IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

S APCR 2016 0037

ALEXANDER JOHN SEMAAN

**Applicant**

**and**

THE QUEEN

**Respondent**

**RESPONDENT'S WRITTEN CASE**
**CONVICTION**

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| Date of document: | 1 June 2017 |
| Filed on behalf of: | The Respondent |
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## Part A: Sentence, Relevant Statutory Provisions and Maximum Penalties

1. The Applicant was found guilty of Murder after a trial in the Supreme Court at Melbourne on 6 September 2016. A plea hearing took place over 24 and 28 October 2016 and the Applicant was sentenced on 4 November 2016 as set out in the table below:

| **Charges on Indictment** | **Offence** | **Statutory provision** | **Maximum** | **Sentence** | **Cumulation** |
|---|---|---|---|---|---|
| 1. | Murder [Contrary to Common Law] | s.3 of the *Crimes Act 1958* | Life imprisonment | 22 years imprisonment | Base |
| Summary Charge | Breach of Parole | s78A(1) of the *Corrections Act 1986* | 3 months imprisonment | 2 months' imprisonment | 2 months |

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| **Total Effective Sentence:** | 22 years and two months imprisonment |
| **Non-Parole Period:** | 18 years |
| **Pre-sentence detention:** | 187 days |
| **Other relevant orders:**<br>• Disposal Order | |

**Part B: Summary of Relevant Facts**

2. The learned sentencing judge summarised the facts of the offending at paras [3] – [17] of His Honour's sentencing remarks. Those facts are relied on by the Respondent as a summary of the relevant facts.

**Part C: Grounds of Appeal**

**3. Background**

3.1 The trial in this matter initially commenced in April 2016. On 28 April 2016 (the 8th day of the hearing) an issue arose in relation to the admissibility of evidence in relation to out of court statements allegedly made by Yousef Khoury and Margaret Khoury.

3.2 Argument in relation to those matters was heard on 28 and 29 April 2016. The trial jury was subsequently discharged for unrelated reasons.

3.3 The learned trial judge delivered a ruling in relation to the admissibility of the challenged evidence on 11 May 2016.[1] The ruling allowed the prosecution to adduce the evidence of those out of court statements.

3.4 The trial recommenced with the same judge and counsel on 18 July 2016.

**4. Ground 1: The learned trial judge erred in ruling the previous representations made by Yousef Khoury ("Khoury") to police officers Seddon and Kerr, were admissible (Rulings 8 and 9) and further erred in ruling neither s. 137 nor the "Haddara" discretion were engaged.**

4.1 The Applicant sets out the course of the discussion in relation to the previous representations made by Yousef Khoury ("the Yousef Khoury evidence") in paragraph 9 of his written case.

[1] *The Queen v Semaan & Ors (Rulings 8, 9 and 10)* [2016] VSC 226.

4.2 Regrettably that paragraph gives a misleading impression of that discussion by concluding with a reference to a part of the transcript from 28 April 2016 where the learned trial judge indicated that he could not be satisfied that the representations in question were first-hand hearsay.[2] The written case then records the learned trial judge's ruling on 11 May 2016 as the next significant event.[3] The sequence of events recounted in that paragraph does not include a later portion of the transcript which is also from 28 April 2016 in which His Honour was taken to the statement of police officer Amy Kerr wherein she recounted Yousef Khoury stating to her that, "...the offender was crazy and that he had pointed the gun at him".[4]

4.3 In response to the prosecutor referring him to that later passage His Honour commented, "Yes, it is a little bit more direct".[5] It was then submitted by the prosecutor that Kerr's evidence on the point supported the proposition that Yousef Khoury had in fact seen the gun.[6] His Honour apparently agreed, and described the evidence of Kerr on the point as being "...of a different quality".[7]

4.4 That error of omission gives a false impression that the Applicant was not on notice in relation to the submission made based on the evidence of Kerr. It also gives the false impression that the last comment made in relation to the issue by the learned trial judge indicated that he could not be satisfied that the relevant representation was first-hand hearsay.

4.5 That particular aspect of the evidence of Kerr subsequently formed the basis upon which His Honour drew his conclusion that the Yousef Khoury representation was first-hand hearsay.[8]

4.6 It is submitted that that conclusion drawn by the learned trial judge was clearly open on the evidence available. In fact, in circumstances where Yousef Khoury had effectively stated that the accused had pointed the gun at him,[9] the overwhelmingly obvious conclusion could only be that Yousef Khoury had seen the accused with the gun. The statements made to Kerr and Seddon were therefore statements made from direct observation and were admissible pursuant

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[2] Applicant's written case, paragraph 9(e).
[3] Ibid, paragraph 10.
[4] Transcript of 28 April 2016, page 511, lines 22 to 29.
[5] Ibid, line 30.
[6] Ibid, page 512, lines 4 to 8.
[7] Ibid, line 9.
[8] *The Queen v Semaan & Ors (Rulings 8, 9 and 10)* op. cit. at paragraph 16.
[9] This is the effect of the combined evidence of Seddon and Kerr. His Honour used the combination of the evidence from officers Seddon and Kerr to conclude that in both cases (1) the accused was the person referred to; and (2) the evidence was first-hand hearsay. Because logic he employed required the use of the evidence in combination, His Honour makes the point in footnote 8 of the ruling that he is satisfied that Yousef Khoury saw the accused pointing the gun at him before he spoke to *both* Seddon and Kerr.

to section 66 of the *Evidence Act 2008* subject to the usual considerations in relation to prejudice and unfairness.

*Section 137 and Haddara*

4.7 No submissions were made by defence counsel at trial in relation to section 137 of the *Evidence Act* or the *Haddara* discretion insofar as the Yousef Khoury evidence was concerned. It is submitted that that was a legitimate forensic decision as a result of the paucity of any basis for such arguments.

4.8 In the written case the Applicant argues that the admission of the Yousef Khoury evidence resulted in the Applicant suffering unfair prejudice.[10]

4.9 Section 137 requires the court to assess whether the probative value of evidence adduced by the prosecution is outweighed by the danger of unfair prejudice to an accused.

4.10 In paragraph 25 of the written case the Applicant submits that the probative value of the Yousef Khoury evidence "...at its highest level, is not very high at all".

4.11 In support of that proposition the paragraph then goes on in the second sentence to effectively repeat the error of omission referred to in paragraphs 4.2 to 4.4 above by failing to refer to the substance of Kerr's evidence.

4.12 Further, the assertion in paragraph 25 is difficult to reconcile with the earlier submissions contained in paragraph 21 of the Applicant's written case to the effect that:

(a) The Khoury evidence was "highly damaging".

(b) The evidence related to the "important issue" of whether the accused had a gun shortly after the incident.

(c) The "...evidence 'cut directly across' the defence case...".

4.13 It is submitted that the probative value of the evidence was obviously high. The probative value was high essentially for the reasons expressed in subparagraphs (b) and (c) of paragraph 21 of the Applicant's written case. In circumstances where the defence case was that a mystery gunman had attended the premises and shot the victim after an attempted armed robbery, the receipt of evidence to the effect that the accused was in possession of a gun

[10] Applicant's written case, paragraph 25.

shortly after the shooting was necessarily of considerable importance both in advancing the Crown case that the accused was the shooter and in countering the defence case.

4.14 The Applicant alleges four types of unfair prejudice in paragraph 25 of the written case:

(a) "*no direction as to 'unreliable evidence' could counter the damaging effect of the representations and a proper assessment by a jury of the weight to be attached to them*".

4.15 The meaning of this proposition is somewhat unclear. If the jury accepted that Yousef Khoury told the two police officers that the accused had the gun in his possession after the shooting; and if, as a result, the jury accepted that the accused did indeed have the gun in his possession after the shooting then that would quite properly have a damaging effect on the defence case.

4.16 An unreliable evidence direction is not intended to "counter the damaging effect of the representations". Rather, in this context, it is intended to assist a jury in assessing whether to accept that the representations were, in fact, made in the first place and whether they were intended to possess the meaning which was contended for by the prosecution.

4.17 The Applicant then asserts that a jury could not properly assess the weight to be attached to the evidence but makes no submission as to why this should be so. It is submitted that there is no basis for such a submission.

(b) "*given Khoury denied having made the representations, a credit attack necessarily would have to be undertaken by defence on two police officers*".

(c) "*such a credit attack on two police officers risked the jury being 'derailed' from the central issue in the trial – did the Applicant shoot the deceased with murderous intent*".

4.18 Senior Constable Kerr was questioned about her recollection of what was said to her on the night by Yousef Khoury.[11]

4.19 Acting Senior Sergeant Seddon was asked very few questions about Yousef Khoury.[12]

4.20 Nothing in either cross examination was confusing or difficult for a jury to understand. Certainly no part of the cross examination "risked the jury being 'derailed' from the central issue".

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[11] Transcript, page 303, line 29 to page 307, line 2.
[12] Ibid, page 280, lines 13 to 20 and page 286, line 27 to page 287, line 2.

4.21 Further, it is submitted that the mere fact that evidence which is unfavourable to the defence comes from police officers (or any other type of credible witness) does not create prejudice in the relevant sense.

(d) *"a real risk arises Khoury would be seen to be either 'in the camp' of the Applicant and/or more dangerously having been 'got at' by the Applicant. This ran the further risk of impermissible rank propensity reasoning".*

4.22 In his statement to police Yousef Khoury had made no mention of seeing the Applicant on the night of the shooting. At committal he stated expressly that he had not seen him on the night.[13] Accordingly there was some tension between the alleged out of court statements and the evidence he was likely to give at trial. It is submitted that, without more, there is no warrant to conclude that as a result of that conflict in his evidence, a jury would automatically see Yousef Khoury as being 'in the camp' of the Applicant.

4.23 Further, even if Yousef Khoury was seen by the jury as trying to assist the Applicant in his evidence, that is not a matter that creates prejudice to the Applicant because it does not reflect on the Applicant other than to indicate that Yousef Khoury was loyal to him to some extent. That is not a matter that, of itself, necessarily reflects poorly on the Applicant.

4.24 No suggestion was made by any party that the Applicant had "got at" the witness.

4.25 It is submitted that it is untenable to suggest that any witness who apparently alters their version of events in a manner which favours an accused cannot then be called by the prosecution for fear that a jury might, as a result purely of that change in evidence, conclude that the accused had interfered with the witness.

4.26 The Applicant's written case repeats the same submissions in relation to the *Haddara* discretion.[14] The Respondent likewise repeats the same submissions in response.

*Natural Justice*

4.27 In paragraph 18(e) of the written case the Applicant complains of a denial of natural justice.

4.28 A denial of natural justice is not a part of this ground of appeal (which is limited to the question of admissibility of evidence). In any case, for the reasons set out in paragraphs 4.2 and 4.3 above no such denial of natural justice took place. The relevant evidence was aired in

[13] *The Queen v Semaan & Ors (Rulings 8, 9 and 10)* op. cit. at paragraph 5.
[14] Applicant's written case, paragraph 26.

open court prior to the ruling and the Applicant's counsel could have made submissions on the issue if he had seen fit to do so.

5. **<u>Ground 2:</u> The judge erred in ruling the previous representations by Margaret Khoury ("Margaret") to Noelle Semaan ("Noelle") was admissible (Ruling 10) and further erred in ruling neither s.137 nor the "Haddara" discretion were engaged.**

   **<u>Ground 3:</u> The judge erred in ruling the previous representation of Noelle Semaan ("Noelle") to police officer Cunha ("Cunha") was admissible (Ruling 10) and further erred in ruling neither s.137 nor the "Haddara" discretion were engaged.**

5.1 The submissions contained in the written case in relation to these grounds appear (at least in part) to misinterpret the ruling made by the learned trial judge.[15]

5.2 The ruling identifies the person giving the evidence in relation to the representation made by Margaret Khoury as Noelle Semaan.[16] In the written case the Applicant asserts that this evidence comes from police officer Cunha.[17] As a result of that apparent misconception the Applicant asserts that the evidence amounts to "second hand hearsay" because it is coming from Cunha.[18]

5.3 In accordance with the ruling, at trial the prosecutor played the recording made by Detective Senior Constable Cunha of his conversation with Noelle Semaan to Noelle Semaan. She confirmed that the voice in the recording was hers and that she had had that conversation with D/S/C Cunha on the night of the shooting. She went on to say that although she knew that it was her speaking in the recording, she didn't remember seeing Margot (Margaret) Khoury on the night.[19] Accordingly, the evidence in relation to Margaret Khoury's representation did indeed come from Noelle Semaan.

5.4 The learned trial judge referred to the issue in his ruling as follows:

> "35 Section 66 stipulates that "evidence of the representation" may be given by a witness who perceived the representation being made. Even though such a witness will usually testify directly that the maker made the previous representation, the form of the evidence to be given by that witness is not prescribed by s 66. Thus, if a witness who

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[15] Ibid. See, in particular, paragraph 31(d) which asserts that the basis for the ruling was, in part, that "Noelle was not giving positive evidence of Margaret having made the representations (the previous representation was thus sought to be adduced through police witness Cunha)… ". This was not the basis for the ruling.

[16] *The Queen v Semaan & Ors (Rulings 8, 9 and 10)* op. cit. at paragraph 36.

[17] Applicant's written case, paragraph 32.

[18] Ibid, paragraph 33, subparagraphs (c) and (d).

[19] Transcript, pages 370 to 372.

perceived the representation being made gives hearsay evidence of the representation this element of the s 66 exception to the hearsay rule may still be satisfied. But if the evidence of the representation takes the form of hearsay evidence, it must itself meet the requirements of s 66 (or some other exception to the exclusionary hearsay rule) to be admissible.

36 For the time being, it is appropriate to maintain the focus on the previous representation by Margaret. I am satisfied that the evidence of Margaret's representation is to be adduced through a witness who perceived the representation being made (Noelle), albeit Noelle is anticipated to give that evidence in a hearsay form."[20]

5.5 The Applicant refers to the evidence as "second-hand hearsay" on a number of occasions in order to support an assertion that it was not admissible.[21] Section 66 does not use that language. The question is whether the provisions of the section were satisfied. It is submitted that the analysis of the learned trial judge is correct. The evidence fell within the parameters laid down by the section and, as a result, was admissible.

5.6 The ruling then goes on to deal with the representation made by Noelle Semaan (i.e. that Margaret had told her that Alex was pointing a gun at everyone)[22] to D/S/C Cunha.[23] That representation was also ruled admissible.

5.7 At trial all that was asked of Cunha in relation to this issue was that he identify the recording of his conversation with Noelle Semaan, which he did.[24] He gave no separate evidence of the representation.

5.8 The ruling was made circumstances where it was known that Noelle Semaan had already given evidence at a *Basha* hearing to the effect that, whilst she could not recall the conversation, it was her voice on the recording and she acknowledged that she had made the relevant previous representation.[25] The recording was subsequently played to Noelle Semaan at trial and she gave evidence in accordance with what she had said at the *Basha* hearing. The origin of the recording needed to be established (through Cunha) in order that it could be properly put to Noelle Semann when she gave her evidence.

5.9 It is submitted that that evidence was properly admitted. It was not used in the manner asserted by the Applicant but only in order to facilitate the adducing of Noelle Semaan's evidence in relation to the representation made by Margaret Khoury.

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[20] *The Queen v Semaan & Ors (Rulings 8, 9 and 10)* op. cit. at paragraphs 35 and 36. References removed.
[21] Applicant's written case, paragraph 33, subparagraphs (d), (f) and (h).
[22] *The Queen v Semaan & Ors (Rulings 8, 9 and 10)* op. cit. at paragraph 44.
[23] Ibid at paragraph 42.
[24] Transcript page 232, line 3 to page 324, line 16.
[25] *The Queen v Semaan & Ors (Rulings 8, 9 and 10)* op. cit. at paragraph 47.

6. <u>Ground 4:</u> **The judge erred in failing to give adequate directions of law concerning "unreliable evidence" as follows:**

**(a) in relation to the unreliable evidence direction the same was expressed by way of 'routine' or 'formality' with a risk arising the jury would minimize the importance of the direction;**

6.1 The directions of law given by the learned trial judge in relation to unreliable evidence were appropriate in the circumstances.

6.2 The directions chiefly arose out of the hearsay nature of the evidence of statements made by Youseff Khoury to police and by Margaret Khoury to Noelle Khoury.

6.3 The Applicant complains about the following part of the learned trial judge's direction:[26]

> "The law says that every jury must take this potential unreliability into account when considering evidence of an out of court statement".

6.4 It is submitted that the impugned sentence in no way diminishes the import direction given. In fact, the sentence underlines the importance of the direction by emphasising that *every* jury which is examining such a statement *must* take such concerns into account. It has the opposite effect to that contended for by the Applicant.[27] It does not express the direction as a matter of "routine" or as a "formality". It is submitted that the Applicant's contention is unsupported by any aspect of the direction.

**(b) whilst the said direction was to be given concerning witnesses Khoury, Margaret, Noelle and others, the specific direction given omitted reference to Khoury;**

6.5 This is simply incorrect. The direction commences with the learned trial judge correctly identifying the witnesses who made the relevant out of court statements as "Yousef Khoury and Margaret Khoury". He repeats Yousef Khoury's name ten times during the direction.[28]

**(c) the direction should have included a direction that the jury were not to reason any of witnesses Khoury, Margaret and Noelle had been 'got at' etc. by the accused;**

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[26] Applicant's written case, paragraphs 41 and 42.

[27] Another example would be where a jury is told that in all criminal trials in the State of Victoria the prosecution must prove guilt beyond reasonable doubt. The fact that a jury is told that such a direction is always given in no way diminishes the force of that direction. Knowledge of the ubiquity of the rule is more likely to underline its importance.

[28] Transcript, page 2058, lines 3, 8, 10, 14 and 16; page 2059, lines 3, 7, 24 and 25; and page 2061, line 8.

6.6 No allegation was made by any party that any witness had been 'got at'. There was no evidence given of any such behaviour by anyone. The giving of such a direction would run the risk of giving some credence to the concept in the eyes of the jury. The respondent refers to and repeats paragraphs 4.22 to 4.24 above.

6.7 No such direction was asked for and there was good reason for the making of a legitimate forensic decision not to seek such a direction.

**(d) the direction failed to identify the representation of Noelle was admitted solely for the limited purpose that Margaret had made the representation to her and not in proof of the truth that Alex was in possession of the gun.**

6.8 The Respondent refers to and repeats the contents of paragraphs 5.7 to 5.9 above.

6.9 In the alternative it is submitted that in the circumstances the direction contemplated by the Applicant would have proven extremely difficult to fashion in a manner which would have been in any way comprehensible to a jury.

6.10 On the one hand the jury would be told that when the recording was played in the evidence of Cunha it could only be used for one particular purpose but, when the same recording was played in the evidence of Noelle Semaan it could be used for a different purpose altogether.

6.11 It is submitted that such a direction would be pointless and could only serve to confuse a jury.

6.12 In any case, having regard to the state of the evidence in relation to this aspect of the evidence it is submitted that even if such a direction could have been given in a comprehensible form it would have made no difference to the outcome of the trial.

## 7. Other matters

7.1 Having regard to the length of the Applicant's written case the Respondent seeks leave to file a written case in excess of 10 pages.

**Date:** 2 June 2017

**Justin Lewis**
**Counsel for the Respondent**