

KADIR v THE QUEEN (S160/2019)
GRECH v THE QUEEN (S163/2019)

Court appealed from: New South Wales Court of Criminal Appeal
[2017] NSWCCA 288

Date of judgment: 30 November 2017

Special leave granted: 17 May 2019

Mr Zeki Kadir and Ms Donna Grech (“the Appellants”) carried on a greyhound training business. The Crown alleged that in the course of that business, Mr Kadir used live animals (rabbits and in one instance, a possum) to train the greyhounds. He did this by attaching them to a mechanical device called a lure-arm, which then propelled the animals around a circular area called a bull-ring. The animals, as bait, were then chased by the greyhounds until they were caught. In that process they were either seriously injured or killed. On occasions, the animals in question were subjected to this procedure repeatedly. As a result the Appellants were charged with numerous counts of serious animal cruelty, contrary to s 530 of the *Crimes Act 1900* (NSW).

On the first day of their trial, the Appellants successfully applied to exclude certain evidence under s 138 of the *Evidence Act 1995* (NSW) (“Evidence Act”). It is common ground that the effect of those exclusions was to demolish the Crown case on counts 1-12 (against both Appellants), while substantially weakening it in relation to the remaining count against Mr Kadir.

Broadly speaking, the excluded evidence fell into the following three main categories: the surveillance evidence, the alleged admissions and the search warrant evidence. The relevant illegality engaged by s 138 of the Evidence Act consisted of various breaches of the *Surveillance Devices Act 2007* (NSW) (“the Surveillance Act”). It also included trespasses to Mr Kadir’s property which occurred when a person engaged by an animal welfare organisation entered his property (without permission) and left a video recording device there. Relevantly, s 8 of the Surveillance Act prohibits the unauthorised installation, use or maintenance of such devices.

On 30 November 2017 the Court of Criminal Appeal (“CCA”) upheld an application by the Director of Public Prosecutions (“the Director”) for leave to appeal from the exclusion rulings. Justices Ward, Price & Beech-Jones unanimously, but only partially, upheld the Director’s appeal. Their Honours found that the trial judge had erred in excluding the first of the video recordings, the alleged admissions and the search warrant evidence. The CCA however rejected the Director’s challenge to the rejection of the balance of the video recordings.

In each of these appeals the grounds of appeal include:

- The CCA erred in finding appealable error in the trial judge’s decision on the basis that the trial judge did not assess the admissibility of the first item of evidence individually.

- The CCA erred in finding error in the trial judge's finding that the s 138 Evidence Act factors governing the exclusion of the recordings were "directly applicable" to the other evidence obtained as a consequence of the illegally obtained recordings, namely recorded admissions and evidence obtained under search warrant.

In each appeal the Respondent has filed a notice of contention, the identical ground of which is:

- The CCA erred in holding that, in order to succeed in the appeal, the Crown was required to demonstrate that the trial judge erred in the sense referred to in *House v King* (1936) 55 CLR 499 at 504-505.