HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 May 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S143/2022
File Title:	McNamara v. The King
Registry:	Sydney
Document filed:	Form 27F - Appellant's outline of oral submissions
Filing party:	Appellant
Date filed:	16 May 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No S143/2022**

BETWEEN: **GLEN PATRICK McNAMARA**
Appellant

AND: **THE KING**
Respondent

OUTLINE OF ORAL SUBMISSIONS FOR THE APPELLANT

Part I: Internet Publication

1. This document may be placed on the internet.

Part II: Outline of Appellant's Argument

2. The courts below held that s.135 permitted the wholesale exclusion from a trial of evidence adduced by one co-defendant to establish his innocence, on the ground that the probative value of that evidence adduced in his defence was substantially outweighed by the danger of unfair prejudice caused to another co-defendant by the admission of that evidence in the trial.

3. Under the common law of evidence there are many statements that the discretion does not apply in this situation[1]: *R v Miller* (1952) 36 Cr App R 169, 171 (Devlin J); *Murdoch v Taylor* [1965] AC 574, 584-6, 593E; *R v Lowery [No 3]* [1972] VR 939 at 946-948 (FC); *Lowery v R* [1974] AC 85, 101C, 102D-F; *R v Neale* (1977) 65 Cr App R 304, 306 (Scarman LJ); *R v Murray* [1980] 2 NSWLR 526, 535G (CCA); *R v Visser* (1983) 12 A Crim R 315, 320, 325-6 (NSWCCA); *Lui Mei Lin v R* [1989] AC 288 296H-297C; *R v Webb* (1992) 59 SASR 563 (CCA) at 573; *Thompson* [1995] 2 Cr App R 589, 592C-D, 593F; *Lobban v R* [1995] 1 WLR 877, 887B-D, 887H–888C (PC) (citing Keane, *The Modern Law of Evidence* (3rd ed, 1974) at p36); *R v Randall* [2004] 1 WLR 56, at [18] (HL); *Winning v R* [2002] WASCA 44 at [41]; *R v Roughan* (2007) 179 A Crim R 389 at [68]–[70] per Keane JA (QCA); *R v Hartley* [2007] 3 NZLR 299 at [60] and [62]; *R v Henry* [2008] NSWCCA 248 at [24] per Nettle AJA; *Russell v WA* (2011) 214 A Crim R 326 at [79]; *R v Murch* (2014) 119 SASR 427 at [38]; *Mansfield v WA* (2017) 52 WAR 233 at [106].

4. Although *R v Darrington* [1980] VR 353 has been interpreted by some as supporting the contrary position, later decisions in Victoria have marginalised it and expressed doubt about its correctness: *R v Gibb* [1983] 2 VR 155 at 163 ("such an exercise of discretion will necessarily be rare"), 171 ("the facts [in *Darrington*] … were very different from the present case … [and] were very unusual"); *R v Carranceja* (1989) 42 A Crim R 402 at 407 ("[t]he circumstances of *Darrington* were very different"); *R v Su* [1997] 1 VR 1 at 66 ("would have to be an exceptional case before a trial judge would exclude"); *R v Hartwick* (2005) 14

[1] This list is provided because the written submissions filed in this case do not adequately deal with the relevant caselaw. The text of these cases will not be read in argument.

VR 125 at [79] ("may perhaps be excluded in the exercise of discretion") per Charles, Chernov and Nettle JJA.

5. One of the rationales for not extending the discretion so as to operate between coaccused is that it would infringe an accused's right to make full answer and defence to establish his innocence: *Miller* at 171; *Murdoch* at 584G, 593E ("[t]he right to do this cannot … be fettered in any way"); *Lowery* (FC) at 946–7 ("need for an accused person to be left unfettered in defending himself by any legitimate means"); *Lowery* (PC) at 102F ("[w]e see no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the innocence of an accused person"); *Neale* at p306.7 ("if this evidence were relevant either to the case against him or to his defence, he would be able, as of right, to extract it or adduce it"); *Thompson* at p593B ("[a] defendant is always entitled to call … evidence 'in disproof of his own guilt' of the offence"); *Lobban* at p887C ("the accused, in seeking to defend himself, should not be fettered in any way"). A related principle is that there is a strong public interest in an accused being able to adduce all relevant evidence in his defence: *Alister v R* (1984) 154 CLR 404 at 414, 431, 437–8. The EA s 135 does not provide otherwise either expressly or by necessary intendment: EA s 9. Moreover, such a right can only be excluded by clear words or necessary intendment. Thus it is difficult for the Crown to show that the NSW legislature clearly intended to change the common law in a way which impaired an accused's right of full answer and defence.

6. There is no indication by the ALRC (or in the Second Reading Speeches) that significant changes to the common law were intended, nor any "full justification" for such changes. That is an indication that there was no intention substantially to alter the common law principles: *Cornwell v R* (2007) 231 CLR 260 at [72].

7. Moreover, there are many protections available to a trial judge to eliminate prejudice to one coaccused from evidence adduced by another. And the availability of such protections means that there is little or no risk of prejudice to a coaccused from another coaccused's evidence. This makes it highly unlikely that the legislature would have infringed one coaccused's rights, to avail another coaccused who was otherwise protected.

8. A joint trial at common law of two (or more) accused is a trial of two (or more) separate cases: *Huynh v R* (2013) 87 ALJR 434 at [49], *R v Towle* (1955) 72 WN(NSW) 338 at p340, *Annakin* (1988) 17 NSWLR 202n at pp208–9; *Bannon v R* (1995) 185 CLR 1 at 13.

9. A number of aspects of a joint trial reflect this: each defendant pleads separately, there are separate facts in issue between the prosecutor and each accused (*Darrington* at p383), the summing up must distinguish the different facts, issues and evidence. No accused is a party to the case between the Crown and a codefendant: *Darrington* at p383. And "the jury must consider the case against each of the defendants separately": *R v Hayter* [2005] 1 WLR 605 at [35].

10. The separate nature of the various cases in a joint trial means that the admissibility of evidence in each separate case must be determined separately. That is the position at common law: *Caleo v R* (2021) 290 A Crim R 352 at [137]; *Towle* at p340; *Thompson* at 592C, 593F; *Lobban* at p889C. The same position obtains under the EA: *DR v R* [2019] NSWCCA 320 at [18]-[19]; *Caleo* at [134]-[138]; *R v Fernando* [1999] NSWCCA 66 at [215]; *R v Chami* (2002) 128 A Crim R 428 at [12], [18], [28]; *Symss v R* [2003] NSWCCA 77 at [69], [73]-[77]; *Pham v R* [2006] NSWCCA 3 at [10]-[11]; *Madubuko v R* (2011) 210 A Crim R 249 at [27]-[29], [32]; *Trotter v R* [2016] NSWCCA 57 at [24], [27], [55]; *Hamalainen v R* [2019] NSWCCA 276 at [60]-[61], [66], [68]; *Destanovic v R* (2015) 49 VR 276 at [98], [101]-[102], [104], [120], [127], [130], [138]; *R v Henry* [2008] NSWCCA 248 at [12].

11. These common law principles in relation to evidence at joint trials have not been altered by the EA either expressly or by necessary intendment: EA s 9. Consequently, s 135 of the EA is applied in a joint trial to each case separately. When s 135 is applied separately to each of the cases of McNamara and Rogerson it does not permit the form of exclusion which occurred in the courts below.

12. Further, for the discretion to operate in the way adopted below would cause anomalies and unfairness. The provisions of s 135 should not be interpreted in that way where another approach is reasonably open which does not cause such anomalies and unfairness.

G.O'L REYNOLDS

Counsel for the Applicant