

HIGH COURT OF AUSTRALIA

GAGELER CJ
GORDON, STEWARD, GLEESON AND JAGOT JJ

GLEN PATRICK MCNAMARA

APPELLANT

AND

THE KING

RESPONDENT

McNamara v The King
[2023] HCA 36
Date of Hearing: 16 May 2023
Date of Judgment: 15 November 2023
S143/2022

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with G D Wendler and D A Ward for the appellant
(instructed by Kings Law Group)

S C Dowling SC with E Balodis and A L Bonnor for the respondent
(instructed by Director of Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

McNamara v The King

Evidence – Criminal trial – Joint trial – Discretionary exclusion rule – Where appellant and co-accused convicted of murder and supplying large commercial quantity of methylamphetamine – Where appellant sought to lead evidence at trial that co-accused admitted participation in several homicides and other criminal violence to establish defence of duress – Where evidence excluded because unfairly prejudicial to co-accused – Where s 135(a) of *Evidence Act 1995* (NSW) permits court to refuse to admit evidence if probative value substantially outweighed by danger of unfair prejudice to "a party" – Whether "a party" includes co-accused in joint criminal trial.

Words and phrases – "a party", "discretionary exclusion", "evidence", "interests of justice", "joint criminal trial", "joint indictment", "jointly charged", "proceeding", "reasons of principle and policy", "right to adduce admissible evidence", "unfairly prejudicial".

Criminal Procedure Act 1986 (NSW), ss 21(2)(b), 29, 29A.

Evidence Act 1995 (NSW), ss 9, 135(a).

1 GAGELER CJ, GLEESON AND JAGOT JJ. Section 135(a) of the *Evidence Act* 1995 (NSW) ("the Evidence Act") empowers a court to refuse to admit evidence, that is relevant and otherwise admissible in "a proceeding", if the probative value of the evidence is substantially outweighed by the danger that it might be unfairly prejudicial to "a party". The question in this appeal is whether "a party" includes a co-accused in a joint criminal trial. The answer is that it does. The Court of Criminal Appeal of the Supreme Court of New South Wales was correct so to hold, and the appeal must be dismissed.

2 To explain that answer in a manner responsive to the argument of the appellant, it is necessary to say something of the nature of a joint criminal trial, to examine the antecedent common law pertaining to the exclusion of evidence sought to be adduced by a co-accused, and to explain more fully how the scheme of the Evidence Act applies to a joint criminal trial.

Background to the appeal

3 The appellant, Glen McNamara, and his co-accused, Roger Rogerson, were tried by a jury before Bellew J in the Supreme Court of New South Wales on a single indictment presented by the Director of Public Prosecutions on behalf of the Crown in right of the State of New South Wales. The indictment charged them jointly with one count of murder and one count of supplying a large commercial quantity of methylamphetamine. The Crown case was that McNamara and Rogerson engaged in a joint criminal enterprise described as a "drug rip-off". Their plan was for McNamara to lure the deceased, Jamie Gao, a drug supplier, to a storage unit with the methylamphetamine where Rogerson was to pose as a purchaser. Their plan was then to dispossess Gao of the methylamphetamine and to cover their tracks by killing Gao and disposing of his body.

4 McNamara's case was that he was not party to a joint criminal enterprise with Rogerson either to dispossess Gao of the drugs or to kill Gao. His case was that an altercation between Gao and Rogerson occurred at the storage unit. The altercation culminated in Rogerson shooting Gao twice with a gun. Until the shooting, McNamara had been unaware that Rogerson had brought a gun to the storage unit. Following the shooting, he assisted Rogerson handling the drugs and disposing of Gao's body under the duress of Rogerson.

5 Rogerson's case was likewise that he was not party to such a joint criminal enterprise with McNamara, although his story of what occurred was different. His case was that he had gone to the storage unit to assist McNamara as his "second set of eyes". When he entered the storage unit, Gao was already lying dead on the floor.

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6 The Crown closed its case on the 49th day of the trial. McNamara and Rogerson then consecutively went into evidence. After giving his evidence in chief, each was cross-examined by counsel for the Crown and by counsel for the other accused.

7 McNamara testified in his evidence in chief that, immediately after the fatal second shot, he asked Rogerson "why? why? why?". He testified that Rogerson in response approached him with the gun pointed directly at his head. McNamara sought to testify that Rogerson said:

"I did Drury, I did Drury. I'll do you too. Get up and fucking help me you weak cunt or I'll leave you on the floor lying next to him ... He pulled the fucking knife first, get up and help me or you'll be as dead as him, then I'll kill your girls."

The reference to "Drury" was to Michael Drury.

8 McNamara additionally sought to testify to having had a conversation with Rogerson some months earlier. The earlier conversation was said to have occurred on a social occasion and in the context of McNamara having agreed to write a book about Rogerson. During the conversation, according to McNamara, Rogerson told McNamara that Rogerson had shot Michael Drury, had murdered Christopher Flannery and disposed of his body, had murdered Warren Lanfranchi, had arranged the murder of Alan Williams, and had been involved with the murders of Sallyanne Huckstepp and Luton Chu.

9 Having been appropriately forewarned of the terms of that proposed testimony, counsel for Rogerson objected to the admission of the whole of the earlier conversation and to the admission of the words "I did Drury, I did Drury". The basis of the objection was that the probative value of that proposed testimony to McNamara was substantially outweighed by the danger of its prejudicial effect on Rogerson.

10 In a reasoned ruling, the trial judge upheld the objection¹. No point having been taken before the trial judge that he lacked power to exclude the proposed testimony of McNamara under s 135(a) of the Evidence Act, his Honour explained that he was persuaded that the probative value of the testimony to McNamara was outweighed by the real danger that it would be unfairly prejudicial to Rogerson and therefore that the power under s 135(a) of the Evidence Act should be exercised to exclude the testimony. As to the probative value of the testimony to McNamara, his Honour found that it added little to McNamara's case of duress,

1 *R v Rogerson [No 45]* [2016] NSWSC 452.

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the "real basis" of the duress McNamara asserted stemming from a combination of seeing Gao shot in cold blood and the threat made by Rogerson immediately afterwards². As to the danger of unfair prejudice to Rogerson, his Honour was satisfied that there was a real danger that admission of the testimony would leave the jury with a distinct impression that Rogerson was complicit in the murder of a number of other people³. That gave rise to a danger that the jury would be improperly influenced by that impression in reaching their verdict as to whether Rogerson had murdered Gao. His Honour considered that danger to be incapable of being alleviated by a direction in any terms⁴.

11 McNamara's evidence in chief as adduced at the trial accordingly omitted the words "I did Drury, I did Drury" from his account of what Rogerson said to him at the storage unit and omitted all reference to the earlier conversation between McNamara and Rogerson.

12 Prior to the trial, Rogerson and McNamara had each unsuccessfully applied for a separate trial⁵. After the ruling of the trial judge which excluded McNamara's proposed testimony, McNamara did not make a further application for a separate trial.

13 In his summing up, the trial judge instructed the jury repeatedly that the prosecution bore the onus of proof "from start to finish" and that the ultimate question for them was whether they were satisfied beyond reasonable doubt that each element of each offence against each accused had been made out. His Honour instructed the jury that the fact that McNamara and Rogerson were being tried together was essentially a matter of administrative convenience and that the jury needed to consider the Crown case against each of them in respect of each count in the indictment separately. His Honour also instructed that, subject to presently immaterial exceptions in respect of which he gave specific directions, all of the evidence admitted in the trial was capable of being used by the jury "either for or against any party". He spelt out that he meant by that instruction that all of the evidence was capable of being used by the jury for or against the Crown or for against either McNamara or Rogerson. No complaint has been made in this appeal about any of those instructions. As will become apparent, all were impeccable.

2 *R v Rogerson [No 45]* [2016] NSWSC 452 at [35].

3 *R v Rogerson [No 45]* [2016] NSWSC 452 at [40].

4 *R v Rogerson [No 45]* [2016] NSWSC 452 at [41].

5 *R v Rogerson [No 3]* [2015] NSWSC 965.

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14 The jury found McNamara and Rogerson each guilty as charged. For the murder of Gao, each was convicted and sentenced to imprisonment for life without parole. For the supply of the methylamphetamine, each was convicted and sentenced to imprisonment for 12 years with a non-parole period of nine years.

15 McNamara and Rogerson each appealed against his conviction. Each appeal was heard and dismissed by the Court of Criminal Appeal constituted by Bell P, R A Hulme and Beech-Jones JJ.

16 One of the grounds on which McNamara unsuccessfully appealed against his conviction to the Court of Criminal Appeal was to the effect that the trial judge was wrong to uphold Rogerson's objection to McNamara's proposed testimony. Despite the point not having been taken before the trial judge, McNamara argued that the trial judge lacked power to exclude the testimony under s 135(a) of the Evidence Act because Rogerson was not "a party" to McNamara's trial. McNamara argued in the alternative that, if there was power to exclude his testimony, the power should not have been exercised because the probative value of the testimony to him should not have been found to have been substantially outweighed by the danger of its prejudicial effect on Rogerson. The Court of Criminal Appeal unanimously rejected both arguments⁶. Only the first of those arguments was renewed before this Court.

17 The sole ground on which McNamara sought and was granted special leave to appeal to this Court was that the Court of Criminal Appeal was wrong to reject his argument that there was no power to exclude his testimony under s 135(a) of the Evidence Act because Rogerson was not "a party" to his trial. No issue was sought to be raised or has been raised before this Court as to the correctness of the exercise of the power assuming the power to have been available.

The arguments on the appeal

18 Though McNamara's argument was directed ultimately to the construction of s 135(a) of the Evidence Act, McNamara pitched the argument at a level of high common law principle.

19 McNamara argued that the fundamental conception of a joint criminal trial at common law is that of the concurrent holding of separate trials of separate cases each exclusively between the Crown and a co-accused. In each of those several trials, according to McNamara, the co-accused has an unfettered right to make full answer to the Crown case against him or her by adducing admissible evidence probative of his or her innocence. Evidence adduced by one co-accused in the trial

6 *Rogerson v The Queen* (2021) 290 A Crim R 239 at 243-263 [478]-[562].

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of that accused in answer to the Crown case against that co-accused does not become evidence in the Crown case against another co-accused in the trial of that other accused unless the Crown elects to re-open and to adopt the evidence of the co-accused in its separate case against the other co-accused. Unless the Crown takes that course of electing to adopt evidence sought to be adduced by one co-accused in its case against another co-accused, so McNamara's argument went, no occasion can arise for that evidence to be the subject of objection by the other co-accused.

20 To the extent there is a risk that relevant and otherwise admissible evidence adduced by one co-accused in answer to the Crown case against that co-accused might be improperly considered by the jury in the Crown case against another co-accused, McNamara argued that risk must be managed by the trial judge in the separate trial between the Crown and that other co-accused. The management tools available to the trial judge in that distinct trial include giving appropriate directions cautioning against use of the evidence by the jury in their consideration of the Crown case against that other co-accused. The management tools available to the trial judge also include, as a last resort, the continuing availability of the power to order a separate trial of the Crown case against that other co-accused. Those management tools do not include any power to exclude the evidence from the case of the co-accused who seeks to adduce that evidence in his or her own defence.

21 By way of principal illustration of the operation of the common law principle for which he contended, McNamara referred to the decision of the Privy Council in *Lowery v The Queen*⁷. There, in a joint trial of two co-accused charged with the callous murder of a young girl, evidence of the opinion of a psychologist as to the respective intelligences and personalities of the two was held admissible in the defence of one co-accused as a basis upon which to attempt to persuade the jury that the other co-accused was the more likely to have killed the girl. The Privy Council specifically endorsed⁸ a statement in the decision of the Full Court of the Supreme Court of Victoria in *R v Lowery [No 3]*⁹ under appeal to the effect that there appeared no reason of policy or fairness which justified or required the exclusion of evidence tendered by an accused in disproof of his or her own guilt.

22 McNamara argued that the common law principle for which he contended is unaffected by the *Criminal Procedure Act 1986* (NSW) ("the Criminal Procedure Act") and is safeguarded by s 9(1) of the Evidence Act which provides

7 [1974] AC 85.

8 [1974] AC 85 at 102.

9 [1972] VR 939 at 945.

that the Evidence Act "does not affect the operation of a principle or rule of common law ... in relation to evidence in a proceeding to which [the] Act applies, except so far as [the] Act provides otherwise expressly or by necessary intendment". Thus, according to McNamara, a co-accused retains an unfettered common law right to adduce admissible evidence in answer to the Crown case against that co-accused. Neither expressly nor by necessary intendment does s 135(a) of the Evidence Act impinge on that common law right.

23 The Director of Public Prosecutions disputed almost every aspect of McNamara's account of the features of a joint criminal trial at common law. In particular, the Director disputed the proposition that a co-accused has, or ever had, an unfettered common law right to adduce admissible evidence in support of his or her innocence. As a counterpoint to the principal illustration of the operation of the common law principle for which McNamara contended, the Director referred to an aspect of the decision of the Full Court of the Supreme Court of Victoria in *R v Lowery [No 3]* which had not been the subject of appeal to the Privy Council in *Lowery v The Queen*. The Full Court had specifically considered and rejected an argument that the trial judge had erred in refusing to exclude the opinion evidence of the psychologist "in the exercise of his discretion". The Full Court stated that "[i]t must be borne in mind that what fell to be assessed ... was not the relative positions of the Crown and [a co-accused], but the probative value of the evidence to the defence of [one co-accused] and the prejudicial effect on the defence of [the other]"¹⁰. That reasoning, the Director pointed out, assumed the existence of a common law discretion on the part of a trial judge to exclude evidence the probative value of which to one co-accused was outweighed by its prejudicial effect on the other. The reasoning went further in underscoring that the trial judge's exercise of that common law discretion involved consideration of the positions of the co-accused relative to each other and not the positions of each co-accused relative to the Crown.

24 Whatever the position at common law, the Director argued, it is clear that, within the meaning of the Evidence Act, a joint criminal trial is "a proceeding" to which each co-accused is "a party", although a co-accused can also fall within several other descriptors within that Act.

Joint criminal trials at common law

25 No account of the features of a criminal trial at common law could be proffered without circumspection. Historical analysis has demonstrated that the nature of a criminal trial changed markedly during the period between the end of the seventeenth century and the end of the eighteenth century from a proceeding

10 *R v Lowery [No 3]* [1972] VR 939 at 947.

which had been essentially inquisitorial to one which became essentially adversarial¹¹.

26 Many aspects of criminal procedure now considered fundamental were introduced only in the nineteenth and early twentieth centuries, and then only in consequence of statute¹². The competence of an accused to give sworn evidence in his or her own defence is a pertinent example. That competence simply did not exist at common law¹³. It was introduced by statute in New South Wales only in 1891¹⁴ and in England only in 1898¹⁵. The scenario with which the present case is concerned – of one co-accused seeking to testify adversely to another co-accused – could not have arisen in a common law trial before then given that neither co-accused could have testified at all.

27 Many common law rules of criminal procedure now considered fundamental were fashioned from conventional practice into rules of law quite late in the development of the common law. The power and duty of a court to exclude relevant and otherwise admissible prosecution evidence the probative value of which was outweighed by its forensic prejudice to an accused was acknowledged to have developed into a rule of law only in 1914¹⁶. The "golden thread" said to have been seen "throughout the web of English criminal law"¹⁷ – "that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt,

11 See Langbein, *The Origins of Adversary Criminal Trial* (2003).

12 See Smith, "The Trial: Adversarial Characteristics and Responsibilities; Pre-trial and Trial Procedures", in Baker (ed), *The Oxford History of the Laws of England* (2010), vol 13, 58 at 60-121.

13 *Cornwell v The Queen* (2007) 231 CLR 260 at 272.

14 Section 6 of the *Criminal Law and Evidence Amendment Act of 1891* (NSW). See *R v Stalder* [1981] 2 NSWLR 9 at 24.

15 Section 1 of the *Criminal Evidence Act 1898* (UK).

16 *R v Christie* [1914] AC 545 at 559. See Pattenden, *The Judge, Discretion and the Criminal Trial* (1982) at 66-67.

17 *Thomas v The Queen* (1960) 102 CLR 584 at 602.

the [accused] should have the benefit of it"¹⁸ – was "discovered"¹⁹ only in 1935²⁰. It will be seen that such support as is to be found in appellate decisions in common law jurisdictions for the existence of the unfettered common law right of a co-accused to give testimony adverse to another co-accused, for which McNamara argued, is of very much more recent origin.

28

There is nevertheless one feature of criminal procedure for trial by jury at common law the requirement for which has been constant through the centuries and remains foundational to the conduct of a trial by jury: the indictment. The indictment is the written accusation (sometimes styled an "information" or a "presentment") which charges one or more accused with one or more offences (each referred to as a "count") and which in so doing constitutes a plea of the Crown²¹. Presentation of the indictment to a court initiated the arraignment of the accused. If and to the extent that an accused pleaded not guilty to the charge or charges set out in the indictment, so as to be taken to have put himself or herself "upon the Country" for trial, the indictment then founded the jurisdiction of the court to empanel a jury to try the issues joined between the Crown and that accused in relation to the disputed charge or charges²². Those basic incidents of a trial on indictment at common law appear to have become conventional by the second half of the eighteenth century²³ and to have been settled by the second half of the nineteenth century²⁴. Following the introduction of trial by jury in New South Wales as the standard method of trial of "all crimes misdemeanors and offences cognizable in the Supreme Court ... and prosecuted by information in the name of Her Majesty's Attorney General or other officer duly appointed for such purpose

18 *Mancini v Director of Public Prosecutions* [1942] AC 1 at 11.

19 *Parker v The Queen* (1963) 111 CLR 610 at 661.

20 *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481-482.

21 *Munday v Gill* (1930) 44 CLR 38 at 86; *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 523-524; *R v Hull* (1989) 16 NSWLR 385 at 389-393.

22 *Munday v Gill* (1930) 44 CLR 38 at 86-87.

23 See Blackstone, *Commentaries on the Laws of England* (1769), bk 4 at 299, 317-319, 333-335, 342-345. Compare Baker, "Criminal Courts and Procedure 1550-1800", in *Collected Papers on English Legal History* (2013), vol 2, 1015 at 1046; Beattie, *Crime and the Courts in England 1660-1800* (1986) at 395-396.

24 See Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 297-307.

by the Governor" by statute in 1839²⁵, those incidents were incorporated into the scheme of the *Criminal Law Amendment Act 1883* (NSW)²⁶ and the *Crimes Act 1900* (NSW)²⁷ and are preserved within the scheme of the Criminal Procedure Act²⁸.

29 The procedure was eventually recognised to involve something which has come to be described as the "one indictment, one jury" rule: that "in a trial upon indictment the jury is, and can only be, impanelled and sworn to try the issues of the particular indictment – to find whether the accused be guilty or not guilty upon that indictment and no other"²⁹. "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" such that "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"³⁰. The "one indictment, one jury" rule was recognised to have crystallised into a common law rule by the House of Lords in 1921, in *Crane v Director of Public Prosecutions*³¹, and was acknowledged by this Court nine years later in *Munday v Gill*³². The common law rule was held by the Court of Criminal Appeal in *R v Swansson*³³ to survive in New South Wales unaffected by the Criminal Procedure Act.

30 To confine one jury to one trial on one indictment has never been thought incompatible with charging one accused with more than one offence on one indictment or with charging multiple accused with one or more offences on one indictment as occurred in the present case. In this respect, something needs to be said of two provisions of the Criminal Procedure Act which have sometimes of

25 *Jury Trials Act 1839* (NSW). See *Alqudsi v The Queen* (2016) 258 CLR 203 at 254-255 [129].

26 See s 332 of the *Criminal Law Amendment Act*.

27 See s 395 of the *Crimes Act 1900* (NSW).

28 See ss 130 and 154 of the Criminal Procedure Act.

29 *Munday v Gill* (1930) 44 CLR 38 at 76.

30 *Munday v Gill* (1930) 44 CLR 38 at 87.

31 [1921] 2 AC 299.

32 (1930) 44 CLR 38 at 76, 87.

33 (2007) 69 NSWLR 406 at 409-411 [11]-[31].

late been conflated in practice³⁴ but which have different provenances and distinct operations.

31 The first is s 21(2)(b), which appears within Pt 2 headed "Indictments and other matters". Section 21(2)(b) is expressed to empower a court to "order a separate trial of any count or counts of [an] indictment" if the court forms the opinion that "it is desirable to direct that an accused person be tried separately for any one or more offences charged in [the] indictment". The reference to "an accused person" is to any accused person charged in the one indictment. That provision assumes the capacity of the Crown to charge multiple accused with one or more offences on one indictment, thereby resulting in a single trial, and restates the power which a court had at common law nevertheless to order separate trials and thereby to bring about a severance of the indictment.

32 The second is s 29(2), which appears within Pt 3 headed "Criminal proceedings generally" and which is explained by s 28(1) to apply "to the extent that it is capable of being applied, to all offences, however arising ... in whatever court dealt with". Section 29(2) is expressed to empower a court in specified circumstances to "hear and determine together proceedings related to offences alleged to have been committed by 2 or more accused persons" subject to the prohibition in s 29(3) that "[p]roceedings related to 2 or more offences or 2 or more accused persons may not be heard together if the court is of the opinion that the matters ought to be heard and determined separately in the interests of justice". Despite the generality of their language, s 29(2) and (3) are properly construed against the background of the provenance of s 29 in the *Justices Act 1902 (NSW)*³⁵ and its subsequent legislative history³⁶ as confined to summary proceedings. In respect of summary proceedings, as *Munday v Gill*³⁷ established, the "one indictment, one jury" rule had no analogue: separate proceedings against different accused charged on different informations could be heard together without affecting the jurisdiction of the justices to hear them.

34 eg *FX v The Queen* (2020) 290 A Crim R 31 at 38 [164]-[166]; *Caleo v The Queen* (2021) 290 A Crim R 352 at 375-376 [132]-[133]. Compare *R v Newson* [2020] NSWSC 462 at [11].

35 Section 78A of the *Justices Act 1902 (NSW)* as substituted by Item (2) of Sch 1 to the *Justices (Amendment) Act 1987 (NSW)*.

36 See *R v Darwiche* [2006] NSWSC 929 at [114]-[118].

37 (1930) 44 CLR 38 at 88-90.

33 Accordingly, in the language of s 28(1), neither s 29(2) nor s 29(3) is "capable of being applied" to proceedings on indictment. Having no application to proceedings on indictment, s 29(2) and (3) cannot be taken to contradict the "one indictment, one jury" rule of the common law. Section 29(2) does not empower a court to hear and determine together proceedings on two or more indictments. Nor do the references to proceedings related to offences alleged to have been committed by two or more accused persons in s 29(2) and (3) indicate that the trial of multiple accused on one indictment involves the hearing and determination together of multiple proceedings.

34 Lest it be thought to have been overlooked, something should also be said about one aspect of s 29A, which was inserted into Pt 3 of the Criminal Procedure Act in 2020³⁸. Section 29A(1) makes provision for circumstances in which "[a] court must hear and determine together proceedings for 2 or more offences" alleged to have been committed by the same person and where the prosecution has given notice that it intends to rely on tendency or coincidence evidence that relates to more than one of those offences. Section 29A(1)(b)(i) specifies as one of those circumstances if "the offences are ... charged in the same indictment". To the extent that those provisions may assume that the trial of an accused for multiple offences charged in the same indictment involves the hearing and determination together of multiple proceedings, they are mistaken as to the common law nature of a trial on indictment. That mistaken assumption cannot itself alter the common law nature of a trial on indictment. Nor can it affect the construction of any other provision of the Act. "An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it"³⁹.

35 Where multiple accused have together been charged with one offence on one indictment, it has not been thought inappropriate to refer to them as "co-accused" who are "jointly charged" on a "joint indictment" and to refer to the resultant trial in the event of pleas of not guilty as a "joint trial". That terminology has not been thought inappropriate even though it has been recognised that every joint charge against two or more co-accused on a joint indictment is also a several charge against each of those co-accused such that it may be open to the jury in a

38 Item 1.8 [3] of Sch 1 to the *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020* (NSW).

39 *Deputy Federal Commissioner of Taxes (SA) v Elders' Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 505-506.

joint trial to return a verdict of guilty in respect of one co-accused and a verdict of not guilty in respect of another co-accused⁴⁰.

36 Moreover, given that the evidentiary issues joined by the plea of the Crown and the separate plea of each co-accused might differ, it has not been thought inappropriate in the joint trial of a joint charge against two or more co-accused to refer to the Crown "case" against each co-accused and the defence "case" for each co-accused. Occasional references to "the trial" of each co-accused⁴¹ should not be taken to countenance the notion of a joint trial involving the concurrent conduct of separate trials, but should be understood as referring to the hearing and determination of the issues joined by those respective cases within the one joint trial. For so long as there remains one indictment there can remain but one trial.

37 Reference to the decision of the Full Court of the Supreme Court of South Australia in *R v Webb and Hay*⁴², as affirmed on appeal to this Court in *Webb v The Queen*⁴³, is sufficient to refute the contention of McNamara that evidence adduced by one co-accused in his or her defence was available at common law to be used by the jury in considering their verdict in respect of another co-accused only if the evidence was adopted by the Crown in its case against that other co-accused. The timing of that decision is significant in that the decision can be taken to illustrate the position at common law as understood in Australia immediately before the enactment of the *Evidence Act 1995* (Cth) ("the Commonwealth Evidence Act") and the Evidence Act (together, "the Uniform Evidence Acts").

38 *R v Webb and Hay* concerned the trial of two co-accused who were jointly charged with murder. Hay gave evidence that Webb delivered the fatal blow. Webb did not give evidence at all. Webb argued that Hay's evidence required the trial judge to have warned the jury that it was dangerous to convict on the uncorroborated evidence of an accomplice. King CJ, with whom other members of the Full Court agreed, rejected that argument. King CJ said that the requirement for such a warning at common law was "confined to the evidence of a witness for

40 *R v Fenwick* (1953) 54 SR (NSW) 147 at 152; *Director of Public Prosecutions v Merriman* [1973] AC 584 at 591-594, 606-607; *R v Darby* (1982) 148 CLR 668 at 677; *King v The Queen* (1986) 161 CLR 423 at 433-434.

41 eg *Bannon v The Queen* (1995) 185 CLR 1 at 13. See also Ross, "One Accused's Evidence of Another's Criminal Disposition" (2006) 11 *Deakin Law Review* 179 at 179.

42 (1992) 59 SASR 563.

43 (1994) 181 CLR 41.

the prosecution"⁴⁴ and adopted the statement of Gleeson CJ, Campbell and Mathews JJ in *R v Henning*⁴⁵ that "different principles apply when the supposed accomplice who gives evidence against a co-accused is himself an accused giving evidence in his own case" in which event "[c]onsiderable latitude must be allowed in order to enable trial judges to address the situation in a manner which will adapt to the competing interests in the particular case". That reasoning was specifically endorsed on appeal by four members of this Court⁴⁶.

39 For reasons also specifically endorsed on appeal by three members of this Court⁴⁷, King CJ went on to reject a distinct argument that the trial judge should have ordered separate trials of Webb and Hay⁴⁸. Drawing on his earlier discussion of principle in *R v Collie*⁴⁹, King CJ referred to there being "strong reasons of principle and policy why persons charged with committing an offence jointly ought to be tried together", especially "where each seeks to cast the blame on the other", leading to the conclusion "that ordinarily persons accused of committing a crime jointly ought to be tried jointly".

40 Reasons of principle and policy earlier identified in *R v Collie* to support the joint trial of two or more co-accused charged with the same offence centrally include the desirability of a jury having before them "the respective accounts and explanations which are given by all of the alleged criminal participants in [an] incident" in order "to arrive at the truth of the matter"⁵⁰. It was there emphasised that, "particularly when each of the accused is seeking to cast the blame on to the other, the interests of justice demand that the jury should have the whole picture presented to them and not half of it, and should see the person on whom blame is sought to be cast as well as the person seeking to cast it"⁵¹. Pursuit of that objective

44 (1992) 59 SASR 563 at 581.

45 Unreported, Court of Criminal Appeal of New South Wales, 11 May 1990.

46 *Webb v The Queen* (1994) 181 CLR 41 at 56, 80-81, 93-94.

47 (1994) 181 CLR 41 at 56, 89.

48 (1992) 59 SASR 563 at 585.

49 (1991) 56 SASR 302 at 307-311.

50 (1991) 56 SASR 302 at 309, quoting *R v Glover* (1987) 46 SASR 310 at 312.

51 *R v Collie* (1991) 56 SASR 302 at 308, citing *R v Gibbins and Proctor* (1918) 13 Cr App R 134 at 137, *R v Grondkowski* [1946] KB 369 and *R v Kerekes* (1951) 70 WN

would be thwarted were evidence given by a co-accused not available to be weighed by the jury in considering their verdicts in respect of each other co-accused, subject to such particular exclusions or limitations on use as might be warranted in the circumstances of a particular trial. Other important reasons of principle and policy which have properly been recognised to support a joint trial include the avoidance of inconsistent verdicts⁵² and the delay in the administration of justice, the increased public expense, and the increased trauma and inconvenience to witnesses, associated with the conduct of separate trials⁵³.

41 Mindful that such reasons of principle and policy might not prevail against countervailing considerations in every case, and could not in any case prevail against the fundamental right of an accused to a fair trial, the common law recognised the power of a court presented with a joint indictment to sever the indictment by ordering separate trials of any one or more charges against any one or more accused where the court was satisfied that the overall interests of justice affirmatively required that course to be taken. The power was exercisable before trial and remained exercisable at any stage during the trial. The same is true of the statutory power to order a separate trial now reposed in a court by s 21(2)(b) of the Criminal Procedure Act⁵⁴.

42 Given that it is in the nature of a joint trial that evidence adverse to one or more co-accused can become known to the jury which would not be known to separate juries were separate trials of each co-accused to be conducted, the existence of some risk of forensic prejudice to an accused arising from the admission of such evidence is inherent in any joint trial and is not of itself inconsistent with the overall interests of justice supporting the conduct or continuation of the joint trial. Prejudice to a co-accused will not result in the ordering of a separate trial if it is amenable to nullification by judicial direction to the jury⁵⁵. Having regard to the strength of the reasons of principle and policy which ordinarily weigh in favour of a joint trial, however, even substantial prejudice to a co-accused of a kind not really amenable to nullification by judicial

(NSW) 102. See also *Ali v The Queen* (2005) 79 ALJR 662 at 670 [58]; 214 ALR 1 at 12.

52 *Webb v The Queen* (1994) 181 CLR 41 at 89, citing *R v Demirok* [1976] VR 244 at 254.

53 *R v Demirok* [1976] VR 244 at 254.

54 See s 21(3) of the Criminal Procedure Act.

55 *R v Henry* [2008] NSWCCA 248 at [12].

direction will not result in the ordering of a separate trial "as a matter of course"⁵⁶. To justify the ordering of a separate trial, the particular prejudice to a co-accused must rather be shown to be such as would occasion "positive injustice"⁵⁷. In a joint trial, as in any other trial, "[a] fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused"⁵⁸.

43 Whether or not the right of a co-accused to adduce admissible evidence probative of his or her innocence for which McNamara contended ought to be understood to form, or ever to have formed, a principle of the common law of Australia falls to be ascertained against that broader background of considerations supporting the conduct and continuation of a joint trial.

44 Apart from the decision of the Privy Council in *Lowery*, McNamara placed the weight of his argument in favour of a co-accused having an unfettered right to adduce admissible evidence probative of his or her innocence on reasons given by Devlin J in *R v Miller*⁵⁹ for refusing to order a separate trial in circumstances where counsel for one co-accused sought to adduce relevant evidence bearing on the character of another co-accused during cross-examination of a Crown witness. Having noted that a question which sought to elicit relevant evidence bearing on the character of a co-accused would rarely be asked by counsel for the prosecution given the power and duty of the court to exclude it were the court of the opinion that its prejudicial effect outweighed its probative value, Devlin J said that "[n]o such limitation applies to a question asked by counsel for the defence", adding that "[h]is duty is to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else"⁶⁰.

45 No issue was raised in *Miller* as to whether the particular question sought to be asked by counsel for the co-accused in that case could and should have been excluded in the exercise of a judicial discretion. The only issue was whether a separate trial should be ordered in the interests of justice. Still, it is noteworthy that, in resolving that issue in the negative, Devlin J emphasised, consistently with

56 See also *R v Jones and Waghorn* (1991) 55 A Crim R 159 at 164, citing *R v Ditroia and Tucci* [1981] VR 247.

57 *Caleo v The Queen* (2021) 290 A Crim R 352 at 377-378 [137]-[138].

58 *Awad v The Queen* (2022) 296 A Crim R 561 at 587 [115], quoting *Jarvie v The Magistrates' Court of Victoria* [1995] 1 VR 84 at 90.

59 [1952] 2 All ER 667.

60 [1952] 2 All ER 667 at 669.

the considerations which support the conduct and continuation of a joint trial, that "the interests of justice are not necessarily the same as the interests of the accused"⁶¹.

46 Despite no issue having arisen in *Miller* as to the existence of a judicial discretion to exclude evidence of one co-accused the probative value of which was outweighed by its prejudicial effect on another co-accused, the reasoning of Devlin J in *Miller* was relied on by the Privy Council on appeal from the Court of Appeal of Hong Kong in *Lui Mei Lin v The Queen*⁶² to hold that the right of a co-accused to adduce evidence relevant to the defence of that co-accused in cross-examination of another co-accused was unfettered.

47 Six years later, in the same year as and shortly after the enactment of the Uniform Evidence Acts, the Privy Council on appeal from the Court of Appeal of Jamaica in *Lobban v The Queen*⁶³ relied again on the reasoning of Devlin J in *Miller*. The Privy Council linked the reasoning of Devlin J in *Miller* to a reference by Lord Morris in the House of Lords in *Murdoch v Taylor*⁶⁴ to a criminal defendant, in the statutory setting there under consideration⁶⁵, having "liberty to defend himself by such legitimate means as he thinks it wise to employ" to confine the power and duty of a court to exclude prejudicial evidence to evidence sought to be adduced by the Crown and to reject the proposition that a trial judge had any discretion to exclude evidence sought to be adduced by a co-accused the probative value of which to that co-accused was outweighed by its prejudicial effect on another co-accused. The Privy Council referred in *Lobban* to "a defendant's absolute right, subject to considerations of relevance, to deploy his case asserting his innocence as he sees fit"⁶⁶. The reasoning in *Lobban* was soon afterwards noted in this Court in *Bannon v The Queen*⁶⁷ without any view being expressed as to whether that reasoning ought to be accepted in Australia.

61 [1952] 2 All ER 667 at 670.

62 [1989] AC 288 at 296-297.

63 [1995] 1 WLR 877 at 886-889; [1995] 2 All ER 602 at 611-613.

64 [1965] AC 574 at 584.

65 Section 1(f)(iii) of the *Criminal Evidence Act 1898* (UK).

66 [1995] 1 WLR 877 at 889; [1995] 2 All ER 602 at 613.

67 (1995) 185 CLR 1 at 23.

48 On the authority of *Lobban*, the proposition that a co-accused has an unfettered right to adduce admissible evidence probative of his or her innocence subsequently came to be accepted by the Privy Council on appeal from the Court of Appeal of Hong Kong in *Tan Siew Gim v The Queen*⁶⁸, by the House of Lords in *R v Myers*⁶⁹ and by the Court of Appeal of New Zealand in *R v Hartley*⁷⁰. The proposition has since also come to be accepted by Courts of Appeal of the Supreme Courts of Queensland⁷¹, South Australia⁷² and Western Australia⁷³. At the present time, Queensland, South Australia and Western Australia are the only three of the Australian States and Territories which have not adopted legislation in the same form as the Uniform Evidence Acts. Whether the proposition should be taken to have acquired the status of a principle of the common law of Australia operative in those three States need not now be determined.

49 Under the common law as understood in Australia during the period of roughly two decades after the decision of the Privy Council in *Lowery* and before the enactment of the Evidence Act, the question whether the acknowledged right of a co-accused to adduce otherwise admissible evidence in his or her defence was qualified by a discretion on the part of the trial judge to exclude that evidence if satisfied that its probative value to that co-accused was outweighed by its prejudicial effect on another co-accused could only be described as unsettled. The Court of Criminal Appeal of New South Wales in *R v Murray*⁷⁴ and *R v Visser*⁷⁵ denied the existence of any discretion. On the other hand, as noted after *Lobban* in

68 [1995] UKPC 25 at 4.

69 [1998] AC 124 at 136, 145.

70 [2007] 3 NZLR 299 at 309 [60], [62].

71 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 403 [68]-[70] (410 [102] contra), affirmed on other grounds in *Jones v The Queen* (2009) 83 ALJR 671; 254 ALR 626.

72 *R v Murch* (2014) 119 SASR 427 at 435-436 [33]-[38].

73 *Russell v Western Australia* (2011) 214 A Crim R 326 at 348 [79]; *Mansfield v Western Australia* (2017) 52 WAR 233 at 257 [106]. Compare *Kazemi v The Queen* (2003) 28 WAR 176 at 177 [8], 184 [58], [60].

74 [1980] 2 NSWLR 526 at 535.

75 (1983) 12 A Crim R 315 at 320, 325-326. An abridged report is available at [1983] 3 NSWLR 240.

*R v Su*⁷⁶, the decisions of the Full Court of the Supreme Court of Victoria in *R v Darrington*⁷⁷ and *R v Gibb*⁷⁸ supported the existence of a discretion whilst demonstrating that circumstances justifying its exercise would be exceptional.

50 Instructively, in *Darrington*⁷⁹, Jenkinson J tied the existence of a discretion on the part of the trial judge to exclude otherwise admissible evidence sought to be adduced by a co-accused, if satisfied that its probative value to that co-accused was outweighed by its prejudicial effect on another co-accused, to the reasons of principle and policy recognised to support the holding of a joint trial. His Honour identified the considerations favouring the existence of the discretion to have been threefold. The first was that "the exercise of an uncontrollable right to adduce any relevant evidence tending to exculpate one of several accused jointly charged with a crime and tending to inculcate another of them may subject the jury to intellectual and emotional burdens of such a character that the administration of criminal justice by jury trial is quite stultified". The second was that "to obviate or lessen the burdens of that character by the exercise of the power to order separate trials of several accused jointly charged would in some cases frustrate one of the primary purposes of the criminal law, by enabling a party to a criminal offence to secure acquittal by giving at his separate trial an explanation, of the circumstances proved against him, which exculpated him and which was controvertible only by one or more of the others charged". The third was that the slightness of the probative value of evidence to the co-accused seeking to adduce it might be sufficient to justify subordination of the interests of that co-accused "to those other interests which the system of trial of criminal issues by jury is designed to serve".

51 Despite views about the common law position within Australia at the time of the framing of the Uniform Evidence Acts having been divided, strong reasons of principle and policy had accordingly been advanced in support of the existence of a judicial discretion to exclude admissible evidence of a co-accused where the probative value of that evidence to that co-accused was outweighed by its prejudicial effect on another co-accused. The commentary proffered by the Australian Law Reform Commission ("the ALRC") in support of its preliminary

76 [1997] 1 VR 1 at 65-66.

77 [1980] VR 353.

78 [1983] 2 VR 155 at 163. See also *R v Carranceja* (1989) 42 A Crim R 402 at 407.

79 [1980] VR 353 at 385.

draft of what became s 135 of the Evidence Act⁸⁰, to which specific regard may be had in the interpretation of that section in accordance with s 3(3) of the Evidence Act, acknowledged and cut through that equivocality. The ALRC stated that "if no judicial discretion exists in this area it is suggested that it should be introduced, so that the court, in considering the legitimate interests of the two accused, can balance the value of the evidence to one against the dangers to the other"⁸¹.

52 Nothing in any subsequent stage of the legislative history of the Evidence Act indicates any change to the policy intent so stated. The section as enacted will be seen to have succeeded in implementing it.

Joint criminal trials and the Evidence Act

53 As has been foreshadowed, the construction of s 135(a) is appropriately addressed in the context of a more general examination of how the scheme of the Evidence Act applies to a joint criminal trial. A component of that more general examination involves the operation of s 9(1) of the Evidence Act upon which McNamara relied as the textual basis for his argument that the unfettered common law right of a co-accused to adduce admissible evidence probative of his or her innocence, which he argues to be part of the common law of Australia, requires s 135(a) to be given a confined construction.

54 Section 9 of the Evidence Act provides in full:

- "(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following –
 - (a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a

80 See cl 114 of the Draft Evidence Bill in Australian Law Reform Commission, *Evidence*, Report No 26 (1985), vol 2 at 57.

81 Australian Law Reform Commission, *Evidence*, Report No 26 (1985), vol 1 at 464 [811].

jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of a court,

- (b) the operation of a legal or evidential presumption that is not inconsistent with this Act,
- (c) a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding."

55 Section 9 of the Evidence Act has an operation broader than s 9 of the Commonwealth Evidence Act, which provides "[f]or the avoidance of doubt" that the Commonwealth Evidence Act "does not affect" specified categories of Commonwealth, State and Territory laws. The "common law" to which s 9(1) of the Evidence Act refers "must be understood either as a body of law created and defined by the courts or as a body of law which, having been declared by the courts at a particular time, may in truth be – and be subsequently declared to be – different"⁸². The same must be true, perhaps even more so, of the reference to "equity"⁸³. The principles of common law and equity to which s 9(1) refers are therefore not confined to antecedent principles. Nor, as s 9(2) illustrates, are they confined to "fundamental" principles⁸⁴.

56 But nor does the declaration in s 9(1), that the Evidence Act does not affect the operation of a principle of common law or equity in relation to evidence "except so far as [it] provides otherwise expressly or by necessary intendment", equate to a "stringent" requirement for the manifestation of "a clear expression of an unmistakable and unambiguous intention" to displace such a principle in order for the Act to be construed as doing so⁸⁵. The provision does not enact a principle of strict or narrow construction. Its purpose and effect are merely to confirm that the Evidence Act does not operate to cover the field of the law of evidence. In the language of the Attorney-General of New South Wales in his second reading speech for the Evidence Act, "whilst the [Act] codifies many aspects of the law of evidence, it is not intended to operate as an exhaustive code". The Attorney-General specifically referred to the principles of common law and equity which

82 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 485. See *Meteyard v Love* (2005) 65 NSWLR 36 at 67 [118].

83 *Aid/Watch Inc. v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23].

84 Compare *Coco v The Queen* (1994) 179 CLR 427 at 437.

85 Compare *Coco v The Queen* (1994) 179 CLR 427 at 437-438.

s 9(1) says are not affected by the Act and explained that "because the [Act] is comprehensive, the scope for operation of these principles and rules will be extremely limited"⁸⁶.

57 In *Papakosmas v The Queen*⁸⁷ Gleeson CJ and Hayne J remarked that the language and legislative history of the Evidence Act make clear that the Act "was intended to make, and that it has made, substantial changes to the law of evidence in New South Wales", that the language of the Act is determinative of the scope of its application, and that the construction of that language is not to be approached on the assumption that it conforms to the pre-existing common law. The subsequent observation by Gleeson CJ, Gummow, Heydon and Crennan JJ in *Cornwell v The Queen*⁸⁸, to the effect that where the ALRC thought that its proposals would change the law significantly it was normally careful to make its intention to do so clear, was an observation which bore on the discernment of the purpose of the statutory language in issue in that case. The observation was not directed to the operation of s 9(1).

58 The upshot is that the construction of s 135(a) turns on the meaning properly to be attributed to the text of that provision purposively construed in the context of the Evidence Act. Section 9(1) would not require any modification of a purposive and contextual construction of the text of s 135(a) even if it were assumed that the principle for which McNamara contends was at the time of enactment of the Uniform Evidence Acts, or has since become, a principle of the common law of Australia.

59 Critical to a purposive and contextual construction of the text of s 135(a) is understanding how the Evidence Act applies to a joint criminal trial. And key to understanding how the Evidence Act applies to a joint criminal trial is an appreciation of two ubiquitous and generic undefined statutory terms. The foundational term is "proceeding". The other inherently related term is "party".

60 The Evidence Act uses the plural in expressing itself to apply to "all proceedings"⁸⁹ in a designated court. For some purposes, it draws a distinction

86 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 May 1995 at 114.

87 (1999) 196 CLR 297 at 302 [10]. See also at 310 [39], 312 [46], 324 [88]. See also *IMM v The Queen* (2016) 257 CLR 300 at 311 [35].

88 (2007) 231 CLR 260 at 289 [72].

89 Section 4(1) of the Evidence Act.

between "a criminal proceeding" and "a civil proceeding", defining "civil proceeding" to mean "a proceeding other than a criminal proceeding"⁹⁰ and "criminal proceeding" to mean "a prosecution for an offence"⁹¹. The latter definition encompasses what it describes for more particular purposes as "a criminal proceeding for an indictable offence"⁹². To the extent that it refers to "a proceeding" that is "a criminal proceeding", it therefore encompasses a trial by jury on an indictment.

61 Throughout the Evidence Act, the term "party" is used in provisions applicable to a criminal proceeding and to a civil proceeding alike. In that context, as the Court of Criminal Appeal correctly observed in the decision under appeal, the term is apt to describe a participant in a proceeding whose rights or liabilities might be affected by evidence adduced in that proceeding⁹³ and is apt to describe all and each of those participants⁹⁴. More specifically, in its application to a criminal proceeding, including a proceeding on an indictment, the term is apt to describe both a participant whom other provisions refer to as "the prosecutor" and a participant whom those same provisions refer to as "a defendant"⁹⁵.

62 Applying the terminology of the Evidence Act to the one joint trial which must be had on the one joint indictment, it is therefore apparent that the joint trial is "a proceeding" to which the Crown ("the prosecutor") is "a party" and to which each co-accused ("a defendant") is also "a party". Once that is accepted, the coherent scheme of the Evidence Act in its application to a joint trial on a joint indictment readily unfolds.

63 Provisions concerning the adducing of evidence within Ch 2 of the Evidence Act furnish illustrations. Section 17(2), providing that in a criminal proceeding "[a] defendant is not competent to give evidence as a witness for the prosecution", has the effect that no co-accused is competent to give evidence as a

90 Evidence Act (definition of "civil proceeding").

91 Evidence Act (definition of "criminal proceeding").

92 Section 20 of the Evidence Act.

93 *Rogerson v The Queen* (2021) 290 A Crim R 239 at 254 [522].

94 *Rogerson v The Queen* (2021) 290 A Crim R 239 at 252-253 [516]. See ss 5(2) and 8(b) of the *Interpretation Act 1987* (NSW).

95 See, eg, ss 20, 66(3), 73(2), 85, 101, 104 of the Evidence Act.

witness for the Crown in a joint trial⁹⁶. Section 20(2), providing that in a criminal proceeding on an indictable offence "any party (other than the prosecutor) may comment on the failure of the defendant to give evidence", has the effect that any co-accused may comment on the failure of any other co-accused to give evidence in the joint trial⁹⁷. Section 27, providing that "[a] party may question any witness, except as provided by this Act", must be read with the explanation in the Dictionary that "[a] reference in this Act to a witness includes a reference to a party giving evidence", including "a defendant in a criminal proceeding"⁹⁸. Subject to restrictions imposed by other sections of the Act, s 27 has the effect that each co-accused is entitled to cross-examine each other co-accused who chooses to give evidence in chief in his or her defence in the joint trial. McNamara and Rogerson each exercised the entitlement conferred by that section when cross-examining the other.

64 Moving to Ch 3 of the Evidence Act, concerning the admissibility of evidence, it would be forgivable at this point in the analysis simply to point to the language of s 135(a), providing 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". Each co-accused being "a party" to the one proceeding constituted by the joint trial on the one joint indictment, the language of the provision can be seen to be more than adequate to implement the policy intent of the ALRC to empower a court to refuse to admit evidence sought to be adduced by one co-accused if the probative value of that evidence is substantially outweighed by the danger that it might be unfairly prejudicial to another co-accused.

65 To underline the coherence of the general language of s 135(a) operating in that way to empower a court to refuse to admit evidence sought to be adduced by one co-accused if the probative value of that evidence is substantially outweighed by the danger that it might be unfairly prejudicial to another co-accused, however, it is appropriate to relate that specific operation of s 135(a) to the place of that provision within the structure of Ch 3.

66 Pivotal to the operation of Ch 3 are ss 55(1) and 56(1). Section 55(1) provides that "evidence that, if it were accepted, could rationally affect (directly or

96 Compare *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 565 [51]-[52].

97 See *RPS v The Queen* (2000) 199 CLR 620; *Azzopardi v The Queen* (2001) 205 CLR 50.

98 Clause 7 of Pt 2 of the Dictionary to the Evidence Act.

indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding" is, without more, "evidence that is relevant in a proceeding". Section 56(1) then provides that "evidence that is relevant in a proceeding" is evidence that is "admissible in the proceeding", "[e]xcept as otherwise provided" by the Evidence Act. The corollary of s 56(1), spelt out in s 56(2), is that "[e]vidence that is not relevant in the proceeding is not admissible".

67 Sections 55(1) and 56(1) combine to produce the result that evidence probative of the existence of one fact in issue in a proceeding is admissible in the totality of the proceeding. The evidence, if admitted, is then available to be used in the totality of the proceeding in the assessment of the probability of the existence of any other fact in issue in the proceeding, including any fact in issue between parties to the proceeding other than the party adducing it, unless and to the extent that its admission is excluded, or its use is limited, by or under another provision of the Evidence Act.

68 The combined operation of ss 55(1) and 56(1) in their application to a multi-party civil proceeding was explained by Austin J in *Australian Securities and Investments Commission v Vines*⁹⁹. His Honour said:

"It is notable that both ss 55 and 56 address the question whether evidence is admissible *in a proceeding*. Where a plaintiff seeks to make out separate cases against several defendants in a single proceeding, the question to which the Evidence Act provides an answer is whether evidence is admissible in the proceeding, not whether evidence is admissible to prove the plaintiff's case against a particular defendant. The answer it gives is that if the evidence is relevant, it is admissible. Once it is admitted, it is evidence in the proceeding, and therefore available to be used for any purpose, unless one of the exclusionary rules of the Act or any surviving general law exclusionary rule applies, or the Court makes use of its statutory discretions to exclude admissible evidence or limit its use."

69 The combined operation of ss 55(1) and 56(1) can be no different in their application to a multi-party criminal proceeding. For the purposes of s 55(1), the facts in issue in a criminal proceeding are the ultimate facts which establish the elements of the offence or offences charged together with such other facts the existence of which may be probative of the existence of those ultimate facts¹⁰⁰.

99 (2003) 48 ACSR 282 at 287 [22]. See also *Johnstone v New South Wales* (2010) 202 A Crim R 422 at 448 [102].

100 *Smith v The Queen* (2001) 206 CLR 650 at 654 [7]. See also *Hughes v The Queen* (2017) 263 CLR 338 at 349 [16].

Applied to a criminal proceeding constituted by a joint trial on a joint indictment, ss 55(1) and 56(1) produce the result that any evidence adduced on the basis that it is probative of the existence of a fact in issue between the Crown and a co-accused is available to be used by the jury in assessing the probability of the existence of any other fact in issue between the Crown and that co-accused or between the Crown and any other co-accused, unless and to the extent that the admission of the evidence is excluded, or the use of the evidence is limited, by or under some other section. That is so for all evidence adduced in the joint trial, whether by the Crown or any co-accused and whether in examination in chief or in cross-examination.

70 Within the framework so set by s 55(1) and s 56(1), ss 135, 136 and 137 use similar terminology to provide for a complementary set of exclusions and limitations. In particular, s 135(a)'s provision that "[t]he 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" is mirrored by s 136(a)'s provision that "[t]he court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might ... be unfairly prejudicial to a party". Each of those discretionary provisions is applicable in a criminal proceeding as it is in a civil proceeding. Section 137 then adds that "[i]n a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant".

71 The express confining of s 137 to "evidence adduced by the prosecutor" serves implicitly to confirm that the reference to "evidence" in each of s 135(a) and s 136(a) extends to evidence adduced by any party including evidence adduced by any co-accused. The danger of unfair prejudice to "a party" which is able to be considered by a court in determining whether to exclude or limit the use of evidence under s 135(a) or s 136(a), no less than the danger of unfair prejudice to "the defendant" which must be considered by a court in determining whether to exclude evidence under s 137, is unfair prejudice to any co-accused.

72 To bring home the coherence of that operation of those provisions within the structure of Ch 3, without attempting to be comprehensive, three further aspects of the statutory scheme in its application to a joint trial on a joint indictment which follow from understanding each co-accused to be "a party" to the one "proceeding" are appropriate to be noted.

73 The first concerns the manner in which the "hearsay rule" in s 59 is modified in its application to evidence of an admission by a co-accused in the outworking of ss 81 and 83. By force of s 81, evidence of an out-of-court representation by a co-accused adverse to that co-accused is not excluded by the hearsay rule in s 59. If probative of a fact in issue, and not otherwise excluded, it is admissible under

s 56(1). By force of s 83, however, evidence of the admission continues to be excluded as against another co-accused (being a "third party" within the definition in s 83(4)). The admission of one co-accused is by those means rendered unavailable to be used by the jury in assessing the probability of the existence of any fact in issue between the Crown and another co-accused unless that other co-accused consents to that use.

74 The second concerns the operation of the "tendency rule" in s 97 and the "coincidence rule" in s 98. Each is expressed to make it a condition of the admissibility of evidence of the nature to which it refers that "the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence" and that "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value". Those conditions apply to tendency or coincidence evidence sought to be adduced by a co-accused just as they apply to tendency or coincidence evidence sought to be adduced by the Crown. Only tendency or coincidence evidence sought to be adduced by the Crown is subject to the additional condition of admissibility set out in s 101. Were a co-accused to seek to adduce tendency evidence of the kind admitted in *Lowery*, for example, then (unless that evidence were to be confined to expert opinion evidence about the character of that co-accused so as to be within the exception to the tendency rule for which separate provision is made in s 111) that co-accused would need to comply with the two conditions set out in s 97. The co-accused would need to give reasonable notice in writing to each other co-accused and to the Crown of his or her intention to adduce the evidence. The co-accused would then need to satisfy the court that the evidence was not simply of probative value but of significant probative value. Those two conditions of s 97 would need to be met before any question would arise as to excluding the evidence under s 135(a) or limiting its use under s 136(a).

75 The third concerns the manner in which the "credibility rule" in s 102 is modified by s 104. Section 104 is expressed to apply "only to credibility evidence in a criminal proceeding". The section makes general provision to the effect that "[a] defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave". The section goes on to provide that "[l]eave is not to be given for cross-examination by another defendant unless ... the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and ... that evidence has been admitted". The terms of that restriction on leave would make no sense unless evidence adduced in chief by one co-accused has the potential to be used by the jury to find facts adversely to another co-accused, which it has through the operation of ss 55(1) and 56(1) already explained. The grant of leave is correspondingly governed by considerations which specifically include

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"the extent to which to do so would be unfair to a party"¹⁰¹; a consideration which encompasses the extent to which the grant of leave to the co-accused to cross-examine the other co-accused would be unfair to that co-accused or another co-accused.

Order

76 The appeal must be dismissed.

101 Section 192(2)(b) of the Evidence Act.

77 GORDON AND STEWARD JJ. Under s 135(a) of the *Evidence Act 1995* (NSW), the 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. Glen McNamara and Roger Rogerson were charged with murder on a single indictment and tried jointly before a jury. At the joint trial, McNamara sought to admit into evidence conversations he had had with Rogerson, his co-accused, in support of his defence of duress. The trial judge refused to admit part of one conversation and the entirety of another under s 135(a) of the Act on the basis that the probative value of that evidence was substantially outweighed by the danger that the evidence might be unfairly prejudicial to Rogerson.

78 The sole issue on appeal to this Court is whether the trial judge and the Court of Criminal Appeal of the Supreme Court of New South Wales were correct to hold that, in the expression "unfairly prejudicial to a party" in s 135(a) of the Act, the word "party" extends to and includes a co-accused in a joint trial. The answer is that they were right to so hold. As these reasons will show, the text of the Act properly construed requires that conclusion. The structure and architecture of the Act and aspects of criminal practice and procedure against which the Act was enacted – single indictment for co-accused, joint trial of co-accused on that indictment, power to sever the indictment and order separate trials before or during a joint trial – combine to require the result that the discretion in s 135(a) applies to evidence given, or proposed to be given, by one co-accused in a joint trial. The appeal should be dismissed.

79 We adopt the facts giving rise to the appeal and the course of the proceedings which are set out in the reasons of Gageler CJ, Gleeson and Jagot JJ.

Evidence Act

80 The starting point is the Act¹⁰². The Act relevantly applies to "all proceedings in a NSW court"¹⁰³; it applies to criminal and civil proceedings. The Act was intended to make and made substantial changes to the law of evidence in New South Wales¹⁰⁴. As a result, the language of the Act is determinative of the

102 *IMM v The Queen* (2016) 257 CLR 300 at 311 [35], citing *Papakosmas v The Queen* (1999) 196 CLR 297 at 302 [10] and *R v Ellis* (2003) 58 NSWLR 700 at 716-717 [78].

103 *Evidence Act*, s 4.

104 *Papakosmas* (1999) 196 CLR 297 at 302 [10], 310 [38]-[40], 312 [46], 324 [88]; *Ellis* (2003) 58 NSWLR 700 at 715-717 [70], [74], [78]; *IMM* (2016) 257 CLR 300 at 311 [35]. See also Australian Law Reform Commission, *Evidence*, Report No 26 (1985), vol 1 at 350 [638], [640] ("ALRC Report").

scope of its application, and the meaning and effect of that language is not to be determined "in the light of, and in a manner that conforms to, the pre-existing common law"¹⁰⁵. It will be necessary to later consider s 9(1) of the Act which preserves "the operation of a principle or rule of common law or equity in relation to evidence" except so far as the Act "provides otherwise expressly or by necessary intendment". As it happens, and as explained below, s 135 is consistent with the common law.

81 Under the Act, if evidence is *relevant*, meaning that, if it were accepted, it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding¹⁰⁶, it is admissible, subject to the exclusions in the Act. As s 56 provides, "[e]xcept as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding" and "[e]vidence that is not relevant in the proceeding is not admissible". In sum, once evidence is through the gateway of ss 55 and 56 of the Act, it is, by definition, "probative"¹⁰⁷ and is relevant for all purposes and in respect of all parties unless excluded by an exclusionary rule or a discretionary or mandatory exclusion¹⁰⁸.

82 One of those discretionary exclusions is s 135(a) of the Act. It contains a general discretion to refuse to admit evidence. It provides that:

"The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a *party*, ..." (emphasis added)

83 "[P]arty" is not defined in the Act. The phrase "unfairly prejudicial to a party" in s 135(a) does not by its ordinary meaning indicate any confinement or limitation such that it cannot apply to a co-accused in a joint trial. As the Court of Criminal Appeal said, "party" is "apt to describe those persons who are participating in a legal proceeding and whose rights and liabilities may be affected by the evidence adduced in that proceeding" and thus, in a joint trial on a single indictment, that includes a co-accused. As will be seen, none of the other provisions in the Act requires, let alone compels, a different conclusion;

105 *Papakosmas* (1999) 196 CLR 297 at 302 [10]; see also at 310 [38]-[40], 312 [46], 324 [88].

106 *Evidence Act*, s 55.

107 *IMM* (2016) 257 CLR 300 at 312 [40].

108 *Australian Securities and Investments Commission v Vines* (2003) 48 ACSR 282 at 287 [22].

other provisions of the Act support "party" in s 135(a) including a co-accused in a joint trial.

84 For example, in Pt 2.1 of the Act, headed "Witnesses", s 20(2) provides that "[a] judge or any party (other than a prosecutor) may comment on a failure of the defendant to give evidence" and then proceeds to address a joint trial of co-accused by stating that "unless the comment is made by *another defendant in the proceeding*, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned" (emphasis added).

85 Similarly, s 27 of the Act provides that "[a] *party* may question any witness, except as provided by this Act" (emphasis added). The term "witness" is defined to include a party giving evidence, and a reference to a "party" in that definition includes a defendant in a criminal proceeding¹⁰⁹. As questioning of a defendant in a criminal proceeding will likely include cross-examination, two other definitions should be noted. "[C]ross-examiner" is defined to mean "a party who is cross-examining a witness"¹¹⁰ and "[a] reference in this Act to cross-examination of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence"¹¹¹. In the trial the subject of this appeal, s 27 conferred upon each of McNamara and Rogerson the right to cross-examine the other when the other gave evidence – a right they each exercised. Put in different terms, to enable cross-examination of a co-accused under s 27, "party" must refer to a co-accused. Next, s 37 of the Act regulates the use of leading questions in examination in chief and re-examination. Leading questions may be put relevantly if there is no objection and "each other party to the proceeding" is legally represented¹¹². 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 a co-accused.

86 Part 3.2 of the Act concerns hearsay evidence. Section 65 in Pt 3.2 applies in criminal proceedings. It allows first-hand hearsay to be admitted where a person who made a previous representation is not available to give evidence about an asserted fact¹¹³. Where evidence of a previous representation about a matter has been adduced by "a defendant" and has been admitted pursuant to s 65(8), s 65(9)

¹⁰⁹ *Evidence Act*, Dictionary, Pt 2, cl 7.

¹¹⁰ *Evidence Act*, Dictionary, Pt 1, definition of "cross-examiner".

¹¹¹ *Evidence Act*, Dictionary, Pt 2, cl 2(2).

¹¹² *Evidence Act*, s 37(1)(c).

¹¹³ *Evidence Act*, s 65(1).

relevantly allows "another party" to also adduce hearsay evidence about that matter. "[A]nother party" includes the Crown and necessarily a co-accused. Section 67 of the Act reinforces that conclusion. It relevantly requires a party who intends to adduce hearsay evidence to give reasonable notice in writing to "each other party" of their intention to adduce that evidence. This includes giving notice to a co-accused, because the evidence cannot be used against a defendant who did not have a reasonable opportunity to cross-examine the witness about that evidence¹¹⁴.

87 Part 3.4 of the Act, headed "Admissions", also reinforces the conclusion that "party" when used in the Act includes any co-accused in a joint trial. The Act defines an "admission" as "a previous representation that is ... made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding)" which is "adverse to the person's interest in the outcome of the proceeding"¹¹⁵. Section 81(1) provides that "[t]he hearsay rule and the opinion rule do not apply to evidence of an admission". However, s 83(1) 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 concerned, other than the party who: (a) made the admission, or (b) adduced the evidence". Thus, an accused may rely on an admission made by a co-accused and tendered by the Crown which exculpates the first accused. A "third party" in s 83 must include a co-accused.

88 Section 87 – concerned with admissions made with authority – provides, among other things, that for the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that "the representation was made by the person in furtherance of a common purpose ... that the person had with the party or one or more persons including the party"¹¹⁶. The reference to "party" in s 87 refers to an accused, any accused, in a criminal trial involving multiple accused.

89 Part 3.6 of the Act addresses tendency and coincidence evidence. Section 97(1)(a) – concerned with the tendency rule – relevantly establishes the requirement for a party seeking to adduce evidence of a tendency to give reasonable written notice, a tendency notice, "to each other party" of the party's intention to adduce the evidence. "[P]arty" must include a co-accused otherwise there would be no obligation to provide a tendency notice to a co-accused. As the

114 *Evidence Act*, s 65(4).

115 *Evidence Act*, Dictionary, Pt 1, definition of "admission".

116 *Evidence Act*, s 87(1)(c).

Crown submitted, the same can be said in respect of the notice requirements in ss 67 (hearsay evidence), 73(2)(b) (reputation evidence), 98(1)(a) (coincidence evidence) and 177(2) (expert certificates). Other notice or service requirements in ss 49(a) (documents in foreign countries), 50(2)(a) (summaries of voluminous or complex documents) and 100(6)(a) (conditions a court may impose upon making a direction dispensing with notice requirements for tendency or coincidence evidence) of the Act similarly provide for notice or service to "each other party". In each instance, for notice or service to be provided to a co-accused, they must be a "party".

90 Next, Pt 3.11 of the Act, which is headed "Discretionary and mandatory exclusions", relevantly contains ss 135 and 136. Section 136 provides that "[t]he court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might ... be unfairly prejudicial to a party". As the Crown submitted, it was impractical and artificial for counsel for McNamara to accept that s 136 could be used to limit the use to be made of evidence in a trial of co-accused, but s 135 could not. Put in different terms, contrary to the submissions of counsel for McNamara, "party" must have the same meaning in both ss 135 and 136. Finally, throughout the Act¹¹⁷, "proceeding" rather than "proceedings" has been used in contexts and in a manner which indicate that while there may be multiple cases, there is a single proceeding.

91 That analysis of the Act is not exhaustive. It is sufficient to demonstrate that the architecture and structure of the Act does not indicate any confinement or limitation so as to exclude a co-accused in a joint trial from the word "party" in s 135(a). "[P]arty" refers to and is intended to refer to a co-accused in a joint trial.

Wider legal context

92 The Act applies to criminal proceedings. What then of the wider legal context – aspects of criminal practice and procedure – against which the Act was enacted? As noted earlier, s 9(1) of the Act preserves the "operation of a principle or rule of common law or equity in relation to evidence" except so far as the Act "provides otherwise expressly or by necessary intendment". 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 presumptions¹¹⁸. The Act has

¹¹⁷ *Evidence Act*, ss 4, 20, 55, 56; cf *Interpretation Act 1987* (NSW), s 8(b).

¹¹⁸ *Haddara v The Queen* (2014) 43 VR 53 at 71-72 [54]-[55]. See also *Evidence Act*, s 93(c); *Harkins v Butcher* (2002) 55 NSWLR 558 at 563 [15]; *Evans v The Queen*

also been held to preserve underlying principles of the accusatorial and adversarial system of a criminal trial¹¹⁹. As five members of this Court recently observed in *Nguyen v The Queen*, in relation to the Uniform Evidence Act and the *Criminal Code* (NT), "[t]he conduct of a criminal trial is subject to practices and procedures which ... may be informed by principles or rules which are regarded as fundamental to the conduct of a criminal trial", and which are not to be found in those kinds of statutes¹²⁰.

93 At least three aspects of criminal practice and procedure combine to require the result that the discretion in s 135(a) applies to evidence given by a co-accused in a joint trial.

Single indictment and joint trial of co-accused

94 In enacting the Act, including s 135(a), the legislature must be taken to have been aware that in a trial upon indictment, the jury can only be empanelled and sworn to try the issues on the particular indictment, whether or not there are multiple co-accused¹²¹. There can only be a single indictment for co-accused¹²².

95 As Gavan Duffy and Starke JJ said in *Munday v Gill*, "in a trial upon indictment the jury is, and can only be, impanelled and sworn to try the issues of the particular indictment – to find whether the accused be guilty or not guilty upon that indictment and no other. Therefore the simultaneous trial of several indictments is impossible"¹²³.

(2007) 235 CLR 521 at 587 [224]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2008) 251 ALR 479 at 484 [13]; Odgers, *Uniform Evidence Law*, 17th ed (2022) at 77 [9.150].

119 *R v Soma* (2003) 212 CLR 299 at 308 [27]; *R v Ronen* (2004) 62 NSWLR 707 at 722 [67]; Odgers, *Uniform Evidence Law*, 17th ed (2022) at 76 [9.90]. See *Nguyen v The Queen* (2020) 269 CLR 299 at 311 [26].

120 (2020) 269 CLR 299 at 311 [26] (footnote omitted).

121 *Munday v Gill* (1930) 44 CLR 38 at 76, 87.

122 *Munday* (1930) 44 CLR 38 at 76, 87. See also *R v Crane* [1921] 2 AC 299 at 319-320, 321-322, 330-331, 335-336; *R v Dennis* [1924] 1 KB 867 at 868-869. Section 130(2) of the *Criminal Procedure Act 1986* (NSW) relevantly provides that "[t]he court has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned".

123 *Munday* (1930) 44 CLR 38 at 76.

96 It has been said that at common law "each count in an indictment is really a separate indictment"¹²⁴ and that "[i]ndictments are to be read jointly and severally"¹²⁵. However, this does not detract from the fact that there is only a single indictment for co-accused in a joint trial¹²⁶. A single indictment of multiple accused will be presented where the matters charged arise out of the same facts and matters. When this is the charge, it is described as a joint charge¹²⁷. As Lord Diplock said in *Director of Public Prosecutions v Merriman*, "[a] 'joint offence' of two defendants means no more than that there is this connection between the separate offences of each, so that as against each defendant not only his own physical acts but also those of the other defendant may be relied upon by the prosecution as an actus reus of the offence with which he is charged"¹²⁸. In a trial of a co-accused on a single indictment, there is not "more than one trial actually taking place"¹²⁹. The foregoing proposition is not denied by the fact that all crime is individual and that each accused needs to be proved guilty independently.

97 Counsel for McNamara's reliance on *R v Stringer*¹³⁰ and *Latham v The Queen*¹³¹ for the proposition that there are two separate trials and therefore two separate proceedings is misplaced. It was submitted that *Stringer* and *Latham* established that each count in an indictment is effectively a separate indictment. Neither is authority for that proposition. The statement in *Stringer* that "each count in an indictment is really a separate indictment" was made in the context of demonstrating that the charging of two offences on a *single* indictment did not give rise to issues of double jeopardy¹³². The statement in *Latham* that "[e]ach count is in fact and theory a separate indictment"¹³³ was used for a different purpose –

124 *R v Stringer* [1933] 1 KB 704 at 712.

125 *R v Fenwick* (1953) 54 SR (NSW) 147 at 152.

126 *Munday* (1930) 44 CLR 38 at 76, 87.

127 See, eg, *Director of Public Prosecutions v Merriman* [1973] AC 584 at 592 where Lord Morris stated "there is no magic in speaking of a joint charge".

128 [1973] AC 584 at 606.

129 *R v Swannson* (2007) 69 NSWLR 406 at 436 [186].

130 [1933] 1 KB 704.

131 (1864) 5 B & S 635 [122 ER 968].

132 *Stringer* [1933] 1 KB 704 at 712.

133 (1864) 5 B & S 635 at 643 [122 ER 968 at 971].

to justify not ordering a new trial after a jury failed to provide a verdict on one count of a single indictment of co-accused¹³⁴. Whether there are two separate "cases" before a jury of two or more accused on a joint indictment is not to the point. To the extent that co-accused have separate cases, the analysis supports the opposite proposition – that an accused is a party to a co-accused's case.

Power to order joint trials and separate trials

98 Similarly, in enacting the Act, including s 135(a), the legislature must be taken to have been aware of the *Criminal Procedure Act 1986* (NSW) which empowers a court, under s 29(2), to order a joint trial but also, under s 21(2)(b), to "order a separate trial" for an accused. The starting point is that "[w]here the crime is one in which the Crown alleges a common purpose in two or more persons to commit a crime prima facie they should be tried together"¹³⁵. The fact that one accused is intending to say that he or she acted under duress by the other accused (whether both are charged as principal offenders or as principal offender and accessory after the fact) is not of itself a valid reason for severing the trial of individual accused persons¹³⁶. In fact, that one accused alleges that he or she was coerced by a co-accused is a reason for adhering to a joint trial¹³⁷.

99 The rationale for joint trials is well established. The interests of justice dictate strong reasons of principle and public policy for joint offences to be tried jointly, especially where co-accused run "cut-throat" defences¹³⁸. Four matters of "public interest" have been articulated in favour of joint trials¹³⁹: (1) it is important to bear in mind the use of court time and public expense incurred if more than one trial is conducted; (2) it is against the interests of justice that there should be

134 (1864) 5 B & S 635 at 641-643 [122 ER 968 at 970-971].

135 *R v Demirok* [1976] VR 244 at 252, quoting *R v Kerekes* [1951] 70 WN (NSW) 102 at 105; *R v Glover* (1987) 46 SASR 310 at 312.

136 *Western Australia v Russell* [2009] WASCA 154 at [72], citing *R v Eriemo* [1995] 2 Cr App R 206 at 211 and *R v Grondkowski* [1946] KB 369 at 372-374. See also *Ali v The Queen* (2005) 79 ALJR 662 at 670 [58]; 214 ALR 1 at 12.

137 *R v Gibb* [1983] 2 VR 155 at 163. See also *Webb v The Queen* (1994) 181 CLR 41 at 56, 88-89; *R v Roughan* (2007) 179 A Crim R 389 at 398-399 [49]-[50].

138 *Webb* (1994) 181 CLR 41 at 56, 88-89; *Roughan* (2007) 179 A Crim R 389 at 398-399 [49]-[50].

139 *Demirok* [1976] VR 244 at 254. See also *Webb* (1994) 181 CLR 41 at 56, 88-89, citing *R v Collie* (1991) 56 SASR 302 at 307-311; *Samia v United States* (2023) 599 US 635 at 654-655.

inconsistent verdicts and where the accounts of the accused differ or conflict, the differences should be resolved by the same jury at the same trial; (3) it is the policy of the law to reach finality as expeditiously as possible; and (4) witnesses should not be required to give evidence of the same events at a succession of trials.

100 On the other hand, considerations relevant to the question of whether an application for a separate trial should be granted were explained by Hunt J in *R v Middis*¹⁴⁰ in the following terms:

"Briefly, the relevant principles are that: (1) where the evidence against an applicant for a separate trial is significantly weaker than and different to that admissible against another or the other accused to be jointly tried with him, and (2) where the evidence against those other accused contains material highly prejudicial to the applicant although not admissible against him, and (3) where there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material, a separate trial will usually be ordered in relation to the charges against the applicant. The applicant must show that positive injustice would be caused to him in a joint trial.

...

I do not believe that the Court of Criminal Appeal in *Regina v Oliver* [(1984) 57 ALR 543] intended an applicant for a separate trial to demonstrate that positive injustice would more likely than not be caused by a joint trial (as it was suggested in argument); nor do I accept that a mere possibility of prejudice is sufficient (as it was also suggested in argument). In my view, what the Court of Criminal Appeal was saying was that, as some prejudice to one or other accused is inevitable in any joint trial, it must be shown by an applicant for a separate trial that the particular prejudice upon which reliance is placed by him would – if it arises [–] result in positive injustice to him in a joint trial."

That passage has been approved in New South Wales on a number of occasions¹⁴¹.

140 Unreported, Supreme Court of New South Wales, 27 March 1991 at 4-5.

141 See *Caleo v The Queen* (2021) 290 A Crim R 352 at 377 [137], [138], citing *R v Baartman* (unreported, Court of Criminal Appeal of New South Wales, 6 October 1994), *R v Chami* (2002) 128 A Crim R 428 at 430 [12], *Symss v The Queen* [2003] NSWCCA 77 at [69], *Pham v The Queen* [2006] NSWCCA 3 at [10], *Madubuko v*

101 Consistent with those principles, prejudice to a co-accused will generally not be sufficient to justify the ordering of separate trials if jury directions would nullify the prejudice¹⁴². It is also for those reasons that an appellate court will not interfere with the trial judge's discretion to not have separate trials unless it would appear that "something occurred later, during the course of the trial, which brought about a miscarriage of justice"¹⁴³. A defining principle of criminal law remains – "[a] presentment should always be severed where that is both desirable and practicable in order to ensure a fair trial"¹⁴⁴.

102 Section 21(2) of the *Criminal Procedure Act* separately, and collectively with the other aspects of criminal practice and procedure to which reference will be made, compels the conclusion that "party" in s 135(a) of the Act was intended to include a co-accused in a joint trial.

Evidence at a joint trial

103 Counsel for McNamara submitted that "party" in s 135(a) should be construed as not extending to a co-accused because in a joint trial only the Crown or the accused could object to evidence being led in the accused's case. This submission had no basis in authority and counsel accepted that no provision of the Act supported it. Rather, the justification for the assertion that prejudice to a co-accused is not considered when applying s 135(a) of the Act was said to arise from two matters – that at common law an accused had an unfettered right to adduce evidence and the nature of the joint trial. The submission is rejected. The nature of the joint trial has been addressed. It compels the contrary conclusion.

104 The contention that at common law an accused had an unfettered right to adduce evidence should not be accepted. Such a "right" does not exist and cannot be picked up by s 9 of the Act – it is not a "principle or rule of common law".

The Queen (2011) 210 A Crim R 249 at 258-259 [28], *Trotter v The Queen* [2016] NSWCCA 57 at [26]-[27] and *Hamalainen v The Queen* [2019] NSWCCA 276 at [68].

142 *Sutton v The Queen* (1984) 152 CLR 528 at 542; *R v Henry* [2008] NSWCCA 248 at [12(3)]; *Stagno v Western Australia* [2013] WASC 186 at [13(h)]. See also *R v Christou* [1997] AC 117 at 129.

143 *Demirok* [1976] VR 244 at 252, quoting *Kerekes* [1951] 70 WN (NSW) 102 at 105.

144 *R v TJB* [1998] 4 VR 621 at 630; see also *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300, 311, 326-329, 353, 362; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 116-117 [37]-[38].

There was and is no such unfettered right in this country¹⁴⁵. On any view, an accused cannot adduce irrelevant evidence¹⁴⁶. Rather, trial judges retain a discretion to refuse to admit evidence¹⁴⁷. However, the circumstances in which the discretion will be exercised to refuse to admit evidence in support of a defence are "few"¹⁴⁸, "exceptional"¹⁴⁹ and "will necessarily be rare"¹⁵⁰.

105 A number of authorities – *R v Lowery [No 3]*¹⁵¹, *R v Darrington*¹⁵² and *R v Gibb*¹⁵³ – support the existence of the judicial discretion to exclude evidence brought by one co-accused against another due to its prejudicial effect. In *Lowery [No 3]*, it was said that there is a "need for an accused person to be left unfettered in defending himself by any legitimate means against the charge made against him"¹⁵⁴. It was held, however, that the trial judge did not act "unjustly or unreasonably by exercising his discretion to admit evidence which was relevant to disprove the guilt of King" because it could not be said that the "probative value to the defence of King was so weak compared with the prejudicial effect on the defence of Lowery as to require the Judge to exclude it as a matter of discretion"¹⁵⁵.

145 cf *Tan Siew Gim v The Queen* [1995] UKPC 25 at 4-5; *R v Myers* [1998] AC 124 at 136, 145; *R v Hartley* [2007] 3 NZLR 299 at 309 [60], [62].

146 *Evidence Act*, s 56(2).

147 *R v Lowery [No 3]* [1972] VR 939 at 948; *R v Darrington* [1980] VR 353 at 384-385; *Gibb* [1983] 2 VR 155 at 163; *R v Su* [1997] 1 VR 1 at 65-66. See also *R v Taylor* [2003] NSWCCA 194 at [130]. See also ALRC Report at 464 [811].

148 *Taylor* [2003] NSWCCA 194 at [130].

149 *Su* [1997] 1 VR 1 at 66.

150 *Gibb* [1983] 2 VR 155 at 163.

151 [1972] VR 939 at 948.

152 [1980] VR 353 at 384-385.

153 [1983] 2 VR 155 at 163.

154 [1972] VR 939 at 947.

155 *Lowery [No 3]* [1972] VR 939 at 947.

The Court found it unnecessary to rule on the submission as to whether the discretion existed because the discretion in that case was "rightly exercised"¹⁵⁶.

106 In *Darrington*, Jenkinson J said (Young CJ agreeing) that "a discretion is reposed in the trial Judge to exclude evidence otherwise admissible which is tendered by one of several accused in disproof of his guilt of a crime charged against them jointly"¹⁵⁷. And in *Gibb*, it was said that a trial judge "retains a discretion to exclude [evidence relevant to the accused's defence] in a proper case ... [b]ut such an exercise of discretion will necessarily be rare"¹⁵⁸. There may be exceptionally rare cases where a defendant will not be able to admit all evidence that they intend to admit¹⁵⁹.

107 Similarly, Devlin J's remark in *R v Miller*¹⁶⁰ about counsel's duty being to "adduce any evidence which is relevant to his own case ... whether or not it prejudices anyone else" was qualified by his statements that that principle "does not open the field to any question" and that "care ought to be taken not to go any further than is strictly necessary for the proof of the relevant point".

108 Counsel for McNamara suggested that the "high-water mark" for the proposition that there existed no judicial discretion to exclude evidence brought by one co-accused against another due to its prejudicial effect could be found in *R v Murray*¹⁶¹ and *R v Visser*¹⁶². Counsel for McNamara submitted that those cases relied on *Miller*. Neither *Murray* nor *Visser* acknowledged the qualifications in *Miller* explained above. And neither case engaged in a detailed examination of the existence of the judicial discretion or the purported unfettered "right". In the context of other Australian cases¹⁶³, *Murray* and *Visser* cannot be understood as

156 *Lowery [No 3]* [1972] VR 939 at 948.

157 [1980] VR 353 at 385.

158 [1983] 2 VR 155 at 163.

159 *Taylor* [2003] NSWCCA 194 at [130]; *Hayward v The Queen* (2018) 97 NSWLR 852 at 872 [75], citing *Alister v The Queen* (1983) 154 CLR 404.

160 [1952] 2 All ER 667 at 669.

161 [1980] 2 NSWLR 526.

162 [1983] 3 NSWLR 240.

163 *Lowery [No 3]* [1972] VR 939 at 948; *Darrington* [1980] VR 353 at 384-385; *Gibb* [1983] 2 VR 155 at 163; *Su* [1997] 1 VR 1 at 66. See also *Taylor* [2003] NSWCCA 194 at [130].

establishing an unfettered "right" of a co-accused to adduce all evidence relevant to their defence.

109 The existence of the discretion at common law to refuse to admit evidence coheres with the duty of the trial judge to provide an accused with a fair trial¹⁶⁴. As the Crown submitted, the existence of the discretion at common law is consistent with s 135. There is no inconsistency to be resolved between the common law and the Act. Perhaps that is why the drafters of the Act did not "direct themselves" to the issue as counsel for McNamara suggested they would have had they intended to resolve it. Put differently, there was no need, as counsel for McNamara put it, for an "express ouster" or an "ouster by a necessary intendment" because no ouster was intended.

110 While uncommon, there are other limitations on this alleged unfettered "right" of an accused to adduce all evidence relevant to their defence including public interest immunity, legal professional privilege and evidence of sexual reputation or sexual experience in s 294CB of the *Criminal Procedure Act*. As the Crown stated, the "exceptional and cautious application of a discretion is very, very different from the proposition that there is no discretion".

111 In each case, one has to consider what the interests of justice require¹⁶⁵. The interests of justice are not just the interests of the accused¹⁶⁶. As Jenkinson J explained in *Darrington*, there are "fundamental" considerations which support the existence of discretionary control by the trial judge over this alleged "right"¹⁶⁷. These considerations include not over-burdening the jury, not allowing the accused to have a separate trial where they could secure their acquittal through an explanation which cannot be controverted by a co-accused and not allowing evidence of only slight probative value to undermine other interests of the system of the criminal trial¹⁶⁸.

164 *Sutton* (1984) 152 CLR 528 at 558; *Dietrich* (1992) 177 CLR 292 at 299, citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29, 56, 72, 75. See also *Dietrich* (1992) 177 CLR 292 at 362.

165 *Miller* [1952] 2 All ER 667 at 670.

166 *Miller* [1952] 2 All ER 667 at 670, citing *R v Grondkowski* [1946] KB 369.

167 [1980] VR 353 at 384-385.

168 *Darrington* [1980] VR 353 at 385.

112 The importance of the discretion was explained in one common situation in these terms in *Stagno v Western Australia*¹⁶⁹:

"It is commonplace that one accused will have made an out of court statement implicating a co-accused and that the prosecution will seek to adduce evidence of the statement in the case against its maker. Generally, a direction that the jury must not use the statement as evidence in the case against the co-accused will be sufficient to ensure a fair trial. There may, however, be instances where an out of court statement is so prejudicial to the co-accused that it cannot be assumed that the prejudice will be removed by a direction to the jury".

Where a jury direction is insufficient to guard against the risk of impermissible prejudice to the accused, an application for separate trials should generally be granted¹⁷⁰.

113 The words "to a party" in s 135(a) do not alter the outcome – the focus is on reducing prejudice. Properly construed, s 135(a) cannot be understood as excluding consideration of prejudice to a co-accused in determining whether a court should refuse to admit otherwise relevant and admissible evidence.

114 This appeal should be dismissed.

169 [2013] WASC 186 at [13(h)], citing *Re Attorney-General's Reference No 1 of 1977* [1979] WAR 45 and *Western Australia v Bowen* (2006) 32 WAR 81 at 95-96 [54]; see also *Zammit v Western Australia* (2007) 34 WAR 302 at 322 [65].

170 *Sutton* (1984) 152 CLR 528 at 541-542; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3, 7, 8; 68 ALR 1 at 4-5, 12, 13; *KRM v The Queen* (2001) 206 CLR 221 at 234-235 [38]. See also *R v Verma* (1987) 30 A Crim R 441 at 444; *Lobban v The Queen* [1995] 1 WLR 877 at 889; [1995] 2 All ER 602 at 613; *Winning v The Queen* [2002] WASCA 44 at [42].