IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D15 of 2019

BETWEEN:

VAN DUNG NGUYEN
Applicant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

This outline is in a form suitable for publication on the internet.

Part II:

The Narrow Issue

1. In the circumstances of the appellant's proposed re-trial, a "*video recording*" of his interview which contains both "*admissions*" and "*other previous representations*" ('a mixed record of interview') which is admissible, and was not considered to be unreliable, is required to be tendered as part of the prosecution case to ensure that the appellant will have a fair trial. Tactical considerations which favour the prosecution can form no proper part of that analysis. Question 2, the subject of this appeal, should be answered, "yes". *AR*, [2], [5]

The Broad Issue

2. More generally, the prosecution's obligation to ensure a fair trial requires the tender by it of all admissible evidence, whether favourable or unfavourable to the accused. That obligation is subject to there being a proper reason for it not to be tendered. That obligation *ordinarily* requires the tender of a video recording of a record of interview that contains both admissions and exculpatory (and neutral) statements. *AWS*, [2]-[3]

Basis for admissibility of the 'video recording' of the interview

3. The admissibility of the video recording is not in issue on the appeal given the Full Court's to question 1. It remains informative to the obligation to tender the "mixed" record of interview to understand the basis for its admission. It was admissible because it:

   3.1. conformed with the procedure in s 142 of the *Police Administration Act (NT)*.

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3.2. contained an "admission" being any fact that is relevant to proof of an element of an offence, or assists in the disproof of an available defence within the meaning of s 81 *Evidence (National Uniform Legislation) Act (NT)* and other "*previous representations*" that are "*made in relation to an admission at the time the admission was made, or shortly before or after that time*" and "*to which it is reasonably necessary to refer in order to understand the admission*".

4. In a trial involving self-defence, admissions made as to the physical elements and/or the mental elements of the charge will meet the requirements of section 81. So will exculpatory statements directed to the accused's purpose in acting and the accused's subjective perception of the circumstances. Furthermore, in order to properly understand what is said, it is simply necessary to receive the interview in its entirety. Those matters are of general application in *most* other cases where a special intent is required to be proven. *AWS,* [17]-[18], *AR*, [6]

Right to a fair trial and the prosecutor's duty to present the case fairly and ensure a fair trial

5. The prosecutor's obligation to tender the record of interview on the facts of this case, and ordinarily otherwise, is part of the accused's right to a fair trial: *AWS,* [23]. It is also part of the prosecution's duty to present the case fairly. This conclusion follows from the statements of principle in this court and is not assisted by decisions of intermediate courts which have considered this issue.

6. Thus the prosecutor's duty to ensure a fair trial, means it has been said:

6.1. as to the conduct of the case, to ensure "*it is presented fully and fairly with the objectives of ensuring that the jury is given the whole picture and not just material which assists the Crown case*": *Subramanian* (2004) 79 ALJR 116, [54]; *Richardson* (1971) 131 CLR 106, 119-120; *Whitehorn* (1983) 152 CLR 657, 663-4 (Deane J);

6.2. as to the tender of evidence generally to: "*all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reasons exists for refraining from calling ...*": *Whitehorn*, 663-4 (Deane J); "*The fact that a witness will give an account inconsistent with the prosecution case is not a sufficient reason for not calling that person*": *Dyers v The Queen* (2002) 210 CLR 285, 292-3 (Gaudron and Hayne JJ); "*to produce all of the material evidence which is available to it before putting the defendant to his election as to whether to give or call evidence*": *Manning* [2017] QCA 23, [27];

6.3. specifically about 'mixed records of interview' by this Court that "… *the prosecutor's obligation to put the case fairly would, on its face require the prosecutor to put the interview in evidence unless there was some positive reason for not doing so*" (*R v Soma* (2003) 212 CLR 299, [31]) and that "*if there is admissible evidence available to the prosecution of out-of-court statements of the accused that contain both inculpating and exculpating material, fair presentation of the prosecution case will ordinarily require that the prosecution lead all that evidence*" (*Mahmood v State of WA* (2008) 232 CLR 397, [41]). In this case departure from that obligation, for purposes which are intended to bear upon the election by the accused as to whether or not to give evidence, gives rise to an unfair trial. It would create a serious risk of doing so generally. *AWS*, [44]

The justification in the ordinary case for the tender of the video recording of the record of interview

7. The necessity for a rule that ordinarily the prosecutor is obliged to tender a mixed record of interview can be seen to be informed by three overlapping considerations:

   7.1. The duty of the prosecutor to fairly present the *whole* of the relevant evidence to the jury so as to ensure a fair trial.

   7.2. The duty to avoid the presentation of a misleading account by omission and excision. This may arise not only in the record of interview but also where there is other evidence which takes a particular significance from an explanation afforded by an accused.

   7.3. Encouragement of participation by accused in interviews. *AR*, [8]

8. The requirement to tender the interview is subject to the qualification that if the prosecutor has, for good reason, concluded that the interview has been demonstrated not to be "credible or reliable", it may not be tendered. That would be a proper exercise of prosecutorial discretion: *Richardson v The Queen* (1974) 131 CLR 116, 122. Proper reasons in this case:

   8.1. cannot be those guided by tactical considerations directed at altering the forensic contest;

   8.2. could not be based on unreliability (or inadmissibility) because the prosecution led the interview at the first trial and no other reason other than the "tactical reason" has been advanced. *AWS*, [35], *AR*, [9]

17 March 2020

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Michael Abbott QC