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INTERLOCUTORY APPEALS IN VICTORIA: EXISTING JURISPRUDENCE AND LIKELY FUTURE TRENDS

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INTRODUCTION

1. Interlocutory appeals in Victoria were introduced as a package of reforms to the law of evidence and criminal procedure that culminated in the passage of the *Evidence Act 2008* and the *Criminal Procedure Act 2009.*

2. In a major reform, for the first time in Victoria, both the accused and the prosecution in trials on indictment in the Supreme and County Court can seek leave to appeal from the Court of Appeal to challenge interlocutory decisions in a criminal trial. This is subject to one important exception: it appears that the accused, but not the prosecution, can appeal against a ruling concerning a no case submission.

3. The importance of this reform cannot be overstated. If these provisions work as envisaged then the benefits that should divest for the administration of criminal justice in Victoria are manifold.

4. Fundamentally, interlocutory appeals represent an attempt to avoid miscarriage of justices and to ensure accused persons have a fair trial according to law. But it is more than that. Because the prosecution – who are also entitled to a 'fair trial' in the sense of being able to present their case in the best possible manner in an attempt to secure a conviction – may also appeal against an interlocutory decision.

THE STATUTORY FRAMEWORK FOR INTERLOCUTORY APPEALS

5. The statutory provisions that govern interlocutory appeals are found in Division 4 of Part 6.3 of the Criminal Procedure Act 2009 (hereafter 'CPA').

6. The definition of ‘interlocutory decision’ is set out in section 3 of the CPA. An interlocutory decision is defined as a

> ‘decision made by a judge in a proceeding referred to in section 295 (1), whether before or during the trial, including a decision to grant or refuse to grant a permanent stay of the proceeding’

7. Immediately it is clear from its terms that the definition of an interlocutory decision is broad, and will most likely capture all procedural, evidential and substantive decisions that are made in the course of a criminal trial. As Weinberg JA observed in *Wells (No 2) v The Queen* [2010] VSCA 294 – at [42] –, the ‘term interlocutory decision is obviously one of wide import’.

8. But the breadth of that statutory definition – and the decisions that are appropriate for an interlocutory application – must be considered in the context of s 295 of the CPA which details the circumstances where a trial judge may certify a decision as being appropriate for an interlocutory appeal.

9. Section 295 of CPA – titled ‘Right of Appeal against Interlocutory Decision’ – sets out the statutory criteria to be satisfied before a trial judge may certify the decision as being one appropriate to proceed as an interlocutory appeal.

10. The key part of section 295 of the CPA is subsection (3). It provides that:

> (3) A party may not seek leave to appeal unless the judge who made the interlocutory decision certifies –
>
> (a) if the interlocutory decision concerns the admissibility of evidence, that the evidence if ruled inadmissible, would eliminate or substantially weaken the prosecution case; and

(b) if the interlocutory decision does not concern the admissibility of evidence, that the interlocutory decision is otherwise of sufficient importance to the trial to justify it being determined on an interlocutory appeal; and

(c) if the interlocutory decision is made after the trial commences, either –

(i) that the issue that is the subject of the proposed appeal was not reasonably able to be identified before the trial; or

(ii) that the party was not at fault in failing to identify the issue that is the subject of the proposed appeal

11. As to the scope of s 295 (3) (a) of the CPA, Redlich JA in *MA v The Queen* [2011] VSCA 13 – [3] – characterized it – and adopting the approach of Maxwell P in the earlier decision of *CGL v DPP (No 2)* [2010] VSCA 24 – in the following manner:

> 'Section 295 (3) (a) is not confined to decisions which rule evidence inadmissible. It has been held that it is applicable to evidentiary rulings to admit evidence. In either case, the statutory question which the trial judge must address is as follows: is this evidence of such significance or so essential that its exclusion would eliminate or substantially weaken the prosecution case?'

12. If s 295 (3) (a) of the CPA is concerned with evidentiary rulings, then s 295 (3) (b) is concerned with procedural and substantive decisions made by the trial judge that affect a criminal trial.

13. Some examples include refusal to discharge a jury, application for a separate trial, permanent stay applications and a ruling as to the constituent elements of a particular offence. Of course, sometimes the legal ruling is bound up with evidentiary *and* procedural aspects. A classic example is cross-admissibility of evidence and an application for severance. In *PNJ* [2010]

VSCA 88 it was made clear that that issue fell within the section 295 (3) (b) and any application for certification should invoke that section of the CPA.

14. Section 296 provides that a party may review the decision of the trial judge of a refusal to certify. In determining a review under s 296 of the CPA, the Court of Appeal is essentially required to engage in a two-step process.

15. First, it is required to consider – the statutory language is 'must' (s 296 (4) – those matters that were considered by the judge pursuant to s 295 (3) and also be 'satisfied as required by s 297' (See also *Wells (No 2)* [7]). Obviously, if the Court of Appeal considers those matters and comes to the same conclusion as the trial judge then the interlocutory appeal will be dismissed. If not, and if the applicant is able to satisfy that 'threshold' test, then the Court of Appeal will consider whether to give leave and whether to allow the interlocutory appeal. As explained by Ashley JA in *Wells v The Queen* [2010] VSCA 100 – in the context of a decision where s 295 (3) (b) was engaged:

> 'In this case, s 295 (3) (b) was in point. So, for the purposes of s 296 (4), the question arises whether the decision was "otherwise of such importance as to justify it being determined on an interlocutory appeal?" That is a matter for this Court to consider afresh, ordinarily on the material adduced below and not ignoring the conclusion reached by the judge below'.

16. Section 297 of the CPA provides the statutory criteria mandating the matters the Court of Appeal considers in determining whether it should grant leave to appeal against an interlocutory decision.

17. The overarching concern is the 'interests of justice' because the Court of Appeal may only give leave if it is satisfied that it is in the 'interests of justice' to do so. What amounts to the 'interests of justice' is conditioned by a list of statutory criteria that the Court of Appeal must consider.

18. Those statutory considerations are:

- The extent of any disruption or delay to the trial process that may arise if leave is given (s 297 (1) (a);

- Whether the determination of the appeal against the interlocutory decision may:

- (i) render the trial unnecessary (s 297 (1) (b) (i)); or

- (ii) substantially reduce the time required for the trial (s 297 (1) (ii));or

- (iii) resolve an issue of law, evidence or procedure that is necessary for the proper conduct of the trial (s 297 (1) (b) (iii); or

- (iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial (s 297 (1) (b) (iv));

- any other matter that the court considers relevant (s 297 (1) (c)

19. It is immediately apparent that all of these matters are directed to the legislative purpose sought by this reform to criminal procedure: prevention of miscarriages of justice, reduction in post-conviction appeals, amelioration of stress and anxiety caused by retrials to accused and complainants and the saving of the precious, finite resources allocated for the administration of criminal justice in Victoria.

20. Section 297 (2) of the CPA provides that the Court of Appeal must not give leave to appeal after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial.

21. Finally, s 297 (3) provides that even though the Court of Appeal refuses leave this does not preclude an accused from rearguing the point upon appeal in the event of a conviction. As I will explain later, this makes

sense because of the difference in the nature of the appellate inquiry at the interlocutory and the post-conviction stage of a criminal trial.

22. Section 298 of the CPA provides guidance as to the mechanics of commencing an interlocutory appeal. Certain time limits are prescribed. As a practical matter, section 298 of the CPA must be read with the *Practice Note* of the Court of Appeal for interlocutory appeals.

23. Section 300 of the CPA titled 'Determination of Appeal' sets out the range of powers the Court of Appeal has in the disposition of interlocutory appeals under s 295. Section 300 (2) provides that on an appeal under s 295 the Court of Appeal may do any of the following:

> (a) may affirm or set aside the interlocutory decision; and
>
> (b) if it sets aside the interlocutory decision –
>
> (i) may make any other decision that the Court of Appeal considers ought to have been made; or
>
> (ii) remit the matter to the court which made the interlocutory decision for determination

24. Importantly, in the event that the Court of Appeal remits a matter under s 300 (2) (b) (ii) it is empowered to 'give directions concerning the basis on which the matter is to be determined'. The court to which the remitter is made 'must hear and determine the matter in accordance with the directions, if any'

INTERLOCUTORY APPEALS 2010 – 2013

25. Lest it be said that Victorian practitioners in the criminal jurisdiction of the Supreme and County Court are overly litigious, in the relatively short time interlocutory appeals have been in existence, there has already developed a substantial body of jurisprudence concerning such appeals.

26. The judgments in interlocutory appeals have had an unexpected beneficial effect by providing guidance to trial judges and practitioners on an array of matters that customarily arise in the course of criminal trials.

27. In particular, there have been a number of important decisions concerning key aspects of the *Evidence Act 2008* (hereafter 'EA'). As practitioners would be aware, the tendency and coincidence provisions of the *EA* in relation to allegations of a sexual nature have been considered extensively in interlocutory appeals.

28. Other important areas of law under the EA where guidance has been provided by the Court of Appeal – in the sense of having a wider impact beyond the parties to the interlocutory appeal – have included, *inter alia,* previous representations, unavailable witnesses, admissions under section 85 of the EA and admissibility of evidence that has been obtained in an illegal or improper manner and s 138 of the EA.

29. Although this 'pedagogical effect' – particularly given the changes introduced by the EA 2008 and the CPA 2009 – was not a stated objective of interlocutory appeals, it has in practice had this effect while appearing to fulfill other important objectives that led to the introduction of this legislation: prevention of miscarriages of justice; reduction of post-conviction appeals; fewer retrials with the associated distress to accused and complainants and savings of precious community and financial resources in the administration of criminal justice.

30. The provisions of the CPA dealing with interlocutory appeals do not distinguish between the prosecution and defense. The 'rights' of the prosecution and defense are identical (save for appeals against a no case submission where it appears that the defence, but not the prosecution, may appeal against such a decision see *DPP v Singh* [2012] VSCA 167; *Linfox Resources Pty Ltd & Ors v The Queen* [2010] VSCA 319). In practice, the far majority of interlocutory appeals have been by the accused. That said, there

have been a number of important cases where the prosecution has appealed – in large part successfully – against rulings by trial judges.

31. The array of procedural, substantive and evidential issues considered by the Court of Appeal – and that is independent of the jurisprudence that has considered the appropriate use and limits on interlocutory appeals which will be considered in the next part of this paper – on an interlocutory basis has been substantial and has included:

- Adjournments (*AJP v The Queen* [2010] VSCA 224; *SC v The Queen* [2010] VSCA 271);

- Admissibility of DNA evidence (*The Queen v DG; DG v The Queen* [2010] VSCA 173);

- Admissibility of pretext recordings ((*CGL v DPP (No 2)* VSCA 24; *FMJ v The Queen* [2011] VSCA 308; *WK v The Queen & Ors* [2011] VSCA 345);

- Admissibility of flight evidence and the conviction and sentence of an accused for another offence (*Mokbel v The Queen* [2010] VSCA 354);

- Admissibility of identification evidence and photo board identification (*THD v The Queen* [2010] VSCA 115; *MA v The Queen* [2011] VSCA 113; *DPP v DJC* [2012] VSCA 132);

- Appropriateness of certification by a trial judge for an interlocutory appeal (*CGL v DPP (No 2)* [2010] VSCA 24; *Wells v The Queen* [2010] VSCA 100; *Wells (No 2) v The Queen* [2010] VSCA 294; *McDonald v The Queen* [2010] VSCA 45; *Stannard v The Queen* [2010] VSCA 165; *The Queen v DG; DG v The Queen* [2010] VSCA 173; *MA v The Queen* [2011] VSCA 13);

- Evidence excluded pursuant to s 138 of the EA (*DPP V Marijancevic & Ors* [2011] VSCA 355);

- Evidence admitted pursuant to s 138 of the EA and sections 81 & 82 of the *Drugs, Poisons and Controlled Substances Act 1981* (*GA v The Queen & Ors.* [2012] VSCA 44);

- Exclusion of record of interviews conducted with an accused because of breach of s 464C of the *Crimes Act 1958* (*DPP v MD* [2010] VSCA 233);

- Hearsay evidence – Previous representations of witnesses at committal proceedings (*DPP v BB & QN* [2010] VSCA 211; (*The Queen v Darmody* [2010] VSCA 41 *Finn v The Queen* [2011] VSCA 68);

- Hearsay evidence – unavailable witness (*ZL v The Queen* [2010] VSCA 345);

- Hearsay evidence – previous representations (*Finn v The Queen* [2011] VSCA 68);

- Interlocutory appeals and *Charter* arguments (*Wells v The Queen (No 2)* [2010] VSCA 294; *The Queen v Chaouk & Ors* [2013] VSCA 99; *WK v The Queen & Ors* [2011] VSCA 345);

- Interim stay following decision by VLA to refuse to provide instructors to accused charged with serious criminal offences (*The Queen v Chaouk & Ors* [2013] VSCA 99);

- Judge's refusal to recuse herself on the basis of apprehended bias (*GP v The Queen* [2010] VSCA 142);

- Jurisdiction of the Court of Appeal to entertain an interlocutory appeal against a successful no case submission (*DPP v Singh* [2012] VSCA 167);

- Tendency evidence (*KJM V The Queen* [2011] VSCA 151; *KJM (No 2)* [2011] VSCA 268; *MR v The Queen* [2011] VSCA 39; *JLS v The Queen* [2010] VSCA 209; *CEG v The Queen* [2012] VSCA 55);

- Tendency and coincidence evidence (*CGL v The Queen* [2010] VSCA 26; *NAM v The Queen* [2010] VSCA 95; *GBF v The Queen* [2010] VSCA 135; *PG v The Queen* [2010] VSCA 289; *JLT v The Queen* [2010] VSCA 358; *MR v The Queen* [2011] VSCA 39; *KRI v The Queen* [2011] VSCA 127; *RHB v The Queen* [2011] VSCA 295; *SPA v The Queen* [2011] VSCA 306);

- Coincidence Evidence (*PNJ v The Queen* [2010] VSCA 88; *CW v The Queen* [2010] VSCA 288; *NAM v The Queen* [2010] VSCA 95);

- Elements of offences (*Stannard v DPP* [2010] VSCA 165; *Dale v The Queen* [2012] VSCA 324; *PJ v The Queen* [2012] VSCA 146; *PA v The Queen* [2012] VSCA 294; *DPP (Clth) v FM* [2013] VSCA 129; *SAJ v The Queen* [2012] VSCA 243; *DPP (Clth*) *v Karabegovic* [2013] VSCA 380);

- Refusal by trial judge to permit an accused to withdraw a plea of guilty (*UR v The Queen* [2011] VSCA 152; *Kumar v The Queen* [2013] VSCA 97);

- Permanent stay of proceedings (*DPP v BDX (No 2)* [2010] VSCA 134; *Aydin v The Queen* [2010] VSCA 190; *Joud & ors v The Queen* [2011] VSCA 158; *PG v The Queen* [2010] VSCA 289; *PA v The Queen* [2012] VSCA 294; *Wells v The Queen* [2010] VSCA 100; *Wells (No 2) v The Queen* [2010] VSCA 294);

- Prosecutor's right to cross examine an accused on statements made to Department of Human Services officers (*ML v The Queen* [2011] VSCA 193);

- Reasonable apprehension of bias (*PA v The Queen* [2012] VSCA 297);

- Rejection of a no case to answer (*Linfox Resources Pty Ltd & Ors v The Queen* [2010] VSCA 319);

- Refusal by trial judge to discharge a jury (*Dertilis v The Queen* [2010] VSCA 360; *SD v The Queen* [2011] VSCA 76; *DPP v Zheng ; Zheng v DPP* [2013] VSCA 304);

- Trial judge's ruling on alternative prosecution case (*DPP v Zheng ; Zheng v DPP* [2013] VSCA 304);

- Severance applications (*JLT v The Queen* [2010] VSCA 358; *CGL v The Queen* [2010] VSCA 26; *HDC v The Queen* [2012] VSCA 136);

- Statutory interpretation of time limits for the commencement of trials for sexual offences pursuant to ss 212 and 247 of the CPA (*BDX (No 2) v DPP & Or* [2010] VSCA 134);

- Statutory construction of the time when special hearings are to be held pursuant to s 371 of the CPA and the meaning of 'exceptional circumstances for an extension of time (*MAC v The Queen* [2012] VSCA 19);

- Separate trials (*Dertilis v The Queen* [2010] VSCA 360);

- Validity of the prosecution filing over a fresh presentment after the commencement of the CPA (*DPP v Guariglia* [2012] VSCA 105)

THE INTERPRETIVE APPROACH OF THE COURT OF APPEAL TO INTERLOCUTORY APPEALS

32. It is obviously not possible to survey in detail all of the interlocutory judgments by the Court of Appeal since 2010. So I want to concentrate on what I would describe as the 'interpretive methodology' of the Court of Appeal to interlocutory appeals.

33. By 'interpretive methodology' I simply mean to convey the idea of overarching philosophy, or approach, by the Court of Appeal to interlocutory appeals generally. That is, the normative vision, reflected in interlocutory judgments, about the appropriate cases that should be the subject of interlocutory appeals and those that should not.

34. Obviously an understanding of that methodology is important in any decision as to the appropriateness and utility of pursuing an interlocutory appeal.

35. An early – within two months of the commencement of interlocutory appeals on 1 January 2010 – and important decision on s 295 (3) (a) and the issue of admissibility of evidence – and the question in what circumstances a certificate should issue – was *CGL v DPP (No 2)* [2010] VSCA 24.

36. Maxwell P – in approaching the issue of the interpretation of s 295 (3) (a) – and evidentiary rulings – noted – [4] – that the Parliament intended that 'decisions of that kind be treated as a special category for the purposes of interlocutory appeals' and that 'Parliament clearly intended that, before a certificate was granted under that sub-section, the judge would evaluate the significance of the evidence in question'.

37. Importantly, Maxwell P sets out – [5]-[6] – how evidentiary rulings are to be approached by trial judges. I set out fully those remarks because they remain extremely important as to whether or not an interlocutory decision concerning evidentiary rulings should be certified by a trial judge:

> 'It was obviously necessary to establish a threshold test before evidentiary rulings could be the subject of an interlocutory appeal. Otherwise this Court would inundated with applications for leave to appeal regarding evidentiary decisions of the multifarious kinds which are made every day in many criminal trials. It is important, therefore, that trial judges and prosecutors exercise very real vigilance as to how s 295 (3) (a) is applied, lest the work of this Court become bogged down, in a way Parliament cannot possibly have intended, with applications for leave to appeal against evidentiary rulings. The threshold test if whether the evidence 'if rule inadmissible would eliminate or substantially weaken the prosecution case'. The provision is not confined to decisions which rule evidence inadmissible. Rather, it is applicable to evidentiary either to admit or exclude evidence. In either case, the statutory question which must be addressed is as follows: is this evidence of such significance that its exclusion would eliminate or substantially weaken the prosecution case?'

38. In the context of the facts of *CGL v DPP (No 2)*, the evidence that was admitted was a recorded conversation that had been admitted by the trial judge pursuant to s 85 of the EA. The allegations involved those of a sexual nature. Apart from those admissions, the prosecution also relied upon evidence of the complainant as to the acts that founded the allegations. In those circumstances, Maxwell P – other members of the Court agreeing – found that in that case it could not be said that the prosecution case had been substantially weakened if the evidence of the admission was excluded. Such a conclusion is clearly correct: the complainant's evidence remained.

39. Further, Maxwell P postulated a useful way on how to approach the question of whether evidence, if excluded, would substantially weaken the

prosecution case by concentrating on what would be the consequence for the prosecution case. His Honour said – [11]:

> 'If the evidence is of such importance that its exclusion could be properly said to 'substantially weaken' the prosecution case, then the situation would presumably be one which called for serious consideration by the Crown about whether the prosecution case should go ahead'.

40. A useful decision as to when a trial judge should certify and the criteria to be applied is the decision of the Court of Appeal in *McDonald v The Queen* [2010] VSCA 45. The facts of *McDonald* are easily stated. The accused was charged with cultivation of cannabis. It appears that the sole legal issue at trial was the contention by the accused that by virtue of being an Aboriginal person the criminal laws of the State of Victoria did not apply to him. The law on this all pointed one way against that submission: the accused could simply not succeed as the matter had been authoritatively being determined by the High Court.

41. The accused made application for the judge to certify the decision for an interlocutory appeal pursuant to s 295 (3) (b) of the CPA. The trial judge did so. The Court of Appeal held that the trial judge should not have granted a certificate. For practitioners, the judgments of Ashley JA and Redlich JA are important.

42. Ashley JA considered that a judge, when considering whether a decision is '…sufficient importance to the trial to justify it being determined on an interlocutory appeal, is to make a 'value judgment' (*McDonald* [15]). In this case, Ashley JA found that the appeal was 'hopeless' and in those circumstances a certificate should not have been granted. Ashley JA then said this – [17]:

> 'I should finally make this observation. Nothing that I have said should be taken to mean that, if a judge considers an unsuccessful argument

> to have been something better than absolutely hopeless, the statutory description will necessarily have been satisfied. Nor should it be taken to imply that the value judgment must necessarily be confined to considerations of prospects of success'.

43. Redlich JA agreed – [20] – with Ashley JA on the need for 'the trial judge, amongst other things, to make a value judgment about the interlocutory decision which or she has given'. His Honour then went on – [21] – to provide guidance more generally – that is, beyond the hopeless case and where there is simply no doubt about the decision of the trial judge – to trial judges as to how they should approach the question of certification:

> 'As this case indicates, where the trial judge is of the view that the interlocutory decision is so plainly correct that the argument to the contrary is hopeless or foredoomed to fail, it is not an appropriate case in which to grant a certificate. In other circumstances, the trial judge is required to assess the relative merit of his or her conclusion and the degree to which it could be said that his or her decision is attended by doubt. I would not wish it to be understood that because a trial judge concludes that their decision may be attended by some doubt, that it necessarily follows that certificate should be granted'.

44. Thus, the trial judge has to make an assessment as to whether the decision was 'attended by doubt'. Leaving aside the obvious difficulty that the trial judge is in an unusual position of having to assess the validity of a decision that a party disagrees with, and 'stepping back' to judge the correctness of their legal decision, trial judges are now required to undertake such a task as part of the decision as to whether to certify or not. And plainly 'some doubt' is not necessarily sufficient. Whether it must be a 'substantial', 'real', 'significant' or 'reasonable' doubt is not entirely clear.

45. Although *McDonald* was concerned with s 295 (3) (b) of the CPA, it is clear that the statements of principle contained in the judgments of Ashley JA and Redlich JA are equally apposite to evidentiary rulings that may be the

subject of applications for certification pursuant to s 295 (3) (a) of the CPA, with the obvious rider of the specific statutory criteria that are applicable to evidentiary rulings.

46. A further 'threshold' consideration for interlocutory appeals was propounded by Redlich JA in *MA v The Queen* [2011] VSCA 13. That threshold consideration was the notion of the 'short trial'.

47. In introducing the notion of the 'short trial' as a relevant consideration as to whether leave should be given by the Court of Appeal pursuant to s 297, Redlich JA observed that:

> 'A primary reason for the introduction of the interlocutory appeal process was to ensure that the resources of an already strained criminal justice system were utilized in the most effective way and not wasted, and delays in the justice system were minimized…Accordingly, one of Parliament's plain objectives was to address the risks associated with significant rulings by a trial judge before or during a trial which would, if erroneous, require the setting aside of a conviction. The interlocutory appeal provides a capacity for review of such rulings, so that the overturning of convictions and the need for retrials which would involve substantial additional cost and result in significant delays could be avoided or substantially reduced. In *Stannard* v *DPP* this Court thererfore referred to the need to take account of the "extent to which court time and resources would be wasted or rendered unnecessary if the decision proved erroneous and was not immediately appealed'.

48. His Honour then observed – [9] – that:

> > 'If the trial is to be a short one, these considerations assume much less weight. There are not the same savings in costs or resources. Where there is an error in short trials which requires

> a conviction to be overturned, the delays are unlikely to be of the same magnitude and the waste of resources are minimal.'

49. The approach of Redlich JA has been followed in other cases and so the notion of the 'short trial' is a relevant consideration as to whether or not the Court of Appeal will grant leave to appeal pursuant to s 297. And it is important to note what Redlich JA also said about the short trial and likelihood of leave being granted – [10] – :

> '…while the fact that a trial will be short is not determinative, it will ordinarily be a very weighty consideration against the grant of leave to appeal from the interlocutory decision'.

50. What constitutes a 'short trial' has not been specified, or set at a precise amount of days, or weeks, and can only be determined on a case by case basis and, perhaps, is a value judgment.

51. Practitioners should also recognize that the notion of the 'short trial' was not intended by Redlich JA to preclude appeals against plainly incorrect interlocutory decision where, for instance, the accused is in custody. As His Honour explained in *MA* – [11]:

> 'The fact that the accused is in custody may become a relevant consideration where it is plain that the interlocutory decision is wrong, and if corrected, will result in the accused's release. That is not this case'

52. Finally, the decision in *McCartney v The Queen* [2012] VSCA 268 – and the comparison between the judicial inquiry at an interlocutory appeal stage and that of post-conviction – is a useful end point to considering interlocutory appeals and the interpretive methodology adopted by the Court of Appeal (See also *KJM (No 2) v The Queen* [2011] VSCA 268 [14]).

53. One of the grounds of appeal in *McCartney* involved a challenge to the trial judge's decision to admit evidence of photo board identification pursuant to s 137 of the EA. A question that arose on appeal – and was determined in *McCartney* – was whether upon appeal, the Court of Appeal was to approach the question of admissibility on the basis of *House v King* principles, or whether the court would decide the question of admissibility for itself. The court held that on an appeal against conviction where there was a challenge to the trial judge' s decision pursuant to s 137 it would decide the question of admissibility for itself (*McCartney* [32]).

54. But the Court made it explicit that for the purpose of interlocutory appeals, and challenges to admissibility of evidence pursuant to s 137 of the EA, that the principles in *House v King* would continue to apply (*McCartney* [46]-[51]. It justified the differing treatment of the same provision of the EA because of the different appellate inquiries that are undertaken by the Court on an interlocutory appeal and a post-conviction appeal (*McCartney* [49]-[51]).

TO APPEAL OR NOT TO APPEAL: FORENSIC CHOICES AND STRATEGY

55. First – and this is an important consideration – is that a decision not to appeal against a decision made pre-trial, or during a trial, in no way amounts to a waiver that the trial judge was correct. It follows that there is no impediment at all to pursuing on appeal a ground that was not subject to an application for an interlocutory appeal.

56. Second, the fact that an interlocutory appeal was pursued and rejected does not preclude a further appeal on the same ground at the post-conviction stage (see 297 (3) of the CPA and, for instance, *KRI v The Queen* [2011] VSCA 127 [65] (Hansen JA). This is because – and as was made clear in *McCartney v The Queen* (see above at paragraphs 53 – 54) – the inquiry made by the Court of Appeal upon an interlocutory appeal and a post-conviction appeal are governed by different appellate criteria.

57. In relation to the former – the interlocutory appeal – the inquiry is more narrowly circumscribed and concerned only with the matters specified by ss 295 and 297 of the CPA. As to the latter, the primary concern of the Court of Appeal – leaving the ground of the appeal that the conviction is unsafe and unsatisfactory to one side – is whether there has been a 'substantial miscarriage of justice'. That inquiry is more 'holistic' because it concerned with the whole of the trial record and what actually occurred during the currency of the trial. The focus is necessarily retrospective, whereas an interlocutory appeal is concerned with an extant criminal trial.

58. Third, depending on the nature and complexity of the trial, a pre-trial judge may have to make numerous pre-trial rulings. In this regard, it is important for practitioners to avoid premature interlocutory applications. All pre-trial arguments should be advanced and rulings made before application is made to Court of Appeal for an appeal against interlocutory decisions. See *Wells (No 2)* [5].

59. In addition, a ruling made by a trial judge on the admissibility of evidence on an interim basis would also be premature and an inappropriate vehicle for an interlocutory appeal. See *KJM v The Queen* [2011] VSCA 151 [4] & [7]-[9].

60. Fourth, the Court of Appeal has made it clear that all arguments need to be advanced before the trial judge. A new argument that was not advanced below and then sought to be agitated before the Court of Appeal has been deprecated (see *Wells (No 2)* [33]-[34]; *BDX (No 2)* [2010] VSCA 134 [2]-[3]; *The Queen v Chaouk & Ors* [2013] VSCA 99). Obviously there are sound reasons for this attitude by the Court of Appeal: how can the Court possibly consider whether or not the trial judge has made a correct decision when the trial judge was not given the opportunity to consider matters first relied upon at the interlocutory stage?

61. Fifth, it is not at all possible to set out in a prescriptive manner when to appeal against an interlocutory decision. It is trite to say that every case is

different. Ultimately, it is a forensic judgment. But as practitioners are aware, the strength or otherwise of a prosecution case is not always susceptible to perfect analysis or prediction. However, depositions will ordinarily reveal the 'key' strengths of the prosecution case. That may be one very important piece of evidence. Or, it may be a number of items of evidence – for instance, in a circumstantial case – where the 'strength' of the prosecution lies precisely in the combination of a number of discrete items of evidence.

62. Of course, a judgment has to be made – particularly when considering the strength of the prosecution case and when evidence has been ruled admissible or inadmissible – as to where that leaves the prosecution case. Remembering, of course, that it is simply not to the point that the prosecution would be weakened by the exclusion of an item of evidence. It must be 'substantially weakened'.

63. Sixth, and this may be described as the issue of 'timing'. The provisions governing interlocutory expect counsel to have identified pre-trial issues well in advance of any trial. A trial now, of course, commencing when the accused is arraigned before the jury panel. And that is already an expectation more generally under the CPA in the exchange of prosecution and defense pre-trial documents. But, of course, again criminal trials are unpredictable and inherently unstable. Things happen. Circumstances change. The CPA recognizes that fact and thus interlocutory appeals can occur in a situations not contemplated. But it remains very important to isolate and determine all pre-trial issues prior to the trial commencing.

64. Seventh, another important assessment to be made as to whether or not to appeal an interlocutory decision is to categorize the *nature* of that decision. By 'nature' of that decision I mean whether the decision that has been made is one that may be described as a matter of law and those governed by the principles in *House v King.* Assessing the nature of the decision is important.

65. Because obviously if the decision is governed by the principles of *House v King* it requires that the original decision by the decision maker is confirmed unless it falls within the limited categories of 'error' in *House v King.*

66. Without being exhaustive, decisions involving the admission of tendency evidence (*KMJ v The Queen (No 2)* [2011] VSCA 268 [14]), record of interviews where there has been alleged breach of the s 464 of the Crimes Act, permanent stay applications, adjournments, and applications to discharge a jury are all governed by the principles in *House v King.* For instance, in *SD v The Queen* – in an appeal against a decision to refuse to discharge a jury – Nettle JA observed – at [13] – that it would only be in an 'exceptional case' that the court would set aside a discretionary decision to refuse to discharge a jury.

66. Other decisions – and again without being exhaustive – which may be characterized as involving a matter of law – and thus standing outside the confined strictures of appellate review under *House v King* – would include coincidence evidence (*PNJ v The Queen* [2010] VSCA 88), constituent elements of a particular offence and statutory construction of provisions of the CPA.

CONCLUSION: LIKELY TRENDS IN INTERLOCUTORY APPEAL JURISPRUDENCE

67. The interpretive stance by the Court of Appeal appears to have been designed to ensure that interlocutory appeals are not brought unnecessarily. And that the Court – which is already stretched with a significant number of criminal appeals – is not overburdened by interlocutory appeals.

68. This is understandable. The introduction of interlocutory appeals has introduced statutory 'fragmentation' into the area of criminal trials. There is a risk – particularly if the provisions are abused – that the aims of the reforms will be thwarted if those appeals are not confined within acceptable limits and

in line with the intention of Parliament. Interlocutory appeals are to be the exception, and not the norm, in the administration of criminal justice.

69. What then is likely to occur in the future? I make this observation. In each of the years 2010 and 2011 there were 37 interlocutory appeals. This was the 'peak' in terms of numerical numbers. The number of such appeals fell significantly in 2012 and 2013. So in 2012 there were 16 such appeals and 9 in 2013[1]. In my view, this is likely to continue and for these reasons.

70. First, by any measure the introduction of interlocutory appeals represented a radical – and welcome – departure in criminal procedure. But it is to be expected given the words of the statute that an interlocutory appeal is to be the exception rather than the norm. Most criminal trials should run to a conclusion without an interlocutory appeal.

71. Second, not unexpectedly practitioners attempted to utilize these provisions when they were first introduced. Again, this is entirely understandable. Lawyers being lawyers – especially defence lawyers – will attempt to do all that they can to ensure that a client receives a fair trial. A new piece of legislation that had the potential to prevent a miscarriage of justice was – and is – attractive.

72. Third, at the same time the Court of Appeal has sought to confine interlocutory appeals to acceptable limits and within what was considered to be the intent of Parliament when it introduced the legislation.

73. Fourth, the confining of interlocutory appeals in the manner in which the Court of Appeal appears to have had an effect of reducing the number of appeals. Hence, the relative decline in interlocutory appeals in 2012 and 2013.

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[1] I thank Mr Chris Temperley, Deputy Registrar, Administration, of the Court of Appeal for providing me with this data.

74. Fifth, because the jurisprudence on when trial judge's should certify is now relatively settled in respect of the tests to be applied both practitioners and trial judges are, as to be expected, in a far better position to approach interlocutory appeals and be clear about what is an appropriate case for appellate consideration.

75. Sixth, because of this reduction in number of interlocutory appeals there is unlikely to be changes to the statutory regime governing interlocutory appeals. At least it is hoped not. I say that for three reasons.

76. First, there have been decisions where it is quite evident that significant community resources have been saved because of interlocutory appeals. The obvious examples are *Joud & Ors v The Queen* [2011] VSCA 158 and *PJ v The Queen* [2012] VSCA 146. It is no exaggeration that those decisions have saved the criminal justice system of Victoria millions of dollars.

77. Second, there is great comfort – particularly those who appear for accused persons – that if something egregious or unfair or manifestly unjust has occurred at any stage of a trial, that results in an accused not receiving a fair trial according to law, then the Court of Appeal is able to intervene to prevent a miscarriage of justice.

78. Third, for prosecutors there is also a 'safety net' in existence to prevent criminal prosecutions being compromised – and thus the chance to secure a conviction reduced – by incorrect rulings.

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