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

ALEXANDER JOHN SEMAAN

Applicant

-v-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

WRITTEN CASE ON BEHALF OF THE APPLICANT

PART ONE – Introduction

1. On 6th September 2016, the Applicant was convicted of murder. A plea in mitigation was presented on the 24th and 28th October 2016.

2. On 4th November 2016, the Applicant was sentenced as set out in the following Table:

Offence	**Individual Sentence**	**Order for Cumulation**
Charge 1 – Murder[1] (Maximum Penalty: Life imprisonment)	Head Sentence: 22 years imprisonment Non-Parole Period: 16 years imprisonment	Base
Summary Charge Breach of Parole[i]	3 months imprisonment	2 months
Total effective sentence Non parole period Pre-sentence detention	22 years and 2 months gaol 18 years 187 days	

PART TWO – Summary of Relevant Facts

[1] *Crimes Act 1958* s 3.

3. The Summary of Prosecution Opening and Reasons for Sentence detail the essential facts for the purpose of this appeal[2].

PART THREE – Appeal against Conviction

Ground 1: The learned trial judge erred in ruling the previous representations made by Youssef 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.

Ground 2: The judge erred in ruling the previous representation 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.

Ground 3: 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.

Ground 4: 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;

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

(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;

(d) the direction failed to identify the representation of Noelle was admitted solely for the limited purpose that Margaret had made the

[2] Both documents are attached to, and filed with, the written case.

representation to her and not in proof of the truth that Alex was in possession of the gun.

BACKGROUND

The Crown sought to lead evidence that the Applicant was seen shortly after the charged incident to be in possession of a gun. Representations to that effect were said to have been made to: (a) police officers Seddon and Kerr by Khoury; and

(b) the Applicant's sister Noelle by Margaret.

In respect of both sets of representations i.e. those from Khoury and that from Margaret both were to be called as witnesses by the prosecution but it was not anticipated either would give evidence of having seen the Applicant in possession of a gun on the night of the incident (that proved to be the situation when the trial ultimately proceeded and the witnesses were called).

Ground 1: The Khoury Representations

4. An admissibility ruling was sought by the Applicant concerning the purported statements to the two police officers by Khoury. Ruling 8 concerns a statement made by Khoury to Sgt. Seddon.[3] Ruling 9 relates to a Khoury statement said to have been made to Constable Amy Kerr.[4]

5. The Crown sought pursuant to s.66 of the Evidence Act[5] to adduce hearsay evidence that the Applicant was observed by Khoury to be in possession of a gun shortly after

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[3] See R v Semaan & Ors Rulings 8, 9 & 10 [2016] VSC 226

[4] See R v Semaan & ors Rulings 8,9 & 10 [2016] VSC 226

[5] Evidence Act Setion 66 Exception—criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—

(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made—

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(2A) .....

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

the deceased was shot. In his witness statement[6] Khoury made no mention of seeing the Applicant on the night of the shooting and at committal[7] Khoury expressly stated he did not see the Applicant that night.

6. Shortly after the shooting, Khoury has told the first police officer ("Seddon") he saw the Applicant in possession of a gun after the shooting.[8]

7. Some minutes later Khoury has told Constable Kerr ("Kerr") he (the Applicant) pointed the gun at him.[9]

8. As was submitted to the judge,[10] the evidence/material demonstrating how Khoury acquired this 'information' as to the Applicant being seen with the gun shortly after the shooting was far from clear. It is submitted the judge erred in finding satisfaction on the balance of probabilities that the representation made by Khoury was based on what he observed and, such a finding was not open on the evidence.

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(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

[6] See Depositions p.234-7;

[7] Depositions p.127

[8] Deps p.599 statement of Sergeant Seddon. She says in her statement that almost immediately after arriving she was approached by Youssef: When I first arrived at 137 Donald Street, Brunswick East, I drove into Lanark Street and was approached by a male person wearing a white singlet and shorts. I did not obtain his details at the time, but I have since been able to identify him using the police database, as Youssef KHOURY (28/05/1987) of 3 Lanark Street, Brunswick East. I had the following conversation with him when he initially approached my vehicle in Lanark Street. He said, "A man's been shot in the head." I said, "Who is it?" He said, "I don't know." I said, "Who shot him?" He said, "My Uncle. You better move, don't stay here because he's in there and he's still got a gun."

[9] See Kerr's statement deps p.607. She says As I was yelling at the crowd to move towards us, a male in a white singlet and shorts walking with a limp approached me and said, "He's crazy; don't go in there, you need the SWAT or something". This male is now known to me as Youssef KHOURY (28/05/1987). A female has also approached me stating that she needed an ambulance; I told her that an ambulance would not be coming while the offender was still armed but an ambulance was just around the corner and we are doing everything we can to make the area safe so that the ambulance could attend. At this time a second male then approached me who was talking on a mobile phone; I now know this male to be Tennous [sic] SEMAAN (25/01/1993). SEMAAN was talking to a 000 operator. He said to me, "She said they were coming", in reference to the ambulance arriving. I heard the 000 operator ask SEMAAN, "Do the girls in the back ground know where the offender is?" on hearing that I said to SEMAAN, "Where is he?" in reference to the offender. Both SEMAAN and KHOURY said that they didn't know where the offender was or where he went. The female asked, "Who?", and either KHOURY or SEMAAN replied "Alex". The 000 operator has then asked SEMAAN who "Alex" was, to that SEMAAN passed the mobile phone to me. I then had a conversion with the 000 operator regarding the situation and was informed that the ambulance was in Holmes Street. I told the operator that police would not be entering the address as the offender was still armed and his location was not known.
I handed the phone back to SEMAAN who told me that he had tried CPR and that blood came out of victim's mouth. KHOURY said that the offender was "crazy" and that he had pointed the gun at him. The female was hugging me saying that her mother was inside and that I needed to go inside and get her out".

[10] See TT p.476 ln 12-31 and p. 477 ln 1-14;

9. The issue is first ventilated on 28th April 2016 and emerges as follows:

(a) Defence Counsel identifies a ruling is required concerning hearsay aspects of Seddon's evidence;[11]

(b) the judge is directed to Seddon's statement at p.603 and the relevant part where she says she spoke to a man in a white T-shirt who she has since learned to be Khoury. The submission was made "the information is not something Khoury knows.....he was not an eye witness...it's clearly hearsay and in any event would be excluded by s66(3);"[12]

(c) a submission as to the applicability of s.66(3) is made however the judge was not attracted to the s66(3) argument and clearly let his view on that known.[13] This part of the Ruling is not challenged;

(d) the Crown acknowledges a necessary precondition to leading the evidence is the requirement that it be first hand hearsay.[14] Further, the Crown state the purpose for leading the hearsay evidence is to prove Alex had a gun;[15]

(e) during and subsequent to submissions made by the Crown on the issue the judge states his view is he cannot be satisfied the representation is first hand hearsay.[16]

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[11] See TT p.476 ln 7-10;

[12] See TT p.476 ln 12-31 and p. 477 ln 1-14;

[13] See TT p.477 ln 10-14;

[14] See TT p.478 ln13-20;

[15] See TT p.481 ln 14-17;

[16] (a) the judge states, having been taken through the transcript of the '000' call he was not, at the moment, persuaded by the references he had been taken to in the transcript that it was first hand hearsay, See TT p.485 ln 20-22;

(b) Crown suggest (See TT p.486 ln 28-30; also p.487 ln 16-17; also p.488 ln 3-11) the playing of the '000' call makes it clear a number of people saw, including Khoury, the Applicant with the gun. Persons present said by the Crown to be Tannous, Margaret and Khoury;

(c) the judge states he needs to be satisfied on the balance of probabilities (See TT p.479 ln 10-18; p.497 ln1-14 and ln 28-29; p.500 ln 22-28) that what Khoury is alleged to have said is based on personal knowledge of what he saw (rather than based on something that he saw other than based on a previous representation made by another); See TT p.481 ln 23-25;

(d) the discussion proceeds with the judge again stating to the Prosecutor "the issue I want to explore at the moment is the basis on which you say it is first hand hearsay based on personal knowledge..."

(e) after continued discussion the '000' call is then played see TT p.494 the judge then says "In a moment Ms Williams, I think it's speculation as to whether he's seen Alex with a gun";

(f) after further discussion the judge says to the prosecutor TT p.496 "It's consistent with a belief that Alex Semaan has a gun. I will grant you that. The question is, is that a belief based on observation of Alex with the gun or not."

(g) again at TT p.500 the judge says "I am not persuaded on the balance of probabilities that Youssef Khoury was in the backyard at the time that Alex Semaan emerged from the bungalow and assuming that Alex Semaan emerged from the gun and if I am not satisfied that Youssef Khoury was in the backyard, how can I be satisfied that he saw Mr Semaan brandishing the gun at that point"

(h) at TT p.505 the judge enquires of the Crown are there previous representations made by anyone else that you are relying on for a hearsay purpose, namely to prove that Alex was seen in possession of a

10. The judge delivers his Ruling in Rulings 8, 9 and 10 on the 11th May 2016

11. It is submitted the trial judge erred in finding that the Khoury assertion 'the Applicant was still in possession of a gun' was based on personal knowledge.[17]

12. His Honour makes this finding "mainly because of what Youssef has told Constable Kerr just a few minutes after Youssef has spoken to Sgt Seddon.....Youssef told Constable Kerr that the offender had pointed a gun at him. That Youssef was referring to Alex when he referred to the offender follows on from the fact that he had told Sgt Seddon a short time before that his uncle was the shooter."[18]

13. The judge footnoted "I am satisfied that Youssef observed Alex pointing the gun at him before he spoke to both Constable Kerr and Sgt Seddon. There is no reason to think that in the few minutes between Youssef speaking to Sgt Seddon and Youssef speaking to Constable Kerr that Yousef observed Alex pointing the gun at him."[19]

14. No issue is taken with the comment or finding expressed in footnote 8 dismissing the possibility of Khoury having observed the gun pointed at him between conversations with the two police officers. It is respectfully submitted though – such is beside the point and does not meaningfully add anything to the issue as to whether Khoury had made the observation of the Applicant with the gun (pointed at him or not) prior to speaking with Seddon.

15. The judge advances no other reason/s other than that identified in par [16] to support the finding made.

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gun? Mr Hutton relies No, Your Honour. There is the statement of Amy Kerr but that really rises and falls with the argument of Youssef Khoury; See TT p.505 ln26-31 and p.506 ln 1 – 2;

(i) shortly after this exchange the judge tells defence counsel they do not need to address him further in relation to the passage on p.603 where Khoury says to Seddon "He is in there and he's still got a gun"

(j) on the following day with some little further discussion on the Khoury hearsay issue the debate then moved onto the Margaret hearsay issue. The trial shortly thereafter 'aborts' for unrelated reasons to this Appeal.

[17] See Ruling par [16]
[18] See Ruling par [16]
[19] See footnote 8 on page 5 of the Ruling;

16. A detailed analysis of the relevant evidence on the issue was canvassed on the 28th April. The judge expressed, properly at that point he was not satisfied the Crown had established on the balance of probabilities Khoury has seen or made the observation himself of the Applicant with the gun. Thus the view then expressed by the judge was the proposed evidence was not first-hand hearsay. The Applicant submits this initial finding was correct for the reasons then stipulated by the trial judge.

17. In fact, as mentioned earlier at footnote 16(i) herein, the Judge indicated he did not require submissions from defence on this point.

18. Clearly the judge had 'changed his mind' from initial comments made by him on the 28th April by the time the Ruling was handed down. It is submitted the judge in making the critical factual finding (i.e. that it was first hand hearsay) contrary to what he had previously indicated was:
    (a) incorrect on the evidence before him on the issue as previously so stated (comprehensively and repeatedly) by the judge;
    (b) further the Defence were effectively 'shut out' from making submissions on the issue (both in relation to s.66 and s.137 and the 'Haddara' discretion) such was the confidence the judge expressed in what would inferentially be the Ruling;[20]
    (c) at the very least the judge ought to have entertained further submissions from Defence Counsel before handing down the subject final ruling; and
    (d) in the premises, the Defence have been denied 'due process' or procedural fairness in not having been heard;[21] and
    (e) the Applicant has been denied natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.

19. Further the judge erred in stating the only element of the s.66 exception which is in dispute (in relation to the Khoury representation via the Kerr evidence) is whether the

[20] Detailed searches and enquiries have been made which fail to reveal any further submissions being requested or made between 29th April 2016 and the Rulings 8,9 and 10 being handed down. In the event, such further submissions were made this particular aspect of the ground of Appeal would unreservedly be withdrawn.
[21] See Commissioner of Police v Tamos (1985) 98 CLR 383, 395; per Dixon CJ and Webb J held that "it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by an judicial or quasi-judicial proceedings he must be afforded an adequate opportunity to be heard"

representation made by Khoury was made for the purpose of indicating the evidence that he would be able to give in an Australian proceeding.[22]

20. It is submitted:

(i) the s.66(3) submission was made when Counsel sought the exclusion of the Khoury representation to Seddon in the alternative to the submission the same was not first-hand hearsay;

(ii) the issue regarding the Khoury representation to Kerr emerged when the judge raised with the prosecutor whether any other similar hearsay representations on this issue were sought to be led and Kerr was identified. The prosecution submitted Kerr will give similar evidence but it takes the matter (i.e. the argument on the issue) no further;[23]

(iii) Counsel had clearly made it known when the hearsay issue first arose that it was challenged that Khoury had personal knowledge of the asserted fact. It is implicit that such submission was not confined only to Seddon. Counsel was not called upon to make any further submission after the exchange between the judge and prosecution.

21. It is submitted:

(a) the evidence of Seddon and Kerr of the prior statements of Khoury was highly damaging evidence;

(b) the same touched directly on an important issue, namely the Applicant being in possession of the gun shortly after the charged incident;

(c) this evidence 'cut directly across' the defence case it was the 'unknown intruder' who had the gun and shot the deceased; and

(d) it could only have but influenced the jury in its deliberations and reasoning towards guilt or at least the risk of same was high;

(e) the fact that the Khoury representations were being led through two police officers further gave the challenged evidence greater weight;

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[22] See par 23 of the Ruling

[23] See TT p.505 ln26-31 and p.506 ln 1 – 2

(f) by receipt of what is submitted was inadmissible second hand hearsay evidence, the Applicant was denied a fair trial and/or the risk of a miscarriage of justice has occurred.

22. As earlier stated no defence submissions were called for or entertained by the trial judge (in relation to the Khoury representations) concerning either s.137 or the "Haddara' discretion.

23. Albeit in IMM's case[24] the majority judgment adopted the NSW Shamouil[25] approach at par[50] of the majority judgment the Justices stated:
"At a level of logic it is difficult to see how a trial judge could approach the question as to what the probative value of the evidence could be in any other way, for the reasons alluded to by Gaudron J in *Adam v The Queen*[26]. It must also be understood that the basis upon which a trial judge proceeds, that the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence. The circumstances surrounding the evidence may indicate that its highest level is not very high at all."

24. It is submitted the circumstances surrounding the Khoury representations indicate its probative value, at its highest level, is not very high at all. The judge clearly stated reasons why he was not satisfied, on the balance of probabilities, that Khoury made the observations and those very reasons relevantly address the High Court statement "the circumstances surrounding the evidence may indicate that its highest level (of probative value) is not very high at all".

25. The 'unfair prejudice' associated with the receipt of the Khoury representations was:
i) 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;
ii) given Khoury denied having made the representations, a credit attack necessarily would have to be undertaken by defence on two police officers;

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[24] [2016] HCA 14
[25] (2006) 66 NSWLR 228
[26] (2001) 207 CLR 96 at 115 [60].

iii) 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;

iv) 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.

26. The same submissions regarding 'unfair prejudice' listed in par 25 herein are repeated or relied upon on the issue of the risk of an unfair trial to the Applicant and the application of the 'Haddara' discretion.

Grounds 2 and 3: The Margaret and Noelle Representations

27. The relevant facts pertaining to this matter are summarized at par [26] of the Ruling. Essentially a police officer Cunha recorded a conversation with the Applicant's sister (Noelle) during which Noelle, inter alia, states "Margaret was telling me, and Margaret's trying to get her up and then my brother turned on everyone, so pointing a gun at everyone...."[27]

28. The judge identifies in the Ruling the Crown sought to rely upon the Margaret representation for its truth (i.e. the Applicant possessed the gun).[28] However in relation to the Noelle representation the judge states "the asserted fact for these purposes is not that Alex was pointing a gun at everyone but that Margaret said that Alex was pointing a gun at everyone[29].

29. On a Basha hearing Noelle identified her voice in the recording but otherwise could not recall having spoken to Margaret as the taped conversation recites[30].

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[27] The representation is found at p.801 – 804 of the depositions being the recorded conversation made/conducted by Cunha.
[28] See Ruling par [28] and [30]
[29] See Ruling par [44]
[30] See TT (third trial) p.518 ff

30. In short, if the Margaret representation was admissible, the representation could only be led via the witness Cunha and the playing of the recorded conversation conducted with Noelle, in the event that Noelle identified her voice on the tape.

31. The rational for the judge admitting the Margaret and Noelle representations appears to be:

(a) the Margaret representation is hearsay. To be admissible under s66 necessarily:

(b) Margaret must have personal knowledge of the representation i.e. that Alex pointed a gun; and

(c) Noelle (the witness from whom the representation is being led) must have perceived the representation made by Margaret;

(d) Noelle was not giving positive evidence of Margaret having made the representation (the previous representation was thus sought to be adduced through police witness Cunha). Accordingly, it would be necessary to establish:

- the previous representation of Noelle (that Margaret told her that Alex pointed the gun) was based on personal knowledge; and
- not for the purpose of a proof of evidence (s.66(3)).

32. It is submitted the Margaret representation when properly distilled amounts to second hand hearsay. Police officer Cunha (through the taped conversation) gives evidence that Noelle says that Margaret says she saw the Applicant (Alex) with the gun.

33. It is submitted:

(a) the statements by Noelle in the recorded conversation with Cunha, where Noelle attributes words of Margaret (of having seen the Applicant with a gun) were representations of fact;[31]

(b) s66(2) requires that someone that has seen, heard or otherwise perceived the representation being made, should give evidence of the representation (i.e. as in the situation with the Khoury representation);

(c) in this case that process involved Cunha repeating the representation (by playing the tape of the conversation with Noelle) for the purposes of proving the truth of the representation; and

[31] The essential fact in issue in the trial was whether the Applicant had been seen in possession of the gun shortly after the charged incident.

(d) this would be second hand hearsay and therefore offend the rule in s62 of the Act;

(e) importantly when Noelle spoke the words recorded in the tape, she was not describing events in which she was either a participant or which she had witnessed and accordingly it was an account being given to Cunha involving hearsay;

(f) in circumstances where Noelle is repeating assertions of fact by someone else (i.e. Margaret) and where the only relevance of such evidence was the facts asserted, it is hearsay. Its repetition by a police officer, when giving evidence of the taped conversation, would involve second hand hearsay and should have been excluded;

(g) the real purpose of the evidence being led was identified by the Crown was for its truth that the Applicant was in possession of the gun;[32] As much was stated by the Prosecutor during submissions and then in closing address "We do rely on the accuracy and truth of that recording and at a time when Noelle may not have known that she was being recorded.....the point of that conversation is Margaret Khoury is indicating Alex Semaan had the gun. That's the point of the conversation."[33]

(h) if Noelle had ben relating to police words and/or actions she witnessed of the Applicant such would not be second hand hearsay and would not offend the rule in respect of second hand hearsay – but this was not that situation.

34. The trial judge in ruling the Noelle representation via Cunha was admissible:

i) drew a distinction that the Noelle representation was being led only for the purpose of proving the Margaret representation was made to Noelle and not for the truth that the Applicant was in possession of the gun;

ii) the judge relied upon R v Suteski (No.4)[34] as authority for the proposition that a previous representation of witness B in police interview was admissible and could be led through witness X (the police officer);[35]

iii) however in 'Suteski' such representations made by witness B were representations (words and actions) made by the Applicant to B in that case;

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[32] See TT 28th April p.503 ln 17-31;
[33] See TT p.1735 ln 14-24;
[34] R v Suteski (No.4) [2002] NSWSC 218
[35] See par [33] of the Ruling and footnote [33];

iv) Kirby J in par [31] clearly stated "Where witness B related to the police assertions of fact by someone else, and where the only relevance of such evidence was the facts asserted, it is hearsay, Its repetition by the police officer, when giving evidence of the interview, would involve second hand hearsay, It must therefore be excluded." The distinction Kirby J went onto make was where witness B was relating to the police the words of the Applicant the hearsay rule would not be offended;

v) in the subject case Noelle was repeating the words of Margaret, not the Applicant.

35. In any event, in the alternative, it is submitted it was not open to be satisfied on the balance of probabilities Margaret had personal knowledge of the asserted fact:

(a) Margaret in her statement[36] makes no mention of having entered the bungalow on the night; and

(b) at committal she said she heard a commotion and went across the street to investigate, entering the backyard through the gate. The people she saw whilst she was in the backyard were Tannous Semaan, her brother Youssef and the deceased. She did not see Alex. She only stayed a short time and then went back to her own house and called 000. She came outside again around the time that police arrived;[37]

(c) on a Basha hearing with Noelle whilst she identified her voice in the recording said she didn't remember saying that to Cunha and that she could not remember speaking to Margaret specifically on that night.[38]

(d) at its highest, based on the evidence there were competing inferences that Margaret may or may not have even been in the bungalow at the relevant time;

(e) it was equally open on all the evidence before the judge Margaret may be recounting her own observations or indeed those of another as told to her;

(f) further given the Noelle evidence of no recollection of speaking with Margaret, a live issue existed as to whether Noelle was in fact giving evidence of a representation told to her by Margaret despite having said this in the recorded conversation with Cunha;

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[36] See Deps p.238;
[37] See Deps p.130-136;
[38] See TT 18 April-2 May 2016 p.518;

(g) she may have been speaking to the Applicant's mother over the phone trying to get the mother to leave the bungalow;

(h) Margaret is reportedly (in the recorded conversation) as having said to Noelle "Margaret was telling me...." but the same does not address whether Margaret saw this with her own eyes or what someone else may have said to her;

(i) at its highest any analysis of the evidence left the position as to where Margaret was at the relevant or critical time inconclusive.

36. Section 137 submissions were heard by the trial judge on the 28th April[39] and 29th April 2016.[40]The judge was correct to apply the test in IMM's case[41] however it is submitted the unfair prejudice outweighed the probative value of the evidence. The unfair prejudice being:

(a) given that Margaret was saying she did not go into the bungalow and did not see Alex with a gun a logical chain of reasoning might be that either she acquired such information from someone else and/or she has been overborn or 'got at' by the Applicant. No direction, even specifically addressing that issue, was capable of curing such an innate prejudice and more likely would highlight the apparent unfair prejudice, nor was one given;

(b) the form of the representation being led before the jury was too indirect or remote (i.e. via the Cunha recorded conversation);

(c) the Defence were unable to 'test' the Margaret representation other than establish Margaret denied having been in the bungalow or seeing the gun. Such would not amount to a 'test' of the attendant circumstances of when and where and whether the Margaret representation was in fact from her own knowledge;

(d) further the Noelle representation (i.e. that Margaret said it to her) in circumstances where Noelle could not remember making the representation nor having any recollection of Margaret making the representation to her likewise prevented the surrounding circumstances of the Margaret representation being examined (i.e. to establish whether or not the Margaret representation was from her own observations);

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[39] See TT 28th April p.509 ln 11-31 and p.510 ln 1-6;
[40] See TT 29th April 2016 p.531-535;
[41] [2016] HCA 14

(e) similarly the Applicant was unable to 'test' the attendant circumstances of the Noelle representation to establish if in fact the Margaret representation had indeed been made by Margaret and not someone else;

(f) unfair prejudice existed in the jury reasoning Noelle's professed lack of memory etc. was a product of intimidation or overbearing conduct directed at her by the Applicant or his agents. No direction would cure this vice and would only highlight the problem. No direction was given;

(g) the cumulative effect of 3 witnesses Khoury, Margaret and Noelle now profession no knowledge of the Applicant being seen in possession of the gun could only but increase the risk of the jury impermissibly reasoning they had all been 'got at' by the Applicant;

(h) on such an important issue (i.e. had Alex been seen in possession of a gun shortly after the charged incident) the distinction between the Noelle representation being admissible only as to the 'Margaret representation having being made to her' as opposed to the truth of same is too subtle a distinction for any jury. No direction was given by the judge the Noelle representation was only admitted as to the truth the Margaret representation was made and not for the truth that Alex possessed the gun;

(i) further, given the Margaret representation was ruled in as admissible for its truth (i.e. that Alex had the gun) yet the Noelle representations only went to the truth of having received the Margaret representation this further compounded the risk the jury would use the Noelle representation as evidence of the truth that Alex possessed the gun;

(j) there existed a real risk of the jury misusing the evidence or overvaluing the evidence of both Margaret and Noelle in all the circumstances.

37. In the premises, should the Margaret and the Noelle representations both have been admissible under s66 it was an appropriate course to rule same inadmissible pursuant to s.137 of the Act (the unfair prejudice outweighing the probative value) or by reason of the risk of the Applicant receiving an unfair trial (for the reasons identified in paragraph 36 herein) in exercise of the 'Haddara' discretion.

38. It is submitted further, ultimately the judge gave no direction as to the limited use for Noelle's representation. Accordingly the very vice of the 'limited use' and potential unfair prejudice were not the subject of any direction of law in the charge by the judge.

39. In such circumstances, even if the Margaret and Noelle representations were properly admissible the trial miscarried by reason of the failure of the judge to provide necessary directions as to the use of same:

(a) that the Noelle representations only went to the truth of Margaret having made the representation, not to the truth of the Applicant having been in possession of the gun; and

(b) in relation to both the Margaret and Noelle representations the jury were not to reason either or both witnesses had been overborn or intimidated into a false memory by the Applicant and they were not to engage in any impermissible propensity reasoning.

Ground 4: Inadequate Directions of Law including the Unreliable Evidence Direction

40. The trial judge gave an 'unreliable evidence' direction.[42]

41. During the course of that direction His Honour stated, inter alia "The law says that every jury must take this potential unreliability into account when considering evidence of an out of court statement."

42. It is submitted by expressing himself in that fashion the judge conveyed to the jury the warning was one of routine or formality. In stating that 'every jury must take this potential unreliability into account'[43] a risk arose the jury would minimize the importance of the direction in the case before them.[44]

43. Further the judge:

i) failed to include a reference to Khoury in the specific part of the direction addressing the warning;

ii) the judge identifies the warning being given 'about the need for caution' applies when considering the relevant statements given by the witnesses Seddon, Kerr,

[42] See Charge p.2059 ln 31 through to p.2061 ln 1-14;
[43] See Charge p.2061 ln 1-4;
[44] See R v Roddam [2001] NSWCCA 168;

Semaan and Cunha as the case may be.[45] It is submitted the omission to include the witness Khoury necessarily increased the risk that the warning did not apply to Khoury but only those witnesses named in the warning. This is especially so where the judge had in fact referred to the Khoury representation and then excluded Khoury as one of the relevant witnesses to whom the warning applied;

iii) failed to give a direction in relation to Khoury, Margaret and Noelle the evidence could not be used, and the jury should not reason, the Applicant had 'got at', intimidated or brought any pressure to bear upon any or all of the witnesses;

iv) failed to direct the jury the Noelle representation was admitted 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;

v) further the judge directed the jury they "may use prior statements as evidence of the asserted facts unless I direct you otherwise"[46]and in then failing to direct as to the limited purpose for which the Noelle representation had been admitted the jury were at liberty to use the Noelle representation as going to the truth i.e. that the Applicant was in possession of the gun.

It is submitted by reason of the aforesaid matters the trial miscarried.

PART FOUR – Disposition of Application and Orders Sought

44. Application is made to file a written case of 16 'substantive' pages. Counsel has endeavored to be as concise as possible and attempted to comply with the '10 page limit' however, the Appeal raises complicated issues concerning the hearsay rule and exceptions to same in its application to 3 lay Crown witnesses and 3 police witnesses in the trial.

45. Application for an extension of time to file a Notice of Appeal against Conviction.

46. If the applicant succeeds on Grounds 1, 2, 3 or 4, the appeal should be allowed, the conviction quashed and a retrial ordered.

47. An indemnity certificate pursuant to s 14 of the *Appeals Cost Act 1998.*

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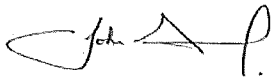
[45] See Charge p.2060 ln 1-7;
[46] See Charge p.2055 ln 28-30;

PART FIVE – Transcript and Audio Visual Material Required

48. No further transcript is required.

28th March 2017



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