Parties in the High Court

McNamara v The King [2023] HCA 36

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In *McNamara v The King* [2023] HCA 36, the High Court confirmed that a trial judge may refuse to admit evidence sought to be led by one co-accused in a joint trial pursuant to s 135(a) of the *Evidence Act 1995* (NSW) ('the *Evidence Act*') if the probative value is substantially outweighed by the danger that it might be unfairly prejudicial to another co-accused. Critically, the reference to a 'party' in s 135(a) of the *Evidence Act* was held to include each of the co-accused in a joint trial.

Background

The Crown alleged that Glen McNamara and Roger Rogerson had entered into a joint criminal enterprise to murder Jamie Gao in order to steal 2.78 kg of methylamphetamine. There was no doubt that either McNamara or Rogerson shot and killed the deceased in a storage unit on 20 May 2014. However, Rogerson and McNamara each gave evidence that the other had killed the deceased and both denied any common purpose between themselves. It was a quintessential cut-throat defence case.

In giving evidence that Rogerson shot and killed the deceased and then threatened McNamara and his daughters (to force McNamara to cooperate with Rogerson in disposing of the body), McNamara wanted to adduce evidence of Rogerson's admissions to him that he (Rogerson) had killed or been involved in the killing or the attempted killing of a number of people in the past as part of his threats to McNamara.

The trial judge, Bellew J, found that the evidence sought to be led by McNamara added little to the evidence McNamara would be able to give of the circumstances surrounding the shooting of the deceased, that it would inevitably prejudice Rogerson, and that no direction could overcome such prejudice. It was excluded pursuant to s 135(a) of the Act.

The Court of Criminal Appeal (Bell P, RA Hulme and Beech-Jones JJ) held that there was no error in the trial judge's approach.

The High Court

In his appeal to the High Court, McNamara contended that there was a common law principle that an accused had an unfettered right to lead evidence in his separate trial even if that evidence prejudiced a co-accused, notwithstanding that there was a joint trial.

The High Court (Gageler ACJ, Gleeson and Jagot JJ; Gordon and Steward JJ agreeing) rejected this argument, holding that at common law in a joint trial of more than one accused there is one trial in which co-accused are joined in the one indictment. Accordingly, evidence led by one accused is admissible against another co-accused because it is led in the joint trial. The Crown is not required to adopt it in order for it to be admissible.

The strong and well-known policy reasons for joint trials were emphasised by the court, namely the need to resolve expeditiously the issues of one incident of criminality in one trial, particularly where the accused may differ in their evidence and even more so when they might blame each other, and the expense and inconvenience to the public and to witnesses if there are separate trials. Gordon and Steward JJ cited the considerations in *R v Middis* (unreported, Supreme Court of New South Wales, 27 March 1991: at 4–5) to resolve whether separate trials should be ordered, which include that the applicant must show that positive injustice would be caused to him or her in a joint trial. Gageler ACJ, and Gleeson and Jagot JJ similarly noted that the particular prejudice to a co-accused must be shown to be such as would occasion positive injustice, to justify ordering a separate trial. Even substantial prejudice to a co-accused which cannot be remedied by judicial direction will not, as a matter of course, result in the ordering of a separate trial.

The court examined the application of s 135(a) of the *Evidence Act* and held that a purposive and contextual construction of the text of s 135(a), which included consideration of the uses of the term 'party' in the Act, led to the conclusion that the word 'party' in s 135(a) includes a co-accused in a joint trial on indictment. It confirmed that it was open to the trial judge to exercise a discretion under s 135(a) to exclude McNamara's evidence that Rogerson was a known killer.

McNamara's appeal was therefore dismissed. He is currently serving a sentence of life imprisonment. BN