SUPREME COURT OF QUEENSLAND

CITATION:	*R v Muniz* [2016] QCA 210
PARTIES:	**R** **v** **MUNIZ, Rafael Arruda** (appellant)
FILE NO/S:	CA No 32 of 2016 SC No 822 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 22 January 2016
DELIVERED ON:	26 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2016
JUDGES:	Holmes CJ and Gotterson and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted by a jury of possessing a marketable quantity of a border controlled drug – where the appellant makes five complaints as to the prosecutor's conduct at trial, namely that the prosecutor: impermissibly put a witness' motive to lie into question; sought to enhance the credibility of a witness by putting into evidence the witness' undertaking to testify against multiple accused persons; used language that departed from the standard expected of a prosecutor; misstated the effect of admitted DNA evidence; and put an imprecise argument to the jury that had no evidential foundation – whether the prosecutor's conduct, considered individually or cumulatively, caused a miscarriage of justice *Libke v The Queen* (2007) 230 CLR 559; [2007] HCA 30, cited *Palmer v The Queen* (1998) 193 CLR 1; [1998] HCA 2, considered *R v Coss* [2016] QCA 44, cited *R v Kostaras* (2002) 133 A Crim R 399; [2002] SASC 326, cited *R v Van Der Zyden* [2012] 2 Qd R 568; [2012] QCA 89, cited *R v Wheatley* [2012] QCA 55, cited

Whitehorn v The Queen (1983) 152 CLR 657; [1983] HCA 42, cited

COUNSEL:	B J Power for the appellant L K Crowley for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Philip McMurdo JA and the order he proposes.

[2] **GOTTERSON JA:** I agree with the order proposed by Philip McMurdo JA and with the reasons given by his Honour.

[3] **PHILIP McMURDO JA:** After a trial the appellant was convicted of an offence of the possession of a marketable quantity of a border controlled drug, namely cocaine, that was unlawfully imported in contravention of s 307.6(1) of the *Criminal Code* (Cth). He was sentenced to a term of seven and a half years imprisonment, with a non-parole period fixed at four and a half years. He has abandoned his application for leave to appeal against that sentence. He appeals against his conviction, making a number of complaints about the conduct of the prosecutor and what is said to have been the failure of the trial judge to avoid the consequences of that conduct, which is said to have resulted in a miscarriage of justice.

[4] On 26 November 2013, police conducted a search of an apartment at the Gold Coast which was occupied by a man named De Souza. At the time of the search, De Souza and a man named Cruz were present. Among the items found were two large suitcases (one of which had been dismantled with the lining removed), more than $11,000 in cash and a total of 936 grams of white powder within clip seal bags, which was found to be cocaine with a total pure quantity of 731 grams. Within the suitcase which had not been dismantled, there was more cocaine, weighing in excess of 1,318 grams with a total pure quantity of 1,037 grams.

[5] A fingerprint examination of items located in the search revealed thumbprints of the appellant on three of the clip seal bags containing cocaine and thumbprints and fingerprints on pieces of lining which had been removed from the dismantled suitcase. Two of those clip seal bags were found in a vase and the other was within a portable safe.

[6] A DNA analysis revealed DNA belonging to the appellant upon the seals of three of the twelve clip seal bags which contained cocaine.

[7] De Souza's DNA was located on the cash and on a number of the clip seal bags containing cocaine and his fingerprints were found on the clip seal bags and on material from inside the dismantled suitcase.

The trial

[8] An investigating police officer gave evidence of the search but each of the facts which I have set out was the subject of an admission made by the appellant's counsel at the commencement of the trial. It was also admitted that a few days prior to the search of De Souza's apartment, the man named Cruz had arrived in Australia with the two suitcases and that on the same day, he and De Souza had taken the suitcases to the apartment.

[9] It was undisputed then that at De Souza's apartment there was a marketable quantity of cocaine which had been unlawfully imported and that the appellant had at least touched several of the clip seal bags containing cocaine and pieces of lining which had been removed from the dismantled suitcase. The issue for the jury was whether it was proved that the appellant was in possession of the cocaine. The prosecution case depended upon the evidence of De Souza, who was the other witness in its case.

[10] De Souza's evidence-in-chief was as follows. In January 2013, he met two other Brazilians living on the Gold Coast and soon after discussed with them an importation of cocaine. De Souza subsequently discussed this with Cruz, who lived in Brazil. In September 2013, Cruz indicated that he was prepared to assist with the importation. De Souza then spoke with the appellant, whom he had met in February 2013, because Cruz needed money and the appellant was a possible source. (The content of De Souza's conversation with the appellant was not otherwise the subject of evidence.) Subsequently Cruz told De Souza that he was going to bring cocaine from Brazil and Cruz flew to Brisbane on a ticket paid for by De Souza's girlfriend. De Souza arranged to meet Cruz at Brisbane airport and he drove Cruz with the two suitcases to his apartment at the Gold Coast.

[11] De Souza gave evidence that after he and Cruz arrived at the apartment, the appellant joined them and the appellant and Cruz began to cut open one of the suitcases whilst De Souza had a sleep. When De Souza awoke, he saw that cocaine had been removed from the suitcase and De Souza helped to tidy up a mess which had been made from that exercise. The appellant, De Souza testified, asked him to keep the cocaine at his apartment for three days. Either on that day or the following day, the appellant returned to De Souza's apartment with a friend of the appellant to whom the appellant gave 10 ounces of the cocaine, leaving the balance with De Souza. The appellant visited the apartment a further time before the police searched it and De Souza was arrested.

[12] The appellant's case was that he went to the apartment to buy cannabis from De Souza, as he had done many times. On 23 November 2013 he went to the apartment where he saw that there was a great deal of mess and cocaine, steroids and cannabis were on a table. He touched plastic bags on the table which contained cocaine but he was there only to buy cannabis and left the apartment when he had done so. He returned on the following day, by which time the mess had been cleared.

[13] When cross-examined, De Souza rejected the appellant's case. He said that he had never sold cannabis to the appellant. He denied that any of the cocaine had been removed from the suitcases by the time the appellant entered his apartment on 23 November 2013. He agreed that prior to the importation, he had returned to Brazil where he had met with Cruz and that he and Cruz collected the two suitcases for Cruz to bring to Australia. He agreed that he had given a statement to police on 27 November 2013, in which he described the participation of another man in terms which suggested that it was that man who was the principal participant in the importation, travelling with De Souza to pick up Cruz and the suitcases at Brisbane airport and having the effective control of the suitcases although they were at De Souza's apartment. He agreed that in a later statement to police, De Souza had withdrawn those claims about the other man and in cross-examination he agreed that the claims had been lies.

[14] De Souza agreed that he had been sentenced upon the basis that he would give evidence against the appellant but disagreed that this made him minded to falsely implicate the appellant in the offence.

[15] The prosecution evidence was completed within a day. On the following day the appellant gave evidence of his case, as I have described it, and both counsel addressed the jury. The trial judge summed up on the third day of the trial and after deliberating for about two hours, the jury gave its verdict.

[16] There are some five complaints now made by the appellant as to the conduct of the trial although only one of them was raised with the trial judge.

The first ground of appeal

[17] The first complaint is that the prosecutor encouraged the jury to engage in impermissible reasoning, in assessing De Souza's evidence, by this part of his address:

> "Mr De Souza has been charged with [the importation] and has pleaded guilty to it. He's pleaded guilty to importing, as my learned friend has said a number of times and seems to refer to the sentencing proceedings against Mr De Souza, of millions of dollars worth of cocaine, he admitted. So why is he going to lie to sell it – lie about selling $10 sticks of cannabis to [the appellant]? If that's the reason that [the appellant] was there, why on earth would Mr De Souza, who's pleaded guilty to importing millions of dollars worth of coke, going to lie about selling a $10 stick … Why lie about that when you're doing time for importing millions of dollars worth of coke? That'd be madness."

[18] In *Palmer v The Queen*,[1] convictions of sexual offences against a child were quashed for two reasons. The first[2] was that the verdicts were unsafe and unsatisfactory with the consequence that verdicts of acquittal were entered. The second[3] was that there was a miscarriage of justice from the prosecutor being permitted to cross-examine the appellant to show that the appellant could not prove any ground for imputing a motive to lie to the complainant. Brennan CJ, Gaudron and Gummow JJ there said:[4]

> "[7] It is one thing to permit cross-examination of a complainant in order to elicit, if possible, a motive to lie. It is another thing to permit cross-examination of an accused to show that an accused cannot prove any ground for imputing a motive to lie to the complainant. A complainant knows whether he or she has a motive to lie and, as a motive to lie is a fact that may be proved to impeach the complainant's credit, the complainant may be asked about it. And evidence may be given by other witnesses of events from which such a motive may be inferred. But the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant. In general, an accused's lack of knowledge simply means that his evidence cannot assist in determining whether the complainant has a motive to lie, but if the facts from which an inference of motive might be drawn are facts that the accused would know if they existed, his lack of knowledge could be elicited to disprove those facts.

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1 (1998) 193 CLR 1; [1998] HCA 2.

2 According to the four members of the court, Brennan CJ, Gaudron and Gummow JJ, and in a separate judgment, McHugh J.

3 According to the joint judgment of Brennan CJ, Gaudron and Gummow JJ and the separate judgment of Kirby J.

4 (1998) 193 CLR 1, 7 (footnotes omitted).

> [8] If it were permissible generally to cross-examine an accused to show that he has no knowledge of any fact from which to infer that the complainant has a motive to lie, the cross-examination would focus the jury's attention on irrelevancies, especially when the case is 'oath against oath'. In such a case, to ask an accused the question: 'Why would the complainant lie?' is to invite the jury to accept the complainant's evidence unless some positive answer to that question is given by the accused. …"

In essence, they held that an accused's lack of knowledge of a complainant's motive to lie is usually irrelevant and a jury's consideration of that irrelevancy creates a risk that the jury will accept the complainant's testimony for the absence of evidence of such a motive.

[19] In the present case, there was no cross-examination of the appellant of the kind in *Palmer*. The present complaint is about the prosecutor's address to the jury. Nevertheless, the reasoning in *Palmer* can be relevant to a prosecutor's address.[5] It is said that the argument to the jury that there was no motive for De Souza to lie about selling cannabis, created the risk that in the absence of an apparent motive, the jury would think that De Souza's evidence must be true.

[20] The appellant argues that the prejudice caused by this impermissible submission by the prosecutor could and should have been avoided by a direction as suggested in *R v Van Der Zyden*.[6] Muir JA there formulated a direction which would have been appropriate for that case, in which the prosecutor had "elevated the absence of any motive to lie on the part of the complainants to a matter 'central' to the jury's assessment of the case and [had] positively asserted the absence of such a motive".[7] That direction has been substantially adopted within the Benchbook where there is a model direction in these terms:

> "The prosecution has submitted that the complainant does not have any motive to lie.
>
> You must bear in mind that any failure or inability on the part of the defendant to prove a motive to lie does not establish that such a motive did not exist.
>
> If such a motive existed, the defendant may not know of it.
>
> There may be many reasons why the person may make a false complaint.
>
> If you are not persuaded that any motive to lie on the part of the complainant has been established, it does not necessarily mean that the complainant is truthful. It remains necessary for you to satisfy yourselves that the complainant is truthful."

[21] The trial judge here gave no such direction. But in the circumstances of this case, such a direction would have been at odds with the arguments made by the appellant's counsel to the jury and the judge's directions which correctly reminded the jury of those arguments. In this case, it was clear that the defendant was suggesting a reason for De Souza to lie about what the defendant was doing at the apartment: namely that

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5 *R v Coss* [2016] QCA 44 at [12] (Margaret McMurdo P, Gotterson and Morrison JJA agreeing); *R v Kostaras* (2002) 133 A Crim R 399, 411 [87].

6 [2012] 2 Qd R 568; [2012] QCA 89.

7 [2012] 2 Qd R 568, 578-579; [2012] QCA 89 at [32].

De Souza was lying in order to minimise his own role and to prove the case against another alleged offender so as to retain the benefit of a lighter sentence. That case was plainly put to De Souza in cross-examination and the trial judge correctly identified the argument in fairly explaining to the jury the risk of acting upon De Souza's evidence. His Honour told the jury that they should approach the evidence of De Souza with caution, firstly because as a person involved in the alleged offence, De Souza may have reasons of self-interest to lie or to falsely implicate another in the commission of the offence. The jury was told that De Souza may have sought to justify his conduct, or at least minimise his involvement, by shifting the blame wholly or partly to others. His Honour reminded the jury of the evidence that De Souza had pleaded guilty and had agreed to give evidence against others, including the appellant, and that by doing so he had received a reduced sentence. In the course of that explanation, his Honour told the jury:

> "You can see, therefore, that there may be a strong incentive for a person in that position to implicate a person in the defendant's position when he is giving evidence."

A direction along the lines of that formulated in *R v Van Der Zyden* would have been inapt and confusing. The evidence and the defendant's argument had raised a particular motive for De Souza to lie, including lying about the supply of cannabis which was essential to the defence case in explaining why the defendant was at De Souza's apartment. In this case a particular motive was suggested by the evidence rather than being unknown.

[22] The trial judge did refer to this particular submission of the prosecutor when summarising his arguments. Although at that point of the summing up, his Honour did not remind the jury of why De Souza might be lying, the jury could not have overlooked his Honour's clear directions when considering this particular argument.

[23] With the benefit of the directions as to why De Souza might be lying in giving evidence which was adverse to the appellant and, of course, the usual directions as to the burden and standard of proof, there was no real risk that the jury would engage in some impermissible reasoning from this argument by the prosecutor. The first of the appellant's grounds must be rejected.

The second ground

[24] The second of the appellant's complaints comes from a question by the prosecutor when re-examining De Souza and a related argument which he put to the jury. When cross-examined, De Souza was asked whether he had received a lesser sentence because of his undertaking to give evidence against the appellant to which he answered "correct" but added "not only against [the appellant]". In a subsequent question, the cross-examiner accepted that De Souza had undertaken to give evidence not only against the appellant but also others. The prosecutor then re-examined as follows:

> "You were asked some questions by my learned friend about you giving evidence against [the appellant], and you said not just [the appellant]?--- Yes.
>
> Are there other people … that you are giving evidence against?--- Correct.
>
> Are they other Brazilian people?--- Yes. One Brazilian and one no Brazilian.
>
> All right. So – and you're being required to give evidence against those people?--- Yes."

[25] The prosecutor sought to use this evidence by addressing the jury as follows:

> "You also heard in re-examination that [the appellant] is not the only person that Mr De Souza is cooperating with law enforcement [sic] about. So you might think that the hell-bent vendetta of pinning something he possibly could on [the appellant] probably isn't as strong as my learned friend would want you to believe."

That argument misstated the defence case, because the appellant's counsel had not suggested to De Souza or argued to the jury that De Souza was lying because of a vendetta against the appellant. Again, the defence case was that he was lying in order to minimise his involvement and to have the benefit of a lower sentence. Of course by this stage, the appellant's counsel had already addressed the jury. But he did not see a need, or at least an advantage, in having the trial judge correct this misdescription of his case. The apparent explanation for that is that the jury could not have misunderstood the defence case having just heard his address and his cross-examination of De Souza. A direction by the trial judge that there was no claim of a "vendetta" would not have been inappropriate, but it was unnecessary.

[26] It is argued for the appellant that the trial judge should have told the jury that, in effect, De Souza's credibility was not enhanced by the fact that he had undertaken to give evidence against several people and not only the appellant. It is said that the jury could have been given the impression that the prosecution regarded De Souza as so credible that he could be relied upon in more than one case. That argument cannot be accepted, again because the circumstances in which De Souza had agreed to give evidence against the others were well explained by the evidence, the address by defence counsel and most importantly, the judge's directions. There was no real risk that the jury could have reasoned that De Souza was more credible for the fact that he was to give evidence against others.

The third ground

[27] The next of the complaints comes from the immoderate language used by the prosecutor when addressing the jury about the appellant's evidence. The prosecutor described the appellant's evidence as a "fairytale" and "complete nonsense". As to the appellant's evidence that the appellant had touched the items which bore his fingerprints and DNA either by accident or out of curiosity, the prosecutor, referring to *Alice in Wonderland*, described that work as "another fairytale … that involved somebody being 'curiouser and curiouser'". For the appellant it is said that these arguments to the jury were inconsistent with the proper role of a prosecutor as explained by the High Court in *Libke v The Queen*[8] and by this court in *R v Wheatley*.[9]

[28] In *Libke*, Kirby and Callinan JJ quoted this passage from the judgment of Deane J in *Whitehorn v The Queen*:[10]

> "The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, the consequences of such a failure

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8 (2007) 230 CLR 559; [2007] HCA 30.

9 [2012] QCA 55.

10 (1983) 152 CLR 657, 664; [1983] HCA 42; quoted also by Muir JA (with the agreement of the other members of the court) in *R v Wheatley* [2012] QCA 55 at [49].

> may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with the consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered."

[29] Whether a prosecutor's conduct departs from the required standards of fairness involves a question of degree and a prosecutor, whilst obliged to be fair, is entitled to be robust in what is an adversarial proceeding.[11] The question here is not whether the prosecutor acted imperfectly but whether the appellant received a fair trial. In my view, the immoderate language used by the prosecutor could not have distracted the jury from fairly and properly considering all of the evidence, including that of the appellant, and no unfairness resulted. This third argument must be rejected.

The fourth ground

[30] The fourth ground of appeal involves an alleged misuse by the prosecutor of the fact, as admitted, of the appellant's DNA upon the seals of clip seal bags containing cocaine. The prosecutor strongly argued to the jury that the location of the appellant's DNA upon this part of the bags was telling, because it was consistent only with the appellant handling the bags by sealing them up after placing cocaine within them.

[31] The relevant parts of the prosecutor's address were as follows:

> "[H]ow, if you've curiously had a look or accidentally touched these things, does your DNA appear, not once, not twice, but thrice on different bags on the clip seals. That is consistent with sealing them, you might think. Not just touching them, having a bit of a fiddle, having a bit of a look. Why are they on the seal? It's the DNA. It's not a fingerprint, it's his DNA. … That piece of evidence itself incontrovertibly supports De Souza.
>
> …
>
> De Souza says that [the appellant] and Cruz got the cocaine out and emptied it into the plastic bags, and lo and behold, whose DNA is on the seals of the plastic bags? Three of them, not once. Once you might accept is a coincidence for an accident. Three different bags. … And that is not in any way consistent with the version of events that he gave you …
>
> And then [the appellant] goes 'I just sort of accidentally touched it and had a bit of a look.' That's not consistent with the DNA, and you might think the number of bags and the number of parts of the wrapping that have got his fingerprints on it is not consistent with that either. … I am asking you to look at these bits of evidence which, in my submission, you would find really do support what [De Souza] says.
>
> And the most significant of those, as I come back to it, and it cannot be explained in any way by the defendant is the DNA and where it's found. That's inexplicable, ladies and gentlemen, unless your explanation is that he's putting the cocaine into those bags and sealing them. Because if you're doing that, where do you grab the bag? On the

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11 *Libke* (2007) 230 CLR 559, 577 per Kirby and Callinan JJ.

> edges, at the end of the seal. You've all got those bags at home. Everybody uses them in the kitchen by and large. You know how they work. That's where you grab them. … There's only one rational explanation for that and his Honour's going to direct you about what you can make of the circumstantial evidence.
>
> … And that's the difference between this DNA evidence and where it's found and maybe a random fingerprint. Now, I say to you that there's too many fingerprints in too many places for you to accept what he says, but the DNA seals it. …
>
> He touched - his DNA ends up on the clip seals, not just on the bag. Not on the outside of the suitcase, on the clip seals of three bags that contain cocaine. Ladies and gentlemen, never - you might think - have the fates so conspired against an innocent man. …"

[32] For the appellant it is argued that the prosecutor misstated the effect of the DNA evidence in two ways. The first was to elevate DNA evidence as being in some way more cogent than fingerprint evidence. The second was to describe the location of the DNA as consistent only with the appellant having sealed up the bags. It is argued that the jury were thereby misled, because they were not alerted to the possibility that the appellant's DNA had been transferred by another to the seals of the bags and that in that way, the DNA evidence had less weight than fingerprint evidence. The jury did not have the advantage of any evidence about the nature of DNA evidence or its limitations in the present case.

[33] The prosecutor correctly described the DNA evidence as part of a circumstantial case. De Souza's testimony was that he had been asleep when, on the prosecution case, cocaine must have been unpacked from the suitcase and placed in clip seal bags by the appellant. The location of the DNA upon the seals of the bags was relevant in that it provided some support for an inference that the appellant handled the bags more extensively than simply picking them up out of curiosity. But the prosecutor overstated the significance of the DNA evidence in asserting that it was consistent only with the appellant's guilt. The evidence was also consistent with the appellant's case, because it was possible that when handling the bags, as he said he did, the appellant picked them up by their seals. But the trial judge identified those two possibilities in summarising the respective arguments.

[34] The possibility of a transfer of DNA was not raised at the trial, either in evidence or in the addresses. The defence case was conducted upon an apparent acceptance that it was the appellant's actions which placed his DNA where it was found on the bags. That was understandable because, after all, the appellant had testified that he had handled these bags and had not claimed to have avoided touching the seals. Therefore an argument to the jury that his DNA had been transferred to the seals by someone else could not have been persuasive.

[35] Although the prosecutor overstated the weight to be given to the DNA evidence, in my view it did not result in an unfair trial. The jury must have understood that they had to reject the possibility that the DNA was present on the seals of the bags simply by the appellant handling the bags as he described in his evidence. Given the directions of the trial judge, which identified the competing arguments about this evidence as well as other issues, the jury could not have understood that the DNA evidence required them to convict the appellant. This fourth ground of appeal cannot be accepted.

The fifth ground

[36] The remaining ground is that another of the prosecutor's arguments to the jury had no foundation yet may have been persuasive. The argument was as follows. The total quantity of cocaine found in the bags was 936 grams, which was to be compared with the total quantity found in the suitcase which had not been unpacked, which was 1,269 grams. The difference approximates a quantity of 10 ounces which, on De Souza's evidence, was the amount which the appellant gave to the man who accompanied him to the apartment. Upon the premise that the same quantity of cocaine had been packed in each suitcase, this comparison was said to support De Souza's evidence.

[37] In summarising the respective submissions, the trial judge said this about the argument:

> "Now, just remember, ladies and gentlemen, that was argument. That was submissions. That's not evidence. … and, in particular, there was no evidence before you that the suitcases that were picked up and brought into the country had equal amounts of cocaine in them. So, as I've said to you on a number of occasions, you make your own decisions on the basis of evidence, not on argument."

What the trial judge there said was the result of a submission by the appellant's counsel at the conclusion of the prosecutor's address. He reminded the trial judge that there was no evidence that there were equal amounts of cocaine in the two suitcases. He asked his Honour to direct as his Honour then did.

[38] Even absent that direction, it was unlikely that this argument would be persuasive. But with the direction given by the trial judge, it was unlikely to have been consequential. Even upon the premise that the two suitcases had contained approximately equal quantities of cocaine, the prosecutor's mathematical exercise was imprecise and the jury must have appreciated its limitations. Understandably, the appellant's then counsel was content with the jury being directed as he requested. This did not result in any miscarriage of justice.

Conclusion and order

[39] It follows that each of the five grounds of appeal should be rejected. Counsel for the appellant argues that it is necessary to consider their effect cumulatively as well as individually. But it cannot be accepted that whilst none of these matters itself resulted in a miscarriage of justice, in some way there was a miscarriage from the totality of them.

[40] I would dismiss the appeal.