



## HIGH COURT OF AUSTRALIA

15 November 2023

MCNAMARA v THE KING  
[2023] HCA 36

Today, the High Court unanimously dismissed an appeal from a judgment of the Court of Criminal Appeal of New South Wales. The appeal concerned s 135(a) of the *Evidence Act 1995* (NSW), which empowers a court to refuse to admit evidence that is relevant and otherwise admissible in a proceeding, if the probative value of the evidence is substantially outweighed by the danger that the evidence might be unfairly prejudicial to "a party". The question for this Court was whether "a party" includes a co-accused in a joint criminal trial.

The appellant and his co-accused, Roger Rogerson, were tried by jury in the Supreme Court of New South Wales on a single indictment which charged them jointly with murder and supplying a large commercial quantity of methylamphetamine. During the trial, to support a defence of duress, the appellant sought to give evidence that Rogerson told him that he "did" another person, he had shot that person, and had murdered or been involved with the murders of other persons. Counsel for Rogerson objected to the admission of the proposed evidence on the basis that its probative value to the appellant was substantially outweighed by the real danger of unfair prejudice to Rogerson. The trial judge excluded the evidence under s 135(a) of the *Evidence Act*. The trial judge found that the proposed evidence added little to the appellant's case of duress, and that the danger of unfair prejudice to Rogerson was incapable of being alleviated by a direction to the jury in any terms. The jury found the appellant and Rogerson guilty on all counts.

The Court of Criminal Appeal dismissed the appeals brought by each of the appellant and Rogerson against their respective convictions. Relevantly, one ground of the appellant's appeal was that the trial judge lacked power to exclude the appellant's proposed evidence about the person Rogerson had allegedly killed under s 135(a) of the *Evidence Act* because Rogerson was not "a party" to the appellant's trial. The Court of Criminal Appeal rejected that argument.

The High Court held that the Court of Criminal Appeal were correct to hold that "a party" in s 135(a) of the *Evidence Act* extends to and includes a co-accused in a joint trial. Thus, a joint trial is "a proceeding" to which each co-accused is "a party". The Court also held that this interpretation of s 135(a) reflects the common law position in Australia and there are strong reasons of principle and policy to support a judicial discretion to exclude evidence of an accused where its probative value is outweighed by its prejudicial effect on another co-accused.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*