

**Royal Commission
Into the Management of Police Informants**

CASES WHICH MAY HAVE BEEN AFFECTED BY
THE CONDUCT OF EF AS A HUMAN SOURCE

THE CONVICTION OF STEPHEN JOHN ASLING

SUBMISSIONS AND APPLICATION FOR LEAVE TO APPEAR

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Filed on Behalf of:	Mr Stephen Asling	ID:	
Prepared by:	Stary Norton Halphen 333 Queen Street MELBOURNE VIC 3000	Telephone:	8622 8200
Email:	[REDACTED]	DX:	DX 279 MELBOURNE
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1. These submissions are drafted in order to indicate that Mr Stephen John Asling's conviction, in relation to the murder of Graham Kinniburgh, may be affected by the conduct of EF as a Human Source.
2. Mr Asling was charged with the murder of Graham Kinniburgh and pleaded 'not guilty.' On 18 March 2017, Mr Asling was found guilty of the charge by jury verdict in the Supreme Court at Melbourne.
3. An appeal against conviction was heard by the Court of Appeal on 14 May 2018. The appeal was dismissed and reasons have been published.¹
4. An application for Special Leave to Appeal to the High Court was filed on Mr Asling's behalf.
5. Special Leave to Appeal was refused on 12 September 2018.²

¹ Asling v The Queen [2018] VSCA 132

² Asling v The Queen [2018] HCASL 275

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Outline of Submissions

6. These submissions illustrate that:
 - i) [REDACTED] was a critical witness at trial;
 - ii) There is a link between [REDACTED] evidence and EF's conduct as a human source;
 - iii) The link between [REDACTED] and EF was not known to counsel for Mr Asling at the time of his trial or during the appellate process; and that
 - iv) Mr Asling's conviction is in issue as a consequence.

Summary of Relevant Facts

7. On 13 December 2003, Graham Kinniburgh was shot and killed on Belmont Avenue in Kew. A burning Ford Falcon was discovered by neighbours in a laneway off Doona Avenue at approximately 12.09am on 13 December 2003.
8. Asling was not linked to the crime scenes at Belmont Avenue or the laneway off Doona Avenue by any evidence of identification, fingerprints or DNA.
9. It was the prosecution's case that Asling had entered into an agreement, brokered by Carl Williams, to kill Graham Kinniburgh. Asling was alleged to have entered into this agreement with a co-conspirator, Terrence Blewitt.
10. Three witnesses were central to this allegation:
[REDACTED]
 - ii) Witness C
 - iii) Witness P

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11. [REDACTED] claimed to have played a role in facilitating the agreement between Mr Asling, Blewitt and Williams.

12. At trial, [REDACTED] that -

- i) He was present when Mr Asling and Blewitt entered into an agreement to kill Lewis Moran;
- ii) He was present when Carl Williams told Mr Asling and Blewitt that they should kill Graham Kinniburgh as they hadn't been able to kill Lewis Moran; and
- iii) That he had supplied guns and drugs to Mr Asling and Blewitt consistent with the agreement that they had reached with Carl Williams.

13. [REDACTED] evidence of the alleged agreement was therefore a critical element of the prosecution's case at trial.

14. Upon appeal, the following issued were identified by the Applicant concerning the quality and characteristics of [REDACTED] evidence³ -

- i) [REDACTED] has an extremely bad character, amongst other things, the evidence showed him to be 'devoid of moral boundaries';
- ii) [REDACTED] was criminally involved in the enterprise to murder Kinniburgh;
- iii) The evidence established that [REDACTED] was prepared to lie in any circumstances to obtain a benefit for himself (including lying at committal about attendance at the scene of a murder);
- iv) [REDACTED] had previously been part of a plan to falsely implicate another person in the crime of murder;
- v) [REDACTED] accepted in evidence that before he made a statement against the applicant he was in a 'dire situation', and that he knew that the making of a statement would likely result (and later did result) in a

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substantial reduction of a sentence to be imposed upon him. Moreover, giving evidence at the applicant's trial that was consistent with his prior statement had the capacity to increase his prospect of being paroled once his non-parole period expired.

- vi) [REDACTED] admitted that he had previously lied in other proceedings (including instructing lawyers to challenge witnesses whom he knew to be truthful).
- vii) [REDACTED] understood that if he did not maintain his statement against the applicant then he was at risk of being re-sentenced for his earlier offending

Witness C

15. It was alleged that Mr Asling had made an admission to Witness C while they were [REDACTED] in 2007.

16. Witness C had claimed that Mr Asling was in possession of a book, 'Big Shots – The Chilling Inside Story of Carl Williams and the Gangland War' when they were at [REDACTED]. Witness C gave evidence that he saw Mr Asling wave the book around and point out his name, which was included in the first chapter. It was in this context that Mr Asling was said to have admitted that he had killed Graham Kinniburgh. However, it was proved to have been an impossible scenario; the book wasn't published until 29 August 2007 and the two men were demonstrated to have never [REDACTED] at any time after its publication.

17. The Crown eschewed reliance upon Witness C's evidence at trial, after these matters were raised in cross-examination.

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Witness P

18. Witness P gave evidence that he was introduced to Mr Asling by Blewitt and that the three became friends.

19. Witness P claimed to have participated, with Mr Asling, in the theft of a blue Ford prior to the murder of Graham Kinniburgh.

20. He also asserted that –

- i) Asling and Blewitt had arrived together at his house the morning that followed the murder of Graham Kinniburgh;
- ii) He recognised the stolen blue Ford on television news footage; and
- iii) Asling and Blewitt had both, on different occasions, admitted that they were responsible for the murder of Graham Kinniburgh⁴.

21. Upon appeal, the following issues were identified by the Applicant concerning the quality and characteristics of Witness P's evidence⁵:

- i) Witness P had powerful motives to lie (the dropping of the charge of [REDACTED] and the dropping of a potential prosecution for [REDACTED] the prospect of sharing in a reward; and the wish to protect his own family from criminal investigation or prosecution);
- ii) The unreliability of Witness P's evidence was palpable with reference to the theft of the blue Ford. It was plain that the blue Ford was stolen in December 2003, not during the winter months of that year. Witness P's evidence about the theft was plainly wrong in respect of material particulars (time and place of the theft);
- iii) The course of Witness P's evidence at trial contained lies, retractions and alterations. Moreover, his evidence was excessively vague in critical parts

⁴ Ibid. at [22] – [33].

⁵ Ibid. at [88].

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- iv) A number of the essential ingredients in Blewitt's hearsay representations to Witness P were wrong. For example, Kinnburgh was not shot in his driveway, rather, he was shot in the street;
 - v) Witness P's character was very bad; he was a proven liar.
22. Witness P's first statement in relation to the murder of Graham Kinnburgh was signed on 27 May 2015; more than 9 years after [REDACTED] statement and at least 7 years after [REDACTED] statement was in the public realm⁶.

Status of the Evidence [REDACTED]

23. Having set out the relevant context, it is apparent that [REDACTED] evidence was an essential feature of the prosecution's case at trial.
24. It could not be fairly asserted that the trial could have reasonably succeeded in the absence of the combination of [REDACTED] and Witness P's evidence.⁷

[REDACTED] *the Link to EF*

25. In the period since Special Leave to Appeal was refused by the High Court, it has become apparent that EF's relationship with Victoria Police and conduct as a human source extended to [REDACTED]
26. It has been published, in local media, that on 30 June 2015, EF wrote a letter to Victoria Police Assistant Commissioner Steve Fontana.
27. Within that letter it is said that, 'In the lead-up to my illness, I played a pivotal role in convincing [REDACTED] to 'roll over' on Williams [REDACTED] and others and notwithstanding undue from the Williams crew (and Tony Mokbel) to try to get

⁶ Having been reproduced by Adam Shand in the book, 'Big Shots – The Chilling Inside Story of Carl Williams and the Gangland War.

⁷ See finding upon appeal that [REDACTED] and Witness P's evidence was broadly consistent, Ibid. at [96].

[REDACTED]

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him to stay silent. I kept Bateson informed of all of this, including solicitors perverting the course of justice and conspiring with criminals to try to ensure a number of gangland murders would remain unsolved or uncharged. As has been documented in the years that followed ██████ deciding to help police, his actions (in becoming a witness for police) created a precedent for others to follow and was the crack in the dam wall of silence that led to a flood. He laid the foundation for the prosecution of numerous murderers and others followed his example.'

28. As has been indicated, ██████ accepted that he was in a 'dire situation' when he agreed to cooperate with Victoria Police.
29. He acknowledged that the 'dire situation' was a direct consequence of ██████ ██████ statements that implicated him in at least three murders.
30. ██████ made a series of statements at that time, March 2006, including the statement that implicated Asling in the murder of Graham Kinniburgh.
31. The circumstances that surrounded his cooperation with police in this period were relevantly and extensively explored by both defence and the prosecution at trial.
32. It was never apparent to defence counsel, at trial or upon appeal, that EF had been acting as ██████ legal representative whilst simultaneously pursuing Victoria Police's strategic agenda as a human source.
33. This conduct was a wholesale breach of professional obligations, embarked upon with the specific objective of bringing about a plea from ██████
34. Now, in light of the publication of these matters, it would appear as though ██████ would never have come to be a witness in any proceeding against Asling were it not for the conduct of EF and her relationship with ██████

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Direct Link Between EF [REDACTED]

35. There is also significant cause for concern that EF directly engaged with [REDACTED] [REDACTED] in a legal capacity, during the period in which [REDACTED] implicated Mr Asling in the murder of Graham Kinniburgh.
36. In March 2006, [REDACTED] embarked upon a process of cooperation with Victoria Police, producing statements that relevantly included the assertion that Mr Asling was involved in the agreement to kill Graham Kinniburgh.
37. [REDACTED] was sentenced in the Supreme Court and subsequently acted as a witness for the prosecution in a series of proceedings.
38. Defence counsel for Mr Asling were served with materials, prior to trial, said to constitute all relevant documents concerning [REDACTED] participation in proceedings in which he was a witness.
39. However, there is presently an indication that EF engaged directly [REDACTED] [REDACTED] in a professional capacity, within this time.
40. In the relevant period, EF continued to maintain both a legal practice at the Bar and also to act as a human source in collaboration with Victoria Police.
41. It was never disclosed to counsel, at trial or upon appeal, that there had been a direct relationship between [REDACTED] and EF.
42. If the Commission establishes that EF advised [REDACTED] at this time, whilst simultaneously pursuing Victoria Police's strategic agenda, then:
 - i) The nature of [REDACTED] evidence in the Asling trial is immediately changed;
 - ii) The defence were deprived of an opportunity to explore this issue at trial; and
 - iii) Mr Asling's conviction is affected as a consequence.

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Obligation of Disclosure at Trial

43. As stated, defence counsel at trial, and upon appeal, were not aware that any link existed between [REDACTED] and EF.

44. If the prosecution were aware of the existence of material that was demonstrative of any relationship between EF and the evidence of [REDACTED] then it should have been disclosed to defence counsel prior to trial.

45. No disclosure of this kind was made.

46. Similarly, there was no indication made to counsel, in the course of appeals to the Court of Appeal and the High Court, that EF's conduct was relevant to Mr Asling's conviction in any way.

Call for Disclosure

47. A request for service of the following materials is to be lodged with the Office of Public Prosecutions –

- i) Any Information Report that concerns the operation of EF as a human source;
- ii) Any notes, documents or things created or produced by EF that are demonstrative of a direct relationship with [REDACTED];
- iii) Any other notes, documents or things that relate to the direct relationship between EF [REDACTED]

Leave to Appear

48. Leave is sought to appear before the Royal Commission, pursuant to s.15 of the *Inquiries Act*.

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49. In so doing, it is asserted that:

- i) Mr Asling has a special interest in the subject matter of the inquiry; and
- ii) Legal representatives for Mr Asling will be in a position to assist the Royal Commission in the examination of witnesses relevant to this matter

50. Granting leave to appear in these circumstances will ensure that Mr Asling is able to satisfactorily explore and demonstrate the extent to which his conviction has been affected by the conduct of EF, Victoria Police and related parties.

51. Whilst it is acknowledged that the Commission is presently sitting, it is understood that –

- i) The period of EF's conduct that is relevant to Asling's conviction has yet to be explored;
- ii) The question of leave, for others similarly affected, has not been addressed;
- iii) A schedule to address these matters has not been finalised.

52. The application for leave to appear is advanced in this context.

Confidentiality

53. These submissions are filed on the basis that they will be accessible to the public, should the Commission determine that they should be published.

54. The standard for protection of the names of [REDACTED] Witness C, Witness P, [REDACTED] that was applied at trial and upon appeal has been retained within this document.

55. It is noted that, for whatever reason, some names have not continued to be protected in media reporting that remains publicly accessible. [REDACTED]

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56. Having regard to these inconsistencies, it may be that the Commission determines that aspects of this submission, or the submission in its entirety, should remain confidential.

Matthew Goldberg
Counsel for Mr Asling

9 April 2019