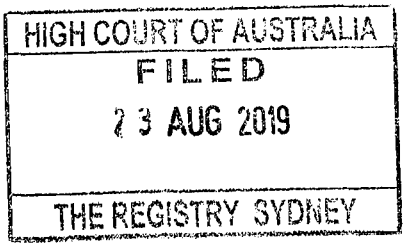
IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S163 of 2019

BETWEEN: **DONNA GRECH**

Appellant

and



THE QUEEN

Respondent

APPELLANT'S REPLY

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Part I: Internet Certification

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

Part II: Reply

2. The crux of the Crown case is understood to be as follows.

3. *First*, the Crown was not required to demonstrate *House* error on the part of the trial judge in order to succeed before the CCA, because (a) a s.5F(3A) appeal is an appeal by way of rehearing and, therefore, required the CCA to "*give the judgment which in its opinion ought to have been given in the first instance*", unless the appeal is in respect of an issue of procedure or a "*discretionary*" determination; and (b) s.138 of the *Evidence Act 1995* (NSW) is a provision which "*demands a unique outcome*" (Crown Submissions (**CS**) [16]-[31]) (the **standard of review argument**).

4. *Secondly*, and in any event, the CCA was correct to identify *House* error in the trial judge's treatment of the first recording, because (a) the trial judge treated "*the recordings*" as a single piece of evidence; and (b) this treatment amounted to an "*error of principle*" because s.138 of the *Evidence Act*, like s.65, does not permit evidence to be approached on a compendious basis (CS[38]-[47]) (the **first recording argument**).

5. *Thirdly*, the CCA was also correct to identify *House* error in the trial judge's treatment of the RSPCA search evidence, because (a) the trial judge failed to give weight to the absence of impropriety on the part of the RSPCA; and (b) this failure was "*productive of error*" (CS[50]-[52]) (the **RSPCA evidence argument**).

6. *Finally*, in re-determining the admissibility of the first recording and the RSPCA evidence, the CCA correctly applied the elements of s.138 (including the onus) to that evidence (CS[55]-[67]) (the **redetermination argument**).

7. None of these arguments should be accepted. Each will be briefly dealt with in turn.

The standard of review argument

Section 5F(3A) appeal

8. The Crown's contention that where an appeal is in the nature of a rehearing, the appellate court must "*give the judgment which in its opinion ought to have been given in the first instance*", unless the appeal is in respect of an issue of procedure or a "*discretionary*" determination (CS[14]-[18]), is wrong in principle. It fails to take into account the possibility that features of the relevant appellate jurisdiction other than the status of the appeal as an appeal by way of rehearing may impact the standard of review. It should be observed that the Crown has not addressed the various features of s.5F(3A) dealt with at [39]-[43] of the Appellant's submissions (**AS**) which point to the need for judicial restraint

on a s.5F(3A) appeal. In particular, nothing is said of the fact that a s.5F(3A) appeal fragments a criminal trial, nor of the implications of this fact for the standard of review on such an appeal.[1] Indeed, the Crown's approach to s.5F(3A) effectively requires one to look only to the subject-matter of a decision under appeal to determine the proper standard of review, in effect ignoring the jurisdiction being exercised by the appellate court. As explained at AS[26] and [34], this approach would not be accepted.

9. By contending that the Crown will only need to prove *House* error in a s.5F(3A) appeal if the decision under appeal is discretionary, the Crown seeks to reduce the debate between the parties to the question of whether or not a ruling under s.138 is "*discretionary*" in the relevant sense (CS[20]). This narrowing of the dispute seems to be at least partly based on the false premise that a wide variety of decisions may be appealed under s.5F(3A) such that it is the character of those decisions that has determinative significance in assessing the standard of review. For example, at CS[18] the Crown identifies "*an appeal ... lodged under s.5F(3A) against a decision to adjourn a trial*" as an example of an appeal requiring the identification of *House* error on the basis that such a decision is discretionary. This submission is misconceived. Section 5F(3A) only confers a right to appeal from "*any decision or ruling on the admissibility of evidence*"; an appeal from a decision to adjourn would be brought under s.5F(2). By conflating sub-ss.(2) and (3A) the Crown: overstates the diversity of decisions that may be appealed under s.5F(3A), thereby unduly increasing the importance of the underlying decision in determining the standard of review; elides the significance of the limitations imposed on s.5F(3A) appeals by the terms of sub-s.(3A); and avoids the need to grapple with the interaction between sub-ss.(2) and (3A) (see AS[42]).

10. The Court therefore should not accept that "*the dispute between the parties concerns the proper characterisation of s.138 of the Evidence Act*" (CS[20]). Rather, the starting point and basal question is the proper standard of review on a s.5F(3A) appeal from a ruling under s.138, which requires the Court to engage in a consideration of the features of s.5F(3A) beyond a s.5F(3A) appeal's status as an appeal by way of rehearing.

Section 138

11. The fact that s.138 "*involves a binary determination rather than a choice of outcomes on a spectrum*" (CS[22]) is not a sufficient basis upon which to conclude that a ruling under s.138 is not properly characterised as "discretionary" in the relevant sense. This is because,

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[1] This may be explained, in part, by the Crown's conflation of a s.5F appeal and a final appeal in its submissions. See, for example, footnote 26 of the CS. As Spigelman CJ observed in *DAO* (2011) 81 NSWLR 568 at [53], this distinction must be the starting point of this Court's analysis.

as is explained at AS[46], the "*binary determination*" made under s.138 follows a series of inter-connected preliminary findings, concluding with a weighing exercise. A primary focus on the outcome of a s.138 ruling thus distracts from the discretion conferred upon a court in carrying out the necessary intermediary steps, including steps involving the finding of intermediate facts and the weighing of considerations both mandatory and non-mandatory, leading to the (binary) determination in making a s.138 ruling: see at AS[54]. When one looks past the result of a s.138 ruling to the entirety of the judicial exercise mandated by s.138, the discretionary character of a s.138 ruling is revealed.

12. The fact that s.138 provides that evidence that was improperly or illegally obtained "*is not to be admitted unless...*" (CS[23]) is also an unsafe basis upon which conclude that a ruling under s.138 is not discretionary. The effect of the words "*is not to be admitted*" is to place an onus on the Crown to demonstrate why improperly or illegally obtained evidence ought to be admitted.[2] The fact that a judicial decision is constrained by the operation of an onus does not result in the decision-maker having no "*latitude as to the choice of decision to be made*". The "*choice*" simply starts from a presumption in favour of a particular outcome.

13. *Finally*, it should not be accepted that the CCA is "*in as good a position*" to make a ruling under s.138 "*as the trial judge*". As foreshadowed above, s.138 requires a court to consider certain intermediate factual issues in dispute, such as "*whether the impropriety or contravention was deliberate or reckless*": s.138(3)(e). A s.138 ruling will therefore often involve the assessment of witnesses' evidence, including as to matters of credit. In those circumstances the position of the CCA as compared to that of the trial judge cannot be said to support the application of a correctness standard of review.

The first recording argument

14. The Crown contends that the trial judge "*treated 'the recordings' as a single piece of evidence*": CS[38]. With respect, this contention is inconsistent with the trial judge's express consideration of the difficulty of obtaining the evidence both before and after the first recording was obtained (see AS[61]-[62]). In circumstances where the CCA concluded that the *only* point of distinction between the first and later recordings was the difficulty of obtaining those recordings (CCA[111]; AB 83), the most that could be required of the trial judge was to distinguish between the recordings with respect to the s.138(3)(h) factor, as

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[2] This construction, plain on the ordinary meaning of the text of s 138, is confirmed by ALRC Report 102 at [16.81]. The Crown cites this paragraph of the ALRC Report as authority for the proposition that s 138 "*was deliberately intended to differ from the common law Bunning v Cross 'discretion' from which it was derived*" (CS[25]), however the paragraph says nothing about whether or not a ruling under s 138 retains the discretionary features of a *Bunning v Cross* ruling; it only relevantly indicates that s 138 has shifted the onus.

his Honour did. Accordingly, the contention that it was necessary for the trial judge to "*differentiate between [the recordings] when addressing each of the subsections of s.138*" (CS[39], emphasis added) would not be accepted.[3] Further, even if the trial judge had not given separate consideration to the first recording, the basis upon which the Crown contends that such a failure amounts to an error of principle is obscure. There is nothing in the text of s.138 that would indicate error in such an approach (CS[45]), particularly in circumstances where "*the way in which the evidence was obtained*", namely via an illegal trespass and breaches of the *Surveillance Devices Act*, was identical in respect of each of the recordings. Further, on the facts of this case, there was no relevant distinction between embarking on a compendious assessment of the evidence, and taking the Crown's case at its highest. This is because taking the Crown's case at its highest only required the trial judge to consider the admissibility of the first recording, as it was conceded that the case for admissibility became weaker after the first recording. Accordingly, there could be no error in adopting a "compendious approach" on the facts of this case (see AS[65]-[66]).

15. A significant difficulty the Crown confronts in this part of its case is that the CCA found no error in the trial judge's treatment of the second through seventh recordings, notwithstanding the fact that his Honour did not "*differentiate between them when addressing each of the subsections of s.138*" (CS[39]). The Crown seeks to avoid this difficulty by contending at CS[47] that "*the CCA decision was not premised upon the acceptability of the primary judge 'considering the second through seventh recordings together' ... but upon the acceptability of giving reasons which were identical for the second to seventh recordings*". The distinction the Crown here seeks to draw is illusory, given that the trial judge did not give separate "*reasons which were identical*" for the second through seventh recordings, but rather dealt with those recordings compendiously. The CCA's own approval of a compendious approach is thus a significant hurdle to the submission that a compendious approach was wrong in principle.

The RSPCA evidence argument

16. The Crown contends that the CCA was correct in identifying error in the trial judge's treatment of the RSPCA evidence on the basis that the trial judge "*gave no weight at all to the fact that there was no impropriety on the part of the RSPCA*" (CS[52]). This should not be accepted. The trial judge expressly referred to this fact at AB 21. In any event, even if

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[3] This submission is in tension with the concession in CS[47] that the CCA found that it was acceptable to give "*identical*" reasons "*for the second to seventh recordings, because the considerations for those recordings were relevantly identical*", and the Crown's reliance upon *Sio v The Queen* (2016) 259 CLR 47 (CS FN 60).

the trial judge had *not* considered the lack of impropriety on the part of the RSPCA, it is not clear how "*this failure was productive of error*". The Crown simply contends that the CCA's reasoning on this issue was correct (CS[50], [52]). The Appellant repeats AS[71]-[74] in this regard.

The redetermination argument

17. The Crown gives three reasons in support of its contention that the CCA correctly applied the onus at CS[55]. *First*, the Crown says that the CCA cross-referenced paragraphs of the primary judgment where the trial judge identified the onus without criticism. However, the identified paragraphs appear in the context of CCA's summary of the trial judge's findings. Nowhere does the CCA *approve* the trial judge's reasoning. *Secondly*, the Crown emphasises that the onus was not in dispute. However, it is trite to observe that courts may fall into error in their treatment of matters that are not in dispute. *Thirdly*, the Crown highlights the CCA's conclusion that it was satisfied that the "*desirability of admitting the first recording ... does outweigh the undesirability of admitting the evidence...*" at CCA[107]. This conclusion does not amount to a correct statement of the onus as it treats "*desirability*" as a balancing exercise, as opposed to a threshold requirement to be proved by the Crown. In any event, the reasons must be read as a whole. The CCA's failure to apply the onus is plain when the paragraphs identified at AS[80] are considered.

18. As to the Crown's submissions on the CCA's redetermination of the admissibility of the first recording and the RSPCA evidence, the Appellant repeats AS[82]-[85].[4]

Conclusion

19. For the foregoing reasons and those in the AS, the Crown's case should be rejected and the appeal allowed. If, however, this Court considers that the CCA was entitled to re-determine the s.138 rulings, but accepts that the CCA's reasons were themselves infected with error, it would be appropriate to remit the matter to the trial judge for reconsideration, given this appeal is interlocutory and admissibility issues should be determined by the trial judge.

Dated: 23 August 2019

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[4] It should be noted that there is a tension between the Crown's reliance upon the Chief Inspector's subjective view as to the difficulty of obtaining the impugned evidence absent impropriety (CS[61]), and its acceptance that the question of the difficulty of obtaining that evidence is an objective one (CS[62]).