



HIGH COURT OF AUSTRALIA

9 November 2022

AWAD v THE QUEEN; TAMBAKAKIS v THE QUEEN
[2022] HCA 36

Today, the High Court allowed an appeal from the Court of Appeal of the Supreme Court of Victoria. The appeal concerned whether the giving of a jury direction, prohibited by statute, resulted in a substantial miscarriage of justice for the purpose of s 276(1)(b) of the *Criminal Procedure Act 2009* (Vic).

Following a joint trial, Mr Awad and Mr Tambakakis were convicted of attempting to possess a commercial quantity of an unlawfully imported border-controlled drug, namely cocaine. Mr Awad did not give evidence, instead relying significantly on the evidence of Mr Tambakakis that Mr Awad did not get in the van used to move the consignment. The core of Mr Tambakakis' evidence was that he thought the consignment contained steroid tablets, which are not a border-controlled drug. The sole issue in dispute at trial reduced to whether Mr Awad and Mr Tambakakis, in the belief the consignment contained a border-controlled drug, received, had physical possession of, or had control or joint control of the consignment. Consequently, the credibility of Mr Tambakakis' evidence was at the heart of the trials of both Mr Awad and Mr Tambakakis.

The trial judge directed the jury that "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". This direction was prohibited by s 44J of the *Jury Directions Act 2015* (Vic). The trial judge gave other directions to the jury generally about the onus and standard of proof, and a direction that if the jury rejected the evidence of Mr Tambakakis they should put his evidence to one side rather than finding him guilty, but if they accepted his evidence then they would find him not guilty.

The Court of Appeal unanimously rejected the submission that a contravention of s 44J was such a fundamental error that, without more, it would always result in a substantial miscarriage of justice. The majority held that there was no substantial miscarriage of justice in the particular circumstances of the case, because in the context of the charge to the jury as a whole, the prohibited direction would not have distracted the jury from its task.

The High Court, by majority, held that there was a substantial miscarriage of justice, and ordered a new trial for each of Mr Awad and Mr Tambakakis. The Court held that while not every breach of s 44J will result in a substantial miscarriage of justice, in the present case, the direction left the jury with the choice to approach Mr Tambakakis' evidence on the assumption that he was a guilty person, in circumstances where his credibility was central to both his defence and Mr Awad's defence. Despite correct directions which mitigated the damage caused by the prohibited direction, there remained the capacity for the prohibited direction to undermine the presumption of innocence and deflect the jury from its fundamental task of deciding whether the prosecution had proved the elements of the charged offence beyond reasonable doubt.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.