IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. D15 of 2019

BETWEEN:

VAN DUNG NGUYEN
Appellant

And

THE QUEEN
Respondent

INTERVENER'S SUBMISSIONS

Part I: Suitability for publication on the internet

1. The intervener certifies that this submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

2. The Director of Public Prosecutions for the State of Western Australia seeks leave to intervene or appear as an amicus curiae in this appeal in support of the respondent.

3. The Director of Public Prosecutions for the State of Western Australia seeks leave to be heard only in respect of the question as to whether the duty of fairness on the prosecutor, or the requirements of a fair trial, require a prosecutor to tender a "mixed" record of interview (MROI) in the trial of an accused person, unless there are proper reasons to so decline.

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Part III: Why leave to intervene should be granted

4. The following principles outlined in ***Roadshow Films Pty Ltd v iiNet Ltd (No. 1)***[1] are relevant to the determination of whether to allow a non-party to intervene or appear as amicus curiae:

4.1. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected.

4.2. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.

4.3. Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction to grant leave to intervene, subject to such limitations and conditions it sees fit to impose.

4.4. The grant of leave for a person to be heard as an amicus curiae is not dependent upon the same conditions in relation to legal interest as the grant of leave to intervene. The Court will need to be satisfied, however, that it will be significantly assisted by the submissions of the amicus.

5. The Director of Public Prosecutions for the State of Western Australia (the Western Australian DPP) is responsible for the commencement and conduct of prosecutions of offences, indictable or otherwise, in the State of Western Australia.[2]

6. In the present appeal, the position adopted by the appellant is that the proper exercise of the prosecution's duty to adduce evidence in any given case requires that a MROI be tendered as part of the prosecution case, unless a valid and proper reason exists for not tendering the MROI. The appellant asserts that if there is not a valid and/or proper

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[1] (2011) 248 CLR 37, 38 – 39, affirming ***Levy v Victoria*** (1997) 189 CLR 579, 601 – 605.
[2] *Director of Public Prosecutions Act 1991* (WA) s 11(1).

reason for not tendering the MROI, there is a prima facie breach of the prosecutor's obligation to conduct the trial fairly.[3]

7. This position adopted by the appellant is contrary to established authority of long-standing in Western Australia to the effect that there is no obligation upon the prosecution to tender a MROI as part of the prosecution case. A determination in favour of the appellant has the potential to significantly alter the common law, and consequently, to significantly alter the manner in which prosecutions are conducted by the Western Australian DPP.

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8. The scope of the potential impact upon prosecutorial practice in Western Australia is much broader than the ground of appeal, which purports to limit the asserted obligation to mixed statements admissible under the *Evidence (National Uniform Legislation) Act 2011* (NT) ("*ENULA*"), otherwise suggests. Section 81 of the *ENULA* provides for an exception to the rule against hearsay for admissions and related representations, in substantially the same terms as expressed at the common law. Further, the appellant contends that the purported obligation for a prosecutor to tender such statements arises under the common law. As such, this Court's determination on this issue will be binding in Western Australia.

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9. Ordinarily, the setting of binding precedent by this Court and the resultant effect on the conduct of future prosecutions would not, of itself, be a sufficient basis upon which to grant leave to intervene. However in the present case, it is submitted that a determination of the kind contended for by the appellant would result in such a departure from established precedent in Western Australia as to elevate the impact upon the Western Australian DPP beyond the ordinary operation of precedent and to enliven the Court's jurisdiction to grant leave to intervene.

10. It is submitted that leave to intervene should be granted to the Western Australian DPP
30 to allow fulsome submissions regarding the common law to be put before this Court, as the appellant's submissions do not address the Western Australian authorities that consider this issue.

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[3] Appellant's Written Submissions [22].

Part IV: Statement of issues sought to be raised by the intervener

11. In Western Australia, the questions posed by the appellant in this appeal are to be answered by reference to the following legal principles established by the common law:[4]

11.1. An out of court self-serving statement made by an accused is inadmissible hearsay.[5]

11.2. A recognised exception to the rule against hearsay concerns the use that can be made of an out of court statement made by an accused that consists of admissions accompanied by exculpatory material (a "mixed statement").[6]

11.3. Where the prosecution seeks to rely on the admissions contained in a mixed statement, the whole of the statement must be adduced in evidence and both the admissions and the exculpatory statements may be relied upon as evidence of the truth of that which was asserted.[7]

11.4. It is a matter for the prosecution to determine whether or not it wishes to adduce as part of its case an admissible out of court statement made by an accused. The prosecution **is not bound to tender** an admissible out of court statement made by an accused, including a mixed statement.[8]

11.5. It is for the prosecution to decide what witnesses will be called at trial and to determine the course which will ensure a proper presentation of the prosecution case conformably with the dictates of fairness to the accused.[9]

11.6. A prosecutor cannot be compelled to exercise the discretion in relation to the calling of witnesses in a particular manner, however in some cases the failure to call a witness who ought to be called may result in a miscarriage of justice.[10]

11.7. The prosecution ought to call available witnesses whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. However, a prosecutor is not bound to call a witness, even

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[4] As outlined by McLure P in ***Ritchie v The State of Western Australia*** [2016] WASCA 134 [38] – [42].
[5] ***Middleton v The Queen*** (1998) 19 WAR 179, 189.
[6] *Ibid.*
[7] ***Mule v The Queen*** (2005) 221 ALR 85 [5]; ***R v Soma*** (2003) 212 CLR 299; ***Ritchie*** [38]; ***Middleton***, 189.
[8] ***Middleton***, 189, 202; ***Willis v The Queen*** [2001] WASCA 296 [101], [106], [134]; ***Peck v The State of Western Australia*** [2005] WASCA 20 [71]; ***Ritchie*** [39]; ***KMT v The State of Western Australia [No. 2]*** [2018] WASCA 49.
[9] ***Richardson v The Queen*** (1974) 131 CLR 116, 119; ***R v Apostilides*** (1984) 154 CLR 563, 575; ***Soma*** [29].
[10] ***Whitehorn v The Queen*** (1983) 152 CLR 657, 674.

an eye witness, whose evidence is judged to be unreliable, untrustworthy, or otherwise incapable of belief.[11]

11.8. An accused is not a competent or compellable witness for the prosecution.[12] Thus, the principles relevant to the prosecutor's obligation in respect of calling *witnesses,* as outlined above, do not directly apply to an *accused.*[13]

12. In ***Richardson v The Queen,***[14] Barwick CJ, McTiernan and Mason JJ said:

> *Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful,* ***whether in the interests of justice it should be subject to cross-examination by the Crown****, to mention but a few.*
>
> *What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused.* (Emphasis added)

13. The Court's comments in ***Richardson*** relate to the prosecutor's duties in respect of calling witnesses. An accused is not a compellable witness for the prosecution,[15] but the discretion outlined in ***Richardson*** is analogous to the prosecutorial discretion to determine whether a mixed statement ought to be adduced as part of the prosecution

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[11] ***Whitehorn***, 674.
[12] ***Ryan v The State of Western Australia*** [2011] WASCA 7 [56] – [63]; ***Evidence Act 1906*** (WA) s 8(1).
[13] ***Ritchie*** [40].
[14] ***Richardson*** 119.
[15] ***Ryan v The State of Western Australia*** [2011] WASCA 7 [56] – [63]; ***Evidence Act 1906*** (WA) s 8(1).

case. An obligation of the kind contended for by the appellant which would require unreliable out of court statements to be put before a jury in any case where an accused gave a mixed interview is inconsistent with the role of a prosecutor and the prosecutorial discretion acknowledged at common law.

14. The Western Australian DPP submits that the clear statement of principle derived from the long line of established authority in Western Australia is that there is no obligation on the prosecution to tender mixed statements as part of the prosecution case. As was noted in ***Sampson v The Queen*** by Parker J:[16]

> *The law is well settled, however, that by virtue of those parts of the interview which may be accepted as against the applicant's interest, or "confessional in character", the statement, ie the whole record of the interview,* ***might*** *have been led in evidence by the prosecution; Middleton v The Queen (1998) 19 WAR 179 at 182, 189.* ***But if the prosecution determines against introducing the record of interview*** *it could not have been led in evidence or be the subject of questions in cross-examination by the defence: R v Callaghan [1994] 2 Qd R 300 at 303 – 304.* ***This position has been well settled for approaching two centuries****; R v Higgins (1829) 3 C & P 603 at 604, 172 ER 565 at 565.* (Emphasis added)

15. More recently, in ***KMT v The State of Western Australia***[17] the Court of Appeal said:

> *Self-serving statements of parties to litigation are inadmissible as to the truth of those statements. That is because of the rule that assertions by persons other than the witness who is testifying are inadmissible as evidence of the fact asserted, because they offend the rule against hearsay evidence and the rule against self-corroboration. On the other hand, admissions against interest constitute a recognised category of exception to the hearsay rule. If an out of court statement made by an accused consists of admissions accompanied by exculpatory material, the whole of the statement containing both inculpatory and exculpatory material must be adduced in evidence. It is a matter for the prosecution to determine*

[16] [2002] WASCA 222 [26].
[17] [2018] WASCA 49 [54].

whether or not it wishes to adduce an admissible out of court statement made by an accused. (Citations omitted)

16. The Western Australian DPP submits that the requirements of a fair trial do not require the prosecution to tender, as probative material, self-serving out of court statements of an accused where the prosecution does not seek to rely on any associated admissions made by an accused. Such a requirement would often result in unfairness to the Crown or State (as the case may be).

10 17. Many mixed statements qualify as such due to the existence of the most meagre of admissions – for instance, an acknowledgment that the accused knows the complainant, or accepts that a child is under the age of 13, or that the accused has been to a particular location or suburb before. An obligation to tender any such statement as part of the prosecution case would, in effect, allow the giving of evidence which the prosecution clearly does not accept as reliable,[18] by way of an unsworn statement, which cannot be challenged at trial.[19] This would undermine the clear policy underpinning the abolition of dock statements. Such a situation is not encompassed by the requirements of a fair trial, which require fairness to both the accused *and* the prosecution.

20 18. As was noted by Barwick CJ in ***Ratten v The Queen***:[20]

> *As Smith J rightly said in expressing the reasons of the Full Court in this case, "Under our law 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". It 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*
30 *evidence, fairness and admissibility.*

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[18] ***Barry v Police*** [2009] SASC 295 [68].
[19] A practice prohibited in Western Australia by s 97(2) of the *Evidence Act 1906* (WA).
[20] (1974) 131 CLR 510, 517.

19. While it may be that in a rare case the refusal to tender a mixed statement would be unfair,[21] unfairness cannot and does not arise from the mere election of a prosecutor not to tender a mixed statement. Nor does it arise from an accused person feeling increased pressure to give evidence as a result of their self-serving statements not being before the jury as part of the prosecution case.[22]

20. The appellant seeks a ruling that would in effect give rise to a broad ranging and onerous obligation on prosecuting agencies across the country. The practical result of such a ruling would be to remove the right of the prosecution to determine whether the evidence of the mixed statement should be led in the proper advancement of the prosecution case. A ruling of the kind sought by the appellant in the present appeal would result in a significant departure from settled Western Australia jurisprudence.

Part V: Estimate of time for presentation of oral argument

21. The Western Australian DPP anticipates that 30 minutes would be required to present its submissions.

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[21] ***Singh*** [66] – [67].
[22] ***Ritchie*** [65].