HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

Steven Moore (a pseudonym)
Appellant

and

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The King
Respondent

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APPELLANT'S REPLY

Part I: Certification

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

Part II: Argument

2. Before dealing with the substance of the Respondent's argument on the standard of review and the probative value/prejudice calculus, two preliminary points need to be made.

3. On the standard or review, the Respondent concedes that the Court of Appeal applied the *House* standard (RS [16]) but suggests that the Court of Appeal's comment at J [188] should be understood as an indication that the result would have been the same on the correctness standard (RS [34], see also RS [2(a)]). That is a misreading of the Court of Appeal's judgment. The single conclusionary sentence at J [188], like the equivalent at J [152], involves the Court of Appeal undertaking the final aspect of the task that it identified at J [52] was required in an appeal governed by the *House* standard, namely to 'exercise its own discretion'. In light of the description of the appellate task at J [52], and the correlative focus upon the discretionary nature of the decision under appeal, the statement at J [188] that the trial judge's decision was 'correct' indicates no more than a conclusion that the decision was within the range of legally permissible outcomes.

4. On s 137, the Respondent attempts to shear away some of the representations the subject of this appeal, by observing that at the hearing below the Appellant's oral argument suggested that he 'did not maintain objections to representations which only went to the fact that the complainant had been assaulted' (RS [7], see also RS [35] and [47]). The issues at trial are defined by the Opening and Response (see AS [59]–[60]), and here incorporated the occurrence of the things asserted in each of the representations (see AS [61]–[62]). Presumably recognising that, the Court of Appeal ruled on *all* representations (see J [100], cf [106] and [112], cf [119]).

A Standard of review

5. The Respondent emphasises that the applicable standard of review is a question of statutory interpretation (RS [11]) but fails to refute the majority of the Applicant's arguments from text, context and purpose that support the correctness standard. Eight particular aspects of the Respondent's submissions on this point should be noted.

6. First, the Respondent's submission regarding the 'role of the trial judge' as the 'primary decision-maker' (RS [28]), identifies no justification for appellate restraint on an interlocutory appeal that would not apply equally on a final appeal (save for

'fragmentation', as to which see [9] below). On a final appeal, in *Warren v Coombes* this Court rejected as 'heretical' the notion that 'the decision of the trial judge' on a question that admits of a unique answer 'should be treated as the equivalent of the verdict of a jury.'[1] There is thus nothing 'subver[sive]' about suggesting that an appeal court on an interlocutory appeal might overturn an 'evaluative' *but incorrect* decision (cf RS [28]). On the contrary, demonstrated error going uncorrected 'would be a complete denial of the purpose of the appellate process'.[2]

7. Second, the Respondent is wrong to suggest that 'the evaluative task involved in applying s 137 on a post-conviction appeal' involves a 'materially different exercise' to that undertaken on an interlocutory appeal (RS [20]). In either case, the 'legal character of a decision under s 137 remains the same'.[3] That is significant because '[a]cceptance that the "legal character of a decision" … remains the same whenever the decision falls to be reviewed, suggests that the standard of review should not vary.'[4]

8. Third, the Respondent relies heavily on the 'prospective' nature of an interlocutory appeal and the '*potentially* shifting evidentiary landscape' (RS [21], emphasis added). But as Basten JA observed in *RDT,* 'it is not clear' why this potential should cause 'the standard of review [to] vary'.[5] Where the potential for evidence to shift is realised, the law accommodates it by its recognition that rulings as to admissibility are provisional.[6] In the more likely event that that potential is *not* realised, the Respondent's construction is liable to produce the anomalous consequence identified at AS [33]. In that way, it is liable to fail to achieve the stated purpose of the scheme for interlocutory appeals: to 'prevent re-trials because there was an error in the accused's trial'.[7]

9. Fourth, the Respondent's submissions regarding the undesirability of 'fragmentation' (RS [26]–[27]) ignore that the Victorian Parliament sought expressly to balance that interest against the desirability of 'deal[ing] with issues early in the proceedings that might otherwise result in a post-conviction appeal'.[8] The Respondent provides no answer to the

[1] *Warren v Coombes* (1979) 142 CLR 531, 551–2 (Gibbs ACJ, Jacobs and Murphy JJ).
[2] *Warren v Coombes* (1979) 142 CLR 531, 552 (Gibbs ACJ, Jacobs and Murphy JJ).
[3] *McCartney v The Queen* (2012) 38 VR 1, [51] (the Court).
[4] *Director of Public Prosecutions (NSW) v RDT* [2018] NSWCCA 293, [21] (Basten JA).
[5] *Director of Public Prosecutions (NSW) v RDT* [2018] NSWCCA 293, [21] (Basten JA).
[6] In the sense that they may be revisited, if the evidence changes. See, in NSW, *R v Officer A* [2023] NSWSC 1033, [9]–[11] (Beech-Jones CJ at CL).
[7] Victorian Parliament, Legislative Assembly, *Parliamentary Debates* (4 December 2008), 4987 (Hulls).
[8] Victorian Parliament, Legislative Assembly, *Parliamentary Debates* (4 December 2008), 4987 (Hulls).

submission that the most probable inference is that the way Parliament has struck the balance is through the certification and leave procedures (AS [31]–[32]). Nor does the Respondent explain how the adoption of the correctness standard would result in a 'proliferation of interlocutory appeals' (RS [27]). On either standard, a prospective appellant would need to surmount the 'importance' threshold of certification. It is true that on the correctness standard more interlocutory appeals may succeed than on the *House* standard, but that result would indicate the effective operation of the interlocutory appeal regime: non-discretionary decisions of primary judges would be overturned ahead of trial where those decisions are sufficiently *important* to attract certification and are in fact *wrong* and thus would endanger the fairness of the trial if left to stand.

10. Fifth, although the Respondent properly concedes that the 'nature of the decision under review' is a 'relevant consideration' (RS [12], [13]), her submissions on this issue are confused. In particular, the Respondent's reliance on Kirk JA in *Mann v The Queen* overlooks that, on the Appellant's case and this Court's authorities, the operative distinction is not just between 'binary' and 'non-binary' decisions (cf RS [13]), but between decisions that admit of a 'uniquely right' answer and those that do not (AS [15]). Kirk JA himself made the distinction in *Mann*,[9] and in any event recognised that there was '*no doubt* that a decision involving a binary choice is *more likely* to be subject to the correctness standard of review'.[10]

11. Sixth, the legislative guide to which the Respondent refers at RS [31] in fact *supports* the Appellant's argument.[11] The point arising from the passage cited is that it was only ever intended that appellate deference – and even then, only 'limited deference' – would be afforded to *discretionary* decisions.[12] The author's mistaken assumption that s 137 involved a discretionary exercise was not enacted into law.[13]

12. Seventh, the Respondent does not engage with the recent NSW authority on interlocutory appeals, other than to attempt to distinguish the NSW statutory scheme in a passing comment (RS [14]). The difference between the two statutory schemes that the Respondent points to (RS [14fn22]) is that, at least with respect to appeals by an accused

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9 *Mann v The Queen* [2023] NSWCCA 256, [17]–[19].

10 *Mann v The Queen* [2023] NSWCCA 256, [19] (emphasis added).

11 The legislative guide illustrates the context in which the CPA was enacted, but its utility should not be over-measured, especially as an indication of statutory purpose. The guide was published in February 2010, shortly after the CPA had come into force.

12 Department of Justice (Victoria), *Criminal Procedure Act 2009 – Legislative Guide* p 282.

13 *Honeywood v Munnings* (2006) 67 NSWLR 466, [37]–[40] (Handley JA, Giles JA and Hislop J agreeing).

person, the Victorian scheme permits interlocutory appeals against 'decisions' whereas the NSW scheme only permits appeals against 'judgments' or 'orders'. The Respondent does not explain how this difference in statutory language explains the difference in the standard of review.

13. In any event, much of the NSW authority on the standard of review derives from *Crown* interlocutory appeals against admissibility rulings.[14] The provision permitting such appeals uses relevantly identical terms to that in Victoria (that is, the right of appeal is conferred in respect of *decisions*).[15] It was in this context – i.e. a Crown interlocutory appeal against an admissibility 'decision' – that the NSW Court of Criminal Appeal
10 recently confirmed the proper standard of review to be the correctness standard.[16] The ACT has also endorsed that standard.[17]

14. Eighth, the Respondent's claim that her ultimate contention is 'well established' (RS [9]) is hard to reconcile with the trend of lower court authority (AS [13]–[22]), including authority in Victoria since the decision the subject of this appeal. That authority confirms that what is decisive in determining the standard of review applicable on an interlocutory appeal under the CPA is whether 'the law tolerates but one correct answer'.[18] That discrimen accords with this Court's recent authority.[19]

B Probative value did not outweigh danger of unfair prejudice

15. The Respondent takes a general approach to the probative value of the representations
20 (RS [36]), thereby eliding important differences between the probative value of different representations – for example, the difference between the crucial representation 'The offender was [Steven Moore]'[20] and the peripheral representation '[Moore] returned to the property in the morning. She did not let him in. He left.'[21] While it is true that the central issue at trial was to be identity, and it was not in dispute that the complainant had

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[14] See, eg, *Director of Public Prosecutions (NSW) v RDT* [2018] NSWCCA 293, [4]–[24] (Basten JA); *Director of Public Prosecutions (NSW) v Sullivan* [2022] NSWCCA 183, [38] (Beech-Jones CJ at CL, Button and Hamill JJ agreeing).

[15] *Criminal Appeal Act 1912* (NSW) s 5F(3A).

[16] *R v Riley* [2020] NSWCCA 283, [112] (Bathurst CJ, Wilson J agreeing).

[17] *Sidaros v The Queen* (2020) 15 ACTLR 64, [38] (the Court).

[18] *Director of Public Prosecutions (Cth) v Knopp (a pseudonym)* [2023] VSCA 315, [160] (the Court). See also *Duncan (a pseudonym) v The King* [2024] VSCA 27, [29] (the Court); *Buchanan (a pseudonym) v The King* [2024] VSCA 50, [30] (the Court), *Ballard v The King* [2024] 26, [42] (the Court).

[19] *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, [16] (Kiefel, CJ, Gageler and Jagot JJ).

[20] ABFM 27 (representation #1 to S/C Stack at 1:05pm).

[21] ABFM 31 (representation #29 to S/C Rinderhagen).

been injured (ABFM 20 [8]), the Appellant never admitted the particular assaults alleged to have taken place (indeed, he could not admit the particular means by which the injuries were alleged to have been sustained given his case that he was not present and thus could not know). Although in oral argument on appeal the Appellant did not take issue with the basal fact that an assault apparently occurred (J [87]), his Response remained a denial of the detailed allegations as to the precise assaultive acts in paragraphs 4 and 5 of the Prosecution Opening (see ABFM 20 [4]). Accordingly, a subsidiary issue in the trial other than identity, was whether the acts described at paragraphs 4 and 5 of the Prosecution Opening occurred as alleged. The Respondent has not engaged with this nuance in her
10 submissions on probative value.

16. On the danger of prejudice, the Respondent is wrong to apply the label 'speculative' to the forensic inroads the Appellant might have made had he been able to cross-examine (RS [41]). There will always be uncertainty as to what an unavailable witness would have said when confronted in cross-examination, indeed the risk of the *jury* speculating is a matter going to the danger of unfair prejudice.[22] In any event, in circumstances like the present,[23] where a complainant has not attended at the two most recent pre-trial hearings, it cannot be said the prospect of advantageous cross-examination was speculative. The Appellant otherwise maintains his attempted categorisation at AS [63], which the Respondent has not dealt with but which has proved useful in other cases.[24]

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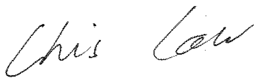
Dated: 16 May 2024



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22 *Tsamis v Victoria (No 6)* [2019] VSC 591, [16] (John Dixon J).

23 See also *R v A (No 3)* [2015] NSWSC 79, [12] (Bellew J); *Director of Public Prosecutions v B Makoi* [2023] ACTSC 22, [17] (Baker J).

24 See, eg, *Galvin v The Queen* (2006) 161 A Crim R 449, [21], [28] (Howie J, McClellan CJ at CL and Latham J agreeing); *R v McKerlie* [2016] NTSC 37, [52] (Blokland J).