HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE AND KIEFEL JJ

DLSHAD HAMAD MAHMOOD APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Mahmood v State of Western Australia
[2008] HCA 1
30 January 2008
P39/2007

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 14 May 2007.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Western Australia for further hearing and disposition in accordance with the reasons of this Court.*

On appeal from the Supreme Court of Western Australia

Representation

J J Edelman with C H Withers for the appellant (instructed by Kott Gunning Lawyers)

B Fiannaca SC with D A Lima for the respondent (instructed by Director of Public Prosecutions for Western Australia)

CATCHWORDS

Mahmood v State of Western Australia

Evidence – Criminal law – Portions of "walk through" video tendered by defence at trial – Prosecution objected to tender of whole video – In closing prosecutor invited jury to draw adverse inferences from portions played – Trial judge refused to allow defence to re-open case to tender whole of video – Whether re-opening ought to have been allowed – Whether a direction to the jury was required to overcome prejudicial effects of the prosecutor's invitation.

Criminal law – Practice and procedure – Directions to jury – Distinction between directions and comments – Whether trial judge's statements in summing up amounted to a direction.

Evidence – Criminal law – Duty of prosecutor to tender all inculpatory statements – Whether prosecutor obliged to tender "walk through" video in whole or in part.

Evidence – Criminal law – Evidence of blood stains in pocket – Whether accused had had opportunity to respond to blood-stain allegation – Whether judge's direction to the jury on this point was sufficient.

Evidence – Criminal law – Evidence of blood stains in pocket not put to prosecution witnesses but mentioned by prosecutor in closing – Whether judge required to give a *Jones v Dunkel* direction.

Criminal Appeal Act 2004 (WA), s 30.

1 GLEESON CJ, GUMMOW, KIRBY AND KIEFEL JJ. Dlshad Hamad Mahmood (the appellant) was found guilty by a jury of the wilful murder of his wife following a trial in the Supreme Court of Western Australia. The murder took place on Sunday 4 July 2004 at premises at Mt Lawley where the appellant and his wife conducted a restaurant business called the Kebabistan Restaurant. In his evidence the appellant said that, after a visit from a friend he began cleaning the premises whilst his wife went to the toilet. When she did not return he went to find her. She was lying in a passageway bleeding. Her throat had been cut. He said that he picked her up but she was not breathing. He went outside to see if the person responsible was still there, but found no one. He returned to his wife and called the police, the ambulance and his son. During this time he said that he was very distressed.

The video recording

2 A lengthy record of interview was undertaken of the appellant on the day of the murder. About one week later he accompanied the police to the scene and "walked through" the events of the day as he had explained them. This narrative and his actions were recorded on video equipment.

3 The case against the appellant was circumstantial. He had believed his wife had been unfaithful to him and had hired private investigators. He had not believed them when their report did not confirm his suspicions. There was evidence of an argument, or raised voices, at the restaurant premises on the morning of the murder, which the appellant denied. The prosecution called evidence of two expert witnesses in relation to the location of blood in the premises and on the appellant's clothes. The murder weapon was never discovered.

4 During the case for the prosecution counsel for the defence cross-examined a police officer concerning the "walk through", or re-enactment, by the appellant of the events of 4 July 2004. In that re-enactment he indicated to the police officers the position of his wife's body when he discovered it, in the passageway connected to the restaurant, how he kneeled down to her and lifted her body so that part of it rested upon his knee. The police officer was asked about what had been recorded on the video of the re-enactment, but he was not present when it was filmed and was unable to recall in detail what he had seen of it. Defence counsel at that point sought to tender part of the video recording, some six minutes out of a total of more than two hours. The portion in question dealt only with the appellant's description of how he had held his wife's body. Its evident purpose was to explain the position of the blood on his clothes and his

hands. Counsel for the defence did not seek to tender the whole of the video, but expressed a willingness to do so. The prosecution did not consent to that course. The trial judge (Jenkins J) indicated that only that part to which the defence required reference would form part of the evidence. Her Honour said that if the jury wished to view that part of the video tape they could be brought to the courtroom where arrangements could be made to view it. Her Honour explained to the jury that that situation arose because there was not consent between the parties that the whole of the tape should be tendered in evidence and there was no tape containing only that part relied upon. Shortly afterwards the portion of the tape was received into evidence.

5 In his address to the jury the prosecutor said the following with respect to the evidence so admitted:

> "Some other things you can take into account: did you notice in the walk-through, the extract which was played to you, the accused man describing how he found his wife and how he held her and I'm suggesting to you that how he held her was a matter well within his knowledge, but did you notice his demeanour? This was on 11 July, a week after her death. Was there any emotion when he was asked about blood and so on? Did you see any sign of emotion in that recounting?
>
> Here is a man who is accused of killing his wife and the police ask him to even take part in this and asked those sort of questions. You saw his reaction, his demeanour. It was, I suggest to you, cold-blooded and clinical and this killing was cold-blooded and clinical."

6 These submissions occurred just before the conclusion of the prosecutor's address. Counsel for the defence commenced his address shortly thereafter. He reminded the jury about how only a part of the video recording had been tendered, that the defence had offered to tender all of it, but that the prosecution had said there may be "issues" as to that. He went on:

> "… We put in a short section because they object and then they turn around and say, 'On the short section you've seen he's not crying.' Now what is that about?"

7 The following morning counsel for the defence applied, in the absence of the jury, to re-open the case for the defence in order to tender evidence of other parts of the video recording where the appellant could be seen to be emotional. This was said to be warranted by the inference that the jury had been asked to draw about his lack of emotion, by reference to the short extract which had been admitted in evidence for another purpose. The trial judge refused the application.

Her Honour was not convinced that the evidence taken of the re-enactment was sufficiently important to warrant that course and that the matter could properly be dealt with "by me indicating to the jury that it would be more relevant for them to consider the accused's demeanour on the day in question …". Her Honour appears to have taken the view that the events a week or so after the day of the killing would, or should, be less important to the jury.

8 In the course of summing up her Honour said:

> "There's one final part of the evidence that I wish to give you directions on and that is in respect to some submissions that were made to you about drawing an adverse inference against the accused because of his demeanour during the walk-through video. [The prosecutor] made some submissions to you about this and then [defence counsel] replied, [and] said that you couldn't draw anything from the accused's demeanour during that video. Now, members of the jury, it would seem to me that it would be unwise for you to draw any adverse view against the accused because of his demeanour in the walk-through video.
>
> There are some reasons for that. The first is that you have only seen a portion of the video. You don't know what his demeanour was during the rest of the video. Secondly, the video was done some seven days after the death. It, in my view, would be more relevant if you were going to take demeanour into account to have regard to the accused's demeanour during the video record of interview taken on 4 July 2004, the very day that Ms Dbag died.
>
> It would also be relevant for you to take into account what some of the witnesses said who were walking past the shop. I think one in particular clearly heard what would have been the accused after Ms Dbag had died and he referred to the sound that he heard coming from the shop at that time as – I think it was Mr O'Hazy and he said that between about 8.50 and 9 am he saw what appears to be the accused distressed, unhappy, angry and upset, crying and moaning.
>
> Members of the jury, that's all I wish to say about the law relating to the evidence."

The appeals

9 The Court of Appeal (Roberts-Smith, McLure and Buss JJA)[1] dismissed an appeal against conviction and by special leave the appellant appeals to this Court. The principal grounds of appeal in this Court concern, first the treatment of the video recording and secondly the significance of stains of the wife's blood upon the clothing worn by the appellant. If either ground succeeds there will arise the question of the application of "the proviso".

The Court of Appeal

10 In the Court of Appeal it was conceded by the prosecution that what had been put to the jury, about the appellant's apparent lack of distress or "cold-bloodedness" as being representative of what had occurred on that occasion as recorded on the video, was misleading. It was submitted that it was corrected by her Honour's direction. It was common ground that the appellant did display distress and seemed to be emotionally upset when talking about his wife at several points in the balance of the recording not seen by the jury. These concessions were noted by Roberts-Smith JA, who observed that the prosecution had signalled objection to the tender of the whole of the video on the basis that it was self-serving[2].

11 Roberts-Smith JA did not consider that there was any error in the exercise of the trial judge's discretion to refuse the application to re-open the case, concluding that an appropriate direction would be sufficient to correct the misstatement by the prosecution, which was described by his Honour as "unfair, insofar as it conveyed the implication the appellant's apparent lack of emotion and the extract the jury saw was representative of the whole of the recording"[3]. As his Honour observed, it should not have been said. There was however considerable evidence before the jury which indicated that the appellant had been emotionally upset and distressed about the death of his wife at a time closer to the event, commencing from his telephone calls to the ambulance and to the police and including the evidence of witnesses who saw and heard him at this time and the lengthy record of interview. Against that background, and combined with the trial judge's reminder to the jury that the exhibit was only part

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1 *Mahmood v The State of Western Australia* [2007] WASCA 101.

2 *Mahmood v The State of Western Australia* [2007] WASCA 101 at [29]-[30].

3 [2007] WASCA 101 at [31].

of the recording, his Honour considered that the direction given was sufficient to rectify the statements made by the prosecutor. His Honour concluded that it did not result in a miscarriage of justice[4]. Buss JA agreed[5].

12 Roberts-Smith JA was referring to the ground of appeal provided by s 30(3)(c) of the *Criminal Appeals Act* 2004 (WA), which provides that the Court of Appeal must allow an appeal against conviction if, in its opinion, there was a miscarriage of justice. Sub-section (4) contains the proviso that, even if a ground of appeal is decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that "no substantial miscarriage of justice has occurred". It followed from the conclusion reached by his Honour that it was not necessary to consider the proviso[6].

13 McLure JA agreed with the conclusion reached by Roberts-Smith JA. Her Honour did not agree with the trial judge's characterisation of the prosecution comment as being marginally relevant. In her Honour's view it linked the act of killing with the appellant's reaction. If this was part of the prosecution's case, it followed that the balance of the video recording was also relevant[7]. On the other hand her Honour was not satisfied that it was sufficiently material to warrant a re-opening of the defence case. In particular her Honour did not consider that it would have been to the appellant's forensic advantage to focus attention on his demeanour in that way, whereas the trial judge's statement to the jury was. It followed that there was no miscarriage of justice[8].

14 The view of McLure JA, as to the materiality of the inference the prosecutor invited the jury to draw, is plainly correct. It did not initially form part of the prosecution case. If it became relevant, it was incumbent upon the prosecution to admit the balance of the video in order that the jury could form a view about the appellant's state of emotion when the re-enactment of the events of the day of the murder was recorded. It was wrong to suggest that they should conclude that the appellant's reaction was unemotional from an excerpt, when there was at least some evidence to the contrary upon which the jury might

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4 [2007] WASCA 101 at [33].

5 [2007] WASCA 101 at [168].

6 [2007] WASCA 101 at [125].

7 [2007] WASCA 101 at [155].

8 [2007] WASCA 101 at [156].

conceivably have formed a different view. The question which then arises is what is necessary to be done to address such a situation.

Direction and comment

15 Courts are usually inclined to allow a re-opening to call evidence considered to be of sufficient importance, even after addresses[9]. That is not to say that it is the only course which may be taken in a given case. In the present case the members of the Court of Appeal were agreed that a direction by the judge would be sufficient, perhaps even preferable, to that course. What their Honours must have had in mind was a direction which would overcome the prejudicial effects of the prosecutor's remarks. To achieve that result it was necessary that the direction deny the implication, in the prosecutor's remarks, that that part of the video recording which they had seen was evidence of the appellant's emotional state as he recounted the events of the day of the murder. It was necessary for the directions, in effect, to distance that evidence from the purpose suggested by the prosecution in the address to the jury. A direction could be framed to achieve that outcome.

16 The distinction between a direction and a comment by a trial judge is referred to in *Azzopardi v The Queen*[10]. It reflects the fundamental division of functions in a criminal trial between the judge and the jury. The distinction is important. Telling a jury that they may attach particular significance to a fact, or in this case suggesting that other evidence may be considered of greater weight, is comment. Because it is comment it may be ignored by the jury, a matter about which the jury should be told. A direction, on the other hand, may contain warnings about the care needed in assessing some evidence or the use to which it may be put. A direction is something which the law requires the trial judge to give to the jury and which they must heed[11].

17 It may be inferred from that part of the trial judge's summing up in question that her Honour appreciated that something in the nature of a direction was necessary, given the prosecutor's remarks. Her Honour's statements were more than comment. They went further than the identification of issues arising in connection with the evidence, leaving the matter of how they were to be dealt

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9 *Dyett v Jorgensen* [1995] 2 Qd R 1 at 5 per Pincus JA.

10 (2001) 205 CLR 50 at 69-70 [49]-[52].

11 (2001) 205 CLR 50 at 70 [50].

with for the jury[12]. Her Honour obviously considered it necessary to deflect attention from the appellant's demeanour, as seen in the video recording, by suggesting that the record of interview would be more relevant to the jury because it was closer in time to the murder of the deceased. Although her Honour made the suggestion in strong terms it nevertheless conveyed only an opinion about how the jury should view the matter. With respect to her Honour, what was not provided was a direction, in the nature of a warning, which the law required the jury to follow.

18 The evidence available to the jury as an exhibit was only part of the video recording of the appellant giving his account of the events of the day of the murder. It was necessary for the jury to be directed, in unequivocal terms, that they knew so little of the context in which the segment of the video recording appeared that they could not safely draw the inference that the prosecutor had invited them to draw, that is to say, that they should ignore the prosecutor's invitation and remarks. However, the statements made by the trial judge in summing up would have conveyed to the jury, erroneously, that they were entitled to take the evidence into account as relevant to, and probative of, the question of the appellant's lack of emotion and inferentially, his guilt. The trial judge's remarks were directed to the reasons why they might give the evidence lesser weight than other, more contemporaneous, evidence. They failed to deny its evidentiary effect. The misdirection therefore amounts to an error of law[13].

19 The first ground of appeal succeeds.

The second ground of appeal

20 The second ground of appeal may be dealt with shortly. The prosecution's case, in opening, relied upon evidence of the presence of the appellant's wife's blood in a number of places on the appellant's body and clothing. The position of the blood stains was said to be inconsistent with his account of how he had come in contact with his wife's body and consistent with his having killed his wife. Although reference was made, in a scientific report, to the presence of the blood of his wife in his trouser pocket, the witnesses called by the prosecution were asked no questions about it. It is not immediately apparent what the prosecution

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12 (2001) 205 CLR 50 at 69-70 [50].

13 *Gilbert v The Queen* (2000) 201 CLR 414 at 416-417 [2] per Gleeson CJ and Gummow J, 423 [23] per McHugh J, 429 [45] per Hayne J; *Darkan v The Queen* (2006) 227 CLR 373 at 413 [136] per Kirby J.

witnesses could have said about the presence of the appellant's wife's blood in his trouser pocket. The respondent however concedes that some evidence might have been adduced about the blood stains which might have shed some light upon their source and whether they could have come from an implement such as a knife, on the assumption that this was the nature of the murder weapon.

21 The first reference to these blood stains came in a question put to the appellant, in cross-examination and without objection, that he had put the knife in his pocket before going outside to dispose of it. It may be observed that more than one inquiry was involved in what was put to the appellant for answer. The appellant's counsel took the matter up in re-examination. He said to the appellant: "They're saying that you had a knife in your pocket and ran out of the restaurant and threw it away?" The appellant denied that it was true and denied having anything to do with the killing of his wife.

22 In his address to the jury, the prosecutor said of the evidence in this regard:

> "You will see an interesting DNA result in that blood was found in the inside of his right – this right-handed accused's pocket, jeans pocket, inside, actually inside his right pocket. What I'm suggesting is he has put the weapon, whatever it was, in there and he has been absent from the restaurant disposing of that before returning and then carrying out this pretence that someone, meaning someone else, killed his wife."

23 In the address for the defence, counsel said:

> "Then they suggest to you, 'Oh, you know, he had the knife; had the knife in the pocket.' What, they want you to guess and speculate. The witness is called. Why not ask the blood-spatter man, 'Listen, the stain that you say is on the pocket, is that consistent with a bloodstained knife being put into the pocket?' Why not just ask him when he is in the witness box instead of not asking the witness and then three days later suggesting that you can guess and you can speculate."

24 In her summing up to the jury the trial judge referred to the evidence relating to presence and position of blood. Having dealt with another aspect of it and the need to exclude "as a reasonable hypothesis" that something else explained the presence of blood on a door, her Honour went on:

> "… The second result the state relies upon is the blood found in the accused's pocket. The state says this is consistent with the accused putting the murder weapon in that pocket. Again, the significance of this

> evidence is a matter for you but before you could use that evidence against the accused you would have to exclude as a reasonable hypothesis other means by which the blood could have got in the pocket; for example, if the accused had put his bloodstained hand in the pocket to get something out or to search for something or even just out of habit."

25 Shortly prior to dealing with these aspects of the evidence her Honour had said that she would direct the jury specifically as to some matters.

26 Roberts-Smith JA rejected the appellant's contention that he had not had an opportunity to respond to the allegation[14]. His Honour also rejected the argument that her Honour was required to direct the jury that they could not draw the inference that the blood stain in the pocket came from a knife in the pocket because that had never been put to the prosecution witness Reynolds, who gave other evidence about blood stains[15]. The appellant's reliance upon the rule in *Jones v Dunkel*[16] was misplaced[17], in his Honour's view. It had been held, in *Dyers v The Queen*[18] that, as a general rule, such a direction should not be given in a criminal trial. McLure and Buss JJA agreed[19].

27 It was neither necessary nor appropriate for the trial judge to direct the jury that an inference adverse to the case for the prosecution could be drawn because the presence of blood in the appellant's trouser pocket had not been the subject of evidence by the prosecution's witnesses. In the joint reasons in *RPS v The Queen*[20] it was pointed out that where a witness, who might have been expected to be called and to give evidence on a matter, is not called by the prosecution, the question is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, they should entertain a

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14 [2007] WASCA 101 at [100].

15 [2007] WASCA 101 at [102].

16 (1959) 101 CLR 298.

17 [2007] WASCA 101 at [109].

18 (2002) 210 CLR 285.

19 [2007] WASCA 101 at [166].

20 (2000) 199 CLR 620 at 632-633 [27]-[29] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

reasonable doubt about the guilt of the accused. Similar views were expressed by Gaudron and Hayne JJ and by Callinan J in *Dyers v The Queen*[21].

28 Contrary to his contention, the appellant had the opportunity to explain the presence of the blood in his pocket. He did not offer an explanation. There was no evidence before the jury about the matter. They were not in a position to conclude that the blood stains were made by a knife, placed in the pocket by the appellant. There were other possibilities, consistent with innocence. These were addressed by her Honour the trial judge in her direction to the jury. The use of the word "hypothesis" may not always be advisable, and plainer terms preferable. But what her Honour said, particularly by way of example, was sufficiently clear to convey to the jury that they could not draw the inference suggested by the prosecution, given the standard of proof required.

29 The second ground therefore fails.

Conclusion and orders

30 There was a failure to give a direction to the jury as to the use which they could not make of the excerpt of the video recording. The commentary which was provided as to its evidentiary value reflects a wrong decision on a question of law, a ground provided for by s 30(3)(b) of the *Criminal Appeals Act*. The appeal to this Court should be allowed on this ground only.

31 There remains for consideration the application of the proviso, in sub-s (4). The matter should be remitted to the Court of Appeal to consider whether there has been no substantial miscarriage of justice[22].

32 To give effect to this conclusion, the appeal should be allowed. The order of the Court of Appeal of the Supreme Court of Western Australia should be set aside. In place of that order, the proceedings should be remitted to the Court of Appeal for the completion of the hearing of the appeal consistent with these reasons.

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21 (2002) 210 CLR 285 at 293 [13], 327-328 [120]-[123].

22 See *Weiss v The Queen* (2005) 224 CLR 300.

33 HAYNE J. I agree with the other members of the Court that, for the reasons their Honours give, the appeal should be allowed and the matter remitted to the Court of Appeal of the Supreme Court of Western Australia.

34 In the course of their investigations police asked the appellant to re-enact what had happened when, as the appellant had it, he found his wife bleeding to death in a passageway behind their restaurant. The appellant agreed to do this, and the re-enactment was video-recorded. If, in the course of the re-enactment, the appellant made assertions of fact that were inculpatory, the record of that re-enactment was both relevant and admissible evidence at the appellant's trial.

35 By the very nature of the re-enactment in which the appellant participated he made assertions of fact that were inculpatory. Those out-of-court assertions against interest were admissible against him at his trial. The simplest and most obvious of those assertions against interest was that he was present at the restaurant when his wife was murdered. And much, if not all, of what the appellant said and did during the re-enactment acknowledged that he had had the opportunity to inflict on his wife the injuries from which she died.

36 The appellant denied that he had killed his wife and during the re-enactment he sought to explain how it was that he had heard no assault upon his wife and had come to have so much of his wife's blood on his clothing. These explanations were proffered by him as exculpatory. And what the appellant said and did during the re-enactment was substantially in accordance with what he said to police when he was interviewed at a police station, and a video recording was made of that interview. In that record of interview, the appellant gave an account of events in which he asserted that he had not murdered his wife.

37 The prosecution tendered the video recording of the interview with police but did not tender the record of the re-enactment. When trial counsel for the appellant sought to tender part of the record of the re-enactment and offered to tender it all, the prosecution consented to the tender of only part because, so it was submitted, the full record was "self-serving".

38 The record of the re-enactment was no more self-serving than the videotaped record of interview. On both occasions the appellant asserted his innocence and sought to provide an explanation of events consistent with that assertion. But both the record of interview and the record of the re-enactment contained assertions of fact that were contrary to the interests of the appellant. If one record was admissible, so too was the other.

39 In general, the prosecution should call "[a]ll available witnesses ... whose evidence is necessary to unfold the narrative and give a complete account of the

events upon which the prosecution is based"[23]. If an accused has made inculpatory statements that are admissible in evidence, the prosecution should ordinarily lead evidence of all of those statements. It is necessary, of course, to take account of statutory provisions governing admissibility of out-of-court admissions that are not recorded[24]. But subject to that important consideration, it is not open to the prosecution to pick and choose between those statements, whether according to what is forensically convenient or on some other basis. And in leading evidence of out-of-court assertions which the prosecution alleges are inculpatory, the prosecution must take the out-of-court assertion as a whole; the prosecution "cannot select a fragment and say it bears out their case, and reject all the rest that makes against their case"[25].

40 Application of the last-mentioned principle to the record of a lengthy interview or re-enactment may not be easy[26]. But just as the prosecution in this case tendered the whole of the record of interview (apart from the undisputed excision of some irrelevant material) so too the prosecution could have, and should have, tendered the whole of the record of the re-enactment.

41 In its supplementary submissions on this point the respondent relied on the decision of the Court of Appeal of the Supreme Court of Queensland in *R v Callaghan*[27] and three Western Australian cases[28] in which *Callaghan* has been considered. It was accepted in *Callaghan*[29] that the interview, of which the accused had sought to tender evidence at his trial, "did not contain any

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23 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674 per Dawson J. See also *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 294; *Richardson v The Queen* (1974) 131 CLR 116; *R v Apostilides* (1984) 154 CLR 563.

24 See, now, in Western Australia, *Criminal Investigation Act* 2006 (WA), Pt 11, ss 115-124.

25 *Jack v Smail* (1905) 2 CLR 684 at 695.

26 cf *Mule v The Queen* (2005) 79 ALJR 1573 at 1574-1575 [5], 1579 [23]; 221 ALR 85 at 86-87, 93-94.

27 [1994] 2 Qd R 300.

28 *Middleton v The Queen* (1998) 19 WAR 179; *Willis v The Queen* (2001) 25 WAR 217; *S* (2002) 132 A Crim R 326.

29 [1994] 2 Qd R 300 at 302.

inculpating statements". It was in this context that Pincus JA and Thomas J said in *Callaghan*[30]:

> "[I]f a prosecutor chooses to put into evidence a version which is in substance exculpatory, he makes it evidence in the case, and subject to matters of weight, it can be acted on as showing or tending to show the truth of its contents. There is no general obligation on the prosecution to call such evidence. The calling of such evidence is a benefit tendered by the prosecution and accepted by the defence."

In Western Australia, *Callaghan* has been said[31] to stand for the proposition that "[i]t is a matter for the prosecution to determine whether or not it wishes to lead the evidence as part of its case" of an out-of-court statement that contains both inculpating and exculpating material. The decision in *Callaghan* does not establish that proposition and it is a proposition that is not consistent with the proper presentation of the prosecution case. 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.

42 The difficulties which emerged so late in the appellant's trial stemmed from the failure of the prosecution to tender admissible evidence available to the prosecution which was evidence it asserted in its final address to the jury was relevant to, and demonstrative of, the appellant's guilt. Had the prosecution tendered in its case the complete record of the re-enactment in which the appellant had participated, trial counsel for the prosecution could not sensibly have made the submission he did and there would have been no occasion for the direction that should have been, but was not, given to the jury to ignore the argument advanced by the prosecution.

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30 [1994] 2 Qd R 300 at 304.

31 *Middleton* (1998) 19 WAR 179 at 182. See also *Willis* (2001) 25 WAR 217; *S* (2002) 132 A Crim R 326.