IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY No. 15 of 2019

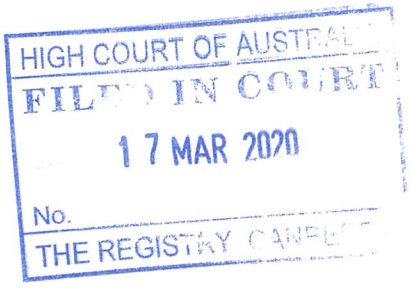
BETWEEN: VAN DUNG NGUYEN

Appellant

and

10 THE QUEEN

Respondent



RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification for publication

1. It is certified that this submission is in a form suitable for publication on the internet.

Part II:

20

2. The Respondent's primary submission is that the representations identified as inculpatory in the police interview with Nguyen do not constitute admissions as defined by s81 of the Evidence (National Uniform Legislation) Act 2011 (NT) ("ENULA"). An admission is defined as a previous representation adverse to a person's interest in the outcome of the proceeding. When the asserted inculpatory representations contained within the Appellant's interview are considered in the context of other representations about the same factual issues, they are properly characterised as exculpatory because they assert defences to the offences alleged. They are representations that are not adverse to the Appellant's interest in the outcome of
30 the proceeding and therefore not admissible as exceptions to the rule against the admission of hearsay evidence.

Director of Public Prosecution
Level 3, Old Admiralty Tower
68 The Esplanade, Darwin NT 0800

Telephone: 08 8935 7500
Fax: 08 8935 7552
Email: david.morters@nt.gov.au
Ref: David Morters SC

3. It is a matter for the prosecutor to decide what witnesses to call in the Crown case. Some of the factors relevant to that consideration include "whether the evidence is credible and truthful and whether in the interests of justice it should be subject to cross examination by the Crown..."[1]

4. In this matter it is entirely appropriate for the prosecutor to make a determination that it would not be in the interests of justice that the out of court self-serving statements of an accused be adduced as part of the Crown case. The prosecutor does not accept the credibility or truthfulness of such representations because, if they were so accepted, it would be improper for the prosecutor to proceed to trial. Further, any opportunity for testing of the representations would be lost.

5. There is an obligation on the prosecutor to call all material witnesses essential to the unfolding of the narrative unless a prosecutor identifies through enquiry good reasons as to why a particular witness should not be called. A prosecutor is not in a position to make such inquiry in relation to representations made by an accused. The prosecutor does not have the opportunity to consult with the maker of the representations to investigate for themselves the veracity of the information being conveyed and assess the credibility of the representor, which have been held to be legitimate enquiries in making such a determination.

6. The Appellant refers to a number of decision which emphasise the obligation placed upon a prosecutor to act with fairness and impartiality. None of the cases to which the Appellant refers concerns a complaint against the prosecutor for failing to adduce evidence of a "mixed interview." The only decisions which address this issue directly are *Rymer, Barry* and *Helps*. In *Rymer* Grove J concludes that s59 of ENULA alters the common law position as to admissibility of exculpatory representations but finds another basis for their admission.

7. In *Barry* Kourakis J specifically rejects the proposition that an unfairness arises because a prosecutor elects not to adduce evidence of admissions contained in a "mixed interview."

---

[1] *Richardson v R* (1974) 131 CLR 116

8. In *Helps* Peek J in the minority and in *obiter* concludes that there is an obligation upon a prosecutor to adduce evidence of a "mixed interview". He reaches that conclusion on the basis of an acceptance of the established position in decisions from the UK and New Zealand that it is proper for a jury to hear evidence of an accused's response when first taxed by police. In addition he relies on comments made by the Court in *Soma* and Hayne J in *Mahmood* as authority for the proposition that an obligation falls upon the Crown to lead evidence of "mixed interviews" extending beyond circumstances where the Crown splits its case.

9. The Respondent submits that no assistance can be drawn from the decision of Peek J because he fails to place into proper perspective the comments he relies upon from *Soma* and *Mahmood,* both of which were principally concerned with the unfairness which arises from the splitting of the prosecution case. Further, even if his conclusions about the application of principles derived from UK and New Zealand authorities was correct, it would be inconsistent with the position at law in Uniform Evidence Act jurisdictions. Section 59 makes it clear that out of court representations relied upon for their truth are inadmissible as Grove J acknowledged in *Rymer*.

10. A consequence of the Prosecutor not adducing out of court exculpatory statements is that the accused may feel obliged to give evidence. That is not a consequence of the Crown not adducing prior representations however, but a forensic decision made by the accused on the basis of an assessment of the case against them. If a consequence of that election is that the accused's representation as to innocence can be tested through cross examination, then that is consistent with the objective of ensuring the jury receives information which best approximates the truth. It is not striving for a conviction, it is not a tactical decision; but rather a decision consistent with the rules of admissibility of evidence.

Dated: 16 March 2020

.....

Name: David Morters SC