

# Boston College Law Review

---

Volume 62  
Issue 8 *Symposium: Essays in Honor of Chief  
Justice Ralph D. Gants*

---

Article 20

11-29-2021

## One of One: Justice Gants and Lessons from the *Keo* Case

Joshua E. Goldstein

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Judges Commons](#)

---

### Recommended Citation

Joshua E. Goldstein, *One of One: Justice Gants and Lessons from the Keo Case*, 62 B.C. L. Rev. 2827 (2021), <https://lawdigitalcommons.bc.edu/bclr/vol62/iss8/20>

This Symposium Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [abraham.bauer@bc.edu](mailto:abraham.bauer@bc.edu).

# ONE OF ONE: JUSTICE GANTS AND LESSONS FROM THE *KEO* CASE

JOSHUA E. GOLDSTEIN\*

**Abstract:** Chief Justice Ralph D. Gants was a uniquely kind and empathetic person and an enormously consequential reformer. He was also a model judge. He prepared for each case like it was the only one before him, considered thorny legal issues from every angle, and pursued justice in all his judicial work. These qualities were on full display in *Commonwealth v. Keo*. There, a dissenting Justice Gants identified a question of fundamental fairness, one which the parties had not raised: If a prosecutor, based on essentially the same evidence, makes contradictory statements in the trials of two different defendants, can a defendant introduce those statements into evidence as admissions of a party opponent? In his dissent, Justice Gants answered that question brilliantly, disentangling a complex legal issue to craft a solution that was both pragmatic and would make the legal system operate more fairly. Though not among his most famous opinions, Justice Gants’s *Keo* dissent reveals the sharpness and integrity of his legal mind and his constant pursuit of a more just, fair, and righteous legal system.

## INTRODUCTION

Chief Justice Ralph D. Gants was one of one. The most knowledgeable yet most humble person in the room. A brilliant legal thinker and theorist who never lost sight of the practical, real-world consequences of his work. A genius who, through his disarming sense of humor and endless supply of kindness and self-deprecating humor, made others feel smarter, more important—*better* in his presence. An impossibly busy person who never cut corners. Someone who treated every case on the docket, and every issue he encountered, like it was the only one before him.

I clerked for Chief Justice Gants<sup>1</sup> during the 2013–2014 term. A lot happened that year at the Massachusetts Supreme Judicial Court (SJC) and in Chief Justice Gants’s chambers in particular. The court handed down a number

---

© 2021, Joshua E. Goldstein. All rights reserved.

\* Law Clerk to Chief Justice Ralph D. Gants (2013–2014); Associate, Ropes & Gray LLP (2014–2021).

<sup>1</sup> I was a law clerk to Chief Justice Gants when he was elevated from Associate Justice to Chief Justice on July 28, 2014. I refer to “Chief Justice Gants” as such when discussing his work that spanned the year I worked for him, and as “Justice Gants” when discussing work that only took place prior to his confirmation as Chief Justice.

of momentous decisions on everything from the legality of Massachusetts's community parole supervision for life statutory scheme as a punishment for sex offenders,<sup>2</sup> whether sentencing a juvenile to life without parole was a cruel or unusual punishment under the Massachusetts Declaration of Rights,<sup>3</sup> and how to handle the fallout from the Annie Dookhan evidence tampering scandal.<sup>4, 5</sup>

Justice Gants's role on the court changed during that time. After Chief Justice Roderick Ireland announced his retirement, Governor Deval Patrick selected then-Associate Justice Gants to replace him.<sup>6</sup> In the following months, Justice Gants appeared before and was confirmed unanimously by the Governor's Council and sworn in as Chief Justice.<sup>7</sup>

Beyond the courtroom, Justice Gants was constantly working on the many initiatives and reforms, particularly around access to justice, that came to define his legacy. I marveled at his drive. Even before becoming Chief Justice, he seemed to be working the equivalent of three or four full-time jobs, all on issues of critical importance to the Commonwealth and its legal system.

But when I reflect back on Chief Justice Gants's legacy and the life-changing year I spent learning from him up close, the first thing that comes to mind is his work on *Commonwealth v. Keo*,<sup>8</sup> and what it says about him as a judge and as a person.

### I. COMMONWEALTH V. KEO

*Keo* was not a highly anticipated case. It did not receive much, if any, media attention, and on the surface, it did not involve any of the novel or weighty legal issues that typically occupy the SJC.<sup>9</sup> And the SJC's decision

<sup>2</sup> See *Commonwealth v. Cole*, 10 N.E.3d 1081, 1082 (Mass. 2014) (Gants, J.) (majority opinion).

<sup>3</sup> See *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 286–87 (Mass. 2013).

<sup>4</sup> See *Commonwealth v. Rodriguez*, 5 N.E.3d 519, 520–21 (Mass. 2014); *Commonwealth v. Scott*, 5 N.E.3d 530, 535–36 (Mass. 2014); *Commonwealth v. Gardner*, 5 N.E.3d 552, 554, 556–57 (Mass. 2014).

<sup>5</sup> Annie Dookhan, a chemist working in the Massachusetts' state drug lab, engaged in misconduct that called into question the validity of thousands of chemical analyses, resulting in the dismissal of more than twenty thousand drug cases. See Katie Mettler, *How a Lab Chemist Went from 'Superwoman' to Disgraced Saboteur of More Than 20,000 Drug Cases*, WASH. POST (Apr. 21, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/04/21/how-a-lab-chemist-went-from-superwoman-to-disgraced-saboteur-of-more-than-20000-drug-cases/> [<https://perma.cc/7FGS-ZY6M>].

<sup>6</sup> Bob Salsberg, *Ralph Gants Approved as SJC's Chief Justice*, WBUR, <https://www.wbur.org/news/2014/06/11/ralph-gants-sjc-approved> [<https://perma.cc/PZ4Q-DG22>] (June 11, 2014).

<sup>7</sup> *Id.*; *Gants Sworn in as New Chief Justice of SJC*, ASSOCIATED PRESS (July 28, 2014), <https://apnews.com/article/dbf581596d7d4b79a8abaf3a54cc8690> [<https://perma.cc/NX97-7JGP>].

<sup>8</sup> 3 N.E.3d 55 (Mass. 2014).

<sup>9</sup> See, e.g., MASS. R. APP. P. 11(a) (providing that the Supreme Judicial Court may grant application for direct appellate review if case presents "(1) questions of first impression or novel questions of

ultimately affirmed the defendant's first-degree murder conviction.<sup>10</sup> But *Keo* offers a glimpse of Justice Gants at his finest.

*Keo* involved a fatal shooting where the defendant, Kevin Keo, and several fellow gang members, including Bonrad Sok, were present.<sup>11</sup> The victim was a member of a rival gang.<sup>12</sup> It was unclear whether Keo, Sok, or another member of their gang pulled the trigger.<sup>13</sup>

At Keo's trial, the prosecutor argued that Keo, not Sok, was the shooter, and regardless, that Keo was guilty as a joint venturer.<sup>14</sup> Keo argued that Sok was the shooter and that Keo was not guilty as a joint venturer because he did not share Sok's state of mind in killing the victim.<sup>15</sup> The jury disagreed, concluding that Keo was guilty of murder in the first degree, either because Keo was the shooter or he aided or abetted the shooter and shared the shooter's intent for murder.<sup>16</sup> Keo's appeal went straight to the SJC pursuant to Massachusetts law, which entitles defendants convicted of murder in the first degree to appeal their convictions to the SJC directly.<sup>17</sup>

*Keo* came to the SJC for argument during the September 2013 sitting, a four-day period in which the court typically heard twenty or more cases. To prepare for oral argument, Justice Gants and his colleagues had to read and digest an average of three briefs per case (appellant, appellee, and reply briefs), plus any materials from the record, caselaw, statutes, regulations, or other materials necessary to understand the issues involved in the case. Justice Gants had noticed that, according to the appellant's brief, Sok was tried for the murder months before Keo's trial, and at Sok's trial, the prosecutor had argued that Sok, not Keo, was the shooter.<sup>18</sup> The jury eventually convicted Sok of murder in the second degree as a joint venturer.<sup>19</sup>

Keo's trial counsel did not seek to admit the prosecutor's contradictory statements at the Sok trial into evidence, and Keo's appellate counsel did not raise the issue on appeal. Nevertheless, it caught Justice Gants's attention. The

---

law . . . or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court").

<sup>10</sup> *Keo*, 3 N.E.3d at 66.

<sup>11</sup> *Id.* at 58–61.

<sup>12</sup> *Id.* at 58.

<sup>13</sup> *Id.* at 59–62.

<sup>14</sup> *Id.* at 57–58.

<sup>15</sup> *Id.* at 61–63.

<sup>16</sup> *Id.* at 57–58, 63–65. Under *Commonwealth v. Zanetti*, the jury was not required to decide whether Keo was the shooter, or whether he aided or abetted the shooter and shared his intent for the murder, in order to convict Keo of murder in the first degree. 910 N.E.2d 869, 871, 885–86 (Mass. 2009) (Gants, J.) (majority opinion); see also *Keo*, 3 N.E.3d at 57–58, 63–64.

<sup>17</sup> MASS. GEN. LAWS ch. 278, § 33E (2021).

<sup>18</sup> Defendant/Appellant's Brief on Appeal from Judgments of the Superior Court at 18–19, *Keo*, 3 N.E.3d 55 (Mass. 2014) (SJC-10949), 2013 WL 4251799.

<sup>19</sup> *Keo*, 3 N.E.3d at 57–58, 58 n.2.

notion that a prosecutor could present contradictory arguments to juries in different trials and the defendant in the second trial might be precluded from informing the jury about the contradiction seemed problematic, and Justice Gants wanted to learn more.

He started with the record, arranging for the transcript from the Sok trial to be delivered to chambers, along with the Keo trial transcript, to get a fuller picture of what had transpired.

Next, he wanted to know what other courts had said about the issue. It turned out the SJC had addressed it decades earlier. In *Commonwealth v. Arsenault*, the court considered whether a prosecutor's statements at one trial were admissible in a subsequent retrial of one of the defendants where the government's theory of the case had changed.<sup>20</sup> At the first trial, Henry Arsenault, Jr., was tried alongside two joint venturers, one of whom, the prosecutor argued during opening and closing argument, had planned a robbery in which Arsenault allegedly participated.<sup>21</sup> Fifteen years later, Arsenault was tried again.<sup>22</sup> At that trial, he was the only defendant, and that time, the prosecutor asserted Arsenault had planned the robbery.<sup>23</sup> The court held the prosecutor's contradictory statements from the first trial were not admissible because "the trial of a case on one theory does not, without more, constitute an admission by a party who proceeds on a different theory in a retrial of the case."<sup>24</sup> The court did not explain why not. Instead, it emphasized that the Commonwealth was not "lock[ed] . . . into the theory of its first trial" and could "conduct[] the second trial on the basis of evidence then available to it" and "proceed[] on any theory supported by that evidence."<sup>25</sup>

Other courts had taken a different approach, emphasizing that because the government is a party-opponent of the defendant, and because prosecutors act as agents of the government, a prosecutor's prior assertions that are factually inconsistent with the theory being presented at a later trial are admissible, so long as the prosecutor cannot offer an "'innocent' explanation" for the contradiction.<sup>26</sup>

---

<sup>20</sup> 280 N.E.2d 129, 136–37 (1972), *overruled by Keo*, 3 N.E.3d 55 (Mass. 2014).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 130–32.

<sup>23</sup> *Id.* at 136–37.

<sup>24</sup> *Id.* at 136.

<sup>25</sup> *Id.*

<sup>26</sup> *United States v. Orena*, 32 F.3d 704, 716 (2d Cir. 1994); *see also Harris v. United States*, 834 A.2d 106, 120 (D.C. 2003); *United States v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991); *United States v. Salerno*, 937 F.2d 797, 811–12 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992); *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988); *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984); *Hoover v. State*, 552 So.2d 834, 838, 840 (Miss. 1989); *State v. Cardenas-Hernandez*, 579 N.W.2d 678, 685 (Wis. 1998).

Justice Gants studied these materials and cases in preparation for oral argument.

## II. ORAL ARGUMENT

At oral argument, Justice Gants made his concerns known. During the appellant's argument, he first confirmed key facts—that Keo's defense at trial had been that Sok was the shooter, and that trial counsel had not sought to admit the prosecutor's prior statements to that effect—lest there be some angle or explanation he had not considered.<sup>27</sup> That was classic Justice Gants. He always led with humility, open to the possibility that, despite his immense preparation, there might be something he had missed.

Next, he asked the appellant whether the prosecutor's statements could have been admitted into evidence as admissions by an adverse party, as other courts had permitted.<sup>28</sup> By raising the issue, particularly one that had not been briefed, with the appellant, he not only provided himself and his colleagues the benefit of the thoughts of the appellant's counsel, but also previewed for the government the tough questions he would be asking it. Justice Gants did not play "gotcha." Always looking to ensure the process was as fair as possible for all, he avoided springing something on a party if he could help it.

When it was the government's turn, Justice Gants interrupted counsel to ask "a fundamental question" in which he first laid out the prosecutor's contradictory assertions<sup>29</sup> and then asked: "How can a prosecutor make those two [conflicting Keo and Sok] arguments in good conscience without the jury understanding that the same prosecutor at the first trial had argued exactly what the defense was arguing, that Sok was indeed the shooter?"<sup>30</sup>

His question showed the government—and his fellow Justices—that he was already deep into the weeds on an issue of fundamental fairness, which, though not briefed, was lurking in the case and would need to be addressed.

When the government's counsel attempted to deflect that question and his follow-up, Justice Gants returned to first principles: "Does truth not matter? Can the same prosecutor make fundamentally different arguments to a jury and not be held accountable for that? . . . [I]s that ethical and appropriate for a prosecu-

---

<sup>27</sup> Oral Argument at 5:10–6:11, *Commonwealth v. Keo*, 3 N.E.3d 55 (Mass. 2014) (SJC-10949), <https://www.youtube.com/watch?v=jBtZSG2be5A&t=1232s> [<https://perma.cc/23CS-YDVA>].

<sup>28</sup> *Id.* at 6:12–7:03.

<sup>29</sup> Specifically, Chief Justice Gants said, "How can a prosecutor in your office argue in the Sok trial that Sok was the shooter, that Keo's hand was such that it made him unlikely to be the shooter, that the discussion in the back of the car in which the person who admitted to the shooting was Sok, and then six months later at the Keo trial say Keo was the shooter, Keo was the person who spoke that, and Keo's hand was not such as to prevent him from being the shooter?" *Id.* at 21:35–22:09.

<sup>30</sup> *Id.* at 22:09–22:23.

tor's office to do . . . ?"<sup>31</sup> After another unsatisfying response, Justice Gants asked the government a question for which there is only one correct answer: whether it would like to submit a supplemental brief on the issue.<sup>32</sup> The government answered in the affirmative and the argument moved on.<sup>33</sup> The appellant and government both submitted supplemental briefs on the admissibility of the prosecutor's contradictory assertions and what remedy, if any, was appropriate.<sup>34</sup>

### III. THE MAJORITY OPINION

The court rejected the defendant's arguments for a new trial set forth in his original brief.<sup>35</sup> On the question Justice Gants had identified, whether the prosecutor's prior statements that Sok was the shooter may have been admissible in the Keo trial, the court split four to three, with the majority answering in the negative.<sup>36</sup>

The majority concluded that (1) the defendant's counsel was not ineffective for failing to seek to admit the prosecutor's contradictory statements because Massachusetts courts had not previously said prosecutors' prior assertions could be admissible as admissions of a party-opponent; and (2) under the circumstances, the prosecutor was justified in presenting "alternative (albeit inconsistent) theories of liability in each trial"—that is, that Keo was the shooter or, in the alternative, was guilty as a joint venturer—"and in so doing presented different theories that as a matter of law are not contradictory."<sup>37</sup> The majority's holding was also supported by the fact that both formulations—that Sok was the shooter or that Keo was the shooter—were "supported by the evidence," and "the prosecutor never abandoned his argument that the jury ultimately were not required to determine the identity of the shooter," and "[t]he jury were instructed correctly that the closing arguments of counsel are not evidence."<sup>38</sup>

That said, the majority made clear that *Arsenault* was "no longer sound precedent."<sup>39</sup> Further, it left open the possibility that a prosecutor's contradictory factual assertions could be admissible where no "innocent explanation"

---

<sup>31</sup> *Id.* at 24:07–24:44.

<sup>32</sup> *Id.* at 26:11–26:18.

<sup>33</sup> *Id.*

<sup>34</sup> Defendant/Appellant's Supplemental Brief on Appeal from Judgments of the Superior Court, Commonwealth v. Keo, 3 N.E.3d 55 (Mass. 2014) (SJC-10949), 2013 WL 8022595; Brief and Supplemental Record Appendix for the Commonwealth, *Keo*, 3 N.E.3d 55 (SJC-10949), 2013 WL 4251802.

<sup>35</sup> *Keo*, 3 N.E.3d at 58–59.

<sup>36</sup> *Id.* at 63–64, 71–72.

<sup>37</sup> *Id.* at 68; *id.* at 67–70.

<sup>38</sup> *Id.* at 68–69.

<sup>39</sup> *Id.* at 67 n.21.

existed for the contradiction.<sup>40</sup> In this case, however, the majority presumed that “the jury’s verdict in the Sok trial—that Keo had been the shooter and that Sok was liable as a joint venturer”—explained the prosecutor’s shift in theories at the Keo trial, and that that explanation was sufficient to warrant exclusion of the inconsistent statements.<sup>41</sup> Moreover, even if the prosecutor’s contradictory statements had been offered and improperly excluded, any error would likely not “have unfairly influenced the jury’s verdict”<sup>42</sup> because, “pursuant to *Commonwealth v. Zanetti* . . . the jury could have reached its verdict without determining that the defendant had been the shooter.”<sup>43</sup>

#### IV. JUSTICE GANTS’S DISSENT

Justice Gants masterfully unraveled these arguments in his dissent. He started by setting forth the key facts. As Justice Gants laid bare, the prosecutor asserted in the Sok trial that Sok was the shooter,<sup>44</sup> and that it could not have been Keo, in part because of “the limited mobility” in Keo’s dominant hand.<sup>45</sup> The prosecutor then argued six months later in the Keo trial, based on the *same* core evidence, that Keo was the shooter,<sup>46</sup> and that it could not have been Sok because he was too far away when the shots were fired.<sup>47</sup> Although the prosecutor also pursued a joint venture theory in both trials, Justice Gants noted, “a joint venture theory was far harder for the prosecution to prove.”<sup>48</sup> Although “[t]here can be no doubt that the shooter intended with premeditation to kill the victim . . . if Sok was the shooter, there certainly could have been a reasonable doubt whether Keo shared Sok’s premeditation and intent to kill” based on the evidence.<sup>49</sup> Keo’s defense at trial was that Sok was the shooter and that he did not share Sok’s intent to kill—a defense, Justice Gants reasoned, that “would have been immeasurably stronger had defense counsel offered in evidence” the prosecutor’s previous statements because the prosecutor in the Sok

---

<sup>40</sup> *Id.* at 69–70.

<sup>41</sup> *Id.* at 69 (citation omitted); *id.* at 69–70.

<sup>42</sup> *Id.* at 70 (quoting *Commonwealth v. Johnson*, 711 N.E.2d 578, 585–86 (Mass. 1999)); *id.* at 69–72.

<sup>43</sup> *Id.* at 70 (citing 910 N.E.2d 869, 885 (Mass. 2009) (Gants, J.) (majority opinion)) (second citation omitted); *id.* at 70–71.

<sup>44</sup> *Id.* at 72 (Gants, J., dissenting).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 72–73 (noting that the prosecutor argued in his closing statement that “Keo ‘is the shooter, that’s what all the evidence shows’”).

<sup>47</sup> *Id.* The prosecutor said, “It couldn’t have been Bonrad [Sok],’ because the fatal shot was fired from within four feet of the victim, and Sok was approximately thirty feet from the victim at the moment of the shooting.” *Id.* at 72 (alteration in original).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 72–73.



trial made the same argument that defense counsel was asserting in the Keo trial.<sup>50</sup>

Having explained the significance of defense counsel's failure to seek to introduce the prosecutor's prior contradictory arguments, Justice Gants dove into the law. Although "[a] prosecutor may argue any theory of criminal liability supported by the evidence," and is not limited to theories expounded in previous cases,<sup>51</sup> "the jury [are] at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims."<sup>52</sup> The alternative—permitting a prosecutor, "wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts"—would undermine "[c]onfidence in the justice system."<sup>53</sup> That is why the majority correctly recognized that contradictory arguments may be admissible under certain circumstances, and why *Arsenault* was no longer sound precedent.<sup>54</sup>

And while the prosecutor was permitted to argue at the Sok and Keo trials that the defendant was the shooter or, in the alternative, was guilty as a joint venturer, that does *not* mean the prosecutor's assertions were not contradictory "as a matter of law," as the majority concluded.<sup>55</sup> The prosecutor "did not merely identify the evidence supporting" these two different theories; rather, "he made a forceful factual (and inconsistent) assertion that the defendant on trial was the shooter."<sup>56</sup> Having done so, the prosecutor could not prevent the admission of his contradictory assertions on the basis that he argued alternate theories of liability.

Moreover, the majority's presumption that the prosecutor changed theories on whether Sok or Keo was the shooter because the jury in the Sok trial convicted Sok as a joint venturer was problematic procedurally and substantively.<sup>57</sup> As an initial matter, the prosecutor never attempted to provide an "'innocent' explanation" for the change in theories because the defendant did not seek to admit the prosecutor's contradictory assertions.<sup>58</sup> *Keo*, Justice Gants argued, should therefore be remanded to the trial court to allow the prosecutor the chance to provide an "'innocent' explanation."<sup>59</sup> It would then be "the role

---

<sup>50</sup> *Id.* at 73.

<sup>51</sup> *Id.* (citing *Commonwealth v. Housen*, 940 N.E.2d 427, 443 (Mass. 2011)).

<sup>52</sup> *Id.* (alteration in original) (quoting *United States v. Salerno*, 937 F.2d 797, 812 (2d Cir. 1991)).

<sup>53</sup> *Id.* (quoting *Salerno*, 937 F.2d at 812).

<sup>54</sup> *Id.* at 67 n.21, 71–72 (majority opinion).

<sup>55</sup> *Id.* at 67–69.

<sup>56</sup> *Id.* at 76 (Gants, J., dissenting).

<sup>57</sup> *Id.* at 69–72 (majority opinion).

<sup>58</sup> *Id.* at 76–77 (Gants, J., dissenting).

<sup>59</sup> *Id.* at 77.

of the trial judge, not this court, to determine whether [the prosecutor's explanation] is credible and whether, in the absence of newly discovered evidence, it suffices as an innocent explanation for the prosecutor's 180 degree shift in his theory of the case."<sup>60</sup>

Justice Gants also attempted to flesh out what would constitute an "innocent explanation" such that a prosecutor's inconsistent assertions could be excluded. For example, if a prosecutor at a subsequent trial "offered 'additional, not conflicting, theories,'" or presented a contradictory theory based on evidence discovered after the first trial, the prosecutor's statements would not be admissible.<sup>61</sup> Notably, neither explanation would seem to apply to *Keo*. As Justice Gants emphasized throughout his dissent, the prosecutor's assertions regarding the identity of the shooter were directly contradictory, and the Sok and Keo trials proceeded on essentially the same evidence.<sup>62</sup> Nevertheless, Justice Gants did not expressly say that the prosecutor lacked an innocent explanation for the change in theories; he was unwilling to foreclose that possibility without the benefit of a full record on the issue.<sup>63</sup>

Justice Gants then proceeded to dismantle the majority's conclusion that, even if the prosecutor's contradictory statements were admissible, the defendant was not prejudiced by the fact that they were not introduced because the evidence was sufficient to convict the defendant as a joint venturer.<sup>64</sup> Justice Gants agreed the evidence was sufficient to convict Keo as a joint venture, but that did not mean there was *no* prejudice.<sup>65</sup> To the contrary, Justice Gants explained, "the *weight* of the evidence of Keo's premeditation and intent to kill was far weaker if Sok was the shooter rather than Keo"; not coincidentally, that was Keo's defense at trial.<sup>66</sup> Under the circumstances, had the jury learned the prosecutor had once advanced the same argument Keo's trial counsel was making, based on the same evidence, the outcome might have been different.<sup>67</sup>

Lastly, Justice Gants argued that, regardless of whether defense counsel was ineffective for failing to seek to admit the prosecutor's contradictory statements, the court had the authority to remand the case on that issue. In a first-degree murder appeal, Justice Gants contended, the court is permitted to

---

<sup>60</sup> *Id.* at 77 n.5.

<sup>61</sup> *Id.* at 75 (quoting *United States v. Orena*, 32 F.3d 704, 716 (2d Cir. 1994)).

<sup>62</sup> *Id.* at 72–74, 77 n.5, 78–79.

<sup>63</sup> Unfortunately, that full record was never assembled as the majority refused to remand the case on this issue; nevertheless, Justice Gants's guidance on the issue could aid other courts when considering similar questions in the future.

<sup>64</sup> *Keo*, 3 N.E.3d at 69–72 (majority opinion).

<sup>65</sup> *Id.* at 77–78 (Gants, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

order a new trial “for any . . . reason that justice may require.”<sup>68</sup> Where the prosecutor’s contradictory statements may have been admissible, their admission “would have substantially bolstered defense counsel’s argument,” and the court could not “be certain, or even confident, that the jury would have found Keo guilty of murder in the first degree as an aider and abettor if they had a reasonable doubt whether Keo was the shooter.”<sup>69</sup> Thus, the court was well within its authority to remand the case regardless of whether defense counsel was ineffective.<sup>70</sup>

To hold otherwise, Justice Gants concluded, “is to affirm that the truth does not matter in criminal trials, that a prosecutor who lacks an ‘innocent explanation’” may pursue an argument in one trial that “will more easily lead to that codefendant’s conviction and, in another trial” advance a directly contradictory argument because it “offers an easier path to securing a conviction.”<sup>71</sup>

\* \* \*

In so many ways, *Keo* was quintessential Gants. It encapsulates who Chief Justice Gants was—as a judge, as a reformer, and as a person.

*He prepared.* When Justice Gants was nominated to become Chief Justice, I joked that he was living proof that if you are the most insightful and you work the hardest, dreams really could come true. I realized after working with him up close for a year how rare that combination is, particularly because talent and hard work can be at odds with each other—the more natural talent a person has, the less hard they may need, or want, to work to be successful. Not Chief Justice Gants. He never gave less than his best. His talent and work ethic reinforced each other to create his best, and his best was supreme.

The only reason the court weighed in on the admissibility of the prosecutor’s contradictory statements is because Justice Gants put in the work. He read the briefs closely, as he always did, and thought critically about what he read, and when he noticed the prosecutor’s contradictory assertions, his alarm went off. That meant there was more work for him to do. To be ready for oral argument he had to devour all the facts and law he could find and ponder whether the law needed to change.

*He cared.* He cared about every litigant whose case came before him, or any court, and he cared about those who would interact with the judicial system in the future.<sup>72</sup> He wanted to make the legal system work justly for every-

---

<sup>68</sup> *Id.* at 78 (quoting MASS. GEN. LAWS ch. 278, § 33E (2021)).

<sup>69</sup> *Id.* at 78, 78–79.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 78–79.

<sup>72</sup> Chief Justice Gants’s legendary thoughtfulness was not limited to his opinions—it was how he lived his life. I experienced his kindness throughout my year with him, and beyond. When I was to be sworn in to the Massachusetts Bar two months into my clerkship, he held a personal ceremony for me

one. Process was critical. Any unfairness was unacceptable. If a prosecutor wanted to use the same facts to tell different stories at different trials in order to increase the government's chances of "winning" the case and not be held accountable for that "180 degree" reversal, that was unfair and needed to be remedied.<sup>73</sup>

*He was proactive.* He wanted to root out unfairness. If an issue arose in a case on his docket, he called it out and addressed it. If the issue reached beyond the walls of his courtroom, as so many did, he sought to wrap his arms around it and then solve it in his characteristic way: with speed, force, and doggedness. He sought to sweep in as many people as possible to his cause, fueled by the knowledge that the legal system could do better and needed to do better, and that any less than our best would be to tolerate injustice.

*He embraced tough questions.* Although solving the complex problem he identified in *Keo* would not be easy, Justice Gants took it upon himself to try. The admissibility of prosecutors' contradictory statements was a relatively novel legal issue in Massachusetts and had only been addressed in a handful of jurisdictions around the country. Permitting such statements to be offered into evidence invited a host of other thorny questions: How would prosecutors' statements be presented to the jury? How much context would need to be presented alongside these statements, and would the presentation of too much evidence from an earlier trial risk confusing the jury? If the contradictory arguments were made by the same prosecutor, as was the case in *Keo*, could the prosecutor continue working on the latter case (or the former, for that matter)? Nevertheless, Chief Justice Gants believed it was his job to try to answer these questions where possible.

*He did not presume to have all the answers.* Somehow, amidst all that talent and hard work, amidst all the good he was doing for so many others, amidst all the vexing and critically important problems he was trying to solve, he was humble. He listened more than he spoke. He treated others with respect. He asked thoughtful questions and then listened carefully to and considered the answers. Though he identified the problem in *Keo*, he did not overstep in trying to address it. His solution was to remand the case to the trial court to

---

at the courthouse. Though just a few people would be attending and he had only known me a short time, Justice Gants spoke as if he was giving the best man toast at my wedding, mixing personal anecdotes with humor and career and life advice. For many, the swearing-in ceremony is simply a formality; he made mine an occasion I will remember and cherish forever.

<sup>73</sup> Notably, Chief Justice Gants's concern with ensuring the judicial process was as fair as possible was true with respect to all litigants, not just criminal defendants. To be sure, as a former prosecutor, he believed the government had a heightened responsibility to seek truth and justice. But that belief was not limited to prosecutors. He was not shy about reminding lawyers and litigants alike of their own ethical obligations when interacting with the judicial system.

make the determinations for which it was best suited, which the Appeals Court or SJC could then review, if necessary, with the benefit of a complete record.

And though *Keo* was not a good vehicle to answer *all* of the aforementioned tricky questions the admission of a prosecutor's prior statements might create, he did not let perfect be the enemy of good. Far better to tackle the issue and address the source of unfairness right in front of him than to wait, potentially forever, for an ideal case to present itself.

*He was impactful.* Unsurprisingly given all that talent, hard work, and concern for others, Chief Justice Gants's impact was massive. Even in dissent, Justice Gants made the legal system work better. Had he not identified the prosecutor's contradictory statements in *Keo* as problematic, the court would not have addressed the issue. The SJC ultimately did not follow Justice Gants's approach, but his work in raising the issue and stating his arguments surely resulted in the court expressly rejecting *Arsenault*. The SJC's decision prevented future prosecutors from using it as cover to contradict themselves with impunity, prevented courts from relying on it as sound precedent, and ensured that defendants would not be dissuaded from seeking to introduce such contradictions in the first place.

And though the court ruled the prosecutor's contradictory statements were inadmissible based on the facts and circumstances of *Keo*, the court also made clear that defendants *could* introduce a prosecutor's prior statements under certain circumstances. In fact, the majority concluded its discussion of the issue with an express warning to prosecutors:

[P]rosecutors, in future cases, should proceed with caution when asserting inconsistent arguments in different trials involving the same crime, assuming no "innocent explanation," significant changes, or new evidence have come to light. We note that, particularly after *Commonwealth v. Zanetti*, there is no need for a prosecutor to emphasize principal liability. If a prosecutor does so and the position is inconsistent with what he formerly argued at another trial for the same crime, he does so possibly at his own peril.<sup>74</sup>

Both opinions in *Keo*—the majority and Justice Gants's dissent—also served as a reminder to prosecutors that they "have a special role in the criminal justice system 'in the search for truth in criminal trials.'"<sup>75</sup> Because they represent "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," a prosecutor's goal is not simply to "win a case,"

---

<sup>74</sup> *Keo*, 3 N.E.3d at 71 (majority opinion) (citation omitted).

<sup>75</sup> *Id.* at 64 (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)); *id.* at 73 n.2 (Gants, J., dissenting).

but rather to ensure that “justice [is] done.”<sup>76</sup> In other words, the “role of [a] prosecutor ‘is to assist the jury to discover the truth.’”<sup>77</sup> If a prosecutor strayed from that obligation to seek truth above all else, *Keo* showed that the SJC, and Justice Gants in particular, was watching and would not be shy about raising an issue or holding the Commonwealth accountable.

Moreover, just as the majority and dissent included warnings to prosecutors, so too did they offer defense counsel an additional tool by which to hold government lawyers accountable. Before *Keo*, members of the defense bar may not have tried to find, or sought to introduce, contradictory statements made by government attorneys. *Keo*’s appellate counsel, for example, said at oral argument she was not familiar with the federal caselaw holding that prosecutors’ contradictory factual assertions were admissible.<sup>78</sup> *Keo* presumably changed that.

### CONCLUSION

*Keo* was not among the many landmark decisions Chief Justice Gants authored. Both inside and outside the courtroom, he spearheaded reforms and initiatives of far greater import than the specific evidentiary question at issue in *Keo*.

But *Keo* offers a window into the special jurist Chief Justice Gants was. There, as with virtually anything he touched, Justice Gants focused his unparalleled work ethic, talent, and dedication to improving the legal system, to always being alert to the possibility of injustice or unfairness in the matters before him, and to using his time and talent to make the justice system more just.

That is an inspiring legacy for all of us to emulate.

---

<sup>76</sup> *Id.* at 64 (majority opinion) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

<sup>77</sup> *Id.* (quoting *Commonwealth v. Weaver*, 511 N.E.2d 545, 548 (Mass. 1987)).

<sup>78</sup> Oral Argument at 5:49–7:04, *Keo*, 3 N.E.3d 55 (SJC-10949), <https://www.youtube.com/watch?v=jBtZSG2be5A&t=1232s> [<https://perma.cc/23CS-YDVA>].