HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: GLEN PATRICK McNAMARA
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues raised on appeal

2. Does the word "party" in s 135(a) of the *Evidence Act 1995* (NSW) exclude a co-accused in a criminal proceeding?

Part III: Section 78B of the *Judiciary Act*

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required to be given.

Part IV: Material contested facts

4. The facts set out in the appellant's submissions (**AS**) at [5] to [10] are broadly accurate but are supplemented in paragraphs [55] to [75] below in the event of the application of the proviso to s 6 of the *Criminal Appeal Act 1912* (NSW).

Part V: Argument

5. The appellant was tried on a single indictment which jointly charged the appellant and Roger Rogerson with murder (count 1)[1] and supplying a large commercial quantity of

[1] Section 18 of the *Crimes Act 1900* (NSW).

methylamphetamine (count 3).[2] Before the trial, each accused unsuccessfully applied for a separate trial.[3] Given that each accused laid the responsibility for the murder and the possession of methylamphetamine on the other,[4] there were strong reasons of principle and policy why they should be jointly tried.[5]

6. At trial, the appellant sought to give evidence of statements which he claimed Rogerson had made to him, first in February 2014 and again shortly after Rogerson shot the deceased, in which Rogerson referred to other murders and a shooting which he had committed (**subject evidence**) (AS [9]-[12]). The appellant sought to use the subject evidence to support his claim that after the shooting of the deceased he had acted under duress to assist Rogerson to dispose of the body.[6] The appellant contended that the subject evidence "reinforced and strengthened" other evidence he gave about threats he said were made by Rogerson in the aftermath of the shooting.[7]

7. The subject evidence gave rise to the inherent difficulty, sometimes encountered in a joint trial, that evidence which is sought to be adduced by one co-accused (D2) is prejudicial to another co-accused (D1).[8] The trial judge found that the probative value of the subject evidence to the appellant's case was limited and that there was a clear danger that the evidence would be unfairly prejudicial to Rogerson as it would show that Rogerson was complicit in other murders.[9] His Honour applied s 135(a) of the *Evidence Act 1995* (NSW) (**EA**) to exclude the subject evidence.[10]

8. Following the trial judge's decision, the appellant did not make any further application for a separate trial, accepting, it is submitted, the necessity for the appellant to be jointly tried together with Rogerson.[11]

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[2] Sections 25(2) and 33(3)(a) of the *Drug Misuse and Trafficking Act 1985* (NSW). Count 2 was an alternative to count 1 alleged against Rogerson alone of being an accessory after the fact.
[3] *R v Rogerson; R v McNamara (No 3)* [2015] NSWSC 965. The application did not raise the admissibility issue the subject of this appeal.
[4] CCA [13]-[18] **CAB 386-391**.
[5] *Webb and Hay v R* (1994) 181 CLR 41 at [25] (Toohey J).
[6] CCA [479] **CAB 520**.
[7] CCA [486] **CAB 523-524**.
[8] *Bannon v The Queen* (1995) 185 CLR 1 at 13 (Deane J).
[9] CCA 493
[10] *R v Rogerson; R v McNamara (No 45)* [2016] NSWSC 452, esp at [32]-[42].
[11] CCA [561] **CAB 547**.

9. The appellant challenged that ruling in ground 1 of his appeal to the CCA. The CCA concluded that the trial judge was correct to apply s 135(a) of the EA to exclude the subject evidence and rejected ground 1.[12]

The interpretation of a term in the EA

10. It is well established that construction of a statutory provision must commence with the plain and ordinary meaning of the text read in context (including statutory, historical or other relevant context) and having regard to the purpose of the statute (cf AS [19]).[13] The EA made substantial changes to the law of evidence.[14] The language of the EA was properly the primary source to determine the admissibility of the subject evidence, not the pre-existing common law (cf AS [19]).[15] The approach of the appellant in this application has more to do with an asserted policy of the common law than a textual consideration of the EA.[16]

The terms of section 135 of the EA

11. Section 135(a) provides that a court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to "a party". The term "party" is not defined in the EA, but can only mean a litigant, being a person who is on one side of a legal dispute, whether that is an individual, a corporation or a body corporate or politic.[17]

12. Section 4 relevantly provides that the EA applies to all proceedings in a NSW court, including the proceedings listed in s 4(1)(a)-(d).[18] Accordingly, s 135 applies both to civil and criminal proceedings and the word "party" in s 135(a) refers to a party in both types of proceedings (as opposed to, for example, s 137, which applies only to criminal proceedings).[19]

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[12] CCA [542] **CAB 541**, [549]-[562] **CAB 543-547**.
[13] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].
[14] *Papakosmas v The Queen* (1999) 196 CLR 297 at 302 [10] (Gleeson CJ and Hayne J), at 310 [38]-[40] (Gleeson CJ and Hayne J), at 312 [46] (Gaudron and Kirby JJ), at 324 [88] (McHugh J); *R v Ellis* (2003) 58 NSWLR 700 at 716-717 [78].
[15] *IMM v The Queen* (2016) 257 CLR 300 at 311 [35] (French CJ, Kiefel, Bell and Keane JJ); at 339 [144] (Nettle and Gordon JJ); *Papakosmas v The Queen* (1999) 196 CLR 297 at 302 [10] (Gleeson CJ and Hayne J), at 310 [38]-[40] (Gleeson CJ and Hayne J), at 312 [46] (Gaudron and Kirby JJ), at 324 [88] (McHugh J); *R v Ellis* (2003) 58 NSWLR 700 at 716-717 [78].
[16] *IMM v The Queen* (2016) 257 CLR 300 at 316 [54] (Gageler J).
[17] ss 21(1) of the *Interpretation Act 1987* (NSW); CCA [500].
[18] s 4 of the EA.
[19] *IMM v The Queen* (2016) 257 CLR 300 at 306 [16] (French CJ, Kiefel, Bell and Keane JJ); CCA [500].

13. Section 135(a) applies to all proceedings, including proceedings involving multiple parties, and relevantly, to criminal proceedings on an indictment which charges more than one accused. The words "unfairly prejudicial to a party" do not by their ordinary meaning, indicate any particular confinement or limitation to exclude one accused or another in a trial involving more than one accused.

Context: s 136 of the EA

14. The immediate context of s135(a) is the other provisions of the EA,[20] and in particular, s 136. Section 136(a) provides, in language similar to s 135(a), that evidence may be limited if there is a danger that a particular use of it might be unfairly prejudicial to "a party". The limiting of evidence was achieved at common law by directions as to the use to which evidence led by D2 might be put.[21] Under the EA, that power is found in s 136. Sections 135(a) and 136(a) are sequential in the EA and, as the CCA correctly observed, are *"*closely related*"* because of the obvious similarities in their statutory language and purpose.[22] It should be presumed that the parliament intended consistency between them.[23] There is no reason to give the term "party" any different meaning as between ss 135(a) and 136(a)[24] and the appellant does not make any submission to that effect.

15. The appellant accepts that any prejudice to Rogerson caused by the subject evidence could have been addressed by directions given pursuant to s 136 (AS [25]). This acceptance necessarily acknowledges that Rogerson was a "party" within the meaning of that term in s 136(a) and is an implicit acknowledgement of the correctness of the CCA's reasoning at CCA [512], [519]-[520].[25]

16. In a joint trial, evidence led by D2 is admissible both for and against the interests of D1.[26] If that evidence is unfairly prejudicial to D1, then its use may be limited to D2's case, pursuant to s 136 of the EA. However, there are times when the probative value of that evidence to D2's case is substantially outweighed by its prejudicial effect upon D1 so that a trial judge may use the discretion within s 135(a) of the EA to exclude the evidence altogether. Thus,

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[20] *Project Blue Sky Inc v Australian Broadcasting* Authority (1998) CLR 355; [1998] HCA 28 at [69]; CCA [511] **CAB 531**.
[21] For example *Winning v R* [2002] WASCA 44 at [39]; *R v Murrell* [2005] EWCA Crim 382 at [28]-[30], referred to in *Russell v The State of Western Australia* [2011] WASCA 246 at [327].
[22] **CAB 531**.
[23] *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452.
[24] See *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J).
[25] **CAB 531, 533-534**.
[26] CCA [519] **CAB 533**; *Awad v The Queen* (2022) 96 ALJR 1082 at [56]; *Buck* (1896) 22 VLR 66; *Marriott* (1908) 8 SR (NSW) 350; *R v Attard* [1970] 1 NSWR 750; *Yeo v R* [2005] NSWCCA 49 at [84].

in a trial of multiple accused, s 135(a) works harmoniously with s 136 as another mechanism available to the trial judge to ensure a fair trial for all accused.

Other contextual matters

17. Construction of the term "party" in s 135(a) must be undertaken with reference to the language and purpose of all the provisions of the EA, bearing in mind that words should be interpreted consistently in a statute.[27]

18. When referring to criminal proceedings against more than one accused, the EA employs various different descriptors of the party against whom criminal proceedings are brought by the prosecutor including "another defendant",[28] an "associated defendant",[29] and "2 or more persons being tried together for an indictable offence".[30] In other provisions, the EA refers to a co-accused as a "third party",[31] "any party (other than the prosecutor)",[32] and "a party other than the party who called the witness to give evidence".[33] The use of these terms is specific to the issues to which each section relates. In other provisions, use of the term "party" alone or as part of a wider definition reflects an intention to include an accused and each co-accused, if there be any, in a criminal proceeding.

19. Section 20 of the EA enables the judge or "any party (other than the prosecutor)" in a criminal proceeding to comment on a failure of a defendant to give evidence. Necessarily this section applies to a joint trial of more than one accused: s 20(5). The juxtaposition of "any party (other than the prosecutor)" with "the defendant" and "another defendant" in the section reveals the reference to "any party (other than the prosecutor)" to be a reference to a co-accused.

20. Section 27 of the EA provides that a "party" may question any witness, except as provided by the EA. The term "witness" is defined in the Dictionary to the EA to include a defendant in a criminal proceeding giving evidence.[34] Section 27 is relevant to this appeal because it conferred upon each of the appellant and Rogerson the right to each cross-examine the other, when the other gave evidence.

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[27] *Williamson Pty Ltd v Barrowcliff; Registrar of Titles (WA) v Franzon*; *IMM v The Queen* (2016) 257 CLR 300 at [43].
[28] ss 20(2), 20(4), 104(6), 108B(6), 111(1) of the EA.
[29] s 17(3) of the EA.
[30] s 20(5) of the EA.
[31] s 83 of the EA.
[32] s 20 of the EA.
[33] Cl 2(2) of Pt 2 of the Dictionary to the EA.
[34] Cl 7(3) of Pt 2 of the Dictionary to the EA.

21. Section 37 of the EA regulates the use of leading questions in chief or re-examination, which may be put if there is no objection and "each other party" is legally represented.[35] In the context of a criminal proceeding where there is more than one accused, "each other party" in s 37(1)(c) must refer to each of (perhaps multiple) accused.

22. Section 65 applies in criminal proceedings and allows first-hand hearsay to be admitted in certain circumstances. Where hearsay evidence about a matter has been adduced by "a defendant" pursuant to s 65(8), s 65(9) allows "another party" to also adduce hearsay evidence about that matter. "Another party" includes the Crown but does not limit the application of the subsection to 'the prosecutor' (cf s 20), because "another party" when used in s 65(9) necessarily includes a co-accused. Section 67 of the EA requires a party who intends to rely upon hearsay evidence to give notice to "each other party" of evidence sought to be led pursuant to sub-ss 65 (2), (3) or (8) of the EA. This includes giving notice to a co-accused, because evidence cannot be used against a defendant who did not have a reasonable opportunity to cross examine the witness (s 65(4) of the EA).

23. Other notice or service requirements in ss 49(a), 50(2), 73(2)(b), 97(1)(a), 98(1)(a), 100(6)(a) and 177(2) of the EA similarly provide for notice or service to "each other party."

24. Section 83 provides strong support for the conclusion that "party" when used in the EA includes any co-accused in a joint trial.[36] The Dictionary to the EA defines an admission as, relevantly, a previous representation made by a person who is or becomes "a party to a proceeding (including a defendant in a criminal proceeding)". Section 83 confirms the application of the hearsay and opinion rules to evidence of an admission in respect of the case of "a third party". Section 83(4) defines "third party" as "a party to the proceeding, other than the party who (a) made the admission or (b) adduced the evidence". Thus, D1 may rely on an admission made by D2 and tendered by the Crown which exculpates D1. The common law did not allow such use of an admission.[37]

25. Section 110(1) of the EA (which applies only in a criminal proceeding) disapplies various exclusionary rules to evidence adduced by an accused as to good character generally or in a specific aspect. It also disapplies those rules to evidence adduced by the Crown or a co-accused in rebuttal (s 110(2)). Section 135 allows D1 to apply to have evidence of bad

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[35] s 37(1)(c) of the EA.
[36] CCA [517]-[518] **CAB 533**.
[37] *Bannon v The Queen* (1995) 185 CLR 1, 22 (Dawson, Toohey and Gummow JJ); *Baker v The Queen* (2012) 245 CLR 632, 649 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); cf *R v Darrington & McGauley* [1980] VR 353, 383.

character sought to be led against him by D2.[38] Section 135(a) could only so operate if D1 and D2 are "parties" to the same proceedings.

26. There was a recognised discretion at common law that applied to evidence led by the prosecution against D2, which was prejudicial to D1.[39] A necessary consequence of the appellant's argument, if accepted, would be to also deny the availability of s 135(a) to D1 in relation to evidence led by the Crown against D2.[40]

27. As this exegesis seeks to make clear, the use of the term "party" in the EA applies to each of the co-accused in a joint trial. To so construe the section does not involve a straining of language and recognises the principle that a provision conferring a power to be exercised judicially should be construed as liberally as its terms and context will permit.[41] That s 135(a) refers to a "party" and not to "another party" or "each other party" is a function of the general application of the section.

Parties to a criminal proceeding: trials on indictment of more than one accused person

28. That the term "party" in s135(a) of the EA includes a co-accused in a joint trial is also supported by consideration of the nature of a criminal trial involving multiple accused. It is a fundamental rule of criminal procedure that, in a trial upon indictment, the jury can only be empanelled and sworn to try the issues on a single indictment, which must include where the indictment charges more than one accused person.[42] In *Munday v Gill*, Dixon J described the procedure in challenging summoned jurors when accused persons are jointly indicted:[43]

> When prisoners are jointly indicted they may sever or they may join in their challenges, and the consequences which ensue are prescribed by law. But there is no way allowed by law of putting in charge of one jury at one time two or more prisoners arraigned upon separate indictments. The jurors are specially chosen for the single purpose of trying one indictment or such of the prisoners arraigned on one indictment as they may have in charge.

29. The jury as a tribunal is empanelled for the single purpose of hearing and determining the charge or charges on one indictment. The jury can only be empanelled and sworn to try the issues of the particular indictment, that is, "to find whether the accused be guilty or not guilty

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[38] *R v Qaumi & Ors (No 61)* [2016] NSWSC 1192 at [25] (Hamill J), noting that s 192 of the *EA* also has application.
[39] *Lobban v R* [1995] 2 All ER 602 at 611; *Bannon v The Queen* (1995) 185 CLR 1, [21].
[40] *R v Qaumi & Ors (No 52)* [2016] NSWSC 1065 at [16] (Hamill J); *The Queen v Casimiro and The Queen v Pinto (No 2)* [2020] NTSC 46 [16]-[20], [59] (Kelly J).
[41] *PMT Partners Pty Ltd (In liq) v Australian National Parks &Wildlife Service* (1995) 184 CLR 301 at 313; [1995] HCA 36; CCA [522] **CAB 534-535**.
[42] *Munday v Gill* (1930) 44 CLR 38 at 76 (Gavan Duffy and Starke JJ), at 87 (Dixon J).
[43] *Munday v Gill* (1930) 44 CLR 38 at 87 (Dixon J).

upon that indictment and no other".[44] This is why where there is a joint trial, there must be a single indictment and why a simultaneous trial of more than one accused on several indictments will be incompetent.[45]

30. As the CCA observed, in enacting the EA, the legislature must be taken to have been well aware of this rule.[46] Thus, in s 17(3) of the EA, D1 or "an associated defendant" (as defined in the Dictionary) is not a compellable witness for or against D2 "unless [D1] is being tried separately from [D2]". In context, being "tried separately" must mean proceedings upon a separate indictment. Moreover, s 83(2) of the EA allows an admission to be used in the "*case* of a third party" not the "*trial* of a third party."

31. The general principle that persons charged with jointly committing an offence may be tried together also finds statutory recognition in s 29(2) of the *Criminal Procedure Act 1986* (NSW) (**CPA**).[47] Section 21(2)(b) of the CPA empowers a court to "order a separate trial" for an accused.

32. In *Swansson v R; Henry v R*,[48] the trial was found to have been a nullity because the accused were tried before one jury on multiple indictments. The respondent contended that the indictments represented separate trials, consistent with directions to juries to the effect that separate trials take place where there are multiple accused or multiple charges.[49] Addressing this submission, Howie J stated:

> But I do not believe that a trial judge intends the jury to understand that there is literally more than one trial actually taking place. The direction is intended to make it clear that separate consideration must be given to each of the allegations in the indictment. In any event there seems to me to be a difference between separate trials taking place in the one proceeding and separate proceedings.

33. The direction to the jury where there are multiple accused is that the jury is to consider the evidence adduced in respect of each accused *as if* an individual accused had been tried separately (cf AS [21]).[50]

34. The appellant's reliance upon *R v Fenwick*[51] and *DPP v Merriman*[52] is misplaced (AS [25]). These authorities stand for the proposition that while more than one accused may be joined

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[44] *Munday v Gill* (1930) 44 CLR 38 at 76 (Gavan Duffy and Starke JJ).
[45] CCA [513] **CAB 532**.
[46] CCA [513] **CAB 532**.
[47] *R v Atkinson* (1706) 1; Salk 382, *R v Trafford* (1871) 1 B&AD 874, *Young v R* (1789) 3 Term Rep 98, *R v Benfield and Saunders* (1760) 2 Burr 980 at 985; *Caleo v R* [2021] NSWCCA 179 at [132].
[48] [2007] NSWCCA 67; 69 NSWLR 406.
[49] *Swansson v R; Henry v R* [2007] NSWCCA 67 at [183], [186].
[50] *R v Towle* (1955) 72 WN(NSW) 338 at 340.
[51] (1953) 54 SR (NSW) 147.
[52] [1973] AC 584.

in an indictment and the prosecution may rely upon principles of complicity, criminal liability is personal and there is no requirement at law to prove that co-accused acted jointly, so that failure to do so will not necessarily result in the acquittal of all co-accused.[53] Thus, an indictment charging more than one accused is both joint and several.[54] As the appellant correctly notes (AS [24]), this rule is of considerable antiquity.[55] The trial judge directed the jury in the subject trial that they might convict either the appellant or Rogerson if they failed to find they acted in concert.[56]

35. To approach the construction of s 135(a) of the EA on the basis that a proceeding against co-accused charged on one indictment is in fact "two trials proceeding together" (cf AS [25]) fails to recognise the nature of a joint trial. The nature of the jurisdiction founded by the indictment, the empanelment of one tribunal of fact to hear and determine the charges on one indictment, and the concomitant consideration that the admission of evidence in the trial is not limited as against either accused unless otherwise directed or ordered, compel the contrary conclusion.

36. In any event, if there are "two trials proceeding together" there remains one substantive proceeding to which the EA is addressed, which should not restrict the application of s 135 of the EA to all the parties in all of those "trials". Each is a party to "the proceeding", as Howie J noted in *Swannson*. The reasons for allowing s 135 to apply are no less compelling whether there is one trial or more trials within the one overall proceeding. Whether D1 is tried together or separately from D2 in the same proceeding, the prejudicial effect on D1 of evidence led by D2 may be equally damaging.

Common law: admissibility of evidence adduced by an accused

37. An examination of the authorities relied upon by the appellant reveals that they do not speak with one voice as to an unfettered right to lead evidence (cf AS [27]). Moreover, the changes made to the common law by the EA circumscribe their utility to the appellant's argument.

38. *R v Lowery and King (No. 3)*[57] concerned the admissibility of opinion evidence of a psychologist, sought to be adduced by K, which concerned both co-accused. The Crown case

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[53] *Reg. v. Fenwick* (1953) 54 SR(NSW) 147 at 151-3 (Street CJ), at 154-155 (Owen J), at 156 (Herron J); *DPP. v. Merriman* (1973) AC 58 at 591-594 (Lord Morris), at 599-600, 603 (Viscount Dilhorne), at 607 (Lord Diplock); see also *Reg. v. McConnell* (1977) 1 NSWLR 714, 720-721; *R v Wood & Anor* [2000] WASC 64 at [2].
[54] *Reg. v. Fenwick* (1953) 54 SR(NSW) 147 at 152 (Street CJ).
[55] Hale's Pleas of the Crown New 3rd ed. (1800) vol.I, p.46; Hawkins' Pleas of the Crown 8th ed. (1824) vol.II, p 331, s.89; *R v Benfield and Saunders* (1760) 2 Burr 980 at 984.
[56] **CAB 146-149**.
[57] *R v Lowery and King (No. 3)* [1972] VR 939 at 947.

was that one or both of them killed a 15-year-old girl while both were present in a sadistic and otherwise motiveless killing.[58] L contended that the evidence merely revealed L's disposition or propensity and that the rule that restricts the Crown leading such evidence (see *Makin v AG for NSW*[59]) should equally apply to evidence led by K.[60] The Full Court of the Supreme Court of Victoria (**Victorian Full Court**) rejected that submission, referring to the unfettered right of an accused to defend himself "by any legitimate means".[61] The Privy Council upheld that decision.[62]

39. The Victorian Full Court also considered a second ground of appeal directed to the trial judge's exercise of a discretion to reject the opinion evidence because of its prejudicial effect on L's case given its asserted limited probative value to K's case. In that context, the Court also referred to an accused's unfettered right to defend himself.[63] The existence of such a discretion was not challenged before the Privy Council.[64] The Privy Council's statement that in the circumstances of that case it would be unjust to prevent either of two co-accused from calling any evidence of probative value which could point to the probability that the perpetrator was the one rather than the other, was in response to the peculiar nature of that case[65] and a result in part of L putting his character in issue.[66] Moreover, it said nothing about the existence of a discretion.[67]

40. The statement in *Lowery* that "[a]n accused person must be left unfettered in defending himself by any legitimate means" derived from *Murdoch v Taylor* [1965] AC 574. Murdoch turned upon s 1(f) of the *Criminal Evidence Act 1898 (UK)*, which provided that an accused could not be questioned in a manner tending to show commission of a prior criminal offence or bad character, unless the accused had given evidence against a co-accused (a situation now governed in NSW by s 104(6) of the EA). Lord Morris of Borthy-y-Gest considered whether the court's permission was required before questioning under s 1(f). It was in that context that his Lordship stated that "[the accused] must have liberty to defend himself by such legitimate means as he thinks it wise to employ". Even then, his Lordship held that the judge had functions to discharge, in ruling whether the accused had given relevant evidence in the terms of the provision, and that it was always for the judge to rule in relation to

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[58] *R v Lowery and King (No. 3)* [1972] VR 939 at 944.
[59] (1894) AC 57.
[60] *R v Lowery and King (No. 3)* [1972] VR 939 at 944-945.
[61] *R v Lowery and King (No. 3)* [1972] VR 939 at 947.
[62] *Lowery v The Queen* [1974] AC 85.
[63] *R v Lowery and King (No. 3)* [1972] VR 939 at 947.
[64] *Lowery v The Queen* [1974] AC 85, 89.
[65] *Lowery v The Queen* [1974] AC 85, 101.
[66] *Lowery v The Queen* [1974] AC 85, 101-102.
[67] *R v Darrington & McGauley* [1980] VR 353, 384.

evidence and the propriety of any question. A question had to be within the terms of the permission in s 1(f) and also had to be "capable of justification according to the general rules of evidence and in particular must satisfy the test of relevance".

41. *Lowery* does not stand for the proposition that rules of evidence other than relevance are ousted where an accused seeks to adduce evidence in his or her defence, whatever the probative value or measure of unfairness to a co-accused (cf AS [27]). Evidence sought to be led on behalf of an accused may be inadmissible as a result of a rule at common law or by operation of statute.[68] Indeed, "even under the general law, an accused person [did] not have an unqualified right to have evidence which may be relevant to their defence be produced or admitted."[69]

42. In cases subsequent to *R v Lowery and King (No. 3)*, the Victorian Full Court accepted the existence of a discretion of a trial judge to exclude relevant evidence sought to be adduced by an accused, the probative value of which was outweighed by its prejudicial effect upon the case of a co-accused.[70] In *R v Darrington & McGauley*, Jenkinson J (with whom Young CJ agreed) accepted that an accused should be able to defend himself by "relevant and legitimate means" but that this freedom was qualified by considerations "just as fundamental and of greater weight" in favour of discretionary control over the exercise of that freedom by the trial judge.[71] Those considerations were addressed to avoiding the stultification of the administration of criminal justice; that ordering separate trials may enable an accused to secure acquittal in frustration of one of the primary purposes of the criminal law; and that the probative value of what the Court comprehended in the use the expression "all legitimate and relevant means" in *Lowery and King (No 3)* may be assessable as slight enough to justify subordination of the interest of the accused to other interests which the system of trial of criminal issues by jury is designed to serve.[72]

43. In *Winning v R* [2002] WASCA 44 (see AS [19]), the Western Australian Court of Criminal Appeal[73] (**WA CCA**) found that the trial judge erred in refusing to allow the appellant to

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[68] For example s 294CB of the *CPA*; client legal privilege, protected confidences and exclusion of evidence of matters of state in ss 117-126F and s 30 of the *EA;* and s 29(1)(d) of the *Children and Young Persons (Care and Protection) Act* 1998 (NSW) for which see *Hayward v R* (2018) 97 NSWLR 852**.**

[69] *Hayward (a pseudonym) v R* (2018) 97 NSWLR 852, [68], referring to *Alister v The Queen* (1983) 154 CLR 404 (public interest immunity); and see *Carter v The Managing Partner, Northmore Hale Davy and Leake and Others* (1995) 129 ALR 593 (legal professional privilege).

[70] *R v Darrington & McGauley* [1980] VR 353; *R v Gibb and McKenzie* [1983] 2 VR 155; *R v Carranceja* (1989) 42 A Crim R 402; *Caine & Goddard v R* (1993) 68 A Crim R 233; *R v Su, Katsuno, Katsuno, Katsuno, Asami & Honda* (1997) 1 VR 1; CCA [531]-[539], [540].

[71] *R v Darrington & McGauley* [1980] VR 353 at 384-385.

[72] *R v Darrington & McGauley* [1980] VR 353 at 385; see CCA [531]-[536] **CAB 537-539**.

[73] The judgment of Olsson AUJ, with which Malcolm CJ and Steytler J agreed.

introduce into evidence the antecedent criminal record of a co-accused, A, to prove that A had a demonstrated propensity to violence.[74] The Court accepted the evidence was relevant and admissible, in accordance with the Privy Council decision in *Lowery*[75] and held that there was no discretion to exclude the evidence.

44. In contrast, in *Kazemi v R* [2003] WASCA 301 Templeman J (Miller J agreeing) observed a "general rule" that the right of an accused to lead all relevant evidence in his defence should be paramount, but also that it might be appropriate "in some exceptional circumstance" for a trial judge to exercise a discretion to exclude otherwise admissible evidence.[76]

45. In *R v Roughan & Jones*,[77] Keane JA considered that propensity evidence tendered by D2 against D1 should pass the common law test of admissibility that is applied to such evidence when tendered by the Crown,[78] while McMurdo J disagreed.[79] In the subsequent appeal to this Court (*Jones v The Queen*[80]) it was unnecessary to decide whether there are cases in which a propensity of one accused may be relied on by the other irrespective of whether he has put his character in issue.[81] Hayne J noted the risk of a trial being diverted into collateral issues should one accused tender evidence about the criminal propensities of the other, the questions that such evidence raised about whether or how a rule of the kind in *Pfennig v The Queen*[82] could, or should, be applied and whether, if such evidence were allowed the trial should continue as a joint trial.[83]

46. In NSW, the admissibility of the disputed evidence of the type considered in *Winning* and *R v Roughan & Jones* would be resolved by the application of ss 97 and 98 of the EA which govern the admissibility of coincidence and tendency evidence led by D2 against D1, and so, although s 135(a) would also have application, if the evidence had significant probative value, it would be unlikely that s 135(a) would be applied to exclude such evidence.

47. In *R v Murch; R v Logan*[84] (see AS [27]) the South Australian Court of Criminal Appeal concluded the trial judge was in error to disallow the cross-examination of one co-accused

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[74] *Winning* at [32].
[75] *Winning* at [40].
[76] *Kazemi v R* [2003] WASCA 301, [8], [58], [60].
[77] (2007) 179 A Crim R 389.
[78] *R v Roughan & Jones*, [72].
[79] *R v Roughan & Jones*, [102].
[80] *Jones v The Queen* (2009) 239 CLR 175.
[81] *Jones v The Queen* (2009) 239 CLR 175 at [20]-[22].
[82] (1995) 182 CLR 461.
[83] *Jones v The Queen* (2009) 239 CLR 175 at [37].
[84] (2014) 119 SASR 427.

by another on a matter of credit, [85] relying upon *R v Miller*[86] and *Murdoch v Taylor*.[87] The Court doubted that a trial judge has a residual discretion to exclude such evidence but found that, in any event, there was no occasion for its exercise in that case.[88] Under the EA, the situation which arose in *Murch* is governed by s 104(2), which requires leave to be granted before an accused may cross-examine a co-accused, who must have first given evidence adverse to the applicant (s 104(6)). A grant of leave is governed by consideration of the factors in s 192, including considerations of fairness to the co-accused, [89] which are essentially the same considerations as those that arise on an application under ss 135 and 137 of the EA.[90]

Section 9 of the EA

48. Section 9 of the EA preserves "the operation of a principle or rule of common law or equity in relation to evidence".[91] The report of the Australian Law Reform Commission (**ALRC**) which led to the passing of the EA concluded that matters of substantive law and procedure lay outside the scope of the proposed Act.[92] Section 9 has been interpreted to preserve common law rules of evidence that could be classified as part of the substantive law, such as the parol evidence rule, the doctrines of res judicata and issue estoppel and the law relating to presumptions.[93] Section 9 would also preserve the underlying principle of the accusatorial and adversarial system of a criminal trial.[94]

49. The "principle" advanced by the appellant, even if it was found to exist in the terms contended by the appellant, is not a fundamental principle of criminal law or of a kind that would qualify as a category of a principle of substantive law or equity. It is a recognition of the uncontroversial proposition that, in general terms, an accused should have as much latitude as possible in defending himself in a criminal trial. As already noted, that latitude is subject to various common law and legislative restrictions. Section 135(a) clearly makes evidence sought to be led by D2 subject to the interests of D1 in the circumstances set out therein.

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[85] *R v Murch; R v Logan*, [31].
[86] (1952) 36 Cr App R 169 at 171.
[87] [1965] AC 574.
[88] *R v Murch; R v Logan*, [38]; cf *Kazemi* and *Question of Law Reserved (No. 3 of 1977)* (1998) 100 A Crim R 464, 472.
[89] s 192(2)(b) of the EA.
[90] *R v Duncan and Perre* [2004] NSWCCA 431 at [249].
[91] AS [27].
[92] (1985) Report on Evidence, ALRC Report No. 26 Vol I, 23 [46].
[93] *Butcher v Lachlan Elder Realty Pty Ltd* [2002] NSWCA 237, [15]; *Haddara v R* (2014) 43 VR 53, 56 [54]-[57].
[94] *R v Soma* (2003) 212 CLR 299; [2003] HCA 13 at [27].

50. Before the CCA, the appellant relied upon reports of the ALRC[95] which proposed a provision in terms similar to s 135(a) but without the expression "a party", such that the object of the unfair prejudice was not identified.[96] Ultimately, the CCA found that inclusion of the term, without further explanation, did not advance the appellant's contention, noting also that the ALRC had remarked on the uncertainty of the state of the common law at that time in respect to the existence of a discretion (cf AWS [26]).[97]

The authorities

51. The appellant places substantial reliance upon the limited reference to s 135(a) in *R v Henry; R v Gravett; R v Swansson*[98] at [24] by Nettle AJA, with whom McClellan CJ at CL and Simpson J agreed. The CCA determined that it was not bound by his Honour's reference as *Henry* was an urgent interlocutory appeal, the point did not appear to have been argued and no line of authority arose from what Nettle AJA said about s 135(a).[99] Importantly, as noted at CCA [506], *R v Gibb and McKenzie* [1983] 2 VR 155 at 171 (cited by Nettle AJA in *Henry* at [24]) does not support the proposition that "a trial judge cannot exclude evidence favourable to one accused on the ground that it might be prejudicial to another". Both *Gibb* and *Darrington* support the existence of the discretion.[100] Subsequently to *Henry*, trial judges at first instance have applied s 135(a) consistently with the decision the subject of this appeal.[101]

Conclusion

52. The interpretation of the term "party" in s 135 of the EA includes any co-accused in a trial which charges two or more accused. This conclusion is properly derived from an orthodox approach to statutory interpretation. The CCA was correct to conclude that the EA provides a clear mechanism for the exclusion of evidence sought to be led by an accused, if it is of limited probative value and presents a danger of unfair prejudice to a co-accused.

53. The appeal should be dismissed.

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[95] Noting s 3(3) of the EA.
[96] (1985) Report on Evidence, ALRC Report No. 26 Vol I p. 54 cl 114; (1987) Report on Evidence, ALRC Report No. 38 p. 229, cl 117.
[97] CCA [529] **CAB 536**.
[98] *R v Henry; R v Gravett; R v Swansson* [2008] NSWCCA 248 at [24].
[99] CCA [510] **CAB 531**.
[100] *R v Darrington & McGauley* [1980] VR 353, 384-385; *R v Gibb and McKenzie* [1983] 2 VR 155, 171.
[101] *DPP v Hills & Ors (Ruling No 6)* [2010] VSC 486 [28]*; R v Qaumi & Ors (No 24)*; *R v Qaumi & Ors (No 42)* [2016] NSWSC 887.

Proviso

54. If this Court was to determine that the CCA was in error, the Court would find that no substantial miscarriage of justice actually occurred and therefore the appeal should nonetheless be dismissed through the application of the proviso to s 6(1) of the *Criminal Appeal Act 1912* (NSW).

55. The overwhelming preponderance of admissible evidence clearly established beyond reasonable doubt that the appellant and Rogerson were parties to the premeditated execution of Jamie Gao for the purpose of stealing a large quantity of drugs from him.[102] That conclusion can be reached on the basis of the extensive video surveillance from CCTV cameras, recorded communications, records of telephone calls and the proven unreliability of the appellant.[103] The nature and effect of the absence of the subject evidence from the trial, limited as it was in its probative value, does not prevent an appellate court from being able to assess whether guilt was proved to the criminal standard or whether the proviso may be applied.[104]

56. As detailed in the CCA's judgment including in its discussion of Rogerson's unreasonable verdict ground of appeal,[105] the combined force of each aspect of what in total was a powerful circumstantial case was overwhelming. The discussion below addresses aspects of the evidence relevant only to the appellant's case in support of its argument on the proviso. The respondent also relies on the analysis of the evidence led against both offenders by the CCA.

57. The CCA found that "[the appellant's] assertion that his [27 meetings between 15 January 2014 and 20 May 2014] with Jamie Gao were for the purpose of research for a third book were of quite doubtful credibility."[106] The telephone contact between Rogerson and the appellant that occurred before and after many of the meetings was a powerful indication that Rogerson knew of the fact, purpose and frequency of the meetings and supported the

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[102] *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69 [12] (Kiefel CJ, Bell, Keane and Gordon JJ); *Lane v The Queen* [2018] HCA 28; (2018) 265 CLR 196 at 206-207 [38] (Kiefel CJ, Bell, Keane and Edelman JJ).

[103] CCA [402] **CAB 496**; *Hofer v The Queen* (2021) 95 ALJR 937 at 952-954 [61]-[71] (Kiefel CJ, Keane and Gleeson JJ).

[104] *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ).

[105] CCA [201]-[306] **CAB 438-462**.

[106] CCA [30]-[32] **CAB 394**, [71] **CAB 405-407**.

inference that, contrary to the appellant's case, his meetings with the deceased were not about research for the appellant's book.[107]

58. On 20 May 2014, the deceased was collected by the appellant driving a white Ford Falcon station wagon BV67PX (**BV67PX**).[108] After he was murdered, his body was taken away in it. The circumstances of the purchase of BV67PX allowed an inference of premeditation, in that the car was untraceable.[109] The appellant's claim that his possession of the car, obtained from Rogerson, was only from 14 May 2014 and intended only for taking rubbish to the tip, was reliably contradicted by other evidence.[110] The appellant's explanation that he put the receipt for BV67PX in a box marked "receipts" on a desk in his apartment so that it could be easily found by police lacked credibility.[111]

59. The appellant and Rogerson disposed of the body of the deceased using the appellant's motorboat. The appellant removed his boat from storage on 19 May 2014, had it available on 20 May 2014 for the body of the deceased to be placed there and on 21 May 2014 used it to dispose of the body of the deceased. The appellant then took his boat back to storage.[112] The appellant's explanation was that the removal was for service of the boat, but it had been serviced the month before.[113] It was either a 'complete coincidence' or part of the plan to kill and dispose of the deceased.[114]

60. Rogerson had obtained a key to the lock up unit at 803 and the passcode to the facility. Rogerson had visited the premises on 2 April 2014. On 4 April 2014 the appellant and Rogerson drove to Rent a Space, a storage facility at 57 Davies Road, Padstow (**Rent a Space**). The appellant accepted in cross-examination that he already had the passcode to the premises and key to the lock up unit.[115]

61. On 9 and 10 April 2014 the appellant made a number of internet searches in relation to a .25 Baby Browning pistol. This type and size of pistol could have been the murder weapon, although the murder weapon itself was never recovered.[116]

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[107] CCA [33]-[37] **CAB 394-397**.
[108] CCA [59]-[84] **CAB 402-410**, [175] **CAB 433**, [229]-[233] **CAB 443-445**, [300]-[301] **CAB 461**.
[109] CCA [59] **CAB 402-403**, [84] **CAB 410**, [144] **CAB 425**, [231] **CAB 444-445**.
[110] CCA [79] **CAB 409**, [80] **CAB 409**.
[111] CCA [230](i); TT 3184.38-3187.40.
[112] CCA [87]-[90] **CAB 411-412**.
[113] CCA [91] **CAB 411**.
[114] CCA [90] **CAB 411**, [275] **CAB 456**.
[115] CCA [49]-[51] **CAB 400**.
[116] CCA [188] **CAB 435**, [193] **CAB 436**, [195] **CAB 436-437**.

62. The events of the morning of 20 May 2014 showed that the appellant took steps to meet with the deceased. The text conversation "strongly suggests something nefarious" and the possibility of a false alibi.[117]

63. The appellant left his apartment in BV67PX. He took a surfboard cover.[118] His explanation for intending to take the surfboard cover to the tip was not credible.[119]

64. The appellant and Rogerson entered Rent a Space together, in Rogerson's car. Their activities appeared more directed to preparing the storage unit in anticipation of shooting the deceased than merely checking the lock as the appellant contended.[120]

65. The appellant and Rogerson drove together from Rent a Space. The appellant got out of Rogerson's car and into BV67PX, which had been parked outside, and drove to Arab Road, parking in different places on the street. The appellant's evidence was that he was going to wait at a McDonalds on Arab Road while Rogerson was going off to meet the deceased, speak to him, possibly "at the shed", and then drop him back to the appellant as he had arranged with Rogerson.[121] However, the appellant opened the door of his car when he first saw the deceased drive towards him.[122] Rogerson re-parked his car allowing the deceased to also park on Arab Street. Rogerson did not intervene when the deceased walked towards the appellant and drove away with him.[123] Rather than Rogerson meeting the deceased first followed by the appellant, it was clear that the appellant was intending to drive the deceased to Rent a Space. [124] The movements of the appellant and Rogerson clearly indicated that they were working together as part of a plan to take the deceased to Rent a Space.

66. The appellant drove himself and the deceased to the front entrance of Rent a Space. After pulling up outside unit 803, the appellant was at the rear of BV67PX immediately before the deceased exited to go into storage unit 803.[125] The appellant said he did so because the tailgate rattled as he drove. It appears however that the appellant was using a key to unlock

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[117] CCA [100] **CAB 414**.
[118] CCA [101] **CAB 414**.
[119] CCA [77] **CAB 408-409**, [80] **CAB 409**, [101] **CAB 414**, [269] **CAB 455**.
[120] CCA [108] **CAB 416**, [114]-[118] **CAB 418-419**; Trial Exhibit Q at "Rent a Space Padstow 20 May 2014 1.16pm", from 21m to 25m10s; Trial Exhibit P **RFM 81**.
[121] TT 3137.45-3138.5 **RFM 136-137**.
[122] TT 3944.1-3948.9 **RFM 208-212**.
[123] CCA [119]-[128] **CAB 419-421**; Trial Exhibit Q at "Micks Meats Arab Road Padstow 20 May 2014 1.33pm", from 26m 18s to 27m 14s; Trial Exhibit Q at "Micks Meats Arab Road Padstow 20 May 2014 1.38pm", from 27m 38s to 29m 38s; Trial Exhibit P **RFM 82**.
[124] CCA [14] (fifth paragraph) **CAB 387**.
[125] Trial Exhibit Q at "Rent a Space Padstow 20 May 2014 1.42pm", from 31m 17s to 35m 6s; Trial Exhibit P **RFM 82**.

the tailgate, a matter of importance given that this was where the deceased's body was later placed.[126]

67. The appellant moved BV67PX to park directly outside unit 803. When the deceased got out of BV67PX, the appellant stood in such a way that it shielded the deceased from the CCTV camera that was filming them.[127]

68. After leaving Arab Street, Rogerson took another route to arrive at the rear entry to Rent a Space. After driving around Rent a Space, Rogerson parked and then walked to and entered 803.[128] On the appellant's case, Rogerson shortly thereafter shot and killed the deceased.[129] On Rogerson's case, the deceased was already dead, the appellant saying that he had killed him in self-defence.[130]

69. The appellant and Rogerson wrapped and removed the body of the deceased, including with the surfboard cover,[131] and took it to the appellant's unit, departing only to hire equipment to put the body in the appellant's boat.[132]

70. The appellant and Rogerson both consumed some beer in the presence of the appellant's daughter, Jessica.[133] CCTV footage from the appellant's apartment complex does not give the appearance of a man operating under duress.[134] It included the appellant and Rogerson in the lift of the apart complex with a six pack of beer which they later consumed.[135] Evidence from Jessica McNamara tended to support the appellant, but although the Crown relied upon it to show that Rogerson was armed with the pistol used to kill the deceased, it was not probative as to a level of duress that would exculpate the appellant.[136]

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[126] TT 3150.24-30 **RFM 145**; TT 3949.41-3950.21 **RFM 213-214**; TT 3951.11-3955.13 **RFM 215-219**.
[127] TT 3956.6-8 **RFM 220**.
[128] CCA [133]-[136] **CAB 423**; Trial Exhibit Q at "Rent a Space Padstow 20 May 2014 1.42pm", from 35m 7s to 37m 20s; Trial Exhibit P **RFM 82**.
[129] CCA [15] **CAB 387**.
[130] CCA [17] **CAB 390-391**.
[131] CCA [142]-[144] **CAB 425**; Trial Exhibit Q at "Rent a Space Padstow 20 May 2014 1.42pm", from 37m 20s to 50m 27s; Trial Exhibit P **RFM 82**.
[132] CCA [148] **CAB 426**; Trial Exhibit Q at "Kennards Hire Taren Point 20 May 2014 4.20pm", from 51m 53s to 1h 2m 29s; Trial Exhibit P **RFM 82**.
[133] CCA [150] **CAB 427**.
[134] Trial Exhibit Q at "Cote D'Azur Apartments 20 May 2014 at 5.06pm, at 5.12pm, at 5.14pm, at 5.26pm", from 1h 3m 35s to 1h 5m 25s, Trial Exhibit P **RFM 82**.
[135] CCA [150] **CAB 427**; Trial Exhibit Q at "Cote D'Azur Apartments 20 May 2014 6.24pm", from 1h 5m 25s to 1h 6m 3s; Trial Exhibit P **RFM 82**.
[136] CCA [151] **CAB 427**, [281]-[284] **CAB 457-458**.

71. There was a body of evidence from the appellant that he found the drugs that had been in BV67PX. His evidence of dealing with the methylamphetamine through a fear of fire or explosion lacked credibility.[137]

72. The appellant and Rogerson departed from the appellant's apartment complex, taking his boat containing the body of the deceased on the morning of 21 May 2014.[138] CCTV footage showed both men in the lift of the apartment complex. The appellant held two fishing rods.[139] The body of the deceased, wrapped in the surfboard cover, a tarpaulin and chains and tied to an anchor was disposed of at sea.[140]

73. The appellant met Rogerson and others at the Crown Hotel, Revesby on the night of 22 May 2014. The appellant gave evidence that Rogerson instructed him to bring BV67PX and the drugs, but the appellant refused.[141] Rogerson wanted BV67PX and the drugs towed away.[142] However on 23 May 2014 the appellant cancelled the arrangement for BV67PX to be towed.[143]

74. Rogerson left a message for the appellant on 23 May 2014 at 11:10am. It gives no suggestion of any duress or coercion exercised by Rogerson over the appellant.[144]

75. On 24 May, after discovering BV67PX gone (because the police had taken it and the drugs therein),[145] the appellant spoke by telephone to Rogerson, who was about to fly to Queensland.[146] The appellant went to the airport to meet with Rogerson.[147] No suggestion of duress can be detected in the conversation.

76. The Crown presented an overwhelming case against the appellant. Notwithstanding that the subject evidence was not admitted, the appellant's guilt was proven at trial and the proviso should be applied.

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[137] TT 3170.5-3173.48 **RFM 155-158**; TT 3178.35-3179.15 **RFM 159-160**; TT 3958.7-21 **RFM 221**; TT 4016.45-50 **RFM 229**.
[138] CCA [152] **CAB 427**.
[139] Trial Exhibit Q at "Cote D'Azur Apartments 21 May 2014 at 7.32am", from 1h 9m 39s to 1h 10m 23s; Trial Exhibit P **RFM 83**.
[140] CCA [90] **CAB 411-412**, [186]-[192] **CAB 435**.
[141] TT 3179.33-3180.14 **RFM 160-161**; TT 3912.11-42 **RFM 179**.
[142] TT 3217.40-3218.15 **RFM 169-170**; TT 3181.1-40 **RFM 162**.
[143] TT 3187.42-3188.50 **RFM 166-167**; TT 3992.38-3997.39 **RFM 223-228**.
[144] Trial Exhibit CX1, Trial Exhibit CX2 **RFM 84**.
[145] CCA [168]-[169] **CAB 431-432**.
[146] Trial Exhibit CY1; Trial Exhibit CY2 **RFM 86**.
[147] CCA [172]-[174] **CAB 432-433**; [298]-[299] **CAB 460**.

Conclusion

77. The appeal should be dismissed.

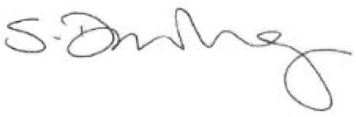
Part VI: Notice of contention or cross-appeal

78. Not applicable.

Part VII: Estimate of time

79. The respondent estimates three hours will be required for the respondent's oral argument.

Dated 24 February 2023



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Annexure: List of the provisions, statutes and statutory instruments referred to in the written submissions:

Children and Young Persons (Care and Protection) Act 1998 NSW, s 29 (as at 25 November 2022)

Crimes Act 1900 (NSW) s 18 (as at 1 February 2023)

Criminal Procedure Act 1986 (NSW) 21, 29, 294CB (as at 1 February 2023)

Drug Misuse and Trafficking Act 1985 (NSW) ss 25(2), 33(3)(a) (as at 1 April 2021)

Evidence Act 1995 (NSW), ss 4, 9, 17, 20, 27, 30 37, 49, 50, 65, 73, 83, 97, 98, 100, 104, 108B, 110, 111, 117-126F, 135, 136, 137 177, and Dictionary Cl 2, 7 (as at 25 November 2022)

Interpretation Act 1987 (NSW) s 21 (as at 13 April 2022)

Criminal Evidence Act 1898 (UK), s 1 (as at 31 October 2009)