



HIGH COURT OF AUSTRALIA

5 February 2020

KADIR v THE QUEEN; GRECH v THE QUEEN
[2020] HCA 1

Today, the High Court unanimously allowed, in part, two appeals from the Court of Criminal Appeal of the Supreme Court of New South Wales. The appeals concerned the admissibility of improperly or illegally obtained evidence. Section 138 of the *Evidence Act 1995* (NSW) relevantly provides that evidence obtained improperly or in contravention of an Australian law, or in consequence of such an impropriety or contravention, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

The appellants, Mr Kadir and Ms Grech, are jointly charged on an indictment with acts of serious animal cruelty. The charges relate to the alleged use of rabbits as "live bait" in training racing greyhounds. At the trial, the respondent proposes to tender seven video-recordings depicting activities at Mr Kadir's property which were covertly recorded by Animals Australia in contravention of s 8(1) of the *Surveillance Devices Act 2007* (NSW) ("the surveillance evidence"). It also proposes to tender material obtained as a result of the execution of a search warrant by officers of the Royal Society for the Prevention of Cruelty to Animals ("RSPCA") ("the search warrant evidence") and certain alleged admissions made by Mr Kadir ("the admissions"). Each of the three categories of evidence was obtained either in contravention of an Australian law, or in consequence of such a contravention.

On the first day of the trial in the District Court of New South Wales, the appellants applied to have the surveillance evidence, the search warrant evidence, and, in Mr Kadir's case, the admissions, excluded pursuant to s 138 of the *Evidence Act*. Following a voir dire hearing, the trial judge excluded each of the three categories of evidence. The respondent appealed to the Court of Criminal Appeal, contending, among other grounds, that the trial judge failed to properly assess the difficulty of obtaining the evidence without contravening an Australian law, being a relevant factor under s 138(3)(h). The Court of Criminal Appeal found that the difficulty of lawfully obtaining the evidence "tip[ped] the balance" in favour of admitting the first recording of the surveillance evidence, but that once the first recording was obtained, Animals Australia might have approached the authorities with a view to further evidence being obtained by lawful means, with the result that s 138(1) required exclusion of the balance of the recordings. The Court of Criminal Appeal also held that the trial judge erred in his analysis of the admissibility of the search warrant evidence and the admissions in failing to take into account material differences in the "way" these categories of evidence were obtained as compared to the surveillance evidence, and determined that the search warrant evidence and the admissions were also admissible.

By grant of special leave, the appellants appealed to the High Court. The Court held that the basis upon which the parties and the courts below approached s 138(3)(h) was misconceived: demonstration of the difficulty of obtaining the evidence lawfully did not weigh in favour of admitting evidence obtained in deliberate defiance of the law. The trial judge's conclusion that all of the surveillance evidence should be excluded was correct. The High Court proceeded to re-determine the admissibility of the search warrant evidence and the admissions according to law and found that the Court of Criminal Appeal was correct to conclude that the search warrant evidence

and the admissions were admissible. The causal link between the contravention and the admissions was tenuous, which affected the weighing of the public interest in not giving curial approval or encouragement to unlawful conduct. In the result, the appeals were allowed in part, with the effect that all of the surveillance evidence is inadmissible in the appellants' trial, but the search warrant evidence and the admissions are admissible.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*