NGUYEN v THE QUEEN (D15/2019)

Court appealed from: Supreme Court of the Northern Territory (Full Court) [2019] NTSC 37

Date of judgment: 29 May 2019

Special leave granted: 16 August 2019

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 at Palmerston in the Northern Territory on 18 June 2016. The appellant pleaded not guilty to both counts.

During the (first) trial, the prosecution led evidence of a record of interview between the appellant and the police dated 19 July 2016. This interview was what is colloquially referred to as a "mixed" statement or record of interview as it contained both admissions made by the appellant referrable to the charges and exculpatory statements that he acted in self-defence. During the 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.

Prior to the commencement of the second trial, the prosecution gave notice that for 'tactical reasons' the mixed statement would not be tendered as a part of the Crown's case. The Crown submitted that the mixed statement should be categorised as being substantially or wholly exculpatory and therefore inadmissible, or in the alternative, if it were categorised as being a mixed statement that containing both exculpatory and inculpatory material, the Crown had absolute discretion whether to tender the evidence. The appellant submitted that the tactical reason for the Crown not tendering the mixed record of interview as a part of the prosecution case was to force the appellant into the witness box where he would be subject to cross-examination by the prosecutor.

The appellant applied to stay the proceedings on the basis that the refusal to tender the record of interview amounted to an abuse of process, constituted a breach of the prosecutorial duty to represent the case fairly and completely and impinged on the appellant's right to a fair trial. At the request of both parties the trial judge then referred two questions of law arising from the mixed statement to the Full Court of the Supreme Court of the Northern Territory:

- 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?

The Full Court noted that the same questions of law had arisen shortly before in the Court of Criminal Appeal in the matter of *Singh v The Queen ("Singh").* The Full Court answered the questions in this case in the same way as in *Singh*. That is:

- As to 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"; and

- As to Question 2 “No: The Crown is not obliged to tender the recorded interview”.

The Full Court was constituted by the same Justices who had decided *Singh*, in which Kelly and Barr JJ were in the majority and Blokland J had dissented. In this appeal Blokland J agreed with the majority but noted that she was bound by the reasoning in *Singh.*

The ground of appeal is:

- That the Full Court of the Supreme Court of the Northern Territory erred in answering the second of the two questions referred to it in the negative.

The North Australian Aboriginal Justice Agency and the Director of Public Prosecutions for Western Australia have both filed submissions seeking leave to intervene in the appeal.