HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

VAN DUNG NGUYEN APPELLANT

AND

THE QUEEN RESPONDENT

Nguyen v The Queen
[2020] HCA 23
Date of Hearing: 17 March 2020
Date of Judgment: 30 June 2020
D15/2019

ORDER

1. *Appeal allowed.*

2. *Set aside the answer given on 29 May 2019 by the Full Court of the Supreme Court of the Northern Territory to Question 2 of the questions referred to that Court and in lieu thereof order that the answer to that question be "Yes".*

On appeal from the Supreme Court of the Northern Territory

Representation

M L Abbott QC with C Jacobi and A E Abayasekara for the appellant (instructed by Northern Territory Legal Aid Commission)

D J Morters SC with N M Loudon for the respondent (instructed by Director of Public Prosecutions (NT))

North Australian Aboriginal Justice Agency appearing as amicus curiae, limited to its written submissions

CATCHWORDS

Nguyen v The Queen

Evidence – Criminal trial – Mixed statements – Where appellant interviewed by police prior to being charged – Where appellant made inculpatory and exculpatory statements during interview ("mixed statements") – Where recorded interview relevant and admissible – Where recorded interview not tendered by prosecution at trial – Whether prosecution's obligation to put case fully and fairly requires tender of records of interview containing mixed statements.

Words and phrases – "admissibility of mixed statements", "admissions", "all available, cogent and admissible evidence", "duty of fairness", "ethical practice", "fair trial", "fully and fairly", "inculpatory and exculpatory statements", "miscarriage of justice", "mixed record of interview", "mixed statement", "obligation to tender", "prosecutorial discretion", "prosecutorial duty", "record of interview", "rule of practice", "speculation by the jury", "tactical decision".

Evidence (National Uniform Legislation) Act 2011 (NT), ss 59(1), 81, 190.

1 KIEFEL CJ, BELL, GAGELER, KEANE AND GORDON JJ. The appellant was charged on indictment with offences against the *Criminal Code* (NT) and stood trial before a jury in the Supreme Court of the Northern Territory. The appellant had been interviewed by the police about the offences in question prior to being charged. The interview was recorded electronically.

2 The recorded interview contained statements by the appellant in the nature of admissions together with exculpatory statements. The appellant offered an explanation for his conduct which could be taken to be a claim of self-defence. Records of this kind, which contain both inculpatory and exculpatory statements, are commonly called "mixed statements"[1].

3 The recorded interview was relevant and admissible. The prosecution did not tender the recorded interview as part of the Crown case, although it was not suggested that the statements made by the appellant were demonstrably untrue or unreliable. The essential reason for the refusal to tender the statements into evidence was that they would not assist the Crown case.

4 The appellant did not give evidence at trial. His retrial[2] was stayed whilst questions which there arose were referred to a Full Court of the Supreme Court of the Northern Territory for consideration.

5 The principal issue concerned the discretion of a prosecutor with respect to the tender of evidence. More particularly the question for the Full Court was whether the prosecution was obliged to tender the recorded interview containing the mixed statements. The Court answered that question in the negative[3]. The appellant contends that, ordinarily speaking, the prosecution's obligation of fairness in the conduct of a trial would require its tender unless there were good reasons not to do so.

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1 Malek (ed), *Phipson on Evidence*, 19th ed (2018) at [36-33].

2 See below at [11].

3 *R v Nguyen* (2019) 345 FLR 40 at 46 [24] per Kelly and Barr JJ, 54 [56] per Blokland J.

The evidence and the interview

6 The appellant was charged with one count of unlawfully causing serious harm to another and one count of assault aggravated by the use of an offensive weapon[4]. He pleaded not guilty to both counts. The Crown case on count 1 was that he either threw a bottle of beer at the victim or hit the victim on the head with it, causing serious harm; its case on count 2 was that he threw a bottle of beer at a second victim.

7 The evidence from Crown witnesses was that the appellant and the victims were at a party with others in a house where alcohol was consumed. The first victim and the appellant had an exchange of words with raised voices when the appellant did not follow the rules of a singing game and refused the victim's requests to do so. One witness said they afterwards shook hands. After the game the appellant and the first victim were outside. The victim said that the appellant followed him outside, approached him with something in his hand and hit him on the top of his head.

8 A witness said that he heard one of the group yell out that there was fighting outside; another heard the same person say that the appellant and the first victim were fighting. The person who had yelled out said that he saw, through a window of the house, the appellant hit someone with a bottle and that person fall to the ground. The witnesses saw the victim enter the house bleeding from his head injuries. The second victim was said to have been one of two people who ran after the appellant. The appellant then threw a bottle of beer at him.

9 The appellant was administered a special caution prior to his interview, which was conducted with the assistance of an interpreter. The appellant was asked to explain the caution in his own words. He said: "Whatever you ask and whatever I answer will be taken as evidence in the court."

10 In the interview the appellant admitted throwing the bottles but said, in effect, that he did so in self-defence. He said that while he was at the party singing the first victim became angry towards him. They exchanged words. Five of those present went outside to smoke; three showed anger towards him and the appellant thought they wanted to hit him. Two of them blocked the door to the house. The appellant took two bottles of beer and threatened to throw them if they hit him. The first victim moved forward. The appellant said he had no choice but to throw the bottle of beer at him for otherwise he would have been hit. When he threw the

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4 *Criminal Code* (NT), s 188(1) and (2)(m).

bottle, he was at a distance of two to three metres from the victim, who was struck on the head. The appellant then ran outside to the road. When others followed he threw the other bottle at them as a warning.

The proceedings below

11 At the appellant's first trial the prosecution played the recorded interview as part of its case. The jury were unable to reach a verdict. Before the commencement of the second trial the prosecutor advised the Court that the Crown would not tender the recorded interview. The trial judge asked if that was because the prosecutor considered the Crown had "a better chance of winning" without the recorded interview, to which the prosecutor responded: "To be blunt, your Honour, yes it's a tactical decision." He said that if the exculpatory statements were given in evidence the appellant would not be subject to cross-examination on that account. He pointed out that the appellant could give evidence about the matters in the record of interview if he chose to do so.

12 On an application to stay the trial, defence counsel argued that the recorded interview was properly characterised as a mixed statement and was admissible in the Crown case, and that in fairness the Crown should tender it. The prosecutor disputed that the interview was a mixed statement and asserted an absolute discretion to decide whether to adduce it. The trial judge referred two questions to the Full Court[5]:

> "Question 1: Is the recorded interview ... admissible in the Crown case?
>
> Question 2: Is the Crown obliged to tender the recorded interview?"

13 A Court of Criminal Appeal of the Supreme Court of the Northern Territory constituted by the same judges (Kelly, Blokland and Barr JJ) had previously considered essentially the same question regarding the Crown's obligation in *Singh v The Queen*[6]. There on the first day of the trial the prosecutor advised the trial judge that she did not anticipate that the Crown would lead evidence of the record of interview. The prosecutor gave as her reason for not tendering the record that it would go to the jury untested, which would not be fair to the Crown. Defence counsel protested but the trial judge ruled that he was unable to compel the Crown

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5 *Supreme Court Act 1979* (NT), s 21.

6 (2019) 344 FLR 137.

to tender the record in its case. An application by defence counsel on the second day of the trial to tender the record of interview in its entirety was refused on the basis that an exculpatory or self-serving statement can only be introduced as an exception to the hearsay rule when it is tendered with admissions relied on by the Crown as part of its case[7].

14 Mr Singh appealed from his conviction on the ground that the decision of the Crown not to tender the record of interview deprived him of a reasonable chance of acquittal. The Court of Criminal Appeal by a majority (Kelly and Barr JJ, Blokland J dissenting) dismissed the appeal. It was the view of the majority[8] that it is a matter for the prosecutor to decide whether to adduce evidence of admissions. If the evidence is not called it is then a matter for an appeal court to determine whether the accused had been denied a fair trial[9]. An appellant cannot discharge the onus of proving unfairness merely by establishing that an exculpatory account was not put before the jury or that he was obliged to give evidence in order to place his version of events before the jury[10].

15 The majority in *Singh* accepted as uncontroversial[11] that if the prosecution wishes to rely on admissions by an accused in a record of interview or other statement, it is obliged to tender the whole of a mixed statement[12]. Kelly J (Barr J agreeing) considered that there is no general principle that a prosecutor must, as a matter of fairness, tender either exculpatory or mixed out-of-court statements by an accused[13].

16 The Full Court answered Question 1: "Yes". Kelly and Barr JJ added to their answer that "the record of interview would be admissible in evidence at the

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7 *R v Singh* (2018) 328 FLR 427 at 428 [4].

8 *Singh v The Queen* (2019) 344 FLR 137 at 141 [12], 166 [68].

9 *Singh v The Queen* (2019) 344 FLR 137 at 149 [25], 166 [68].

10 *Singh v The Queen* (2019) 344 FLR 137 at 166 [68].

11 *Singh v The Queen* (2019) 344 FLR 137 at 141 [13].

12 See also *Singh v The Queen* (2019) 344 FLR 137 at 177-178 [106] per Blokland J.

13 *Singh v The Queen* (2019) 344 FLR 137 at 165-166 [66].

instance of the Crown. The exculpatory parts of the interview are not admissible at the instance of the accused." Their Honours answered Question 2: "No".

17 In her reasons Blokland J accepted that, because of the view of the majority in *Singh*, the answer to Question 2 must be in the negative, but considered that there remained the question whether the trial could be perceived to be fair when evidence of this kind is withheld from the jury. In that regard, her Honour observed that the appellant was given to understand at the interview that what he said would be put before the jury. Her Honour suggested that the prosecutor reconsider the question of tender of the recorded interview[14].

18 In relation to the question as to whether the prosecution was obliged to tender the recorded interview, Kelly and Barr JJ reiterated the view which their Honours had expressed in *Singh* that there is no general rule or principle that the prosecution's duty of fairness requires it to tender a record of interview simply because it contains admissible material. Fundamentally it is a matter for the prosecution to determine what witnesses will be called and what evidence will be adduced in the Crown case. A prosecutor may take into account a number of factors, including whether the evidence of a particular witness is essential to the Crown case; whether the witness is credible; and whether it is in the interests of justice for particular evidence to be subject to cross-examination by the Crown[15].

The admissibility of mixed statements

19 Chapter 3 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("the Uniform Evidence Act"), which was adopted in the Northern Territory, is concerned with the admissibility of evidence. Section 56(1), which appears in Pt 3.1, states the primary rule that evidence that is relevant in a proceeding is admissible in the proceeding except as otherwise provided by that Act. Section 59(1), which appears in Pt 3.2, states the hearsay rule in terms to the effect that evidence of a previous, out-of-court, statement made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert.

20 Section 81(1), which appears in Pt 3.4, provides that the hearsay rule does not apply to evidence of an admission. Section 81(2) provides for a further

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14 *R v Nguyen* (2019) 345 FLR 40 at 54 [56].

15 *R v Nguyen* (2019) 345 FLR 40 at 44 [16].

exception to the hearsay rule. The hearsay rule does not apply to evidence of a previous statement:

> "(a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
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> (b) to which it is reasonably necessary to refer in order to understand the admission."

21 It is through the combined operation of s 81(1) and (2) that the exculpatory aspects of a mixed statement may be admissible under the Uniform Evidence Act. Once admitted they are evidence of the truth of what is there stated, subject to questions of weight. There are of course other means by which a record of interview may be admissible but it is not necessary to canvass them.

22 It is to be expected that exculpatory statements made in a record of interview which also contains admissions will usually satisfy the requirements of s 81(2)(a) and (b). In the event that there is some doubt about the connection between an exculpatory statement and an admission[16], it should be borne in mind that what is to be made of a mixed statement is a matter for the jury, which might attach different degrees of credit to different parts of it[17]. It has been observed[18] that, under the Uniform Evidence Acts, provided relevant evidence is rationally capable of acceptance, questions of credibility and reliability are to be seen as squarely within the province of the jury. Considerations of this kind suggest that no narrow approach should be taken to the relationship between exculpatory statements and admissions.

23 At common law exculpatory or self-serving elements of a mixed statement were also received into evidence as an exception to the hearsay rule. The exception has been said to trace back to 19th century authorities[19]. The anomalous position

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16 See also [44] below.

17 Malek (ed), *Phipson on Evidence*, 19th ed (2018) at [36-33].

18 *R v Bauer (a pseudonym)* (2018) 92 ALJR 846 at 866 [70]; 359 ALR 359 at 382.

19 Malek (ed), *Phipson on Evidence*, 19th ed (2018) at [36-35]; Gooderson, "Previous Consistent Statements" (1968) 26 *Cambridge Law Journal* 64 at 66.

which formerly prevailed at common law[20], by which exculpatory statements were said to be something less than evidence of their truth, has been resolved[21].

24 Howsoever mixed statements come to be admitted into evidence they are invariably subject to a direction to the jury that they may give less weight to exculpatory assertions than to admissions and that it is for them to decide what weight is to be given to a particular statement[22]. The rationale for the direction is that exculpatory statements are not statements made against interest, are not made on oath and are not subject to cross-examination.

25 The admissibility of mixed statements by statute facilitates their reception as part of the Crown case. It follows from the terms of s 81(2) that any exculpatory evidence connected with an admission can only be admissible when an admission is to be relied upon, and that will invariably be by the Crown. But the Uniform Evidence Act and its provisions for admissibility do not provide an answer to the question which arises in this matter, namely whether the prosecution may be obliged to tender a mixed statement.

Practice and principle

26 The conduct of a criminal trial is subject to practices and procedures[23] which are not to be found in statutes such as the Uniform Evidence Act and the *Criminal Code* (NT). These practices and procedures may be informed by principles or rules which are regarded as fundamental to the conduct of a criminal trial. One such fundamental rule is that it is for the prosecution to decide which witnesses are to be called and what evidence is necessary for the proper presentation of the case for the Crown[24]. Another fundamental principle affecting the conduct of a trial is that the prosecution must put its case both fully and fairly

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20 *Pearce* (1979) 69 Cr App R 365 at 369-370.

21 *Duncan* (1981) 73 Cr App R 359 at 365; *R v Sharp* [1988] 1 WLR 7 at 15; [1988] 1 All ER 65 at 71; *R v Aziz* [1996] AC 41.

22 *Mule v The Queen* (2005) 79 ALJR 1573 at 1580 [25]; 221 ALR 85 at 94.

23 *R v Soma* (2003) 212 CLR 299 at 308 [26]-[27].

24 See, eg, *Richardson v The Queen* (1974) 131 CLR 116 at 119; *R v Apostilides* (1984) 154 CLR 563 at 575; *Dyers v The Queen* (2002) 210 CLR 285 at 295 [17].

before the jury[25]. The broader concern that trials be conducted fairly has informed many aspects of the rules of evidence both at common law and in the Uniform Evidence Acts[26] as well as aspects of practice and procedure in the context of a trial.

27 It is well settled that if the prosecution seeks to rely upon an out-of-court admission or other incriminating statement the whole statement made by the accused must be put before the jury including those hearsay statements by which the accused tried to exculpate himself or herself. This practice is not to be confused with questions of admissibility, although the two may share a common rationale. The practice may be understood to reflect the fundamental obligation referred to above, that the prosecution put its case fully and fairly. The prosecution may not "pick and choose" between statements which it says bear out its case and those which do not[27].

Differences of opinion and practice

28 It has been observed that there has been a divergence of opinion in Australian courts as to whether the prosecution has an obligation to tender mixed statements[28]. In *Ritchie v Western Australia*[29], McLure P observed that there was a line of authority in that State that it is for the prosecution to determine whether or not it wishes to adduce an admissible out-of-court statement made by an accused as part of its case. Her Honour said that in *R v Callaghan*[30] the Queensland Court

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25 *R v Soma* (2003) 212 CLR 299 at 308 [27].

26 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102 (2005) at 352 [10.117].

27 *Mahmood v Western Australia* (2008) 232 CLR 397 at 408 [39], referring to *Jack v Smail* (1905) 2 CLR 684 at 695.

28 *Barry v Police (SA)* (2009) 197 A Crim R 445 at 456 [44]; see also *Ritchie v Western Australia* (2016) 260 A Crim R 367 at 377 [46].

29 (2016) 260 A Crim R 367 at 374-375 [39].

30 [1994] 2 Qd R 300.

of Appeal had expressed a similar view. It suffices to say that that view has been challenged[31].

29 In *Barry v Police (SA)*[32], Kourakis J concluded that the prosecution was under no obligation to tender a mixed statement. This is a view with which not all judges of the Supreme Court of South Australia have agreed. In *R v Helps*[33], Peek J considered that the situation was governed by the principle that it is the duty of the prosecution to present the Crown case fairly and completely. No mention was made in *Barry* of the decision of the South Australian Court of Criminal Appeal in *R v Golding and Edwards*[34], where it was observed that it had been the practice in South Australia for the prosecutor to tender statements made to police even if they were exculpatory. More recently, it has been observed that the practice may have changed over time[35].

30 Some years ago it was noted by the Victorian Court of Appeal[36] that evidence in the nature of self-serving statements was traditionally led by the Crown, whether it was also incriminating or not, both as a matter of fairness and to show the response made by the accused to the allegations made against them when they were given the first opportunity to do so. The practice has also been explained as consistent with the duty of the prosecution to give the jury a complete and fair understanding of the events on which the prosecution relies[37].

31 A line of authority in New South Wales refers to the common practice of the prosecution adducing evidence of conversations with police containing exculpatory statements. A justification for the practice is said to be that otherwise

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31 *Mahmood v Western Australia* (2008) 232 CLR 397 at 408-409 [41].

32 (2009) 197 A Crim R 445 at 463 [70].

33 (2016) 126 SASR 486 at 555 [336]-[337].

34 (2008) 100 SASR 216 at 236 [54]; see also *Spence v Demasi* (1988) 48 SASR 536 at 540; *R v H, ML* [2006] SASC 240 at [25]-[27].

35 *R v Helps* (2016) 126 SASR 486 at 493 [25].

36 *R v Su* [1997] 1 VR 1 at 64.

37 *R v Rudd* (2009) 23 VR 444 at 458 [55]-[56], [59].

the jury would be left to speculate as to whether the accused had given any account of their actions when first challenged by the police[38].

32 Whatever be the difference in prosecutorial practices or the views of judges and intermediate appellate courts of the States and Territories concerning mixed statements, there can be no question about the obligation of the prosecution to present its case fully and fairly. It is an obligation which informs the rules of conduct of prosecutors which apply to members of the legal profession in the Northern Territory[39]. It is an obligation which has been reiterated in a number of decisions of this Court as a fundamental principle. And it is that fundamental principle which resolves the question on this appeal.

Prosecutorial discretion and fairness

33 In *Richardson v The Queen*[40] it was pointed out that any discussion of the role of a Crown prosecutor must commence with the fundamental proposition, noted above[41], that it is for the prosecutor to determine what evidence will be called and how the case for the Crown will be presented. The Court went on to say that the prosecution also has the responsibility of ensuring that the Crown case is presented with fairness to the accused.

34 In *Richardson* the Court acknowledged that there may be many factors for the prosecution to take into account regarding evidence, including whether it is credible and whether it is in the interests of justice that it be tendered. Importantly,

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38 *Familic* (1994) 75 A Crim R 229 at 234; *R v Keevers* (unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 26 July 1994) at 7, both quoting *R v Astill* (unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 17 July 1992).

39 Northern Territory Bar Association, Barristers' Conduct Rules, rr 62, 66B(a)-(b); Law Society Northern Territory, Rules of Professional Conduct and Practice, rr 17.46, 17.52(a)-(b); see also Northern Territory, Guidelines of the Director of Public Prosecutions, Guidelines 1, 14.

40 (1974) 131 CLR 116 at 119.

41 See above at [26].

the Court observed[42], it is in light of those factors that a prosecutor must determine the course "which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused". This, the Court said, is what is meant by prosecutorial "discretion".

35 The discretion is not reviewable[43]. The tender of evidence by the Crown cannot be compelled by a trial judge[44] although in practice a trial judge might suggest that the prosecutor reconsider a decision not to tender certain evidence. A trial judge might do so where it is foreseen that a failure to do so may result in a miscarriage of justice. Whilst the decision remains one for the prosecutor to make, the reality is that if the exercise of that discretion miscarries the accused might be denied a fair trial. In *Whitehorn v The Queen*[45] it was explained that because a failure to call evidence may result in a miscarriage of justice and a new trial it is possible to speak of a Crown prosecutor being bound, or under a duty, to call all available material witnesses. It is not to be understood as a duty owed to an accused. It forms part of the functions of a prosecutor.

36 It has been said that the concept of a fair trial cannot comprehensively or exhaustively be defined[46]. But there can be no doubt that fairness encompasses the presentation of all available, cogent and admissible evidence. In *Ziems v The Prothonotary of the Supreme Court of New South Wales*[47], Fullagar J observed the rule in criminal cases to be that "the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury". This statement was quoted with

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42 *Richardson v The Queen* (1974) 131 CLR 116 at 119.

43 *Richardson v The Queen* (1974) 131 CLR 116 at 119.

44 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674.

45 (1983) 152 CLR 657 at 674-675.

46 *Dietrich v The Queen* (1992) 177 CLR 292 at 300, 353.

47 (1957) 97 CLR 279 at 294, quoting *R v Harris* [1927] 2 KB 587 at 590.

approval by the Court in *Richardson*[48], where, as noted above[49], it was said that it was the responsibility of the prosecution to present the case for the Crown "conformably with the dictates of fairness to the accused". In *Whitehorn*[50] Dawson J said that "[a]ll available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based".

37 The respondent to this appeal sought to distinguish these and other cases on the basis that they concerned decisions whether to call material witnesses, the implication being that mixed inculpatory and exculpatory statements made by an accused when interviewed by police about an offence are not subject to the same or similar considerations. The simple answer to that submission is that what was said in cases such as *Richardson* and *Whitehorn* about the responsibilities of a prosecutor apply by analogy. They apply to the tender of all evidence which may properly and fairly inform the jury about the guilt or otherwise of the accused. As Dawson J said in *Whitehorn*[51], the prosecutorial obligation to call all witnesses is but an aspect of "the general obligation which is imposed upon a Crown Prosecutor to act fairly in the discharge of the function which he performs in a criminal trial. That function is ultimately to assist in the attainment of justice between the Crown and the accused."

38 So understood, the power or discretion of a prosecutor is not unconfined[52]. It is subject to the principle that, as a general rule, the prosecution must offer all its proofs during the progress of its case[53]. Thus in *R v Soma* it was said[54] that the prosecution could not, conformably with its obligations, tender part only of a tape recording of an interview with the accused to prove that he had made a prior inconsistent statement. If the prosecution case was to be put fully and fairly, it had

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48 *Richardson v The Queen* (1974) 131 CLR 116 at 119, 120-121.

49 See above at [34].

50 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674. See also *Mahmood v Western Australia* (2008) 232 CLR 397 at 408 [39], fn 33 and the authorities cited therein.

51 *Whitehorn v The Queen* (1983) 152 CLR 657 at 675.

52 *R v Soma* (2003) 212 CLR 299 at 309 [29].

53 *R v Soma* (2003) 212 CLR 299 at 311 [36].

54 (2003) 212 CLR 299 at 309-310 [30]-[31].

to adduce any admissible evidence of what the accused had said to the police when interviewed. To the extent that the recording of the interview contained exculpatory material, if the prosecution wished to rely on inculpatory material, it was "bound to take the good with the bad". The prosecutor's obligation to put the case fairly required the prosecutor to put the interview in evidence "unless there were some positive reason for not doing so".

39 What was said in *Soma* should be understood not just as a caution to prosecutors about being selective but rather as a reminder about the prosecutorial obligation to present all available, cogent and admissible evidence. Cases involving the omission of a vital witness may provide somewhat more stark examples of a failure properly to exercise that discretion than a mixed statement given by an accused in a police interview, but the latter may have just as important an impact on the outcome of the trial and the need for a new one. It was considerations of what is necessary for the proper presentation of the prosecution case which led Hayne J to say in *Mahmood v Western Australia*[55] that:

> "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."

40 The use of digital recordings together with statutory provisions aimed at ensuring that they have not been tampered with[56] have alleviated some concerns formerly held about methods of questioning suspects. The fact that suspects are invariably questioned by police is widely known, including to persons who may become members of a jury. The point made by the New South Wales Court of Criminal Appeal as explaining the practice of prosecutors to tender mixed statements is apposite[57]. To do otherwise would encourage juries to speculate as to whether the accused had given an account of their actions when first challenged by the police. The omission of that evidence may for this reason also work an unfairness to the accused.

41 There may be circumstances where it would be unfair to an accused to tender a record of interview, for example where the accused has refused to

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55 (2008) 232 CLR 397 at 409 [41].

56 *Police Administration Act 1978* (NT), Pt VII, Div 6A.

57 See above at [31].

comment. In such a circumstance the omission of that evidence is justified. But where an accused provides both inculpatory and exculpatory statements to investigating police officers, it is to be expected that the prosecutor will tender that evidence in the Crown case, unless there is good reason not to do so, if the prosecutorial duty is to be met.

42 Earlier in these reasons[58] it was explained that the question of the duty of a prosecutor is not to be confused with that of the admissibility of evidence of mixed statements. The provisions of the Uniform Evidence Act respecting exceptions to the hearsay rule facilitate the tender, but they do not determine whether the evidence should be tendered. There is another provision of the Uniform Evidence Act which permits the prosecutorial duty to be discharged where the provisions relating to the hearsay exceptions are not met.

43 It will be recalled that ss 59(1) and 81(1) and (2) appear respectively in Pts 3.2 and 3.4 of the Uniform Evidence Act. Section 190(1) provides that the parties to a proceeding may dispense with the application of provisions of those and other Parts in relation to particular evidence or generally. In criminal proceedings s 190(2) requires that an accused's consent must be the subject of legal advice. In a case where a record of interview does not meet the requirements of s 81(2) there seems no reason in principle why a prosecutor ought not properly resort to this provision with the consent of the accused.

Countervailing factors

44 What has been said about the obligations which attach to the power or discretion of a prosecutor with respect to the tender of evidence does not detract from the need for a prosecutor to consider factors about particular evidence which may properly influence the decision whether to call that evidence. There may be valid reasons not to do so. In *Richardson* the prosecutor had grounds for believing that the witness in question was not credible or truthful. The prosecution could not be expected to tender the evidence of a witness whose account has been carefully prepared or is otherwise contrived[59]. It would not be necessary for the full presentation of the prosecution case to adduce evidence which is no more than a scurrilous attack on the character of a witness or when it is clear to demonstration

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58 See above at [25].

59 *Pearce* (1979) 69 Cr App R 365 at 370.

that it is false, as where it is contradicted by other, objective evidence. But circumstances such as these may be expected to be rare. The decision whether to tender evidence should be guided in each case by the overriding interests of justice. It should only be where the reliability or credibility of the evidence is demonstrably lacking that the circumstances may be said to warrant a refusal, on the part of a prosecutor, to call such evidence[60].

45 A prosecutor acting in accordance with the responsibilities of their office is not to be expected to be detached or disinterested in the trial process[61]. A prosecutor is to be expected to act to high professional standards and therefore to be concerned about the presentation of evidence to the jury. It is to be expected that some forensic decisions may need to be made. It is not to be expected that they will be tactical decisions which advance the Crown case and disadvantage the accused. In *Ziems*[62], Fullagar J observed that in that case the object of not calling a vital witness could only have been to deny the other party the ability to cross-examine him. Whilst the creation of a tactical advantage might be permissible in civil cases, in criminal cases it may not accord with traditional notions of a prosecutor's function, his Honour said. In *Whitehorn*[63], Deane J said that the observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. It will be obvious that a decision by a prosecutor to refuse to tender a mixed statement so that the accused is forced to give evidence falls into this category.

Conclusion and orders

46 The recorded interview of the appellant provided his detailed account of what occurred. He was challenged a number of times by the interviewing police officer but his account remained consistent. It was not suggested that his account could be described as demonstrably false because it differed from the account of others. It provided the foundation for a claim to self-defence and the basis for

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60 *R v Apostilides* (1984) 154 CLR 563 at 575-576.

61 *Whitehorn v The Queen* (1983) 152 CLR 657 at 675.

62 *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 294.

63 *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664.

questioning Crown witnesses by defence counsel. It is evident that the appellant believed that what he was to say in the interview would be placed before the court[64]. The decision not to adduce it was admittedly a tactical one, to favour the Crown. It did not accord with the prosecutorial obligation respecting the presentation of the Crown case and disadvantaged the appellant.

47 There should be orders allowing the appeal. The answer to the second question referred to the Full Court should be set aside. That question should be answered: "Yes".

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64 See above at [9].

48 NETTLE J. I have had the advantage of reading in draft the reasons for judgment of the plurality, and I agree with their Honours that the Crown's obligation to put its case both fully and fairly before the jury means that the Crown ought to tender an accused's mixed record of interview unless there are proper grounds for not doing so[65]. As professional practice in New South Wales and Victoria has long recognised[66], a prosecutor's failure to adduce such admissible evidence of an accused's response when confronted with allegations of criminality is apt to present an unfair choice to the accused between electing to give or tender such evidence and risking adverse speculation by the jury.

49 That conclusion does not entail, however, and I am not persuaded, that the Crown's obligation of fairness ordinarily extends to the presentation to the jury of "all available, cogent and admissible evidence"[67]. To date, the scope of the obligation has developed incrementally[68], and by reference to identified procedural disadvantages to accused persons from decisions by the prosecution not to adduce

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65 *R v Soma* (2003) 212 CLR 299 at 309-310 [31] per Gleeson CJ, Gummow, Kirby and Hayne JJ; *Mahmood v Western Australia* (2008) 232 CLR 397 at 408 [39] per Hayne J.

66 *R v Keevers* (unreported, Court of Criminal Appeal of New South Wales, 26 July 1994) at 7-8 per Hunt CJ at CL (Carruthers and Bruce JJ agreeing); *R v Su* [1997] 1 VR 1 at 64 per Winneke P, Hayne JA and Southwell A-JA; *R v Rymer* (2005) 156 A Crim R 84 at 90 [33] per Grove J (Barr and Latham JJ agreeing at 100 [92], [93]); *R v Rudd* (2009) 23 VR 444 at 457-458 [54]-[57] per Redlich JA (Maxwell P and Vickery A-JA agreeing at 445 [1], 465 [93]).

67 Reasons of Kiefel CJ, Bell, Gageler, Keane and Gordon JJ at [36].

68 See, eg, *R v Simmonds* (1823) 1 Car & P 84 at 84 per Hullock B [171 ER 1111 at 1111-1112]; *R v Beezley* (1830) 4 Car & P 220 at 220 per Littledale J [172 ER 678 at 678]; *R v Bodle* (1833) 6 Car & P 186 at 187 per Gaselee J (Vaughan B agreeing) [172 ER 1200 at 1201]; *R v Vincent* (1839) 9 Car & P 91 at 106 per Alderson B [173 ER 754 at 761]; *R v Carpenter* (1844) 1 Cox CC 72 at 72 per Alderson B; *R v Barley* (1847) 2 Cox CC 191 at 191 per Pollock CB; cf *R v Woodhead* (1847) 2 Car & K 520 at 520 per Alderson B [175 ER 216 at 216]; *R v Farrell* (1848) 3 Cox CC 139 at 139 per Pennefather B; *R v Cassidy* (1858) 1 F & F 79 at 79 per Parke B [175 ER 634 at 634]; cf also *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 294 per Fullagar J; *Whitehorn v The Queen* (1983) 152 CLR 657 at 664-665 per Deane J; *R v Apostilides* (1984) 154 CLR 563 at 576 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ; *Velevski v The Queen* (2002) 76 ALJR 402 at 411 [47] per Gleeson CJ and Hayne J, 421 [118] per Gaudron J, 432 [176] per Gummow and Callinan JJ; 187 ALR 233 at 245-246, 260, 274.

particular types of evidence[69]. As it appears to me, that approach recognises that the Anglo-Australian system of criminal justice is not only accusatorial, but also adversarial[70], and, therefore, that "a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence"[71]. It follows that there may well be unexceptional cases in which a prosecutor would be perfectly entitled to choose not to tender available, cogent and admissible evidence without risk of unfairness to the accused[72].

50 Of course, each case depends on its own facts and circumstances, and, in the end, the question of whether a prosecutor's decision not to tender some piece of evidence is productive of a substantial miscarriage of justice can only be judged in hindsight on appeal against conviction[73]. But, if for no other reason than that, I am not willing to predicate as a proposition of apparently general application that the Crown's obligation to put its case fully and fairly includes a prima facie duty to adduce all "cogent"[74] and admissible evidence available to the Crown.

51 For the reasons above, however, I agree in the orders proposed by the plurality.

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69 See Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1978), vol 7, §2079.

70 See *Doggett v The Queen* (2001) 208 CLR 343 at 346 [1] per Gleeson CJ; *Nudd v The Queen* (2006) 80 ALJR 614 at 618-619 [9] per Gleeson CJ; 225 ALR 161 at 164; *R v Baden-Clay* (2016) 258 CLR 308 at 324 [48] per French CJ, Kiefel, Bell, Keane and Gordon JJ.

71 *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ, quoting *Re Ratten* [1974] VR 201 at 214 per Smith J for the Full Court.

72 See, eg, *Velevski* (2002) 76 ALJR 402 at 421 [118] per Gaudron J; 187 ALR 233 at 260.

73 *Apostilides* (1984) 154 CLR 563 at 577 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ; cf *R v Hair* [2009] NTSC 9 at [15] per Mildren J; *R v Nguyen* (2019) 345 FLR 40 at 42-43 [8]-[12] per Kelly and Barr JJ.

74 See and compare *R v Kneebone* (1999) 47 NSWLR 450 at 460 [49]-[50] per Greg James J, 470-471 [102] per Smart A-J (Spigelman CJ agreeing with both at 451 [1]).

EDELMAN J.

Introduction

52 This appeal raises the following legal question: what are the legal consequences, for a trial governed by the *Evidence (National Uniform Legislation) Act 2011* (NT) ("the Uniform Evidence Act"), of the refusal of a prosecutor to tender into evidence a "mixed" video record of interview between the police and an accused person – that is, a record containing both inculpatory and exculpatory statements. The facts and circumstances of this appeal are set out more fully in the joint judgment. I agree with their Honours that the appeal should be allowed generally for the reasons they express. The central focus of the following reasons is upon the difficulties that arise from the way in which this legal question arose before the Full Court of the Supreme Court of the Northern Territory and the expression of the questions referred to that Court.

53 The usual circumstance in which an allegation of breach of prosecutorial duty arises before an appellate court can be seen in *Singh v The Queen*, Matter D16 of 2019, with which this appeal was heard concurrently. In *Singh*, the appellant was convicted after trial before a judge and jury. The question before the Court of Criminal Appeal of the Northern Territory[75] was whether the appeal should be allowed because the failure of the prosecutor to tender the video record of interview occasioned a miscarriage of justice[76]. But the legal question in this appeal arose in a different way. The relevant trial, namely the retrial, of Mr Nguyen had not even begun when the issue arose. The trial was stayed pending the referral of two questions to the Full Court of the Supreme Court of the Northern Territory, which concerned (i) whether the video record of interview was "admissible in the Crown case", and (ii) whether the Crown was "obliged to tender the recorded interview"[77]. The Full Court answered the first question "Yes" and the second question "No". Although the answer to the first question was not challenged by a cross-appeal in this Court, it is necessary to understand the basis for that answer in order to answer the second question.

54 The assumption underlying the literal expression of the second question referred to the Full Court is that prior to a trial there can be an existing legal obligation on the prosecution to tender a video record of interview. That assumption is incorrect. A so-called "obligation" to tender a video record of interview, like a so-called "obligation" to call a witness, is not a free-standing obligation at all. It is an aspect of the prosecutor's duty of fairness. The content of

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75 *Singh v The Queen* (2019) 344 FLR 137 at 149 [24]-[25], 182 [122].

76 See *Criminal Code* (NT), s 411(1).

77 *R v Nguyen* (2019) 345 FLR 40 at 43 [12].

the prosecutor's duty of fairness depends upon all the circumstances at trial. It can never be said with certainty prior to the conclusion of the prosecution case that a prosecutor's duty of fairness would necessarily require a witness to be called or a video record of interview to be tendered. An initial impression that fairness would require a witness to be called or a video record of interview to be tendered might be affected by later circumstances, perhaps wholly unexpected, which might even make the tender of a video record of interview or calling of a witness unfair. If the second question referred to the Full Court were understood literally as asking, at a point prior to trial, whether there will be a legal obligation for the prosecution to tender the video record of interview during the prosecution case at trial then the answer would be "Impossible to answer".

55 The manner in which this issue was argued in the Full Court and in this Court reveals that the second question can only be understood as asking about a breach of the prima facie content of the prosecutor's duty of fairness in the circumstances that existed prior to the trial. Understood in that way, the second question should be answered in the affirmative: on the information presently before this Court, and in the absence of any change in circumstances, if the prosecutor were to maintain his stance throughout the Crown case of refusing to tender the video record of interview then it is likely that his conduct would be a breach of his duty of fairness and would lead to an unfair trial and a miscarriage of justice.

The first referred question: admissibility of the "mixed" record of interview

56 Although the respondent orally queried the admissibility of the video record of interview, the respondent did not file any cross-appeal to challenge the answer given to the first question by the Full Court, that the video record of interview was admissible. It became common ground during oral submissions that the mixed video record of interview was admissible because it contains admissions.

57 The statements of admission in the video record of interview fall within the exception, in s 81(1)[78] of the Uniform Evidence Act, to the general inadmissibility of hearsay evidence in Pt 3.2[79]. This exception for admissions is broad. An admission by the accused is any previous representation that is "adverse to the person's interest in the outcome of the proceeding" whether by statement or

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78 And outside the proviso in s 82.

79 See Uniform Evidence Act, s 59 "The *hearsay rule* – exclusion of hearsay evidence".

conduct[80]. Almost any statement or conduct, no matter how apparently innocuous, is capable of being an admission. It need not be against the maker's interest at the time it was made[81]. It might not even be apparent prior to trial whether the statement is an admission[82]. However, a substantial constraint on the matters which can constitute an admission is that the previous representation must be adverse to the interest of an accused "in the outcome of the proceeding". In other words, at the point in time that the admissibility issue is raised, there must be some possibility that the previous representation could have an effect upon the outcome of the proceeding that is adverse to the interest of an accused.

58 The existence, at the time of the admissibility dispute, of admissions in a video record of interview does not, by itself, make the whole video record of interview admissible. As to the remainder of the video record of interview, including self-serving statements, the Uniform Evidence Act generally reflects the previous, although criticised[83], common law position that hearsay statements that reveal a consciousness of guilt are generally admissible but hearsay statements that reveal a consciousness of innocence are generally inadmissible. However, one extremely significant departure from this general position is s 81(2), which permits evidence of any hearsay "(a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and (b) to which it is reasonably necessary to refer in order to understand the admission". Section 81(2), like the common law that preceded it, has a primary underlying concern for the need for context for admissions[84]. The context contemplated by s 81(2) is broad. For instance, in its application to video records of interview, it will often be reasonably necessary to see and hear self-serving statements by an accused person

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80 Uniform Evidence Act, Dictionary, Pt 1 "Definitions", see "admission" and "previous representation"; see also Northern Territory, Legislative Assembly, *Evidence (National Uniform Legislation) Bill 2011*, Explanatory Statement at 49.

81 *Falcon v Famous Players Film Co* [1926] 2 KB 474 at 489; *R v Lovett [No 3]* [2013] WASC 102 at [36]. See Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1904), vol 2 at 1217 §1048.

82 *R v Horton* (1998) 45 NSWLR 426 at 437-438.

83 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1904), vol 1 at 384-385 §293; *Corke v Corke & Cook* [1958] P 93 at 109; Jolowicz, "Case and Comment" (1958) 16 *Cambridge Law Journal* 145 at 146, discussing *Corke v Corke & Cook* [1958] P 93.

84 *Pearce* (1979) 69 Cr App R 365 at 369; *Duncan* (1981) 73 Cr App R 359 at 363. See Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 424 [755].

made in the same interview in order to consider why the accused person made admissions in that interview even if they might seem to concern matters unconnected to the self-serving statements. The expression of the self-serving statements might also reveal matters that could shape the precise meaning, purpose and weight of the admission such as the general demeanour of the accused person during the interview or how the accused person responded to the interviewer. For these reasons, it should be extremely rare for any part of the same interview to be treated as falling outside the necessary context for admissions contained elsewhere in that interview. Quite properly, this was not suggested to be the case in this appeal.

59 Although the concern of s 81(2) is context, the use to which the self-serving statements is put is not limited to mere context for the admissions. They are admissible for the truth of their contents. One reason for this is that they might be difficult or impossible to separate from the admissions[85]. Another is that they might qualify or modify the admissions, which are admitted as evidence of the truth of their contents[86]. A third is the unintelligibility of a direction to the jury that some previous statements are admissible for the truth of their contents but others are something less although made at about the same time, such as in the same interview. It would be, "to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state"[87]. And, contrary to the approach in England, which countenances a usual direction by the trial judge that "incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight"[88], such a general statement has been held in Australia to be an "unwise" direction and an "undesirable" one to the extent that it expounds traditional reasons why admissions against interest are commonly regarded as reliable evidence[89].

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85 *Mule v The Queen* (2005) 79 ALJR 1573 at 1577 [15]; 221 ALR 85 at 90; Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 424 [755], 424 fn 29.

86 See Australia, Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 424 [755], 424 fn 29.

87 *Duncan* (1981) 73 Cr App R 359 at 365. See also *R v Sharp* [1988] 1 WLR 7 at 15; [1988] 1 All ER 65 at 71; *R v Aziz* [1996] AC 41 at 49-50.

88 *Duncan* (1981) 73 Cr App R 359 at 365.

89 *Mule v The Queen* (2005) 79 ALJR 1573 at 1579 [23]; 221 ALR 85 at 93, quoting *R v Cox* [1986] 2 Qd R 55 at 65. See also, in Canada, *R v Rojas* [2008] 3 SCR 111 at 129-130 [39]-[40].

60 There is another basis relevant to this appeal upon which the entirety of a mixed record of interview might be admissible. Section 190 of the Uniform Evidence Act, enacted against an understanding that the laws of evidence were "often waived by parties in litigation"[90], permits the court to dispense with the application of the hearsay provisions in Pt 3.2. The consent of the parties is required, including the advised or informed consent of an accused person.

61 Mr Nguyen, with legal advice, had sought the tender of the video record of interview by the prosecution. For "tactical" reasons the prosecution said that they did not intend to tender the video record of interview, asserting that "there's no unfairness involved in doing things this way ... the accused is able to give evidence if he wants to and, of course, if he does then he'll be subjected to cross-examination".

The second referred question: an "obligation" upon the prosecution to tender the mixed record of interview

The obstacles of principle to the purported pre-trial legal obligation

62 There is a strong analogy between a so-called obligation prior to trial upon the prosecution to tender a video record of interview and a so-called obligation prior to trial upon the prosecution to call a witness. Indeed, the existence of a legal obligation upon the prosecution, prior to trial, to tender a video record of interview might involve an obligation to call a person, such as a police officer who conducted the interview, who could tender the video record of interview. The ethical practices for prosecutors generally to undertake, where requested prior to trial, to tender a video record of interview or to call relevant witnesses are aspects of the prosecutor's duty of fairness. There are three reasons that point strongly against elevating them to the status of free-standing obligations.

63 **First**, any attempt to carve an independent obligation in advance of trial to tender a video record of interview from the general duty of fairness existing in all of the circumstances of the trial would require numerous exceptions and qualifications which would prevent the obligation from being stated in anything other than vague, contingent terms. For instance, an obligation upon the prosecution to call a witness or to tender a video record of interview could not exist if, in the circumstances of the trial that unfolded, the evidence was immaterial. If a hundred people saw an accused person at the scene of the crime, whose image was also captured on CCTV, then the prosecution could not be obliged to call all of the hundred people to give evidence. And in such a case, at least if the accused did not request its tender, the prosecution could not be obliged to tender a video

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90 Australia, Law Reform Commission, *Reform of Evidence Law*, Discussion Paper No 16 (1980) at 10 [21].

record of interview in which the accused said no more than to acknowledge their presence at the scene of the crime.

64 Another exception to any purported prosecutorial legal obligation in advance of trial to tender a video record of interview would be where evidence called by the prosecution during trial made it manifest that, by reference to clear and objectively identifiable circumstances, the accused's answers in the interview as a whole were plainly false or fanciful or were plainly unreliable[91].

65 A further exception to such a pre-trial obligation, which could potentially undermine it entirely, would be that such a pre-trial obligation would necessarily be subject to the prosecutor's overriding duty to conduct the trial fairly. A prosecutor could not be obliged to tender a video record of interview if it were apparent at the time of tender, either from previous circumstances or from events that arose during trial, that the tender would cause legal unfairness to the conduct of the defence. In such circumstances, the prosecutor would not merely be permitted to accede to the request of an accused person not to tender the video record of interview; the prosecutor would be obliged to do so. Thus, the relevant prosecutorial duty is not concerned with the prosecutor's decision to tender the video record of interview but, instead, with the overall fairness in the conduct of the trial.

66 **Secondly**, a curious, even bizarre, attribute of a so-called pre-trial prosecutorial legal obligation to call a witness or to tender a video record of interview is that it would be one that a trial judge would be incapable of enforcing. Trial judges have powers to enforce the prosecutor's duty to act fairly in order to ensure a fair trial without descending into the adversarial arena. Their powers include a range of directions and orders including, in the most extreme cases of unfairness, the grant of a permanent stay of proceedings where other measures cannot be taken to ameliorate a substantial unfairness in the trial[92]. In contrast, a trial judge has no power to enforce any perceived pre-trial "obligation" to tender a video record of interview. As this Court said in *R v Apostilides*[93], the trial judge "cannot direct the prosecutor to call a particular witness". Nor could a trial judge

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91 *R v Apostilides* (1984) 154 CLR 563 at 576. Compare *R v Brown* [1998] AC 367 at 377; *Mallard v The Queen* (2005) 224 CLR 125 at 153 [73]-[74].

92 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1 at 23 [99]-[100], 40 [197]-[198], 50-53 [264]-[272]; 361 ALR 23 at 49, 71-72, 86-88; *Director of Public Prosecutions (Cth) v Kinghorn* [2020] NSWCCA 48 at [139].

93 (1984) 154 CLR 563 at 575.

direct a prosecutor to ensure that evidence is tendered. In *Apostilides*[94], this Court also referred to discussion of Brinsden J in *Skubevski v The Queen*[95], including his Honour's quotation from Barwick CJ in *Ratten v The Queen*[96]:

> "[A criminal trial] is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law."

67 **Thirdly**, even on an appeal which raised issues concerning the failure by the prosecution to call a witness, the question would not be whether the prosecutor was obliged to call the witness. The question would be whether a decision by a prosecutor not to call a particular person as a witness constituted a ground for setting aside the conviction because it gave rise to a miscarriage of justice "when viewed against the conduct of the trial taken as a whole"[97]. That question is plainly not to be assessed from a perspective before the trial took place.

The obstacles of authority to the purported pre-trial legal obligation

68 In *Skubevski v The Queen*[98], Mr Skubevski was charged with wilful murder arising from a brawl between a group of Aboriginal men and a group of Macedonian men. The Crown called all of the Aboriginal men but none of the Macedonian men. After the prosecutor refused to comply with a direction by the trial judge to call the Macedonian men, the trial judge discharged the jury, adjourned the trial, and referred questions for consideration by the Court of Criminal Appeal of the Supreme Court of Western Australia. The Court of Criminal Appeal accepted the Crown submission, not made on the present appeal, that the reference of most of the questions was incompetent because for all

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94 *R v Apostilides* (1984) 154 CLR 563 at 570.

95 [1977] WAR 129 at 138-140.

96 (1974) 131 CLR 510 at 517, quoted in *Skubevski v The Queen* [1977] WAR 129 at 139. See also *R v Apostilides* (1984) 154 CLR 563 at 575.

97 *R v Apostilides* (1984) 154 CLR 563 at 575. See also *Director of Public Prosecutions (Cth) v Kinghorn* [2020] NSWCCA 48 at [139].

98 [1977] WAR 129.

practical purposes the trial was at an end[99]. Nevertheless, the Court expressed an opinion on the questions. After explaining that the prosecutor was legally entitled not to call the Macedonian men as witnesses, the Court of Criminal Appeal explained, in answer to one of the questions (Question 4), that it had no power to "express an opinion upon whether in the circumstances the discretion ought to have been exercised in the manner in which it was"[100]. Burt CJ, with whom Smith J agreed, said this[101]:

> "For the purposes of Question (4) it is, I think, important to appreciate that we are not being called upon to say whether there has been a miscarriage of justice, that being a question which cannot arise at this point of time. As the question now arises before us it should be answered 'No'. A decision of Crown counsel to call or not to call a witness cannot be reviewed or challenged within the trial in which that decision is made. It is no doubt possible that such a decision could give rise to a miscarriage of justice. As such it would be examinable on appeal. But that is a different matter."

69 The point being made by Burt CJ is that there is a difference between, on the one hand, asking an appellate court directly to review a decision of a Crown prosecutor about whether to call a witness when the prosecutor has no legal duty to do so and, on the other hand, asking an appellate court to make an assessment of the fairness of a trial, such as that made in the context of an appeal from conviction. The distinction may be a fine one but it is one that this Court also made in its decision in *Richardson v The Queen*[102] nearly half a century ago, in terms that have been approved or followed on many occasions[103]. This Court acknowledged that a failure by the prosecutor to call a particular witness might

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99 *Skubevski v The Queen* [1977] WAR 129 at 133, 140.

100 *Skubevski v The Queen* [1977] WAR 129 at 131, 133.

101 *Skubevski v The Queen* [1977] WAR 129 at 133.

102 (1974) 131 CLR 116.

103 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674; *R v Apostilides* (1984) 154 CLR 563 at 577-578; *Velevski v The Queen* (2002) 76 ALJR 402 at 421 [117]; 187 ALR 233 at 259-260; *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1 at 150 [677]; *R v Nikolaidis* [2003] VSCA 191 at [54]-[55]; *Roberts v Western Australia* [2010] WASCA 223 at [36]; *Diehm v Director of Public Prosecutions (Nauru)* (2013) 88 ALJR 34 at 47 [65]; 303 ALR 42 at 58-59; *Lane v The Queen* (2013) 241 A Crim R 321 at 358 [164]; *R v M, RS* (2018) 131 SASR 24 at 41 [47].

give rise to a miscarriage of justice "when viewed against the conduct of the trial taken as a whole"[104] but concluded that the prosecutor does not owe a specific "duty" to call any witness[105]:

> "It is, therefore, a misconception to speak of the prosecutor as owing a duty to the accused to call all witnesses who will testify as to the events giving rise to the offence charged. The misconception has arisen, we venture to think, from treating some observations in the decided cases, which have been made with the intention of offering guidance to prosecutors in how they are to approach their task, as the prescription of an inflexible duty to call all material witnesses, subject to certain exceptions or to special circumstances."

A prosecutor is under a continuing duty to act fairly

70 For the reasons explained, any "requirement" for a prosecutor to call witnesses or to tender evidence "is not a duty owed by the prosecutor to the accused which is imposed by some rule of law; rather it forms part of a description of the functions of a Crown Prosecutor"[106]. Those functions can often be performed in different ways but the underlying principle which governs their performance is that the prosecutor is under a continuing duty to conduct the trial fairly. In *Attorney-General (NT) v Emmerson*[107], six members of this Court described the "traditional considerations" of fairness as standards that arise from "rules of practice; established by judges over the years ... calculated to enhance the administration of justice by ensuring that an accused has a fair trial".

71 The requirements of the duty of fairness are neither rigid nor static. They vary according to the circumstances of the particular accused person and the changing circumstances of the case, and over time can even change with changing social values[108]. However, it is now well established that the prosecutor's duty of

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104 *Richardson v The Queen* (1974) 131 CLR 116 at 121-122.

105 *Richardson v The Queen* (1974) 131 CLR 116 at 120.

106 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674.

107 (2014) 253 CLR 393 at 432 [63], citing *Whitehorn v The Queen* (1983) 152 CLR 657 at 664 and *Cannon v Tahche* (2002) 5 VR 317 at 339 [56].

108 *Dietrich v The Queen* (1992) 177 CLR 292 at 364.

fairness requires that decisions about whether to call a witness "be made with due sensitivity to the dictates of fairness towards an accused person"[109].

The only sensible meaning of the second referred question

72 In light of the insurmountable obstacles of principle to the recognition of a legal obligation existing before trial to tender a video record of interview, and in light of nearly half a century of consistent authority, the only sensible way to understand the question whether, prior to trial, the Crown could be said to be "obliged to tender the recorded interview" at trial is to see it as instead inviting the enunciation of a "prima facie rule of practice"[110], a general guide to the ethical practice which informs the prosecutor's duty of fairness, the departure from which in the trial could be productive of a miscarriage of justice. Mr Nguyen's submissions on appeal should be understood as submissions that, subject to events that might emerge at trial, the pre-trial prima facie content of the prosecutor's duty of fairness included an undertaking, where requested, to tender the video record of interview.

The breach of the prosecutor's duty of fairness

A prima facie rule of practice that admissible video records of interview be tendered

73 As I have explained, the video record of interview was admissible evidence which could be tendered by the prosecution on two different bases. One basis was that it contained admissions (s 81 of the Uniform Evidence Act). And since Mr Nguyen sought the tender of the interview with informed consent, the other basis was by consent of the parties (s 190 of the Uniform Evidence Act). Either basis required the prosecutor's decision to be made fairly, in light of general rules of ethical practice. Once the decision to tender the interview was taken, the entire interview (as edited by consent of the parties to remove anything inadmissible to which objection is taken) would have been required to be tendered: the prosecution would be "bound to take the good with the bad and put it all before the jury"[111].

74 The starting point for the prosecutor's preliminary view about whether to tender the video record of interview, subject always to any issues that might later emerge during trial, should have been that "the prosecutor's obligation to put the

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109 *R v Apostilides* (1984) 154 CLR 563 at 576.

110 *McKinney v The Queen* (1991) 171 CLR 468 at 478.

111 *R v Soma* (2003) 212 CLR 299 at 309 [31].

case *fairly* would, on its face, require the prosecutor to put the interview in evidence unless there were some positive reason for not doing so"[112]. In *Mahmood v Western Australia*[113], this prima facie requirement for fairness was expressed by Hayne J as an ordinary requirement. His Honour said of admissible mixed statements that "fair presentation of the prosecution case will ordinarily require that the prosecution lead all that evidence". Those words were carefully chosen. They did not assert a legal obligation to call evidence. Instead they directed attention to the unfairness that might result from a failure to do so. Contrary to the reasoning of McLure P in *Ritchie v Western Australia*[114], the reasoning of Hayne J was not obiter dicta, nor was it inconsistent with the joint reasons of the other members of this Court in *Mahmood*, who did not address this issue. Nor was his Honour's reasoning confined to cases where there are several out-of-court statements[115].

75 The reasons that underpin this prima facie ethical rule of practice that informs the prosecutor's duty of fairness are several. First, the video record of interview is usually an early response, sometimes the first opportunity, of an accused person confronted by the allegations[116]. The fading and plasticity of memory and the cognitive processing of the allegations between interview and trial can make recollection and response at trial less accurate and more generalised than recollections and responses closer to the events and in the absence of adversarial dispute[117]. Secondly, the tender of a video record of interview avoids, more conclusively than any direction, any adverse speculation by the jury about whether an accused gave any account of their actions when confronted by the police[118].

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112 *R v Soma* (2003) 212 CLR 299 at 310 [31] (emphasis in original).

113 (2008) 232 CLR 397 at 409 [41].

114 (2016) 260 A Crim R 367 at 376 [44].

115 Compare *Barry v Police (SA)* (2009) 197 A Crim R 445 at 460 [58].

116 *Storey* (1968) 52 Cr App R 334 at 337-338; *Pearce* (1979) 69 Cr App R 365 at 369; *Newsome* (1980) 71 Cr App R 325 at 329; *R v Su* [1997] 1 VR 1 at 64; *R v Pidoto* [2002] VSCA 60 at [49]-[50]; *R v H, ML* [2006] SASC 240 at [27]. Compare *R v Helps* (2016) 126 SASR 486 at 493 [25].

117 See also *Fennell v The Queen* (2019) 93 ALJR 1219 at 1233 [81]; 373 ALR 433 at 452. See further Lacy and Stark, "The neuroscience of memory: implications for the courtroom" (2013) 14 *Nature Reviews Neuroscience* 649 at 651, 653, 656.

118 *R v Astill* (unreported, New South Wales Court of Criminal Appeal, 17 July 1992) at 8-9; *Familic* (1994) 75 A Crim R 229 at 234.

Thirdly, and in the almost invariable circumstance that the interview contains some admissions, the prima facie requirement to tender a video record of interview in conformity with the duty of fairness avoids the risk that the prosecutor might present a less than complete picture of the Crown case based upon an inaccurate prediction of the likely materiality of admissions in the defence case.

Breach of the prima facie requirements of the duty of fairness

76 In this case, as the North Australian Aboriginal Justice Agency submitted in its intervention, the prima facie requirement of the duty of fairness was further enhanced by Mr Nguyen's linguistic and cultural disadvantages and his expectation at the time of giving the interview that it would be tendered in court. The video record of interview of Mr Nguyen was undertaken after the police had given Mr Nguyen a caution, following the general approach described in the *Anunga* rules[119], in an attempt to ensure fairness in the interview of Mr Nguyen as a vulnerable or disadvantaged person. After Mr Nguyen, who was assisted by an interpreter, was asked to explain the caution in his own words he said: "Whatever you ask and whatever I answer will be taken as evidence in the court."

77 When counsel appearing for the Director of Public Prosecutions was questioned by the trial judge about the reasons why the video record of interview would not be tendered, his explanation was that it was a "tactical decision". It was a decision taken not to adduce evidence of admissions which would otherwise be part of the prosecution case in order to require the accused man, with cultural and linguistic disadvantages that are plainly evident from the interview, to expose himself to cross-examination in order to put his account of events before the jury[120]. This reasoning process was not consistent with the prosecutor's duty of fairness. In the absence of any compelling reason for the prosecution not to tender the record of interview, the maintenance of that refusal at trial is extremely likely to have been productive of an unfair trial with the consequence that any conviction would have involved a miscarriage of justice.

78 In this Court, senior counsel for the respondent relied upon an alternative purported reason for the refusal by the prosecution to tender the video record of interview. This reason was that the interview contained no material admissions in the sense that any admissions possessed such a low degree of relevance that they could not be admissible. The submission that the interview contained no material admissions could not be maintained in the absence of a cross-appeal on the answer to the first question given by the Full Court. If a cross-appeal had been brought

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119 *R v Anunga* (1976) 11 ALR 412.

120 As to the difficulties presented by such an approach, see Eades, "The social consequences of language ideologies in courtroom cross-examination" (2012) 41 *Language in Society* 471 at 474-479.

and if it had been concluded that there were no material admissions there would then have been a need to consider other relevant aspects of the video record of interview when considering the duty of fairness in relation to s 190 of the Uniform Evidence Act.

79 The submission that the interview contained no material admissions was not ultimately pressed on this appeal. It suffices therefore to make only two general observations about the submission concerning "immateriality" – that is, an extremely low degree of relevance. First, in circumstances where Mr Nguyen was alleged to have caused serious harm to one man by throwing a beer bottle at him or hitting him on the head with the bottle, as well as throwing another bottle at another man, the admissions by Mr Nguyen that he threw bottles at those men were plainly more than minimally relevant. In *Dyers v The Queen*[121], speaking of a usual requirement of the duty of fairness that the prosecution call all material witnesses, Callinan J said that a "broad practical view of materiality should be taken". This is particularly so because the precise contours of the issues at trial are not always clear at the time prosecution witnesses are called. His Honour said that admissible evidence is material if it could "reasonably influence a jury on the question of the guilt or otherwise of an accused". It will be rare for an admission in a video record of interview to fall outside that description of materiality.

80 Secondly, even in the rare instance where, prior to trial, a prosecutor correctly considers that an admission might be immaterial to the issues that, objectively, are likely to unfold during the trial, this does not necessarily mean that it will be fair for the prosecutor to refuse an informed request to tender the record of interview. The reasons for the prima facie requirement of the duty of fairness, discussed above, will not necessarily be overcome merely because the admissions are, in the events existing prior to trial, objectively likely to be immaterial.

Conclusion

81 The appeal should be allowed and orders made as proposed in the joint judgment, with the second question to be understood as expressed in these reasons.

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121 (2002) 210 CLR 285 at 326 [118].