



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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

BETWEEN:

FRANK SAMUEL FARRUGIA
Appellant

and

10

THE KING
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

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PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Framework

1 Authority (in New South Wales and elsewhere) establishes that, on a sentencing appeal, the appellate court's authority to intervene is dependent on the demonstration of a *material* error: cf **NSW [4], [14]**. An appellant must therefore demonstrate that: (a) there was an error; and (b) the error “could realistically” have affected the exercise of the sentencing discretion: **RS [10]-[18]**.

10 • *Hancock v The King* [2025] NSWCCA 213 at [79]-[82] (**JBA v 3, Tab 13**);
 • *Bailey v Tasmania* [2025] TASCCA 13 at [11]-[14];
 • *Johns v The Queen* [2020] VSCA 135 at [78]-[87];
 • *Harding v Western Australia* [2015] WASCA 27 at [71]-[74].

2 In this case, the Appellant must establish that: (a) there was a breach of the “conflict rule”; and (b) that breach could realistically have affected the exercise of the sentencing discretion.

There was no conflict

3 To establish such an error, the Appellant must establish that there was a “conflict or a real or substantial possibility of a conflict” between the duties that Senior Counsel owed to the Appellant and the duties that Senior Counsel owed to the Co-Offender: **RS [19]-[22]**.

4 The assessment of whether there was a conflict, or a real or substantial possibility of a conflict, must account for:

4.1 the determination of an offender’s “position or seniority in the organisation”, in the context of a drug syndicate;
 • *Tyler v The Queen* [2007] NSWCCA 247; 173 A Crim R 458 at [76]-[80];

4.2 the “Agreed Facts” (**RBFM 4**) at [8]-[9] (roles), [10], [13] (Ledger and BlackBerry) [14]-[16] (Appellant), [30], [33], [41], [46] (Co-Offender), which were personally signed by the Appellant and the Co-Offender (**RBFM15-16**);

4.3 the written “Crown Submissions on Sentence” (**CAB 74**) at [17]-[19] (roles), [20], [23], [29], [34]-[35] (Appellant), [36], [40]-[43], [49] (Co-Offender), [66] (parity);

- 4.4 the written “Outline of Submissions on Sentence for the Offender”, filed on behalf of both the Appellant and the Co-Offender (**CAB 90**) at [4]-[6] (introduction), [12]-[13], [16]-[22] (roles), [24]-[26] (objective seriousness), [75]-[76] (conclusion);
- 4.5 the oral submissions made on behalf of the Co-Offender at **CAB 116** (lines 47-49), **119** (lines 7-19), **120** (lines 10-50), **121** (lines 1-50), **122** (lines 1-9, 20-50), **123** (lines 30-31);
- 4.6 the oral submissions made on behalf of the Crown in response to the submissions of the Co-Offender at **CAB 129** (lines 6-49), **131** (lines 6-12, 31-33), **132** (lines 5-14);

10 4.7 the oral submissions made on behalf of the Appellant at **CAB 137** (line 26), **152** (lines 23-50), **153** (lines 39-49), **154** (lines 1-20);

- 4.8 the oral submissions made on behalf of the Crown in response to the Appellant’s submissions at **CAB 157** (lines 33-50), **158** (lines 1-50);
- 4.9 the lack of any evidence as to the scope of Senior Counsel’s retainer, the Appellant’s instructions, the advice he received, whether he obtained independent legal advice (on the recommendation of Senior Counsel or otherwise), the content of any such advice, or any instructions subsequently given by the Appellant: **CAB 59 [65]**.

5 In the circumstances, the Appellant has not discharged his onus of demonstrating a breach
20 of the conflict rule: **RS [23]-[29]**.

- 5.1 “The submissions made in the District Court concerning a relative evaluation of the objective criminality of the two offenders were correct”: **CAB 60 [67]**.
- 5.2 On the Agreed Facts, having regard to their respective positions within the organisation, no counsel acting in accordance with their duties could have put a submission to the effect that the Co-Offender’s offending was objectively more serious than the offending of the Appellant: **RS [49]-[51]**; cf **Reply [10]**.
- 5.3 To the extent the Crown originally put a submission to that effect in writing, it was plainly wrong and not “properly made”: cf **AS [42]**.

Consent

6 To the extent the Appellant has established any *prima facie* conflict, the Appellant has failed to establish that he did not give fully informed consent to Senior Counsel continuing to act for him: **RS [30]-[39]**. That does not involve drawing any adverse inference from the Appellant's maintenance of legal professional privilege; there is simply an evidentiary gap: **CAB 57 [57], 59 [62]**; cf **Reply [9]**.

Any error was immaterial

7 If there was a breach of the conflict rule, the Appellant has not established how that breach could realistically have affected the exercise of the sentencing discretion: **RS [47]-[51]**.
10 Having regard to the matters in paragraphs 4.1 to 4.9 above, the Appellant has not identified what counsel without a conflict could have done differently or how that different conduct could realistically have affected the result: cf **Reply [10]**.

Administration of justice

8 It is not correct to approach the issue through the lens of the "proper administration of justice" test relied upon by the Appellant: **RS [40]-[41]**.

8.1 However, even on that approach, the result would be the same.

8.2 Having regard to the matters in paragraphs 4.1 to 4.9 above, there is no basis to conclude that the sentencing judge "should have" exercised a power to restrain Senior Counsel from acting for the Appellant (assuming the District Court has such a power): **RS [42]-[43]**; cf **Reply [7]**.

- *Maclean v Brylewski, in the matter of Maclean* [2025] FCAFC 133 at [27], [32] (Jackson and Moore JJ), [120], [122] (Stellios J) (**JBA v 3, Tab 15**);

8.3 This is not a case where a conflict was obvious on the face of the record.

- *R v Tay* (NSWCCA, unreported, 1 October 1987);
- *Holloway v Arkansas* 435 US 475 (1978) at 477-481, 484 (**JBA v 3, Tab 14**);
- *R v Silvini* (1991) 5 OR (3d) 545 at 3-4, 10-12 (**JBA v 3, Tab 20**).

Remittal

9 In this case, it is unnecessary to resolve the tension between s 6(3) and s 12(2) of the *Criminal Appeal Act 1912* (NSW): **RS [52]-[55]**.



Raelene Sharp

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Thomas Wood

Edward McGinness

11 February 2026