

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GORDON, EDELMAN, STEWARD AND GLEESON JJ

Matter No M44/2022

DANNY AWAD

APPELLANT

AND

THE QUEEN

RESPONDENT

Matter No M45/2022

JOHN MICHAEL TAMBAKAKIS

APPELLANT

AND

THE QUEEN

RESPONDENT

Awad v The Queen
Tambakakis v The Queen
[2022] HCA 36
Date of Hearing: 13 September 2022
Date of Judgment: 9 November 2022
M44/2022 & M45/2022

ORDER

In each matter:

1. *Appeal allowed.*
2. *Set aside paragraph 2 of the orders made by the Court of Appeal of the Supreme Court of Victoria dated 18 October 2021 dismissing the appeal and, in its place, order that:*
 - (a) *the appeal against conviction be allowed;*

(b) *the appellant's conviction be set aside; and*

(c) *there be a new trial.*

On appeal from the Supreme Court of Victoria

Representation

B W Walker SC with O P Holdenson KC for the appellant in M44/2022
(instructed by Milides Lawyers)

D A Dann KC with P J Smallwood for the appellant in M45/2022 (instructed
by Stephen Andrianakis and Associates)

P J Doyle SC with C J Tran for the respondent in both matters (instructed by
Commonwealth Director of Public Prosecutions)

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Reports.

CATCHWORDS

Awad v The Queen **Tambakakis v The Queen**

Criminal Practice – Appeal – Error or irregularity in trial – Directions to jury – Where credibility of one accused giving evidence central to both trials – Where trial judge directed jury that innocent person can do nothing more than give evidence – Where trial judge directed jury that guilty person may give evidence in hope or belief they will more likely be believed – Where directions prohibited by s 44J of *Jury Directions Act 2015* (Vic) – Whether misdirection constituted substantial miscarriage of justice.

Words and phrases – "charge", "conviction was inevitable", "credibility", "deflect the jury from its fundamental task", "direction", "essential to a fair trial", "fundamental error", "jury", "misdirection", "motivation to give evidence", "natural limitations", "onus of proof", "presumption of innocence", "prohibited direction", "serious departure from the prescribed processes for trial", "substantial miscarriage of justice".

Criminal Procedure Act 2009 (Vic), s 276(1)(b).
Jury Directions Act 2015 (Vic), ss 44J, 44K.

1 KIEFEL CJ AND GLEESON J. Following a trial in the County Court of Victoria, the appellants were each convicted of one charge of attempting to possess a commercial quantity of an unlawfully imported border-controlled drug¹, namely cocaine. These appeals concern a misdirection by the trial judge. The misdirection was as to the reason why Mr Tambakakis may have chosen to give evidence. It is a direction which s 44J(b) of the *Jury Directions Act 2015* (Vic) states must not be made. There is no issue that the direction was contrary to law. The question on the appeals is whether the direction amounts to a substantial miscarriage of justice from which it would follow that the appeals from conviction should have been allowed by the Court of Appeal of the Supreme Court of Victoria.

Background

2 Australian Border Force officers intercepted a consignment of printers which were found to contain 22.4 kilograms of cocaine, 15.456 kilograms of which was pure cocaine. A commercial quantity is two kilograms. An inert substance was substituted for the cocaine, and a listening device and a tracking device were placed within the consignment. Surveillance of the delivery of the consignment was undertaken.

3 So far as concerned Mr Tambakakis, the evidence showed that he collected the consignment and stored it overnight in the yard of premises in which he conducted a business. The following evening the consignment was moved to the residential premises of another co-accused. Mr Tambakakis delivered a white Kia van to those premises and the van was later used to transport the consignment to a warehouse which he had leased in a false name. Mr Awad picked up Mr Tambakakis after the van was delivered and they drove to Mr Tambakakis' apartment. The two later travelled together to a carpark in the vicinity of the warehouse and proceeded on foot, though separately, towards it.

4 At a certain point Mr Tambakakis entered the van and helped unload the consignment at the warehouse. When the van was unloaded, Mr Tambakakis drove it out of the warehouse and parked at a carpark. He and Mr Awad were then seen walking to the carpark where Mr Awad's car was parked and drove away.

5 Mr Tambakakis and Mr Awad were not charged with any conspiracy to commit an offence. Mr Awad was not charged with having aided, abetted, counselled or procured the commission of an offence by Mr Tambakakis. The prosecution case that Mr Awad was in joint possession of the substance in the consignment depended upon him having entered the van with Mr Tambakakis. But Mr Tambakakis gave evidence that, although it had been planned that both he and

1 *Criminal Code* (Cth), ss 11.1(1) and 307.5(1).

Mr Awad would enter the van and travel in it to the warehouse, Mr Awad did not do so. And there was no CCTV footage which placed Mr Awad there.

6 Mr Tambakakis also gave evidence in his own defence. It was to the effect that another person organised the importation and that he, Mr Tambakakis, believed the drugs were steroid tablets. They had previously imported such drugs. This defence involved confessing to involvement in the illegal importation of steroids but not to the importation of a border-controlled drug.

7 It follows that both Mr Tambakakis' defence and the prosecution case against Mr Awad critically involved the jury's assessment of the credibility of Mr Tambakakis' evidence.

The misdirection

8 At an early point in his charge to the jury, the trial judge directed the jury that, although Mr Tambakakis had the right to remain silent and was not obliged to give evidence, he chose to do so. The trial judge told them that Mr Tambakakis undertook to tell the truth and submitted himself to cross-examination, a process by which the credibility and truthfulness of a witness are examined. The trial judge went on:

"Now, there are two factors that are significant that you should have regard to when you are assessing Mr Tambakakis' evidence. Firstly, in a criminal trial, there is nothing more [that] an innocent [person] can do than give evidence in his own defence and subject himself to cross-examination, and that is what occurred here. *On the other hand, secondly, a guilty person might decide to tough out cross-examination in the hope or belief that he will be more likely to be believed and his defence accepted if he takes the risk of giving evidence.* You should consider both of these observations when evaluating Mr Tambakakis' evidence." (emphasis added)

9 The trial judge went on to say that it is a matter for the jury as to what they accept or what weight they give to the evidence. They should treat Mr Tambakakis' evidence in the same way as they would treat the evidence of other witnesses. But they should bear in mind that an accused giving evidence is probably under more stress than any other witness when giving evidence in a trial.

10 The appellants contend that the directions were not only prohibited by the *Jury Directions Act*, but that they resulted in a substantial miscarriage of justice such that their convictions should be quashed and new trials ordered.

The Jury Directions Act

11 Sections 44H to 44K were inserted into the *Jury Directions Act* with operation from 1 October 2017. Section 44J is in the following terms:

3.

"Prohibited directions in relation to evidence of an accused

The trial judge must not direct the jury about any of the following matters in relation to the evidence of an accused –

- (a) whether the accused is under more stress than any other witness;
- (b) that the accused gave evidence because –
 - (i) a guilty person who gives evidence will more likely be believed; or
 - (ii) an innocent person can do nothing more than give evidence.

Note

This section prohibits the trial judge from giving directions to the jury about particular matters. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial – see section 65."

12

Section 44K provides:

"Abolition of common law rules

- (1) Any rule of common law under which a trial judge is prohibited from directing the jury on the interest a witness or an accused may have in the outcome of a trial is abolished.
- (2) Any rule of common law under which a trial judge is required or permitted to direct the jury about the matters referred to in section 44J in relation to the evidence of an accused is abolished.

Notes

- 1 Subsection (1) abolishes the rule attributed to *Robinson v R* [1991] HCA 38; (1994) 180 CLR 531.
- 2 Subsection (2) abolishes directions based on –
 - *R v Haggag* [1998] VSC 355; (1998) 101 A Crim R 593; and
 - *R v McMahon* [2004] VSCA 64; (2004) 8 VR 101; and

4.

- *R v Buckley* [2004] VSCA 185; (2004) 10 VR 215.

3 Section 4 applies generally to override any rule of law or practice to the contrary of this Act."

13 It will be observed that the trial judge gave each of the directions to which s 44J(a), (b)(i) and (b)(ii) refer. The direction which the appellants contend gave rise to a substantial miscarriage of justice² is that referred to in s 44J(b)(i) and is highlighted in the directions set out above.

14 Prior to its enactment, directions of the kind prohibited by s 44J were given in criminal trials in Victoria. The cases noted to s 44K are examples of such cases. But in his dissenting judgment in the Court of Appeal in this case³, Priest JA observed that prior to the promulgation of s 44J(b), not every trial judge in Victoria gave the directions, since not every judge was satisfied that they were not offensive to principle. The directions had not gained currency or approval outside that State.

15 A report by the Criminal Law Review of the Department of Justice & Regulation⁴ described the directions as "unhelpful" and "problematic". It said⁵:

"The direction on assessing evidence (i.e. a guilty person may tough out cross-examination, but there's nothing more an innocent person may do) contains two competing propositions that arguably neutralise each other. The competing nature of the directions may confuse the jury and have the unintended consequence of focusing attention on the motivation of an accused to give particular evidence given their interest in the outcome of a trial."

16 In the Second Reading Speech to the *Jury Directions and Other Acts Amendment Bill 2017*, the Attorney-General said that "trial judges and parties will be prohibited from suggesting that an accused's evidence is less credible or requires more scrutiny than the evidence of other witnesses. ... The bill will ... prohibit

2 *Criminal Procedure Act 2009* (Vic), s 276(1)(b)-(c).

3 *Awad v The Queen* (2021) 291 A Crim R 303 at 320-321 [64].

4 Victoria, Criminal Law Review, Department of Justice & Regulation, *Jury Directions: A Jury-Centric Approach Part 2* (2017) at 13.

5 Victoria, Criminal Law Review, Department of Justice & Regulation, *Jury Directions: A Jury-Centric Approach Part 2* (2017) at 12.

trial judges from giving certain problematic common law directions"⁶. The Explanatory Memorandum of the Bill described the directions the subject of the proposed prohibition as "confusing, unhelpful and arguably inaccurate"⁷.

A "mandatory" provision?

17 In the Court of Appeal, as in this Court, the appellants contended that the language of s 44J is mandatory and must be given effect. In enacting s 44J(b)(i), the legislature has prescribed what is essential to a fair trial for an accused. Non-compliance with the prohibition is a departure from that process and is itself sufficient to constitute a substantial miscarriage of justice for the purpose of s 276(1) of the *Criminal Procedure Act 2009* (Vic). The appellants may be understood to say that a conclusion that there has been a substantial miscarriage of justice follows automatically from non-compliance with s 44J(b)(i). The issue raised is one of statutory interpretation.

18 It may first be observed that the *Jury Directions Act* does not itself spell out the consequences of a failure to comply with s 44J(b)(i). In such a circumstance the question of what may be taken to follow non-compliance is not resolved by describing statutory requirements as "mandatory" or "directory". In *Project Blue Sky Inc v Australian Broadcasting Authority*⁸, it was said that these classifications have "outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid". The classification reflects the result of an enquiry, not the beginning. The correct test for determining validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision is invalid.

19 In *Project Blue Sky*, the relevant provision of the *Broadcasting Services Act 1992* (Cth) proceeded on the basis that the Australian Broadcasting Authority ("the ABA") has power to perform certain functions. It then directed the ABA to perform those functions in a "manner consistent with" four matters set out in the relevant section. It was held that the fact the provision regulates the exercise of functions already conferred on the ABA, rather than imposes essential preliminaries to the exercise of its functions, strongly indicates that it was not a

6 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 February 2017 at 297.

7 Victoria, Legislative Assembly, *Jury Directions and Other Acts Amendment Bill 2017*, Explanatory Memorandum at 8.

8 (1998) 194 CLR 355 at 390 [93].

purpose of the Act that a breach of the provision was intended to invalidate any act done in breach of it.

20 *Project Blue Sky* may be contrasted with *Subramaniam v The Queen*⁹, where the statute required the Court at the commencement of a special hearing to explain to the jury ("must explain to the jury") the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts. The requirements were not met, in that they were provided piecemeal over the course of the hearing or in statements by counsel¹⁰. This Court held that the failure to comply with the provision was, of itself, a substantial miscarriage of justice. An obligation was imposed on the Court and it was both limited and specific.

21 As mentioned previously, the appellants here argue that the *Jury Directions Act* has in s 44J(b)(i) determined what is essential to a fair trial, so that non-compliance with its prohibition necessarily amounts to a substantial miscarriage of justice.

22 It may be noted at the outset that of the three directions which s 44J prohibits being made, the other two are such as might favour the accused. More importantly, when regard is had to the stated purposes of the *Jury Directions Act*, it is not obvious that its purpose here is as the appellants contend. Most relevant amongst the purposes stated in s 1 are:

"(a) to reduce the complexity of jury directions in criminal trials; and

...

(c) to simplify and clarify the duties of the trial judge in giving jury directions in criminal trials ..."

23 The stated purposes accord with the description of the prohibited directions in the extrinsic materials as "confusing" and "unhelpful", "arguably inaccurate" or "problematic". Nowhere is it suggested that non-compliance with s 44J(b)(i) means that a fair trial will be lost in every case. That is understandable. Much will depend upon the evidence given by the accused to which the direction refers, the issues for the jury arising from that evidence and the prosecution case, and the directions given by the trial judge as a whole.

9 (2004) 79 ALJR 116; 211 ALR 1.

10 *Subramaniam v The Queen* (2004) 79 ALJR 116 at 126 [44]; 211 ALR 1 at 14.

A substantial miscarriage of justice?

24 Section 276(1) of the *Criminal Procedure Act* provides that an appeal against conviction must be allowed if an appellant satisfies the court that:

- "(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
- (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
- (c) for any other reason there has been a substantial miscarriage of justice."

25 In *Baini v The Queen*¹¹, the majority said that, when read together, paras (b) and (c) encompass every form of substantial miscarriage of justice. Section 276(1)(b) encompasses any departure from trial according to law and the reference in para (c) to "any other reason" shows that para (b) is not exhaustive.

26 In *Baini*¹², it was explained that no single universally applicable description can be given for what amounts to a substantial miscarriage of justice. There may be many examples. It may, however, be said that an error or irregularity in relation to the trial will amount to such a miscarriage only where an appellate court cannot be satisfied that it did not make a difference to the outcome of the trial¹³. An appellate court can be satisfied that the result of the trial would not have been different if, having reviewed the record of the trial, it concludes that conviction was inevitable¹⁴.

27 The majority in *Baini* made some further observations which are here relevant. One such observation concerns the fact that s 276(1) does not adopt the common form proviso¹⁵. The majority pointed out that to recognise the inevitability of a verdict of guilty in a given case does not involve the reintroduction of the common form proviso, nor does it impose some kind of onus on the appellant. It merely acknowledges that an appellate court's satisfaction of inevitability is relevant to determining whether there has been a substantial

11 (2012) 246 CLR 469 at 479 [25].

12 *Baini v The Queen* (2012) 246 CLR 469 at 479 [26].

13 *Baini v The Queen* (2012) 246 CLR 469 at 479 [26].

14 *Baini v The Queen* (2012) 246 CLR 469 at 480 [30], 481 [32].

15 As to which see *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

miscarriage of justice¹⁶. If it is submitted that a guilty verdict was inevitable, an appellant need not prove his or her innocence to meet the point. It will be sufficient for the appellant to show no more than that, had there been no error, the jury may have entertained a doubt as to his or her guilt. The respondent must then convince the court that the appellant's conviction was inevitable¹⁷.

28 The majority also observed¹⁸ that in many cases the appellate court will not be in a position to decide whether an appellant must have been convicted if the error had not been made. Such a conclusion may not be reached because of the nature of the error or irregularity and the "natural limitations" that attend an appellate court's task¹⁹. If it is said that a guilty verdict was inevitable, which is to say that a verdict of acquittal was not open, an appellate court must decide that question on the written record of the trial with the "natural limitations" that exist in the case of an appellate court proceeding on that basis. In that regard the majority referred to *Fox v Percy*²⁰. There it was said that one such natural limitation is the disadvantage that an appellate court labours under in respect of the evaluation of the credibility of a witness.

29 It has never been disputed that the misdirection by the trial judge in this case was an error in the trial within the meaning of s 276(1)(b). No member of the Court of Appeal (Priest, McLeish and Niall JJA) accepted that it was of a fundamental kind which of its nature meant that the trial substantially miscarried. But their Honours divided on the question of the possible effect of the misdirection.

30 In the view of McLeish and Niall JJA, the nature of the error or irregularity may be such that it made no difference to the trial. It may be possible in some cases to determine whether that is so without assessing the whole of the record of the trial²¹. Consideration could be given as a preliminary matter to identifying how the direction may have affected the outcome of the trial when the issue of inevitability

16 *Baini v The Queen* (2012) 246 CLR 469 at 480 [30].

17 *Baini v The Queen* (2012) 246 CLR 469 at 481 [31].

18 *Baini v The Queen* (2012) 246 CLR 469 at 480 [29], 481 [32].

19 *Baini v The Queen* (2012) 246 CLR 469 at 480 [29].

20 (2003) 214 CLR 118 at 125-126 [23]. See also *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15]; *Orreal v The Queen* (2021) 96 ALJR 78 at 82 [20], 86-87 [41]; 395 ALR 631 at 636, 641-642.

21 *Awad v The Queen* (2021) 291 A Crim R 303 at 339-340 [149].

is raised²². There will be cases where the departure from a trial according to law was "innocuous", in the sense that it could have occasioned no real forensic disadvantage to the appellant²³.

31 The issue, their Honours observed²⁴, is whether the misdirection had the capacity to direct or encourage the jury to reason in a particular way or from a particular standpoint which they may not have adopted had the direction not been given. Their Honours accepted that, in a criminal trial, framing the issue as one of guilt or innocence might distract attention from the real issue, namely whether the prosecution has discharged its burden of proof to the requisite standard²⁵. But their Honours considered that the direction given provided two alternative explanations for an accused giving evidence, but it did not provide a basis for the jury to assume which of the two might apply. The jury were not distracted from their task²⁶.

32 Priest JA dissented. In his Honour's view a direction of this kind has the real potential to undermine the presumption of innocence and deflect the jury from applying the requisite onus of proof²⁷. It had the potential to taint the jury's consideration and evaluation of Mr Tambakakis' evidence, thereby undermining his defence. His Honour was unable to conclude that, absent the giving of the prohibited direction, Mr Awad's conviction was inevitable²⁸.

33 It will be recalled that Mr Tambakakis' defence was that he believed that the substance in the consignment was steroids. His evidence, that Mr Awad did not enter the van containing the substance (and, it would follow, that Mr Awad did not participate in its unloading), if accepted, could seriously affect the prosecution case against Mr Awad on possession. Mr Tambakakis' credibility was critical to the jury's evaluation of the evidence and the outcome of the case against both Mr Tambakakis and Mr Awad.

22 *Awad v The Queen* (2021) 291 A Crim R 303 at 340 [150].

23 *Awad v The Queen* (2021) 291 A Crim R 303 at 340-341 [152], referring to *Kalbasi v Western Australia* (2018) 264 CLR 62 at 87-88 [70].

24 *Awad v The Queen* (2021) 291 A Crim R 303 at 343 [164].

25 *Awad v The Queen* (2021) 291 A Crim R 303 at 344 [170].

26 *Awad v The Queen* (2021) 291 A Crim R 303 at 345 [177].

27 *Awad v The Queen* (2021) 291 A Crim R 303 at 322 [70], 325 [87].

28 *Awad v The Queen* (2021) 291 A Crim R 303 at 325 [83].

34 The concerns of Priest JA as to the effects upon the presumption of innocence and the onus of proof, which are essential to a criminal trial, are clearly well founded. The jury were invited to come to a view about Mr Tambakakis' motivation to give evidence. The choice given – to identify that motive as one of a "guilty person" who decided to "tough out cross-examination in the hope or belief that he will be more likely to be believed and his defence accepted if he takes the risk of giving evidence" – has the real potential both to undermine the presumption and to deflect the jury from their task of determining whether they are satisfied beyond reasonable doubt that the accused were guilty of the acts charged.

35 The respondent submitted that the directions about why a guilty person and an innocent person might give evidence balance each other out. That submission cannot be accepted. The directions do not neutralise each other. The directions are specific. They clearly identify a choice for the jury to make, and the one in issue is inconsistent with the presumption that an accused person is innocent of the acts charged until the jury are satisfied to the requisite standard of that person's guilt.

36 It was also submitted that the other directions given by the trial judge, in particular that which immediately followed the misdirection, would have made it clear to the jury how they were to correctly approach their task. It will be recalled that the trial judge said that they should treat Mr Tambakakis' evidence in the same way as they would treat the evidence of other witnesses. And it is true to say that the trial judge correctly directed the jury about the onus and standard of proof at a number of points in the charge and said that they were not altered by reason that Mr Tambakakis gave evidence.

37 It cannot be accepted that these directions would have dispelled the effect of the misdirection as to why a guilty person might give evidence. The misdirection was directly relevant to the credit of Mr Tambakakis. It may not have been obvious to the jury that the question of his credit, as to various aspects of his evidence, was to be determined bearing in mind the presumption and the onus of proof. It may not have been obvious because the jury were instructed by the misdirection to approach the question from a particular perspective. Further, the jury were not told how Mr Tambakakis' possible innocence or guilt might be used to assist in the evaluation of his evidence. Nor were the jury instructed about how to reconcile the misdirection with the elements of the charge concerning onus and standard of proof, if they were capable of reconciliation. On the one hand, the jury were told to evaluate Mr Tambakakis' evidence by reference to his possible guilt or innocence. In the next breath, the jury were told to approach his evidence in the same way as any other witness. The respondent did not explain how the jury might have done both of these things.

38 The majority in the Court of Appeal reasoned to the effect that the misdirection was of such a kind that it could not have made a difference to the trial. They did not resolve the question of whether there had been a substantial

miscarriage of justice by determining whether conviction was inevitable having regard to the record of the trial.

39 Even approached correctly, this is not a case where it is possible for an appellate court to be satisfied that conviction was inevitable. In our view that conclusion could not be reached because it would not be possible properly to evaluate the credibility of Mr Tambakakis' account. This is not a case like *Hofer v The Queen*²⁹, where it is possible to do so on the basis of objective evidence. Here an appellate court is subject to the "natural limitations" to which *Baini* refers³⁰. Here, the defence in Mr Tambakakis' case raised his belief that the substance imported was steroids. The respondent did not explain how this was overcome.

40 In such a circumstance it is appropriate to order a new trial³¹. The respondent does not now contend to the contrary. During the course of the hearing of these appeals, the respondent withdrew its submission that the matter should be remitted to the Court of Appeal to conduct a review of the record in order to determine the issue of inevitability. It is appropriate that there be an order for a new trial in each matter.

Orders

41 We agree with the orders proposed by Gordon and Edelman JJ in each appeal.

29 (2021) 95 ALJR 937 at 952-954 [61]-[71]; 395 ALR 1 at 15-18.

30 *Baini v The Queen* (2012) 246 CLR 469 at 480 [29].

31 See, eg, *Orreal v The Queen* (2021) 96 ALJR 78; 395 ALR 631.

GORDON AND EDELMAN JJ.

Introduction

42 The appellants, Mr Awad and Mr Tambakakis, were jointly tried before a judge and jury. The trial judge directed the jury in terms that were prohibited by s 44J of the *Jury Directions Act 2015* (Vic). The appellants were convicted. The prohibited direction concerned the manner in which the jury should assess the evidence of Mr Tambakakis. There was no dispute that the giving of the prohibited direction was an error of law within the meaning of s 276(1)(b) of the *Criminal Procedure Act 2009* (Vic). The issue was whether the error of law resulted in a substantial miscarriage of justice within that subsection.

43 Mr Awad and Mr Tambakakis submitted that any contravention by a trial judge of s 44J results in a substantial miscarriage of justice or, alternatively, that there was a substantial miscarriage of justice because the Crown had not established that, without the error of law, conviction was inevitable. The Court of Appeal of the Supreme Court of Victoria unanimously, and correctly, rejected the primary submission of Mr Awad and Mr Tambakakis. A majority of the Court of Appeal (McLeish and Niall JJA; Priest JA dissenting) also rejected the alternative submission.

44 The majority of the Court of Appeal concluded that the conviction of Mr Awad and Mr Tambakakis was inevitable without considering the whole of the trial record. They considered that, in the context of the whole of the trial judge's charge to the jury, the prohibited direction could not have had any bearing on the outcome of the trials. For the reasons below, that reasoning was erroneous. In broad terms, the prohibited direction was not sufficiently ameliorated by other, correct, directions given by the trial judge because the prohibited direction had the capacity to affect the jury's assessment of Mr Tambakakis' credibility in circumstances where his credibility was central to the defence of both appellants.

45 The Crown abandoned a submission that if the appeals were allowed the matter should be remitted to the Court of Appeal for consideration of whether the convictions were inevitable. Therefore, the proper orders upon allowing the appeals are for new trials.

The trials of Mr Awad and Mr Tambakakis

46 Mr Awad, Mr Tambakakis, and Mr Kanati were tried on a joint indictment for the offence of attempting to possess a commercial quantity of an unlawfully imported border-controlled drug contrary to ss 11.1(1) and 307.5(1) of the *Criminal Code* (Cth). Mr Awad and Mr Tambakakis were convicted by the jury. The jury were unable to reach a verdict in relation to Mr Kanati. The evidence led in the prosecution and defence cases was to the following effect.

The prosecution case

47 On 1 May 2017, a consignment of five Xerox printers arrived in Melbourne from Mexico. The consignment was intercepted and inspected by Australian Border Force officers, who discovered 22.4 kg of cocaine concealed within the consignment, with a content of 15.46 kg of pure cocaine. Australian Federal Police officers substituted an inert substance for the cocaine and placed a listening device and a tracking device within the consignment.

48 On the afternoon of 8 May 2017, the consignment was delivered to the premises of Overall Auto Care, as part of a "controlled delivery" conducted by police. Delivery was accepted by Mr Rohen, who introduced himself as "Mark Hart". The consignment was collected from the Overall Auto Care premises later that day by Mr Tambakakis, who took it on the back of a "skip" truck to the Campbellfield premises of his business, GT Skips. It was then taken to a secure yard in Randor Street, Campbellfield, used by Mr Tambakakis for his GT Skips business. That evening, Mr Tambakakis was seen driving a Jeep car, with false number plates, slowly down Randor Street and stopping to ask the occupants of another car – who were undercover police officers – for directions. Mr Awad's car was also seen in the vicinity of Randor Street.

49 The next evening, on 9 May 2017, the consignment was collected from the Randor Street yard and taken to Mr Kanati's house in a Budget rental truck that had been hired shortly beforehand by Mr Rohen.

50 On the evening of 10 May 2017, Mr Tambakakis drove a Kia van to Mr Kanati's house and left it there. Mr Tambakakis was then picked up by Mr Awad and they drove to Mr Tambakakis' apartment. At 5.26 pm, Mr Kanati drove the Kia van, loaded with the consignment, to King Street, Airport West. He drove in convoy with a white BMW that was registered to Mr Rohen. Earlier in the afternoon, the white BMW had been seen driving up and down Shaftsbury Street, with Mr Kanati periodically coming out of his house to speak with the driver. Surveillance officers had also previously observed Mr Awad walking around a football oval while speaking with a man who was driving the white BMW. It was agreed that Mr Rohen was not the driver on either of those earlier occasions.

51 At 5.53 pm on 10 May 2017, Mr Kanati parked the Kia van in King Street. The white BMW was also parked in King Street, facing the Kia van, with its headlights on. Shortly afterwards, Mr Tambakakis and Mr Awad arrived at the nearby Autobarn car park. CCTV footage showed them walking out of the car park at 6.07 pm.

52 At 6.13 pm, Mr Kanati drove the Kia van down King Street. CCTV footage showed Mr Tambakakis walking on the southern side of that street and Mr Awad

walking on the northern side of the street. At 6.18 pm, Mr Kanati did a U-turn, parked the Kia van, and collected an unidentified man. At 6.25 pm, the Kia van was driven down King Street. At 6.29 pm, it was driven into a warehouse at Halsey Road, Airport West, where the consignment was unloaded. The warehouse had been leased by Mr Tambakakis using a false name.

53 At 6.55 pm, Mr Tambakakis drove the Kia van, no longer containing the consignment, from the warehouse and parked it in a car park in King Street. At 7.02 pm, CCTV footage showed Mr Tambakakis and Mr Awad walking back to the Autobarn car park. They drove away and were later arrested in Mr Awad's car. A search of the car revealed: (i) a Hawk Sweep electronic scanner; (ii) a backpack containing a vacuum sealer and multiple plastic vacuum seal bags; and (iii) a key to the Kia van.

54 When investigators entered the warehouse at 10.55 pm, they discovered that only one box in the consignment had been opened. The printer had been removed from that box, the paper tray taken out, and the substituted package removed from that tray. The package had been cut open and the surveillance devices removed. A hard case for the Hawk Sweep electronic scanner and digital scales were also found at the warehouse. Mr Kanati's fingerprints were found on two of the unopened boxes in the warehouse. Mr Rohen's left palm print was found on the top of one of the unopened boxes. DNA and fingerprint analysis of items seized from the warehouse and of the Kia van did not reveal any match to Mr Awad. However, Mr Awad's fingerprints were found on the vacuum sealer in the backpack seized by police when they searched his car following the arrest.

55 The prosecution case was that Mr Awad and Mr Tambakakis got into the Kia van shortly prior to 6.25 pm, when it was driven to the warehouse. At the warehouse, Mr Awad and Mr Tambakakis helped to unload the consignment and scan it for surveillance devices with the Hawk Sweep electronic scanner (with the sounds of scanning being detected on the listening device), before leaving at 6.55 pm. On the prosecution case, therefore: (i) Mr Awad was in possession of the substance in the consignment from 6.25 pm until 6.55 pm when he left the warehouse; and (ii) Mr Tambakakis was in possession of the substance in the consignment from the time he collected the consignment from Overall Auto Care on 8 May 2017 until it was unloaded from the Kia van in the warehouse.

The defence cases

56 Mr Awad did not give evidence. As the trial judge instructed the jury, Mr Awad's case relied "significantly on the evidence of Mr Tambakakis". Mr Tambakakis gave evidence as follows.

57 Mr Tambakakis denied any intention to possess cocaine. He said that he had acted at the direction of his personal trainer and business partner, Mr Edwards. The

core of Mr Tambakakis' defence was that he thought the consignment contained steroid tablets. Mr Tambakakis said that Mr Edwards had previously received a shipment of large terracotta pots containing steroids and that he and Mr Edwards had vacuum sealed and repackaged at least five kilograms of those steroids at the warehouse. They had packaging left over afterwards and Mr Edwards had remarked, "we'll end up using all these bottles", leading Mr Tambakakis to understand that "more [steroids] would come". Mr Edwards and Mr Tambakakis intended to distribute steroids to make money for a proposed business at the warehouse involving recycling clothes. They needed money for the business in order to pay for the bins in which the clothes would be collected. The reason Mr Tambakakis had leased the warehouse in a false name was that he had a credit default on his record.

58 Mr Tambakakis transported the consignment to the Randor Street yard on 8 May 2017 as a favour to Mr Edwards, who he believed was in Thailand. Mr Edwards had promised to pay him \$2,500 "for an hour's work". That evening, Mr Tambakakis drove around the streets near the Randor Street yard checking parked cars because Mr Edwards had told him that the consignment was "worth a stack" and wanted to check if law enforcement was aware of the steroid shipment. The Jeep car that Mr Tambakakis drove was owned by Mr Edwards, but Mr Tambakakis knew that it had false plates.

59 Mr Tambakakis accepted in cross-examination that he met with Mr Awad on the evening of 8 May 2017, but he said that it was "just a social meeting" to "catch up for a bite to eat". During that meeting, they agreed that Mr Awad would receive sample bottles of steroids for a friend who would buy more if his friend was satisfied.

60 On 9 May 2017, Mr Edwards asked Mr Tambakakis to help with repackaging the steroids. Mr Tambakakis initially refused but then agreed after Mr Edwards offered him a cut of the profits: "he said, 'I'll give you 10 per cent, it should be about 20 or 30 K.'"

61 On 10 May 2017, at the direction of Mr Edwards, Mr Tambakakis drove the Kia van to Mr Kanati's house. Mr Awad picked Mr Tambakakis up from Mr Kanati's house. As Mr Awad was interested in obtaining samples of the steroids, Mr Tambakakis had asked Mr Awad to pick him up and said that they could go to get the steroids together, requesting that he bring "a set of scales and a cryovac machine". But Mr Awad had not brought scales, so they drove to Mr Tambakakis' apartment where Mr Tambakakis obtained scales and gloves to package steroids. They then drove to the Autobarn in Airport West.

62 It was planned that Mr Tambakakis and Mr Awad would enter the Kia van and go to the warehouse. However, after they had parked in the Autobarn car park and walked to the Kia van, Mr Awad did not get in the van. Instead,

Mr Tambakakis took Mr Awad's backpack containing the cryovac machine and put it in the Kia van, before Mr Tambakakis got into the driver's seat. The only people in the Kia van were Mr Tambakakis and Mr Rohen. Mr Edwards had expressed a concern that his friends would "rip him off" so Mr Awad did not get into the van. Mr Awad was concerned that "if [Mr Edwards] didn't want his boys to ... know where the warehouse was then he wouldn't want [Mr Awad] to know where the warehouse was". Mr Tambakakis told Mr Awad to wait, and that he would be back in ten minutes.

63 Mr Tambakakis' evidence was therefore that he was seated in the driver's seat of the Kia van and Mr Rohen was seated in the passenger seat. Mr Tambakakis accepted that his voice was recorded on the listening device, remarking to Mr Rohen about the short stature of the previous driver. Mr Tambakakis explained that this remark was prompted by the fact that the driver's seat was "pretty far forward". In that exchange, Mr Tambakakis twice referred to the previous driver in the third person, although on his own account the immediately previous driver was Mr Rohen, the person to whom he was speaking. Mr Tambakakis maintained in cross-examination that he was not talking about Mr Rohen.

64 When Mr Tambakakis arrived at the warehouse with Mr Rohen, a friend of Mr Edwards who Mr Tambakakis knew as "Sam" was already there. Mr Rohen and Sam scanned the boxes in the Kia van and Mr Tambakakis helped them move the boxes into the warehouse. Sam opened one of the boxes, walked into the warehouse kitchenette with a package, and then came out "pretty frantic and freaked out", telling the others that it was "off" and to get out. Mr Tambakakis left with Mr Rohen and Sam in the Kia van. The others soon got out of the Kia van and Mr Tambakakis drove back to King Street where, upon seeing Mr Awad, he parked the Kia van, threw Mr Awad's backpack to him, and took the scanner that had been left in the Kia van. Mr Tambakakis and Mr Awad then walked back to the Autobarn car park and drove away in Mr Awad's car.

The central issue in the trials of Mr Awad and Mr Tambakakis

65 Mr Awad and Mr Tambakakis were not charged with any conspiracy to commit an offence, pursuant to s 11.5 of the *Criminal Code* (Cth). The prosecution also chose not to present a case against Mr Awad that, pursuant to s 11.2(1) of the *Criminal Code* (Cth), he aided, abetted, counselled or procured the commission of an offence by Mr Tambakakis.

66 The sole issue in dispute at trial was therefore whether Mr Awad and Mr Tambakakis took possession of the substance that was substituted for the cocaine. In relation to each of Mr Awad and Mr Tambakakis – for whom the prosecution case was based on knowledge not recklessness – this question reduced to whether, in the belief that the consignment contained a border-controlled drug, they received, had physical possession, or had control or joint control of the

consignment³². Consequently, the credibility of Mr Tambakakis' evidence was at the heart of the trials of Mr Tambakakis and Mr Awad.

Section 44J of the *Jury Directions Act*

67 Prior to 2017, a "conventional comment" by a trial judge to a jury in Victoria, as Callaway JA expressed it in *Haggag*³³, was that "whilst there is really no more that an innocent person can do than give sworn evidence and submit to cross-examination, a guilty person may choose to brazen it out in the witness box". This was described in *R v Buckley*³⁴ as a "standard direction" and was said in *R v McMahon*³⁵ to be "unexceptionable".

68 In a 2017 review by the Department of Justice and Regulation, under the heading "Problems with the current law", it was observed that this direction appeared to be unique to Victoria and that it did not appear in the model directions in Queensland, New South Wales, the United Kingdom, or Canada. The review considered a prohibition upon the direction proposed by the *Jury Directions and Other Acts Amendment Bill 2017*, saying that the direction³⁶:

"contains two competing propositions that arguably neutralise each other. The competing nature of the directions may confuse the jury and have the unintended consequence of focusing attention on the motivation of an accused to give particular evidence given their interest in the outcome of a trial".

69 In the second reading speech of the Bill, the Attorney-General described this, and related directions, as "confusing, unnecessary or inaccurate"³⁷. The Explanatory Memorandum accompanying the Bill also noted that the proposed

32 *Criminal Code* (Cth), s 300.2, definition of "possession".

33 (1998) 101 A Crim R 593 at 598.

34 (2004) 10 VR 215 at 231 [56].

35 (2004) 8 VR 101 at 116 [28].

36 Victoria, Department of Justice and Regulation, *Jury Directions: A Jury-Centric Approach Part 2* (2017) at 12-15.

37 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 February 2017 at 297.

s 44J "prohibits certain common law directions relating to the evidence of an accused that are confusing, unhelpful and arguably inaccurate"³⁸.

70 The relevant provisions of the *Jury Directions Act* commenced on 1 October 2017. Sections 44J and 44K provide:

"44J Prohibited directions in relation to evidence of an accused

The trial judge must not direct the jury about any of the following matters in relation to the evidence of an accused –

- (a) whether the accused is under more stress than any other witness;
- (b) that the accused gave evidence because –
 - (i) a guilty person who gives evidence will more likely be believed; or
 - (ii) an innocent person can do nothing more than give evidence.

Note

This section prohibits the trial judge from giving directions to the jury about particular matters. This does not limit the obligation of the trial judge to refer the jury to the way in which the prosecution and the accused put their cases in relation to the issues in the trial – see section 65.

44K Abolition of common law rules

- (1) Any rule of common law under which a trial judge is prohibited from directing the jury on the interest a witness or an accused may have in the outcome of a trial is abolished.
- (2) Any rule of common law under which a trial judge is required or permitted to direct the jury about the matters referred to in section 44J in relation to the evidence of an accused is abolished.

38 Victoria, Legislative Assembly, *Jury Directions and Other Acts Amendment Bill 2017*, Explanatory Memorandum at 8.

Notes

- 1 Subsection (1) abolishes the rule attributed to *Robinson v R* [1991] HCA 38; (1994) 180 CLR 531.
- 2 Subsection (2) abolishes directions based on –
 - *R v Haggag* [1998] VSC 355; (1998) 101 A Crim R 593; and
 - *R v McMahon* [2004] VSCA 64; (2004) 8 VR 101; and
 - *R v Buckley* [2004] VSCA 185; (2004) 10 VR 215.
- 3 Section 4 applies generally to override any rule of law or practice to the contrary of this Act."

The prohibited direction and the redirection

71 In the critical part of the trial judge's charge relevant to these appeals, the trial judge directed the jury as follows:

"Mr Tambakakis chose to give evidence in his own defence, he did not have to do that. An accused person has the right to remain silent in court, they are not a compellable witness, he cannot be compelled to give evidence. So, he chose to. In choosing to give evidence, Mr Tambakakis undertook to tell the truth, and he also submitted himself to cross-examination which is the way lawyers test a witness' credibility and truthfulness, and he was cross-examined over an extensive period of time by [the prosecutor].

Now, there are two factors that are significant that you should have regard to when you are assessing Mr Tambakakis' evidence. Firstly, in a criminal trial, there is nothing more [that] an innocent [person] can do than give evidence in his own defence and subject himself to cross-examination, and that is what occurred here. On the other hand, secondly, a guilty person might decide to tough out cross-examination in the hope or belief that he will be more likely to be believed and his defence accepted if he takes the risk of giving evidence. You should consider both of these observations when evaluating Mr Tambakakis' evidence.

In the end, it is for you to determine whether or not you accept it and what weight you give to it. In making this determination, you should treat the accused's evidence in exactly the same way as you would treat the evidence of any other witness. However, you must bear in mind, ladies and gentlemen, that an accused giving evidence in his own defence is probably under more stress than any other witness giving evidence in a trial. And if

you were assessing Mr Tambakakis' demeanour, which of course you would have been when he gave his evidence, have regard to that fact."

72 At the conclusion of the day on which this direction was given, and after the jury had retired, senior counsel for Mr Tambakakis informed the trial judge that the direction was prohibited by s 44J of the *Jury Directions Act*. He told the trial judge that he was concerned how the direction could be corrected "without highlighting the issue" and added, with the later agreement of the prosecutor, that it was "better to say nothing". Senior counsel for Mr Tambakakis asked the trial judge instead to direct that if the jury were to find that it was reasonably possible that Mr Tambakakis believed that the secreted substance was steroids, then they must acquit him.

73 The trial judge had already given a direction to the jury that if they rejected the evidence of Mr Tambakakis then they should put his evidence to one side rather than finding him guilty. But if they accepted his evidence as reasonably possible then they would find him not guilty. That is broadly a direction of the nature described by Brennan J in his dissenting reasons in *Liberato v The Queen*³⁹, as modified by four members of this Court in *De Silva v The Queen*⁴⁰. His Honour repeated this modified *Liberato* direction to the jury on the morning after the prohibited direction had been given.

A substantial miscarriage of justice within s 276(1)(b) of the *Criminal Procedure Act*

74 On an appeal that concerns only an error of law in the course of the trial, s 276(1)(b) of the *Criminal Procedure Act* relevantly provides that the Court must allow the appeal if the appellant satisfies the Court that "as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice". Otherwise, the Court must dismiss the appeal⁴¹.

75 Section 276 of the *Criminal Procedure Act* is not in the same form as the common form criminal appeal provision, which was its legislative predecessor. As the majority of this Court, French CJ, Hayne, Crennan, Kiefel and Bell JJ, said in *Baini v The Queen*⁴², "comparing a statute with its legislative predecessor (and cases decided under that predecessor) is only a useful exercise if doing so illuminates the actual text of the new provision". The interpretation of s 276 must

39 (1985) 159 CLR 507 at 515.

40 (2019) 268 CLR 57 at 64 [12].

41 *Criminal Procedure Act 2009* (Vic), s 276(2).

42 (2012) 246 CLR 469 at 478 [20].

therefore begin with the text of that provision and the decision of this Court in *Baini*.

76 Two of the non-exhaustive categories of substantial miscarriage of justice described by the majority in *Baini*⁴³ are where: (i) "there has been a serious departure from the prescribed processes for trial"; or (ii) "there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial". As their Honours later said, the first category involves a departure "from trial processes (sufficiently described for present purposes as 'serious' departures), whether or not the impact of the departure in issue can be determined"; and the second category involves "an error which possibly affected the result of the trial"⁴⁴.

77 As to the first category – like appeals under the common form criminal appeal provision – where the conclusion is reached that an error is a fundamental one, which "goes to the root of the proceedings"⁴⁵ or amounts to "a serious breach of the presuppositions of the trial"⁴⁶, the demonstration of that error by the appellant will, of itself, establish a substantial miscarriage of justice. That is, a fundamental error will result in a substantial miscarriage of justice irrespective of whether the Court of Appeal considers that the error could have affected the result of the trial.

78 As to the second category, the majority in *Baini* observed⁴⁷:

"If it is submitted [by the respondent] that a guilty verdict was inevitable, an appellant need not prove his or her innocence to meet the point. An appellant will meet the point by showing no more than that, had there been no error, the jury may have entertained a doubt as to his or her guilt. As a practical matter, it will then be for the respondent to the appeal

43 (2012) 246 CLR 469 at 479 [26].

44 (2012) 246 CLR 469 at 481 [33].

45 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Krakouer v The Queen* (1998) 194 CLR 202 at 211 [21]; *Hofer v The Queen* (2021) 95 ALJR 937 at 950 [51]; 395 ALR 1 at 13.

46 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46]; *Lane v The Queen* (2018) 265 CLR 196 at 212 [57]; *Hofer v The Queen* (2021) 95 ALJR 937 at 954 [72]; 395 ALR 1 at 18.

47 (2012) 246 CLR 469 at 481 [31].

to articulate the reasoning by which it is sought to show that the appellant's conviction was inevitable."

In other words, once the appellant shows that an error of law had the capacity to affect the result of the trial, then as a practical matter the Crown will be required to show that the appellant's conviction was nevertheless inevitable⁴⁸. However, it may also be the case that the Court is not in a position to assess inevitability because the error will be of a kind that will prevent the Court from reaching that conclusion on the record of the trial, given the natural limitations attending the appellate task⁴⁹. Once the appellant has shown an error of law had the capacity to affect the result of the trial, if the Court is not satisfied, or is unable to be satisfied, that the conviction was inevitable on the record of the trial, the appeal must be upheld.

The majority of the Court of Appeal conclude that there was no substantial miscarriage of justice

79 In the Court of Appeal, and in this Court, there was no dispute that the trial judge's direction, prohibited by s 44J, was an error in the trials within the meaning of s 276(1)(b) of the *Criminal Procedure Act*. Putting to one side the other grounds of appeal raised by Mr Awad and Mr Tambakakis, which were rejected by the Court of Appeal and for which special leave was not sought, the sole remaining issue was whether the contravention of s 44J by the trial judge resulted in a substantial miscarriage of justice.

80 Mr Awad and Mr Tambakakis relied, as alternatives, on each category of substantial miscarriage of justice described above. In relation to the first category, the Crown submitted to the Court of Appeal that a contravention of s 44J does not necessarily involve a fundamental departure from the trial process. In relation to the second category, the Crown submitted that each appellant's conviction was inevitable: (i) because the nature and effect of the error could not have distracted the jury from their task; or (ii) having regard to the entire record.

81 The Court of Appeal unanimously rejected the submission by Mr Awad and Mr Tambakakis that a contravention of s 44J was such a fundamental error that, without more, it would always result in a substantial miscarriage of justice⁵⁰. However, the majority of the Court of Appeal accepted the Crown's submission

48 See *Mraz v The Queen* (1955) 93 CLR 493 at 514-515; *TKWJ v The Queen* (2002) 212 CLR 124 at 143 [63]; *Lindsay v The Queen* (2015) 255 CLR 272 at 294 [64].

49 *Baini v The Queen* (2012) 246 CLR 469 at 480 [29].

50 *Awad v The Queen* (2021) 291 A Crim R 303 at 324 [78], 349 [196].

that, when the trial judge's charge was considered as a whole – including the correct directions as to the onus and standard of proof – and in light of the "approach taken to the direction before the enactment of s 44J", the prohibited direction would not have distracted the jury from the performance of their task⁵¹. The majority held that, in assessing whether there was a substantial miscarriage of justice, it was not necessary to assess the whole of the record if a misdirection, in the context of the charge as a whole, "was innocuous, had been corrected, or could have had no bearing on the outcome of the trial"⁵². The majority thus did not consider the Crown's submission that conviction was inevitable having regard to the entire record of the trials.

82 Priest JA dissented. His Honour held that the prohibited direction had "the potential to undermine the jury's consideration and evaluation of crucial evidence" and was unable to conclude that, absent the prohibited direction, the convictions were inevitable⁵³.

There was a substantial miscarriage of justice in each trial

The way that the issue was framed in this Court

83 At the special leave hearing in this Court, the Crown foreshadowed an intention to file a notice of contention in each appeal to contend that the appeal should be dismissed because, having regard to the whole of the record, conviction was inevitable. No notice of contention was ultimately filed. Instead, in the circumstances involving the constraint of hearing time, and taking the view that "it would be inappropriate for this Court to do so at first instance", the Crown submitted that if the appeals were allowed then the matter should be remitted to the Court of Appeal for consideration of whether conviction was inevitable, having regard to the whole of the record.

84 At the hearing of the appeals in this Court, the Crown abandoned its submission that the matter should be remitted. The decision to abandon that submission was properly made because the submission misapprehended the test and onus under s 276(1)(b) of the *Criminal Procedure Act*. Once an appellant establishes that there was an error and it had the potential to affect the outcome, the appellate court must allow the appeal unless it can be satisfied that the error did not make a difference to the outcome of the trial.

51 (2021) 291 A Crim R 303 at 345 [177].

52 (2021) 291 A Crim R 303 at 340 [150].

53 (2021) 291 A Crim R 303 at 325 [83], [87].

85 Since the Crown no longer seeks to establish that the convictions were inevitable having regard to the whole of the record of the appellants' trials, a new trial should be ordered for each appellant if he establishes that either (i) a contravention of s 44J is a fundamental error which will always constitute a miscarriage of justice, or (ii) as Priest JA held, the prohibited direction, in the context of the charge as a whole, had the potential, or capacity, to affect the result of the trials. For the reasons below, Priest JA was correct.

A contravention of s 44J is not a fundamental error

86 Mr Awad and Mr Tambakakis relied on the formulation by the majority in *Baini*⁵⁴ that a fundamental error occurs where "there has been a serious departure from the prescribed processes for trial". It was submitted that the breach of s 44J was a serious departure from a legislatively prescribed process for trial, compliance with s 44J being, as Mr Awad submitted, "an essential means of securing a fair trial according to law".

87 In using the expression "serious departure from the prescribed processes for trial", a paraphrase of s 276(1)(b), the majority in *Baini* were not suggesting a formula for ready application. The expression is no more capable of direct application than other well-used expressions, such as errors that go "to the root of the proceedings" or amount to "a serious breach of the presuppositions of the trial". As the majority in *Baini*⁵⁵ said, "paraphrases do not, and cannot, stand in the place of the words used in the statute".

88 The more absurd the outcome of requiring a new trial or an acquittal for any breach of a legislative provision, the less likely that Parliament intended that outcome. Although it might be expressed in mandatory terms, in circumstances where a statutory provision can be contravened in a variety of ways, with effects that range from the most serious to the very trivial, Parliament should rarely be taken to have intended that any breach of the provision be treated as a substantial miscarriage of justice. This reflects the position at common law.

89 The common law position can be seen in *Glennon v The Queen*⁵⁶. In that case, the trial judge directed the jury that they could use the silence of the applicant to test the veracity of his evidence. The applicant submitted that the misdirection on his right to silence was so fundamental an error that, without more, it resulted in a substantial miscarriage of justice. Although this Court ultimately concluded,

54 (2012) 246 CLR 469 at 479 [26].

55 (2012) 246 CLR 469 at 476 [14].

56 (1994) 179 CLR 1.

on consideration of the whole of the record, that conviction was not inevitable⁵⁷, this submission of fundamental error was rejected. Mason CJ, Brennan and Toohey JJ said that "[a]lthough the right to silence is a fundamental right of any accused person, it cannot be said that *any* misdirection on that subject is a fundamental irregularity"⁵⁸. Deane and Gaudron JJ said that "a misdirection of that kind is ordinarily one that must be evaluated in the light of the issues in the trial and the way in which the trial was conducted"⁵⁹.

90 The same is true of a direction prohibited by s 44J. An example that illustrates the absurdity of a conclusion that Parliament intended that any breach of s 44J would result in a substantial miscarriage of justice, requiring a new trial or an acquittal, is where the breach is to the advantage of an accused. Indeed, that occurred in this case. In giving the directions set out above, the trial judge breached s 44J(a) by directing the jury that the accused was under more stress than any other witness. Unsurprisingly, no ground of appeal alleged that the giving of that prohibited direction had resulted in a substantial miscarriage of justice. In circumstances where Mr Tambakakis had said in cross-examination that he was under pressure and his counsel had reiterated that in his closing address, that direction by the trial judge would have been to the advantage of Mr Awad and Mr Tambakakis.

91 The Court of Appeal was correct to reject the appellants' submission that any breach of s 44J would result in a substantial miscarriage of justice.

The contravention of s 44J had the capacity to affect the result

92 The majority of the Court of Appeal concluded that the prohibited direction did not result in a substantial miscarriage of justice "by reference to the part that error or irregularity played in the wider context of the trial, without assessing the whole of the record to determine whether a finding of guilt was the only conclusion reasonably open"⁶⁰. The effect of this reasoning is that, no matter how strong the defence cases were, the giving of the prohibited direction had no capacity to affect the result of the trials.

93 There might be cases in which an appellate court dismisses an appeal without considering the whole of the record because the error of law had no capacity to affect the result of the trial. An example given by Gleeson CJ is the

57 (1994) 179 CLR 1 at 9, 13.

58 (1994) 179 CLR 1 at 8.

59 (1994) 179 CLR 1 at 12.

60 *Awad v The Queen* (2021) 291 A Crim R 303 at 340 [149].

admission of inadmissible evidence to prove a fact against an accused where the accused later admits that fact⁶¹. The same is true for some errors of law under the *Jury Directions Act*.

94 Suppose a trial judge gives a required direction without first inviting submissions from the prosecution and defence counsel as required under s 16(2) of the *Jury Directions Act*. If both the prosecution and defence counsel would necessarily have supported such an essential direction, the error of law in failing to comply with s 16(2) would have no capacity to affect the result of the trial. Even without consideration of the whole of the record, the error can be seen to involve no substantial miscarriage of justice, perhaps because it involved no miscarriage of justice at all. However, where the appellant has demonstrated that an error of law has occurred in or in relation to their trial, the appellate court will need to be satisfied that the error was plainly so innocuous that it could not possibly have affected the outcome in order to dismiss the appeal on that basis. If that high threshold of satisfaction cannot be reached, then the court must assess the inevitability of the conviction on the whole of the record.

95 Where the error is a particular misdirection to a jury, it will usually be necessary to focus upon the specific misdirection when considering whether the misdirection had the capacity to deflect the jury from their fundamental task of deciding whether or not the prosecution has proved the elements of the charged offence beyond reasonable doubt. That may commonly be the case where the misdirection was not trivial or innocuous and, in the context of the whole of the charge, it was "open" for the jury to follow the misdirection⁶². For instance, a trial judge may give unexceptionable general directions on matters such as the presumption of innocence and the onus and standard of proof, but nonetheless also give a particular misdirection that tends to contradict those general directions and results in a substantial miscarriage of justice⁶³. The nature of the error may be such that the court cannot be satisfied that it was so innocuous that the jury would have disregarded it, or that the correct directions were too general to counteract the particular potential effect of the misdirection on the jury's task.

96 In the present case, senior counsel for the Crown submitted that the prohibited direction was an error that was so innocuous that the jury would have disregarded it. It was submitted that the standard direction was abolished only

61 *Weiss v The Queen* (2005) 224 CLR 300 at 302.

62 *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [46].

63 See, eg, *Robinson v The Queen* (1991) 180 CLR 531 at 534-535; *Azzopardi v The Queen* (2001) 205 CLR 50 at 75-76 [71]-[72]; *GBF v The Queen* (2020) 271 CLR 537 at 543-544 [11]-[12].

because it was "no longer regarded as particularly helpful", rather than because it gave rise to any risk of impermissible reasoning by the jury. Further, it was submitted that in the prohibited direction "one comment balances out the other". In other words, the invitation to reason on the basis that Mr Tambakakis was guilty was balanced by the invitation to reason on the basis that he was innocent.

97 The attempt by the Crown to minimise the effect of the prohibited direction should not be accepted. It is not to the point that the direction had previously been regarded as a standard direction in Victoria, albeit uniquely. It was prohibited by Parliament because it was confusing, unnecessary, or inaccurate. As the majority of the Court of Appeal correctly observed, the trial judge's prohibited direction invited "consideration, from the perspective of an accused, as to why the person may have chosen to give evidence"⁶⁴. And that consideration was to be undertaken on the basis that Mr Tambakakis was innocent or guilty. If the jury were to have accepted the invitation and to have speculated that Mr Tambakakis was guilty independently of their consideration of the whole of the evidence, then the effect of the prohibited direction would have been to invite the jury "to engage in circular reasoning: (a) assume sub silentio that the accused is guilty; (b) use that assumption to discount his or her evidence; and (c) having discounted that evidence, find that the accused is guilty"⁶⁵.

98 The two aspects of the prohibited direction did not "balance" each other out. The jury were not instructed that the presumption that Mr Tambakakis was not guilty required them, before reaching any conclusions, to approach Mr Tambakakis' evidence only on the basis that "there is nothing more [that] an innocent [person] can do than give evidence in his own defence and subject himself to cross-examination". Instead, it was left open for the jury to approach Mr Tambakakis' evidence on the basis that "a guilty person might decide to tough out cross-examination in the hope or belief that he will be more likely to be believed and his defence accepted if he takes the risk of giving evidence".

99 By leaving the jury with the choice to approach Mr Tambakakis' evidence on the a priori basis that he was a guilty person deciding to "tough out cross-examination", there was a conflict with the directions given on the onus and standard of proof. As this Court said in *Robinson v The Queen*⁶⁶, if the presumption of innocence "is to have any real effect in a criminal trial, the jury must act on the basis that the accused is presumed innocent of the acts which are the subject of the

⁶⁴ *Awad v The Queen* (2021) 291 A Crim R 303 at 343 [167].

⁶⁵ *Haggag* (1998) 101 A Crim R 593 at 598.

⁶⁶ (1991) 180 CLR 531 at 535-536.

indictment until they are satisfied beyond reasonable doubt that he or she is guilty of those acts".

100 The Crown also submitted that the trial judge had given a number of directions that mitigated the potential damage arising from the prohibited direction. The most immediate of these was the direction given by the trial judge after the prohibited direction to "treat the accused's evidence in exactly the same way as you would treat the evidence of any other witness". The trial judge repeatedly told the jury that the assessment of all the evidence was a matter for them. The trial judge correctly directed generally about the onus and standard of proof. The trial judge also reiterated on several occasions that each accused did not need to prove his innocence and that this did not change because Mr Tambakakis decided to give evidence. And the modified *Liberato* direction was given and subsequently repeated.

101 These correct directions mitigated the damage caused by the prohibited direction. But, for three reasons, they did not entirely remove the capacity of the prohibited direction to affect the result of the trials. In other words, and "expressed at a high level of abstraction", there remained the capacity for the prohibited direction to "deflect the jury from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt"⁶⁷.

102 First, the trial judge's modified *Liberato* direction on how the jury should approach the Crown case in circumstances where Mr Tambakakis had given evidence was directed to what the jury should do after they had decided whether or not to accept his evidence in whole or in part. These directions did not address the approach the jury should take when assessing the credibility or reliability of his evidence, and so could not mitigate the effect of the prohibited direction on that assessment. Indeed, in written submissions the Crown identified only one aspect of the charge, other than the misdirection, that addressed the manner in which the jury should assess or evaluate Mr Tambakakis' evidence. That was when, immediately after the misdirection, the trial judge told the jury to "treat the accused's evidence in exactly the same way as you would treat the evidence of any other witness".

103 Secondly, despite the mitigating effect of the correct directions, it remained the case that the jury had been effectively instructed in contradictory terms. Without a redirection to the jury requiring them to disregard the prohibited direction – which, contrary to the concession by senior counsel for Mr Awad, may not have been sufficient in the circumstances of this case to ameliorate the error to the extent that it was plainly so innocuous that it could not have possibly affected

⁶⁷ *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [46].

the outcome of the trials – it remained possible that the jury would speculate as to the reason that Mr Tambakakis gave evidence, and that confusion might ensue concerning the onus and standard of proof in the assessment of Mr Tambakakis' evidence.

104 Thirdly, even if the prospect of confusion was small, it was highly significant in circumstances where the credibility of Mr Tambakakis was central to both his defence and Mr Awad's defence. The trial judge correctly directed the jury that there was "one significant factual issue" that they needed to resolve in relation to Mr Tambakakis. That issue was whether the prosecution had proved that Mr Tambakakis knew that the consignment contained a border-controlled drug. The credibility of Mr Tambakakis, in turn, was central to Mr Awad's defence that (as Mr Tambakakis said) Mr Awad did not get into the Kia van and thus did not possess the substance in the consignment, and that (consistently with the account of Mr Tambakakis) Mr Awad believed the substance in the consignment to be steroids.

105 In assessing Mr Tambakakis' credibility, many questions may have arisen for the jury, including: Did Mr Tambakakis collect the consignment as a favour to Mr Edwards? Why had he previously been involved in illegal importation and distribution of steroids? How plausible was his explanation about slowly driving down Randor Street on the evening that the consignment had been delivered? Why was he driving a Jeep car that he said was owned by Mr Edwards, knowing that it had false number plates? Did Mr Tambakakis meet with Mr Awad only for social reasons on the very same day that the consignment arrived? If the only people in the Kia van at the time of the recorded conversation about the size of the previous driver were himself and Mr Rohen (the immediately previous driver on Mr Tambakakis' account), why would Mr Tambakakis have referred to the previous driver twice in the third person? Was it plausible that the vacuum sealer was being used for packaging steroids? Was it believable that Mr Tambakakis rented the warehouse in a false name due to his concerns about credit default? Was Mr Tambakakis' evidence plausible that \$22,000 was paid annually in rent for the warehouse but that he and Mr Edwards could not afford to purchase the bins in which the clothing was to be deposited for recycling?

106 In the context of the trials of Mr Awad and Mr Tambakakis, therefore, with the importance of the jury's assessment of Mr Tambakakis' credibility, the prohibited direction had the capacity to deflect the jury from their task and thus the potential to affect the result of the trials. The Court of Appeal could only have concluded that conviction was inevitable by assessing the prohibited direction in light of the whole of the record, including all of the issues related to Mr Tambakakis' credibility and any natural limitations attending the appellate task which may have prevented such a conclusion. It may be that the natural limitations arising from the Court of Appeal not having seen Mr Tambakakis give evidence would have prevented such a conclusion. But since the Crown no longer seeks

remittal of the appeals to determine the inevitability of the convictions, and since the parties made no submissions on the substance of that issue, this Court should not attempt to determine it.

Conclusion

107 In circumstances in which the Court of Appeal did not consider the whole of the record, the Court of Appeal should have concluded that there was a substantial miscarriage of justice. Orders should be made in each appeal as follows:

1. Appeal allowed.
2. Set aside paragraph 2 of the orders made by the Court of Appeal of the Supreme Court of Victoria dated 18 October 2021 dismissing the appeal and, in its place, order that:
 - (a) the appeal against conviction be allowed;
 - (b) the appellant's conviction be set aside; and
 - (c) there be a new trial.

108 STEWARD J. The facts of these matters are set out in the reasons of Gordon and Edelman JJ, which I gratefully adopt. I agree with the majority that this was not a case in which it could be said that the misdirection (set out below) constituted a serious departure from the prescribed processes for a criminal trial⁶⁸. That leaves for consideration the appellants' alternative contention, as described by Gordon and Edelman JJ⁶⁹, made in reliance upon s 276(1)(b) of the *Criminal Procedure Act 2009* (Vic).

109 The misdirection took place in the context of a detailed charge to a jury. It is convenient to set out the misdirection in full:

"Now, there are two factors that are significant that you should have regard to when you are assessing Mr Tambakakis' evidence. Firstly, in a criminal trial, there is nothing more [that] an innocent [person] can do than give evidence in his own defence and subject himself to cross-examination, and that is what occurred here. On the other hand, secondly, a guilty person might decide to tough out cross-examination in the hope or belief that he will be more likely to be believed and his defence accepted if he takes the risk of giving evidence. You should consider both of these observations when evaluating Mr Tambakakis' evidence."

110 Mr Tambakakis was one of three accused, the others being Mr Kanati (who was not convicted and is not a party to these appeals) and Mr Awad. Mr Tambakakis gave evidence; Mr Awad did not. Mr Tambakakis' evidence was critical to the outcome of his own trial as well as the outcome of the separate trial of Mr Awad (as a matter of convenience, the trials were heard together). It was common ground that the direction should not have been given because of s 44J of the *Jury Directions Act 2015* (Vic) ("the JD Act"), the terms of which are set out in the reasons of Gordon and Edelman JJ⁷⁰. It was "an error or an irregularity" for the purposes of s 276(1)(b) of the *Criminal Procedure Act*.

111 In determining whether an error or an irregularity has resulted in a substantial miscarriage of justice, it is not always necessary to assess the whole of the record to determine whether a finding of guilt was or was not the only conclusion reasonably open. In the Court of Appeal below, McLeish and Niall JJA were, with very great respect, correct to observe that an examination of the nature

68 Being the third category of case identified by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Baini v The Queen* (2012) 246 CLR 469 at 479 [26].

69 See [78], [92]-[106], being the second category of case identified by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Baini v The Queen* (2012) 246 CLR 469 at 479 [26].

70 See [70].

of the error or irregularity may show that it could have made no difference to the outcome of the trial⁷¹. The error may have been entirely harmless or of "no significance"⁷². As French CJ, Heydon, Kiefel and Bell JJ observed in *Jones v The Queen*⁷³:

"In *Weiss v The Queen* it was said that there are cases in which it is possible for an appellate court to conclude that an error at trial would have had no significance in determining the verdict. This was such a case. Keane JA described the impugned direction in the appellant's case as innocuous. He observed that it had occasioned no real forensic disadvantage to the appellant. Given the issues in the trial and the conduct of it, which included the trial judge's direction as to the use the jury might make of the evidence of [the co-accused's] bad character, this assessment of the effect of the misdirection was well open." (footnotes omitted)

112 It follows that, in the case of a given misdirection, McLeish and Niall JJA were right to state that⁷⁴:

"[T]here will have been no substantial miscarriage of justice if, having regard to the direction in the context of the charge as a whole, the erroneous direction was innocuous, had been corrected, or could have had no bearing on the outcome of the trial." (footnote omitted)

113 The foregoing expressions of principle do not involve any alteration to the shifting persuasive onus imposed by s 276(1)(b)⁷⁵. Here, the appellants established that an error or irregularity had taken place. It was thereafter a matter for the Crown to show that there had been no resulting substantial miscarriage of justice. In this case, that meant demonstrating that the error or irregularity "was innocuous, had been corrected, or could have had no bearing on the outcome of the trial"⁷⁶. For the

71 *Awad v The Queen* (2021) 291 A Crim R 303 at 339-340 [149]-[150].

72 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

73 (2009) 83 ALJR 671 at 678 [30]; 254 ALR 626 at 634.

74 *Awad v The Queen* (2021) 291 A Crim R 303 at 340 [150].

75 See *Baini v The Queen* (2012) 246 CLR 469 at 480-481 [30]-[31] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Andelman v The Queen* (2013) 38 VR 659 at 681 [101]-[102] per Maxwell P, Weinberg and Priest JJA.

76 *Awad v The Queen* (2021) 291 A Crim R 303 at 340 [150] per McLeish and Niall JJA.

reasons which follow, and with very great respect to the majority, the Crown has established that the misdirection here was an error or irregularity of this kind.

114 At the outset, three propositions should be noted. First, a misdirection cannot be characterised as innocuous or harmless, and will instead be productive of a substantial miscarriage of justice, if it "deflect[ed] the jury from [their] fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt"⁷⁷. Secondly, that inquiry requires a consideration of the entire charge to the jury by the trial judge⁷⁸. In order to evaluate the true nature and possible effect of a misdirection, it must be considered in its entire context. Thirdly, as a matter of logic, a misdirection may be capable of being corrected or cured by the trial judge during his or her charge⁷⁹. A misdirection will have been effectively corrected or cured when it can be said of it that it no longer had the effect of deflecting the jury from their fundamental task.

115 In applying the foregoing test, care must be taken not to raise the bar too high and insist upon a trial which is immaculate. A misdirection is either innocuous or harmless, or it is not. With profound respect, it makes little sense, and may lead to error, to define grades of what is innocuous or what is harmless. In that respect, it is well established that⁸⁰:

"A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused".

116 It is thus better to express the test consistently with what this Court said in *Hargraves v The Queen*⁸¹ by reference to that which has deflected the jury away

77 *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

78 *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

79 See, eg, *Webb v The Queen* (1994) 181 CLR 41 at 81 per Deane J. See also s 16 of the JD Act, which entitles a judge to give a redirection if there are "substantial and compelling reasons for doing so"; cf s 7, which obliges a judge to correct statements or suggestions made at trial by counsel, or arising in a question from the jury, that are contrary to the Act.

80 *Jarvie v The Magistrates' Court of Victoria* [1995] 1 VR 84 at 90 per Brooking J, citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49-50, 54 per Brennan J, *R v Glennon* (1992) 173 CLR 592 at 614-617 per Brennan J and *Dietrich v The Queen* (1992) 177 CLR 292 at 325 per Brennan J. See also *Packard v The Queen* (2018) 271 A Crim R 353 at 401-402 [164], [168] per Beach JA and Beale A-JA.

81 (2011) 245 CLR 257.

from their fundamental task. Where the misdirection has not so deflected the jury because by its nature it is harmless, or because of the adoption of some successful correction or cure by the trial judge which renders the misdirection harmless or innocuous, there is no substantial miscarriage of justice.

117 Senior counsel for Mr Awad conceded that if the prohibited direction set out above had been expressly corrected by the trial judge, there would have been no substantial miscarriage of justice. He was, however, at pains to emphasise that no such correction had taken place here.

118 The observation of senior counsel for Mr Awad that the misdirection was not expressly corrected should be accepted. But it does not follow that it was not otherwise cured. In that respect, this is not a case where there was a manifest failure by counsel to object to a misdirection at trial⁸². Senior counsel for Mr Tambakakis promptly raised the misdirection with the trial judge as an exception at the end of the first day of the charge to the jury. When informed, the trial judge stated that he would correct the mistake. Senior counsel submitted that to do so would highlight the error to the jury and that it would be better to say nothing. He submitted that the trial judge should instead make the following direction:

"If you find that it's reasonably possible that Mr Tambakakis believed the secreted substance was steroids, then you must acquit him."

119 The trial judge informed counsel that he intended to give this direction anyway.

120 Senior counsel for the Crown was also of the opinion that the misdirection should be "simply left alone". He expressed the view that, in any event, each proposition in the misdirection "balance[d] out the other", a view also reached by McLeish and Niall JJA in the Court of Appeal⁸³. Senior counsel for Mr Tambakakis also agreed that the misdirection "was balanced". The trial judge responded by inviting counsel to consider overnight whether the misdirection should be corrected and confirmed again that he would give the direction sought by senior counsel for Mr Tambakakis; indeed, he said he would "emphasize" it. The next day, having had a full opportunity to reconsider the matter, counsel for Mr Tambakakis informed the Court that their position had not changed; they even

82 See, eg, *R v Osland* [1998] 2 VR 636 at 651-652 per Winneke P, Hayne and Charles JJA; *King v The Queen* (2012) 245 CLR 588 at 611 [55] per French CJ, Crennan and Kiefel JJ; *Mitchell v The Queen* [2022] VSCA 32 at [46]-[47] per Maxwell P, Beach and Sifris JJA. See also *Dhanhoa v The Queen* (2003) 217 CLR 1 at 12-13 [37]-[38] per McHugh and Gummow JJ.

83 *Awad v The Queen* (2021) 291 A Crim R 303 at 343-344 [167].

opposed a suggestion by the trial judge that he make it clear to the jury that what he had said was only a mere comment and not a direction of law.

121 It was submitted that the vice of the prohibited direction was that it would have confused the jury into thinking both that they were required to make a choice between guilt and innocence and, further, that Mr Tambakakis bore some onus in order to secure the acceptance of his defence. These propensities, it was said, deflected the jury from their task of deciding whether the Crown had "proved the elements of the charged offence beyond reasonable doubt"⁸⁴.

122 As mentioned already, the issue is not whether the misdirection, in and of itself, might have deflected the jury away from their fundamental task, but rather whether the entire charge, which included the misdirection, might have had such an effect. The trial judge commenced his charge with an orthodox statement that the jury would be bound by his directions of law, but not by any comments he might make about the evidence or the facts. His Honour emphasised: that the prosecution must satisfy the jury of guilt beyond reasonable doubt; that an accused may remain silent and does not have to prove anything; and, in particular, that Mr Tambakakis did not, by giving evidence, "assume some evidentiary onus". His Honour further said that, in giving evidence, Mr Tambakakis undertook to tell the truth and submitted himself to cross-examination, "which is the way lawyers test a witness' credibility and truthfulness". All of this was said before the misdirection took place.

123 Following the misdirection, in a passage that commenced with the words "[i]n the end, it is for you to determine whether or not you accept [Mr Tambakakis' evidence] and what weight you give to it", the trial judge told the jury to treat his evidence "in exactly the same way as you would treat the evidence of any other witness". His Honour then said: "[i]t is also essential, and this is very important in this case, ... that it is for the prosecution to prove its case beyond reasonable doubt". This direction was made repeatedly by the trial judge. His Honour also repeated that it was not for Mr Tambakakis to prove his innocence and that the burden of proof remained on the prosecution "irrespective of what you make of Mr Tambakakis' evidence".

124 The jury were told that: if they thought that Mr Tambakakis' evidence was true, then they were to find him not guilty; if they were not sure about whether his evidence was true, they were to find him not guilty; if they merely preferred the evidence of the prosecution witnesses to that of Mr Tambakakis, they were to find him not guilty; and if they were to reject Mr Tambakakis' evidence, they were then to put that evidence "to one side" and determine whether the Crown had nonetheless proven guilt beyond reasonable doubt. The trial judge made this last

84 *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

direction four times. It was also repeated in the Crown's final address to the jury. Consistently with the direction sought by Mr Tambakakis' defence counsel, the trial judge told the jury that if they thought that it was reasonably possible that Mr Tambakakis believed that he had acquired steroids, they were to find him not guilty. The trial judge repeated this direction after summarising Mr Tambakakis' evidence. Ultimately, it was up to the prosecution to prove beyond reasonable doubt, his Honour said, that Mr Tambakakis knew that a border controlled drug was in the printer boxes.

125 In the case of Mr Awad, amongst other matters, the trial judge charged the jury that if they were to reject Mr Tambakakis' evidence about who was in the van, they were then to put that evidence aside and consider the other evidence relied upon by the Crown to determine whether they were satisfied beyond reasonable doubt that Mr Awad was guilty.

126 The foregoing charge – when "taken as a whole"⁸⁵ – makes it abundantly clear that the trial judge well cured the effect of his mistaken direction and any propensity it may have had to deflect the jury away from their fundamental task. The jury could not have been under any misapprehension that the onus was entirely on the Crown to prove the guilt of Mr Tambakakis and Mr Awad beyond reasonable doubt. They would clearly have understood that: there was no onus on Mr Tambakakis or Mr Awad; Mr Tambakakis did not change this by giving evidence; and their task was not simply to make a choice between guilt or innocence.

127 That conclusion is supported by three considerations. First, there is the nature of the misdirection. It is conceivable that the two propositions contained in it – one that assumed innocence, followed by one that assumed guilt – balanced each other out and did not steer the jury in any particular direction. Indeed, as already mentioned, that conclusion was accepted by senior counsel for Mr Tambakakis during the charge and by McLeish and Niall JJA on appeal. Whether this is so may not matter. That is because it should be accepted, in any event, that the proposition that a guilty man might enter the witness box as a means of exculpation would be an idea that would occur in the minds of a jury without the need to be told of this possibility. It would have been "something which ... must have been quite obvious to any moderately intelligent human being"⁸⁶.

85 *Hargraves v The Queen* (2011) 245 CLR 257 at 277 [46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

86 *Haggag* (1998) 101 A Crim R 593 at 601-602 per Callaway JA, quoting *R v Silk* (unreported, Court of Criminal Appeal of the Supreme Court of Victoria, 22 September 1993).

128 Secondly, the charge proceeded in accordance with the solution to the misdirection proposed by senior counsel for Mr Tambakakis. That is also significant. As French CJ, Crennan and Kiefel JJ observed in *King v The Queen*⁸⁷, a decision to not seek a redirection by defence counsel at trial, which may be made for a variety of reasons, "informs consideration of the extent to which, taken in context, the direction was likely to confuse or mislead the jury".

129 In *R v Osland*⁸⁸, Winneke P, Hayne and Charles JJA made a similar observation in circumstances where "well-experienced" defence counsel had declined to object to certain erroneous directions and omissions at trial that then formed the basis for an appeal against conviction. Their Honours said⁸⁹:

"That, in itself, tends to suggest that, in the context of the trial, those counsel did not regard the directions as other than adequate to convey to the jury the relevant law as it related to the evidence in the trial and the cases being made to the jury on that evidence. It is the obligation of counsel, if he or she thinks that a direction or omission to direct is significant in the context of the trial, to take exception and ask the judge to redirect."

130 A failure to seek an explicit correction of a misdirection will not always preclude a finding of a substantial miscarriage of justice on appeal in respect of that misdirection⁹⁰. But it will nonetheless be relevant insofar as it "tends to shed [light] on the atmosphere, and the forensic conduct of an accused's counsel, at the trial"⁹¹. If there was a substantial risk of the jury being deflected from their task by the misdirection here, it would be expected that defence counsel would have sought an express redirection. That the parties made the deliberate forensic decision not to draw further attention to the misdirection, but rather to correct it by emphasising the burden of proof borne by the prosecution, supports a characterisation of the misdirection as being unhelpful at its highest, rather than as being potentially productive of a substantial miscarriage of justice.

131 Thirdly, today's juries have never been so well educated. It can safely be assumed that jurors are intelligent and rational individuals who will follow the

87 (2012) 245 CLR 588 at 611 [55].

88 [1998] 2 VR 636.

89 [1998] 2 VR 636 at 651-652. See also *R v Defrutos* [1998] 2 VR 589 at 600 per Callaway JA; cf *General Motors-Holden's Pty Ltd v Moularas* (1964) 111 CLR 234 at 242-243 per Barwick CJ.

90 *R v Clune [No 2]* [1996] 1 VR 1 at 6 per Callaway JA (Winneke P and Crockett A-JA agreeing).

91 *Melbourne v The Queen* (1999) 198 CLR 1 at 62 [175] per Callinan J.

directions of the trial judge and will not be easily confused⁹². As Keane JA observed in *R v D'Arcy*⁹³:

"High authority confirms that the law does not proceed upon a sceptical view of the intelligence or integrity of juries, or their ability rationally to determine issues of guilt or innocence strictly by reference to the evidence adduced at trial. Rather, the law proceeds upon the assumption that jurors may be relied upon to determine issues of guilt or innocence in accordance with their sworn oath. The administration of criminal justice necessarily depends upon the compliance by jurors with directions from the trial judge to base their verdict on the evidence given before them on the trial and to disregard information otherwise acquired."

132 In *Varga v Matri*, Priestley JA said⁹⁴:

"The trial judge was of the opinion that the problems caused by the defence's opening could be overcome by the directions he would give concerning them. In stating this view he remarked that he was taking into account that juries must be given credit for education and intelligence. This is an observation with which I agree. Juries are entrusted with serious tasks in the administration of justice and it seems to me to be quite incongruous for appellate courts to treat juries entrusted by the community with those serious tasks, as being less than ordinarily adequate to cope with them."

133 In *Roux v Australian Broadcasting Corporation*, Cummins J observed⁹⁵:

"I think the responsibility, intelligence, commonsense and robustness of Australian juries is constantly under-estimated. I consider that when persons come together to act as judges of the facts, time and time again it is demonstrated that they do just that – they give verdicts according to the evidence before them. Time and again juries demonstrate they are capable of putting aside extraneous or prejudicial or inflammatory or irrelevant material. ... Juries, in my view, are well capable of acting consonantly with their high function of giving a true verdict according to the evidence."

92 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13] per Gleeson CJ and Gummow J, 425 [31] per McHugh J.

93 [2005] QCA 292 at [28]; cf *R v H* [1995] 2 AC 596 at 613 per Lord Griffiths.

94 Unreported, Court of Appeal of the Supreme Court of New South Wales, 28 August 1987.

95 (1991) 25 ALD 210 at 212.

134 Of course, there may be rare exceptions to the foregoing, but these cannot dictate the rule to be applied in all cases.

135 As explained above, the trial judge's charge was emphatic as to the fundamental task of the jury. His Honour consistently articulated the approach that the jury should take with respect to Mr Tambakakis' evidence, as well as the presumption of innocence to which Mr Tambakakis was entitled and the burden of proof borne by the prosecution. In light of the insignificance of the misdirection in the entire context of the charge and the trust reposed by the criminal justice system in "the integrity and sense of duty of jurors"⁹⁶, it should be concluded that the jury understood and faithfully applied the trial judge's directions as to their fundamental task of "giving a true verdict according to the evidence".

136 The appeals should be dismissed.

96 *R v Glennon* (1992) 173 CLR 592 at 615 per Brennan J.