HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: GLEN PATRICK McNAMARA

Appellant

and

THE KING

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE

2. In a trial on indictment the jury is, and can only be, empanelled and sworn to try the issues on that particular indictment: ***Munday v Gill*** at 76, JBA 313. The jurors are chosen for the single purpose of trying one indictment: ***Munday v Gill*** at 87, JBA 324; ***Swansson*** at [20], JBA 988. Where an indictment charges multiple accused, the jury is empanelled and sworn for the purpose of trying the issues against each of those accused: ***Munday v Gill*** at 76, JBA 313. These principles are long established in criminal procedure. The legislature must be taken to have been aware of them when enacting the *Evidence Act 1995* (NSW) (**EA**): CCA [513], CAB 532.

3. An indictment charging more than one accused person is both joint and several, because criminal liability is in all cases personal: *Hawkins' Pleas of the Crown* (1824), JBA 1084; ***Merriman*** at 46, JBA 425. A joint charge may be brought where that personal liability arises from a joint act with another or out of one transaction with another: *Hawkins*, JBA 1084; ***Merriman*** at 53, 56, JBA 432, 435; ***Fenwick*** at 152-153, JBA 828-829.

4. Whether there are separate "cases" before a jury of two or more accused on a joint indictment is not to the point: AS [21].

Section 135 *Evidence Act*

5. On a plain and ordinary reading of s 135(a) EA, in a criminal proceeding on indictment which charges more than one accused person, "a party" means the prosecutor or any one or more of the accused persons, because the text of the position contains no words of confinement or limitation to exclude one accused or another: JBA 86.

6. "Party" is not defined in the EA. It is an expression which is apt to describe those persons who are participating in a legal proceeding and whose rights and liabilities may be affected by the evidence adduced in that proceeding: CCA [522], CAB 534-535. It is apt to describe a co-accused named in a joint indictment.

7. The other provisions of the EA strongly indicate that the term "party" in s 135(a) does not exclude co-accused persons.

Statutory context

8. Sections 135(a) and 136(a) of the EA are related and sequential provisions in the EA. The term "party" must have the same meaning in each.

9. In a criminal proceeding on a joint indictment, except as otherwise provided by the EA, all evidence which is relevant in a proceeding is admissible in the proceeding: ss 55(1), 56(1) EA, JBA 41.

10. Section 136 (JBA 86) provides generally for limiting the use of evidence. No other provision so provides. If "party" in s 136 is construed to exclude a co-accused in a joint trial, a variety of circumstances would arise in which a trial judge could not limit the use of evidence as between co-accused.

11. Section 83 (JBA 53) employs the term "third party" for a co-accused, meaning a party to the proceeding concerned other than the party who made the admission or adduced the evidence.

12. Section 20 (JBA 26-27) also contains clear expression that each accused person in a criminal proceeding on a joint indictment is a "party" to the same proceeding.

13. Section 27 (JBA 29) provides that a party may question any witness except as the EA otherwise provides. Section 27 is the source of the entitlement of an accused person to cross-examine a co-accused on a joint indictment: CCA [521(2)], CAB 534. A "witness" includes a party giving evidence, and in turn a defendant in a criminal proceeding: Part 2, cll 7(1), 7(3), Dictionary, EA, JBA 127. A "cross-examiner" means a party who is cross-examining a witness, and "cross-examination" of a witness means questioning of a witness by a party other than the party who called the witness to give evidence: Part 1, Dictionary, EA; Part 2, cll 2(2), Dictionary, EA; JBA 122, 126.

14. The requirement to give notice of an intention to adduce tendency evidence in s 97 (JBA 59) must contemplate notice to each other accused person as well as the prosecutor, in order for the object of s 97 to be satisfied. The same consideration attends requirements to give notice in ss 67, 73, 98 and 117 EA; JBA 47, 50, 59, 69.

15. The rule of construction that the same meaning is to be given to the same words in the statute is not displaced: ***Registrar of Titles (WA) v Franzon*** at 618; ***IMM v The Queen*** at [143].

16. The ALRC intended that a trial judge have a discretion to exclude similar conduct evidence sought to be adduced by a co-accused: *Evidence* (Report No 26, 1985, [811]) JBA 1091; s 3(3) EA, JBA 21. That discretion is found in s 135.

17. There is no basis in the terms of s 135 or in principle to limit that discretion to similar conduct evidence.

Common law context

18. The interests of justice dictate strong reasons of principle and public policy why joint offences should be tried jointly: ***Webb*** 88, 89, 56 (***Roughan*** at [49], JBA 945); cf AS [21]. This is particularly so in a case of "cut throat" defences, which arose in the appellant's trial: ***Roughan*** at [50], JBA 945. The issue in the present matter arises in this context.

19. ***Lowery v R*** [1974] AC (JBA 621) is not authority that at common law there was no discretion in a trial judge to exclude evidence adduced by one accused if that evidence may be prejudicial to a co-accused, in a proceeding on a joint indictment: AS [19].

20. It is not correct to assert that there was a principle at common law, immediately prior to the passage of the EA, of a kind described in AS [19].

21. A number of Victorian authorities clearly supported the existence of such a discretion: ***R v Lowery and King (No 3)*** at 948, JBA 843; ***Darrington*** at 384-385, JBA 743-744; ***Gibb & McKenzie*** at 163, JBA 754. Other authorities did not find a discretion (***Murray***, JBA 886; ***Visser***, JBA 1052) but it was by no means the settled common law that there was no discretion: AS [19].

22. Evidence of propensity of a co-accused was permitted to be adduced by an accused in cross-examination of prosecution witnesses: ***Roughan***, JBA 948. Leading of evidence of criminal antecedents of a co-accused to demonstrate disposition was permitted in ***Winning***, JBA 1060, following ***Lowery***, on the basis that evidence of that type necessarily negates the existence of a general discretion to exclude it. The existence of a residual discretion to exclude evidence sought to be introduced in cross-examination of D1 by D2 was doubted in obiter comments in ***Murch***, JBA 857. A discretion to exclude cross-examination by D1 of D2 on prior inconsistent statements (***Kazemi***, JBA 578) or admissions (***Question of Law (No 3 of 1997)***, JBA 662) was recognised.

23. In the event it is found that the CCA fell into error in the interpretation of the term "party" in s 135, the nature and effect of the error is not such to preclude application of the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW): ***Weiss*** [43]-[45], JBA 385.

24. In any application of the proviso, the respondent relies upon the evidence at trial that is before this Court and the factual findings in CCA [23]-[305], JBA 392-462, regarding evidence led at the trial.

15 May 2023

S Dowling SC