HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

Steven Moore (a pseudonym)
Appellant

and

The King
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Standard of review

2 CoA referred to the *House* standard (J [52], [178]) and expressed their dispositive conclusion on s 137 as: decision was 'open' (J 6(b)], [178], [187]).

3 CoA understood J's decision under s 137 to involve exercise of 'discretion' (J [4(b)], [31], [52]). That was wrong; it admits of only one correct answer:

- *Em v The Queen* (2007) 232 CLR 67, [95], [102] (Gummow and Hayne JJ);

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- Statutory text: 'discretionary and mandatory exclusions'; 'must refuse to admit';
- Consistent with approach in *Aytugrul v The Queen* (2012) 247 CLR 170, [23]-[24] (French CJ, Hayne, Crennan and Bell JJ), [76] (Heydon J); *IMM v The Queen* (2016) 257 CLR 300, [109] (Gageler J); *R v Bauer (a pseudonym)* (2018) 266 CLR 56, [63], [82], [95], [100] (the Court);
- Lower courts: *McCartney v The Queen* (2012) 38 VR 1, [33] (the Court); and on s 135: *Rogerson v The Queen* (2021) 290 A Crim R 239, [542]-[544] (the Court).
- That 'reasonable minds may sometimes differ', or that criterion is 'evaluative', does not change character of decision as admitting of only one correct answer: *R v Bauer* (2018) 266 CLR 56, [61] (the Court) considering 'significant probative value'; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [49] (Gageler J), [85] (Nettle and Gordon JJ), [150] (Edelman J); *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, [15] (Kiefel CJ, Gageler and Jagot JJ, Gleeson J agreeing).

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4 The question for this Court is thus: *what standard of review does the CPA require on an interlocutory appeal against a decision that admits of only one correct answer?*

5 The statute is silent as to standard of review, but consideration of its text, context and purpose reveal the 'correctness' standard best achieves the statutory purpose.

6 Context and purpose:

6.1. Entirely new right of appeal against 'interlocutory decisions', broadly defined (s 3);

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6.2. 'a mechanism for a trial judge's rulings to be tested on appeal before a trial starts or, in limited circumstances, during trial' (SRS p 4986 **JBA tab 47 p 1530**);

6.3. Identified advantages: 'prevent guilty people being acquitted; prevent innocent people from being wrongly convicted; and prevent retrials because there was an error at the accused's trial.' (SRS p 4987 **JBA tab 47 p 1531**);

6.4. Associated efficiency benefits and 'reducing the stress and trauma of court proceedings' (SRS and SoC p 4977 and 4987 **JBA tab 47 p 1521 and 1531**);

6.5. Concern for fragmentation dealt with in certification and leave requirements (EM p 109 **JBA tab 46 p 1473;** ss 295-297 **JBA p 22-24**).

7 Text: Appeal is by way of re-hearing, thus concerned with correction of error (s 300(1)).

8 Right of appeal against 'interlocutory decisions'. Contemplates:

10 8.1. decisions concerning 'admissibility of evidence', where decision that evidence inadmissible would 'eliminate or substantially weaken prosecution case' (s 295(3)(a));

8.2. decisions (whether concerning admissibility or not) that may 'render the trial unnecessary' (s 297(1)(b)(i));

8.3. decisions (whether concerning admissibility or not) that may 'reduce the likelihood of a successful appeal against conviction' (s 297(1)(b)(iv)).

9 To best permit the correction of error in such decisions, and to achieve the statutory purpose, the discrimen for the application of the 'correctness' or *House* standard must be whether the decision admits of only one correct answer.

20 10 Applicant's conclusion as to standard of review consistent with the way in which standard of review is ordinarily discerned—namely, primarily by reference to whether or not underlying decision admits of more than one legally permissible answer.

- *R v Bauer* (2018) 266 CLR 56, [61] (the Court);
- *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, [49] (Gageler J), [85] (Nettle and Gordon JJ), [150] (Edelman J);
- *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, [15]–[16] (Kiefel CJ, Gageler and Jagot JJ, Gleeson J agreeing), [89], [96] (Steward J).

11 Applicant's conclusion does not preclude giving 'respect and weight' to the decision of the

30 trial judge or acknowledging any special advantage enjoyed by them: *Warren v Coombes* (1979) 142 CLR 531, 551 (Gibbs ACJ, Jacobs and Murphy JJ).

Probative value

12 Not focus of argument on appeal, but assessment must proceed by reference to facts in issue. Most importantly, identity (J [86(a)]) but also charged acts that were not admitted (**AS [61]**).

Danger of unfair prejudice

13 In each case, assessment requires (1) *identification* and (2) *quantification* of danger of unfair prejudice, and (3) consideration of the capacity of the judge to fashion, and the jury to follow, directions that ameliorate that danger.

14 Here, two sources of danger of unfair prejudice, both risk jury giving undue weight to
10 evidence of central importance: the complainant's evidence as to identity of assailant.

15 <u>(1) Inability to cross-examine:</u> Deprived of cross-examination on, in particular: inconsistency as to identity of assailant: 'ex-partner' or accused (a person with whom she was 'friends' and 'not intimate'); failure to attend in answer to two summonses.

16 These matters called for explanation, but absent explanation allowed only speculation.

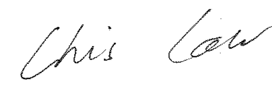
17 The jury would thus be left in the impossible position of seeking to speculate as to the relative likelihoods of competing 'inferences' as to why she may have deliberately (on accused's case), or innocently (on Crown case), misidentified her assailant. Directions unable to ameliorate that danger of prejudice.

18 <u>(2) Repetitive nature of representations:</u> Repetitive representations (prior consistent
20 statements) give rise to closely related risks of jury: (a) thinking that repetition of representation makes it more likely to be true; and (b) mistaking complaint evidence as independent corroboration.

19 Such risks usually capable of amelioration by direction.

20 Not so here where representations form core of Crown case, are repeated, and could be used to go to complainant's credibility (the very thing which the accused is deprived of challenging through cross-examination).

Dated: 5 June 2024



Chris Carr **Julian R Murphy** **Patrick Coleridge**