IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D16 of 2019

BETWEEN:

Harold James Singh
Appellant

10

and

The Queen
Respondent

APPELLANT'S SUBMISSIONS

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Part I: Certification

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

Part II: Statement of issues

2. Should a prosecutor in possession of a "mixed statement" record of interview, admissible under section 81 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("*ENULA*"), ordinarily in the exercise of the prosecutorial discretion tender such evidence unless there are proper reasons to so decline?

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

3. It is certified that the appellant considers that notices under s 78B *Judiciary Act 1903* are not required.

Part IV: Citation

4. The medium neutral citation of the reasons for judgment of the Northern Territory Court of Criminal Appeal is *Singh v The Queen* [2019] NTCCA 8 **[CAB 44]**. The medium neutral citation of the ruling of the Supreme Court discussing the admissibility of the record of

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interview is *R v Singh* [2018] NTSC 10 **[AFB 150]**. This ruling is not the subject of any appeal or notice of contention.

Part V: Narrative Statement

5. The appellant was charged with armed robbery of a taxi driver whilst in company of other passengers pursuant to section 211(1) and (2) of the *Criminal Code* (NT) **[CAB 4]**. The robbery was partially captured on the taxi video camera. The appellant participated in an electronically recorded interview in which he admitted his presence in the taxi but explained
10 that he was not part of an agreement to rob the driver or aid and abet the co-offenders **[AFB 169]**. This was a contention open on the video footage. The appellant did not give evidence at trial with the result that there was no additional evidence upon which to support the contention that he did not participate in the robbery. The appellant adopts the statement of relevant facts, with particular reference to the record of interview, as set out by the Court of Criminal Appeal in the judgment of Kelly J **[CAB 46-49].**

6. At the trial, defence counsel informed the Court that the Crown would not be tendering the appellant's interview with police. Defence counsel submitted that the record of interview should be tendered as part of the prosecutor's duty to put all relevant and admissible material
20 before the jury **[AFB 65-84, 89-104, 121-124]**. A ruling was also sought as to whether the interview could be tendered by the defence pursuant to section 81 of the *ENULA*. The learned trial Judge confirmed the position that a prosecutor could not be compelled to tender a record of interview and further ruled that the defence could not adduce the record of interview through cross-examination.[1] **[AFB 152-157]**

7. The Court of Criminal Appeal held by majority (Kelly and Barr JJ) that there was no general obligation on a prosecutor to tender the record of interview as part of the Crown case and in the circumstances of the case there was no relevant unfairness **[CAB 46-97, 131]**. Blokland J dissented. She held that, in the circumstances of the case, the prosecutor's discretion
30 miscarried and there was not a full presentation of the evidence, constituting a miscarriage of justice. **[CAB 97-130]**.

[1] *R v Singh* [2018] NTSC 10

Part VI: Appellant's argument

8. There is a divergence in the development of the common law across Australia with regard to the obligations of a prosecutor to adduce evidence of mixed statements.[2] A tension has developed between: (1) the view that a party to a proceeding would only be expected to introduce an exculpatory statement of the other party if it was necessary to do so in order to adduce evidence of an admission[3]; and (2) the principle that, in the context of the special role of prosecution counsel, a fair trial requires that the prosecutor puts before the Court the whole of the evidence which comprises the case.[4]

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9. In all Australian and most other common law jurisdictions, when an out-of-court "mixed" statement is received by a Court, both its inculpatory and exculpatory statements are probative as an exception to the hearsay rule. When such a mixed statement is tendered, the trial Judge, as a matter of course, directs in accordance with the principles in *Mule v The Queen*[5].

The Prosecution's duty to adduce

10. The appellant submits that ordinarily a prosecutor in possession of a mixed police record of interview, should be required to tender the record of interview as part of the prosecution case unless there are proper reasons not to.[6] This is consistent with the general duty upon a prosecutor to present its case fully and fairly and to adduce all relevant evidence.[7] Hinton succinctly concluded in his article on the prosecutor's duty to call witnesses:[8]

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> That role burdens the prosecutor with conducting the prosecution case in the pursuit of the truth. That is, the jury must be put in the position where all reasonable hypotheses consistent with both guilt and innocence are raised and tested so that a verdict of guilt beyond reasonable doubt does not conflict with the truth of the matter to the extent that it can be discerned by the jury. This necessitates that the jury be privy to all available and admissible evidence relevant to the determination of a fact in issue or a material fact irrespective of whether such evidence is consistent with the hypothesis promulgated by the

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[2] This divergence of opinion was recognised in *Ritchie v Western Australia* (2016) 260 A Crim R 367 [46] per McLure P

[3] The position in *Barry v Police* (2009) 197 A Crim R 445 embraced by the majority in the Court of Criminal Appeal in this matter.

[4] The case advanced here by the appellant.

[5] *Mule v The Queen* [2005] HCA 49; 221 ALR 85.

[6] *Mahmood v The Queen* (2008) 232 CLR 397 [39] per Hayne J; *The Queen v Soma* (2003) 212 CLR 299 [30]-[31]; cf *R v Reynolds* [2015] QCA 111 [71]-[76] per Carmody CJ.

[7] *Whitehorn v The Queen* (1983) 152 CLR 657, 674 per Dawson J; *Dyers v The Queen* (2002) 210 CLR 285 [118] per Callinan J; *Bugeja v R* (2010) 30 VR 493 [56] per Weinberg JA; *R v Manning* [2017] QCA 23 [27].

[8] Martin Hinton, "The prosecutor's duty with respect to witnesses: pro Domina Veritate" (2003) 27 *Criminal Law Journal* 260, 270.

prosecution. It also necessitates that the jury be put in the position where it can accord the evidence the weight that it truly deserves.

11. These duties are reflected, to a large extent, in the various professional conduct rules and guidelines promulgated by Directors of Public Prosecutions. For example, the *Legal Profession Uniform Conduct (Barristers) Rules* 2015 [NSW] provide *inter alia:*[9]

> Prosecutor's duties
> 83. 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.
> ....
> 89. A prosecutor must call as part of the prosecution's case all witnesses;
> (a) whose testimony is admissible and necessary for the presentation of all the relevant circumstances; or
> (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
> Unless
> (i) the opponent consents to the prosecutor not calling a particular witness;
> (ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;
> (iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or witnesses;
> (iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable; or
> (v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.

12. *The Guidelines of the Director of Public Prosecutions* (NT), as with NSW, attach the barristers' rules of professional conduct but the body of the guidelines provide further support for the importance of placing all admissible material before the finder of fact. They provide *inter alia:*

> 1. Roles and duties of the prosecutor
> 1.1 ....
> 1.2 The prosecutor owes a duty of fairness to the court and the community. The community's interest is two-fold: that those who are guilty be brought to justice and that those who are innocent not be wrongly convicted. The prosecutor's role is to assist the court and do justice between the community and the offender according to law and the dictates of fairness. Importantly a prosecutor:
> (1) Has the duty to act fairly and impartially;

[9] These rules are current to 18.01.2019 and the earlier publication of these rules were attached as an appendix to the 2007 DPP Guidelines in NSW. In *R v MG* (2007) 69 NSWLR 20 [54] the Court of Appeal recognised the important standing of Bar rules and prosecutorial guidelines.

(2) Has the duty of ensuring that the Crown case is presented properly and with fairness to the offender;
(3) Is entitled to firmly and vigorously urge the Crown view about a particular issue and to test the case advanced on behalf of the offender by all proper means provided by the criminal process which is an accusatorial and adversarial procedure;
(4) Must never seek to persuade a jury to a point of view by introducing prejudice;
(5) Must not advance any argument that does not carry weight in his or her own mind or try to shut out any evidence that would be important to the interests of the offender;
(6) Must inform the court of authorities or trial directions appropriate to the case, even where unfavourable to the prosecution;
(7) Must offer all evidence relevant to the Crown case;

....

14. Witnesses

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14.4 The prosecution should call all apparently credible witnesses whose evidence is admissible and essential to the complete unfolding of the prosecution case or is otherwise material to the proceedings.....

13. The *Victorian Criminal Proceedings Manual,*[10] in relation to prosecutors, provides specifically that there is an expectation that records of interview be adduced:

7.2 Counsel for the Prosecution

...

27. As part of the obligation to call all credible and relevant witnesses, the prosecutor should generally lead evidence of any out-of-court statements by the accused, such as a record of interview. The whole statement should be led and the prosecution should not seek to extract only the incriminating portion.

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14. If an accused person must rely upon the prosecutor to adduce all relevant evidence, a prosecutor in possession of a mixed statement should be expected to adduce the statement unless there is a proper basis to refuse the tender. For example, the prosecutor's judgment would not be in error if there was a basis to suspect that the statements were carefully prepared or concocted as postulated in the English case of *R v Pearce*.[11] In those circumstances a fair trial *vis a vis* the community requires that an interview is not adduced which is also consistent with the provisos in the professional rules. The rules permit a prosecutor to decline to call a witness (or adduce evidence) if the prosecution believes on reasonable grounds that the

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[10] Judicial College of Victoria, *Victorian Criminal Proceedings Manual* (3 August 2017) <http://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27554.htm>
[11] *R v Pearce* (1979) 69 Cr App R 365.

interests of justice would be harmed. As with any other evidence, the decision to adduce a record of interview should be made on a case by case basis, which takes into account the particular circumstances of the case, the accused and the manner and circumstances in which the interview was conducted.

15. In the appellant's trial, it is submitted that the jury did not have before it admissible evidence which supported the closing submission that there was a reasonable doubt on the face of the CCTV as to his participation. There was a considerable risk that without the record of interview the jury assessed the final submission as a hypothetical argument without foundation. This deprived the appellant, on the whole of the evidence, of a reasonable chance of acquittal. In *Nguyen's* appeal, unless the appellant gives evidence, he would not be able to raise selfdefence unless he gives evidence. This raises the question as to whether declining to adduce the record of interview places unfair pressure on an accused in the context that there is no obligation for the accused to prove or bring anything forward.[12] Although in a different context, *Azzopardi v The Queen* discussed the considerations which may bear on the difficult forensic decision whether to give evidence or for example rely on a record of interview in the context of ensuring that the choice to give evidence or stay silent is a real choice and that remaining silent should not be seen as an indicator of guilt.[13] These issues are in sharper relief with accused who are unsophisticated and those who have cognitive or mental health deficits.

16. If the record of interview is admissible, then it follows that it is capable of rationally affecting the assessment of the probability of a fact in issue. It is inconsistent with the notion of a fair trial for admissible evidence not to be put before the trier of fact unless it is excluded in the exercise of the trial judge's discretion or alternatively is not adduced because a sound judgment is made by the Crown in the interests of a fair trial. Generally speaking exclusion of admissible evidence under sections 135 -137 of the *ENULA* seldom occurs unless the probative value is slight and the prejudicial effect is great and such prejudice cannot be allayed by appropriate direction. The jury is entrusted to use the evidence appropriately and according to law.

17. It is submitted that the discerning capacity of the jury and the demands upon it have increased with the introduction of the *ENULA*. Under that Act, questions of credibility and reliability are not relevant considerations in determining the probative value of the evidence and hence

[12] *Dyers* (2002) 210 CLR 285 [118]-[120] per Callinan J, *RPS v The Queen* (2000) 199 CLR 620 [27]-[29] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.
[13] *Azzopardi v The Queen* (2001) 205 CLR 50 per Gaudron, Gummow, Kirby and Hayne JJ at [40], [47], [48].

admissibility. Where the evidence is rationally capable of acceptance, questions of credibility and reliability are squarely in the province of the jury.[14] Indeed, the jury is required to exercise considerable intellectual vigor with regard to fine distinctions such as the use which can be made of contextual, tendency and coincidence evidence often arising in the one proceeding. There are also fine distinctions with regard to complaint evidence. It is difficult to argue, given these intellectual demands, that a trier of fact cannot fairly assess the credibility and reliability of the exculpatory aspects of a mixed statement in circumstances where the prosecutor can address on its probative value and the trial judge will give appropriate directions as to the considerations in assessing the weight of evidence which is not tested under cross-examination. Ultimately, it is the appellant's case that unless there is a real risk that the trier of fact will be misled and the prosecution case is unfairly prejudiced despite directions, a record of interview should be played. If the prosecutor has reasonable grounds that the interests of justice would be harmed, as with a witness, naturally it would be appropriate to decline adducing a record of interview.

18. In New South Wales and Victoria, fairness required at common law that records of interview generally be tendered.[15] In the Northern Territory consistent with this principle of fairness Martin (BR) CJ, in *obiter dictum* remarked, in *Flowers v The Queen:*

> Even in the particular circumstances under consideration, it might be said with some force that I have taken an overly generous view of the admissibility of the exculpatory statement. If that be so, it is a view borne out of a concern to ensure that the strict rules of admissibility do not operate unfairly against an accused charged with serious crimes.[16]

19. Accused persons who co-operate with and participate in a recorded interview with investigators forgo their right to silence. They are often told that the interview is conducted so as to provide them with the opportunity to put forward their account. These days such interviews are electronically recorded, are often lengthy and involve extended, probing and trained questioning by one or more investigating officers. The finder of fact has an opportunity to view and assess the demeanor and conduct of the defendant at the time of interview. The suspect is often told as part of the caution that what they say may be used as evidence in Court. A suspect is not told that any exculpatory account will not be seen by the

[14] *R v Bauer (a pseudonym)* (2018) 359 ALR 359 at [70] in relation to a real possibility of collusion; at [92] in relation to soliciting a disclosure in a suggestive manner.
[15] Before the introduction respectively of the *Evidence Act* 1995 (NSW) and *Evidence Act* 2008 (VIC), *Cross on Evidence* (Australian Ed) [33455].
[16] *Flowers v The Queen* (2005) 189 FLR 423, 428. This remark was made prior to the introduction of the *ENULA* and incidentally reflects the sentiments with regard to the strict application of the rules of evidence expressed in *Walton v R* (1989) 166 CLR 283, 293 per Mason CJ and 308 per Deane J.

court. The interview process is an important part of the police investigation and the overall factual narrative.[17]

20. The exercise of the prosecutorial discretion to adduce the record of interview must be based upon principle rather than the particular view of the prosecutorial office, prosecutor or forensic necessity, otherwise the potential for unfairness is manifest.[18] It is incongruous that relevant and admissible evidence might be part of the prosecution case in one trial but not another as a matter of "happenstance".

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Queensland and Western Australia: No obligation?

21. In *R v Callaghan*[19] Pincus JA and Thomas J of the Queensland Court of Appeal referred to the English case of *Higgins*,[20] and held:

> Similarly if 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.

22. The decision in *Callaghan* was in the context of a "uniformly self-serving and inadmissible" statement and, although the Court stated its view on the prosecutor's obligation to tender such statements, it was not a ground of appeal that fell to be decided. It is submitted that the principle referred to in *Callaghan* has not clearly been extended to mixed statements in Queensland. In the more recent case of *R v Reynolds*, the Court of Appeal, after discussing the obligations of the prosecutor in the context of ensuring a fair presentation of the prosecution case with regard to mixed statements, held that the statement was not a mixed statement and did not require adduction for a fair presentation of the prosecution case. Further, the defence had not requested the prosecution to adduce the interview.[21] The Court of Appeal confined the analysis by Hayne J in *Mahmood v Western Australia*[22] to the prosecutor's duty to the requirement to lead the entire statement.

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[17] *Soma* (2003) 212 CLR 299 [30]-[31].
[18] *R v Rymer* (2005) 156 A Crim R 84 [59] per Grove J.
[19] *R v Callaghan* [1994] 2 Qd R 300,304.
[20] *R v Higgins* (1829) 3 *Car & P* 603, 604; 172 ER 565, 565 per Parke J.
[21] See eg *Reynolds* [2015] QCA 111 per Carmody CJ at [71]-[81]; and per Gotterson JJA at [100]-[104]; *R v Bartzis* [2012] QCA 225 did not concern a mixed statement per Gotterson JA at [31]-[32]; *Middleton v The Queen* (1998) 19 WAR 179
[22] *Mahmood v Western Australia* (2008) 232 CLR 397 at [39]-[41].

23. In *R v Manning* the Queensland Court of Appeal in considering the prosecution's failure to call relevant witnesses held more broadly:[23]

> Once it is seen that the evidence was material and not unreliable, the prosecution was obliged to lead that evidence because "a basic requirement of the adversary system of criminal justice is that the prosecution, representing the State, must act 'with fairness and detachment and always with the objectives of establishing the *whole* truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one'".[24] This is part of [the] prosecutor's function ultimately to assist in the attainment of justice between the Crown and the accused.[25] A prosecutor is not relieved of that responsibility by the fact that the accused could elect to call that evidence. Rather, 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. Therefore, the fact that the defence was able to call the witness as a defence witness does not overcome the miscarriage of justice which occurs as a result of the Crown's refusal to calla material witness.[26]

24. In Western Australia, the prevailing view is that there is no obligation on a prosecutor to adduce mixed statements. However, care must be taken in identifying the principle. A review of the Court of Criminal Appeal authorities in Western Australia (including *Middleton v The Queen,*[27] *Willis v The Queen,*[28], *Peck v Western Australia,*[29] *R v Bartzis*[30] and *R v SCD*[31]) reveals that the Court, although often expressing a clear view, did not decide those cases on the prosecutor's obligation to adduce a mixed statement. Most recently, in *Ritchie v Western Australia*[32], the Court reviewed those authorities, also with reference to *Barry v Police*[33] in South Australia, and reaffirmed the position that it was a matter for the prosecution to determine whether or not it wishes to adduce as part of its case an admissible out of court mixed statement made by an accused, contrary to the practice in Victoria.[34] Although the Court was clear in its opinion, once again that matter was decided on a different issue.

South Australia

25. In South Australia the Court of Criminal Appeal has observed that "[t]he practice in [South Australia] has been for [a] prosecutor to tender at trial as part of the Crown case statements

[23] *R v Manning* [2017] QCA 23 at [27].
[24] *Dyers* (2002) 210 CLR 285 at [11].
[25] *Whitehorn* (1983) 152 CLR 657 at 675.
[26] *R* v Jensen (2009) 23 VR 591 at [78].
[27] Middleton (1998) 19 WAR 179 at 188, 202.
[28] Willis v The Queen (2001) 25 WAR 217.
[29] Peck v Western Australia [2005] WASCA 20.
[30] R v Bartzis [2012] ACA 225.
[31] R v SCD [2013] QCA 352.
[32] *Ritchie* (2016) 260 A Crim R 367 at [39], [46].
[33] *Barry* (2009) 197 A Crim R 445.
[34] *Ritchie* (2016) 260 A Crim R 367 at [39], [46].

made by the accused to police even if exculpatory".[35] In *Barry v Police*[36], Kourakis J held that, "self-serving statements are admissible, and have probative value, only when introduced as part of the "Crown package"."[37] Kourakis J held that there was no particular duty on the prosecutor to adduce mixed statements in accordance with duties of prosecutorial fairness. He held in the alternative that there were also good reasons consistent with the approach in NSW and England for the prosecutor to refuse to lead the evidence in circumstances where the interview was a mechanism used to deliver a "contrived hearsay case".[38]

26. More recently, Peek J in *R v Helps*[39] addressed the question of the discretion to tender a mixed statement by the prosecutor in the context of the overarching duty of the prosecution to present the case fairly and completely. In a comprehensive survey of the position across common law jurisdictions, Peek J decided, in substance, that unless there was good reason not to lead a mixed statement record of interview (such as a contrived hearsay case) then there was a risk that a miscarriage would follow. In his view, upholding the ground of appeal, the failure of the prosecutor to tender the mixed statement resulted in the appellant not having a fair trial.[40] Peek J specifically disagreed with the analysis of Kourakis J in *Barry*. Although Lovell J did not decide the issue, he did observe, in relation to Hayne J's passages in *Mahmood*:

> This is also consistent with the prosecutor's duty as explained in *R v Apostilides* although the High Court in that case was dealing only with competent and compellable witnesses.[41]

Victoria and NSW – Mixed and Self-serving Statements

27. In Victoria, the position is that as a matter of fairness the Crown ordinarily tenders statements made by the accused to police even if wholly exculpatory. This confirms the exception to the rule that self-serving statements will be admissible where they form part of a mixed statement made before the accused is charged and is in accordance with the prosecutorial duty to lead all relevant evidence.[42]

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[35] *R v Golding and Edwards* (2008) 100 SASR 216, [54] per Gray J.
[36] *Barry* (2009) 197 A Crim R 445.
[37] *Barry* (2009) 197 A Crim R 445, [67] per Kourakis J; *R v Weetra* (2010) 108 SASR 252, [61]; *Spence v Demasi* (1988) 48 SASR 536 at pp 540-41 per Cox J.
[38] *Barry* (2009) 197 A Crim R 445 at [70].
[39] *R v Helps* (2016) 126 SASR 486
[40] Ibid per Peek J at [221]-[367]. It is important to note that the other members of the Court, Kelly and Lovell JJ did not address this issue in detail as did Peek J and Peek J's analysis cannot be regarded as part of the *ratio decidendi* of the Court, particularly as this ground of appeal was not the basis for allowing the appeal. Further, the judgment of Kelly J recognized that there were two distinct positions and favoured the approach by Kourakis J in *Barry*.
[41] Ibid per Lovell J at [388].
[42] *Rudd v The Queen* (2009) 23 VR 444, 453-58 [42]-[62] per Redlich JA; *R v Su, Katsuno, Asami and Honda* [1997] 1 VR1, 64 per Winneke, Hayne JA and Southwell AJA.

28. In New South Wales the authorities reflect the same general principle of fairness or fair play. In *R v Rymer*[43] Grove J (with whom Barr and Latham JJ agreed) concluded that the Crown should have led in that case a number of wholly exculpatory statements made by the accused when confronted by police with the allegations some years after the date of the alleged offences. The obligation to introduce the exculpatory evidence was said to comply with the rule of fair play essential to the proper administration of justice. His Honour held:[44]

> Since the abolition of the entitlement of an accused at trial to make an unsworn statement to the jury, it was acknowledged (and confirmed by observation of cases which pass through this Court) that it is a not infrequent occurrence for an accused person, after tender by the Crown of the content of exculpatory material usually in the form now of a video taped interview, to invite the jury through counsel to consider that material as a response to the Crown case and a basis for a verdict of not guilty.
>
> It would be, to say the least, unsatisfactory for that course to be open to some accused but not to others as a matter of mere happenstance. I am not implying that prosecutors do not behave responsibly but if the tender of such material is done as a matter of unfettered discretion it would be expected that some prosecutors would tender it and others would not.
>
> A danger which would need to be guarded against would be that contemplated in *Pearce* that an accused may bring forward a contrived "hearsay case".
>
> Nevertheless, it is submitted on behalf of the appellant that the Crown should have called the exculpatory evidence as "a rule of fair play essential to the proper administration of justice". It would certainly lead to unfairness if evidence of this type were tendered or not as a result of arbitrary selection on the part of a prosecutor. I consider that, absent some particular reason for refraining from doing so, such evidence should be put before the Court by the prosecution.

29. The practice at common law was described by Hunt CJ at CL (Carruthers and Bruce JJ agreeing) in *R v Keevers*[45]:

> The fact that the investigating police officers had put the prosecution's versions of the facts to the accused, and had given him the opportunity to answer them and to give his own account of the events in question, was relevant to the fairness of their conduct ... As was said by this Court in an earlier case, it has long been common practice to adduce evidence of such conversations because, if it were not given, the jury would be left to speculate as to whether the accused had given any account of his actions when first challenged by police: *R v Astill* (1992) 63 A Crim R 148.

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[43] *Rymer* (2005) 156 A Crim R 84. See also *R v Familic* (1994) 75 A Crim R 229, 234 per Badgery-Parker J; *R v Astill* (1992) 63 A Crim R 148; and *R v Reeves* (1992) 29 NSWLR 109.

[44] *Rymer* (2005) 156 A Crim R 84 at [56]-[59]. It is also submitted on this appeal that the admissibility issues affected by the amendments to the legislation are not relevant to the general duties upon the prosecutor.

[45] *R v Keevers* unreported, Court of Criminal Appeal, NSW, No 60732 of 1993, 26 July 1994

30. In *Mahmood,*[46] the central issue before the High Court was the failure of the Crown to tender all the statements by the accused, particularly those in a re-enactment. In addition, however, supplementary submissions were requested by the Court on the prosecutor's duty to tender the re-enactment video. Hayne J was the only member of the Court who addressed this issue. His Honour held in relation to the broader obligation:[47]

> 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".[48] 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. 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."[49]
>
> ....
>
> 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*[50] and three Western Australian cases in which *Callaghan* has been considered. It was accepted in *Callaghan*[51] that the interview, of which the accused had sought to tender evidence at his trial, "did not contain any inculpating statements ..." It was in this context that Pincus JA and Thomas J said in *Callaghan:*
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>> [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 weigh, 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.
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> And yet in Western Australia, *Callaghan* has been said 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

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[46] *Mahmood* (2008) 232 CLR 397.

[47] Ibid at [39] – [41]. As Blokland J in dissent in this matter in the Court of Criminal Appeal NT observed, in a different trial context, Hayne J was a member of the Victorian Court of Appeal in *Su & Ors* (1997) 1 VR 1 where, at 69, with Winneke P and Southwell AJA, it was said of exculpatory statements, "Such material is traditionally led by the Crown, whether incriminating or not, both as a matter of fairness and to show the "first opportunity" response...". Her Honour also observed that Hayne J "...drew upon established authorities relevant to prosecutorial duties in support of the general proposition that the Crown call all available evidence to give a complete account of the events": *Singh v The Queen* [2019] NTCCA 8 at [77].

[48] *Whitehorn* (1983) 152 CLR 657, 674 per Dawson J.

[49] *Jack v Smail* (1905) 2 CLR 684, 695.

[50] *Callaghan* [1994] 2 Qd R 300.

[51] Ibid at 304.

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.

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.

31. It is submitted that the principles enunciated in the judgment of Hayne J in *Mahmood* reflect the broader common law position in Australia with regard to prosecutorial duty and the exercise of the discretion with regard to the tender of statements made by an accused.[52] It is submitted that a prosecutor in possession of an accused person's admissions should ordinarily adduce them and the statements by the accused giving context to them, rather than confining such tender to cases where it is forensically necessary to advance guilt. It should not be open to a prosecutor without good reason to decline to adduce admissions, whether because they are not sufficiently inculpatory or because the overall flavour of the mixed statement to which they belong is exculpatory or for some other forensic purpose. Such an approach does not sit easily with the detached role of prosecution counsel.

Part VII: Orders Sought

32. The appellant seeks the following orders: That the appeal be allowed, the orders of the Northern Territory Court of Criminal Appeal be set aside and in lieu thereof order that the appeal against conviction be allowed and a new trial held.

[52] See also *Soma* (2003) 212 CLR 299, [30]-[31].

Part VIII: Time Estimate

20. It is estimated that the presentation of the appellant's oral argument will require 1 hour.

Dated: 4 October 2019

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

NO. D16 of 2019

HAROLD JAMES SINGH

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. *Criminal Code Act 1983* (NT)

Statutory Instruments

1. *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW)

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

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