HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN **GLEN PATRICK Mc NAMARA**
Appellant

THE KING
Respondent

APPELLANT'S WRITTEN SUBMISSIONS

Part I: Certification

1. The appellant ("McNamara") certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of the issues presented by the Appeal

2. The issue presented on this appeal is whether the expression *"party"* in s 135(a) of the Evidence Act 1995 (NSW) ("EA") refers only to the accused and the Crown and not to a co-accused jointly charged on the indictment.

Part III: Section 78B Judiciary Act 1903 (Cth)

3. This appeal does not require a notice pursuant to s78B of the Judiciary Act 1903 (Cth).

Part IV: Citation of the judgment of the court below

4. The reasons for judgment of the Court may be found at **Rogerson v R; McNamara v R [2021] NSWCCA 160 and (2021) 290 A Crim R 239.**

Part V: Relevant Facts

5. On 1 February 2016 McNamara and his co-accused Roger Rogerson ("Rogerson") were arraigned upon a joint indictment that alleged one count of murder and one count of supply a large commercial quantity of a prohibited drug namely, methylamphetamine. **CAB 5-7**. On 15 June 2016 the jury found McNamara and Rogerson guilty as charged. **CAB 301**. On 2 September 2016 McNamara and Rogerson were sentenced to life imprisonment without parole for the offence of murder and 12 years imprisonment with a non-parole period of 9 years for the prohibited drug offence. **CAB 361-362.**

Background – Appellant's Trial

6. The prosecution alleged that pursuant to a joint criminal enterprise McNamara and Rogerson murdered the deceased, an illegal drug dealer, dispossessed the deceased of a quantity of illegal drugs and disposed of his body at sea. **CAB 385-386.**

7. McNamara's case was that he was not party to any joint criminal enterprise with Rogerson to murder the deceased and confiscate his drugs in public storage shed 803 on 20 May 2014. McNamara testified that in storage shed 803 an altercation over the transfer of illegal drugs occurred between the deceased and Rogerson culminating in Rogerson shooting the deceased dead. McNamara's case was that at no time did he know Rogerson was armed. **CAB 386-391**. McNamara's case was that he was not a party to any joint criminal enterprise to murder or obtain illegal drugs from the deceased; that his knowledge of Rogerson's capacity for fearless lethal violence informed his, McNamara's behaviour, following the shooting of the deceased; that in respect to the events following the shooting of the deceased and the handling of the illegal drugs he was under the duress of Rogerson.

8. Following the shooting of the deceased McNamara said to Rogerson: "*Why, Why, Why?"*. **CAB 390.** Immediately following this evidence, counsel for McNamara sought to introduce evidence relevant to the defence of duress and the existence of a joint criminal enterprise. Objection was taken by counsel for Rogerson. This evidence

comprised what Rogerson said to McNamara immediately following the shooting and earlier conversations between McNamara and Rogerson whereby Rogerson described to McNamara numerous very serious crimes Rogerson had committed historically and the circumstances in which he had committed them.

9. The evidence McNamara sought to introduce alleged that immediately following the shooting of the deceased, Rogerson said to McNamara: *"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 a 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 a reference to *"Michael Drury"* a former police officer. Additionally, McNamara sought to introduce evidence of previous representations made by Rogerson to him during their social relationship in particular; Rogerson had arranged the murder of Alan William, had shot Michael Drury, had murdered Chris Flannery, and disposed of his body at sea, had murdered Warren Lanfranchi and was involved with the murders of Sallyanne Huckssteppe and a heroin dealer named Luton Chu. **CAB 521-522**.

10. Accordingly, having regard to McNamara's fear and knowledge of Rogerson's criminal history, in particular Rogerson's propensity for extreme lethal violence, McNamara relied on the defence of duress relevant to the existence of a joint criminal enterprise and possession of the illegal drugs. Further, evidence of Rogerson's past criminality informed McNamara's attitude to Rogerson and explained why McNamara co-operated with Rogerson post the shooting of the deceased including assisting Rogerson to dispose of the body of the deceased. Additionally, there was evidence of episodic threats made by Rogerson to McNamara concerning the McNamara's daughters. The totality of this evidence was directly relevant to the existence of the style of joint criminal enterprise alleged by the Crown.

Part VI: Succinct argument addressing the following points:
The trial judge's ruling re ss55 and 135(a) of the Evidence Act 1995 (NSW)

11. The admissibility of evidence concerning Rogerson's representations to McNamara at the shooting of the deceased and Rogerson's representations to McNamara of the historical commission of serious crimes precipitated an interlocutory ruling of

significant forensic importance to the McNamara's trial; **The Queen v Rogerson, The Queen v McNamara (No45) [2016] NSWSC 452.**

12. The trial judge, pursuant to ss 55 & 135(a) of the Evidence Act 1995 (NSW) ("EA"), ruled that the representation by Rogerson to McNamara in the storage shed was, in truncated form, admissible i.e., McNamara was permitted to introduce Rogerson's words: *"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 words *"I did Drury, I'll do you too"* were excluded. Additionally, McNamara was completely prohibited from introducing before the jury Rogerson's historical representations to him that Rogerson had arranged the murder of Alan Williams, Rogerson's shooting of Drury, Rogerson's murder of Chris Flannery and the disposal of his body at sea, Rogerson's admission he had murdered Warren Lanfranchi and was involved in the murders of Sallyanne Huckssteppe and Luton Chu.

13. The trial judge accepted that the relevance test in s55 of the EA had been satisfied however, the evidence of Rogerson's representation to McNamara in the storage shed concerning Drury and past confessional statements describing heinous criminal activity by Rogerson were excluded. This was, in the words of s135(a) of the EA, because the judge held the probative value of the evidence was *"substantially outweighed by the danger the evidence might be unfairly prejudicial to a party"*, namely, Rogerson.

14. The correctness of the afore-mentioned evidence ruling was the centrepiece of McNamara's appeal to the Court of Criminal Appeal against conviction. **CAB 520-547**.

The Court of Criminal Appeal and its treatment of s135 of the EA.

15. Before the Court of Criminal Appeal McNamara submitted that the evidence ruling by the trial judge was erroneous and occasioned McNamara a miscarriage of justice justifying a new trial. The Court of Criminal Appeal held, **Rogerson v The Queen; Mcnamara v The Queen [2021] NSWCCA 160,** that the trial judge had correctly applied s135(a) of the EA to exclude the evidence **[at paras 549,552,554-558], CAB**

543-547 and that Rogerson, as co-accused, was a *"party"* within the meaning of s135(a) of the EA **[at paras 514 -523 540]. CAB 535-540.** McNamara submits that this ruling by the Court of Criminal Appeal was erroneous.

16. Section 135(a)(b)(c) of the EA confers upon a court exercising civil and criminal jurisdiction a discretion to exclude otherwise admissible evidence where the probative value of the evidence is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing or cause or result in undue waste of time.

17. McNamara advanced two distinct but interrelated questions for consideration by the Court of Criminal Appeal: **CAB 527** first, there was no power pursuant to s135(a) of the EA to exclude the evidence of Rogerson's representations in shed 803 and the additional representations by Rogerson to McNamara that Rogerson was involved with previous homicides because Rogerson was not *"a party"* within s 135. Secondly, assuming there was power under s135 to exclude the evidence of the two conversations that evidence should not, in the exercise of the trial court's discretion, have been excluded, and having been excluded, created a miscarriage of justice. **CAB 527**.

18. The Court of Criminal Appeal held that Rogerson was, within the terms of s135 (a) of the EA a *"party"* and thus the Court had power to exclude evidence of Rogerson's criminal past. **CAB 535**.

McNamara's Argument re s135(a) of the EA

19. McNamara submits that s135(a) of the EA should be construed consistently with the common law caselaw that there is no discretion in a trial judge to exclude evidence adduced by one accused that is relevant and consistent with innocence because it may be prejudicial to a co-accused in a joint trial situation **Lowery v R [1974] AC**; **Winning v R [2002] WASCA 44.** At common law a general discretion to exclude evidence which is more prejudicial than probative applies where the evidence is tendered by the prosecution but not where it is introduced by the defence. It is defence counsel's duty to put all relevant evidence before the tribunal of fact that assists the accused's defence in answer to the prosecution case. It is unjust to prevent an accused

from calling evidence of probative value capable of being consistent with innocence merely because such evidence is prejudicial to a co-accused; **Lowery v R [1974]AC 85** (Privy Council on Appeal from Victoria)**; R v Miller & Ors (1952) 36 Cr App R 169 at 171 (per Devlin J). In Winning v R** two accused were charged and jointly tried for murder. Each accused alleged it was the other who was guilty of the offence**.** The antecedent criminal record of one of the accused was relied on by the other accused to demonstrate it was more probable that the other accused was responsible for the murder. The trial judge ruled the antecedent record inadmissible under the common law of evidence. The Court of Appeal of Western Australia (applying **Lowery v R)** held that the trial judge's evidence ruling was erroneous and found that the exclusion of the criminal record precipitated a miscarriage of justice and ordered a re-trial. Rogerson's history of serious crimes (related by Rogerson to McNamara), was relevant to the existence of the joint criminal enterprise and the possession of the illegal drugs. The exclusion of this evidence has precipitated a miscarriage of justice. Adopting the language of the Court of Appeal of Western Australia in **Winning v R at [37**] *"…it is one thing to say that such evidence is excluded when sought to be tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by an accused in disproof of his own guilt. There is no reason of policy or fairness which justifies the exclusion of evidence relevant to prove the innocence of an accused person".* See also Lowery at s102F.

20. Additionally, it is submitted that there is a public interest in an accused relying on evidence demonstrating innocence of the offence charged and, in an accused, fully defending him/herself on criminal charges. see generally **Alister v R (1984) 154 CLR 404 at 414, 431, 437-438.**

21. In **R v Henry; R v Gravett; R v Swansson [2008] NSWCCA 248** Nettle AJA (as his Honour then was) with whom McClellan CJ at CL and Simpson J agreed held at **para 24** that *"when it comes to probative value against prejudice for the purposes of s135 it is of course prejudice to the accused, not a co-accused which must be born in mind"* This statement supports McNamara's position that the term *"unfairly prejudicial to a party"* does not mean unfairly prejudicial to a co-accused. Further, Nettle's AJA observation is consistent with the common law cases which hold that a trial judge cannot exclude evidence favourable to one accused on the ground that it

may prejudice a co-accused. The Court of Criminal Appeal at **para 510** considered that it was not bound by **R v Henry** and the implication from **Henry** that s135 cannot operate to the forensic detriment of a particular accused in a joint trial situation. **CAB 531**. The Court of Criminal Appeal's determination that *"party"* in s135(a) includes a co-accused in a joint criminal trial is wrong in law. There are two separate cases before the jury in that situation, a matter which is routinely mentioned by judges in summing up in such joint trials. Similarly, a co-accused is not a necessary party to an accused's appeal and the conviction or acquittal of a co-accused is not a matter to which an accused is a party under the law of res judicata. That it is convenient and cheaper to have joint trials does not alter this fundamental position.

22. That McNamara was threatened by Rogerson during the shooting of the deceased and that Rogerson had confided in McNamara that he, Rogerson, had committed multiple historical murders was directly relevant to explain McNamara's behaviour following the shooting of the deceased which (the prosecution alleged) was capable of informing the existence of a joint criminal enterprise. It was also directly relevant to the issue of duress. The exclusion of the evidence left McNamara forensically disadvantaged and the tribunal of fact dispossessed of evidence consistent with innocence. The exclusion of this evidence precipitated a manifestly unfair trial.

23. At common law an indictment is a written accusation of a crime made at the suit of the sovereign against one or more persons; **R v Federal Court of Bankruptcy 59 CLR 556 at 582**. The joint indictment charged McNamara and Rogerson with identical offences. At common law *"each count in an indictment is really a separate indictment…"* per Lord Hewart CJ; **R v Stringer [1933] 1 KB 704 at 710**. At common law each count on an indictment alleges the commission of a distinct and separate crime by the accused and for the purpose of verdict and judgment each count is treated as a separate indictment **Latham v R (1864) 9 Cox C. C. 516.**

24. At common law the rule of practice was that there could be a joinder of offenders in the same indictment only if (a) they had joined in committing the offence charged or (b) they were principals and accessories; **Hale's Pleas of the Crown (1778, Vol 2 pp173-174; Hawkins' Pleas of the Crown Vol 2 p831** or (c) a public nuisance was

the work of multiple accused; **R v Assim (1966) 2 QB 249. Hale's Pleas of the Crown Vol 1 p46** *"every indictment is as well several as joint".*

25. In **DPP v Merriman [1973] AC 584** the question was whether it was open to a jury when trying a joint charge to which one accused pleaded guilty to convict the remaining accused of committing independently the offence the subject matter of the joint charge. Under an earlier case, the position was that if persons were jointly charged on the one indictment and one accused had pleaded guilty the other accused could only be convicted if it was found by the jury that the two accused had acted pursuant to a common purpose; **R v Scaramanga [1963]2 QB 807- (overruled by DPP v Merriman).** Lord Morris of Borthy-Gest in answering the question before the House of Lords in the affirmative, observed in his speech at **591-592** that *"in answering the question it is important to consider what is meant by a "joint charge'. In my view it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named on one count. Each person is, however, being charged with having himself committed an offence. All crime is personal and individual though there may be some crimes (of which conspiracy is an example) which can be committed in co-operation with others. The offences charged in the present case were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to be guilty".* In **DPP v Merriman supra** all their Lordships referred with approval to the observation of Street CJ in **R v Fenwick (1953) 54 S R (NSW) 147 at 152** where the Chief Justice, with whom Owen and Herron JJ agreed, held that *'Indictments are to be read jointly and severally, and this indictment, as is common practice in indictments in cases of murder although it is framed against two accused, it is to be regarded as a joint and severable indictment of those accused".* Thus, it is submitted that in the trial before Bellew J, there were two trials proceeding together and neither McNamara nor Rogerson was a "*party"* in the prosecution of the other. That the two cases were heard at the same time, determined by the same tribunals of fact and law and (largely) on the same evidence does not alter that fundamental position. Any prejudice to Rogerson could have been dealt with by directions under EA s136.

26. The Court of Criminal Appeal at **para 521** rejected McNamara's submission that where there is a joint indictment there are two trials proceedings together and neither accused is a *"party"* in the trial of the other accused. **CAB 534**. The Court of Criminal Appeal justified its approach with reference to the Australian Law Reform Commission (ALRC) Report. The Court of Criminal Appeal at **para 522** also referred to other sections of the EA where the expression party is mentioned e.g., ss 20, 27,41(4)81(1),104(6), as justifying a *"broader view"* of the expression "*party"* in s135(a) encompassing a co-accused in a joint trial but provided little reasoning in support of that conclusion.

27. The Court of Criminal Appeal's reliance on the ALRC treatment is of dubious value because the ALRC draft bill cl 114 and the EA demonstrate a significant difference in that cl 114 does not contain the words *"unfairly prejudicial to a party".* This is significant because it suggests that the Parliament intended to achieve a different result to that advocated by the ALRC, which is consistent with an adoption of the common law cases that there is no discretion to exclude evidence adduced by one accused on the ground that it is *"unfairly prejudicial"* to another accused in a joint trial. Additionally, s9 of the EA preserves the operation of common law principles in relation to evidence except in so far as the EA expressly or by implication provides otherwise. Those principles include the principle that there is no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the innocence of an accused person; Lowery v R [1974] AC 85, at 101F, 101H (FC); R v Lowery [No.3][1972] VR 939, at 945, 947; Lui Mei Lin v R [1989] 1 AC 288, at 296 - 7; R v Murch (2014) 119 SASR 427 (FC), at 435 -6 ("[t]he preponderance of authority appears to support the entitlement of an accused to call any evidence which is adjudged to be relevant to his defence"). McNamara submits that the legislature did not intend to interfere with these principles in enacting s135.

PART VII: Orders sought

28. The orders sought are:

(a) Appeal allowed.

(b) Set aside the judgment and orders of the New South Wales Court of Criminal Appeal dated 16 July 2021, and in lieu thereof order that the appeal against conviction to that court be allowed and there be a new trial.

PART VIII: Time for oral argument

29. The appellant's estimate for oral argument is 2 hours 15 minutes.

G O'L Reynolds SC

G D Wendler

D Ward DATED 16 January 2023

Annexure: List of the constitutional provisions, statutes and statutory instruments referred to in the written submissions:

1. Evidence Act 1995, s 9, s 135 and s 136 (As at 25 November 2022)