IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. 163 of 2019

BETWEEN: DONNA GRECH

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: PUBLICATION

1. This outline is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The standard of review (the Notice of Contention) (RS [15]-[32])

2. Section 5F of the *Criminal Appeal Act* 1912 does not, of itself, govern the standard of appellate review to be applied. Rather, the standard of appellate review under s. 5F requires consideration of the interaction between the particular subsection of s. 5F that the appeal is brought under and the particular decision that is the subject of appeal.

3. It is necessary to look at the nature of the decision appealed from so as to determine whether there is a justification or requirement for restraint or deference. Where an appeal seeks to challenge a "discretionary" finding, then the context, namely, that Parliament intended the primary judge to be able to select from a range of outcomes, indicates that there should be restraint or deference to the decision of the primary judge: *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at [47] and [151]; *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [19]. In such a case, it is necessary for *House* error to be established.

4. Whether Parliament intended the primary judge to be able to select from a range of outcomes is a question of statutory interpretation. In the present case, the text of s. 138, which states that evidence "*not to be admitted*" unless the desirability of admitting the evidence is outweighed by the way in which it was obtained, indicates that there can be only one legally correct answer to the question of admissibility under s. 138.

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5. The fact that "*reasonable minds may differ*" as to what the "*answer*" should be does not indicate that there should be judicial restraint: *The Queen v Bauer (a pseudonym)* (2018) 92 ALJR 846 at [61]; see also *SZVFW* at [46] and [85].

6. As there is no justification for appellate restraint or deference, the standard to be applied is the correctness standard described in *Warren v Coombes* (1979) 142 CLR 531. It was not necessary for the CCA to be satisfied of *House* error.

In the alternative, *House* error was demonstrated

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7. In the alternative, even if *House* error was required, there was no error in the CCA's determination that *House* error was established.

The first recording (RS [38]-[39]; [43]-[47])

8. The CCA correctly found that the primary judge considered the admissibility of the recordings globally or compendiously: CAB 81[105].

9. The primary judge's approach accorded with the appellant Grech's submissions at
20 first instance: DGFM 88-89; DGFM 242-256. In contrast, the Crown contended that the recordings needed to be separately assessed: DGFM 92.17-29; cf Grech AWS [67].

10. At the outset of the reasons, the primary judge stated that there were "*essentially three pieces of evidence*" (namely, the recordings, the search evidence and the admissions): CAB 31.50. Thereafter, the primary judge treated "*the recordings*" as a single piece of evidence, to which his Honour applied the balancing considerations under s. 138 of the *Evidence Act*: CAB 32.48; 32.52; 33.12; 33.24; 33.52; 34.12, 34.25, 38.15. The primary judge concluded that "*the recordings*" would not be
30 admitted: CAB 41.41.

11. Contrary to the appellant's submissions in this Court, the primary judge did not approach the s. 138 assessment by first considering the admissibility of the first recording; cf Grech AWS [63]. In considering the "*gravity*" of the contravention, the primary judge referred to "*repeated deliberate breaches*" of the *Surveillance Devices Act* 2007 (NSW) ("*SD Act*"): CAB 36.37; CAB 81.25. [104]. In considering the difficulty of obtaining "*the evidence*", the primary judge considered *both* the position before the first recording *and* the position after the first recording in reaching the conclusion that there was "*some difficulty*" in obtaining "*the evidence*": CAB 39.25-
40 39.40; CAB 81 [105].

12. In the CCA, the appellant contended that the primary judge had considered the recordings as a single piece of evidence and that this approach was correct: ZKFM 262 and CAB 72 [75].

13. It was an error of principle for the primary judge to consider the admissibility of "*the recordings*" in a global or compendious manner; cf Grech AWS [67]. The application of s. 138 of the *Evidence Act* requires the analysis and balancing of the characteristics and circumstances of the particular item of impugned evidence.

The search evidence (RS [50])

14. The CCA correctly found that the primary judge erred in concluding that his s. 138 findings in relation to the recordings were "*directly applicable*" to his consideration of the evidence obtained following the issue of the search warrant: CAB 87 [121]; CAB 42.43. The "*way*" in which the search evidence was obtained was "*materially different*" to the "*way*" in which the recordings were obtained: CAB 89 [125].

The redetermination of the admissibility of the first recording and the search evidence

15. As the identification of *House* error was not required, and as *House* error was demonstrated in any event, the CCA was entitled to re-determine the admissibility of the recordings and the search evidence. There was no error in this redetermination.

Onus (RS [55])

16. The CCA correctly applied the onus; cf Grech AWS [80]. The judgment as a whole and the CCA's ultimate conclusions demonstrate that the onus was correctly applied: CAB 82 [107]; see also CAB 92 [130].

Engaging in the statutory task (RS [56]-[57]; [67])

17. The CCA expressly considered the statutory factors for the first recording and the search evidence: CAB 82-83 [108]-[110]; see also CAB 90 [127]. The weighing exercise was expressly undertaken: CAB 83-84 [111] and CAB 90-91 [128]-[130]; cf Grech AWS [82].

The CCA's findings in respect of the first recording are not contrary to the evidence (RS [61]-[62]

18. The CCA held that the Crown had not demonstrated that the primary judge's description of Ms White's opinion as to the difficulty of obtaining a surveillance device warrant as "*sheer speculation*" constituted *House* error: CAB 76 [88] and 82 [106]. This finding did not preclude the CCA from considering the unchallenged aspects of Ms White's evidence, in addition to other evidence in the *voir dire*, including the evidence of RSPCA Chief Inspector O'Shannessy, as to the difficulty of obtaining evidence of the offences without a contravention of the *SD Act*; cf Grech AWS [69].

19. The CCA was correct to conclude that there was a difficulty of obtaining evidence of the offences without more than an anonymous complaint and that this factor "*tips the balance*" under s. 138 in respect of the first recording: CAB 83 [111].

Dated: 15 October 2019

H Baker SC H Roberts B K Baker