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

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Internet publication certificate

1. It is certified that this outline is in a form suitable for publication on the internet.

Part II: Outline

2. The *Criminal Procedure Act 2009* (**CPA**) does not set a standard of review for interlocutory appeals. Section 300 is silent on this aspect and it appears that this was intentional. It was left to the Court to determine the appropriate standard in the circumstances. This appeal raises the issue of what standard ought be applied in relation to s 137 of the *Evidence Act 2008* (Vic).

3. Up until the present the Victorian Court of Appeal has applied *House v The King* to all interlocutory appeals. *McCartney v The Queen* (**JBA Vol 5 Tab 34**) set out the Court's approach in relation to interlocutory appeals which had been previously set out by a five-member bench in *KJM v R (No 2)*. *McCartney* was a case relating to s 137 and secondly made the distinction between the standard of review in relation to interlocutory appeals and appeals against conviction. Appeals against conviction were, it was decided, to be considered on the correctness standard whereas interlocutory appeals applied the *House v King* principles (*McCartney* at [40]–[51], **JBA Vol 5 Tab 34 at 944–947**).

4. In so deciding the Court of Appeal followed the decision of a bench of five in NSW in *DAO v The Queen* (**JBA Vol 5 Tab 23**). This was hardly surprising given the nature of an interlocutory appeal and other material produced at the time on the introduction of the CPA. In particular the Guide produced at the time of introduction gives a description which on its face is a *House* formula **(JBA Vol 7 Tab 48 at 1656**).

5. The standard of appellate review is informed by the 'legislative or common law allocation of decision-making authority between the trial court and the appellate court': *SZVFW* at 557 [35] (Gageler J) (**JBA Vol 3 Tab 16 at 404)**. The different contexts of an interlocutory appeal and a post-conviction appeal mean that it cannot be assumed that the legislature intended the same allocation of decision-making authority to apply. Determining the appropriate standard of review is not only a function of the nature of the decision under review, but also the 'nature and scope of the particular statutory appeal for which the legislature provides': *Dwyer v Calco Timbers Pty Ltd* at 138-9 [40] (**JBA Vol 3 Tab 10 at 185–186)**; *SZVFW* at 592–3 [153] (Edelman J) (**JBA Vol 3 Tab 16 at 439–440**).
6. The nature of an interlocutory appeal is one that supports the underlying principle of judicial restraint. To the extent that the *House* principles are said to apply restraint to a Court of Appeal by looking to see error in the trial judge's decision and by giving primacy to the role of the trial judge, this approach is most apt for an interlocutory appeal just as the correctness test is most apt in considering an appeal against conviction. The *House* standard provides a further brake on the fragmentation of the criminal process by giving primacy to the decision of the trial judge and evidentiary rulings. Whilst there are leave/certification provisions in the CPA, those provisions do not strictly confine interlocutory appeals in the way the application of the *House* standard does. It should be noted that in Victoria, unlike NSW, interlocutory appeals on evidentiary rulings are not confined to Crown appeals.
7. An interlocutory appeal in relation to evidence is most often launched in circumstances where the evidence has not been placed before the jury, is not complete and where it cannot be said that the Court is reviewing a case where the primary facts have been found by the trial judge. Most importantly in this case where directions to the jury would have an impact on unfair prejudice, these have not been given and so can only be considered in a general way. Thus there is no anomaly in having a different standard on an interlocutory appeal than on a final appeal when all of the evidence is in.
8. In NSW there has been ongoing debate about the appropriate standard. Justice Basten applied the correctness standard in *DPP v RDT* (**JBA Vol 5 Tab 25)**, by applying *R v Bauer* (a conviction appeal), but others on the Court declined to be drawn on the issue. It should be noted that his Honour was prepared to accept that the incompleteness of evidence had some relevance in relation to the standard to apply. In *R v Riley* (**JBA Vol**

6 Tab 39) after an extensive review Bathurst CJ did not express a concluded view. *Mann v The King* (**JBA Vol 5 Tab 33)** was an appeal against conviction. The question of the appropriate test on an interlocutory appeal remains an issue.

9. In Victoria the position is that since *GLJ* (**JBA Vol 5 Tab 29)** a number of cases have considered the issue on the basis of both tests. That was the case here where the Court considered both the s 65 admissibility question and the s 137 issue on both tests – openness and correctness. It should also be noted that a permanent stay application in a criminal case can be appealed by way of the interlocutory appeal provisions. In recent cases the correctness standard has been applied to permanent stay applications in relation to criminal cases. If there is a line to draw on where the correctness standard applies and where the open standard applies then permanent stay applications would be appropriate.
10. It is accepted that the application of s 137 is an evaluative task whereas s 135 has been referred to as a discretionary exclusion provision. However, just because after evaluation of the two competing circumstances produces an outcome it does not follow that the test ought to be a 'correctness' test. If the binary nature of the task in s 137 is determinative of the standard of review then the question arises as to whether different sections of the *Evidence Act* will lead to different standards.
11. In this case the Court upheld both the admissibility of evidence under s 65 and refused to exclude it under s 137 on both the openness and correctness tests. The evidence was highly probative of the identity of the offender as being the accused. Whilst it can be accepted that the inability to cross examine does amount to unfair prejudice there is nothing about this particular case that prevents the unfairness being ameliorated by judicial directions. Further, the trial judge considered that the lines of cross examination suggested were speculative in nature or of low relevance **(CAB at 90)**. Some were capable of being addressed by submission and through a forensic disadvantage warning. These matters were capable of being weighed against the high probative value. Just as unfairness has to be assessed on the whole of the evidence *Aytugrul v The Queen* (**JBA Vol 3 Tab 7**) so available judicial directions are relevant to the assessment. There was no error in the approach of the Court of Appeal.

Dated: 4 June 2024

Brendan F. Kissane **Jack O'Connor**