***Lewis (a pseudonym) v The Queen* [2018] VSCA 40 (27 February 2018) – Victorian Court of Appeal**

'Admissibility of evidence' – 'Hearsay rule' – 'Interlocutory appeal' – 'Physical violence and harm' – 'Tendency evidence'

Charges: Aggravated burglary x 1; Intentionally cause injury x 2; Recklessly cause injury x 2; Intentionally damage property x 1; Extortion with a threat to kill x 1; False imprisonment x 1; Making threat to kill x 1; Contravening family violence intervention order x 1; Attempt to pervert the course of justice x 2.

Case type: Application for leave to appeal against interlocutory decisions.

Facts: The charges related to an incident of violence committed by the applicant against the aggrieved, his partner. The aggrieved was to be the central witness for the prosecution ([5]-[7]). The aggrieved invoked s 18 *Evidence Act 2008* (Vic), which provides that a person can avoid giving evidence against their partner if there is a sufficient likelihood that harm would be caused to the person ([9]-[11]). The prosecution then gave notice under s 65 *Evidence Act 2008* that they would rely on statements that the aggrieved had made to the police as tendency evidence as an exception to the hearsay rule ([16]).

Issues: The applicant appealed against 3 main interlocutory decisions made by the judge. First, admitting the statements the aggrieved made to the police. Second, refusing to certify the appeal, which is a precondition to appeal against an interlocutory decision under s 295(3) of the *Criminal Procedure Act 2009* (Vic). Third, refusing to sever the proceedings for each of the applicant's charges.

Decision and Reasoning: The Court dismissed all grounds of the appeal. On the first ground, it was reasonably open for the judge to admit the evidence as an exception to the hearsay rule. The applicant argued that admitting the evidence might lead to prejudice because the aggrieved could not be cross-examined (since she had invoked the protection against giving evidence against a de facto partner) ([58]). The Court held that there were sufficient protections available to ensure a fair trial, including directions against giving too much weight to untested statements ([59]). Accordingly, in relation to the second ground, it was reasonably open for the judge to refuse to certify ([64]). On the third ground, the Court held that many charges stemmed from the same factual basis, so there was no basis to sever the charges ([68]).

The Court observed that the applicant did not seek to challenge the judge's ruling that the tendency evidence satisfies the requirements of ss 97 and 101, 'presumably' because 'he regards a submission of that kind as foredoomed to fail, based upon the recent decision of the High Court in *Hughes v The Queen*' [2017] HCA 20 (14 June 2017). [72] The Court stated at [73] that:

> It is, however, worthy of note that the general evidence of the history of domestic violence, which forms the basis of the tendency notice, may not have quite the probative force in relation to the allegation of the threat to kill and extortion, as it does in relation to the other charges brought against the applicant.

The Court concluded by cautioning trial judges about the use of tendency evidence: '[if the tendency] evidence were led, the judge would have to give a careful direction as to how it could be used and, more importantly, how it could not be used' ([75]).