IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. 160 of 2019

BETWEEN: ZEKI RAY KADIR

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: PUBLICATION

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

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The standard of review (the Notice of Contention) (RS [19])

2. The respondent contends that the CCA erred in finding that it was necessary for it to be satisfied of *House* error in order to re-determine the admissibility of the first recording, the search evidence and the admissions. The respondent relies on its submissions in respect of the Grech appeal in respect of this issue.

3. It is acknowledged that the respondent did not so contend in the CCA: CAB 71 [69]. At the special leave hearing, neither appellant suggested that there was any unfairness in the Court determining this issue in the present appeal; cf Kadir Reply [4].

In the alternative, *House* error was demonstrated

4. In the alternative, even if *House* error was required, there was no error in the CCA's determination that *House* error was established.

The first recording (RS [45]-[49])

5. The CCA correctly found that the primary judge considered the admissibility of the recordings globally or compendiously: CAB 81[105].

6. The primary judge's approach accorded with the appellant Kadir's submissions at first instance: DGFM 242-256; DGFM 73. In contrast, the Crown contended that the recordings needed to be separately assessed: DGFM 92.17-92.29; cf Kadir AWS [39].

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7. At the outset of the reasons, the primary judge stated that there were "*essentially three pieces of evidence*" (namely, the recordings, the search evidence and the admissions): CAB 31.50. Thereafter, the primary judge treated "*the recordings*" as a single piece of evidence, to which his Honour applied the balancing considerations under s. 138 of the *Evidence Act*: CAB 32.48; 32.52; 33.12; 33.24; 33.52; 34.12, 34.25, 38.15. The primary judge concluded that "*the recordings*" would not be admitted: CAB 41.41.

8. Contrary to the appellant's submissions in this Court, the primary judge did not approach the s. 138 assessment by first considering the admissibility of the first recording; cf Kadir AWS [35]. In considering the "*gravity*" of the contravention, the primary judge referred to "*repeated deliberate breaches*" of the *Surveillance Devices Act* 2007 (NSW) ("*SD Act*"): CAB 36.37; CAB 81.25 [104]. In considering the difficulty of obtaining "*the evidence*", the primary judge considered *both* the position before the first recording *and* the position after the first recording in reaching the conclusion that there was "*some difficulty*" in obtaining "*the evidence*": CAB 39.25-39.40.

9. In the CCA, the appellant contended that the primary judge had considered the recordings as a single piece of evidence and that this approach was correct: ZKFM 256 [31] and CAB 72 [74].

10. It was an error of principle for the primary judge to consider the admissibility of "*the recordings*" in a global or compendious manner; cf Kadir AWS [39]. The application of s. 138 of the *Evidence Act* requires the analysis and balancing of the characteristics and circumstances of the particular item of impugned evidence.

The search evidence (RS [55] and [72]) and the admissions (RS [57])

11. The CCA correctly found that the primary judge erred in concluding that his s. 138 findings in relation to the recordings were "*directly applicable*" to his consideration of the evidence obtained following the issue of the search warrant: CAB 87 [121]; CAB 42.43. The "*way*" in which the search evidence was obtained was "*materially different*" to the "*way*" in which the recordings were obtained: CAB 89 [125]. Similarly, the CCA correctly held that the primary judge erred in applying his reasons for rejecting the recordings directly to the admissions: CAB 95 [141]; CAB 43.30

The redetermination of the admissibility of the first recording, the search evidence and the admissions

12. As the identification of *House* error was not required, and as *House* error was demonstrated in any event, the CCA was entitled to re-determine the admissibility of the recordings and the search evidence. There was no error in this redetermination.

Onus (RS [59])

13. The CCA correctly applied the onus; cf Kadir AWS [41]. The judgment as a whole and the CCA's ultimate conclusions demonstrate that the onus was correctly applied: CAB 82 [107]; see also CAB 92 [130].

Engaging in the statutory task (RS [59])

14. The CCA expressly considered the statutory factors for the first recording, the search evidence and the admissions: CAB 82-83 [108]-[110]; CAB 90 [127] and CAB 94-95 [138]-[142]. The weighing exercise was expressly undertaken: CAB 83-84 [111], CAB 90-91 [128]-[130] and CAB 94-95 [138]-[142]; cf Kadir AWS [65] and [82].

The CCA's findings on redetermination are not contrary to the evidence (RS [61]-[62]; [69]; [73]

15. The CCA held that the Crown had not demonstrated that the primary judge's description of Ms White's opinion as to the difficulty of obtaining a surveillance device warrant as "*sheer speculation*" constituted *House* error: CAB 76 [88] and 82 [106]. This finding did not preclude the CCA from considering the unchallenged aspects of Ms White's evidence, in addition to other evidence in the *voir dire*, including the evidence of RSPCA Chief Inspector O'Shannessy, as to the difficulty of obtaining evidence of the offences without a contravention of the *SD Act*: cf Kadir AWS [49].

16. The CCA was correct to conclude that there was a difficulty in obtaining evidence of the offences without more than an anonymous complaint, and that this factor "*tips the balance*" under s. 138: CAB 83 [111].

17. As the CCA correctly held, any other potential breaches of the *SD Act* by the RSPCA did not add to the case for exclusion of the search evidence: CAB 53-54 [7]; cf Kadir AWS [72].

18. There was no error in the CCA's finding that there was only a "*bare causal connection*" between the contravention and the obtaining of the admissions by Ms Lynch, nor the ultimate conclusion that the evidence of admissions was admissible: CAB 94 [134]. The primary judge held the circumstances in which the admissions were made to Ms Lynch (not an investigating official) were not unfair: CAB 43; cf Kadir Reply [9].

19. The primary judge and the CCA each correctly held that the breach of privacy "*is not a factor that weighs heavily against the admission of the evidence*": CAB 37-38; CAB 83 [109]. The training facility was a part of a business that was subject to inspection by RSPCA inspectors and, as such, was not a private activity; cf Kadir Reply [8]. The recordings only depict the area in which the appellant conducts his business. The appellant's residence cannot be seen in the recording: ZKFM 204.46-204.53.

Remittal (RS at [74])

20. If, contrary to the above, this Court finds that there was error in the CCA's redetermination, this Court should determine the admissibility of the evidence for itself, or alternatively, the appeal should be remitted to the CCA.

Dated: 15 October 2019

H Baker SC H Roberts B K Baker