IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D15 of 2019

BETWEEN:

Van Dung Nguyen
Appellant

and

The Queen
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication

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

Part II: Statement of issues

2. Does the duty of fairness on the prosecutor ordinarily require the prosecutor to tender, on the trial of an accused person, a "mixed" record of interview taken by the police from the accused, when such interview is admissible under section 81 of the *Evidence (National Uniform Legislation) Act* (2001) ("*ENULA*"), unless there are proper reasons to so decline?

3. Does the requirement to accord to an accused person a trial that is fair in all relevant respects, ordinarily require the prosecutor to tender such a mixed record of interview at the trial of an accused, or is the prosecution permitted to decline to tender such a record of interview for purely tactical reasons?

Part III: Certification with respect to s 78 B *Judiciary Act* 1903

4. It is certified that the appellant considers that notices under section 78B of the *Judiciary Act 1903* are not required.

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Part IV: Citation

5. The medium neutral citation of the reasons for judgment of the Full Court of the Supreme Court of the Northern Territory is *The Queen v Nguyen* [2019] NTSC 37 **[CAB 8]**.

Part V: Narrative statement

6. The appellant was charged with one count of unlawfully causing serious harm and one count of assault aggravated by the use of an offensive weapon (a beer bottle). Both offences were alleged to have occurred on 18 June 2016 at Palmerston in the Northern Territory. The appellant pleaded not guilty to both counts and during the course of a trial in December 2017 ("the first trial") the prosecution led evidence as part of the prosecution case of a "mixed" record of an interview conducted between the police and the appellant recorded on 19 July 2016 **[AFB 1]**.

7. This record of interview was what is colloquially referred to as a "mixed" record of interview as it contained not only admissions referable to the charges against the appellant but also exculpatory statements by the appellant to the effect that he acted in self-defence. During the first trial, the appellant did not give evidence and the trial judge left self-defence to the jury, however the jury was unable to reach a verdict and was accordingly discharged.

8. A retrial was listed to commence on 19 March 2018 ("the second trial"). Before the commencement of the second trial, the Court was advised that the mixed record of interview would not be tendered by the prosecution in the second trial **[AFB 29]**. The prosecutor told the court that that decision was made for "tactical" reasons **[AFB 29, 30]**. The tactical reason for not tendering the mixed record of interview was that if the prosecution tendered that interview in the course of the Crown case, and the appellant did not give evidence (as had happened in the course of the first trial), the appellant would not be subject to cross-examination in respect of that interview, which interview would then, as part of the prosecution case, go to the jury without the jury having seen and heard the appellant being cross-examined and would presumably require the trial judge to leave the defence of self-defence to the jury.

9. In other words, the tactical reason for not tendering, as a part of the prosecution case, the mixed record of interview was to force the appellant into the witness box where he would be

subject to cross-examination by the prosecutor. Otherwise, there would be no evidence of defensive conduct given during the course of the trial of the appellant, and in those circumstances there would be no basis for the trial judge to direct the jury in respect of any defence of defensive conduct.

10. As a consequence of the prosecutor's decision, the appellant applied to stay the proceedings on the grounds that the tactical decision not to tender the record of interview amounted to an abuse of process, constituted a breach of the prosecutorial duty to present the case fairly and completely, and impinged on the appellant's right to a fair trial.[1] The question of the admissibility of the mixed record of interview and the prosecutor's duty to tender it was referred to the Full Court of the Supreme Court of the Northern Territory at the request of both parties.

11. The trial judge referred two questions of law to the Full Court pursuant to section 21 of the *Supreme Court Act 1979* (NT).

Question 1

Is the recorded interview of 19 July 2016 … admissible in the Crown case?

Question 2

Is the Crown obliged to tender the recorded interview?[2]

12. As the Full Court noted, the same question of law arose in the Court of Criminal Appeal in the matter of *Harold James Singh v The Queen*[3] ("*Singh's* case"). The Full Court answered the questions in the same way that it answered the questions in *Singh's* case as follows:

Question 1

Yes: the record of interview would be admissible in evidence at the instance of the Crown. The exculpatory parts of the interview are not admissible at the instance of the accused.

Question 2

No. The Crown is not obliged to tender the recorded interview.[4]

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[1] The transcript of the stay proceedings can be found at **[AFB 41-156]**.
[2] The case stated pursuant to section 21 of the *Supreme Court Act 1979* (NT) can be found at **[CAB 3]**.
[3] *Singh v The Queen* [2019] NTCCA 8.
[4] **[CAB 37]**.

13. In *Singh's* case, the Court of Criminal Appeal held by a majority (Kelly and Barr JJ, Blokland J dissenting) that there was no general duty on a prosecutor to tender the record of interview as part of the Crown case and accordingly, in *Singh's* case, there had been no relevant unfairness. In the case of the appellant, given that the decision of the Court of Criminal Appeal had been handed down on 25 March 2019, some two months before the decision of the Full Court in the appellant's case, the members of the Full Court (being the same judges who constituted the Court of Criminal Appeal) were bound by the decision of the majority in *Singh's* case. In those circumstances, Blokland J, whilst now agreeing with the way in which the questions had been answered by Kelly and Barr JJ, delivered a judgment in which she recorded her disquiet at the course which was going to be taken by the prosecution during the second trial of the appellant **[CAB 19-36]**.

Part VI: Argument

Introduction

14. A Record of Interview ("ROI") which contains statements to the police by an accused person that are inculpatory (that is, tending to establish the accused's guilt of the offence charged), as well as statements by an accused that are exculpatory (that is, tending to establish that the accused is not guilty of the offence charged) is commonly referred to as a "mixed" ROI ("MROI").

15. This appeal is concerned only with MROIs.

16. Subject to any exclusionary rules, a MROI is admissible in the trial of an accused if it contains relevant evidence.[5] Evidence is relevant if it could rationally affect (directly or indirectly) the assessment of the probability of a fact in issue in the proceeding.[6]

17. A MROI is admissible in the trial of an accused at the instigation of the prosecution because of the inculpatory statements that the MROI contains. Those inculpatory statements are admitted under the *ENULA* as an exception to the hearsay rule.[7]

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[5] s 56 *ENULA*.
[6] s 55 *ENULA*.
[7] s 81(1) *ENULA*.

18. If the prosecution tenders, as part of its case, a MROI, the exculpatory statements as well as the inculpatory statements become evidence in the trial. Both the exculpatory and the inculpatory statements go in as evidence in the prosecution case and also as evidence of the truth of the statements.[8]

19. There are other ways a MROI can become evidence in a trial and even a wholly exculpatory ROI may be admissible under other heads of admissibility (and may therefore be admissible at the instigation of prosecution and/or defence). Some examples include:

    (a) to rebut recent invention;

    (b) to prove relationship;

    (c) as evidence of what an accused person said and how he behaved when first confronted by the police with the allegations;

    (d) as relevant to the assessment of other evidence.[9]

20. This appeal does not concern any of these issues. This appeal seeks to raise the issue of the ambit of the prosecutor's duty to lead or not to lead MROIs in the possession of the prosecution in circumstances where the MROI is admissible and relevant evidence of what was said by an accused person when interviewed by the Police in relation to the allegations constituting the offence(s).

21. This appeal concerns an MROI which, as is the usual course, was given by the appellant to a police officer within a reasonable time of the allegations of the offending first being made, and was not a statement crafted by or on behalf of the appellant and was not therefore within the third limb of *Pearce's* case.[10]

The appellant's position

22. The appellant's position is that the proper exercise of the prosecution's duty to adduce evidence in any given case requires that MROIs be tendered as part of the prosecution case unless a valid and proper reason exists for not tendering the MROI. In the event that there is not a valid and/or proper reason for not tendering the MROI, then, as Deane J pointed out in

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[8] s 81(2) *ENULA*. For common law authority see, for example, *Spence v Demasi* (1988) 48 SASR 536, 540.
[9] For example, in *Middleton v The Queen (*1998) 19 WAR 179 per Ipp J.
[10] *R v Pearce* (1979) 69 Cr App R 365.

Whitehorn v The Queen[11], there is a prima facie breach of the prosecutor's obligation to conduct the trial fairly. That breach requires a further investigation by the Court to ascertain whether or not the breach has resulted in the accused not receiving a trial that is fair in all relevant respects.[12]

Fair trial

23. It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law.[13] The concept of a fair trial is impossible to comprehensively define and what does and does not remove the overall quality of fairness from a trial must be determined on a case by case basis and can involve a large content of essentially intuitive judgment.[14] A trial that is not conducted according to law will be unfair but the corollary is not necessarily true. Thus the requirement of fairness is independent from and additional to the particularised legal rules and practices which the common law requires to be observed in the administration of the substantive criminal law.[15]

24. In determining the practical content of the requirement that a criminal trial be fair regard must be had to the interest of the Crown acting on behalf of the community as well as to the interests of the accused.[16] What is fair very often depends on the circumstances of a particular case and notions of fairness are inevitably bound up in prevailing social values.[17] A trial is not necessarily unfair because it is less than perfect, but is unfair if it involves a risk of the accused being improperly convicted.[18] A fair trial requires not only that justice be done but that it must be seen to be done. The appearance of a fair trial is as important as its actuality.[19]

Duty of the prosecutor to ensure a fair trial

25. In this context, a prosecutor occupies a special role and function in a criminal trial bounded by long-established duties and responsibilities.[20] Whilst, the content of the prosecutor's duty in this respect cannot be exhaustively catalogued, a central, if not the central, element in that role

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[11] *Whitehorn v The Queen* (1983) 152 CLR 657.
[12] Ibid, 662-669 per Deane J.
[13] *Dietrich v The Queen* (1992)177 CLR 292, 299 per Mason CJ and McHugh J, 326 per Deane J at, 362 per Gaudron J; *Jago v District Court of NSW* (1989) 168 CLR 23, 56 per Deane J.
[14] *Dietrich* (1992)177 CLR 292, 353 per Toohey J; *Jago* (1989) 168 CLR 23, 57 per Deane J.
[15] Ibid, 326 per Deane J; at 363 per Gaudron J.
[16] *Barton v The Queen* (1980) 147 CLR at 101 per Gibbs ACJ and Mason J.
[17] *Dietrich* (1992)177 CLR 292, 364 per Gaudron J.
[18] Ibid, *365* per Gaudron J.
[19] *MG v The Queen* (2007) 69 NSWLR 20, 42 and 45.
[20] *Libke v The Queen* (2007) CLR 559, 586 per Hayne J; *Richardson v The Queen* (1974) 131 CLR 116; *R v Apostilides* (1984) 154 CLR 563.

is ensuring that the Crown case is presented with fairness to the accused.[21] Counsel for the prosecution are to regard themselves as 'ministers of justice' and not to struggle for a conviction;[22] a role to be performed without concern as to whether the case is won or lost.[23] This requires a prosecutor to act in an independent and impartial manner in making prosecutorial decisions[24] and to not use any tactical manouevre legally available in order to secure a conviction.[25] A prosecutor has a duty to present the case 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, in accordance with the procedures and standards which the law requires to be observed.[26] A departure from these standards will only warrant intervention by an appellate court when the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial.[27]

26. The authorities establish the way in which these functions delineate a prosecutor's obligations in relation to the calling of witnesses. A prosecutor is required to call all witnesses who may give relevant evidence unless there are proper reasons not to do so.[28] Whilst there can be no comprehensive definition of what constitutes "proper reasons", there are clear principles which have developed with reference to the overarching prosecutorial duties. A material witness should be called although that witness could give an account inconsistent with the Crown case.[29] A prosecutor, however, is not bound to call a witness whose evidence the prosecutor judges to be unreliable, untrustworthy or otherwise incapable of belief.[30] But a suspicion by the prosecutor about the unreliability of evidence is not enough: the prosecutor's opinion as to the unreliability of the evidence will suffice only "where there are identifiable circumstances which clearly establish it."[31]

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[21] *Richardson* (1974) 131 CLR 116, 119; *Libke* (2007) CLR 559, 586 per Hayne J.
[22] *King v The Queen* (1986) 161 CLR 423, 426 per Murphy J; *Subramaniam v The Queen* (2004) 79 ALJR 116.
[23] *R v Livermore* (2006) NSWLR 659.
[24] *MG v The Queen* (2007) 69 NSWLR 20.
[25] *King* (1986) 161 CLR 423, 426 per Murphy J.
[26] *Subramaniam* (2004) 79 ALJR 116 at [54]; *Whitehorn* (1983) 152 CLR 657, 663 per Deane J.
[27] *Whitehorn* (1983) 152 CLR 657 per Deane J at 664.
[28] *Richardson* (1974) 131 CLR 116; *Whitehorn* (1983) 152 CLR 657; *Apostilides* (1984) 154 CLR 563.
[29] *Whitehorn* (1983) 152 CLR 657, 674 per Dawson J, *Dyers v The Queen* (2002) 210 CLR 285, 326 per Callinan J; *R v Manning* [2017] QCA 23 at [19].
[30] *Whitehorn* (1983) 152 CLR 657, 674-5 per Dawson J; *Manning* [2017] QCA 23 at [19].
[31] *Apostilides* (1984) 154 CLR 563, 576; *Manning* [2017] QCA 23 at [19].

27. The focus here is on the demonstrable unreliability of the evidence rather than a personal belief in the truthfulness of the evidence.[32] This must be so, as a corollary of the requirement to call all relevant witnesses including those whose evidence is inconsistent with the Crown case is that the prosecution is not obliged to accept, or warrant, the truthfulness of the evidence given by a particular witness called by it.[33] This is consistent with the role of the jury as the sole determiner of the facts.

28. Seen in this way, all relevant evidence that can assist the jury in its fact-finding task should be placed before the jury. As stated by Callinan J when discussing the obligation to call all material witnesses in *Dyers v The Queen*:

> A broad practical view of materiality should be taken. All the available admissible evidence which could reasonably influence a jury on the question of the guilt or otherwise of an accused is capable of answering the description "material".[34]

29. By corollary, "proper reasons" for not placing evidence before the jury could include where that evidence does not assist the jury in their fact-finding task or positively detracts from it. Evidence that is demonstrably unreliable by reference to positively identifiable factors is one category as it could have the tendency to mislead the jury. Alternatively, evidence that could confuse or distract the fact-finder or unfairly prejudice the Crown or the accused in some way could also constitute proper reasons. But each piece of evidence must be considered on a case-by-case basis in the particular circumstances of the particular matter.

30. It should be accepted that this analysis is not confined to the oral testimony of witnesses but extends to all admissible material evidence. Such evidence ordinarily must be tendered through a witness and this approach is consistent with the overarching duties of the prosecutor. In *Bugeja v The Queen*[35], Weinberg JA (with whom Bongiorno JA agreed), in considering a ground of appeal based on conduct by a prosecutor at trial stated the principles with reference to all relevant and cogent evidence:

> The starting point, in relation to a ground of that type, must be to consider the role of prosecuting counsel. As has been said many times before, that role differs from that of an advocate representing an accused person in a criminal matter. The prosecutor represents the State. *His or her duty is to fairly and impartially place*

[32] See, for example, the analysis in *Manning* [2017] QCA 23 at [20] –[25].
[33] *R v Le* (2002) 54 NSWLR 474, 486-7 [68] (Heydon JA); *Saddik v The Queen* [2018] VSCA 249 [79]; *Ritchie v The Queen* [2019] VSCA 202 at [65].
[34] *Dyers* (2002) 210 CLR 285, 326 [118] quoted with approval in *Manning* [2017] QCA 23 at [19].
[35] *Bugeja v R* (2010) 30 VR 493.

> *before the jury all relevant and cogent evidence, and not to obtain a conviction by any or all means.* Having presented the evidence, the prosecutor should then address the jury as to how it should be viewed, but always doing so in a manner that is scrupulously fair.[36] (emphasis added)

31. Once it is established that the prosecutor is obliged to lead all material evidence, the prosecutor is not relieved of that responsibility by the fact that the accused could elect to call that evidence. As was said in *Manning,* "fairness requires the prosecution 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." (emphasis added)[37] Thus the fact that the defence may be able to call a witness or lead the relevant evidence in the defence case does not overcome the miscarriage of justice which occurs by a prosecutor's failure to discharge his or her duty.[38]

32. These duties are reflected in and reinforced by the rules of professional conduct that apply to prosecutors in the Northern Territory. For example, The *Barristers' Conduct Rules* of Northern Territory Bar Association provide:

> 62. A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
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> ...
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> 66B. A prosecutor must call as part of the prosecution's case all witnesses:
> (a) whose testimony is admissible and necessary for the presentation of the whole picture;
> (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
>
> ...

These are identical to rules 17.46 and 17.52, respectively, of the *Rules of Professional Conduct and Practice* of the Law Society of the Northern Territory and similar to the corresponding rules in other Australian jurisdictions. Additionally, both the general duties of a prosecutor and those specific to calling witnesses are reflected in the *Guidelines of the Director of Public Prosecutions of the Northern Territory.*[39]

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[36] Ibid,503 [56].
[37] *Manning* [2017] QCA 23 at [27].
[38] *Manning* [2017] QCA 23 at [27]; *R v Jensen* (2009) 23 VR 591, 604 [78].
[39] Director of Public Prosecutions (NT), *Guidelines of the Director of Public Prosecutions of the Northern Territory* (2016) <https://dpp.nt.gov.au/__data/assets/pdf_file/0005/574124/DPP-Guidelines-Current-2016.pdf>. See in particular Guideline 1 and 14.

33. It is expected that prosecutors will comply with professional ethical rules and statutory guidelines which have been designed to ensure that an accused person receives a fair trial.[40] Any breach of those rules and guidelines may bring into question the integrity of a trial prosecuted by that prosecutor.[41]

The duty to adduce MROIs

34. From this analysis, it follows that a MROI, like any other piece of admissible evidence, should ordinarily be placed before a jury in the Crown case unless there are proper reasons not to. Those proper reasons must be positively identifiable if the prosecutor is required to provide those reasons either by the court or defence. As previously stated, the failure to tender an MROI can in some cases lead to a trial that is unfair in the relevant sense.

35. Proper reasons cannot be those guided by tactical considerations.[42] Thus declining to lead an MROI because it strengthens the Crown case or improves the chances of conviction are not proper reasons. Declining to lead an MROI so that an accused is required to give evidence in his or her own case in order to raise a defence or place otherwise admissible evidence before the jury is not a proper reason in the absence of other positively identifiable factors that go to the reliability or some other aspect of the MROI. A jury is perfectly capable of making assessments of what weight to attribute to that evidence in accordance with the usual directions from the trial judge.[43]

36. This is particularly the case since the advent of audio-visual recorded police interviews which have only become a standard practice throughout Australia in relatively recent history. Prior to their introduction there were real concerns about the reliability of written confessions by accused persons when they were in custody in police stations. Thus in *McKinney v The Queen*[44], the Court adopted a new rule of practice that a judge should, as a matter of course, warn a jury of the danger of convicting an accused only on the basis of a confessional statement made in a police station that was not reliably corroborated. In doing so, the court made specific reference to the entitlement of an accused to a fair trial and that the content of

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[40] *R v Livermore* (2006) NSWLR 659, 671.
[41] *MG* (2007) 69 NSWLR 20 at [54].
[42] *Whitehorn* (1983) 152 CLR 657, 664 per Deane J; *R v Lucas* [1973] VR 693, 697.
[43] *Mule v The Queen* (2005) 221 ALR 85.
[44] *McKinney v The Queen; Judge v The Queen* (1990) 171 CLR 468.

the requirement of fairness may vary with changed social conditions, including developments in technology and increased access to means of mechanical corroboration.[45]

37. By way of contrast, a modern audio-visual recorded police interview is undoubtedly a reliable account of what the accused actually told the police at the time he was spoken to. In assessing that evidence, the jury will not only have that account but be able to observe the questions that the accused was asked and the manner of his or her responses often over a substantial period of time.

The Hearsay Rule and the MROI

38. In *Barry*, Kourakis J, in holding that the Crown did not have an obligation to adduce the interview in that case, concluded that "self-serving statements are admissible, and have probative value, only when introduced as part of the 'Crown package;'"[46] a statement adopted by Kelly and Barr JJ in the Full Court.[47] Whilst it may be accepted that it is the admission of the inculpatory parts of a MROI that provide the basis for the *admissibility* of the exculpatory parts, the same cannot be said, at least under *ENULA*, in relation to the *probative value* of the exculpatory parts. Ordinarily, the exculpatory statements in a MROI will be relevant in their own right as having the capacity to rationally affect the probability of the existence of a fact in issue[48] and hence will have probative value[49]. The reason that they may not be admissible by themselves is that, notwithstanding their relevance, they will be excluded by the hearsay rule[50] and there is no corresponding exception to that rule except in connection with the admission of the inculpatory parts of the statement.[51] It is not insignificant that, under the *ENULA*, considerations of the probative value of evidence in connection with its admissibility contain no warrant for the application of tests of reliability and credibility and the evident policy of the Act is that those questions are matters for the jury.[52]

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[45] Ibid, 478
[46] *Barry* (2009) 197 A Crim R 445, 463 [67].
[47] *Nguyen v The Queen* [2019] NTSC 37 at [19] **[CAB 17]**.
[48] *ENULA* s 55.
[49] Probative value is defined as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue": *ENULA* Dictionary Part 1.
[50] *ENULA* s 59.
[51] *ENULA* s 81(1) and (2)
[52] *IMM v The Queen* (2016) 257 CLR 300, 316 [54]

39. In *Spence v Demasi* (1988) Cox J said:[53]

> The rule against hearsay evidence usually operates to prevent a party from tendering his self-serving statements made out-of-court in proof of the truth of the matters so asserted. The problem comes with mixed statements, tendered by an opponent, containing admissions against the party making them and also exculpatory statements, whether relating to the admissions or on other relevant topics. The position in the criminal court, I think, is clear. It is common for the Crown to tender a record of the accused's interrogation by the police, and often this will contain a mixture of admissions and self-serving statements. The Crown cannot pick and choose. It cannot put in only the damaging questions and answers, or have the admissions treated as evidence and the rest rejected or ignored as hearsay…

40. In *Barry*, Kourakis J said:[54]

> The question of the admissibility of an accused's purely exculpatory statements and the question of the extent of the duty of prosecutors to lead mixed statements are related. The conflicting authorities reflect, I think, the circumstance that the common law must in these cases deal with the intersection of two conflicting principles. The first is that out-of-court statements are generally inadmissible and the second is that admissions against interest are generally admissible.
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> Wigmore describes the resolution of the conflict in this way:
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> > Since the principle is that the statement is made under circumstances fairly indicating the defendant's sincerity and accuracy, it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement.
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> > As for the limits which it thus becomes necessary to set, these must be largely a matter of judgement in each case. For the phrasing of a rough general test, different language has been used by different judges;
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> > …
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> > It may be doubted, however, whether for really difficult cases any additional light is gained from such phrases as "all matters knit up with or involved in the statement" or "all that forms an essential part of it". These tests give more or less arbitrary results. Going back to the living principle, a more useful test appears to be this: All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest.[55]

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[53] *Spence v Demasi* (1988) 48 SASR 536 at 540.
[54] *Barry* (2009) 197 A Crim R 445, 463 [64].
[55] JH Wigmore, *Evidence in Trials at Common Law* (3rd ed, 1979) Vol 5, p 339 [1465].

41. It appears that it is the perceived reliability of inculpatory statements that provides the foundation for the rule that admissions by an accused person are an exception to the hearsay rule. The rationale was presumably that because an accused person has made out-of-court declarations against the interests of that person, they are very likely to be true and can therefore be relied on.

42. However, in a modern audio-visual police interview, all statements made would usually appear to be so reliable in the sense that there would be no perceivable difference between the making of the exculpatory statements and the making of the inculpatory statements. This leads to the position that, if the inculpatory statements in a MROI are prima facie reliable why would the exculpatory statements not be equally so?

43. Moreover, the nature and the content of a particular MROI and a jury's ability to assess it do not change depending on whether or not a prosecutor chooses to adduce that evidence. Thus, under the regime espoused in *Barry* and adopted by Kelly and Barr JJ in the Full Court, if a jury has capacity to assess the inculpatory and exculpatory parts of an MROI in circumstances where the prosecutor chooses to adduce it because, for example, it is the only evidence that proves a particular element of the offence, then it must follow that the jury will have capacity to assess it in all situations. There cannot be any justifiable reason consistent with a fair trial to withhold such an MROI from the jury.

44. It is not to the point whether, as stated by Kourakis J in *Barry*[56] and adopted by Kelly and Barr JJ in the Full Court[57], the exculpatory parts of the MROI are only led to explain the inculpatory parts. Aside from the fact that this focuses on the basis of *admissibility* of the exculpatory parts, the argument employs circular reasoning as it proceeds on the assumption that the prosecutor has an absolute discretion in deciding whether to adduce the inculpatory parts of the statement, the very conclusion that is sought to be proved. As explained by Hayne J in *Mahmood*, if an accused has made inculpatory statements 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. A fair trial requires that the prosecutor adduce all of that evidence.[58]

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[56] *Barry* (2009) 197 A Crim R 445, 463 [67].
[57] *Nguyen v The Queen* [2019] NTSC 37 at [19] **[CAB 17]**.
[58] *Mahmood* (2008) 232 CLR 397, 408–409.

45. Once it is established that a fair trial requires the prosecutor to adduce the MROI in the prosecution case, it is no answer that the accused can instead give evidence in his own case if he wants that material before the jury. The reasoning of Kelly and Barr JJ to that effect[59] should not be accepted. As discussed in the appellant's submissions at [31] above, fairness requires the prosecution to produce all of the material evidence before putting the defendant to his election as to whether to give or call evidence and the fact that the defence may be able to call a witness or lead the relevant evidence in the defence case does not overcome the miscarriage of justice which occurs by a prosecutor's failure to discharge his or her duty.

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46. It also follows that the factor identified in *Richardson*, and referred to by Kelly and Barr JJ[60], for a prosecutor to consider when deciding to call a witness as to "whether it is in the interests of justice for particular evidence to be subject to cross-examination by the Crown"[61] is not applicable, as a general rule, to MROIs. First, it should be observed that a MROI is of a different nature to the viva voce evidence of an accused and the situation is not directly analogous to the refusal to call a witness who can be called in the defence case. Furthermore, the factor identified in *Richardson* should be seen in light of the issue that fell for determination in that case, namely, the prosecutor's decision not to call a plainly unreliable witness who, if she was to be called, should have been available for cross-examination by the
20 prosecutor for that reason. Any decision not to play a MROI for these kinds of reasons must be based on positively identifiable factors of unreliability.

The public interest in a MROI being tendered as part of the prosecution case

47. Our criminal justice system depends on the police being charged with the investigation of criminal behaviour. Once a suspect is identified, that person is interviewed or at least an interview is attempted for the purpose of putting the allegations to the suspect and recording the suspect's response. That response often takes the form of a MROI.

30 48. There is a public interest in persons suspected of criminal behaviour co-operating with the police and not relying on the right to silence. If the rule is that the prosecutor can decide, without proper reasons, to not adduce as part of the prosecution case a MROI, this can only

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[59] *Nguyen v The Queen* [2019] NTSC 37 at [18] **[CAB 17]**.
[60] Ibid. **[CAB 17]**.
[61] *Richardson* (1974) 131 CLR 116, 119.

result in suspects exercising their right to silence as participation in an interview can only, at best, not assist them. The task of the police to obtain evidence of criminal behaviour would be considerably increased.

49. There is an obvious public interest that those who are guilty of criminal behaviour should admit their guilt and those who are not guilty should provide an exculpatory account to the police so that public funds are not wasted on prosecuting those who are not guilty. Accordingly, if a suspect has made inculpatory statements constituting a MROI it is in the public interest that such a MROI be part of the prosecution evidence regardless of the number of exculpatory statements contained in the same record of interview.

Conclusion

50. Ordinarily, an MROI must be tendered by the prosecution because it is both prima facie reliable evidence and admissible as an exception to the hearsay rule, unless there are proper reasons not to. Failure to tender as part of the prosecution case a MROI which contains reliable and admissible evidence constitutes a breach of the prosecutor's duty to tender all admissible evidence at the trial and may also be a breach of the prosecutor's duty to be impartial and detached.

51. There is a public interest in demonstrating to the world at large that those persons who are charged with criminal offences and who have given a MROI to the police will have such MROI led as part of the prosecution case on their trial. This is because all persons charged with criminal offences are entitled to a fair trial. A trial where the prosecutor fails to lead evidence for tactical reasons is not, by definition, a fair trial.

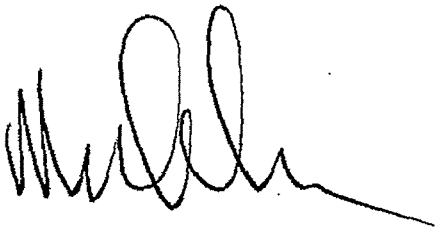
Part VII: Orders sought

52. That the appeal be allowed and the second question answered by the Full Court of the Supreme Court of Northern Territory in the negative be answered by this Honourable Court in the positive.

Part VIII: Time estimate

53. It is estimated that the presentation of the appellant's oral argument will require one hour.

Dated: 4 October 2019



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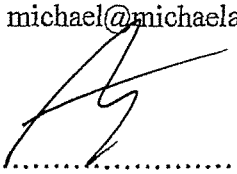

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

NO. D15 of 2019

VAN DUNG NGUYEN

Appellant

AND:

THE QUEEN

Respondent

Annexure – List of statutes and statutory instruments

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STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN THE APPELLANT'S SUBMISSIONS

Statutes

1. *Evidence (National Uniform Legislation) Act 2011* (NT)

2. *Supreme Court Act 1979* (NT)

Statutory Instruments

1. Law Society of the Northern Territory, *Rules of Professional Conduct and Practice*, May 2005

2. Director of Public Prosecutions (NT), *Guidelines of the Director of Public Prosecutions of the Northern Territory,* 2016

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