

# Exclusion of evidence under the *Uniform Evidence Acts*

*Steven Moore (a pseudonym) v The King* [2024] HCA 30



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Crown Prosecutors' Chambers

The High Court has unanimously held that the correctness standard applies to appellate review of the decision of a trial judge to refuse to exclude evidence pursuant to s 137 of the *Evidence Act 2008* (Vic) (*'Evidence Act'*). The decision applies equally to corresponding provisions of the uniform Evidence Acts.

## Background

The appeal was from an interlocutory decision of the trial judge in the County Court of Victoria, where the appellant was due to stand trial for six offences of assault alleged to have been committed against the complainant at her home in 2021.

Shortly after the alleged offences, the complainant made several representations about what occurred to her mother, in a triple-0 call, to a police officer (recorded on body-worn camera) and in a written police statement.

In early 2023, the complainant passed away. After her death, the Crown served a notice on the appellant, pursuant to s 67 of the *Evidence Act*, of its intention to adduce evidence at the appellant's trial of representations made by the complainant under the unavailability exception to the hearsay rule provided in s 65 of that Act. The appellant objected to the admission of the representations pursuant to s 137

of the *Evidence Act* on bases that included the probative value of the evidence being outweighed by the danger of unfair prejudice arising from his inability to cross-examine the complainant. The trial judge declined to exclude the evidence.

The appellant sought leave to appeal to the Victorian Court of Appeal, which upheld the trial judge's decision and dismissed the appeal. In so holding, the Court applied the principles in *House v The King* (1936) 55 CLR 499 (*'House v The King'*) to determine that the refusal was 'open' to the trial judge.

## Decision

The High Court observed that whether appellate review of a first instance judicial determination requires application of the correctness standard or a *House v The King* standard turns on whether the legal criterion to be applied 'demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies': at [15]. Under the correctness standard, the appellate court determines for itself the correct outcome, while making due allowance for such 'advantages' as may have been enjoyed by a judge who conducted the trial or hearing: at [14].

The Court held that the correctness standard applies to appellate review of determinations about whether or not evidence should be excluded under s 137 of the *Evidence Act*: at [18].

On the substantive issue, the Court held that the trial judge was correct to refuse to exclude the complainant's previous representations pursuant to s 137. Without more, an inability to cross-examine will not justify the exclusion of evidence that is otherwise admissible pursuant to s 65 of the *Evidence Act*: at [32]. However, the Court

accepted that an inability to test evidence by cross-examination 'may constitute a legitimate ground for its exclusion where this will affect the ability of the fact finder to assess rationally the weight of the evidence': at [34]. This assessment depends on a number of factors including (at [34]–[35]):

1. the basis on which the hearsay rule did not apply;
2. the possible significance of the cross-examination; and
3. whether there are other means of assessing the reliability of the evidence.

The plausible lines of cross-examination relied on by the appellant went to inconsistent statements, delay in making the complaint, intoxication, the complainant's 'calm demeanour' in the body-worn camera footage, and the complainant's resumption of affectionate relations with the appellant. As these points could be otherwise established and then made the subject of submissions to the jury, the Court did not consider that there was any basis for concluding that the inability to test the evidence would substantially affect the ability of the trier of fact to rationally assess the weight to be attributed to the complainant's representations: at [37]–[39].

To the extent there was a potential danger in the jury treating mere repetition of the representations as adding weight to the complainant's allegations, this was a matter about which the trial judge could give directions to the jury: at [41]. While it is not an 'immutable assumption' that juries will follow judicial directions, in the appellant's case, the Court considered that the assumption that a jury would follow the suggested directions to alleviate the relatively modest danger of prejudice was soundly based: at [42].

Accordingly, the appeal was dismissed. **BN**