IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S~~265~~ 163 of 2018

BETWEEN:

DONNA GRECH

Appellant

and

10

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

Legal Aid
PO Box K847
Haymarket 1238

Telephone: 02 9219 5158
Fax: 02 9219 5889
Email: pip.hill@legalaid.nsw.gov.au
Ref: Grech

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. What is the standard of review in a Crown appeal under s5F(3A) of the *Criminal Appeal Act 1912* (NSW) from a ruling excluding evidence under s138 of the *Evidence Act 1995* (NSW)?
3. Did the Court of Criminal Appeal (**CCA**) err in finding appellable error in the trial judge's exclusion of evidence under s138 of the *Evidence Act*?

Part III: s 78B Notices

4. On the basis of the arguments advanced in these submissions the appellant considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Citation

5. The primary judgment is *R v Grech; R v Kadir* (unreported, 28 June 2017, District Court of New South Wales, Buscombe DCJ).
6. The CCA decision is *R v Grech; R v Kadir* [2017] NSWCCA 288 (currently restricted).

Part V: Relevant facts

7. The appellant, Ms Grech, and her co-accused, Mr Kadir, pleaded not guilty to 12 and 13 counts respectively relating to serious animal cruelty contrary to s530 of the *Crimes Act 1900* (NSW). The charges arise out of the appellant's alleged use of animals as "live bait" in training racing greyhounds on Mr Kadir's property. They carry a maximum penalty of five years' imprisonment.
8. On the first day of trial, the appellant applied to exclude certain evidence under s138 of the *Evidence Act*, on the basis that the evidence was illegally obtained, or obtained in consequence of illegality. This application was dealt with by the hearing of a *voir dire*.
9. The evidence sought to be excluded consisted of seven covert video recordings of activities occurring at Mr Kadir's greyhound training premises on various dates over a one-month period (the **recordings**), and evidence obtained during the execution of a search by officers of the RSPCA on Mr Kadir's property (**RSPCA evidence**).[1] The alleged illegality consisted of breaches of the *Surveillance Devices Act 2007* (NSW) and trespasses to property. The impugned evidence was obtained in the following circumstances.

---

[1] The Crown also sought to tender evidence of alleged admissions made by Mr Kadir in conversations with the filmmaker, posing as a greyhound owner. As the alleged admissions were not tendered against the appellant, no submissions are made on that category of evidence.

The illegally obtained recordings

10. An animal protection organisation, Animals Australia, received an anonymous complaint about activities at the Kadir property. The Chief Investigator of Animals Australia engaged a documentary filmmaker to investigate. That person, dressed in dark clothing, entered Mr Kadir's property in the early hours of 5 December 2014 by climbing through a fence, passing through a neighbouring property, climbing over another fence, and opening a latched gate and covertly installing a surveillance camera in the vicinity of the area where the greyhounds were trained (Joint Core Appeal Book (**AB**) 17.41). The filmmaker returned to the property the next night to covertly retrieve the surveillance camera (AB 18.21). The footage obtained depicted serious animal cruelty.

11. Shortly after retrieving the footage, the filmmaker contacted the Chief Investigator to convey that a recording of animal cruelty had been obtained: AB 24.32. The Chief Investigator did not approach the police or the RSPCA upon receiving that information. Instead, she instructed the filmmaker to obtain further recordings: AB 43.

12. The filmmaker ultimately entered both the Kadir property and the neighbouring property without permission on 11 occasions between 5 December 2014 and 13 January 2015, obtaining a total of seven recordings. The Chief Investigator and the filmmaker confirmed on the *voir dire* that they were aware that their conduct breached the *Surveillance Devices Act*.

13. On 13 January 2015, the filmmaker was interviewed by a journalist: AB 20.19. The recordings were provided to the journalist at around the same time: AB 26.50.[2]

14. Several weeks after providing the recordings to a journalist, on 2 February 2015, Animals Australia presented a letter enclosing the illegally obtained recordings to the RSPCA: AB 21.31. The RSPCA obtained a search warrant for Mr Kadir's property which was executed on 11 February 2015: AB 22.19. The entry and search were also authorised by powers conferred on the RSPCA by s24G of the *Prevention of Cruelty to Animals Act*: AB 22.20. The RSPCA obtained the impugned RSPCA evidence during the search.

The *voir dire*

15. The Chief Investigator accepted during the *voir dire* that she made no attempt to contact the police or the RSPCA before contracting the filmmaker to obtain the recordings. She stated in cross-examination that her "*assessment*" was that a judicial officer was "*highly unlikely to give a warrant*" under the *Surveillance Devices Act*, based on an anonymous

---

[2] Edited versions of the recordings and the filmmaker's interview were shown in a *Four Corners* episode on the greyhound industry on 15 February 2015.

tip: AB 15.33. However, she conceded that she had never been involved in applications for surveillance or listening device warrants while a police officer in South Australia from 1981-2001: AB 16-17. She further accepted that Animals Australia had available, but did not avail itself of, the services of legal counsel: AB 15.49-16.41.

16. The Chief Inspector of the RSPCA also gave evidence on the *voir dire*. He explained that the RSPCA would investigate anonymous complaints of organised animal cruelty such as complaints of live baiting of greyhounds, including through exercising its power of inspection under s24G of the *Prevention of Cruelty to Animals Act*: AB 23.26-47. However, the Chief Inspector stated that in the circumstances of *this* case, the search warrant was obtained based on the information provided by Animals Australia: AB 22.14-17.

17. The Crown conceded that the recordings were illegally obtained (AB 21.13-22), and that the RSPCA evidence was obtained "as a consequence" of the illegally obtained recordings: AB 31.36. The Crown also accepted that after Animals Australia was in possession of the first recording, "*the Crown was in a less strong position in terms of arguing that what was done was done because of the difficulties in obtaining the evidence in some other way*": AB 31.20.

The primary judgment

18. On 28 June 2017, the day after the hearing on the voir dire, the trial judge granted the appellant's and her co-accused's applications under s138. His Honour accepted that the probative value of the evidence was "*very high*", that the evidence was "*very important*" to the proceedings, and that the animal cruelty offences were "*serious*"; factors he considered tended towards the admission of the recordings: AB 33-35. However, his Honour found the gravity of the contraventions of the *Surveillance Devices Act* was "*very high and serious*", including by reason of the fact that the contraventions were deliberate and repeated, the fact that the decision to breach the Act was taken by a person holding the office of "chief investigator", and the seriousness with which Parliament views the unauthorized use of optical devices: AB 36.51-37.15. These matters all tended towards exclusion of the recordings: AB 37.38.

19. In assessing the gravity of the contraventions the trial judge emphasised that the recordings were obtained without any attempt to approach law enforcement officers to obtain a warrant or otherwise explore lawful mechanisms to obtain evidence: AB 36.40. While his Honour noted the Chief Investigator's evidence that she did not consider that a surveillance device warrant would have been granted had the appropriate judicial officer

been approached, he found that the Chief Investigator "*had no relevant experience on which to come to such conclusion*": AB 35.35.

20. The trial judge considered each of the remaining factors identified in s138(3) of the *Evidence Act* (see at AB 37-38). In considering the difficulty, if any, of obtaining the evidence absent impropriety or illegality (per s 138(3)(h)), the trial judge held that the Chief Investigator's perception of difficulty "*involved to a significant degree, sheer speculation*" (AB 38.40), particularly where there was no approach to authorities, and the RSPCA had the power and ability to investigate an anonymous complaint: AB 38.40-39.42. While his Honour found that there was "*some difficulty*" in obtaining the evidence absent impropriety, he concluded that "*the degree of difficulty is not easily determined when no steps were taken to endeavor to obtain the evidence in a lawful way*" and "*[t]here clearly were other investigatory steps ... that could have been attempted prior to engaging in the deliberate breach of the Surveillance Devices Act*": AB 39.31-42.
21. Taking all of the s 138(3) factors into account, the trial judge held that the Crown had not discharged its onus to show that the desirability of admitting the recordings outweighed the undesirability (notwithstanding Animals Australia's "*laudable motives*": AB 37.30). The recordings were not admitted: AB 41.42.
22. The trial judge held that the RSPCA evidence was obtained "*in consequence of*" the contraventions of the *Surveillance Devices Act* (AB 41.49), and that s138 was triggered: AB 42.30. His Honour found that the factors leading him to exclude the recordings, applied directly to his consideration of the RSPCA evidence, and, as a result, excluded that evidence: AB 42.49.

The Crown appeal

23. The Crown appealed these evidentiary rulings under s5F(3A) of the *Criminal Appeal Act*, an interlocutory appeal provision that contains no leave requirement but does require the Crown to establish that the impugned ruling "*eliminates or substantially weakens the prosecution's case*".
24. The CCA allowed the Crown's appeal in part, finding that, despite the trial judge "*carefully address[ing] each of the matters required by s 138(3) to be taken into account*" (AB 99.15), his Honour erred in excluding the first of the recordings, the RSPCA evidence and the alleged admissions tendered against Mr Kadir. Specifically, the CCA held that the trial judge erred in failing to assess the first recording in isolation and in failing to weigh the difficulty of lawfully obtaining the first recording as compared to the later recordings, and further erred in holding that his reasoning in respect of the

recordings applied directly to the RSPCA evidence. The CCA rejected the Crown's challenge to the balance of the recordings.

Part VI: Argument

Short summary of argument

25. The appellant's argument can be reduced to the following propositions.

26. *First*, the standard of appellate review is informed a number of factors, including the appellate jurisdiction being exercised, and the nature of the question under review.

27. *Secondly*, the terms, statutory context and purpose of s5F(3A) of the *Criminal Appeal Act* demand that the CCA exercise a significant degree of judicial restraint in reviewing admissibility rulings.

28. *Thirdly*, the terms of s138 of the *Evidence Act* also point towards the need for the CCA to exercise a significant degree of judicial restraint in reviewing a ruling under that section. Section 138 is distinguishable, in this regard, from ss 97 and 98 of the *Evidence Act*.

29. *Fourthly*, by reason of the foregoing, the CCA may not overturn a trial judge's ruling under s 138 on a s5F(3A) appeal if the trial judge's reasoning and ruling were reasonably open. A mere difference of opinion will not justify appellate intervention; error of the kind described in *House v King* must be identified.

30. *Fifthly*, the CCA did not identify error in the trial judgment, and so there was no basis upon which to allow the appeal in part. The CCA's orders allowing the appeal in part should therefore be set aside.

31. *Sixthly,* even if the CCA did identify error in the trial judge (which is disputed), the CCA itself fell into error in applying s138, and so its orders should be set aside.

32. *Finally*, even if (contrary to the foregoing) there was no need for the CCA to identify error on the part of the trial judge, this Court should still set aside the CCA's orders, as the trial judge was correct to exclude the impugned evidence.

The standard of review on a s5F(3A) appeal from a s138 ruling

33. This case was argued before the CCA on the basis that the Crown needed to demonstrate *House* error in order to succeed: AB 71.12. The Crown now contends, by a Notice of Contention, that it was *not* required to demonstrate that the trial judge had committed *House* error in its s5F(3A) appeal. Accordingly, before turning to the specific features of this case, it is necessary to grapple with the conceptual question of the standard of review in a s5F(3A) appeal from a ruling under s138.

Section 5F(3A)

34. The "*degree of intensity of review on appeal*" is determined, in part, by the proper construction of the statutory provision providing for review.[3] It is therefore necessary to commence any analysis of the appropriate standard of appellate review by considering the jurisdiction being exercised by the appellate court.[4]

History and legislative purpose

35. Prior to the introduction of s5F into the *Criminal Appeal Act*,[5] a defendant in criminal proceedings in the District Court could apply to the Court of Appeal for review of interlocutory judgments or orders, however the *Supreme Court Act 1970* (NSW) precluded any such application from criminal proceedings in the Supreme Court. As outlined in the second reading speech for the *Criminal Appeal (Amendment) Act 1987* (NSW), this resulted in a "*proliferation*" of interlocutory applications to the Court of Appeal by defendants in criminal proceedings in the District Court, on matters ranging from stays of proceedings to applications to change the listed trial date.[6] Section 5F was introduced with a view to rationalising "*existing avenues of appeal from interlocutory applications in criminal proceedings on indictment in the District Court and the Supreme Court, while ensuring that issues can be dealt with which justice requires should be resolved prior to the completion of a trial.*"[7]

36. This history gives an insight into the purpose of s5F (which may also be drawn from the text of the provision), namely to introduce a harmonised mechanism for appeals to be brought to a specialised appeal court, the CCA, from interlocutory decisions, with a view to avoiding unconstrained interlocutory applications being brought to multiple courts, causing fragmentation and undue delays.[8]

---

[3] See, for example, *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at [151] per Edelman J. See also *DAO v R* (2011) 81 NSWLR 568 at [88] per Allsop P.

[4] It follows from this that the appropriate standard of review in an appeal from a s138 ruling in a s5F(3A) appeal may well differ to the standard of review required in a different form of appeal from such a ruling. See, for example, Spigelman CJ in *DAO* at [53]: "*the analysis must commence with the fact that this Court has before it an appeal under s5F from an interlocutory judgment or order. The Court is not required to determine the position with respect to an appeal after conviction, to which s 5(1) and s 6(1) of the Act would apply [one is] not necessarily conclusive with respect to the other.*" It will not be necessary for this Court to consider the standard of review from s138 rulings outside the s5F(3A) context in this appeal.

[5] *Criminal Appeal (Amendment) Act 1987* (NSW).

[6] Hansard, New South Wales Legislative Assembly, 17 November 1987, p 16088.

[7] Ibid, at p 16089.

[8] Section 5F of the *Criminal Appeal Act* should, therefore, be read together with s 17 of the *Supreme Court Act 1970* (NSW), and r 51.35 of the Uniform Civil Procedure Rules 2005 (NSW), which together govern a defendant's appeal rights in respect of interlocutory decisions in criminal proceedings in the Supreme Court.

37. Sub-section 5F(3A) was inserted into s5F some 16 years later by the *Crimes Legislation Further Amendment Act 2003* (NSW), granting the Crown the right to appeal evidentiary rulings that eliminate or substantially weaken the Crown case. The defendant has no comparable right of appeal, even with leave, given that evidentiary rulings do not constitute "*an interlocutory judgment or order*" for the purposes of s5F(3)[9]. Importantly, while the effect of s5F(3A) is to expand the Crown's ability to appeal evidentiary rulings, there is nothing to suggest that the legislative intention to streamline interlocutory appeals and avoid unnecessary fragmentation and delays that underlies s5F more generally does not apply to sub-s(3A) specifically. Indeed, the s5F(3A) second reading speech expressly referred to the undesirability of unnecessary fragmentation of criminal trials.[10]

The standard of review on s5F(3A) appeals

38. Section 5F(3A) requires the CCA to exercise a substantial degree of judicial restraint in overturning admissibility rulings. This is so for the following reasons.

39. *First*, the text, context and legislative history of s5F(3A) specifically and s5F generally indicate that the object of s5F is to create a streamlined approach to interlocutory appeals in criminal proceedings that avoids unnecessary fragmentation and delay, as explained above. Indeed, the second reading speech in respect of the *Crimes Legislation Further Amendment Act 2003* (NSW) which introduced sub-s(3A) into s5F, expressly refers to the undesirability of fragmentation, telling against a construction of s5F(3A) that permits the wholesale review of trial judges' rulings (emphasis added):

> "*The Crown should ... be able to test the correctness of such a ruling made during the trial, so that an accused may not derive the benefit of an acquittal secured as a result of an* ***erroneous*** *evidentiary ruling.* ***It is not desirable that criminal trials be unnecessarily disrupted*** *for the purpose of appealing evidentiary rulings. It is therefore anticipated that the Crown would exercise this new appeal power only sparingly.*"[11]

40. *Secondly,* the legislature should not be taken to have intended s5F(3A) to be a gateway for the CCA routinely to substitute its own decisions on evidentiary rulings adverse to the Crown. This would undermine the important allocation of functions of the trial judge and the appellate court. If a mere difference of opinion regarding admissibility resulted in a trial judge's decision being set aside, the CCA would be in the position of substituting evidentiary rulings in the course of an ongoing jury trial absent the need to show any error on the part of the trial judge, who has an intimate appreciation of the factual matrix within which the evidence is led. This would seriously undermine the decision-making

---

[9] See, for example, *DAO* at [74] per Allsop P, and the cases there cited.
[10] Hansard, New South Wales Legislative Assembly, 2 December 2003, p 2.
[11] Ibid.

process of the trial court, with the result that, to borrow Simpson J's language in *DAO* at [175], "*the trial process would become well-nigh unworkable.*"

41. *Thirdly*, the requirement that a ruling eliminate or substantially weaken the prosecution case does little to restrain the ambit of appeals under s5F(3A) given that a great many admissibility rulings will have the potential to substantially diminish the prosecution case.[12] The longstanding principle against permitting the fragmentation of criminal trials therefore nevertheless points towards the need for a substantial degree of judicial restraint being exercised in s5F(3A) appeals. There is little reason why the Crown would not regularly invite appellate intervention if differences in weight or perspective could result in the reversal of an admissibility ruling.

42. *Fourthly,* there is nothing in the text of sub-s(3A) that would suggest a different standard of review ought to apply to appeals under that section, as compared to appeals under sub-s(2). To the contrary, both the fact that sub-ss(4) and (5) apply to both sub-ss(2) and (3A) appeals, and the possibility of the Crown bringing an appeal under both sub-ss(2) and (3A)[13] suggests the same standard of review ought apply in sub-s(2) and sub-s(3A) appeals. As such, if the CCA were permitted to substitute its own rulings for those of the trial judge in a s5F(3A) appeal, it would follow that the same standard of review ought apply in an appeal under s5F(2). This would create a serious floodgates problem, wherein the CCA could be called upon to determine the correctness of decisions that are squarely within the domain of case management, such as a ruling to grant or refuse an adjournment (described by Campbell JA as "*the archetype of a discretionary decision on a matter of practice and procedure that is reviewable only in accordance with House v The King*"[14]), given that s5F(2) has no leave requirement. This outcome would undermine the object of s5F.

43. *Fifthly*, it is clear that s5F(3A) creates an imbalance between the Crown and an accused insofar as the Crown is given the right to appeal rulings on admissibility that eliminate or substantially weaken the prosecution case, whereas the accused is only able to appeal evidentiary rulings following conviction. The extent of this imbalance can be seen once it is appreciated that a s5F(3A) appeal has the potential to be larger than a s 5 conviction

---

[12] In practice, illegally or improperly obtained evidence is often a substantial part of the Crown case, as evidence contested under the provision frequently involves admissions or important forensic evidence. See, for example, *Ridgeway v The Queen* (1995) 184 CLR 19; *R v Camilleri* (2001) 119 A Crim R 106; *R v Dalley* (2002) 132 A Crim R 169; *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612; *Gedeon v R* (2013) 237 A Crim R 326.

[13] See, for example, *R v Lane* (2011) 221 A Crim R 309 at [5].

[14] *R v Ford* (2009) 201 A Crim R 451 at [70], by reference to *R v Alexandroaia* (1995) 81 A Crim R 286.

appeal. Permitting the CCA to overturn trial judges' decisions in s5F(3A) appeals based on a mere difference of opinion would significantly exacerbate the imbalance between the Crown and an accused at the interlocutory stage. This Court would be slow to construe s5F(3A) as permitting such a result, absent any supportive textual indication.

44. *Finally*, while the character of a s5F(3A) appeal has not been conclusively determined by this Court, and there is conflicting authority below,[15] the better view is that a s5F(3A) appeal may be described as an appeal by way of "rehearing" (as opposed to an appeal in the strict sense, or an appeal de novo[16]), though not precisely the same species of rehearing as is conducted in an appeal under s 75A of the *Supreme Court Act 1970* (NSW), given the differences between that provision and s5F. This is so for the following reasons. *First,* s5F(4) provides that a s5F appeal is to be determined on the evidence before the trial judge, unless leave is granted to adduce fresh, additional or substituted evidence. Such provisions have been "*relied upon in support of the conclusion that the nature of the appeal is by way of rehearing*" [17]. *Secondly*, s5F(5) provides that, in a s5F appeal, the CCA may "*affirm or vacate*" the decision under appeal, and, if vacated, the CCA "*may give or make some other judgment, order, decision or ruling*". The unrestricted nature of the CCA's powers under s5F further indicates that such an appeal is an appeal by way of rehearing.[18] The character of a s5F(3A) appeal as an appeal by way of rehearing nevertheless points towards the need for the Crown to demonstrate "*some error on the part of the primary judge before the powers of the court to set aside the primary judge's decision were enlivened.*"[19]

Features of s138 and implications for the standard of review

45. While s5F(3A) thus points towards a significant level of judicial restraint, this is not conclusive of the standard of review that ought to have been exercised by the CCA in the present proceedings. As Allsop P observed in *DAO* at [84], "*[t]he character of [the]*

---

[15] See, for example, *Norvenska v CDPP* [2007] NSWCCA 158 at [11]-[13] per Basten JA, Grove and Howie JJ agreeing, holding an appeal under s5F is by way of rehearing; see further discussion by Campbell JA in *R v Ford* at [68]ff. The contrary view was reached in *R v BWM* (1997) 91 A Crim R 260 at 265 per Hunt CJ at CL, though neither the Chief Justice nor Hidden J agreed with that part of Hunt CJ at CL's reasons. In *DAO*, Allsop P was "*prepared to assume the correctness of Norvenska*": at [83].

[16] These terms are used in the sense described by the majority in *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [57].

[17] *Norvenska v Director of Public Prosecutions (Cth)* [2007] NSWCCA 158 at [11]. See also Basten JA recently in *Hordern v R* [2019] NSWCCA 138 at [8].

[18] *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [13].

[19] *Lacey* at [58]. See also Campbell JA in *R v Ford* at [73], Howie and Rothman JJ agreeing, holding, by reference to High Court authority, that "*[c]oncerning an appeal by way of rehearing in the conventional sense of the term, establishing error on the part of the trial judge is necessary before the appeal succeeds*".

underlying decision will affect how the appeal court approaches its task". Specifically, the breadth of discretion accorded to the trial judge in making the underlying decision is a significant factor in assessing the appropriate standard of review on appeal.[20]

46. When considered through this lens, s138 is a somewhat challenging provision. It may be thought that, prima facie, as a ruling on admissibility where the outcome is one of two alternatives (admissible or inadmissible), s138 "*demands a unique outcome*" such that the "*correctness standard applies*".[21] However, the position is not so straightforward. When one turns to the terms of s138 itself, it becomes apparent that the provision involves a complex series of inter-connected preliminary decisions concluding with a weighing exercise that distinguishes the provision from rules of admissibility such as s97 or s98 of the *Evidence Act*.

47. Section 138(1) provides that evidence obtained "*improperly or in contravention of an Australian law*" or "*in consequence of an impropriety or of a contravention of an Australian law*", "*is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*". Sub-section (3) sets out eight mandatory, but non-exhaustive, considerations which must be taken into account in carrying out the weighing exercise mandated by sub-s(1), including a number of factors which may involve credibility findings such as whether the impropriety was deliberate or reckless.

48. To anticipate what follows, both the weighing exercise required by sub-s(1), and the non-exhaustive list of mandatory considerations in sub-s(3) confer a measure of "discretion" on a trial judge that distinguishes rulings under s138 from other rulings on admissibility.

Section 138 confers a significant measure of 'discretion' on a trial judge

49. In *Coal and Allied Operations Pty Ltd v AIRC*,[22] Gleeson CJ, Gaudron and Hayne JJ described a 'discretionary' decision as one in which "*no one [consideration] and no combination of [considerations] is necessarily determinative of the result. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made.*" A

---

[20] It follows that the standard of review required in a s5F(3A) appeal from a ruling under s138 would not necessarily apply to s5F(3A) appeals from other admissibility rulings. For example, presumably on an appeal from a ruling under s 59 to the effect that certain evidence constitutes hearsay (see for example, *R v Ung* [2000] NSWCCA 195) may be overturned on the basis that the CCA concludes that the trial judge's decision was incorrect, as there is no possibility in that context of a ruling that the CCA considers to be *reasonably open* but not, in that Court's view, *correct*, as evidence either is, or is not, hearsay under s 59. To say that an appeal from such a ruling is to be conducted to the correctness standard would not, therefore, offend the need for judicial restraint in a s5F(3A) appeal.

[21] Gageler J in *SZVFW* at [49].

[22] (2000) 203 CLR 194 at [19].

decision may therefore be said to be "*discretionary*" not only where a range of *outcomes* are permissible, but also where a range of *considerations* may be taken into account in deciding on an outcome, such that two decision-makers may properly take into account *different* considerations in reaching a conclusion.

50. In such circumstances, it could not be said that the provision "*demands a unique outcome*", because the conferral of discretion in considering which factors feed into an outcome necessarily means that, if no improper considerations are taken into account, the legislature envisions that different outcomes may be tolerated. In this way, even a decision that results in an 'affirmative/negative' outcome may be 'discretionary'.

10 51. Section 138 is such a provision. As foreshadowed above, sub-s(3) sets out mandatory factors a judge must consider in ruling under s138, however that subsection is expressly stated to be non-exhaustive. One judge may, therefore, conceivably regard a particular consideration (being a consideration other than those enumerated in sub-s (3)) as relevant to the s138 exercise, whereas another judge undertaking the same exercise may not. Section 138 is, therefore, appropriately construed as a provision conferring a "discretion" on a judge, notwithstanding the fact that the *result* of a determination under s138 is necessarily one of two rulings. In this way, s138 is distinguishable from ss97 and 98, and prima facie demands an error-based standard of review.

52. The "*weighing*" exercise required by the proviso in s138(1) further distinguishes that
20 provision from ss97 and 98. Section 138(1) provides that illegally obtained evidence is "*not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.*" The simplicity of this language belies the complexity of the exercise. While the subsection refers to "*desirability*" being weighed against "*undesirability*", when one interrogates what factors are relevant to desirability and undesirability in this context and, in particular, appreciates the significance of the phrase "*the way in which the evidence was obtained*", it becomes apparent that what is being weighed are two incommensurables; namely the public interest in "*bringing to conviction the wrongdoer*" and the undesirable effect of "*curial approval, or even encouragement,*
30 *being given to the unlawful conduct of those whose task it is to enforce the law.*"[23] This is in contrast to ss97 and 98, which require a judge proleptically to evaluate whether or not the evidence will have "*significant probative value*" in the context of the trial.

---

[23] *Bunning v Cross* (1978) 141 CLR 54 per Stephen and Aickin JJ at 75. See also *Ridgeway v The Queen* (1995) 184 CLR 19 at 49.

53. Further, the mandatory considerations enumerated in sub-s138(3) are themselves incommensurables which, importantly, may point in different directions, depending on the circumstances. For example, sub-s(3)(c) requires consideration of "*the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding*". The seriousness of the subject offence may, in some circumstances, point towards the admission of the illegally obtained evidence, in furtherance of the public interest in the conviction of a wrongdoer. However, in other circumstances, the gravity of the offence may lead a court to conclude that the public interest in ensuring that serious charges are made out by reference to properly obtained evidence points towards the *inadmissibility* of illegally obtained evidence. Further, the direction of factors such as the gravity of the underlying offence may in turn depend on other factual matters such as whether the impropriety or illegality in obtaining the impugned evidence was commonplace or deliberate. Chief Justice Gleeson's observation in the sentencing context is here apposite (emphasis added):

> "*In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. ... It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences flow from the presence or absence of particular factual circumstances.* ***In every case, what is called for is the making of a discretionary decision in light of the circumstances of the individual case, and in the light of the purposes to be served*** *by the sentencing exercise.*"[24]

54. The same is true of a ruling under s138. It would be artificial to suggest that a provision that demands that a judge not only weigh incommensurables, but also that grants the judge latitude as to *which* incommensurables are to be weighed, can produce only one correct answer and involves no "*discretion*". In this sense, s138 is more similar to s192[25] than sections such as ss97 or 98; a judge would fall into error if they *failed to consider* the mandatory considerations enumerated in s138(3), just as they would if they failed to consider the mandatory considerations set out in s192,[26] however, if the mandatory considerations have been considered, a ruling cannot be overturned on the basis that the CCA disagrees with the trial judge's *assessment* of those considerations.

55. Accordingly, the character of a ruling under s138 further points to an error-based standard of review on appeal, given that such a ruling involves the exercise of "*discretion*", notwithstanding its status as a ruling on admissibility.

---

[24] *R v Engert* (1995) 84 A Crim R 67 per Gleeson CJ at 85.
[25] See also s 126B.
[26] In respect of s192, see *Stanoevski v R* (2001) 202 CLR 115. See also *Kaddour v R* [2019] NSWCCA 90.

Conclusion: the standard of review in a s5F(3A) appeal from a ruling under s138

56. Taking the features of s5F(3A) and s138 together, this Court should conclude that the CCA is required to exercise a substantial degree of judicial restraint in a s5F(3A) appeal from a ruling under s138, such that the trial judge's ruling under s138 cannot be overturned on the basis that the CCA would have reached a different conclusion, had they been exercising the s138 discretion. Error in the trial judge's decision must be identified.

57. Specifically, the CCA would not be permitted to interfere with a trial judge's ruling on the admissibility of evidence under s138, if the reasoning process and ruling were reasonably open on the evidence. To suggest otherwise would be to disregard the latitude conferred on trial judges to determine the factors to be considered in ruling under s138, and the weight to be given to those factors, and would also fail to recognise the limitations placed upon the CCA by s5F itself. It follows that *House v King* does have application to a s5F(3A) appeal from a ruling under s138.[27]

58. It should be observed that this standard of review resonates with that adopted in judicial review proceedings. The overlap in administrative and criminal law discourse in this area has previously been acknowledged by members of this Court.[28]

CCA erred in finding appellable error in excluding the first recording: Ground 1

59. In light of the foregoing, it was incumbent on the CCA to find error in the *House v King* sense in the trial judge's application of s138.

60. The CCA accepted the trial judge's factual findings, and findings of credit. The Court acknowledged that the trial judge addressed all of the s 138(3) mandatory considerations, and accepted that he did not act upon any wrong principle; nor did he take into account extraneous or irrelevant matters: AB 80.15. The only error identified by the CCA in respect of the recordings was that the trial judge failed to assess the first recording in isolation from the subsequent recordings, holding at [103] (AB 81.13):

> *"what is not apparent from his Honour's reasons is that his Honour weighed the difficulty of obtaining evidence of criminal activity before the first recording was obtained against the difficulty of obtaining such evidence once the first recording had been obtained. It stands to reason that once*

---

[27] While *House v King* leaves open the possibility of a ruling being overturned on the basis of the trial judge having mistaken the facts, this should be refined, at least in the context of a s5F(3A) appeal from a ruling under s138, to permit interference where the trial judge's finding of the facts was not reasonably open. This issue does not arise in the present case.

[28] *Plaintiff S157/2002 v Commonwealth* (2003) 221 CLR 476 at [13] per Gleeson CJ; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [68]-[74]. As Hayne, Kiefel and Bell JJ observed in *Li* at [68], *Wednesbury* was decided *after* the principles governing the review of a judicial discretion were settled in Australia in *House v The King*, and *Avon Downs Pty Ltd v Federal Commissioner of Taxation* was decided less than two years after *Wednesbury*, at time when it was the practice of the High Court to follow decisions of the Court of Appeal in England which appeared to have settled the law in a particular area.

there was evidence in the form of the first recording, then whatever difficulties were (or were perceived to be) attendant on investigation of an anonymous complaint must have lessened."

At [104] the CCA further held that the "*difficulty of obtaining the evidence and the gravity of the breach should at least have been addressed separately with respect to the first recording.*" This and other paragraphs to similar effect (eg [107], [111]) fails to identify any error, let alone appellable error, for the following reasons.

61. *First*, the error identified by the CCA is based on a misreading of the primary judgment. The trial judge *did* expressly give separate consideration to the difficulty of obtaining evidence of criminal activity before and after the first recording was obtained. His Honour first dealt with the position *before* the first recording was obtained, holding at AB 39: "*clearly were other investigatory steps ... that could have been attempted* ***prior to*** *engaging in the deliberate breach of the Surveillance Devices Act*" (emphasis added). To similar effect, his Honour observed (emphasis added): *"No attempt to conduct other investigatory steps or approach the police or the RSPCA on a confidential basis to engage in other investigatory steps was engaged in* ***prior to the decision being made*** *to breach the Surveillance Devices Act.*"

62. His Honour *also* considered the position *after* the first recording was obtained, holding at AB 39 (emphasis added): "***[o]nce the first recording was obtained****, there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device*".

63. Accordingly, on a fair reading, it is plain that the trial judge did give separate consideration to the first and later recordings, including with respect to the difficulty of obtaining the impugned evidence. Indeed, the finding that there was "some difficulty" in lawfully obtaining the evidence could only be applied to the first recording as thereafter there was no obstacle to seeking the assistance of the RSPCA.

64. It is no answer to this conclusion to point out that the trial judge referred to the repeated breaches in assessing the gravity of the illegality in respect of the first recording. It is trite to observe that the first breach did not involve a repetition, but it was the first in a series of 11 trespasses and seven breaches of the *Surveillance Devices Act*. The first recording could only be meaningfully assessed without regard to the repeated breaches if some event, like approaching the police or RSPCA, had taken place between the first and subsequent recordings, but this did not occur. Indeed, the trial judge would have fallen into error if he disregarded the repeated breaches in assessing the gravity of the illegality

of the first of a series of illegal recordings, as this would not give a full picture of the gravity, as required by s138(3)(d).

65. *Secondly*, the premise of the alleged error identified by the CCA is misconceived when the facts of the case are considered. Even though the trial judge did weigh the admissibility of the first recording separately from the admissibility of the later recordings (as the CCA held he was required to do), he need not have done so (and would not have *erred* had he failed to do so), in circumstances where the Crown explicitly conceded that its prospects of having the recordings admitted into evidence became weaker after the first recording. The trial judge was entitled to assess the Crown's case at its highest, that is, by reference to the first recording. If the Crown could not clear the inadmissibility hurdle for the first recording, the case for admissibility could only get weaker, and so, as a matter of logic, there was no need to consider the admissibility of the later recordings separately from the first.

66. Accordingly, it was not necessary to address separately "*factors such as the difficulty of obtaining the evidence and the gravity of the breach ... with respect to the first recording, as distinct from the assessment of those matters with respect to the later recordings*" (AB 81.37). In those circumstances, the "error" identified by the CCA, even if committed, would have been no error at all.

67. *Thirdly*, even if the trial judge *had not* separately considered the difficulties in obtaining the first recording as compared to the later recordings, and especially in light of the Crown's concession that its case for admissibility weakened following the first recording, it is unclear how such a matter could, in any event, constitute *appellable* error. No one contended that each item of evidence needed to be considered separately as a matter of principle; the CCA's decision is premised on the acceptability of the trial judge considering several items of evidence together (here, the second through seventh recordings). Whether or not one of several items of evidence is to be considered in isolation is a matter falling within the trial judge's discretion, and does not found appellate interference in the context of a s5F(3A) appeal.

The first recording ought to have been excluded

68. Even if the CCA was *not* required to identify error on the part of the trial judge such that a "correctness" standard applies, the trial judge's decision to exclude the first recording was plainly correct, and should not have been reversed on appeal.

69. The only additional 'factor' identified by the CCA that led that Court to conclude that the first recording ought be admitted into evidence was the difficulty of obtaining that

recording. As discussed further below at [83], there was no evidence to support a conclusion that there was any significant difficulty in obtaining the first recording legally; to the contrary this was said to be "*sheer speculation*". Accordingly, the factor relied upon by the CCA to overturn the trial judge's ruling was without any basis in the evidence. The trial judge's decision to exclude the first recording was, therefore, correct. Further, attributing significant weight to the (unproven) difficulty attending the first recording is inappropriate in circumstances where Animals Australia took no steps to obtain the evidence lawfully *after* obtaining the first recording; that is, it is necessary to have regard to the repeated breaches in assessing the admissibility of the *first* recording for the reasons explained above at [64].

70. It should be appreciated, in this context, that even in an appeal of the type described in s 75A of the *Supreme Court Act 1970* (NSW) where *Warren v Coombes* applies, it is necessary to give respect and weight to the conclusions of the trial judge.[29] Importantly, the trial judge made credibility findings in respect of the Chief Investigator (see at AB 35.25 and interpreted by the CCA at AB 74.35), which informed his assessment of the s 138(3) considerations.

CCA erred in finding appellable error in excluding the RSPCA evidence: Ground 2

71. Both the trial judge and the CCA accepted that the RSPCA evidence was obtained in consequence of the illegally obtained recordings. No appeal is brought from those findings. In any event, the conclusion necessarily follows from the evidence on the *voir dire*, as set out above at [16].

72. In considering whether to admit the RSPCA evidence, the trial judge held that the same reasons applied to the s138 weighing exercise in respect of that evidence as applied to the recordings, and that the RSPCA evidence therefore should not be admitted: AB42-43.

73. The CCA held that this reasoning disclosed error, as the trial judge's reasons for rejecting the recordings could not directly apply to the RSPCA evidence in circumstances where the RSPCA was not implicated in the wrongdoing underlying the recordings: AB 89.15. This overlooks the fact that the reference to "*the way in which the evidence was obtained*" in s138(1) must be construed to refer to the entire chain of causation leading to the evidence being obtained, not merely the final step in that chain. To adopt a narrow construction of the phrase "*the way in which the evidence was obtained*" would be to undermine the legislative objective of excluding evidence that was obtained improperly

---

[29] *Warren v Coombes* (1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ.

or illegally, as the final step in the chain of causation may *not* disclose any impropriety or illegality. Indeed, a wide construction of "*the way in which the evidence was obtained*" necessarily follows from the express extension of the operation of s138 to evidence which was obtained "*in consequence*" of impropriety or illegality by sub-s(1)(b).

74. Once this is appreciated, it becomes clear that Animals Australia's illegal conduct in obtaining the recordings is directly relevant to the Court's assessment of the admissibility of the RSPCA evidence, as that illegal conduct is a fundamental feature of "*the way in which*" the RSPCA evidence "*was obtained*", notwithstanding the fact that the RSPCA was not itself implicated in the wrongdoing. The trial judge in effect concluded that, notwithstanding the clear difference between the position of the RSPCA and Animals Australia, considerations telling against the admissibility of the recordings *nonetheless* applied to the RSPCA evidence. In this context, it should be appreciated that the trial judge's reasoning in respect of the recordings must be brought to bear on his conclusions in respect of the RSPCA evidence. Accordingly, the trial judge's reasoning in respect of the RSPCA evidence does not disclose appellable error. The CCA's conclusion to the contrary simply discloses a difference of opinion between the CCA and the trial judge as to the result of the weighing exercise required by s138, with the CCA considering that the trial judge ought to have afforded greater weight to the lack of impropriety on the part of the RSPCA in obtaining the RSPCA evidence that the trial judge considered to be appropriate. This difference of opinion cannot support the overruling of the trial judge's decision on a s5F(3A) appeal for the reasons set out above.

Exclusion of RSPCA evidence correct on the merits

75. In any event, even if no error was required to be demonstrated, the trial judge was correct to exclude the RSPCA evidence. The trial judge's reasons for excluding the recordings applied with equal force to the RSPCA because only exclusion of all of the evidence was sufficient to act as a deterrent to calculated and sustained breaches of law on behalf of Animals Australia. It would not be appropriate to encourage organised groups, especially groups with investigative arms and in-house counsel, to 'cleanse' illegally obtained evidence through government agencies, so as to skirt the operation of s138 by relying on the lack of knowledge of the government agencies of the impropriety in question.

76. This is not to say that *all* evidence obtained in consequence of illegality must be excluded under s138. It is only to say that, in the circumstances of this case, where, on the facts as found by the trial judge, Animals Australia had the opportunity to raise the anonymous

complaint with the RSPCA or the police *before* obtaining the first recording[30] (not to mention its ability to do so after obtaining the first recording) and yet did not, the gravity of the illegality was such that the factors in favour of admissibility did not outweigh the presumption in favour of exclusion. The trial judge was correct to so conclude.

CCA erred in application of s138: Ground 3

77. If, contrary to the foregoing, this Court concludes that the CCA correctly identified error on the part of the trial judge, the CCA's orders should still be set aside. This is because, in purporting to rule on the admissibility of the impugned evidence, the CCA itself committed appellable error in three respects. First, the CCA failed to apply the onus of proof as required by s138. Secondly, the CCA's decision was reached contrary to the evidence. Thirdly, the CCA failed to engage in the weighing exercise mandated by s138.

Onus of proof

78. An important distinction between the discretion to exclude improperly obtained evidence at general law and under s138 relates to the onus on the moving party. As Basten JA observed in *Robinson v Woolworths Ltd*, "*[p]rior to the Evidence Act, a defendant bore the onus of establishing illegality or impropriety as a basis for invoking the general law discretion to exclude evidence.*"[31] Under s138, while the onus still lies on the defendant to establish illegality or impropriety, once established, the onus shifts to "*the Crown to persuade the trial judge that the evidence should nonetheless be admitted. The discretion is therefore to admit the evidence notwithstanding the impropriety or illegality.*"[32]

79. The "two-staged" approach mandated by s138 of the *Evidence Act* is now well established.[33] The Crown does not contend otherwise.[34]

80. The CCA failed to apply the onus imposed on the Crown by s138. Specifically, the CCA treated the "*desirability*" test under s138 as a balancing exercise, as opposed to a threshold requirement to be proved by the Crown to the requisite standard. This is plain from the CCA's repeated references to the test as being a balancing exercise. The error is perhaps most apparent at [122] where the CCA holds:

---

[30] The trial judge accepted the RSPCA Chief Inspector's evidence that the RSPCA's practice was to investigate anonymous complaints of serious animal cruelty, of which "live baiting" is an example, and that the RSPCA had the power to conduct investigations absent a search warrant under s 24G of the *Prevention of Animal Cruelty Act 1979* (NSW). His Honour also held that the suggestion that the inability of police to obtain a search warrant under the *Surveillance Devices Act* based on an anonymous complaint was "*sheer speculation*".

[31] (2005) 64 NSWLR 612 at [33].

[32] Per Basten JA in *Robinson v Woolworths* (2005) 64 NSWLR 612 at [33], quoting Hunt CJ at CL in *R v Coulstock* (1998) 99 A Crim R 143 at 147.

[33] See, eg, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] and [57].

[34] Crown Response on the Special Leave at [33].

> *"[t]he concluding words of s138(1) require a Court to undertake a weighing process that compares the 'desirability' of admitting the evidence with the 'undesirability' of admitting that evidence 'that has been obtained in the way that evidence has been obtained'. ... Thus, the provision is directed to weighing 'two competing considerations of public policy'..."*[35]

81. With respect, this is an erroneous statement of the test under s138. The section does not require the Court to undertake a "*weighing process that compares the 'desirability' of admitting the evidence with the 'undesirability' of admitting that evidence*". It requires that the evidence be excluded *unless* the prosecution can persuade the Court that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, obtained in that way, on the balance of probabilities in accordance with s142(1) of the *Evidence Act*. In approaching the test of admissibility under s138 as a choice between preferred policy objectives on an even playing field, the CCA did not merely fail to articulate a well-known statutory standard but in fact failed to engage in a mandatory statutory task. The CCA thereby fell into appellable error.

Failure to engage in statutory task

82. The proviso in s138 requires the Court to determine whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, such that the Crown has discharged its onus of proving admissibility. In addition to failing to apply the onus, the CCA undertook no such (out)weighing exercise prior to admitting the evidence. It simply concluded the difficulty of obtaining the first recording was a factor which "*tips the balance in favour of admission of the first recording*" (at [111]). No explanation is given as to why this is so, by reference to the various other mandatory considerations set out in s138(3). In failing to carry out a weighing exercise (or, if such an exercise was carried out, in failing to disclose its reasons for weighing the mandatory considerations as it did), the CCA fell into error, as it failed to carry out the task mandated by s138. The same is true of the CCA assessment of the RSPCA evidence. Accordingly, the CCA's decision to admit both the first recording and the RSPCA evidence should be set aside.

Finding contrary to evidence

83. The trial judge found, as set out above at [18], that the Chief Investigator of Animals Australia had "*no relevant experience*" upon which to conclude that a judicial officer would not grant a surveillance device warrant based on an anonymous tip: AB 35.34. His

---

[35] See also at [111], where the CCA refers to a "*factor which here tips the balance in favour of admission of the first recording*"; at [112], where the CCA concludes "*[o]n balance, therefore, in the re-exercise of the discretion under s138 of the Evidence Act, the Court has concluded...*"; and at [130], where the CCA further concludes "*[i]n the end result, the desirability of admitting the search warrant evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.*"

Honour ultimately concluded that the Chief Investigator's view that no surveillance device warrant could be obtained if she approached the RSPCA or the police prior to engaging in the various breaches of the *Surveillance Devices Act* "*involved, to a significant degree, sheer speculation*": AB 38.41. The trial judge further held that the Chief Investigator "*was in no position ... to simply make a decision that the only way to obtain the evidence was through breaching the Surveillance Devices Act.*"

84. The CCA rejected a complaint by the Crown in respect of these findings, affirming the trial judge's conclusion that the Chief Investigator's opinion was "*no more than speculation*" at [106] (AB 82).

85. Notwithstanding this conclusion the reasons given by the CCA for admitting the first recording into evidence were based upon the very conclusion that the CCA had earlier confirmed was "*no more than speculation*", namely the difficulty of obtaining the first recording absent impropriety. In reaching a conclusion in the absence of any evidence, the CCA fell into appellable error, and its decision should be set aside.

Conclusion

86. The standard of review in a s5F(3A) appeal from a ruling under s138 is error-based. The CCA failed to identify error in the trial judge's reasons, and so its decision to allow the appeal in part should be set aside. Even if error *was* identified, the CCA itself fell into error, such that its orders cannot stand. Finally, even if, contrary to the appellant's submissions, the "correctness" standard of review applied in the s5F(3A) appeal, the trial judge's decision was correct, and should have been permitted to stand.

Part VII: Orders sought

87. The appellant seeks the following orders: (1) The appeal is allowed. (2) The orders of the CCA are quashed. (3) In their place, an order that the appeal to the CCA is dismissed.

Part VIII: Estimate

88. The appellant estimates that 1.5 to 2 hours will be required for the presentation of her oral argument, including her submissions in reply.

Dated: 5 July 2019

Tim Game
Forbes Chambers
Tel: 02 9390 7777
Fax: 02 9261 46000
E: tgame@forbeschambers.com.au

Kirsten Edwards
Forbes Chambers

Kate Lindeman
Banco Chambers