker**