IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D16 of 2019

BETWEEN:

Harold James Singh
Appellant

and

The Queen
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II:

2. With regards to the threshold issue, the trial judge and the CCA held that the electronic record of interview ("EROI") was admissible, **(AFB: 152-153; CAB 95 and 118-124)**.[1]

3. There could have been no objection on the grounds of admissibility had the prosecution sought to adduce the EROI **(AFB: 169-208)** because it contains:

   (i) evidence of admissions **(s 81(1) *ENULA*)**;[2] and
   (ii) representations made at the time which were reasonably necessary to refer to understand the admission **(s 81(2) *ENULA*)**.[3]

4. The determinative issue in the CCA was the nature of a prosecutor's duty to lead an admissible EROI. Accepting the premise that the EROI was admissible, that also is the issue in this appeal.

5. The prosecution as part of its obligation to present its case fully and fairly must adduce all relevant evidence both favourable and unfavourable to the accused unless there is

[1] Although the whole Court held the interview was admissible, the approach and analysis by Blokland J (and Hiley J at trial) is to be preferred because it adheres strictly to admissibility under *ENULA* rather than analysis in common law terms which the majority in the CCA largely adopted. Both routes lead to admission..
[2] CAB 47 & 118-9
[3] CAB 47 & 118-9

some valid reason for not doing so, **AS[10]**.[4] These principles are reflected in the professional guidelines, **AS[11]-[13].**

6. It follows that admissible evidence should be adduced unless it is excluded by one of the Court's statutory exercises of discretion, **(ss135-138 *ENULA*)** or alternatively, a trial prosecutor makes a judgment that there is a proper and identifiable basis for not adducing the evidence, **AS[10].**[5]

7. The concern with the analysis by the CCA is that the principle has been read down in the case of an EROI so that the bounds of the discretion are limited, in substance, only as to whether the prosecution needs the admissions to advance the prosecution case. This also is the tenor of ***Barry's*** case upon which the majority relied, **(CAB 90-94).**

8. Paragraph **[31]** of *R v Soma* does not establish the proposition that the discretion to adduce a record of interview is unfettered, **R[23].** The phrase, *" ...if it wished to rely on them at the respondent's trial.."* is taken out of context. The general proposition as per ***Richardson*** and ***Apostilides*** is confirmed in the same paragraph. See Callinan J also in ***Soma*** at **[113].**

9. The analysis of Hayne J in ***Mahmood*** supports the proposition that ordinarily and consistent with the prosecutor's obligations to ensure a fair presentation of the prosecution case, the prosecutor will be required to lead an admissible record of interview unless there is good reason not to do so. As Blokland J observed in the Court of Criminal Appeal, his analysis:

> "...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 events". **CAB 103-106**

10. The majority of the Court of Criminal Appeal relied heavily on the analysis by Kourakis J in *Barry*. Although Kourakis J did refer to *Mahmood,* he did not cite or address *Whitehorn, Richardson, Apostilides* or *Soma.* Nor did the Court refer to *Golding and Edwards* at **[53]-[54]** from the South Australian Court of Criminal Appeal 18 months earlier. The CCA(SA) referred to *Mahmood* and confirmed the practice of prosecutors in South Australia to tender statements made to the police, even if exculpatory.

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[4] *Whitehorn* per Deane J at 663-665**(JBA Part C 595-7);** *Apostilides* per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ at 576 **(JBA Part C 509);** *Soma* per Gleeson CJ, Gummow, Kirby and Hayne JJ at [31] and Callinan J at [113]**(JBA Part C 522 & 549)** *Dyers* per Callinan J at [117-8] **(JBA Part C 382);** *Mahmood* per Hayne J at [39]-[41] **(JBA Part C 456-7)**

[5] The respondent argues that the duty as enunciated in *Apostilides* is restricted to material witnesses, **R[34]** but cf **R[14].** Properly analysed this distinction is misconceived and inconsistent with the rationale for the principle, **Rep[9].**

11. In the context of a record of interview which contains admissions and representations referable to the admissions, the prosecutor's decision whether to adduce a record of interview (as with any admissible evidence) must be determined on a case by case basis.

12. Although the obligation to adduce admissible evidence is not absolute, there must be identifiable circumstances justifying the decision not to adduce by reference to the overriding interests of justice in the context of a prosecutor's special role, **AS[10]** and ***Apostilides*** at **p576.2 (JBA Part C 509); *Whitehorn* p663.8 (JBA Part C 595).** Some examples of a sound refusal to adduce might include:

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(i) A contrived or choreographed EROI, eg ***Mule* Rep[6] , *Barry v Police*** at **[69];**
(ii) The interview amounts to a scurrilous attack on the character of one or more of the witnesses or the prosecution;
(iii) The interview is abjectly false or fanciful;
(iv) Although strictly admissible, the prosecutor makes a judgment that it would be unfair to the accused; and
(v) By agreement.

13. The prosecutions reasons for not adducing the EROI at trial were:

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(i) The interview was not admissible, **(AFB 95.5, 98.10, 102.6)**
(ii) There was no unfairness if it wasn't adduced, it is a matter for the Crown as to what evidence it calls and the accused can give evidence **(AFB 99.5, 102.6, 111.5)**
(iii) The evidence would go through untested and that would be unfair to the Crown, **(AFB 100.9, 102.10)**

14. There was a real risk that the appellant was deprived of a reasonable chance of an acquittal because the respondent chose not to lead the interview without sufficient
30 reason depriving the appellant of an important evidential foundation for his defence. Not only are the explanations important but the manner of his engagement with the interviewer provides material which is consistent with his borderline range of cognitive function not inconsistent with a lack of awareness, **(CAB 31).**

15. In the CCA, the respondent conceded that if the prosecutorial discretion miscarried, then there would have been a miscarriage of justice, **CAB 130.**

Dated: 16 March 2020

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