IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. D16 of 2019

BETWEEN:

HAROLD JAMES SINGH
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.

Part III: Why leave to intervene should be granted

3. 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:

   3.1. 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.

[1] (2011) 248 CLR 37, 38 – 39, affirming ***Levy v Victoria*** (1997) 189 CLR 579, 601 – 605.

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3.2. 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.

3.3. 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.

3.4. 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.

4. 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]

5. The appellant in the present appeal seeks to assert the existence of a general obligation on the part of a prosecutor to tender a "mixed statement" record of interview as part of the prosecution case unless there are "proper reasons" to decline to do so. The obligation is said to arise from a prosecutor's general duty to present their case fully and fairly and to adduce all relevant evidence.[3] This assertion is contrary to established authority of long-standing in Western Australia. 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.

6. 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

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[2] *Director of Public Prosecutions Act 1991* (WA) s 11(1).
[3] Appellant's Written Submissions [10].

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.

7. 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.

8. It is submitted that leave to intervene should be granted to the Western Australian DPP to allow fulsome submissions regarding the common law to be put before this Court. Although the appellant refers to some of the relevant Court of Appeal authorities from Western Australia,[4] it is submitted that the analysis does not fully identify the line of authority and seeks to cast doubt on the indisputable statements of principle that arise from those cases.

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

Legal principles relevant to the admission of mixed statements in Western Australia

9. In Western Australia, the question posed by the appellant in this appeal is to be answered by reference to the following legal principles established by the common law:[5]

9.1. An out of court self-serving statement made by an accused is inadmissible hearsay.[6]

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[4] Appellant's Written Submissions [24].
[5] As outlined by McLure P in ***Ritchie v The State of Western Australia*** [2016] WASCA 134 [38] – [42].
[6] ***Middleton v The Queen*** (1998) 19 WAR 179, 189.

9.2. 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").[7]

9.3. 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.[8]

9.4. 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.[9]

9.5. 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.[10]

9.6. 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.[11]

9.7. 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 an eye witness, whose evidence is judged to be unreliable, untrustworthy, or otherwise incapable of belief.[12]

9.8. An accused is not a competent or compellable witness for the prosecution.[13] Thus, the principles relevant to the prosecutor's obligation in respect of calling *witnesses,* as outlined above, do not directly apply to an *accused.*[14]

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[7] *Ibid.*
[8] ***Mule v The Queen*** (2005) 221 ALR 85 [5]; ***R v Soma*** (2003) 212 CLR 299; ***Ritchie*** [38]; ***Middleton***, 189.
[9] ***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.
[10] ***Richardson v The Queen*** (1974) 131 CLR 116, 119; ***R v Apostilides*** (1984) 154 CLR 563, 575; ***Soma*** [29].
[11] ***Whitehorn v The Queen*** (1983) 152 CLR 657, 674.
[12] ***Whitehorn***, 674.
[13] ***Ryan v The State of Western Australia*** [2011] WASCA 7 [56] – [63]; ***Evidence Act 1906*** (WA) s 8(1).
[14] ***Ritchie*** [40].

10. In ***Richardson v The Queen,***[15] 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.*
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> *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)

11. 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,[16] 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 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.

12. 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. Contrary

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[15] ***Richardson*** 119.
[16] ***Ryan v The State of Western Australia*** [2011] WASCA 7 [56] – [63]; ***Evidence Act 1906*** (WA) s 8(1).

to the proposition implicit in the appellant's submissions,[17] there is no ambiguity about this issue in Western Australia. As was noted in ***Sampson v The Queen*** by Parker J:[18]

> *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)

13. More recently, in ***KMT v The State of Western Australia***[15] 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 whether or not it wishes to adduce an admissible out of court statement made by an accused.* (Citations omitted)

The appellant's argument

14. In the present appeal (and in the Court below), the appellant submits that ordinarily, a prosecutor in possession of a mixed police record of interview should be required to

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[17] Appellant's Written Submissions [24].
[18] [2002] WASCA 222 [26].

tender the record of interview as part of the prosecution case unless there are proper reasons not to.[19] In support of this submission, the appellant:

14.1. Places reliance on ***Soma***[20] and the obiter remarks of Hayne J in ***Mahmood v The Queen***[21];

14.2. Seeks to establish a divergence in the development of the common law across Australia with regard to the obligations of a prosecutor to adduce evidence of mixed statements (as between Queensland and Western Australia, Victoria and New South Wales, and South Australia);[22] and

14.3. Refers to the various professional conduct rules and guidelines which enunciate a prosecutor's duties[23] in support of an argument that a fair trial requires the prosecution to tender all mixed statements.

15. The Western Australian DPP submits that:

15.1. For the reasons expressed by McLure P in ***Ritchie v The State of Western Australia***,[24] and by Kelly J in the instant appeal in the court below,[25] ***Soma*** and the obiter remarks of Hayne J in ***Mahmood*** do not stand for the proposition advanced by the appellant;

15.2. For the reasons espoused by Kelly J in the instant appeal in the court below,[26] there is significant doubt as to whether the authorities *do* establish a divergence in the development of the common law; and

15.3. The requirement for a prosecutor to act fairly does not encompass a requirement for a prosecutor to tender out of court statements of an accused on which it does not intend to rely.

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[19] Appellant's Written Submissions [10] footnote [6].
[20] ***Soma*** [30] – [31].
[21] (2008) 232 CLR 397 [39].
[22] Appellant's Written Submissions [8].
[23] Appellant's Written Submissions [11] – [14].
[24] [2016] WASCA 134 [43].
[25] ***Singh v The Queen*** [2019] NTCCA 8 [46] – [49].
[26] *Ibid* [33] – [54].

16. The relevant passage of ***Soma*** cited by the appellant in support of the proposition advanced by the appellant appears at [30] – [31] of that case. In ***Ritchie***, McLure P said:[27]

> ***Soma*** *is not authority for the proposition that the fair presentation of the prosecution case ordinarily requires the prosecution to adduce in evidence out of court statements of the accused containing both inculpatory and exculpatory material. The issue in* ***Soma*** *concerns the general rule against the prosecution splitting its case... The majority (Gleeson CJ, Gummow, Kirby and Hayne JJ), in a joint judgment, said the underlying principle of the accusatorial and adversarial system is for the prosecution to put its case both fully and fairly before defence counsel is called on to announce the course that will be followed at trial [27]; if the prosecution wished to rely on admissible incriminating out of court statements made by the accused, it was bound to put them in evidence before the accused was called upon to decide the course he would follow at his trial, unless there was some positive reason for not doing so [31]. There was no such positive reason in that case. Thus, the prosecution was not permitted to split its case by relying on the law relating to prior inconsistent statements to adduce inculpatory aspects of a mixed statement. If the prosecution wished to rely on the inculpatory statements, it could and should have tendered the mixed statement as part of its case.*

17. McLure P's comments in ***Ritchie*** are echoed by Kelly J in the instant appeal in the Court below.[28]

18. The appellant relies upon the comments of Hayne J in ***Mahmood***[29] for the dual purpose of establishing the existence of an obligation on the prosecution to tender mixed statements as part of the prosecution case, and to demonstrate a divergence in the development of the common law.[30] The Western Australian DPP submits that the comments of Hayne J in ***Mahmood*** do not serve either of those purposes. Firstly, as was

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[27] [2016] WASCA 134 [43].
[28] ***Singh*** [46] – [49].
[29] (2008) 232 CLR 397 [39].
[30] Appellant's Written Submissions [30] – [31].

noted by Kelly J in the Court below,[31] Hayne J's comments were obiter, and must be viewed in the context of the matter the High Court was then considering. ***Mahmood***, like ***Soma***, involved the prosecution selectively tendering mixed statements made by the accused. This context informs his Honour's use of the words *"all that evidence"*. Further, as was observed by McLure P in ***Ritchie***,[32] Hayne J's comments are contextualised when viewed against the background of a particular prosecutorial practice in Victoria whereby wholly exculpatory self-serving statements are traditionally adduced by the Crown as part of its case. This prosecutorial practice does not exist in Western Australia. The comments made by Hayne J do not mandate an obligation for the prosecution to tender mixed statements made by an accused as a matter of course.

19. Implicit in both ***Soma*** and ***Mahmood*** is a recognition of the prosecutorial discretion to determine whether or not a mixed statement is adduced as part of the prosecution case. In ***Soma*** the requirement to tender *all* of a mixed statement was predicated upon the prosecution electing to lead evidence of the statement.[33] Although the majority judgment in ***Mahmood*** does not directly address the issue, the reasons of the majority are inconsistent with the existence of an obligation on a prosecutor to tender mixed statements.[34]

A divergence in the development of the common law?

20. The Western Australian DPP submits that, for the reasons espoused by Kelly J in the Court below[35] and as submitted by the respondent,[36] there is considerable doubt as to whether a divergence in the approach of the common law regarding the existence or otherwise of an obligation on a prosecutor to tender a mixed statement, has in fact developed.

21. It is submitted that the existence of a prosecutorial practice in Victoria and New South Wales to tender mixed statements of accused persons as a matter of course, does not

[31] ***Singh*** [54]. See also ***Barry v Police*** [2009] SASC 295 [58].
[32] [2016] WASCA 134 [46].
[33] ***Soma*** [30] – [33].
[34] ***Ritchie*** [44].
[35] ***Singh*** [33] – [54].
[36] Respondent's Written Submissions [25] – [34].

create or demonstrate the existence of an obligation at common law for a prosecutor to tender mixed statements of an accused. To determine otherwise would effectively result in well-established authority in Western Australia being overturned as a result of prosecutorial practice in other States.

Fairness and the duties of a prosecutor

22. The appellant asserts that an obligation to tender a mixed statement of an accused is consistent with the guidelines which set out prosecutorial obligations.[37] 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).

23. 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,[38] in an unsworn statement unchallenged at trial.[39] Such a situation is not encompassed by the requirements of a fair trial, which require fairness to both the accused *and* the prosecution.

24. As was noted by Barwick CJ in ***Ratten v The Queen***:[40]

> *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*

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[37] Appellant's Written Submissions [10] – [14].
[38] ***Barry*** [68].
[39] A practice prohibited in Western Australia by s 97(2) of the *Evidence Act 1906* (WA).
[40] (1974) 131 CLR 510, 517.

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.

25. While it may be that in a rare case the refusal to tender a mixed statement would be unfair,[41] 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 his self-serving statements not being before the jury as part of the prosecution case.[42]

26. 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

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

Dated the 15th day of November 2019

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[41] ***Singh*** [66] – [67].
[42] ***Ritchie*** [65].