AMENDED SUMMONS

This document was eFiled on 14 Jun 2023 . Final acceptance has been given.

Principal Registrar &
Chief Executive Officer

COURT DETAILS

Court Court of Appeal

Division

List

Registry Sydney

Case Number **2021/00015614**

TITLE OF PROCEEDINGS

[First] Applicant Mr Huy Huynh

[First] Respondent Attorney-General (Cth)

FILING DETAILS

Filed for Mr Huy Huynh

Filed in relation to 2020/86959

Legal Representative Self-represented

Contact Details [redacted]

Contact email:

HEARING DETAILS

This summons is listed at:

TYPE OF CLAIM

Review against the decision of Garling J delivered on the 13 October 2020 with respect to the applicant's section 78 of part 7 of the Crimes (Appeal and Review) Act 2001.

The judicial review is sought pursuant to:

1. Section 69 of the Supreme Court Act 1970.

RELIEF CLAIMED

1. Allow the summons;
2. That the decision of Garling J on the 13 October 2020 be set aside;
3. Declare that there was an error of jurisdiction and law on the part of Garling J.
4. Such further or other orders as the Court deems fit.
5. Refer the matter to the Court of Criminal Appeal.
6. The respondent(s) pay costs.

GROUNDS

1. Error of jurisdiction on the part of Garling J as his Honour exercised a power that was not open to him by determining the outcome of legal questions that were submitted in the applicant's section 78 application as his Honour was performing an administrative task and was not acting in a judicial capacity as per s 79(4).
2. Error of law as Garling J's reasons for decision did not apply the relevant principles with respect to the applicant's defence not being put to the jury and his honour also did not apply the relevant principles as to how a conspiratorial agreement is properly proven when addressing the issues the applicant raised in the s 78 application.

SIGNATURE

I acknowledge that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity: Self-Represented

Date of signature:

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the Court may give judgement or make orders against you in your absence. The judgement may be for relief claimed in the summons and for the applicant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

HOW TO RESPOND

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REGISTRY ADDRESS

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PARTIES TO THE PROCEEDINGS

APPLICANT

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Address	[redacted]

RESPONDENT

[First]	Attorney – General (Cth)
Address	CDPP level 10, 175 Liverpool St, Sydney NSW 2000
Contact Phone	[redacted]

STATEMENT OF GROUNDS

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case Number	2020/86959

TITLE OF PROCEEDINGS

[First] Applicant	Mr Huy Huynh
[First] Respondent	Attorney –General (NSW)

FILING DETAILS

Filed for	Mr Huy Huynh
Filed in relation to	2013/00310184
Legal representative	Self-represented
Contact details	[redacted]
Contact email	

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STATEMENT OF GROUNDS

Whether the summing up resulted in a miscarriage of justice as defence for June offences not put to the jury.

1. The facts in the **R**espondent's **S**ubmissions filed 30 April 2020 (**RS**) at [26]-[54] and his Honour, Garling J's reasons for decision at [15]-[19] largely exceed the detail necessary for the purposes of these proceedings. The applicant relies on the facts and relevant authorities with respect to a trial judge's directions to a jury in criminal trials set out in his submissions dated 18 March 2020 - **A**pplicant's **S**ubmissions (**AS**) at [11]-[19], [28]-[29], [36]-[38].
2. The applicant's defence for the June importations was not put to the jury. A careful analysis of the evidence shows that Mr Lamella's testimony implicating the applicant for the June imports was critical to the Crown case because, without it, the Crown could not show that:
    a. The applicant intentionally entered into an agreement
    b. That the applicant had knowledge of, or belief in, the existence of the facts that is the subject of the agreement of the offence.
    c. And that the applicant intended that the offence would be committed pursuant to that agreement.
3. **AS** [53], [55]-[56].
4. It was an indispensable link in the chain of reasoning.
5. Without Mr Lamella's testimony concerning these alleged meetings the Crown would fail to prove that the applicant was criminally involved in the conspiracy for the June importations.
6. Therefore, it was of critical importance that the jury be directed that before they could convict the applicant, the jury had to be satisfied beyond reasonable doubt that Mr Lamella and the applicant met during April 2012 to discuss the importations for June.
7. In his Honour's reasons for deciding that it was open to the trial judge in not putting the applicant's defence for the June offences, Garling J has not demonstrated how his Honour's findings accommodate principles that parties' cases be accurately and fairly put to the jury and that a summing up must leave for the jury any issue that they may find for the accused. **AS** [59]-[64] and **A**pplicant's **R**eply, **AR** [100]-[102], [106]-[107].
8. It was especially critical in this case that the applicant's defence be put to the jury that he did not meet up with Mr Lamella during April – May 2012 as his honour the trial judge put to the jury that the crown relied on meetings that Mr Lamella had with the applicant during that period so there were competing scenarios for the jury to determine.
9. The relevant principles to be applied in deciding this ground are well established and uncontroversial .The question was whether, in light of the accepted principles, the summing up properly explained how a conspiratorial agreement is proven and how the law may be applied to the facts of this particular case for the June offences.
10. The jury was deprived of an adequate opportunity of understanding and giving effect to the applicant's defence and the matters relied upon in support of that defence.
11. When a complaint is made that a summing up was not fair, balanced or impartial and a miscarriage of justice has resulted, the question on appeal is whether the trial judge has put

the defence case for the accused in such a way as to allow the jury to properly consider the issues raised on the accused's behalf: *Domican v The Queen (1992) 173 CLR 555 at 560-561.*

SEPARATE DEFENCES

12. The conclusion of Garling J with respect to the applicant not being able to have different defences is at odds with authority. Justice Garling's reasons at [49]: "Any 'defence' to involvement in the June importation would not be a complete defence to the charge the Crown was prosecuting. Lesser involvement in the June importation did not absolve the applicant of involvement in the broader conspiracy."
    Furthermore, Garling J did not have the authority to determine the outcome of whether the applicant's defence was adequately put to the jury.
    With respect, that would be a question for the Court of Criminal Appeal if this case was to proceed there.
13. Garling J proceeded on an erroneous basis in concluding that the applicant did not have two different defences to the one single conspiracy charge where the applicant had cited *R v Hamzy* in the (**AR**) at [27]-[28]. That case also concerned duplicity.
14. His Honour did not disavow *R v Hamzy* and totally ignored or did not have proper regard to that case as his Honour makes no mention of it in his Honour's reasons for decision.
15. If, as it appears, Garling J's referral to the way the Crown ran its case to explain the context and nature of the applicant's defence (one of total denial) and that there was not a separate defence as such, this error overlooked the case of *R v Hamzy* but also the relevant principles of an accused's defence/s being put fairly and accurately to a jury.
16. With respect, that proposition further highlights why the single conspiracy charge was unfair. In effect, it allows the Crown to roll up a multiplicity of offences under the guise of a single conspiracy even though the Crown would not be able to prove all of the offences committed pursuant to the one single agreement and allow innocent people to be convicted of crimes that they did not commit. That would bring the fair and proper administration of criminal law in Australia into disrepute amongst right-thinking people.
17. That proposition is also contrary to authority and with common sense as that would deny accused persons of being able to properly defend themselves if prosecuting authorities were to join multiple crimes under the guise of a single conspiracy.
18. Had the Crown charged the applicant with two separate conspiracies, the Crown would have been required to prove how the applicant was involved in the June offences and it would have required and been less complicated for the trial judge to identify the separate defences and direct the jury accordingly.
19. The primary problem (unfairness) stems from the Crown rolling up the two discrete acts of criminality into the one single conspiracy. The resultant problems and blame lay squarely with the Crown in its inability to prosecute fairly.
20. Therefore it is respectfully submitted that what Garling J decided about not being able to have different defences and that the applicant's defence was one of total denial for both offences is at odds with what Hunt CJ at CL expounded in R v *Hamzy*. See above at [12].
21. Having separate defences for multiple acts of criminality charged under the one conspiracy count and duplicity are matters that are intertwined and inextricably linked. Accused persons should be able separate defences in order to properly defend themselves.

22. It is respectfully submitted that Garling J has acted arbitrarily or capriciously and not in good faith. See below at [31] where McCallum JA (as her Honour then was) in *Clark* citied Buck v Bavone (1976) 135 CLR 110; [1976] HCA 24 at 118 (Gibbs J), 131 (Mason J). The applicant's defence was clearly not put to the jury and it can be accepted that Garling J accepted as much from his Honour's reasons for decision.
23. It is submitted that his Honour Garling J was unreasonable (in the sense described by McCallum JA in *Clark* above) in his decision with respect to the applicant not being able to raise different defences for different acts charged under the one count as it was clearly contrary to the decision in *R v Hamzy*. It is therefore submitted on a proper application of the relevant principles that was capable of raising a doubt or question of the applicant's conviction with respect to the criteria in s 79(2).

ERROR OF JURISDICTION

24. All that Justice Garling had to be satisfied of was certain factual matters. It appears that his Honour was satisfied that the applicant's defence was not put. It was then open for his Honour to refer the matter to the CCA to be dealt with as an appeal but his Honour went beyond what was required and exercised a power that was not open to his Honour in deciding questions of law relating to this case but also erroneously deciding that the applicant had to show that he was not guilty of the offences or to put in in his Honour's words: "...to put it another way, whether the available material causes me unease or a sense of disquiet in allowing the conviction to stand". See decision at [27], [44]-[45], [52]. Section 79(4) provides that proceedings under s 79 are not judicial proceedings.
25. His Honour's threshold was considerably higher than what was required (decision at [13]) and omitted consideration of highly relevant conditions as was expounded by Basten JA in R v *Sinkovich* at [26]-[27], [29]-[30] (AR[20]-[21]) with respect to the criteria the applicant must meet in order to have the matter referred to the Court of Criminal Appeal. See also *Li v Attorney General (NSW) [2019] NSWCA 95 at [15].* The judgement of Basten JA in *Sinkovich* (with whom the whole Court agreed) at [23]-[54] provides a helpful analysis of the statutory language and history of Part 7.
26. The statutory language of s 79(2) is not whether there *is* a doubt or question, but whether there *appears* to be a doubt or question....The Court does not need to be satisfied that a doubt or question is well founded to order an inquiry, as that is a matter for the inquiry: *R v Li* at [19].
27. Justice Garling's threshold and reasoning for refusing the application is also in stark contrast to what the High Court propounded in R v Weiss *The Queen* (**AR** at [91](a)-(b)): the Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ (said at [26]-[27]):
    a. [26]"...The first was that a party has a legal right to observance of the rules of evidence (and we would add, to observance of all other aspects of law and procedure, the contravention of which could constitute "a wrong decision of any question of law" or "on any ground...a miscarriage of justice"). The second was that judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be usurpation of the jury's function."
    b. [27]"...Thus, in Mraz v The Queen (1955) 93 CLR 493 at 514, Fullagar J said that the proviso should be read, and in fact always has been read, "in light of the long tradition of the English criminal law that every accused person is *entitled* to a trial in

which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed" (emphasis added)...".

28. Here, Garling J's basis for refusing to refer the matter to the CCA was that the applicant has been properly found guilty for the March offences and therefore his honour has no sense of disquiet or unease about the applicant's guilt. See [26](a) above: "...judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be usurpation of the jury's function.
29. Garling J has used the strength of the case with respect to the March offence and that the applicant would have been convicted for the March importation as a basis for refusal. That approach is incongruous with what was expounded in R v Weiss at [45]:

> "Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved beyond a reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind".

30. The High Court has made it abundantly clear that although a Court of Criminal Appeal is persuaded to the requisite degree of the applicant's guilt, it cannot be used as a basis not to order a re-trial if certain error/s were made during the trial.
31. In this matter, Garling J has decided a question of law and also what the outcome should be. His Honour has exercised a power that was not open to him.
32. It is incontestable that the applicant's defence for the June imports was not put to the jury and so the jury was deprived of an adequate opportunity of understanding and giving effect to the applicant's defence and the matters relied upon in support of that defence.
33. The applicant asks the Court to have regard to the well known and often quoted statement of Fullagar J in Mraz v The Queen (above [26](b)).
34. Accordingly, Garling J should have referred this case to the CCA once his Honour accepted the applicant's defence was not put to the jury in conformity with accepted authority.

THE DECISION WAS UNREASONABLE

35. In *Clark v Attorney General of New South Wales [2020] NSWCA 70* at [44] McCallum JA said: "In determining whether to consider an application under Part 7, it would be not permissible for the judge to act arbitrarily or capriciously; where it is a condition of the exercise of a statutory power that the decision- maker must be "satisfied" as to existence of certain factual matters, he or she is required to act in good faith in reaching a conclusion on that issue: Buck v Bavone (1976) 135 CLR 110; [1976] HCA 24 at 118 (Gibbs J), 131 (Mason J).The scope of the discretion is otherwise confined at least by the "the subject matter, scope purpose of the legislation under which it is conferred": Li at [23] (French CJ). The separate judgements of Basten JA and Beech-Jones J in *Sinkovich* provide a helpful analysis of the statutory history and language of Part 7. Justice Basten concluded at [52] that the overriding purpose of that Part is, "consistently with the high value placed on the freedom of the individual and the unwillingness to allow that liberty to be infringed because

commission of a criminal offence unless the offence has been established beyond reasonable doubt, to provide a means to address doubts as to compliance with these principles."

36. At [46]-[47] in *Clark*, "It may be accepted in accordance with those remarks that the breadth of the matters which an applicant may seek to raise in applying for an inquiry informs the scope of the Court's consideration for the purposes of s 79(3) as to whether "the matter" has been fully dealt with at the trial or on appeal, or previously dealt with under Part 7. However it does not follow that the Court cannot exercise the discretion without again considering every issue that was raised in any previous proceeding. On that approach the screening function of the discretionary power to refuse to consider an application would be defeated."
37. At [47]: "Finally, the content of the relevant "matter" and the question whether it has been "dealt with" previously will be informed by the nature of the issue raised. Although, as noted by Basten JA in *Sinkovich* at [46], Part 7 is "inherently an exception to the principle of finality", it is not intended to set the verdict at nought. There is nothing in the text of the statute to suggest that it is necessary, before the discretion to refuse to consider an application under Part 7 in enlivened, for the Supreme Court to be satisfied that every piece of evidence or every paragraph of every submission put in support of the application was fully dealt with at the trial or on appeal or has been previously dealt with under Part 7. The task is to identify the substance of the matter the applicant contends warrants an inquiry or referral of the case to the Court of Criminal Appeal.
38. In Garling J's reasons for refusal, one of his Honour's reasons was that the matter was dealt with at the applicant's appeal. With respect, it clearly was not. See CCA judgement at [11].
39. It will be seen that no ground relating to the applicant's defence was argued at the CCA. The relevant ground was that the charge was duplicitous and that the agreement was two conspiracies not the single agreement.

ABUSE OF PROCESS FOR UNFAIRNESS

40. Garling J's decision at [33], [37], [40], [42]-[43] in essence, says the procedure adopted by the Crown was appropriate but that is not the applicant's contention nor is it to the point.
41. That would ignore what his Honour Gleeson CJ said in *R v Nudd* (**AS** [76], [79]) and the High Court's dissertation on abuse of process for unfairness. **AS** [81]-[86].
42. The applicant's contention was the impropriety of the procedure for unfairness not the illegality, the two are not synonymous. The applicant readily accepts that the Crown was well within its discretion to use whatever charges it preferred.
43. But that is not the issue.
44. The procedure adopted by the Crown in the circumstances of this case was oppressive.
45. Importantly, his honour did not identify why it was not unfair for the applicant in having the two discrete acts of criminality charged under the single conspiracy count, and how, if the Crown had charged two separate conspiracies, what unfairness and prejudice the Crown may have suffered apart from proving the relevant offence.
46. Because the Crown ran its case as a single conspiracy it therefore absolves the Crown from proving that the applicant was involved for June (or lesser involvement as Garling J put it at

[49]) does not address the substantive issue of the applicant's defence for June not being put to the jury. Critically, his Honour does not articulate what that lesser involvement was.

47. It was essential that the applicant's defence be put to the jury fairly, cogently and clearly. Indeed, in charging multiple acts of criminality under a single conspiracy, the more essential it was to identify any different defences so that it can be considered in light of the Crown case and evaluated as part of the overall determination of whether the Crown discharged its onus of proof.
48. Unfairness arose because it made it difficult for the trial judge to separate the evidence for each act of criminality and then present the different defences the applicant had and also for the reasons stated in the **AS**[70], [72]-[73] and [75]. The applicant was denied the right to receive a verdict for each discrete offence and for the jury to properly determine what offences they had found proven.
49. Whether the Crown has established the applicant's guilt for the March offence is not the issue. The applicant does not take issue with that aspect of the proceedings, the issue is whether the trial miscarried because the summing up did not address the applicant's defence for the June offences.
50. To use the strength of the March offences as a basis to refuse to direct an inquiry or refer the matter to the CCA would be to detract from the applicant's main contention.
51. There was a fundamental misunderstanding or oversight on the critical element necessary in proof of the conspiracy with respect to the June offences.
52. Observations in the Respondent's Submissions do not engage with the particular feature of the summing up that created the miscarriage of justice.
53. The respondent in submitting that the applicant was properly convicted for the June offences without Lamella's testimony has not properly addressed the elements of the Criminal Code Act 1995 (Cth) s 11.5(2).
54. The applicant could not have entered into an agreement with the persons named in the indictment (for the June offences) if he was not seen in physical proximity with any of the alleged co-conspirators nor was he shown to be in communication with anyone named in the indictment after late March? The respondent is unable to answer that aspect of the Crown case.
55. One cannot therefore have the knowledge of, or belief in, the facts that make the proposed conduct an offence. But also have intended that an offence would be committed pursuant to the agreement: s 11.5(2) of the Criminal Code. **AS** [55]-[56] citing R v LK (2010) 241 CLR 177; HCA 17.
56. Garling J raised for the first time in his reasons for decision at [49] that: "Any 'defence' to involvement in the June importation would not be a complete defence to the charge the Crown was prosecuting. Lesser involvement in the June importation did not absolve the applicant of the involvement in the broader conspiracy."
57. It is submitted that there was a denial of procedural fairness as it was not an argument the A-G had raised in its submissions. The applicant also submits that that is a question of law for the CCA to resolve on how a conspiratorial agreement is proven, what liability is to be attributed to an accused in joining multiple acts under a single conspiracy charge and if separate defences are permitted to be raised in denial of the charge in this case.

Conclusion

58. Garling J's reasoning does not sit well with what Basten JA said in R v Sinkovich at [29]: "That such mistakes occur is undoubted: if the error were to be disclosed only after an appeal had been dismissed, it would seem curious that the offender could have no right of relief. The section does not limit the relationship of the doubt or question to its subject matter, and must allow for a range of connections."
59. A trial judge must put fairly before the jury the case that the accused makes – an obligation which extends to explaining any basis for which the jury might properly return a verdict in the accused's favour: RPS v The Queen (2000)199 CLR 620; (**AS** [60]).
60. The reference to the accused making a case is to be understood to encompass any challenge to the prosecution evidence and submissions: Dixon v R [2017] NSWCCA 299 at [14] per Basten JA. **AR** at [101].
61. In this matter, it would not be right for Justice Garling to simply ignore or not to have regard to the authorities referred to, such as the cases of R v Sinkovich, R v Hamzy and R v Clark because those cases do not accord with his Honours views.
62. His Honour would be expected to either disavow or accept those authorities in accordance with comity of decisions especially when his Honour was acting in an administrative capacity.
63. It is submitted that the pertinent question in these proceedings was whether the trial judge put the applicant's defence to the jury.
64. It was critical in this case as the Crown case was put to the jury while the applicant's defence that he never met up with Mr Lamella did not get mentioned at all.
65. Garling J's reasons for decision concerning the applicant's guilt with respect to the March importation detracts from the main point the applicant raises.
66. Therefore the applicant respectfully submits that the decision of Justice Garling was unreasonable and his Honour was acting beyond jurisdiction.
67. As was said by McCallum JA in *R v Clark* at [47]: "...The task is to identify the substance of the matter the applicant contends warrants an inquiry or referral of the case to the CCA." The substance of the matter here is the applicant's defence for the June offence was not put to the jury. So in conformity with accepted and well established principles with respect to the obligation of a trial judge leaving for the jury an accused defence/s, it is respectfully submitted that that is capable of giving rise to a doubt or question as to the applicant's conviction. The applicant has therefore satisfied the necessary criteria and the applicant asks the Court to refer the matter to the Court of Criminal Appeal for a re-hearing.

SIGNATURE

I acknowledge that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature [redacted]

Capacity: Self-represented

Date of signature: 22/5/23

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PARTY DETAILS

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