IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D15 of 2019

BETWEEN:

VAN DUNG NGUYEN
Applicant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

PART I: Certification

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

PART II:

Introduction

1. It is helpful to frame the reply to the points made in the respondent's written submissions (*RWS*) and those of the intervener, Western Australia DPP (*WAWS*), using the essential structure of the propositions that constitute the appellant's argument in the appellant's written submissions (*AWS*).

2. The evidence the subject of the dispute in this appeal is a "video recording" of the "questioning of a person", being the appellant, made in accordance with the law governing the process for "electronic recording" in the Northern Territory[1] (and which law is substantively replicated in all Australian jurisdictions). That evidence is hereafter referred to as a "record of interview".

3. The question of whether the proper exercise of the prosecutorial discretion at trial requires the tender of a record of interview which contains statements that are both an "admission"[2] and "a previous representation in relation to an admission"[3], arises in this appeal in the

[1] Section 142 *Police Administration Act (NT)*.
[2] Both as used in section 142 of the *Police Administration Act (NT)* and section 81 of the *Evidence (National Uniform Legislation) Act (NT) (UEA)*.
[3] Section 81(2) of the *UEA*.

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context of an application for the court to grant a conditional stay in order to ensure a fair trial.[4]

4. That question raises the issue whether: *there is an obligation on the prosecution to ordinarily tender a video recording of a record of interview that contains both admissions and exculpatory (and neutral) statements*. The principle for which the appellant contends is that *ordinarily* there is such an obligation, and in this case no relevant exception applies.

5. The underlying issue falls to be resolved on the facts of this case. Here the admissions are tied to exculpatory statements made in the context of an interview about an alleged assault where self-defence was raised. That underscores what is said about *ordinarily*. There are dangers of extrapolation in the submissions made by the respondent which have a width of application that would apparently apply to a diverse range of factual circumstances. Some care must be taken, as the *AWS* and this Reply have sought to do, in relating what is said to this case, bearing in mind the law creating the offence and the defence of self-defence in the Northern Territory.

The admissibility issue

6. Any question about the prosecutor's obligation to present evidence at trial requires as a primary step for that evidence to be admissible. Here, the interview is admissible in its entirety by reason that:

6.1. Whether a prior out-of-court statement is admissible if tendered by the prosecution is to be determined first, by reference to section 142 of *Police Administration Act (NT)* and further by reference to section 81 of the *Evidence (National Uniform Legislation) Act (NT)* (*UEA*) (subject to the application of any of the discretions in the *UEA*). The interview conforms with the procedure in section 142.

6.2. Evidence of a previous representation is admissible if it is an "admission" which, within the *UEA,* means that it is (1) made by the accused, and (2) adverse to the accused's interest in the outcome of the proceeding. In practical terms, in a criminal trial, that will mean any fact that is relevant to proof of an element of an offence, or assists in the disproof of an available defence.

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[4] The same question may fall to be answered following a conviction on an appeal, where it is said that the verdict was occasioned by a miscarriage by reason that the trial was unfair. Though different in their prospective and retrospective analysis, the question to be answered requires a consideration of the same underlying issue.

6.3. Whether it is an admission requires an objective assessment. That assessment is not affected by what other evidence is available to the prosecution and does not depend on significance of the admission to the prosecution.

6.4. The respondent's submissions,[5] unsupported by a notice of contention[6], are incorrect to suggest that the representations in the record of interview in this case are not admissible. With respect, the observations of Martin CJ (to the extent they are in support) in *Flowers v The Queen* and relied upon in the *RWS* are inconsistent with the definition in s81(2).[7] The statements of Kourakis J (as he then was) in *Barry v Police*[8] are correct on this issue.

10 6.5. Whether other "prior representations" are admissible depends on whether they 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"[9]. This includes exculpatory and neutral statements.

6.6. In practical terms, in a trial involving self-defence, admissions made as to the physical elements or the mental elements of the charge, will be admissible through section 81(1) and exculpatory statements directed to their purpose in acting (eg. "*I had to stop him because he had a knife*") and their subjective perception of the circumstances (eg. *"I hit him, but I was terrified"*) will meet the requirements of section 81(2) because they are inextricably connected with those admissions. That will also invariably be so in
20 circumstances of cases involving the defences of provocation, duress, necessity or where it is necessary to prove a specific intent. It will also be so, where the accused admits a circumstance, but denies a physical element (eg. "*I was on the river bank, but I didn't fire the gun"*). It may be different on a defence of alibi.

6.7. However, that is not the limit of section 81(2). In the context of a recorded interview, in order to properly understand what is said, it is simply necessary to know it all – because the questions may disclose a situation where shifts in answers are perceptible only by reference to the entirety of the interview. For example, the raising of a fact may shift the focus of an interview and the answers given, or a defendant's lack of comprehension only becomes clear at a later time and so on. That is all the more
30 significant because, invariably, today the evidence of a record of interview placed

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[5] *RWS*, [9]-[12].
[6] *High Court Rules 2004*, r. 42.08(5).
[7] *RWS*, [11] and the quote from *Flowers v The Queen* (2005) 189 FLR 423, [3].
[8] *Barry v Police* (2009) 197 A Crim R 445, [42].
[9] Section 81(2) of the *UEA*.

before the jury is part of a video recording. Formerly it used to be by a police officer reading from his notes or his notes of an interview, or a written record of interview signed by the accused and therefore adopted by the accused as his out-of-court statements against interest. In a video, of course, the problems of editing are more pronounced.

6.8. Admissibility is also subject to the exercise of the mandatory and discretionary exclusions in the *UEA* which provide a further basis for the exercise of judicial control at the point of admissibility to ensure a fair trial.[10]

10 **The prosecutorial discretion**

7. While the prosecutorial discretion is not itself amenable to direct control by a court, it is a combination of duties subject to a number of overriding principles.[11] It is not unfettered.[12] One of the duties is the duty to call, save for limited exceptions, all material witnesses at trial. However, on the view of the appellant, it is not that particular aspect which is the relevant issue. This evidence is a video recording. Moreover, the accused cannot be a witness for the prosecution.[13] However, that particular duty discloses an important feature of the duty of the prosecutor generally which is to call relevant evidence even if it is unfavourable.

20 **The requirement to tender in the ordinary case**

8. The rationales for the principle that in the ordinary case the prosecutor is obliged to tender a mixed record of interview are:

8.1. The duty of the prosecutor to fairly present the *whole* of the relevant evidence to the jury so as to ensure a just conviction. In this case, the *Criminal Code (NT)* provides for both an offence[14] and a defence of self-defence.[15] It forms no part of the prosecutor's function to ensure a conviction by presenting evidence relevant to the *offence* and withholding it with respect to the *defence.*[16] An example demonstrates the point. It would be an improper exercise of the discretion not to tender an angle of a CCTV recording showing actions relevant to the proof of self-defence. The same applies,

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[10] *UEA*: s 135 (general discretion to exclude evidence) s 136 (limit to the use of evidence) and s 137 (exclusion of prejudicial evidence).
[11] *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Apostilides* (1984) 154 CLR 563.
[12] *RWS*, [3].
[13] *WAWS*, [11.8].
[14] Section 181 and sections 188(1), 188(2)(m) *Criminal Code (NT)*.
[15] Section 29 *Criminal Code (NT)*.
[16] There would be no "unfairness to the Crown or State": *WAWS*, [16].

ordinarily, to an interview which contains admissions and exculpatory statements which shows the same conduct or circumstances.

8.2. The duty to avoid the presentation of a misleading account by omission and excision. What is sometimes said to be fairness. This may arise where there is other evidence which takes a particular significance from an explanation afforded by an accused. Returning to the example, a CCTV recording may be ambiguous or unclear as to whether it shows conduct that is, or might be, defensive. When watched in light of an account given by an accused in an interview, it may be readily understood as showing defensive conduct.

8.3. Encouragement of participation by accused in interviews. There is a public purpose served by the participation of accused in records of interview. From the perspective of an accused, participation is not served where what an accused person has said is only considered at the point of the decision to lay a charge and not by the Court or jury deciding whether the accused has committed an offence. The value of participation is undermined if the prosecutor (absent evidence that the interview is demonstrably discreditable) chooses not to tender it.

9. The principle is subject to the qualification that the prosecutor does not, for good reason, conclude that the entire interview is not "credible or reliable".[17] Whilst a reduction of "the risk of unreliability" may be why inculpatory statements have been made an exception to the necessary rule (*RWS* [16]-[18]) it cannot be a basis for the prosecutor to decide not to lead a mixed record of interview. On the circumstances of this case, however, the entire video recording is admissible. There is no basis for the application of any principle to exclude the evidence via the relevant discretion and none has been suggested. Rather, as explained in the *AWS*, the expressed rationale to decline to tender the video recording was simply to alter the forensic contest at the trial.

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[17] *Richardson v The Queen* (1974) 131 CLR 116, 122. If the prosecutor genuinely comes to the view that the evidence is so unreliable that it should not go before the jury then that would be a proper exercise of prosecutorial discretion. That is informed by matters such as time, opportunity for reflection, knowledge of what the Police know and pre-planning evident in answers.