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

PAUL FREDERICK SMITH

- v -

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

PROCEEDINGS BEFORE THE COUNTY COURT OF VICTORIA AND APPLICATION FOR LEAVE TO APPEAL

1. The Applicant was convicted and sentenced following a plea hearing before the County Court of Victoria. The particulars of those proceedings are:

Learned Sentencing Judge	Judge Punshon
Court at which plea heard **Date on which convicted**	County Court of Victoria at Ballarat 10 November 2016
Date on which sentence imposed	22 November 2016

2. He applies for leave to appeal against his conviction.

SENTENCES IMPOSED, MAXIMUM PENALTIES AND RELEVANT STATUTORY PROVISIONS

3. The learned sentencing judge imposed the following sentences:

Charge	Offence	Maximum Penalty	Sentence	Cumulation
1	Negligently Cause Serious Injury	10 y	5y	Aggregate
2	Reckless Conduct Endangering Serious Injury	5 y	5y	Aggregate
3	Failure to render assistance	10 y	5y	Aggregate
Total Effective Sentence		5 years		
Non-parole period		3 years		
Pre-Sentence Detention		12 days imprisonment		

4. The trial commenced 17 October 2016, it ran for 6 days until the jury was discharged by the Judge on 24 October 2016. It was decided that there was a "high degree of need" due to questions asked of a witness by defence counsel, which opened the potential for two drink driving convictions to be

lead in rebuttal by the prosecutor.[1] The trial resumed on 25 October 2016 and ran for a further 8 days until verdict.

GROUNDS OF APPEAL AGAINST CONVICTION

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.

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.

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.

Ground 4: A substantial miscarriage of justice occurred 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 circumstances where he had just prior been involved in a major collision and was suffering concussion.

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.

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

SUMMARY OF RELEVANT FACTS

5. The Applicant was born on 11 August 1972 he was 40 years of age at the time of the alleged offending. The charges relate to a motor vehicle collision between the Applicant's Commodore and a Landcruiser around about 6pm on Sunday 4 August 2013 in Lambert Street, Ararat.[2]

6. The trial was contested on two principal issues. First, whether the prosecution could prove the Applicant was the driver of the Commodore and secondly, whether he left the scene in a condition that might have prevented him from being aware of the collision as well as whether anyone had suffered serious injury as a result of the collision.[3]

---

[1] Ruling 24/10/2016.

[2] Reasons for Sentence 22/11/2016 [3].

[3] Reasons for Sentence 22/11/2016 [12].

7. At approximately 3:08pm on Sunday 4 August 2013 the Applicant attended Ararat Hotel in Barkley Street, Ararat.[4] The Applicant admitted to consuming at least 11 pots of full strength beer over the course of the afternoon, 165 minutes.[5]

8. At approximately 5:53pm, the Applicant admitted to leaving the Ararat Hotel and attending the Aldi Supermarket.[6] However, he did not admit to leaving the Hotel alone nor to driving his car to the supermarket.[7] He also disputed driving his car after leaving the supermarket.

9. It was alleged that at approximately 6:00pm, after leaving the supermarket the Applicant's car was observed to be driven erratically, [8] before veering across the divided line into the path of the Toyota Landcruiser driven by the first complainant (Ayenew Kindish) containing 6 other passengers.[9]

10. It was not disputed that the Applicant's vehicle and the Victim's vehicle collided around 6:09pm.[10] However, the Applicant denied being the driver.[11]

11. It was not in dispute that the collision caused the Landcruiser to flip onto its roof and slide along the road seriously injuring the driver[12] *(Charge 1 – Negligently Cause Serious Injury)*. The passengers were not injured (*Charge 2- Reckless Conduct Endangering Serious Injury).*

12. Evidence was led that the Applicant was observed by a driver following the Landcruiser to climb out of the driver's window of his Commodore and walk away from the car.[13] This was rejected by the Applicant as the description of this person did not match the Applicant.[14] That person was told to return to the scene.[15] *(Charge 3 – Failure to Render Assistance)*

13. Police and emergency services attended the scene however the Applicant could not be located as he had left.[16]

14. It was not in dispute that the Police located the Applicant's iPhone at the scene (next to the passenger door and that the passenger door was open). Further while in possession a friend of the Applicants friend Timothy O'Brien called. Police answered and informed Mr O'Brien that the Applicant could not be located. [17]

---

[4] Amended Prosecution Opening 18/08/2015 [2].

[5] Admission of Fact 20/10/2016 [4] and Defence Response to the Crown Prosecution Opening 25/08/2015 [2].

[6] Amended Prosecution Opening 18/08/2015 [3], Defence Response to the Crown Prosecution Opening 25/08/2015 [3] and Admission of Fact 20/10/2016 [3].

[7] Defence Response to the Crown Prosecution Opening [3].

[8]Transcript 19/10/2016 T.164.08 – T.164.21.

[9] Amended Prosecution Opening 18/08/2015 [4].

[10] Admission of Fact 20/10/2016 [5].

[11] Defence Response to the Crown Prosecution Opening [4] .

[12] Amended Prosecution Opening 18/08/2015 [6].

[13]Transcript 19/10/2016 T.164.04 – T.164.06 (Bekele Sisay).

[14] Defence Response to the Crown Prosecution Opening [6].

[15]Transcript 19/10/2016: T.177.03-T.177.09 (Bekele Sisay).

[16] Amended Prosecution Opening 18/08/2015 [8] and Defence Response to the Crown Prosecution Opening [7].

[17] Amended Prosecution Opening 18/08/2015 [9]-[11] and Transcript 4/11/2016: T.220.08-T.220.11 (S/C Anthony Passalick).

15. At an unknown time after 11:30pm that night the Applicant attended at Mr O'Brien's house where he soon lost consciousness and urinated on himself.[18] Mr O'Brien decided to take the Applicant to hospital however on route the Applicant told him to take him to the police station.[19]

16. At the police station the Applicant was identified and photographed. His injuries were noted and ambulance offered. The offer was declined by the Applicant who then went with Mr O'Brien to the hospital.[20]

17. The Applicant was treated at the hospital and discharged later that morning. The following injuries were noted: swollen right cheek; a minor split on his upper lip; a swollen and tender ankle which restricted movement; and an undisplaced fracture of the right ulna.

18. The physician who attended to the Applicant concluded that the Applicant's presentation including (memory loss) would be consistent with a diagnosis of concussion.[21]

19. The Applicant attended the police station following his discharge. He was interviewed and stated that he was unable to recollect much of what occurred, didn't know where the collision was,[22] stated that he couldn't remember if it happened but there was a bang[23] and that he blacked out and ended up beside a train line.[24]

20. The Applicant's blood alcohol was calculated to be between 0.116% to 0.146% at the time of collision. This was based on quantity and type of alcohol consumed over that period of time.[25]

GROUND 1: Improper conduct by the prosecutor - 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.

21. The prosecutor represents the state. His or her duty is to fairly and impartially place before the jury all relevant and cogent evidence, and not to obtain a conviction by any or all means. Having presented the evidence, the prosecutor should then address the jury as to how it should be viewed, but always doing so in a manner that is scrupulously fair.[26] The duty of a prosecutor is to present the case against the accused fairly and honestly; not to use any tactical manoeuvre legally available in order to secure a conviction.[27]

---

[18] Transcript 3/11/2016: T.124.18-T.124.28 (O'Brien).

[19] Amended Prosecution Opening 18/08/2015 [13] and Transcript 3/11/2016: T.126.09-T.126.13 (O'Brien).

[20] Amended Prosecution Opening 18/08/2015 [16] – [16]. Transcript 3/11/2016: T.126.24 – T.126.28 (O'Brien) .

[21] Amended Prosecution Opening 18/08/2015 [18]. Transcript 21/10/2016: T.403.21.-T.403.25. (Dr O'Deary).

[22] Record of Interview Q 70.

[23] Record of Interview Q 67.

[24] Record of Interview Q 71.

[25] Amended Prosecution Opening 18/08/2015 [25].

[26] *Bugeja v* R (2010) 30 VR 493, 503.

[27] *King v* R (1986) 161 CLR 423, 426. Referred to in *Bugeja v* R (2010) 30 VR 493, 503.

22. Naturally the common law has long established that the prosecutor should not, for example, adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack on the accused. These rules extend to closing addresses.[28]

23. For instance, prosecuting counsel must not make submissions calculated to inflame the jury.[29] In *Livermore*,[30] the New South Wales Court of Criminal Appeal summarised the position:[31]

> *This brief review of the authorities relevant to the disposition of this appeal disclose a number of features of a Crown address that have, either alone or in combination, consistently been held to justify the censure of this Court. They are:*
>
> (i) *A submission to the jury based upon material which is not in evidence.*
>
> (ii) *Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.*
>
> (iii) *Comments which belittle or ridicule any part of an accused's case.*
>
> (iv) *Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.*
>
> (v) *Conveying to the jury the Crown Prosecutor's personal opinions.*

24. In this case the prosecution closing is beleaguered with statements that should not have been made. Many fall into the categories set out above in *Livermore* (and endorsed in other subsequent cases)[32];

(a) The prosecutor suggested to the jury that Mr Smith's injuries were inconsistent with being a passenger in the car.[33] There was simply no valid evidentiary basis for this assertion it was the prosecutor's personal opinion;

(b) The prosecutor tells the jury in her closing address that the Accused positively was not concussed.[34] There is no evidence to support this assertion[35] and impacts post offence conduct. Again, it was the prosecutor's personal opinion;

(c) The prosecutor comments on the CCTV of Mr Smith drinking alone prior to the accident as someone who "cuts a pathetic figure"[36] and sarcastically remarks "that's his social afternoon drinking with his friends"[37] – there was no probative value in these belittling personal opinions, just unfair prejudice indeed the sort of comments recently disapproved by Priest JA in *Basic v The Queen* [2015] VSCA 109 at [62];

---

[28] *Bugeja v* R (2010) 30 VR 493, 504.

[29] Rule 136 of the *Rules of Conduct* provides prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

[30] *R v Livermore* (2006) 67 NSWLR 659, 667.

[31] Ibid 667.

[32] *R v Teasdale (*2004) 145 A Crim R 345; *R v Smith* (2007) 179 A Crim R 453.

[33] Transcript 07/11/2016: T.386.05-0T.386.20.

[34] Transcript 07/11/2016: T.366.21-T.366.22 and Transcript 08/11/2016: T.423.14 – T.423.20, T.423.30-T.424.03, T.430.04-T.430.09 and T.431.13-T.431.18.

[35]Transcript 21/10/2016: T.404.07-T.406.13 – Dr Deary evidence of concussion.

[36] Transcript 07/11/2016: T.373.05-T.373.11.

[37] Transcript 07/11/2016: T.375.11-T.375.13.

(d) The prosecutor gives evidence about what is shown in the CCTV on a central point that is far from clear from the footage – she says that Mr Smith is collecting his keys from the bartender[38] – the defence say the footage is black and what is described cannot be seen;[39] This is inviting impermissible speculation;

(e) The prosecutor relies heavily on the time of the hotel CCTV knowing that it is inaccurate;[40]

(f) The prosecutor said that Mr Smith would have had to organize someone to drive his car; she rhetorically asked "did a random person appear out of thin air? Who?";[41] - this belittles or ridicules part of the Applicants case.

(g) The prosecutor told the jury that there would have been screaming at the scene at a certain time[42] and that Mr Smith "probably heard sirens"[43] – no evidence of this and is designed to be inflammatory;

(h) The prosecutor gives a personal example of her mother getting bitten by a snake to inform the jury of the abilities of the human body under stress[44] – evidence from the bar table in particular use of personal experience was recently disapproved by Priest JA in *Woods v R* [2014] VSCA 233 [102];

(i) The prosecutor uses an example of football players when they have concussion and what occurs[45] – evidence from the bar table;

(j) The prosecutor is unacceptably emotive in her language and tone throughout her entire address in particular in describing the accident scene and ridiculing the evidence from prosecution witnesses O'Brien and Thomas. Intemperate language jeopardises a fair trial. A prosecutor must not appeal to emotion or seek to excite or inflame undue prejudice in the jury. He or she must not belittle or ridicule the defence case, or invite the jury to engage in impermissible speculation.[46]

25. The extracted passages the prosecutor's closing are:

(a) Unfair – on multiple occasions she made submissions amounting to evidence from the bar table. Further making emotive assertions where no evidence had been led.

(b) Misleading – she relies on evidence known to be inaccurate or where there is evidence to the contrary.

(c) An emotive attack resulting in–

[38] Transcript 07/11/2016: T.373.20 – T.373.22.

[39] Transcript 08/11/2016: T.442.12-T.442.17.

[40] Transcript 07/11/2016: T.371.01-T.375.13.

[41] Transcript 07/11/2016: T.376.02-T.376.06.

[42] Transcript 07/11/2016: T.377.22 and Transcript 08/11/2016: T.428.05-T.428.06.

[43] Transcript 08/11/2016: T.431.29.

[44] Transcript 08/11/2016 T.430.29-T.431.06.

[45] Transcript 08/11/2016 T.424.06-T.424.13.

(i) Prejudice - The prosecutor used both language and a tone which was prejudicial in describing the accident scene and her own witnesses rather than being more impartial and detached.[47]

(ii) Ostensible Bias - the prosecutor's conduct creates for the jury the appearance of bias.[48] Allied to the above, the test for bias in relation to a prosecutor must be applied with due regard to the special nature of the prosecutor's role.[49]

26. To act contrary to the basic responsibilities that the prosecution must shoulder, may well lead, in a given case, to a miscarriage of justice.[50] Here when viewed in its entirety the prosecutor's closing address led to the Applicant not receiving a fair trial. Short of discharging the jury[51] no judicial intervention in relation the prosecutor's conduct could have provided an antidote to the effect it would have on the jury.[52] As a result it has given rise to a substantial miscarriage of justice.[53]

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.

27. At common law, a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.[54] The presumption is not that the accused is not guilty. It is that the accused is innocent.[55] The presumption of innocence has also been enshrined in s25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

28. Except for limited statutory exceptions, in criminal trials the onus of proving the accused's guilt always lies on the prosecution. Accused people do not need to prove their innocence.[56] This is a hallmark of our criminal justice system.

29. The prosecutor engaged in inappropriate rhetoric in relation to defence case and reversed the onus of proof several times during her closing address;

a) She said that Mr Smith would have had to organize someone to drive his car; she rhetorically asked "did a random person appear out of thin air? Who?";[57]

b) At another point in her address she says "If he is the passenger where is the driver?"[58]

---

[46] *De Vries v* R [2013] VSCA 210.

[47] *Basic v The Queen* [2015] VSCA 109 a [62].

[48] R *v MG* (2007) 69 NSWLR 20.

[49] R *v Karounos* (1995) 77 A Crim R 479.

[50] *Bugeja v* R (2010) 30 VR 493, 503.

[51] *Smale v* R *[2007]* NSWCCA 328 - If the prosecutor engages in any inappropriate conduct, the court must consider whether it is necessary to discharge the jury. This will depend on the severity of the conduct, the potential for prejudice, the strength of the prosecution case and whether the accused can still receive a fair trial.

[52] *Woods v* R [2014] VSCA 233 [106]. Audio Charge 08/11/2016 at 21.10 (counsel's remarks not evidence direction).

[53]. *Baini v* R (2012) 246 CLR 469; *Andelman v* R [2013] VSCA 25.

[54] *Woolmington v DPP* [1935] AC 462; *Howe v* R (1980) 32 ALR 478.

[55] R *v Palmer* (1992) 64 A Crim R 1.

[56] *Woolmington v DPP* [1935] AC 462; *He Kaw Teh v* R (1985) 157 CLR 523; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

c) At another point she says "Where is this mystery friend that drives?"[59]

30. Recently in *Spence v R* [2016] VSCA 113 the plurality relevantly remarked:

"The principle in Palmer thus precludes the asking of rhetorical questions…they invite reasoning which undermines the prosecution's burden of proof…There is no doubt that the rule in Palmer may also apply where the absence of evidence of a motive to lie is only raised during the prosecutor's closing address. The principle may be infringed because it is explicitly submitted that no motive to lie has been proffered by the accused or because rhetorical questions or other forms of argument implicitly convey that message. 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"[60] *(emphasis added)*

31. The onus of proof was reversed by the prejudicial argument in the prosecutor's closing address. It had the effect of reversing the onus onto the Applicant, so that he had to demonstrate he was not driver.

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.

32. The prosecution changed its position drastically in the space between the first and second trial, without providing any good reason for this. The change of position was an unfair one;

(a) In the amended opening dated 18 August 2015, the Crown was not taking issue with the defence claim that the Accused was concussed after the collision;[61]

(b) In the Notice to Admit dated 20 October 2016 and signed by the Accused at the behest of the Crown, it stated that the Accused's injuries included concussion;[62]

(c) The prosecutor announced on 17 October 2016 that because the Accused was concussed, she would not rely on post-offence conduct ("flight") as an implied admission of guilt because it would be unfair;[63]

(d) At page 521 of the transcript on 24 October 2016, the prosecutor simply changes her mind. She decides to depart from the Opening, depart from the Notice to Admit, and starts to form an idea that in fact she does want to challenge the diagnosis of concussion in the retrial and she now wants to rely upon flight.[64]

---

[57] Transcript 07/11/2016: T.376.02-T.376.06.

[58] Transcript 08/11/2016: T.425.06-T.425.07.

[59] Transcript 08/11/2016: T.430.01-T.430.02.

[60] *Spence v R* [2016] VSCA 113 [30].

[61] Amended Prosecution Opening 18/08/2015 [18].

[62] Admission of Fact 20/10/2016 [18].

[63] Transcript 17/10/2016: T.09.01 – T.09.11.

[64] Transcript 24/10/2016 T.524.06 – T.524.31. See also Charge 08/11/2016 T. 513.15-T.513.22.

(e) The Prosecutor then overtly relies on 'flight' as implied admission of guilt in her closing address to the jury.[65]

33. The prosecutor has effectively made a fundamental somersault in her case strategy. To do so at such a late stage in the trial processes, contrary to the Notice to Admit signed at request of the crown and announcement on 17 October that she was not going to rely on post-offence conduct ("flight") was tactically underhanded. It created an unfair forensic disadvantage which the Applicant could not address. It led to an unfair trial.[66]

GROUND 4 - A substantial miscarriage of justice occurred 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 circumstances where he had just prior been involved in a major collision and was suffering concussion.

34. In addition to the unfairness in resiling from her original decision not to rely on post offence conduct of flight, the Crown should not have been allowed to rely upon it in first place.[67] The Applicant had just been in a major accident where a doctor has formed the opinion he had suffered concussion and the unchallenged evidence of the prosecution witness, Mr O'Brien, was that the Applicant was suffering symptoms consistent with a head injury.[68]

35. The prosecutor recognised this at the start of the trial:

> *"But from the prosecutor's point of view, to rely upon that as well, in old fashioned way, as evidence of consciousness of guilt, namely decamping a scene of an accident, given the state of Mr Smith. It's been decided that that would be verging on the unfairness towards the accused… And that it would be, it would be unfair in such a circumstance to actually turn something and make it relevant to his criminal state of mind as such, when he's obviously just been hit."*[69]

36. In *Whitehorn v R*,[70] Deane J said:

> *Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping ensure that the accused's trial is a fair one.*[71]

---

[65] Transcript 08/11/2016: T.429.15-T.432.31.

[66] *Patel v R* (2012) 247 CLR 531 - The Court found that a miscarriage of justice had occurred because, on the 43rd day of a 58 day trial, the prosecution radically changed its case in a way that rendered irrelevant much of the evidence that had been admitted. The Court ordered that there be a new trial.

[67] Transcript 08/11/2016: T.429.15-T.432.31. Judges Transcript Charge 08/11/2016: T.534.27-T.535.15 s relying if had concussion does not nullu.

[68] Transcript 21/10/2016: T.404.07-T.406.13 – Dr Deary evidence of concussion. See: *R v Ciantar* [2006] VSCA 263 [33], *Heyes v R* (2006) 12 VR 401; see also *R v TY* (2006) 12 VR 557.

[69] Transcript 18/10/2016: T.09.01 – T.09.11.

[70] (1983) 152 CLR 657.

[71] *Whitehorn v R* (1983) 152 CLR 657 at 663–4.

37. As a result by relying on 'flight' as an implied admission of guilt a substantive miscarriage of justice occurred.

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.

38. It is improper for a prosecutor to impugn the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.[72]

39. The prosecutor discredited crown witnesses (Mr O'Brien and Mr Thomas) in her closing address without putting the matters to the witness during their evidence:[73]

(a) Describes witnesses as the Applicant's long term friends.[74]

(b) She questions Mr O'Brien's relationship to the accused calling it a peculiar friendship.[75] She cynically describes Mr O'Brien's evidence. The clear intent to is to undermine aspects of his evidence particularly in relation to the Applicant's head injuries.[76]

(c) Describes Mr Thomas's as another 'long term friend'[77] whose evidence is 'almost as interesting as Mr O'Brien's.'[78]

(d) The prosecutor concludes remarking these friends really don't puzzle her as they are long term friends of the accused.[79]

The clear intent of the prosecutor's language and tone was to use it as a mechanism to discredit and undermine her witnesses' evidence, particularly in relation to the issue of concussion. It appears she did this by planting the seed that because they were friends of the Applicant they were giving false evidence in order to protect him.[80]

40. Whilst not as direct, the prosecutor's conduct in the Applicant' case is not dissimilar to what the prosecutor did in *R v Kennedy*.[81] In that case the prosecutor, in his closing address, said that one of the witnesses called by the prosecutor gave evidence designed to protect the accused and to best look after his interests. There was no opportunity to meet the allegations. This created such unfairness as to cause the trial to miscarry.

---

[72] *R v Livermore* (2006) 67 NSWLR 659 at 667. Affirmed in *Basic v The Queen* [2015] VSCA 109 [64].

[73] T.123.26 – T.127.23 evidence in chief. Closing address T.382.16-T.385.15.

[74] Transcript 07/11/2016: T.382.16-T.382.20, T.384.13-T.384.17 and T.385.04-T.385.05.

[75] Transcript 07/11/2016: T.383.28-T.383.29.

[76] Transcript 07/11/2016: T.382.24-T.384.12.

[77] Transcript 07/11/2016: T.384.13.

[78] Transcript 07/11/2016: T.384.16-T.384.17.

[79] Transcript 07/11/2016: T.385.04-T.385.05.

[80] Transcript 07/11/2016: T.382.16-T.385.11.

[81] [2000] NSWCCA 487; (2000) 118 A Crim R 34.

41. The cogency of the evidence led from Mr O'Brien was critically important to the Applicant's case – namely that he suffered a concussion and had no recollection of the events – this went specifically to explaining why he left the scene; both in terms of any implied admission of guilt (Charges 1 &2) but also obligations to remain at the scene (Charge 3). This situation can be distinguished from relative recent case of *R v De Vries* [2013] VSCA 210 where although it was found improper for the prosecution to discredit their own witness the Court of Appeal ultimately found the trial did not miscarry. In that case the defence also argued that the witness was unreliable.[82] Unlike in this case it was not integral to the way the Crown put its case and the jury were not invited to reason adversely to that Applicant on the basis of it.[83] Finally, unlike in this case, the judge in *De Vries* was able to provide curative directions after defence counsel complained.[84] Here defence did complain rightly taking issue to this following the prosecutors closing address but little could be done to cure it without emphasising it.[85] The jury ought to have been discharged in order to avoid a substantive miscarriage of justice.

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

42. The Applicant submits that Grounds 1-5 on their own amount to a substantive miscarriage of justice. However, it is important to view them together, as a whole to provide the complete picture of their true significance. This is because an appellate court may find that there was a substantial miscarriage of justice even if it is satisfied that each *individual* ground of appeal did not involve any substantial miscarriage of justice. This ground of appeal recognises that the combined effect of several errors or irregularities may meet the threshold of a "substantial miscarriage of justice"[86]

Conclusion

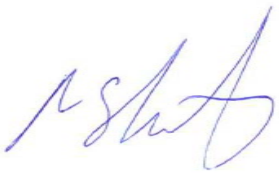
43. In some cases it will be impossible for an appellate court to assess the effect of an irregularity on the outcome of the trial. While the strength of the Crown case is relevant, it is not determinative. Departures from the proper processes of the trial may be so great that the court may find that there has been a substantial miscarriage of justice even if the accused's conviction was inevitable.[87]

44. In the present case, the most important consideration is whether or not the Applicant would have been able to receive his fundamental right to a fair trial as a result of the Crown closing address and conduct of the matter.[88]

---

[82] *R v De Vries* [2013] VSCA 210 [28].
[83] *R v De Vries* [2013] VSCA 210 [26].
[84] *R v De Vries* [2013] VSCA 210 [33].
[85] See for instance discussion with the learned judge at Transcript 08/11/2016: T.434.02-T..16-T.439.09.
[86] *R v Kotzmann* [1999] 2 VR 123; *R v Schaeffer* (2005) 13 VR 337; *R v Gell* [2006] VSCA 255; *R v Ireland* (1970) 126 CLR 321; *R v Glennon* (No 3) (2005) 12 VR 421.
[87] *Baini v R* (2012) 246 CLR 469; *Andelman v R* [2013] VSCA 25.
[88] *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300, citing *Bunning v Cross* (1978) 141 CLR 54 and *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29; In *Wilde v The Queen* (1988) 164 CLR 365 at 373 it was said that the old proviso has no application where there has been such a departure from the essential requirements of the law that the irregularity goes to the root of the proceedings. If that has occurred, it can be

45. It is submitted that either alone or in combination, each of these grounds give rise to a substantial miscarriage of justice.[89]



Rebekah Sleeth

Counsel for the Applicant

Jeremy R Cass

Jnr Counsel for the Applicant

said that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of this kind may be so fundamental that by their very nature they exclude the application of the proviso.

[89] *Baini v R* (2012) 246 CLR 469.