

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No S160 of 2019

BETWEEN:

ZEKI RAY KADIR
Appellant

AND:

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Filed on behalf of the appellant by
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Dated: 15 October 2019
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PART I: INTERNET CERTIFICATION

1. It is certified that this document is suitable for publication on the internet.

PART II: ARGUMENT

(1) Surveillance Evidence (“SE”)

2. The CCA found two errors in the judge’s reasoning.
3. The first alleged error relates to the s.138(3)(h) factor. The CCA criticise the judge’s reasoning in three respects: at CCA [103] (2nd – 3rd sentences) (JCAB¹ 81); at CCA [105] (1st sentence) (JCAB 81) and at CCA [105] (2nd sentence) (JCAB 81). All of these criticisms by CCA are problematical.
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4. The second alleged error relates to the s.138(3)(d) factor. Although both the judge and the CCA assessed this factor in identical terms, the CCA suggests error by the judge at CCA [104] (last sentence) and [105] (2nd sentence) (JCAB 81). Neither criticism is justified.
5. Having found error, the CCA redetermined the admissibility of the SE at [107]-[112] (JCAB 82-84). The key passage at CCA [111] (JCAB 83-84) has a number of difficulties.
6. Kadir submits that any redetermination should be made by the primary judge. But if this court redetermines the SE issues, a number of factors are relevant to that redetermination.
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(2) Search Warrant Evidence (“SWE”)

7. There are two basic steps in the judge’s reasoning in relation to the SWE. First, the s.138(1)(b) finding and secondly, the exercise of the discretion in s.138(1).
8. In relation to the SWE, the primary judge adopted the same reasoning deployed by him in relation to the SE, but substituted SWE for SE and noted that the SWE was

¹ Joint Core Appeal Book.

obtained as a consequence of the obtaining of the SE. Those changes altered the desirability equation: AS^2 [51].

9. The CCA examines the judge's reasoning at [116]-[126] (JCAB 85-90) and finds three errors by the judge. The first is at the end of [123] (JCAB 88-89); the second is at [125] (JCAB 89-90); the third is at [126] (JCAB 90). There are difficulties with all of these alleged errors.
10. Having found error, the CCA redetermined the admissibility of the SWE at CCA [127]-[130], especially at [128]-[129] (JCAB 90-92).
11. It is submitted that there are several problems with this reasoning.
- 10 12. If this Court redetermines the admissibility of the SWE, a number of factors are relevant to that redetermination.

(3) Admissions Evidence ("AE")

13. The judge's reasoning on the admissions evidence is at JCAB 42-43. As with the SWE, the reasoning is essentially twofold:
 - (i) the s.138(1)(b) issue;
 - (ii) the balancing test.
14. In relation to the AE, the judge adopts the reasoning adopted for the SE *and* SWE (compare AS [51]).
15. The CCA reasoning in finding error by the judge is twofold.
- 20 16. First the CCA finds that (although the relevant connexion existed) the judge erred by failing to take into account as a relevant factor on discretion that the connexion was "tenuous" or "bare". That reasoning does not withstand scrutiny.
17. Secondly, the CCA makes various observations at [141] (JCAB 95) which are problematical.
18. Having found error, the CCA redetermined the admission of the AE at CCA [142]

² Appellant's Submissions.

(JCAB 95) which picks up CCA [138]-142] (JCAB 94-95). The redetermination is problematical:

- (a) none of the mandatory factors in s 138(3) are considered;
- (b) the CCA erred in finding that there was no impropriety;
- (c) the CCA erred in finding that there was no approval, condonation or encouragement;
- (d) no proper account is taken of the onus of proof on the Crown;
- (e) contra [139] (JCAB 94.35), Ms Lynch was in a better position to interrogate Kadir by reason of obtaining the SE;
- 10 (f) the connection was not tenuous.

19. If this Court redetermines the admissibility of the AE, a number of factors are relevant to that redetermination.

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G. O'L. Reynolds

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D. P. Hume

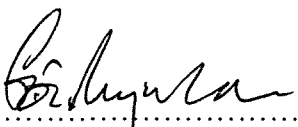
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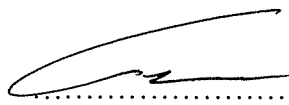
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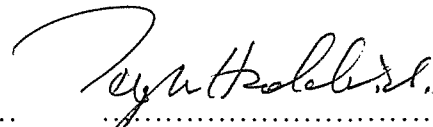
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