HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S143 of 2022

BETWEEN **GLEN PATRICK McNAMARA**
Appellant

AND **THE KING**
Respondent

APPELLANT'S REPLY

Part I: Certification

1. The appellant certifies that this Reply is in a form suitable for publication on the internet.

Part II: Reply to Appellant's Argument

(i) General

2. RS [14]–[27] place emphasis upon other provisions of the *Evidence Act 1995* (NSW) ('EA') and, in that context, upon the presumption that a word has the same meaning throughout the Act. However, this method of construction is a presumption "of the mildest kind" (J. Bell and G. Engle, *Cross: Statutory Interpretation* (Lexis Nexis Butterworths (UK) 3rd ed, (1995) at 115), is "slight" (*Clyne v DCT* (1981) 140 CLR 1 at 10 per Gibbs CJ) and "readily yields to the context" (ibid at 15: Mason J; Aickin and Wilson JJ agreeing).

3. Moreover the word "party" is used in very different linguistic contexts throughout the EA[1].

4. Further, part of the context to which the presumption "readily yields" is the common law principle that, subject to the rules of evidence[2], an accused "must have liberty to defend himself by such legitimate means as he thinks it wise to employ": *Murdoch v Taylor* [1965] AC 574 at 584 per Lord Morris) and has an entitlement "to call any

[1] For example, the NSWCCA placed emphasis upon s.83 but in that provision *"party"* is used as part of the composite, separately defined expression, "*third party*" and it is also used in s.83 in relation to the words "*case*" and "*proceeding*", which expressions are not found in s 135.
[2] As opposed to any residual judicial discretion.

evidence which is adjudged to be relevant to his defence": *R v Murch* (2014) 119 SASR 427 at [38].

5. Accordingly, the weak presumption that a word has the same meaning throughout an Act must also yield here to the presumption that absent clear words the legislature did not intend to interfere with that fundamental entitlement of an accused[3].

6. RS at [14]–[27] refer to various provisions of the EA that the Crown says provide contextual support for the Crown's construction of s.135.

7. As to s.136, RS [15], insinuates that McNamara has somehow implicitly conceded that his construction of s.135 is wrong. However, AS [25] referred to the possible use of s.136 in the prosecution of *Rogerson*. Rogerson is a "party" to his own prosecution, and the use of any evidence in *that* case was able to be limited under s.136[4].

8. As to s 20, RS [19] says that the phrase "any party (other than the prosecutor)" in s 20(2) is, by virtue of the juxtaposition of "party" and "prosecutor" in that context, a reference to a co-accused. However, s.20 uses different language from s.135 in referring to the various persons who are involved in the hearing, and is directed to a quite different aspect of it. Moreover, s.20 illustrates that the EA is *inconsistent* in the way that it refers to other defendants. Subsection (5) specifically refers to persons tried together for an indictable offence, but it does *not* refer to them as parties. Rather, it refers to them merely as "persons … tried together". That illustrates the limited significance that can be given to s.20 and other provisions in construing s.135.

9. As to s.27, RS [20] says that the provision confers on a co-accused the right to cross-examine another co-accused who gives evidence, because "witness" is defined in the EA Dictionary as including a "party" giving evidence, including a "defendant in a criminal proceeding" (RS [20]). But there is no mention of co-defendants in s.27 or the relevant clause of the Dictionary. A criminal accused may, of course, give evidence in his own defence. Section 27 confirms that the Crown may, in that case, question the accused. Section 27 tells us nothing about s.135.

10. As to s.37, RS [21] makes a similar point to the one in relation to s.27, and the problem with the point is the same.

11. As to s.65(9), RS [22] relies on the fact that the provision refers to evidence being adduced by "another party" in a criminal proceeding, rather than only by "the

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[3] Cf *Coco v R* (1994) 179 CLR 427 at 437 (per Mason CJ, Brennan, Gaudron and McHugh JJ).

[4] And the Courts assume that any such limitation would have been obeyed by the jury: *Gilbert v R* (2000) 201 CLR 414, at [13] and [31]; *Dupas v R* (2010) 241 CLR 237 at [28]-[29].

prosecutor". It is then asserted that this must mean that a co-accused could also be a "party". However that the legislature could have referred in s.65(9) specifically to the prosecutor, but did not, is a slender reed on which to base an argument about the construction of s.135.

12. RS [22]-[23] refer to various requirements to give notice to "each other party", asserting that these must refer to co-accused. But this assertion provides no tenable argument about the construction of s.135.

13. As to s.83, RS [24] says that its reference to "third party" must include a reference to a co-accused. However, "third party" in s.83 is a different and composite expression found in a linguistic setting that is very different to that of s.135. Setion 83 refers to a third party (an expression which is then defined) and also refers to "the case" and "the proceeding", neither of which expressions occurs in s.135.

14. RS [25] refers to s.110, but it is not clear what the Crown point is, given that the word "party" does not appear in that provision.

15. RS [48] acknowledges the powerful controlling legal effect of s9 of the Evidence Act 1995 (NSW) and correctly submits that s.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 presumptions" adding that "Section 9 would also preserve the underlying principle of accusatorial and adversarial system of a criminal trial".

16. But at RS [49] it is stated that "the "principle" advanced by the appellant, even if it was found to exist in the terms contended by the appellant, **is not** a fundamental principle of criminal law of a kind that would qualify as a category of substantive law or equity". However, there can be few principles more fundamental to the adversarial system of criminal justice than the principle relied upon by McNamara[5].

(ii) The proviso argument

17. At RS [54]-[76], the Crown submits that there was no substantial miscarriage of justice because the evidence adduced at the trial "clearly established beyond reasonable doubt that [McNamara] and Rogerson were parties to the premeditated execution of Jamie Gao" (RS [55]).

18. It is important in this context to draw two distinctions.

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[5] Referred to at [4] above.

19. The first distinction is between evidence relevant to prove that McNamara was party to an arrangement with Rogerson to deprive Gao of drugs. Evidence relating to that issue is referred to by the Crown at RS [57], [60], [62], [65], and [67]. That is to be contrasted with evidence relevant to prove an arrangement between McNamara and Rogerson to kill Gao. Evidence relating to that issue is referred to by the Crown at RS [58], [59], [61], [63], [64], [69], and [72]-[75].

20. The second distinction relates to the evidence just noted, namely, evidence relevant to prove an arrangement between McNamara and Rogerson to kill Gao. The distinction is between evidence referred to by the Crown, which related to the period *before* Gao's death (RS [58], [59] (part), [61], [63] and [64]) and evidence which related to the period *after* Gao's death (RS [59] (part), [69] and [72]-[75]).

21. McNamara makes three points in this context. The first is that the evidence at RS [58], [59] (part), [61], [63] and [64] relating to the period *before* Gao's death is exiguous, and on no view capable of establishing an arrangement to murder beyond reasonable doubt.

22. The second is that the complexion of the evidence at RS [59] (part), [69] and [72]-[75] relating to the period *after* Gao's death is capable of being substantially affected by the evidence which was excluded. In short, McNamara's case that his post-mortem actions were the result of fear of Rogerson is capable of raising a reasonable doubt as to his guilt if the excluded evidence is considered.

23. The third point is that the Crown cannot submit that this Court would be able to conclude that the evidence properly admitted at trial[6] established beyond reasonable doubt that McNamara was guilty of being party to an arrangement with Rogerson to kill Gao[7].

24. The Crown bears the onus of proof, and the Crown submissions on the proviso should be rejected.

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[6] With or without the addition of the excluded evidence.
[7] Cf *Weiss v R* (2005) 224 CLR 300, at [44].