IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY

No. D16 of 2019

BETWEEN:

HAROLD JAMES SINGH

Appellant

and

10

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification as to publication

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

20 **Part II:**

2. The Respondent's primary submission is that the representations identified by the Appellant as inculpatory in the police interview with Singh 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. Each representation needs to be looked at in the context of qualifications contained in other representations. When viewed from that perspective, the representations are properly characterised as exculpatory in nature. They are therefore inadmissible as they are excluded by operation of s59 of ENULA
30 which excludes out of court statements relied on for their truth and do not fall within any of the exceptions to exclusion contained in Part 3 of ENULA.

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3. The Respondent's secondary position is that, even if it was concluded that interview contained some representations against interest, the Crown would still retain a discretion as to whether to adduce evidence of such admissions. As a consequence of the exercise of such discretion, there would be no basis for admissibility of exculpatory representations.

4. The Appellant relies on two lines of authority to assert that the Crown is obliged to lead all relevant evidence that has been collected during the course of an investigation; those cases which require a prosecutor to call all material witnesses, and the obligation to adduce both exculpatory and inculpatory representations in an interview if inculpatory material is to be relied upon.

5. The Respondent's submission is that the Appellant has misinterpreted the responsibility of the Crown by extending the well-established principle that the Crown is generally required to call all material witness to one which requires the Crown to adduce all relevant evidence. It is only when the obligation is so extended that the obligation to adduce evidence of other representations contained within an interview comes into play.

6. The effect of such an interpretation is to achieve the objective of forcing the Crown to adduce evidence that would otherwise be inadmissible because of the operation of the rule against hearsay. Accordingly, there presents a real risk as to the reliability of the evidence that is received by a jury because the usual checks against unreliability cannot be utilised. The veracity of the representations and the credibility of the representor cannot be tested by the prosecutor through proofing of the source of the evidence, the evidence will not be the subject of testing through cross examination during the trial and it will result in the Crown having to adduce evidence about which it must have no confidence. That must follow because, were the exculpatory representations accepted, a prosecutor could not be satisfied as to the test that must be applied before a prosecution is pursued; that there are reasonable prospects of a successful prosecution.

7. The Respondent's submission is that there is no legal basis for the admission of otherwise excluded evidence because of a principle of fairness. The Appellant relies on authorities from NSW and Victoria to support the contention that the Crown has an

obligation to adduce self-serving statements of an accused in its case.[1] The NSW authorities were principally concerned with whether an unfairness had arisen because the Crown elected to adduce evidence of statements made by an accused indicating an intention to exercise a right to silence. The comments relied upon by the Appellant as demonstrating the adoption of a practice in NSW of the Crown leading evidence of self serving statements made by an accused has to be interpreted in light of the issue with which the court in each instance was dealing. That issue was not an objection to the Crown failing to lead evidence of a "mixed interview" but rather the leading by the Crown of statements made by an accused advising an intention to exercise the right to silence. In the Victorian decision of *Rudd*, the comments as to the obligation to lead evidence are in the context of a reliance by the prosecution on some representations which were inculpatory in nature. In the absence of reliance on inculpatory representations, the obligation to lead exculpatory representations falls away.

8. The question is one of admissibility of evidence, rather than an analysis of what constitutes fairness to an accused. The rules of admissibility prescribe the three tests for admissibility of evidence:
    a. Only relevant evidence is admissible;
    b. Relevant evidence will not be admissible if it is of the kind caught by an exclusionary rule;
    c. Otherwise excluded evidence may be admissible if an exception to the exclusionary rule applies subject to an assessment as to whether its probative value exceeds its prejudicial effect.

9. It is the operation of the rules of evidence that results in the exclusion of prior consistent statements, not the conduct of the prosecutor. It is therefore not correct to characterise the outcome of exclusion as an unfairness which results in a miscarriage of justice.

Dated: 16 March 2020

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Name: David Morters SC

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[1] *R v Astill* (1992) Unreported NSW CCA; *R v Familic* (1994) 75 A Crim R 229; *R v Keevers* (1994) Unreported NSW CCA; *R v Reeves* (1992) 29 NSWLR 109; *Rudd v The Queen* (2009) 23 VR 44.