IN THE SUPREME COURT OF VICTORIA S APCR 2017 0159
COURT OF APPEAL
(CRIMINAL DIVISION)

PAUL FREDERICK SMITH

Applicant

and

THE QUEEN

Respondent

RESPONSE TO APPLICANT'S WRITTEN CASE

Date of document:	8 November 2017
Filed on behalf of:	Respondent
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Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties

1. The Applicant was convicted by jury verdict on 10 November 2016 and was sentenced on 22 November 2016 as follows:

Charge on Indictment/ Counts on Presentment	Offence	Maximum	Sentence	Cumulation
1.	Negligently Cause Serious Injury	10 years	5 years	As part of an aggregate sentence

Charge on Indictment/ Counts on Presentment	Offence	Maximum	Sentence	Cumulation
2.	Reckless Conduct Endangering Serious Injury	5 years	5 years	As part of an aggregate sentence
3.	Fail to Render Assitance	10 years	5 years	As part of an aggregate sentence/

Total Effective Sentence:	5 years imprisonment
Non-Parole Period:	3 years imprisonment
Pre-Sentence detention declaration pursuant to s 18(1) of the *Sentencing Act 1991*:	12 days
6AAA Statement: N/A	
Other relevant orders: N/A	

Part C: Summary of Relevant Facts

2. The facts were summarised by the Trial Judge in sentencing the Applicant.[1] The Respondent adopts that summary as a representation of the evidence before the jury.

3. The Respondent also adopts the Summary of Relevant Facts as contained in the Applicant's Written Case.[2]

Part D: Grounds of Appeal

4. **Ground 1 - A substantial miscarriage of justice occurred in the instance of the Applicant by virtue of the prosecutor in closing address asserting matters that were not supported by evidence, were inaccurate or inflammatory.**

[1] *DPP v. Paul Smith* [2016] VCC, at [1] – [17].
[2] Applicant's Written Case, at [5] – [20].

4.1. It is submitted there was no substantial miscarriage of justice due to the content of the prosecutor's closing address. It is disputed that the prosecutor relied on matters not supported by the evidence, put matters inaccurately or addressed the jury in a deliberately inflamatory way.

4.2. The prosecutor closed in a robust, but fair way based on the issues that arose in the circumstances of this case. Such a closing was entirely appropriate. The individual matters raised by the Applicant are addressed specifically.

4.3. It is also relevant to note that the jury were told the address of counsel were simply arguments and not evidence.

4.4. <u>Injuries –</u> The prosecutor argued that the injuries sustained in the accident were inconsistent with a person having been seated in the passenger seat.[3] This was an argument to the jury, properly made which could be accepted or rejected by the jury, based on the injuries actually sustained. It was not a personal opinion.

4.5. <u>Concussion –</u> This was a live issue in the trial: whether the Applicant was concussed and if it explained some of his conduct: specifically in relation to charge 3.[4] The submissions made on this topic were arguments about whether the jury should conclude the Applicant was concussed after the accident[5], a matter which was in issue in the second trial. They were arguments appropriately made.

4.6. <u>Comments about the Applicant drinking alone –</u> It is acknowledged that these comments were unnecessary. However, it is submitted that these comments did not cause a substantial miscarriage of justice. It was relevant to the circumstantial case presented by the prosecution, that the Applicant was drinking alone, as the central issue in this case was whether the prosecution could prove beyond reasonable doubt that the Applicant was driving at the time of the collision. The fact he was not with anyone in the bar was a relevant matter in determining that question.

[3] T386, Trial 2, 8/11/16.
[4] T366, Trial 2, 8/11/16.
[5] T424-25, Trial 2, 8/11/16.

4.7. Collecting the keys – The prosecutor again referred to the CCTV footage from the bar and relied on part of that footage as possibly showing the Applicant collecting his keys from the bartender. This was an argument, based on the footage, open to the prosecutor. If it was without substance, as the Applicant contends, the jury would have rejected the argument as they were instructed they could do by the Trial Judge when considering counsel's arguments.

4.8. Relying on the time from the CCTV – The prosecutor relied on the times as displayed by the CCTV camera as a reference point for the jury. This was done so the jury knew which portion of the footage was being relied on. No unfairness arose from this.

4.9. Who was driving the car if not the Applicant – A central issue in this case was the identity of the driver at the time of the collision. The prosecution case was that based on circumstantial evidence the jury could infer that the Applicant was driving at the time of the accident. The primary defence advanced by the Applicant was that he was not the driver. The jury had to grapple with this issue as one of primary importance: were they satisfied beyond reasonable doubt the Applicant was the driver? Due to the CCTV footage placing the Applicant at a bar shortly before the collision, the prosecutor stated that the Applicant would need to organise someone to drive his car, given there was clear evidence, based on his injuries, that at the very least he was a passenger in the car when it collided with the other vehicle. In addressing this issue in her closing, the prosecutor asked 'did a random person appear out of thin air? Who?' This was a method by which the prosecutor was asking the jury to assess the prosecution case – was there a reasonable doubt the Applicant was not driving. The prosecutor was asking the jury to consider if there was any evidence of an alternate driver which might cause the jury to have a reasonable doubt as to whether the Applicant was driving. This was an appropriate argument given the issues in this case.

4.10. 'Probably heard sirens' – The prosecutor made this submission, as to the likely circumstances existing after the collision, when the Applicant left the scene without rendering assistance. There was no evidence of this, however it was an argument based on the circumstances after the accident and common experience the jury brought to the task of considering this case. The use of the word 'probably' was a clear indication it was not based on specific evidence, but was likely as the Applicant moved away from the scene.

Alternatively, if this Court determines the argument should not have been made it it did not cause a substantial miscarriage of justice.

4.11. Personal example – This was not ideal and should not have been done, nonetheless it did not cause a substantial miscarriage of justice.

4.12. Example of football players being concussed – It is conceded there was no evidence of this before the jury. What the prosecutor was seeking to do was to assist the jury in using their experience of life to assess the concussion issue which was before them. It is submitted this was an argument which was properly made to the jury. Alternatively, if this Court determines the argument should not have been made it it did not cause a substantial miscarriage of justice.

4.13. Unacceptably emotive language – When the address by the prosecutor is read in full, it is not accepted that the prosecutor used unacceptably emotive language. The prosecutor closed in a robust, but fair way based on the issues that arose in the circumstances of this case. The prosecutor was entitled to close in a strong way and this is what she did.

4.14. In *Spence v. R*[6] the Court stated:

> The prosecutor's critique of the defence case was not expressed in language that was inappropriate to the circumstances of the case. Strong language was, at times, employed in the prosecutor's critique of the defence case but that must be seen in the context of the trial as a whole. The defence case was conducted robustly. Having regard to the language which defence counsel employed, the terms in which the prosecutor criticised the defence case could not be described as either intemperate or inflammatory.[7]

4.15. Such comments were equally applicable in this case, particularly if the introductory comments of the Applicant's counsel in his closing address are scrutinised.

4.16. No such miscarriage arose as is asserted. The Applicant asserts the only remedy open was the discharge of the jury. It is significant that no such application was made.

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[6] [2016] VSCA 113.
[7] [2016] VSCA 113 at [38].

5. **Ground 2 – A substantial miscarriage of justice occurred in the instance of the Applicant by virtue of the prosecutor in closing address making statements which invited the jury to invert the onus of proof and place it upon the Applicant.**

5.1. It is submitted the prosecutor's comments in the closing address, as specifically set out by the Applicant under this ground, did not invert the onus of proof and place it upon the Applicant.

5.2. The central issue in this case was whether the prosecution could prove beyond reasonable doubt that the Applicant was driving at the time of the collision.

5.3. The Respondent relies on the matters set out above at paragraph [4.9] in submitting the onus of proof was not inverted and there was no substantial miscarriage of justice.

5.4. It is acknowledged that the use of rhetorical questions can be problematic. However as the Court found in *Spence v. R*[8]:

> The principle in *Palmer* thus precludes the asking of rhetorical questions such as 'why would the witness lie?', because they invite reasoning which undermines the prosecution's burden of proof that unless the jury is satisfied by the accused that the witness has a motive to lie, they should accept the evidence of that witness and convict …
>
> But the use of rhetorical questions in the Crown's closing address does not of itself infringe the principle unless the form of argument that is employed has the effect of casting an obligation on the accused to answer the questions posed and thereby reversing the onus of proof.[9]

5.5. In the circumstances of this case, the use of rhetorical questions did not invert the onus of proof.

5.6. It should be noted that the prosecutor at the start of her closing cautioned the jury against making assumptions. She said:

> We know it's his car. We assume it was him driving that car. Well, of course you make that assumption; who else would be driving his car? The starting point is that this is just an assumption.

[8] [2016] VSCA 113.
[9] [2016] VSCA 113 at [30].

> That by itself is never going to be anything but an assumption, that he was driving. It's not enough – its not enough at law to make him guilty of anything except car ownership.[10]

5.7. The prosecutor made it crystal clear without more this did not establish the Applicant was driving. She then went on to outline the circumstantial matters that the prosecution relied on to establish the Applicant had been driving at the time of the collision.

6. **Ground 3 – A substantial miscarriage of justice occurred in the instance of the Applicant by virtue of the conduct of the prosecution in changing its case and departing from the prosecution Opening and the Notice to Admit at the commencement of the trial.**

6.1. The prosector did change her position between the first and second trial concerning the diagnosis of concussion and whether she would rely on flight as incriminating conduct.

6.2. The prospect of this change in position was raised by the prosecutor, at the end of the first trial after the first jury had been discharged.[11]

6.3. It is submitted there was no unfairness or underhandedness as asserted by the Applicant. The change was explicable based on evidence which was given during the first trial. The Trial Judge, an experienced criminal law Judge, understood the reason behind the potential change in position.[12]

6.4. There was approximately a week between the first and second trial for the defence to consider this potential change of position and prepare for that difference in approach.

6.5. If the defence felt the change prejudiced the Applicant, in terms of its timing, an application for an adjournment of the trial could have been made. No such Application was made.

7. **Ground 4 – A substantial miscarriage of justice occured in the instance of the Applicant by virtue of the conduct of the prosecution in relying upon the 'flight' of the Applicant as an implied admission of guilt in the circumstances where he had just prior been involved in a major collision and was suffering concussion.**

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[10] T367-68, Trial 2, 8/11/16.
[11] Jury discharged, T516, 1st Trial, 24/10/16.
[12] T521-523, 1st Trial, 24/10/16.

7.1. It is submitted this ground of appeal should be considered with ground 3.

7.2. There was no miscarriage of justice based on the prosecution relying on 'flight' as an implied admission of guilt. The issue was properly before the jury.

7.3. The Trial judge ruled that this argument could be made. It is not alleged, specifically, that the Trial Judge erred in allowing the prosecution to go to the jury and make this argument.

7.4. This argument has to be viewed by the jury in the context of all the evidence. If the jury accepted that the Applicant, after having been involved in a major collision, was suffering from concussion they would then not have engaged in the reasoning so contened for by the prosecution.

7.5. It was a matter properly left for the jury to determine.

8. **Ground 5 – A substantial miscarriage of justice occurred in the instance of the Applicant by virtue of the prosecutor discrediting an important crown witness, without laying the foundation for this during the trial.**

8.1. The prosecutor made some general comments about both Thomas and O'Brien. The reference to a 'curious friendship' was unhelpful and of no real relevance. However, it is submitted the prosecutor did not openly seek to discredit either of these witnesses.

8.2. Thomas' evidence was peripheral[13] and even if the prosecutor should have treated him as unfavourable and challenged his account, not that this is conceded, such failure did not amount to a substantial miscarriage of justice.

8.3. In relation to O'Brien, the prosecutor in her address was really questioning whether the Applicant was as unwell as O'Brien described, given he did not call an ambulance or a doctor to assist the Applicant.[14] This was a matter of commonsense clearly arising from the evidence of O'Brien.

[13] T384, Trial 2, 8/11/16.
[14] T383, Trial 2, 8/11/16.

8.4. The Trial Judge, in a break in the prosecutor's address, did seek clarification as to what point she was trying to make about O'Brien.[15]

8.5. The prosecutor told the Trial Judge the importance of this evidence was the Applicant's insistence that no ambulance or doctor be called. It was an attack on the Applicant not wanting an ambulance or doctor, not an attack on O'Brien.[16] The prosecution position was it showed the Applicant had greater awareness then he claimed to have had, when dealing with O'Brien.

8.6. Nonetheless, even if the prosecution should have treated O'Brien as unfavourable and challenged his account, such failure did not amount to a substantial miscarriage of justice.

8.7. After the prosecutor finished her address the Trial Judge categorised the 'O'Brien issue' as the prosecution submitting the Applicant had 'hoodwinked O'Brien as well'[17] concerning the effects of the accident.

9. **Ground 6 – Aggregation of errors. A substantial miscarriage of justice has occurred in the instance of the Applicant by virtue of an aggregation of errors contained in Grounds 1 – 5.**

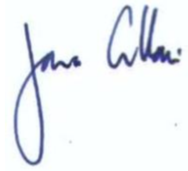
9.1. It is submitted there was not a substantial miscarriage of justice caused by any of the individual grounds 1 to 5, and accordingly there was no aggregation of errors which would amount to a substantial miscarriage of justice.

9.2. In *Spence v. R*[18] the Court stated:

> Being imbued with the atmosphere of the trial, the learned trial judge was well placed to assess whether the terms of the Crown's closing address were intemperate or otherwise unfair. It is significant that his Honour saw nothing wrong, at all, with the address.[19]

[15] T388, Trial 2, 8/11/16.
[16] T388-89, Trial 2, 8/11/16.
[17] T434 & 436, Trial 2, 8/11/16.
[18] [2016] VSCA 113.
[19] [2016] VSCA 113 at [39].

9.3. In this case, while some issues were discussed about the content of the prosecutor's address after it was delivered, the Trial Judge did not view the closing address as intemperate or otherwise unfair such that it required the jury to be discharged or that specific directions be given concerning its content during the Charge. This was significant given the experience of the Trial Judge.



DATED: **8 November 2017**

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Jason Gullaci

Counsel for the Respondent