IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D15 of 2019

BETWEEN:

VAN DUNG NGUYEN
Appellant

AND

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part 1: Certification as to publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. Section 59 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("ENULA") excludes the admission of hearsay statements subject to certain exceptions specified in ENULA. Hearsay statements made by an accused may be admissible if they constitute admissions or related statements consistent with s81 of ENULA.

3. The common law rule that the prosecution is obliged to call all witnesses who can give relevant and admissible evidence does not extend to an obligation upon the prosecution to adduce evidence of hearsay statements made by the accused notwithstanding some

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such statements may be admissible as an exception to the hearsay rule because they constitute admissions. The prosecution retains a discretion not to adduce evidence of hearsay statements made by an accused but, if the prosecution elects to adduce any such statements because they constitute admissions, it will be bound to adduce both inculpatory and exculpatory material consistent with the rule at common law as stated in the decision of *R v Soma.*[1]

Part III: Certification with respect to s78B *Judiciary Act* 1903

4. No constitutional issue is raised in this appeal therefore no notices are required.

Part IV: Appellant's Narrative and Chronology

5. The respondent accepts generally the facts set out in the appellant's narrative statement and chronology however it does not concede the characterisation of the interview between the appellant and investigators **[AFB 1]** as that of a "mixed" record of interview. Nor does the respondent concede that the decision not to adduce evidence of the interview at the second trial was made for tactical reasons although the respondent does concede that the legal practitioner who appeared for the Crown at the mention of the matter on 19 March 2018 communicated such information to the Court. The respondent does not seek to supplement the appellant's Narrative or Chronology.

Part V: Respondent's Argument

6. The appellant does not assert that out of court representations made by an accused which are exculpatory in nature are admissible in evidence but rather, where such representations are mixed with representations that are against interest, the obligation falls upon the prosecution to adduce all such representations.[2]

7. That previous representations which are largely exculpatory are inadmissible is consistent with the position established at common law. In *Flowers v The Queen*[3] Riley J relied upon a number of decisions from several jurisdictions to conclude that there was no basis for the admission of representations which amounted to an exculpatory explanation of

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[1] (2003) 212 CLR 299 at [31]
[2] Appellant's submissions paragraph 22
[3] (2005) 189 FLR 423

relevant matters.[4] The introduction of s59 of ENULA does not alter the common law position.

8. Section 81(1) of ENULA relevantly provides that the hearsay rule does not apply to evidence of an admission. The term 'admission' is defined in part 1 of the Dictionary as: "..a previous representation that is –

(a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
(b) adverse to the person's interest in the outcome of the proceeding."

9. The interview by police of the appellant **[AFB 1 - 25]** contains numerous individual representations only some of which constitute admissions. Representations which could be construed as adverse to interest include:

- That the appellant was present during the alleged offending **[AFB 8 – 9, 11];**
- That the appellant took bottles of beer and threatened to throw them **[AFB 10, 16, 18];**
- That the appellant did throw a bottle of beer at Muoi **[AFB 14, 16, 19, 20];**
- That the appellant later threw two bottles of beer at persons who were pursuing him **[AFB 18, 22];**
- That the appellant saw the bottle of beer that he threw at Muoi hit Muoi **[AFB 21]**.

10. The possible admissions should be assessed in the context of the qualifications made by the appellant during the course of the interview. In each instance where the appellant stated he had thrown a bottle at Muoi, he said he did so because Muoi was approaching him and in the context of Muoi and others being angry at him. Similarly, the statement by the appellant that he threw bottles onto the road is made in the context of being chased by persons who are angry with him.

11. The representations contained in the interview are, for all intents and purposes, exculpatory. It is consistent with the classification that BR Martin CJ applied to the representations the subject of adjudication in *Flowers v The Queen* when he commented that,

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[4] *Ibid* at [36] and with reference to *R v Callaghan* [1994] 2 Qd R 300 per Pincus JA and Thomas J, *S v The Queen* (2002) 132 A Crim R 326 per Parker J at 330, *R v Higgins* (1829) 172 ER 565 per Parke J and *Assafiri v Horne* [2004] WASCA 40 per Roberts-Smith J at [59] and [60].

"Speaking generally, the interview was entirely exculpatory."[5]

Kelly J came to a similar view upon her analysis of the interview in *R v Helps*.[6] In the Court of Appeal decision in *Singh v The Queen*, Kelly J concluded that the interview was an entirely exculpatory account.[7] The question was not considered by the lower court in the instant matter.

12. It is submitted that the interview, which took place one month after the incident which gave rise to the charges, should be construed as exculpatory in nature. Considered in their totality, they are not representations that are adverse to the maker's interests in the proceedings, and therefore not properly characterised as admissions consistent with the definition provided by s81 of ENULA. Accordingly, consistent with the decision of *R v Callaghan*[8] as applied by Riley J in *Flowers*[9], the content of the interview is self serving and therefore inadmissible.

13. In the event that this characterisation is rejected and the interview is construed as being mixed, it is submitted that there was no obligation on the prosecutor to adduce evidence of it in the Crown case and therefore no miscarriage of justice as a result of it not being so adduced.

14. It is well accepted that there is an obligation on a prosecutor to call all material witnesses.[10] That duty necessarily extends to the adducing of all admissible evidence from those witnesses. It is reflected in professional codes of conduct provided for all prosecution offices within Australia.[11] The duty is restated in rules of professional conduct that apply in the Northern Territory such as rule 17.52 of the Law Society of the Northern Territory Rules of Professional Conduct and Practice and rule 66B of the Northern Territory Bar Association Barristers Conduct Rules.[12]

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[5] (2005) 153 A Crim R 110 at [3]
[6] (2016) 126 SASR 486 at [38]
[7] [2019] NTCCA 8 per Kelly J at [66] and at CAB 95.30
[8] [1994] 2 Qd R 300 at 303; 354
[9] At [37]
[10] *Richardson v The Queen* (1974) 131 CLR 116, *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Apostilides* (1984) 154 CLR 563
[11] See for instance Rule 14.4 of *The Guidelines of the Director of Public Prosecutions (NT)*
[12] Both of which can be found at *www.lawsociety.asn.au*

15. In *R v Kneebone*[13] James J summarised the obligation as including the presentment of evidence which assists the defence case, however there is a discretion to refuse to adduce evidence which the prosecutor considers unreliable.[14] That approach was endorsed in *Dyers v The Queen*[15]by Gaudron and Hayne JJ at [11]. It is similarly reflected in prosecutor guidelines across jurisdictions and in particular guidelines 14.5 – 14.7 of Guidelines for Director of Public Prosecutions for the Northern Territory. Those guidelines specifically require conference with a witness before a decision is made not to call a witness.[16] Of course conferencing is not an option when the prosecution is dealing with the out of court representations of an accused.

16. The rationale behind the prosecutor retaining a discretion to elect not to adduce evidence that the prosecutor deems unreliable is consistent with the basis for inadmissibility of self serving statements made by an accused. It is only where statements are against interest that the risk of unreliability is sufficiently reduced and such statements become admissible as an exception to the hearsay rule.[17]

17. The respondent does not contest the well established principles related in paragraphs 23 to 33 of the appellant's submissions. It is accepted that an accused is entitled to a fair trial, that a prosecutor has an obligation to ensure a fair trial and that a prosecutor is obliged to adduce all material evidence at trial even though the evidence may not assist the Crown case. What is not accepted is that a prosecutor has a duty to adduce evidence of hearsay statements made by an accused.

18. The respondent does not agree that, because exculpatory statements are accompanied by inculpatory statements, their reliability is necessarily enhanced or enhanced to the extent that would justify exception to the exclusionary rule.[18] The fact that a suspect concedes an obvious point during an interview with police does not enhance the credibility of statements which assert innocence. That such statements might be audio visually recorded obviously ensures accuracy of what was said but does not assist in a determination of the credibility of its content. The added safeguards which justify exception to the exclusionary rule, that is, the generally accepted principle that persons tend not to make false statements which are against interest, that such statements are not

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[13] (1999) 47 NSWLR 450
[14] At [57]
[15] (2002) CLR 293
[16] Guideline 14.6
[17] See *Evidence (Interim) Report* [1985] ALRC 26 at [753]
[18] Appellant's Submissions paragraph 42

made under oath or subject to punishment for perjury and cannot be tested by cross examination,[19] are not in operation to sufficiently enhance the credibility of the otherwise inadmissible statements.

19. The appellant refers to *IMM v The Queen*[20] as support for the contention that assessments about reliability and credibility should be left to the jury rather than determined by the judge in assessing the weight to be attributed to a hearsay statement.[21] Such reasoning ignores the clear statement of principle contained in s59 of ENULA that hearsay statements are inadmissible. That rule will only be displaced in specific circumstances such as that the hearsay statement constitutes an admission. The discretion to exclude is limited to circumstances where the receipt of an admission would be unfairly prejudicial to an accused.[22] The primary rule with respect to hearsay is one of prohibition. There is no scope for exercise of discretion. The principle enunciated in *IMM* that it is for a jury to determine reliability or credibility with respect to a piece of evidence has no application because the exculpatory hearsay statements are not admissible in the first place.

20. Were the appellant's argument as to admissibility based on the above to be accepted there really would be no basis for it not to be extended to wholly self serving hearsay statements. As Kourakis J commented in *Barry v Police (SA)*[23]

"If the admissibility of mixed statements, other than as part of the prosecution tender of those mixed statements, were to be accepted, it might be claimed by a similar argument, with some superficial attractiveness, that it would be anomalous to allow the defence to adduce that evidence, but not evidence of a purely self-serving and completely exculpatory statement made by an accused. If that proposition were to be accepted, the exception would have swallowed the rule."

21. There is no circulatory in the conclusions of either Kourakis J in *Barry* or Kelly J in the decision of the lower court in this matter that there is no obligation on the prosecution to adduce evidence of inculpatory statements contained within an MROI with the concomitant obligation to adduce evidence of exculpatory statements. The basis for objection to the exercise of the discretion by the prosecutor is one of unfairness to the

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[19] *Evidence (Interim) Report* [1985] ALRC 26 at [753]
[20] (2016) 257 CLR 300 at [54]
[21] Appellant's Submissions paragraphs 38 and 43
[22] ENULA s90
[23] (2009) 197 A Crim R 445 at [69]

accused. No unfairness results from a decision not to adduce truly inculpatory statements. In fact, it should work to the advantage of an accused that such statements are not led. Any unfairness can only derive from the fact that the jury is deprived of the exculpatory material. That deprivation is as a consequence of the operation of the law which excludes the admissibility of hearsay.

22. The appellant relies on the comments of Hayne J in *Mahmood v Western Australia.*[24] It is submitted however that Hayne J's statements at [39] and [41] must be put in the context of the factual situation with which he was dealing. He was part of the plurality that made comments in *Soma* which specifically recognised a prosecutorial discretion to adduce inculpatory statements contained in an interview.[25] No such obligation is said to be placed on the prosecutor by the plurality in *Mahmood.* The real issue in *Mahmood* was the unfairness that arose from the prosecution cherry picking one part of the post offending conduct of the accused and putting that forward as indicative of a course of conduct in circumstances where other material would have put this selection into its proper context.

23. In the Court of Criminal Appeal, Kelly J agreed with the comments of Kourakis J in *Barry,*[26] that the comments of Hayne J in *Mahmood* had to be considered in the context of prosecutorial obligations of fairness where there are several out of court statements, only some of which are adduced in evidence.[27] Their Honours were correct to interpret the statements of Hayne J in this context.

24. The appellant submits that there are public policy reasons for requiring the prosecution to tender MROIs. The principal reason appears to be that if the discretion as to whether to lead a MROI is vested in a prosecutor, suspects will be discouraged from participating in interviews with police.[28]

25. This argument fundamentally misconstrues the purpose behind police inviting a suspect to participate in an interview. The invitation affords a suspect with an opportunity to provide a response to allegations of criminal conduct. It is consistent with an obligation to afford an accused procedural fairness. A suspect is entitled to exercise their right to silence or may elect to provide an account in response to the allegations which have been

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[24] (2008) 232 CLR 397
[25] *Op cit* at [31]
[26] *Op cit* at [54]
[27] *Singh* at [64] CAB 93.40
[28] Appellant's submissions at paragraphs 47 - 49

levelled. It is reasonable to expect that any information that a suspect elected to provide would be taken into account by investigating police in determining whether charges would be laid.

26. The motivation for participating in an interview with police should therefore be to respond to allegations so that a proper determination can be made as to whether criminal charges should be laid; not to provide potential evidence for subsequent court proceedings. Were there any basis for the later incentive, there would be no logic to excluding wholly exculpatory statements but requiring the prosecution to adduce interviews in which some inculpatory statement or statements can be identified, no matter how limited the inculpation might be that attaches to such statement. It would also be inconsistent with the decision by all parliaments in Australia to abolish the dock statement.

27. In acknowledging a discretion of the prosecutor to determine whether the Crown seeks to rely on hearsay statements made by an accused the anomalous situation where the defence is seeking to have put before the jury hearsay evidence of exculpation that would not otherwise be admissible is avoided. If the Crown wishes to rely on what is considers to be statements of admission of any significance, taking the whole of the statement into account and other evidence in the Crown case, then it is entitled to adduce into evidence such statements but it must do so in their entirety. That is the fairness which ensured by the rule in *Soma*.

28. The appellant's contention that an unfairness arises as a consequence of the Crown not adducing evidence of hearsay statements made by an accused depends upon an acceptance that the principle enunciated in *Apostolides* extends beyond an obligation to call all material witnesses to an obligation to adduce all available evidence. There is no authority for that position.

29. Any detriment that accrues as a consequence of the exclusion of exculpatory statements is as a consequence of the operation of the rules of evidence, not because of an exercise of prosecutorial discretion. The obligation placed upon a prosecutor is to call all material witnesses. That obligation does not extend to the adducing of hearsay statements made by an accused. An accused is not a competent witness for the prosecution.[29] The reliability of statements made by an accused cannot be tested in any way by the

[29] ENULA s17(2)

prosecution unless the accused elects to give evidence. Receipt of self serving representations which are not subject to testing runs the risk that the jury will receive information which is not credible. It is for this reason that hearsay evidence is generally excluded.

30. That a consequence of the discretion is that the jury does not receive evidence of an accused's challenge to the Crown case is no more an incidence of unfairness than results as a consequence of an accused's election to exercise a right to silence. In all such instances the jury is directed that no inference can be drawn from the election not to give evidence. As Kelly J correctly pointed out in *Singh*:

"If one were to limit the asserted prosecutorial duty to "mixed" statements, as the appellant does, then whether or not an accused's denials get before a jury would still depend on "happenstance" (ie whether the exculpatory account happened to contain some admissions). Indeed, even if there is said to be a duty to tender all pre-trial statements by an accused, whether or not the accused can communicate an exculpatory account to the jury without giving sworn evidence will still depend upon whether the accused elected to exercise his right to silence when confronted by police. (The appellant accepts that the prosecution would have no duty to tender a contrived ex post facto denial at the instigation of the accused.)"[30]

31. In the event that an accused does elect to give evidence, any attack upon the credibility of the accused's account by the prosecutor can be deflected in re-examination by reference to prior consistent statements such as exculpatory statements made in a police interview in accordance with s108 of ENULA.

32. A prosecutor is entitled to assess the significance of statements made by an accused and make a decision about whether such statements should be adduced in the Crown case. The discretion is not arbitrary in nature, but rather will be based on an assessment of the significance of the representations to the Crown case. Where such representations have little worth, the prosecutor is entitled to elect not to adduce them. The accused is not a witness in the Crown case. The obligation upon the prosecutor is to call all material witnesses, not to adduce all relevant evidence. To conclude otherwise would require,

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[30] CAB 67.40

because of the operation of the rule in *Soma,* that a prosecutor adduce otherwise inadmissible evidence.

33. For these reasons the conclusion of Kelly J in *Singh,* about which Barr J agreed, that no unfairness accrued to the appellant as a consequence of the prosecutor's election not to adduce evidence of the interview was correct and this appeal should be dismissed.

34. The North Australian Aboriginal Justice Agency (NAAJA) has sought leave to be heard in this appeal and the respondent has received NAAJA's written submissions in this matter. In response to those submissions the respondent submits that, notwithstanding NAAJA's submissions purport to be concerned with prosecutorial obligations to adduced evidence of mixed records of interview (MROI), the submissions are really directed to a complaint about the inadmissibility of out of court statements made by an accused generally.

35. Submissions in support of the contention that statements made by an accused when first taxed with an allegation should be adduced by the prosecution so as to ensure fairness to an accused do not differentiate between the exculpatory or inculpatory nature of such statements. In effect, the submissions argue against the reliability principle that underpins the provisions of ENULA generally excluding hearsay statements except in certain circumstances where reliability is sufficiently enhanced.

36. In *Flowers,* Southwood J acknowledges the position that developed in England as reflected in decisions such as *R v Pearce.*[31] However, he recognises several aspects of the limitations to such evidence in England; that is that such statements must be spontaneous and relevant and must give weight to other testimony which has been given in the case and that the statements do not go to the truth of what was said. Further, the law in Australia has diverged from that in England so that there is no rule that such statements are admissible.[32]

37. There may be some instances where exculpatory statements made by an accused are so spontaneous and contemporary that their evidentiary value is sufficiently enhanced to overcome the general rule of exclusion. Such statements which may previously have been captured by the *res gestae* rule, may now be admissible in accordance with s66A of

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[31] (1979) 69 Cr App R 274
[32] *Op cit* at [51] – [56]

ENULA. The relatively limited scope of s66A reinforces the legislative intent that hearsay statements will generally be inadmissible.

38. NAAJA submits that an expectation is created by virtue of the content of the police caution given to indigenous witnesses in local languages. That caution is translated at note 76 to NAAJA submissions. The first sentence of the translation provided by NAAJA is:

"Police might take your story to court and the judge and other people in court can listen to your story and hear you talking."

The caution is premised on a possibility that an interview *may* be played to the jury; not a positive representation that it *will* be played. In any case the contents of the caution does not have the status of law and any issue as to admissibility must be determined by reference to the applicable provisions of ENULA.

39. NAAJA submits that a significant unfairness may accrue to indigenous witnesses who, because of disadvantage caused through various physical and social factors, may be less capable of giving evidence in their defence. These submissions ignore the at least similar if not significantly greater difficulties which must necessarily arise during police questioning in circumstances where an accused has not had the opportunity to receive detailed advice from their lawyer after full disclosure of the evidence upon which the Crown intends to rely.

40. In summary it is submitted that there is no logical basis for departure from the test that the legislature has adopted based on reliability for modifying the general rule of inadmissibility of hearsay evidence because of the characteristics of any particular accused.

Part VI: Respondent's argument on Notice of Contention or Cross Appeal

41. Not applicable.

Part VII: Estimate of time for Respondent's oral argument

42. The respondent estimates that thirty minutes will be sufficient for oral submissions.

Dated this 1st day of November 2019

DAVID MORTERS SC

Counsel for the Respondent