IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D16 of 2019

BETWEEN:

HAROLD JAMES SINGH
Appellant

10

and

THE QUEEN
Respondent

APPELLANT'S REPLY

20 **PART I: Certification**

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

PART II: Reply to the respondent's argument

2. The appellant does not submit that there is an absolute obligation upon the prosecution to adduce all mixed statements and concedes that there will be circumstances in which a proper exercise of prosecutorial judgment requires that a mixed statement is not adduced. In those circumstances the prosecution should be
30 able to identify factors which justify the decision.[1]

3. Although *Mule v The Queen*[2] is the authority which gives trial judges a wide discretion with regard to the comments which may be made regarding records of interview, the circumstances of the interview are the very kind which would justify a refusal to adduce a record of interview. On the face of the description of the circumstances in *Mule* there was a considerable risk that the interview was choreographed. In those circumstances there could be no complaint for a failure to adduce such a record of interview.

---

[1] *R v Apostilides* (1984) 154 CLR 563 at 576; *R v Kneebone* (1999) 47 NSWLR 450 at [43] &[49].
[2] *Mule v The Queen* [2005] HCA 49; 221 ALR 85.

4. Such circumstances might be contrasted with the prosecutor's reasons for not adducing the record of interview in this case. The prosecutor incorrectly stated that the record of interview was hearsay and not admissible, that it did not come within section 81 *Evidence (National Uniform Legislation) Act* and that there were no admissions **[AFB 95.5 –96; 101.5]**. The prosecutor indicated that the Crown was able to prove its case through other evidence **[AFB 102]**. It was put, in substance, that it was unfair to the Crown because the Crown would be denied an opportunity to test it and therefore the jury would not be assisted as to what weight it could attribute to the evidence **[AFB 100.10]**. It was also said that there would be no unfairness to the appellant because he had the opportunity to give evidence in his own case and bolster his credibility with reference to the interview **[AFB 111.5]**. There does not seem to be any genuine analysis or reason proffered as to why the statements might be, for example, "unreliable, untrustworthy or incapable of belief",[3] or otherwise adverse to the proper administration of justice.

5. The respondent, without a notice of contention, persists with the submission that the Court of Criminal Appeal erred in holding that the record of interview was admissible at the instance of the Crown under s 61 *Evidence (National Uniform Legislation) Act* because it was largely exculpatory.[4] It is submitted that this is a distraction to the central issue in this appeal, that is, the nature of the duty of a trial prosecutor to adduce admissible evidence which comes within an exception to the hearsay rule.

6. It is submitted that the respondent's arguments suggest a more competitive approach to prosecutions which risk derogating from the detached role of a trial prosecutor to present the case fairly seeking to establish the whole truth to ensure a fair trial.[5] It is an approach which risks tactical considerations becoming relevant in determining not to adduce admissible evidence because it is not consistent with the prosecution's case theory. If admissible evidence is not adduced without good reason then the

---

[3] *Whitehorn v The Queen* (1983) 152 CLR 657 per Dawson J at 674.
[4] The respondent was queried about raising this complaint at the application for special leave, No D7 & D8 of 2019 pp 16-18. In the Court of Appeal the whole Court held that the record of interview was admissible at the instance of the Crown: *Singh v The Queen* [2019] NTCCA 8, per Kelly J with whom Barr J agreed at [66] and per Blokland J at [113].
[5] *Whitehorn v The Queen* (1983) 152 CLR 657 per Deane J at 663-4; *R v Kneebone* (1999) 47 NSWLR 450.

finder of fact is deprived of material which is rationally capable of affecting its determination. When this occurs, a court of appeal must determine whether such a misjudgment has resulted in a miscarriage of justice.

7. Although generally admissions are regarded as reliable it does not logically follow that an exculpatory statement is "self-serving" and therefore inherently unreliable. A statement in explanation can be a simple statement of the truth, or in a criminal trial, fairly raise a defence or reasonable hypothesis consistent with innocence. It is the province of the finder of fact to determine the weight to be given to such statements, such weight being guided by closing submissions and the final directions to the jury.

8. The justification for not adducing a mixed record of interview because the prosecution, "very obviously" does not consider the accused as truthful, with respect, is misconceived.[6] The decision to prosecute is determined, *inter alia,* by whether the prosecutor believes that there are reasonable prospects of conviction. This does not necessarily require a positive belief that an accused's statements are false. In a self-defence case, a prosecutor may well believe the entire account of an accused but accepts that the appropriate arbiter as to reasonableness and proportionality is the province of the jury. Similar considerations will also apply where there are records of interview which disclose defences of provocation arising out of historical abuse. It is for the finder of fact which represents the community to make a judgment on such issues, it is submitted, rather than a prosecutor.

9. The respondent appears to submit that the principles relating to a prosecutor's duties enunciated in *The Queen v Apostolides* are confined to witnesses.[7] Consistent with *R v Manning,* Callinan J held in *Dyers v The Queen*:[8]

> A broad practical view of materiality should be taken. All the available admissible evidence which could reasonably influence a jury on the question of guilt or otherwise of an accused is capable of answering the description 'material'.

---

[6] *Barry v Police* (2009) 197 A Crim R 445 at [68]; *Singh v The Queen* [2019] NTCCA 8, per Kelly J at [65].
[7] (1984) 154 CLR 563.
[8] *R v Manning* [2017] QCA 23; *Dyers v The Queen* (2002) 210 CLR 285 at [118].

It is submitted that the duty cannot be confined to witnesses, otherwise the obligation would not extend to evidence such as business records, public documents, photographs or indeed real evidence found at crime scenes. In any event, apart those classes of evidence which are admissible *per se* because of statutory facilitation, all evidence is adduced through witnesses and specifically in the case of a record of interview, it is adduced through the interviewing police officer. The rules of evidence determine what can be adduced through witnesses. Hearsay statements which come within one of the exceptions are admissible and adduced through a witness in the same way that a witness can give evidence as to what they observed or heard.

Dated: 25 November 2019

.....
Ian Read
Telephone: 08 8999 3000
Facsimile: 08 8999 3099
Email: ian.read@legalaid.nt.gov.au

.....
Ambrith Abayasekara
Telephone: 08 8999 3000
Facsimile: 08 8999 3099
Email:
ambrith.abayasekara@legalaid.nt.gov.au