CITATION:	*Singh v The Queen* [2019] NTCCA 8
PARTIES:	SINGH, Harold James v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 4 of 2017 (21727851)
DELIVERED:	25 March 2019
HEARING DATES:	9 July 2018
JUDGMENT OF:	Kelly, Blokland and Barr JJ

CATCHWORDS:

APPEAL AGAINST CONVICTION – Crown did not adduce the appellant's record of interview with police in evidence –record of interview "mixed" containing both inculpatory and exculpatory material but substantially exculpatory – record of interview admissible in the Crown case – record of interview not admissible in defence case – whether Crown has a duty to tender "mixed" records of interview in the Crown case – no duty to tender "mixed" records of interview - failure to tender the record of interview not unfair

Uniform Evidence Act (NT) ss 21, 43, 55, 56, 56(2), 59, 66, 66A, 60, 81, 81(1), 81(2), 102, 103

Adam v The Queen (2001) 207 CLR 297, *Allied Interstate (Qld) Pty Ltd v Barnes* [1968] HCA 76, 118 CLR 581, *Richardson v The Queen* [1974] HCA 19, 131 CLR 116, applied

Azzi v R [2013] NSWCCA 249, *Mahmood v Western Australia* [2008] HCA 1), CLR 397, *R v Apostilides* [1984] HCA 38, 154 CLR 563, *R v Astill* (Unreported, NSWCCA, Priestley JA, McInerney and Badgery-Parker JJ, 17 July 1992), *R v Evans* [1964] VicRp 92, VR 717, *R v Familic* (Unreported, NSWCCA, Hunt CJ at CL, Badgery-Parker and Smart JJ, 4 November 1994), *R v Keevers* (Unreported, NSWCCA, 26 July 1994), *R v Li* [2003] NSWCCA 386, 140 A Crim R 288, *R v Pearce* (1979) 69 Cr App R 365, *R v Reeves* (1992) NSWLR 109, *R v Rudd* [2009] VSCA 213, 23 VR 444, *R v Singh* [2018] NTSC 10, *R v Soma* [2003] HCA 13, 212 CLR 299, *Spence v Demasi* (1988) 48 SASR 536, *Whitehorn v The Queen* [1983] HCA 42, 152 CLR 657, *Ziems v The Prothonotary of the Supreme Court of NSW* [1957] HCA 46, 97 CLR 279, referred to

Assafiri v Horne [2004] WASCA 40, *Barry v Police* [2009] SASC 295, *Flowers v The Queen* [2005] NTCCA 5, 153 A Crim R 110, *Kochnieff* [1987] QSC (CCA) 223, 33 A Crim R 1, *Middleton v The Queen* (1998) 19 WAR 179, *R v Callaghan* [1993] QCA 419, 2 Qd R 300, *R v H, ML* [2006] SASC (CCA) 240, 2 Qd R 300, *R v Helps* [2016] SASCFC 154, 126 SASR 486, *R v Higgins* (1829) 3 C & P 603, 172 ER 565, *Sampson v The Queen* [2002] WASCA 222, followed

R v Rymer [2005] NSWCCA 310, 156 A Crim R 84, distinguished

REPRESENTATION:

Counsel:

Appellant:	P Boulten SC with A Abayasekara
Respondent:	D Morters

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	86

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Singh v The Queen [2019] NTCCA 8
No. CA 4 of 2017 (21727851)

BETWEEN:

HAROLD JAMES SINGH
Appellant

AND:

THE QUEEN
Respondent

CORAM: KELLY, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 25 March 2019)

KELLY J:

[1] The appellant was charged with aggravated robbery. He pleaded not guilty and was tried before a jury. The jury found the appellant guilty of robbery, and guilty of both circumstances of aggravation, that is, being armed with an offensive weapon, and being in company.

[2] The prosecution case at trial, in summary, was that the appellant, in company with Davidson Victor Clifford Campbell, Konstantine Lee and Brett James, robbed a taxi driver.

[3] The Crown case relied on the evidence of Detective Senior Constable First Class Rinaldo Coulson and the victim. Each gave evidence before the jury and was subject to cross-examination. The prosecution also tendered CCTV footage of the offence and still photographs extracted from the CCTV footage.

[4] Detective Coulson and another police officer conducted an electronically recorded interview with the appellant. The record of that interview was not tendered at trial.

[5] The following summary of that interview, provided by the appellant, was not contested by the respondent and is generally accurate.

(a) The appellant was not under arrest at the time of the interview;

(b) He participated in the interview to "*clear it up*";

(c) When asked "what can you tell me your involvement [sic] regarding that taxi robbery" he responded, "Um, I was there I was a bit drunk that night, yeah, one too many alcohol and my nephew just asked me, you want to come for a ride, and I didn't know they was going to do that because I never took anything that night and they did and they did that other thing";

(d) The appellant was "drunk and my nephew just told me to follow him, yeah, and I just followed him. I didn't know what was going to happen";

(e) He provided his nephew's name, and a description of his nephew and nephew's friends;

(f) He explained that he was at Nightcliff with "*them boys*" before getting in the taxi;

(g) He was "walking back home" and "them boys came out and annoying me" with his nephew saying "come along, come for a ride, he was saying that" and the appellant "just followed my nephew that's all";

(h) They waved the taxi down, jumped in and the appellant sat in the middle;

(i) When they stopped, his nephew "had that--- I don't know what he had something on his hand … and he started sticking up the taxi driver and I just walked out from the door. When he was doing that I just walked out, yeah." The item he had in his hand was "some kind of sharp object";

(j) The appellant then drew a diagram of where the passengers were sitting in the taxi, and gave a description of the driver;

(k) Once the appellant noticed that his nephew held the sharp object to the neck of the taxi driver, "*I just walked out from them and that's all I know*";

(l) After it he walked back home;

(m) He said "I'll tell you the truth like hiding like that I don't know because I'm not a bad person I'm a good person" and "I'm being honest to you guys";

(n) He said the other boys were running and gave details of the direction in which they ran;

(o) He gave a description of what he was wearing on the night, and what he looks like;

(p) The appellant said "I didn't do anything wrong, no" and "if I wanted to do something that night and that would be hiding but that not me";

(q) The appellant "didn't know he had that knife. If he's going to do something like that and I know he do something criminal but it's my choice and I walked away from the bus";

(r) When shown footage of him looking at the knife for what is said to be "*three minutes*" and asked about it, he states "*Um, nothing I just don't know … because I was really intoxicated that night*";

(s) He did not stop his nephew because "I was intoxicated too myself. I was really intoxicated";

(t) He denied saying "*give me the money*".

[6] On the first day of trial, the prosecutor put the trial judge on notice that he anticipated that the Crown would not be leading evidence of the record of interview.

[7] Defence counsel protested that such a course was unfair and the trial judge ruled, unarguably correctly, as is accepted by the appellant, that he was unable to compel the Crown to adduce the record of interview in evidence in the Crown case.

[8] Later, defence counsel made a further application to adduce the record of interview, in its entirety, during cross-examination of the interviewing officer. This application was refused. The trial judge ruled that there was no basis for exculpatory evidence to be admitted in the defence case, essentially because "an exculpatory/self-serving statement cannot be tendered by an accused unless it is tendered in the context of admissions that are put into evidence as part of the Crown case."[1]

[9] The appellant has appealed against his conviction on one ground, namely that the Crown, in choosing not to adduce the appellant's record of interview of 8 June 2017, deprived the appellant of a reasonable chance of acquittal.

Principles

[10] The Australian appeal cases in relation to the admissibility and reception into evidence of out of court statements by an accused fall into four general categories:

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1 *R v Singh* [2018] NTSC 10 at [4]

(a) cases in which the question before the court was whether the trial judge had erred by admitting into evidence a record of interview with the accused at the instance of the prosecution;[2]

(b) cases in which the question on appeal was whether the trial judge had erred in refusing to allow the defence to tender a record of interview or cross-examine police to elicit the accused's statements in the interview;[3]

(c) cases in which the controversy revolved around the use by the prosecution of part only of a statement (or series of statements) by the accused;[4] and

(d) cases in which the ground of appeal was that the accused did not receive a fair trial because the prosecution did not tender a record of interview/exculpatory statement of the accused (or where that asserted duty was an issue in the case).[5]

Some of these judgments contain remarks which "cross over" into areas relevant to other categories. It is important to keep in mind the actual issues involved on the various appeals in order to read such remarks in context.

[11] The following principles emerge from the cases.

[12] The first principle is that admissions by an accused are admissible at the instance of the prosecution. This proposition is uncontroversial. [UEA s 81]

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2 *R v Astill* (NSWCCA unreported 17 July 1992); *R v Keevers* (NSWCCA, unreported 26 July 1994); *R v Familic* (NSWCCA unreported NSWCCA, unreported 4 November 1994); *R v Li* [2003] NSWCCA 386; (2003) 140 A Crim R 288; *R v Reeves* (1992) NSWLR 109

3 *Middleton v The Queen* (1998) 19 WAR 179; *Sampson v R* [2002] WASCA 222; *Flowers v R* (2005) 153 A Crim R 110; *R v Callaghan* [1994] 2 Qd R 300 at 304; *The Queen v Helps* (2016) 126 SASR 486; *R v Rymer* [2005] NSWCCA 310

4 *R v H, ML* [2006] SASC (CCA) 240; *Mahmood v WA* (2008) CLR 397; *R v Rudd* (2009) 23 VR 444

5 *Azzi v R* [2013] NSWCCA 249; *Flowers v R* (supra); *Barry v Police* [2009] SASC 295

[13] The second principle is that, if the prosecution wishes to rely on admissions contained in an interview or other statement by an accused that also contains exculpatory material, the prosecution is obliged to tender the entire statement, "taking the good with the bad". Again, this is uncontroversial. It is often referred to as "the mixed statement" exception to the rule against hearsay. [*R v Higgins;*[6] *Middleton v R;*[7] *Sampson v R;*[8] *R v H, ML;*[9] *The Queen v Helps;*[10] *R v Soma*][11]

[14] The second principle is not limited to instances in which the inculpatory material and the exculpatory statements are made at the one time or are contained in the one exhibit,[12] provided the statements are "part of a connected series of statements which should have been available for consideration by the jury as forming one narrative".[13]

> [T]he mixed statement exception is broad enough to admit exculpatory statements not made at the same time as the inculpatory statement relied upon by the Crown, provided that the exculpatory statement is made in circumstances which connect it

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6 (1829) 3 C & P 603; 172 ER 565

7 (1998) 19 WAR 179

8 [2002] WASCA 222

9 [2006] SASC 240

10 (2016) 126 SASR 486

11 (2003) 212 CLR 299

12 See *R v Soma* (2003) 212 CLR 299; *R v Rudd* (2009) 23 VR 444; *Flowers v R*; *Mahmood v Western Australia* (2008) 232 CLR 397

13 *Flowers v R* per Southwood J citing *Middleton v R* (1998) 19 WAR 179 at 202 per Heenan J.

to the purpose upon which the admissibility of the inculpatory statement rests.[14]

[15] The third principle is that exculpatory accounts given by an accused to police (or anyone else) are not admissible at the instance of the accused, in the absence of particular circumstances rendering them admissible according to the ordinary rules of evidence – for example to rebut a suggestion of recent invention.

(a) *R v Higgins*[15] per Parke J:

> Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner as well as against him ...

(b) Allied Interstate (Qld) Pty Ltd v Barnes:[16]

> The tender of a self-serving statement not otherwise in evidence and having no other basis of admissibility would be rejected.

(c) R v Kochnieff:[17]

> In my view it cannot be doubted that the accused is not entitled to tender his own prior self-serving statements.

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14 *R v Rudd* (2009) 23 VR 444 per Redlich JA (with whom Maxwell P and Vickery AJA agreed)

15 (1829) 3 C & P 603; 172 ER 565

16 [1968] HCA 76; (1968) 118 CLR 518 at 585 per Barwick CJ; This case did not involve "an accused". However, the rules of evidence relating to the admissibility of self-serving or exculpatory statements are not confined to criminal cases.

17 [1987] 33 A Crim R 1, 4 per Connolly J. with whom the other members of the court agreed

(d) *R v Callaghan*[18] per Pincus JA and Thomas J:

> In Australia the rules against self-corroboration and the general prohibition of proving a witness' prior consistent statements are well established:
>
> The present position in England is similar to that in Australian law. A party cannot tender his own self-serving, out of court statements as evidence of their truth unless some specific hearsay exception applies. (*Cross on Evidence* Aust.Ed. para. 33455; cf. para. 17335).

Their Honours went on to review the authorities (including those quoted above) and stated:

> There may be exceptional cases where the interests of justice require some special qualification of a strict application of the hearsay rule (eg *Daylight* (1989) 41 A Crim R 354; cf *Walton* [1989] HCA 9; (1989) 166 CLR 283, 293), but it is highly desirable that the limits upon admissibility of evidence remain identifiable. If an accused person can introduce his own self-serving version to a police officer as evidence, why may he not also introduce such versions that he gives to others at the scene, or to his wife or anyone else? If an accused can corroborate himself by means of his own consistent statements why may not other defence witnesses do so? Why for that matter should not the prosecution witnesses similarly be able to do so?
>
> A number of rationales have been suggested for the non-receivability of self-serving statements. One of these is the danger of manufactured evidence being put before the jury ... Another is that "self-serving statements are inherently unreliable, and any rule which keeps them out has some justification"... They certainly lack the rationale which justifies the reception of admissions against interest as an exception to the hearsay rule. <u>In our view there is no good reason to sanction the introduction of such evidence</u> ...".

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18 [1994] 2 Qd R 300 at 304 The ground of appeal being considered was that the trial judge erred in disallowing cross-examination of a police witness in relation to an exculpatory video-taped record of interview about six hours after the accused was apprehended.

Their Honours rejected a submission that such evidence should go in as evidence of the accused's reaction to the police investigation; to support the accused's credit by showing consistency; or to demonstrate that the appellant had given a similar version on a prior occasion.

> In our view those matters do not constitute true issues. It is of course possible for such evidence to become admissible if an issue is created, such as recent fabrication. However we reject the submission that such evidence should be received and placed before the jury on any of the above bases. *[emphasis added]*

Their Honours also distinguished statements made as part of the *res gestae* of a particular issue (and admissible as such) from narrative assertions made at a later time in response to police questioning.

(e) *Middleton v R*[19] per Pidgeon J:

> The evidence referred to *[ie several brief conversations with police which included an exculpatory assertion that his wife, whom he had admitted killing, had lost her temper and had come at the appellant with a knife]* would have been admissible in the trial as part of a "mixed" statement, but the particular mixed statement was not being tendered by the Crown. In that event it would not be open to an accused person to seek to lead exculpatory material on a hearsay basis. *[emphasis added]*

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19 (1998) 19 WAR 179 at p 185; The ground of appeal being considered was that the trial judge erred in refusing to permit the defence to lead as evidence statements made by the accused person to the police when they first appeared at the scene.

(f) *Sampson v R*[20] per Parker J (with whom Anderson & Steytler JJ agreed):

> Some parts of the total interview could be taken to be against the applicant's interest, so that the whole interview could be regarded as a mixed statement in the sense frequently used in this context. The prevailing overall flavour of the interview was, however, distinctly self-serving. 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; … 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. … This position has been well settled for approaching two centuries. *[emphasis added]*

His Honour cited *Middleton, Callaghan* and *R v Higgins*.

(g) *Assafiri v Horne*[21] per Roberts-Smith J:[22]

> An admission or confession by the defendant is admissible for the prosecution as an exception to the rule against hearsay. The rationale is that it is a statement against interest and therefore likely to be true. An admission of a fact in issue or a fact relevant to a fact in issue is accordingly evidence of the fact and so is relevant. Mere denials, however, have no probative value and so are irrelevant and hence inadmissible (*R v Haycock* [1989] 2 Qd R 56, 59). The prosecution need not, and cannot be compelled to, give evidence of mere denials (*R v Graham* (1972) 26 DLR (3d) 579; *R v Newsome* (1980) 71 Cr App Rep 325; *Wogandt* (1988) 33 A Crim R 31) and nor can the accused elicit them in cross-examination of prosecution witnesses or give evidence of them in the defence case. If the prosecution does not tender a statement of the defendant which contains both admissions and self-serving material, the defendant cannot tender, or seek to elicit by

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20 [2002] WASCA 222 The proposed ground of appeal on the application for leave to appeal was that the trial judge erred in refusing to allow cross-examination of police witnesses as to the contents of an interview with the applicant.

21 [2004] WASCA 40

22 at [59] and [60]

cross-examination, the self-serving parts (*R v Callaghan* [1994] 2 Qd R 300, 303-4). *[emphasis added]*

(h) *Flowers v R*[23] per Southwood J[24] (who noted that evidence of an accused's statement to police is admissible for the purposes he refers to in England):[25]

> The position is different in Australia. The argument that was put to the Court of Criminal Appeal by counsel for the applicant is the same argument that was rejected by a majority of the Court of Appeal of Queensland in *R v Callaghan* [1994] 2 Qd R 300. That decision is supported by a considerable line of authority including: *Higgins* [1828] EngR 201; (1829) 3 C & P 603 at 604 [1828] EngR 201; 172 ER 565; *Allied Interstate (Qld) Pty Ltd v Barnes* [1968] HCA 76; (1968) 118 CLR 581,585;*Lopes v Taylor* (1970) 44 ALJR 412,421; *R v Williamson* [1972] 2 NSWLR 281, 294-296; *Herbert v The Queen* [1982] FCA 147; (1982) 6 A Crim R 1, 29-32; *R v Cox* [1986] 2 Qd R 55, 63-65; *Kochnieff* (1987) 33 A Crim R 1, 4; and *Spence v Demasi* (1988) 48 SASR 536, 540-546. The decision was followed by the Court of Criminal Appeal of Western Australia in *S* [2002] WASCA 222; (2002) 132 A Crim R 326. All of these cases support the proposition that in Australia there is no exception to rule against prior consistent statements which permits an accused to tender prior consistent statements whether by cross examination of police witnesses or otherwise for the purpose of showing either the accused's reaction when challenged about his offending by police or consistency in the account which he has given of what occurred. *[emphasis added]*

Riley J, with whose reasoning Martin CJ agreed, also concluded that the submission of the applicant that the learned trial judge ought to have allowed cross-examination of the police officers so as to introduce evidence of consistent denials was not sustainable.

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23 (2005) 153 A Crim R 110 The proposed ground of appeal was that the trial had been unfair because the Crown had refused to tender a record of interview with police that was largely exculpatory and the trial judge had indicated he would refuse to allow the defence to introduce it in cross-examination of the interviewing officer.

24 Southwood J dissented in the result but not in rejecting this argument for admissibility.

25 at [54]

In reaching that conclusion, his Honour conducted a review of the authorities,[26] citing, and quoting from *R v Callaghan*; *S (ie Sampson)*; *Middleton*; *Higgins;* and *Assafiri v Horne.*[27]

(i) *R v H, ML*[28] per Vanstone J:

> I turn to the question of principle. Statements made out of court, including by the accused person, are, prima facie, hearsay. However, in a criminal trial the prosecution can tender a statement of a defendant where it is said to contain admissions or other incriminating statements. Where such a statement contains exculpatory material as well – referred to as a "mixed statement" – the prosecution is obliged to tender the whole statement. The material goes in as an exception to the hearsay rule. The jury is entitled to treat the various parts of it as being of differing weight: … The exculpatory parts go in not merely to provide a context to the admissions, but as some evidence of the facts stated:
>
> However, if the statement contains only self-serving material then it is not admissible at the instance of the accused: *Callaghan v The Queen* [1993] QCA 419; [1994] 2 Qd R 300.
>
> It is probably admissible if tendered by the prosecution. Indeed in this jurisdiction it has been for some years customary to tender as part of the prosecution case any response made by the accused when first "taxed with the allegations" by police. That seems to accord with the English practice outlined in *Pearce* (1979) 69 Cr App R 365 as explained in *Newsome* (1980) 71 Cr App R 325. I note that the learned author of Cross on Evidence (7th Australian Edition, Butterworths, 2004) at [17335] is critical of such a procedure.

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26 at [37] to [40]

27 *R v Flowers* also raised the question of the prosecution's obligation to tender the whole of a statement made by an accused if it intended to rely on admissions, and the extent to which this extended to statements of the accused made at different times. It is discussed further under that heading below.

28 [2006] SASC 240 at [25] to [27]; One of the grounds of appeal was that certain parts of the records of interview in which he, essentially speculated about motives the complainant may have had to make up the allegations against him had been wrongly excluded. The suggested motives did go before the jury through XXN of the complainant. The appellant's complaint was that exclusion of them from the interviews meant that the jury were deprived of knowing that the appellant had mentioned them when first accused.

(j) *R v Helps*[29] per Kelly J (with whom Lovell J agreed):

> For the reasons which follow I consider that the Judge was entitled to take the view that the interview with the police on 31 August 2014 was inadmissible at the instance of the defence. In refusing to admit the interview, and even accepting the concession made on appeal that the interview can properly be categorised as a mixed statement containing answers partly inculpatory and partly exculpatory, the Judge was doing no more than correctly applying the law.

Her Honour cited *R v H, ML*.

(k) *Barry v Police*[30] *("Barry")* per Kourakis J (as he then was), after reviewing the authorities said:[31]

> The survey of the authorities undertaken by Cox J[32] shows clearly enough that self-serving statements are admissible, and have probative value, only when introduced as part of the "Crown package". If the prosecution chooses not to lead evidence of incriminatory statements there is no relevant unfairness to the accused in the exclusion of his or her self-serving exculpatory statements. There is therefore no arbitrariness or unfairness in the operation of the common law principle. It may be a matter of "happenstance", as Grove J observed in *Rymer*, as to whether an accused makes an incriminatory, exculpatory or mixed statement, but the only reason for the admission of the exculpatory part of a statement is to ensure the fair use of the incriminatory statement on which the prosecution relies. If the incriminatory statement is not led, the rationale for the admission of the exculpatory part of the statement disappears.

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29 [2016] SASCFC 154; (2016) 126 SASR 486 at [23]; The first ground of appeal was that the prosecution failed to ensure a fair trial by not leading the appellant's record of interview as part of the prosecution case and the Judge similarly failed to ensure a fair trial by refusing permission for the appellant to lead it as part of his case.

30 [2009] SASC 295 The ground of appeal under consideration was that the appellant did not receive a fair trial and there was a miscarriage of justice as a result of the prosecutor refusing to tender a transcript of the appellant's interview by Police.

31 at [67]

32 ie in *Spence v Demasi* (1988) 48 SASR 536

[16] The central point of all of these authorities is that the admissibility of pre-trial exculpatory statements by an accused is governed by the ordinary rules of evidence. One first asks whether the statement is relevant to an issue in the proceeding; one then applies the general rules of evidence including the rule against hearsay, and the rule against self-corroboration; one then asks whether the statement falls within any of the exceptions to the rule/s.

The decision in *R v Rymer* failed to apply this approach

[17] In the New South Wales case *R v Rymer*[33] the appellant appealed against his convictions on three counts of sexual intercourse with a child under the age of ten years. One of the grounds of appeal was that the trial judge had been in error in ruling that exculpatory statements made by the accused to police would only be admissible in evidence (under UEA s 66) if the accused gave evidence.[34] On appeal, Grove J (with whom Barr and Latham JJ agreed) held that the statements were not admissible under s 66[35] as they were not "fresh in the memory" when made because of the temporal gap between the alleged offences and the denials.

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33 [2005] NSWCCA 310 (6 September 2005)

34 Following that ruling, the appellant elected to give evidence and informed the prosecutor of that and both the exculpatory statements were put in evidence in the Crown case.

35 UEA s 66 permits evidence to be adduced of a previous representation about an asserted fact made by a person who is available to give evidence provided certain conditions are met, including that when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation

[18] Grove J then went on to hold that the exculpatory statements to police were admissible under UEA s 60 because the exculpatory account had "the dual purposes of assertion of the fact of innocence and the credibility of that assertion implicit in the denial of guilt conveyed by the plea".[36] His Honour said (at [64]):

> [T]he exculpatory statements were admissible as an exception to the hearsay rule by reason of the dual purposes of the evidence seeking to demonstrate the asserted fact (that the appellant did not commit the sexual assaults alleged) and credibility deriving from his proclamation by plea that he was not guilty. By reason of the dual purposes (s 60) the evidence would not be excluded by the credibility rule (s 103).

In coming to this conclusion, Grove J placed reliance on *Adam v The Queen*[37] in which Gleeson CJ, McHugh, Kirby and Hayne JJ observed:

> Because, however, the evidence would be relevant both for the purpose of considering the witness's credibility and the proof of the facts which he intended to assert in the out of court statements, the hearsay rule would not apply (s 60).

[19] However (as Grove J noted) this was said in the context of a witness who was in fact called and whose prior inconsistent statement to police was left by the trial judge to the jury to consider as evidence of the truth of its content. (In that case the statement in question **was**

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36 at [31] However, the appeal was dismissed because the evidence had in fact been called by the Crown and the only actual difference in the course of trial was that the appellant may have elected not to give evidence, if not for the ruling by the trial judge. The ground of appeal did not assert that the trial miscarried because the appellant gave evidence, but that it was unfair because he was deprived of the right not to give evidence. Since no complaint had been made that the appellant suffered prejudice by actually giving evidence, Grove J held that no substantial miscarriage of justice had occurred.

37 (2001) 207 CLR 297

admissible as a prior inconsistent statement.[38] Therefore s 60 applied to allow the prior inconsistent statement to stand as evidence of the truth of the matters asserted in it.)

[20] With respect, there is a logical (and legal) flaw in the conclusion by Grove J that UEA s 60 would allow the admission of otherwise inadmissible self-serving statements by an accused for the following reasons.

(1) Section 59(1) is the general exclusionary rule relating to hearsay. It provides: "Evidence of a previous representation 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 by the representation" (an "*asserted fact").*

(2) There can only be two possible forensic purposes for the defence wanting to adduce evidence of an exculpatory account given by the accused. The first is to rely on it as evidence of the truth of the exculpatory account. A statement by the accused to the effect that he did not commit the offence is an asserted fact. It is clearly intended by the maker (the accused) to be an assertion that he did not do what he is accused of. The same applies to other more complicated exculpatory explanations. The purpose of adducing them is to rely on the assertions as evidence of the truth of what

38 See UEA s 43

they assert. This is plainly a hearsay purpose: it falls within the general exclusion in s 59.

(3) The second possible forensic purpose for which the defence may wish to tender an accused's exculpatory account is to bolster the credit of the accused by establishing that his present denial is consistent with what he said at an earlier time to police. However, under s 102 (NSW s 103), credibility evidence about a witness is not admissible. (This evidence would also be inadmissible at common law under the rule against the admission of prior consistent statements to bolster credit.)

(4) Section 60 provides: "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representations".

(5) Section 60 applies where one of the purposes for which evidence is sought to be adduced is an admissible purpose. It does not permit a party to adduce evidence just because they can identify more than one inadmissible use for the evidence. Yet that is the effect of the decision in *R v Rymer*.

[21] In *Barry*,[39] Kourakis J also identified that flaw in the reasoning of Grove J in *Rymer* and added:[40]

> The second difficulty is of more fundamental importance. Grove J himself recognised that the concept of evidence relevant to the credibility of the plea of not guilty was problematic. With respect, I do not understand what is meant by the concept of "credibility of an implied assertion of innocence in a plea of not guilty". The plea is not evidence and the accused does not plead as a witness. The plea is a response to the indictment and it makes no more sense to speak of the credibility of the implied assertion of innocence in the plea as it does to speak of the credibility of the implied assertion of guilt in the indictment. Whatever use the concept has for the purposes of the *Evidence Act 1995* (NSW), evidence is not admissible at common law to establish the "credibility" of a plea of not guilty.

[22] In *Rymer*, Grove J also relied on the earlier NSW cases of *Keevers* and *Familic* the logical and legal flaws in which are discussed below. His Honour further relied on the following passage from the judgment of Kirby P in *R v Astill*:

> There is a further basis upon which such evidence may be received. It is where the assertion is so apparently spontaneous as to lend weight to the conclusion that it was not concocted or self-serving. This feature may then permit the reception of the evidence even over objection. The theoretical basis for doing so is, as Dixon J explained in *Adelaide Chemical & Fertilizer Co Ltd v Carlyle* [1940] HCA 44; (1940) 64 CLR 514 at 532f: '... reliance on the greater trustworthiness of statements made at once and without reflection ...' The fundamental basis for the disinclination of judges to exclude such evidence was explained by Lord Wilberforce in *Ratten* at 389f:
>
> > *The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion,*

39 [2009] SASC 295 at [52]

40 [2005] NSWCCA 310; (2005) 156 A Crim R 84 at [53]

> *and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction … As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded …'*

However, that is a separate ground of admissibility, namely that the words spoken form part of the *res gestae*, (see also UEA s 66A) – albeit suggesting an alternative theoretical basis for the doctrine. It would not apply to the contents of a record of interview conducted some time after the events constituting the crime were complete.

[23] In summary, there is no principled legal basis for reliance on *R v Rymer* as authority for the proposition that pre-trial exculpatory accounts by an accused are admissible otherwise than at the instance of the prosecution where the prosecution intends to rely on the inculpatory parts of a mixed statement. Such a proposition is contrary to the line of authority, including High Court authority, set out above.

The issue on the appeal

[24] The question on this appeal is a different one, namely whether the prosecution had a duty, as a matter of fairness, to tender evidence of the largely exculpatory statements made by the accused in an interview

with police, and whether the prosecution's failure to do so resulted in an unfair trial.

[25] It is common ground that a trial judge has no power to compel the prosecutor to adduce evidence.[41] If the prosecution exercises its discretion not to adduce evidence of a record of interview with the accused, then the question to be answered is whether this has led (or would lead) to an unfair trial. If the accused is convicted, the ground of appeal will be (as in this case) that the failure of the prosecution to adduce the evidence led to an unfair trial in that it deprived the appellant of a reasonable chance of acquittal.[42]

[26] Alternatively, the accused could apply for a stay of proceedings on the ground that to proceed without adducing evidence of the record of interview would lead to an unfair trial - as occurred in *R v Van Dung Nguyen*.[43] (In that case, heard shortly after the hearing of this appeal, and raising essentially the same issues, the trial judge referred the question to the Full Court, consisting of the same three judges who heard this appeal.)

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41 See *Richardson v The Queen* [1974] HCA 19; (1974) 131 CLR 116, at pp 119, 121; *R v Evans* [1964] VicRp 92; (1964) VR 717, at p 719ff; *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657 at 663

42 See discussion of remedies in *Whitehorn v The Queen* at p 665; See also *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563 at [13]: "A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice."

43 *R v Van Dung Nguyen* (21633625 – SR1 of 2018)

[27] As I understand it, the appellant does not contend that pre-trial exculpatory statements by an accused are admissible at the instance of the defence (the third principle above). Nor does the appellant contend that the prosecution has a duty to tender purely exculpatory accounts by an accused. The appellant's contention is that the prosecution has a duty to tender "mixed" statements – ie those that contain some admissible material as well as the accused's exculpatory account.

[28] The question for determination by the Court is whether the prosecution does have a duty to tender such "mixed" statements in the Crown case. The respondent contends that it does not: that whether or not to do so is a matter for the discretion of the prosecutor.

Consideration of authorities relied on by the appellant

[29] The appellant relies on the following part of the judgment of Grove J (with whom Barr and Latham JJ agreed) in *R v Rymer*.[44]

> Since the abolition of the entitlement of an accused at trial to make an unsworn statement to the jury, it was acknowledged (and confirmed by observation of cases which pass through this Court) that it is a not infrequent occurrence for an accused person, after tender by the Crown of the content of exculpatory material usually in the form now of a video taped interview, to invite the jury through counsel to consider that material as response to the Crown case and a basis for a verdict of not guilty.
>
> It would be, to say the least, unsatisfactory for that course to be open to some accused but not to others as a matter of mere happenstance. I am not implying that prosecutors do not behave responsibly but if the tender of such material is done as a matter

44 [2005] NSWCCA 310; (2005) 156 A Crim R 84 at [56] to [59]

> of unfettered discretion it would be expected that some prosecutors would tender it and others would not.
>
> A danger which would need to be guarded against would be that contemplated in *Pearce* that an accused may bring forward a contrived "hearsay case".
>
> Nevertheless, it is submitted on behalf of the appellant that the Crown should have called the exculpatory evidence as "a rule of fair play essential to the proper administration of justice". It would certainly lead to unfairness if evidence of this type were tendered or not as a result of arbitrary selection on the part of a prosecutor. I consider that, absent some particular reason for refraining from doing so, such evidence should be put before the Court by the prosecution.

[30] A number of comments may be made about these remarks.

(a) The remarks are obiter. The case was decided on the basis that the exculpatory statements were admissible under UEA s 60, (presumably at the instance of the defence during cross-examination of the police witness).

(b) An observation that it may be "unsatisfactory for that course *[placing before the jury a de facto "unsworn statement" in the form of a police interview]* to be open to some accused but not to others as a matter of mere happenstance" does not answer the question whether such statements are admissible, and in the case of purely exculpatory statements they would not be.

(c) If one were to limit the asserted prosecutorial duty to "mixed" statements, as the appellant does, then whether or not an accused's denials get before a jury would still depend on "happenstance" (ie whether the exculpatory account happened to contain some admissions). Indeed, even if there is said to be a duty to tender all pre-trial statements by an accused, whether or not the accused can communicate an exculpatory account to the jury without giving sworn evidence will still depend upon whether the accused elected to exercise his right to silence when confronted by police. (The appellant accepts that the prosecution would have no duty to tender a contrived ex post facto denial at the instigation of the accused.)

[31] The appellant also relies on the English authority of *R v Pearce*[45] in which the relevant principles in English law are summarised as follows:[46]

> (1) A statement which contains an admission is always admissible as a declaration against interest and is evidence of the facts admitted. With this exception, a statement made by an accused person is never evidence of the facts in the statement.
>
> (2) … A statement that is not an admission is admissible to show the attitude of the accused at the time he made it. This however, is not to be limited to a statement made on first encounter with police. *[The judgment goes on to elaborate in ways not presently relevant including adding the principle - also applicable in Australian law - that statements that are not admissions are admissible if made in the same context as an admission.]*
>
> (3) Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible."

[32] The two underlined portions of the judgment do not represent the law in Australia.

> (a) Where a mixed statement is adduced in evidence, then the whole statement becomes evidence of the truth of what has been asserted: *R v Higgins* per Parke J, quoted above (an older English authority); *R v Middleton; Callaghan; R v H, ML* and others.

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45 (1979) 69 Cr App R 365

46 at [31]

(b) It would be contrary to basic principle for evidence to be held admissible simply because it shows the attitude of the accused at the time he made the statement. How could that be relevant to an issue in the proceeding? (It might be different – depending on the issues before the jury - if it could be said to cast some light on the attitude of the accused at the time of the alleged offence.) Kourakis J made similar comments in *Barry*.[47] Under Australian law, the first question when assessing admissibility is relevance to an issue in the proceeding. Evidence that is not relevant in a proceeding (ie evidence which, if accepted, could not rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding)[48] is inadmissible: UEA s 56(2). (This is not a departure from the common law rule.)

[33] The appellant contended that there was a divergence of authorities in Australia and relied on a number of New South Wales Court of Criminal Appeal cases *(R v Astill; R v Keevers; R v Familic)* for the general proposition that the prosecution has a duty (as part of its duty of fairness) to tender a record of interview in which an accused gives an exculpatory account – or at least a duty to tender a "mixed" statement/interview which contains both admissions and exculpatory material. I am not at all sure that there is such a divergence of authority. These cases are not authority for the general principle espoused by the appellant for a number of reasons.

(a) First, these cases all concerned defence appeals on the ground that records of interview by the accused should not have been admitted when tendered by the prosecution. Anything said in the course of them about the prosecution having a duty to tender exculpatory records of interview is obiter. (I am not aware of any New South Wales authority directly on point. *R v Rymer* is not directly on point and, as explained above, the

47 [2009] SASC 295 at [54]

48 UEA s 55

decision in that case was based on a mis-construction of UEA s 60.)

(b) Second, the remarks relied on (discussed below) do not distinguish between questions of admissibility and questions of fairness, no doubt because they were not directed towards considering the admissibility of exculpatory statements by an accused. In context, some of the remarks simply draw attention to the (at least then current) practice of prosecutors in New South Wales of tendering all records of interview with accused.

(c) Where the remarks go further and comment on admissibility they contain legal and logical flaws (discussed below).

[34] One of the passages relied on by the appellant is the following from the judgment of Badgery-Parker J in *R v Familic*:[49]

> The relevant principle is established in the decisions of this court in *Regina v Astill* (unreported 17 July 1992) and *Regina v Reeves* (1992) 29 NSWLR 109 at 114-115. (See also *Regina v Keevers* (CCA, unreported 26 July 1994). *It is that where an accused person replies to a question put by police officers or responds to an invitation to comment on some matter put to him or her, what he or she says is in general admissible in evidence.*[50] If what is said amounts to no more than an assertion of the right to silence, it may be admitted but the jury should be immediately directed about the right to silence and that no inference adverse to the accused may be drawn by reason of the exercise of it: *Astill* (supra, at 8-9). Where what is said is clearly an admission then, subject of course to the question of voluntariness and the possible existence in the particular circumstances of discretionary reasons for exclusion, it

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49 s*upra; R v Familic* concerned an objection by the accused to the admission of statements made by the accused to police and an appeal against a ruling by the trial judge allowing the admission of that evidence. Badgery-Parker J (with whom Smart J and Hunt CJ at Common Law agreed) found that statements by the accused: "Two of us were in the car when we had the guns, that's all I'll say," and "I can't say anything about the gun," were inadmissible because they could not reasonably be construed as admissions of guilt. Other statements he found to have been admissible on the basis that it was open to the jury to infer from that evidence that the accused had some knowledge of the offences, and the jury was not obliged to accept the explanation for that advanced by the accused's counsel. (These findings are difficult to square with the statements of principle in that portion of the judgment relied on by the appellant.) In the result, the appeal was dismissed because the wrongly admitted evidence did not advance proof of guilt and would not have been understood by the jury as doing so and accordingly there had been no miscarriage of justice.

50 In fact *Regina v Astill* does <u>not</u> establish this principle. See below at [45]

> is admissible. Where it is clearly a denial of guilt, it is admissible and ordinarily should be given in evidence. If what is said is equivocal, in the sense that it may be understood as an admission or as an acknowledgment of guilt, or as implying a consciousness of guilt, but may on the other hand be understood, particularly in the light of some explanation of it later to be given by the accused, as not being an admission or as not implying a consciousness of guilt, it is a question for the jury to determine its meaning. If the jury finds that by what he or she said (and/or did – cf *Astill*) the accused was making an admission of guilt or of a fact from which the inference of guilt might be drawn or was manifesting a consciousness of guilt, the evidence has probative value and ordinarily gives rise to no improper prejudice such as should lead to its exclusion.

[35] No authority is cited for the underlined statement (that denials of guilt are admissible) and it is contrary to long standing authority and to established legal principle. Such a denial would either be hearsay and not admissible if tendered as evidence of the truth of the denial (UEA s 59); or, if tendered for the non-hearsay purpose of bolstering the accused's credibility – would fall foul of the rule against bolstering credit with prior consistent statements (and UEA s 102).[51] [See the discussion at [20](1)to [20](5) above.]

[36] The passage relied upon continues:

> A situation which is not dealt with in *Astill* and in *Reeves* is where although the meaning of what is said by the accused is unclear and does not amount to an unequivocal denial, it cannot reasonably be

51 However, as Kourakis J said in *Barry* [2009] SASC 295 at [51]:

> Badgery-Parker J then went on to find that two of the statements made by the accused were not admissible, because they could not be understood as admissions of guilt. His Honour held that the remaining statement was admissible as evidence that the accused had actual knowledge of the offences. None of the statements were exculpatory and therefore the opinion expressed in the cited passage as to the admissibility of a denial of guilt is strictly obiter.

> understood as importing an admission or as implying an awareness of guilt. *In general, the answer must be that such an answer is inadmissible because it is irrelevant,* unless it ought in fairness to be given in evidence for the reason which I expressed in *Astill*: "It has long been common practice to adduce evidence of such conversations and the justification no doubt is that if it were not given, the jury would be left to speculate as to whether the accused had given any account of his actions when first challenged by the police." Unless the evidence ought be admitted for that reason, *the fact that what is said cannot be construed as an admission or as manifesting an awareness of guilt renders it irrelevant and hence inadmissible.* It should be excluded, and no question of the judge's discretion arises.

[37] So far as the underlined portion of the remarks is concerned, "fairness" is not an independent basis for admissibility of evidence. One must first ask: "Is it relevant to an issue in the proceeding?" Only if the answer is: "Yes," does one look at the exclusionary rules (for example the hearsay rule) and then any exceptions to those rules. It is only when that process is complete that one asks whether otherwise admissible evidence should be excluded (or not excluded) on the basis of fairness.[52]

[38] Further – the fact that prosecutors in New South Wales have had a longstanding practice of doing something is not a basis for admissibility. If they have been doing it as a benefit to the accused –

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52 So far as the suggestion in the italicised portion of these remarks that a statement by an accused should be scrutinised statement by statement and the ambiguous portions eliminated because they are not admissible, that would seem to be contrary to the principle enunciated in *Soma* (though pre-dating that case) that if the prosecution seeks to rely on that part of an interview/statement made by an accused which contains admissions, it should all go in. (This is not to deny that edits may be made in the interests of fairness to the accused, for example by deleting references to an accused's criminal history.)

well and good, but that does not mean they have any obligation to keep doing it. And if, in a particular instance, the accused objects[53] – then the material proposed to be led by the prosecution should be scrutinised for admissibility, which cannot be assessed simply on the basis of past practice: it must be assessed by reference to the rules of evidence. As Kourakis J said in *Barry*: "[T]he past practice of prosecutors cannot, of itself, effect a change in the common law."[54] Similar remarks were made by Lovell J in *Helps*.[55]

[39] In *R v Keevers*,[56] the appellant appealed against his conviction on child sex offences. One of the grounds of appeal was that the trial judge erred in admitting evidence led by the prosecution that the accused had denied the allegation when confronted by the child's mother in circumstances where there was evidence as to the truth of the allegation. In rejecting the appeal on this ground, the Court made the following statements of principle:

> There was no admission of guilt made by the appellant in such a response, and there was nothing of evidential value about the way in which the response was made which was relevant to prove the truth of the allegation put to him. Where allegations are put to the accused in such circumstances, and where there is no evidence of the facts alleged, it is the usual practice to exclude such evidence: … The reason is that the prejudicial effect of what is alleged (and not otherwise proved) usually outweighs any other legitimate

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53 as was the case in *Familic* and *Keevers*

54 [2009] SASC 295 at [54]

55 (2016) 126 SASR 486 at [380]

56 (NSWCCA, unreported 26 July 1994)

> value of the mere fact that the allegations had been put to the accused.
>
> In the present case, there was evidence as to the truth of the allegation which was put to the accused by his wife. This Court has held that evidence may be given of questions asked and of answers given notwithstanding that that evidence discloses that an accused has exercised his right of silence: *Regina v Reeves* (1992) 29 NSWLR 109 at 114-115. The decision of the High Court in *Petty v The Queen* (1991) 173 CLR 95 was distinguished (at 115) upon the basis that the fact that the investigating police officers had put the prosecution's version of the facts to the accused, and had given him the opportunity to answer them and to give his own account of the events in question was relevant to the fairness of their conduct, provided that a direction was given to make it clear to the jury that the accused had a fundamental right to remain silent and that his exercise of that right must not lead to any conclusion by them that he was guilty.

[40] The underlined portion of the judgment begs the question, "How could whether or not the police behaved fairly be relevant to any issue in the trial?" The police were not on trial for acting unfairly. The judgment continued:

> As was said by this Court in an earlier case, it has long been common practice to adduce evidence of such conversations because, if it were not given, the jury would be left to speculate as to whether the accused had given any account of his actions when first challenged by the police: *Regina v Robert Ernst Astill* (CCA, 17 July 1992, unreported) at 8-9. In each of those cases, there was evidence as to the truth of the allegation which was put to the accused by the police.
>
> Were that not the case, the evidence would (as I have said) usually be excluded in accordance with the "Christie" discretion.
>
> Those cases deal with the situation where the allegations have been put to the accused by the investigating police. The jury would be all the more likely to speculate as to whether an accused in the circumstances of this appellant would have been confronted by the victim's mother following the complaint made by her and as to what his response had been.

[41] With respect, the underlined portion of the judgment in the passage above is also an unsatisfactory reason for admitting evidence because it ignores the fundamental question behind all questions of admissibility: is the evidence relevant to an issue in the proceeding? (See UEA s 56). The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. (UEA s 55)[57]

[42] The judgment in *R v Keevers* continued:

> It was submitted by the appellant that it is wrong in principle to permit evidence to be given which is not otherwise probative of some relevant fact against the accused simply to prevent speculation by the jury which may be harmful to the Crown cases. *(sic)* No authority was cited in support of that submission. I have already referred to two cases which are authority against it. In *Regina v Anthony Hancock* (CCA, 16 November 1990, unreported), at 16-17, this Court held that, provided that a direction is given that no adverse inference may be drawn against the accused, evidence may be led of his refusal to participate in an identification parade so that the jury, in the absence of such evidence, do not infer that he has been unfairly dealt with. Reliance was placed upon *Regina v Clune* [1982] VR 1 at 26-27. They are also authority against the submission now made. What the submission overlooks is that a trial must be fair not only for the accused but also for the Crown, which prosecutes on behalf of the community.

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57 Section 56(2) is of no assistance. It provides that evidence is not taken to be irrelevant only because it relates only to (*inter alia*) the credibility of a witness (though UEA s 102 excludes evidence that is relevant only because it affects the assessment of the credibility of the witness or person). But the fact that the jury would be left to speculate as to whether the accused had given any account of his actions when first challenged by the police does not render whatever answer he may give relevant to credit. No adverse inference may be drawn against an accused from a failure to comment; so how could knowledge that he had in fact commented be relevant to his credit?

> For these reasons, the evidence of the confrontation was admissible. The issue as to the directions which should have been given arises under the next ground of appeal.

[43] With respect, the appellant's submission referred to in the underlined section above is undoubtedly correct. No authority needs to be cited for the proposition which is the basic rule for the admissibility of evidence. If authority were needed reference may be made to UEA s 56(2). Further, whether or not an accused has been unfairly dealt with is unlikely (in most cases) to be relevant to any issue in the proceeding.

[44] For these reasons, it does not seem to me that either *R v Keevers* or *R v Familic* is authority for the proposition that the Crown has a duty to tender either exculpatory statements or mixed statements by an accused.[58]

[45] The third case in the trio of cases cited for this proposition, *R v Astill*, does not say anything about what should occur. In that case Badgery-Parker J simply remarked:

> It has long been common practice to adduce evidence of such conversations and the justification no doubt is that if it were not given, the jury would be left to speculate as to whether the accused had given any account of his actions when first challenged by the police. Such evidence having been given, it is the usual (and should be the invariable) practice for the trial

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58 Nor is *R v Reeves* (1992) 29 NSWLR 109, referred to in *R v Familic*. Like *R v Familic* and *R v Keevers*, *R v Reeves* was also an appeal against conviction on the ground that the prosecutor had adduced evidence about a pre-trial interview with the accused, and the appellant contended the trial judge had wrongly admitted it. In *Reeves* the evidence objected to was to the effect that the appellant had not asked for medical treatment, a fact relevant to his allegation that he had been stabbed; and also that he had been "unco-operative". In relation to the latter, the court held that this evidence should have been accompanied by a direction that the accused had a fundamental right to remain silent.

> judge, as soon as it has been given and again in the summing up, to emphasise to the jury that no inference adverse to the accused might be drawn by reason of his refusal to answer questions pursuant to his common law right to silence.

That is a statement about what has occurred; not about what ought to occur.

[46] The appellant also relied on *R v Soma*.[59] The respondent in *Soma* was charged with rape. Police conducted an interview in which the respondent gave an account consistent with consensual sexual intercourse. The interview was not tendered in the prosecution case. The respondent gave evidence at trial and the prosecutor cross-examined with respect to what had been said in his interview. The accused denied having said some of the things put to him and those parts of the interview were played and tendered. The appellant appealed on the ground that the "the learned trial judge erred in permitting the Crown to split its case". The Court of Appeal allowed the appeal on that basis, quashed the conviction and ordered a new trial.

[47] The prosecution appealed unsuccessfully to the High Court. In disallowing the Crown appeal, the plurality[60] said:[61]

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59 (2003) 212 CLR 299

60 Gleeson CJ, Gummow, Kirby and Hayne JJ

61 at [30] and [31]

> In the present case, the prosecution had available to it evidence of statements made by the respondent to police. The prosecution called the interviewing police officer. In this Court it was accepted that the statements which the respondent made to police were adverse to his interests; they were not merely and exclusively self-serving denials. If there were doubts about the admissibility of the record of interview, those doubts could have been resolved on a voir dire. If necessary, the record of interview could have been edited to exclude any objectionable parts. None of these steps was taken.
>
> If the prosecution case was to be put fully and fairly, the prosecution had to adduce any admissible evidence of what the respondent had told police when interviewed about the accusation that had been made against him. To the extent to which those statements were admissible and incriminating, the prosecution, if it wished to rely on them at the respondent's trial, was bound to put them in evidence before the respondent was called upon to decide the course he would follow at his trial. To the extent that an otherwise incriminating statement contained exculpatory material, the prosecution, if it wished to rely on it at all, was bound to take the good with the bad and put it all before the jury. And consistent with what is said in *Richardson v The Queen* and *Apostilides* the prosecutor's obligation to put the 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. The only reason proffered for not doing so in this case was, as the Court of Appeal rightly found, not sufficient. *[citations omitted] [emphasis added]*

[48] The present appellant relied on the underlined part of the judgment as authority for the proposition that the prosecution's duty of fairness extends to a duty to tender all "mixed" statements made by an accused – ie any statement which contains any admissible material. However, in my view, that is not what was intended. The issue in *Soma* was whether the Crown had impermissibly split its case and the remark must be seen in that context. The reference to "the only reason proffered for [not tendering the record of interview as part of the Crown case]" being

"not sufficient" is a reference to the fact that the Court of Appeal had concluded that "the prosecution had split its case without sufficient cause".[62] The relevant unfairness was in introducing part of the record of interview into evidence after the close of the Crown case when it would have been admissible in the Crown case: it was not the initial decision not to tender the interview. The operative words are those between the two underlined portions of the above extract from *Soma*. If the prosecution wants to rely on some part of a record of interview, it must make the decision to do so before the accused is called upon to give evidence. (It cannot split its case.) And if the prosecution wants to rely on part of a record of interview, it must take the good with the bad and tender the whole interview.

[49] In *Helps*,[63] Kelly J said this about *Soma*:

> It can be seen that the observations of the plurality in *Soma* were made in the context of the conduct of the prosecution at the trial, relevantly its failure to tender as part of its case an interview containing mixed statements and only later during the defence case seeking to tender certain inculpatory portions of the interview.
>
> In that respect the conduct of the prosecution in *Soma* amounted to an egregious departure by the prosecution of two well established rules: first, that the prosecution must offer all its proof during the presentation of the prosecution case before an accused is called on to make out his defence; second, the obligation upon the prosecution – if it wishes to rely on an interview containing mixed statements – to place the whole of the statement before the jury.

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62 at [9]

63 (2016) 126 SASR 486 at [33] to [35]

I do not understand the remarks of the High Court in *Soma* to enunciate any principle inconsistent with the remarks of either Vanstone J in *H, ML* or Kourakis J in *Barry*.

[50] Finally, the appellant relied on remarks by Hayne J in *Mahmood v Western Australia*:[64]

> In general, the prosecution should call "[a]ll available witnesses …whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based". If an accused has made inculpatory statements that are admissible in evidence, the prosecution should ordinarily lead evidence of all of those statements. It is necessary, of course, to take account of statutory provisions governing admissibility of out-of-court admissions that are not recorded. But subject to that important consideration, it is not open to the prosecution to pick and choose between those statements, whether according to what is forensically convenient or on some other basis. And in leading evidence of out-of-court assertions which the prosecution alleges are inculpatory, the prosecution must take the out-of-court assertion as a whole; the prosecution "cannot select a fragment and say it bears out their case, and reject all the rest that makes against their case".
>
> Application of the last-mentioned principle to the record of a lengthy interview or re-enactment may not be easy. But just as the prosecution in this case tendered the whole of the record of interview (apart from the undisputed excision of some irrelevant material) so too the prosecution could have, and should have, tendered the whole of the record of the re-enactment.
>
> In its supplementary submissions on this point the respondent relied on the decision of the Court of Appeal of the Supreme Court of Queensland in *R v Callaghan* and three Western Australian cases in which *Callaghan* has been considered. It was accepted in *Callaghan* that the interview, of which the accused had sought to tender evidence at his trial, "did not contain any inculpating statements". It was in this context that Pincus JA and Thomas J said in *Callaghan*:
>
> > *[I]f a prosecutor chooses to put into evidence a version which is in substance exculpatory, he makes it evidence in the case, and subject to matters of weight, it can be acted on as*

64 (2008) 232 CLR 397 at [39] to [42]

> *showing or tending to show the truth of its contents. There is no general obligation on the prosecution to call such evidence. The calling of such evidence is a benefit tendered by the prosecution and accepted by the defence.*
>
> In Western Australia, *Callaghan* has been said to stand for the proposition that "[i]t is a matter for the prosecution to determine whether or not it wishes to lead the evidence as part of its case" of an out-of-court statement that contains both inculpating and exculpating material. The decision in *Callaghan* does not establish that proposition and it is a proposition that is not consistent with the proper presentation of the prosecution case. 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.
>
> The difficulties which emerged so late in the appellant's trial stemmed from the failure of the prosecution to tender admissible evidence available to the prosecution which was evidence it asserted in its final address to the jury was relevant to, and demonstrative of, the appellant's guilt. Had the prosecution tendered in its case the complete record of the re-enactment in which the appellant had participated, trial counsel for the prosecution could not sensibly have made the submission he did and there would have been no occasion for the direction that should have been, but was not, given to the jury to ignore the argument advanced by the prosecution.

[51] In *Mahmood,* the appellant appealed against his conviction for the murder of his wife. He took part in a recorded interview with police on the day of the murder in which he denied that he had killed his wife. He also participated in a two hour video a week or so later in which he had re-enacted the events of the day of the killing and in which he sought to explain why he had not heard the assault on his wife and why he had so much of her blood on his clothing. At the trial the prosecution tendered the record of interview but not the re-enactment. The accused tendered a short excerpt from the re-enactment when a

police witness could not remember the details. Counsel for the accused expressed willingness to tender the entire video, but the prosecution indicated it would oppose that course on the basis that the video re-enactment was self-serving. In his address to the jury, the prosecutor referred to the six-minute excerpt and submitted that the demeanour of the accused during the excerpt was "cold-blooded and clinical". The following day, counsel for the accused sought leave to re-open his case to enable other parts of the video to be tendered in which the accused could be seen to be emotional. The judge refused the application. In the course of summing up, the judge said that "it would seem to me that it would be unwise for you to draw any adverse view against the accused because of his demeanour" in the video excerpt and that it would be "more relevant" to have regard to the accused's demeanour during the record of interview taken on the day of the murder.

[52] On appeal, the respondent conceded that what had been put to the jury about the appellant's apparent lack of distress or "cold-bloodedness" as being representative of what was recorded on the video, was misleading. It was submitted that it was corrected by her Honour's direction. The plurality in the High Court (Gleeson CJ, Gummow, Kirby, and Kiefel JJ) allowed the appeal on the ground that the judge should have given the jury a binding direction in unequivocal terms to ignore the prosecutor's submissions regarding the accused's apparent

lack of emotion in the video excerpt, rather than a comment which the jury was free to accept or reject.

[53] In a separate judgment in which he agreed that the appeal should be allowed, Hayne J focused on the fact that the prosecution had tendered the video recording of the interview with the accused but chose not to tender the video of the re-enactment. His Honour noted that the re-enactment contained assertions of fact that were against interest which were admissible against him at his trial (for example that he was present at the restaurant when his wife was murdered), and that what the appellant said and did during the re-enactment was substantially in accordance with what he said in the record of interview. He noted that the re-enactment was no more self-serving than the interview and that if one was admissible, so was the other. It was in that context that Hayne J made the remarks relied upon by the appellant.

[54] The remarks of Hayne J were obiter. (The basis of the decision of the majority was the inadequacy of the trial judge's direction.) Further, although the underlined words appear to be in general terms, these remarks must be seen in the context of the case in which the Crown tendered one of two related out of court statements by the accused, and sought to draw damaging inferences from that part of the second statement (the re-enactment) that had been tendered by the accused with the consent of the Crown. Hence, no doubt Hayne J's use of the

phrase “all that evidence” – meaning “not just selected parts of that evidence”. The meaning of the remarks in that context is simply an application of the same well established principle that if the Crown is going to rely on admissions in a record of interview, it must take the good with the bad and tender the entire interview, the exculpatory along with the inculpatory. The additional point being made is to emphasise that the principle may apply not only where the inculpatory and exculpatory statements are all contained in the one record of interview. It may also apply where (as in *Mahmood* and *Rudd* and *Flowers*) the accused has given a number of closely related interviews or accounts. In those circumstances, the duty of fairness may dictate that they be treated as a whole and that the Crown may not be permitted to pick and choose between parts of the accused’s overall account. Seen in that context it does not appear that Hayne J is asserting that there is a duty on the prosecution to tender any statement made by an accused so long as it contains within it something that could be characterised as an admission or otherwise admissible material.[65]

65 Saying that, if there is more than one statement containing inculpatory (and exculpatory) material, it would be unfair for the prosecution to pick and choose and only adduce some of them in evidence, is not the same as saying, if there is any statement containing inculpatory (and exculpatory) material, it would be unfair for the prosecutor not to put that statement into evidence.

Authorities establish no duty on prosecutor to tender exculpatory statements by accused

[55] Against these cases relied on by the appellant, are the following authorities to the effect that there is no duty on a prosecutor to adduce evidence of exculpatory out of court statements by an accused. The first case referred to (*Middleton*) also refers, explicitly, to "mixed" statements.

(a) Middleton:

> If it were true that the deceased was angry when she first picked up the knife, it would have been open to the appellant to give sworn evidence to that effect. The appellant was seeking to have this account before the jury on the basis that it was what he said to the police at the very first interview. Section 97(1) of the *Evidence Act 1906* provides that every witness, subject to certain exceptions, shall give evidence on oath.[66] It provides further that in subs(2) that in any criminal proceeding, no accused person shall be entitled to make a statement of fact at his trial, otherwise than by way of admission of a fact alleged against him unless such statement is made by him as a witness.[67] The next basic rule of common law is that witnesses giving sworn evidence must give direct evidence and cannot give hearsay evidence unless it comes within the exceptions. His Honour, in the present case, ruled that the evidence sought to be adduced was hearsay evidence, which clearly it was, and that it did not come within any exception. The critical question is whether or not it does come within any exception.
>
> The first elementary exception is admissions by the accused person which can, at the option of the prosecution, be led by the prosecution. However, an admission will often be accompanied by an explanation and other exonerating and exculpatory material. In that sense it becomes a "mixed" statement. The general rule in the case of a mixed statement

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66 This requirement is contained in the Territory in UEA s 21.

67 In the Territory Act, s 25 which formerly preserved the right of an accused to make an unsworn statement has been repealed.

> is that the whole of the confession must be given in evidence, including parts favourable to the accused person. … The rule thus expressed goes no further than saying that if it is the wish of the prosecution to tender the admissions, then the prosecution must tender the whole statement. It does not suggest that the prosecution is bound to tender the statement containing the admissions and the exculpatory material. Clearly at law it is not so bound. *[emphasis added]*

His Honour quoted from and relied on *Callaghan* and *R v Higgins* (supra) and continued:

> It is a matter for the prosecution to determine whether or not it wishes to lead the evidence as part of its case. If the law were otherwise it could be unfair to complainants, particularly in sexual offence cases. An accused person in a mixed statement could well make some admissions as to intercourse, and couple the admissions with consent in circumstances which would be unfair and could reflect on the complainant. It would be open to the Crown simply not to lead any evidence of the admissions. In those circumstances if the accused person wished to base his defence on the facts in that statement, he must do so as a witness and be cross-examined. If the prosecution puts in the admissions then it must put in the whole statement and what is said by the accused in that statement becomes evidence in the trial. If the accused person does give evidence the earlier statement may well become admissible to rebut recent invention or possibly to show he had given other explanations different from the one in evidence. *[emphasis added]*
>
> In England a practice has grown by which the prosecution tender the accused's prior statements, not as admissions, but as showing his reaction on being taxed with incriminating facts. There would be some doubt in Australia whether this evidence would be admissible if it does not amount to an admission and if it is objected to by the defence. This would be particularly to the point if the accused's reaction supported the prosecution case. This question is referred to in *Cross on Evidence*, 5th Aust Ed, p448, para 17335.

(b) Callaghan:

> Similarly, if a prosecutor chooses to put into evidence a version which is in substance exculpatory, he makes it evidence in the case, and subject to matters of weight, it can be acted on as showing or tending to show the truth of its contents. There is no general obligation on the prosecution to call such evidence. The calling of such evidence is a benefit tendered by the prosecution and accepted by the defence. If inadmissible evidence is let in without objection it may be used by any party "to the extent of whatever rational persuasive power it may have." *Jones v Sutherland Shire Council* (1979) 2 NSWLR 206, 219; *McGregor-Lowndes v Collector of Customs (Queensland)* (1968) 11 FLR 349; *Walker v Walker* [1937] HCA 44; (1937) 57 CLR 630. *Coats* was an unreserved decision which made no reference to authority, and the assumption that everything said by an accused to a police officer is admissible is contrary to principle. It should not be followed here.

(c) *Assafiri v Horne*[68] per Roberts-Smith J:[69]

> An admission or confession by the defendant is admissible for the prosecution as an exception to the rule against hearsay. The rationale is that it is a statement against interest and therefore likely to be true. An admission of a fact in issue or a fact relevant to a fact in issue is accordingly evidence of the fact and so is relevant. Mere denials, however, have no probative value and so are irrelevant and hence inadmissible (*R v Haycock* [1989] 2 Qd R 56, 59). The prosecution need not, and cannot be compelled to, give evidence of mere denials (*R v Graham* (1972) 26 DLR (3d) 579; *R v Newsome* (1980) 71 Cr App Rep 325; *Wogandt* (1988) 33 A Crim R 31) and nor can the accused elicit them in cross-examination of prosecution witnesses or give evidence of them in the defence case. If the prosecution does not tender a statement of the defendant which contains both admissions and self-serving material, the defendant cannot tender, or seek to elicit by cross-examination, the self-serving parts (*R v Callaghan* [1994] 2 Qd R 300, 303-4)." *[emphasis added]*

(d) *Barry:* – discussed in detail below.

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68 [2004] WASCA 40

69 at [59] and [60]

[56] Further, it is difficult to see in principle how, if the accused is not entitled to adduce evidence of his own out of court exculpatory statements, as they are inadmissible, the prosecutor could have a duty to tender them. Presumably it is this logical difficulty that prompted the appellant in this case to limit his submission to the contention that the prosecutor's duty is to tender all "mixed" statements. However, I can see no logical basis for distinguishing between "mixed" statements and wholly exculpatory statements.

Discussion of appellant's argument

[57] The appellant's argument in outline is this.

(a) The hearsay rule and the opinion rule do not apply to evidence of an admission: UEA s 81(1)

(b) The hearsay rule and the opinion rule do not apply to evidence of a previous representation that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and to which it is reasonably necessary to refer in order to understand the admission: UEA s 81(2)[70]

(c) Just as the prosecution has a duty in presenting the case fairly, to call "[a]ll available witnesses … whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based",[71] by analogy, the prosecution has a duty, in presenting the case fairly, to adduce all relevant admissible evidence (including

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70 This is arguably narrower than the common law position articulated in *Soma* as well as earlier and later cases to the effect that if the prosecution wants to rely on admissions in a statement made to police the prosecution must tender the whole statement, taking the good with the bad. However, that is of no moment; there is no doubt that the common law rule applies.

71 *Ziems v The Prothonotary of the Supreme Court of NSW* [1957] HCA 46*;* (1957) 97 CLR 279 at 294

documents such as records of interview) unless there is a good reason not to.

(d) "A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence."[72] The same principle applies in determining whether to tender a document. In the case of a record of interview with an accused, that would be limited to circumstances in which there had been a clearly contrived ex post facto denial at the instigation of the accused such as that described in the third paragraph of *Pearce* (above).

[58] I reject that argument. First, the appellant's argument does not pay sufficient regard to the nature and scope of the prosecutor's responsibilities. In *Richardson v The Queen*[73] the Court[74] 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 the light of those factors, to determine the course which will ensure a proper

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72 *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563 at [14]

73 [1974] HCA 19; (1974) 131 CLR 116 at p 119 at [11] and [12]

74 Barwick CJ, McTiernan and Mason JJ

> presentation of the Crown case conformably with the dictates of fairness to the accused.

Their Honours continued:[75]

> Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution". With this statement we would agree, but so as to avoid any misapprehension we would wish to make two observations about it. First, it should be understood in the sense that it proffers advice to the prosecutor as to how he should approach his task and not as a rule of law formulating a duty owned by the prosecutor to the accused. Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has not to call in the Crown case an eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness.

[59] Secondly, it seems to me that the analogy between calling a material witness and tendering a self-serving out of court statement by an accused is quite simply not apt.

[60] The only appeal case in which the question in the present appeal (namely whether there is a duty on the prosecution to tender a "mixed" statement by an accused) formed the basis of the Court's decision is *Barry*. In that case, after reviewing the authorities and referring to basic principles, Kourakis J determined that there was no such general duty. With respect, his Honour's reasoning in that case is unassailable.

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75 at [16]

[61] In *Barry*,[76] the appellant appealed against his conviction for assault in the lower court. One of the grounds of appeal was that the appellant did not receive a fair trial and there was a miscarriage of justice as a result of the prosecutor refusing to tender a transcript of the appellant's interview by police.[77] Kourakis J (as he then was) described the interview in these terms:

> During the interview the appellant made a number of self-serving exculpatory statements, denying certain allegations put to him and claiming that he had acted in self-defence. However, he also made admissions against his interest; he accepted that he was at the scene of the incident and that he and [the victim] had a "struggle" or "scuffle", although those admissions were made in the context of his claims that he was acting in self-defence and that [the victim] had attacked him.[78]
>
> …
>
> The respondent submitted that the statement contained purely exculpatory remarks. That submission cannot be accepted because the appellant plainly made some inculpatory statements, even though he generally denied any wrongdoing. As such, the statement is what is commonly referred to as a "mixed statement".[79]

[62] The police prosecutor declined the appellant's request to tender the record of interview, and to tender the affidavit of the interviewing officer; and the Magistrate declined to direct that the prosecution call the witness. On appeal, the appellant contended that the prosecution

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76 [2009] SASC 295

77 The appellant had attended the interview with his own handwritten notes and copies of photographs which he said showed injuries he had sustained during the incident.

78 at [40]

79 at [42]

had an obligation to tender the record of interview as part of its case and that as a result of the prosecution's failure to do so, the appellant had not received a fair trial. In the course of dismissing the appeal on this ground, Kourakis J stated:[80]

> Section 18A of the *Evidence Act 1929* abolished the right of an accused to give an unsworn statement. However, there is much authority for the principle that where the prosecution puts into evidence an out-of-court "mixed" statement the exculpatory remarks are probative as an exception to the hearsay rule. If the mixed statement is received, the admissions may be relied upon by the prosecution to prove guilt, and the exculpatory statements can be relied upon by the defendant as evidence of the truth of those statements.
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> …
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> The question that arises in this case is whether the prosecution has an *obligation* to tender such statements. On this point there has been a division of authority in Australian courts, with courts in New South Wales suggesting that the prosecution does have such an obligation, and courts in Queensland and Western Australia coming to the conclusion that even though the prosecution may choose to tender such a statement, it is not obliged to do so.

[63] His Honour reviewed the authorities including *R v Higgins*, *R v Callaghan*, *Middleton v The Queen*, and *S v The Queen* referred to above, as establishing the proposition that it is a matter for the prosecution to determine whether or not it wishes to lead a mixed statement as part of its case. His Honour also considered *R v Rymer* and said:[81]

> It is convenient to record here that I do not accept that the reaction of an accused when "first taxed" with an allegation is admissible

80 at [42] and [44]

81 at [54]

> unless the conduct supports an inference that the accused accepted the truth of the allegation. Prior consistent statements, whether expressly or impliedly made, are inadmissible at common law. The fact that police put an allegation to an accused and the fairness with which they have treated an accused may be relevant in a case where the defence legitimately raises an issue about the propriety of the police conduct. However, the purpose of the admission of that evidence, in such a case, is not in any way related to the exculpatory response made on such an occasion. Moreover the past practice of prosecutors cannot, of itself, effect a change in the common law.

I respectfully agree.

[64] Kourakis J considered the following comment by Hayne J in *Mahmood v Western Australia*,

> 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*. *[emphasis added]*

His Honour pointed out that this remark was made by way of obiter by a single justice of the Court and said (at [58]):

> The words I have emphasised in that passage reflect the factual circumstances with which the judgment of Hayne J in *Mahmood* dealt, and against which, it must be understood. In my respectful opinion, so understood the passages just cited are directed to cases where there are several out-of-court statements; in those cases the "proper" or "fair" presentation of the prosecution case will "ordinarily require that the prosecution lead all that evidence". That proposition does not touch in any way the question raised in the present case, where the prosecution did not adduce any evidence of any inculpatory remarks.

Again, I respectfully agree.

[65] Kourakis J reached the following conclusions:[82]

> The survey of the authorities undertaken by Cox J[83] shows clearly enough that self-serving statements are admissible, and have probative value, only when introduced as part of the "Crown package". If the prosecution chooses not to lead evidence of incriminatory statements there is no relevant unfairness to the accused in the exclusion of his or her self-serving exculpatory statements. There is therefore no arbitrariness or unfairness in the operation of the common law principle. It may be a matter of "happenstance", as Grove J observed in *Rymer*, as to whether an accused makes an incriminatory, exculpatory or mixed statement, but the only reason for the admission of the exculpatory part of a statement is to ensure the fair use of the incriminatory statement on which the prosecution relies. If the incriminatory statement is not led, the rationale for the admission of the exculpatory part of the statement disappears.
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> In my view it would be anomalous to require the prosecution to put before the Court as probative material the self serving assertions of the defendant, whom it very obviously, does not consider to be a witness of truth.
>
> If the admissibility of mixed statements, other than as part of the prosecution tender of those mixed statements, were to be accepted, it might be claimed by a similar argument, with some superficial attractiveness, that it would be anomalous to allow the defence to adduce that evidence, but not evidence of a purely self-serving and completely exculpatory statement made by the accused. If that proposition were to be accepted, the exception would have swallowed the rule.
>
> For these reasons I hold that the prosecution did not have an obligation to adduce evidence of the appellant's record of interview. ...[84]

I respectfully agree with both the reasoning and the result.

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82 at [67] to [71]

83 in *Spence v Demasi* (1988) 48 SASR 536

84 His Honour said that even if he were to follow the approach taken in New South Wales and England he would not have found in favour of the appellant as "there is a real danger that to require the prosecution to lead the evidence would be to use the prosecution as a mere conduit for the delivery by the defence of a 'contrived hearsay case'."

[66] There was some argument between the parties to this appeal as to whether the interview with the appellant should be classed as entirely exculpatory, or as a "mixed" statement. Clearly the interview contained some admissions – for example that the appellant was in the taxi when the robbery occurred. To that extent the interview is "mixed", and it would undoubtedly have been admissible if tendered as part of the Crown case. However, there is no necessarily sharp dividing line between statements of an accused that are entirely exculpatory and those that may be characterised as "mixed". A statement that contains within it utterances that might technically be admissions may nevertheless be in substance purely exculpatory if the admissions are of a minor nature concerning matters that are not genuinely in issue and are only made by the accused in order to tell his exculpatory version of events. To my mind that is the case with this statement: it is, in substance, an entirely exculpatory account notwithstanding that it contains some admissions. In any case, I do not think that it matters whether the statement is described as "entirely exculpatory" or "mixed": 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.

[67] That is not to say that it can never be unfair for the prosecution to refuse to tender a record of interview with an accused. There might be

some circumstances (I would think they would be rare) in which the admissions and exculpatory explanations together place other evidence in the Crown case in a different context and which, if true, may make that other evidence misleading, or which may cast the accused's actions in a different light, in which it may be unfair of the Crown not to tender the mixed statement in evidence. These things must be determined on a case by case basis: it is not the court's place to be setting down the sort of fixed rules contended for by the appellant in relation to the exercise of that prosecutorial discretion when the circumstances are infinitely variable.

Conclusion

[68] It is a matter for the prosecutor in the first instance to make a judgment as to whether it would be unfair not to adduce particular evidence. If the evidence is not called, and the accused is convicted and appeals (or applies for a stay of proceedings), it will be a matter for the court to determine whether, in the particular circumstances of the case, the accused has been denied a fair trial, the onus being on the appellant to demonstrate relevant unfairness (for example because part only of a connected account has been put into evidence or the prosecution has effectively split its case). In line with the principles enunciated above, relevant unfairness will not be established merely because an exculpatory account given by the accused is not put before the jury or

the accused is obliged to give evidence in order to place his version of events before the jury.

[69] This is not a case in which there has been any relevant unfairness. I would dismiss the appeal.

BLOKLAND J:

Introduction

[70] Following a trial by jury the appellant was found guilty of one count of robbery with two circumstances of aggravation contrary to s 211(1) and (2) of the *Criminal Code* (NT), namely, that he was armed with an offensive weapon and was in company. The single ground of appeal is "That the Crown, in choosing not to adduce the appellant's record of interview of 8 June 2017, deprived the appellant of a reasonable chance of acquittal."

[71] Although the appeal turns principally on the question of whether as a matter of trial fairness the Crown was obliged to tender the record of interview of 8 June 2017, the question of the admissibility of the record of interview, while not a separate ground of appeal, is integral to the determination of the appeal. If the record of interview was not admissible, it follows that no question of unfairness to the appellant arises as a result of the choice by the learned prosecutor at trial not to adduce evidence of the interview in the Crown case. If admissible, the

question is whether he was deprived of a reasonable chance of acquittal by virtue of the Crown choosing not to adduce the evidence.

[72] A substantial number of authorities have held there is no obligation on the prosecution to adduce evidence of previous statements of an accused, whether or not those statements constitute admissions or are purely exculpatory or are statements made by an accused that consist of admissions accompanied by exculpatory material, usually referred to as mixed statements.[85] Consistent with those authorities, the Crown maintained before the learned trial judge and on appeal that there was no obligation on the Crown to adduce evidence of the appellant's record of interview. On the Crown argument, its discretion to choose to adduce evidence of out of court statements by an accused is effectively unfettered, save for rare exceptions where on essentially procedural grounds it would be patently unfair for the Crown not to tender an accused's mixed or exculpatory statements.[86]

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85 In this jurisdiction see Riley J in *Flowers v The Queen* [2005] NTCCA 5; 153 A Crim R 110 at [38]-[40] in the context of discussing whether an accused was entitled to cross-examine a police officer about denials he made to the officer an hour after he made an admission while intoxicated. In Western Australia see *Middleton v The Queen* (1998) 19 WAR 179; *Willis v The Queen* [2001] WASCA 296; 25 WAR 217 at [101], [106] and [134]; *Peck v The State of Western Australia* [2005] WASCA 20. In Queensland see *The Queen v Callaghan* [1993] QCA 419; [1994] 2 Qd R 300; *The Queen v Reynolds* [2015] QCA 111. In South Australia see *Barry v Police* [2009] SASC 295; 197 A Crim R 445; *The Queen v Helps* [2016] SASCFC 154; 126 SASR 486 per Kelly J at [27] and per Lovell J at [383]-[384].

86 For example, in the circumstances of a breach of the rule against case splitting see *The Queen v Soma* [2003] HCA 13; 212 CLR 299; or of the Crown choosing to tender only part of the out of court material see *Mahmood v The State of Western Australia* [2008] HCA 1; (2008) 232 CLR 397.

[73] A number of judgments drawn to the Court's attention on behalf of the appellant refer to evidence of this kind being adduced in the Crown case as a matter of fairness to an accused.[87] On the appellant's case, the question of the Crown adducing evidence of this kind is to be seen as an incident of the duty of the prosecutor to present the case fully and fairly. Some caution is required regarding the authorities submitted on behalf of the appellant, as while at first blush they may be seen to support or appear to support the appellant's position, they need to be qualified to some degree by their context. However, those same remarks cannot totally be put to one side given the number of statements in various judgments that support an approach which links the decision on whether to adduce evidence of out of court statements by an accused to the duty of the prosecutor to present a case fully and fairly.

[74] That two lines of opinion exist on this subject was recognised in *Ritchie v The State of Western Australia* ('*Ritchie*').[88] In the context of dealing with similar arguments as here, and requiring examination of Hayne J's remarks in *Mahmood v The State of Western Australia*

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87 See, for example, *The Queen v Su* & *Ors* [1997] 1 VR 1 at 64 per Winneke and Hayne JJA and Southwell AJA; *The Queen v Rudd* [2009] VSCA 213 at [57]-[59]; 23 VR 444 at [59]; *The Queen v Soma* [2003] HCA 13; 212 CLR 299 at [31] per Gleeson CJ, Gummow, Kirby and Hayne JJ; *Mahmood v Western Australia* [2008] HCA 1; 232 CLR 397 at [39] per Hayne J; *The Queen v Helps* [2016] SASCFC 154; 126 SASR 486 at [366] and [367] per Peek J in dissent cf Kelly and Lovell JJ; *The Queen v Rymer* [2005] NSWCCA 310; 156 A Crim R 84 at [41], [56]-[59] per Grove J, with Barr and Latham JJ agreeing.

88 [2016] WASCA 134; 260 A Crim R 367 at [46] per McClure P.

('*Mahmood*'),[89] McClure P observed Hayne J's position was understood to reflect the law in Victoria, not in Western Australia or Queensland. Neither Queensland nor Western Australia recognise a duty on the part of the Crown to tender a mixed statement made by an accused. This is also the position in South Australia.[90] McClure P cited *The Queen v Su & Ors* ('*Su*')[91] and *The Queen v Rudd*[92] as representing the position in Victoria. In *Barry v Police* ('*Barry*'),[93] Kourakis J confirmed the position that the prosecution had no obligation at trial to adduce evidence of "mixed statements" but also acknowledged that two different positions have emerged over the existence of a prosecutorial obligation to tender mixed or purely self-serving records of interview.[94] Kourakis J was critical of reasoning in the decisions relied on by the appellant in *Barry* which were said to demonstrate a practice in New South Wales of the Crown leading exculpatory or mixed statements of an accused on the basis of fairness.[95]

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89 [2008] HCA 1; (2008) 232 CLR 397.

90 *Barry v Police* (SA) [2009] SASC 295; (2009) 197 A Crim R 445; *The Queen v Helps* [2016] SASCFC 154; 126 SASR 486 per Kelly J at [50], Lovell J at [383]-[384]; cf Peek J at [336] and [340].

91 [1997] 1 VR 1.

92 [2009] VSCA 213; 23 VR 444.

93 [2009] SASC 295; 197 A Crim R 445.

94 *Barry v The Police* [2009] SASC 295; 197 A Crim R 445 at [63].

95 For example, in *Barry v Police* [2009] SASC 295; 197 A Crim R 445 at [50]-[54] Kourakis J referred to Grove J's analysis in *The Queen v Rymer* [2005] NSWCCA 310; 156 A Crim R 84 at [56]-[59] and Badgery-Parker J's in *The Queen v Familic* (1994) 75 A Crim R 229 at [234]-[235].

[75] The position or practice in Victoria was acknowledged by Edelman J in the Western Australian case of *The Queen v Lovett [No 3]* (‘*Lovett*’),[96] without any necessity to determine whether the Victorian practice operated as a separate rule of admissibility. The issue in *Lovett* was whether evidence of a forceful arrest was relevant to the evidence of a video recorded interview with one of the accused. The Crown contended it was not. Edelman J considered that if the video recorded interview was tendered, then the evidence of the forceful arrest was relevant. As the parties did not canvas the grounds upon which the video recorded interview was proposed to be tendered, his Honour thought in necessary to discuss the basis for its admissibility. It was found the interview contained admissions and was therefore admissible, however, particular note was made of the Victorian approach to “first opportunity” statements led as a matter of fairness, without determining whether such a practice operated in Western Australia:[97]

> At common law, evidence of out of court, hearsay, statements by an accused person have generally required an exception to the rule against hearsay before they are admissible. A common basis for admitting an out of court interview with an accused person is that the interview contains admissions. In *Cross on Evidence*, JD Heydon defines an admission as ‘any statement, express or implied, oral or written, which is adverse to a party’s case’. This definition incorporates the understanding that a ‘statement’ for the

96 [2013] WASC 102.

97 *The Queen v Lovett [No 3]* [2013] WASC 102 at [35]-[38] (citations omitted).

purposes of an admission means all things 'stated', whether by words or conduct.

An implied admission might not be readily apparent from an interview. But, as the Supreme Court of the United States said in *Miranda v Arizona*, many statements which are intended to be exculpatory may raise inculpatory matters. As Wigmore explained, even statements which are not against the interests of an accused at the time they were made are capable of constituting an admission.

In *Miranda*, the United States Supreme Court considered that '[i]f a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution'. It might be, however, that this approach does not reflect Australian law. In *R v Su* the Victorian Court of Appeal, in a joint judgment, explained a different basis for admitting evidence of an out of court interview with an accused person. Speaking about out of court interviews, the Court (Winneke P, Hayne JA and Southwell AJA) said that '[s]uch material is traditionally led by the Crown, whether incriminating or not, both as a matter of fairness and to show the "first opportunity" response by the accused to the allegations made against him by his accuser'. The Court then quoted with approval from the English Court of Appeal:

> "When the Crown adduces a statement relied upon as an admission, it is for the jury to consider the whole statement, including any passages which contain qualifications or explanations favourable to the defendant, that bear upon the passages relied upon by the prosecution as an admission and it is for the jury to decide whether the statement, viewed as a whole, constitutes an admission. To this extent the statement may be said to be evidence of the facts stated therein. If the jury find that it is an admission they may rely upon it as proof of the facts admitted. If the defendant elects not to give evidence, then insofar as the statement contains qualifications or explanations favourable to the defendant the jury in deciding what, if any, weight to give to that part of the statement, should take into account that it was not made on oath and has not been tested by cross-examination.
>
> When the Crown adduces evidence in the form of a statement by the defendant which is not relied upon as an admission of the offence charged, such a statement is evidence in the trial in that it is evidence that the defendant made the statement, and of his reaction, which is part of the general picture which

> the jury have to consider but it is not evidence of the facts stated."
>
> It is not necessary to decide whether, or the extent to which, this 'traditional practice' in Victoria is an independent rule of admissibility, as it appears to be in Canada, or, if it is a rule of general practice where the tender of the interview is admitted because there is no objection, the extent to which that practice operates in this State.

[76] In my view the comments of Hayne J in *Mahmood*[98] are generally observations of the expected standard of prosecutorial duties, including the duty to tender certain statements made by an accused if fairness dictates it. In *Mahmood* the accused participated in a videotaped interview with police. He later performed a videotaped re-enactment of the events of the day. The prosecution tendered the video of the police interview but not the re-enactment video. Counsel for the accused sought to tender part of the re-enactment video in his own defence and offered to tender the whole video. The prosecution consented to the tender of only part on the basis that the whole video was self-serving. The High Court sought supplementary submissions on the prosecutor's duty to tender the re-enactment video as part of its case. The majority (Gleeson CJ, Gummow, Kirby and Kiefel JJ) do not expressly address the subject. However, the following parts from Hayne J's judgment in

98 [2008] HCA 1; 232 CLR 397 at [39]-[41].

my respectful view speak not only of the direct issue of the irregularity in *Mahmood* but also of a broader obligation:[99]

> In general, the prosecution should call "[a]ll available witnesses ... whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based'. If an accused has made inculpatory statements that are admissible in evidence, the prosecution should ordinarily lead evidence of all of those statements. It is necessary, of course, to take account of statutory provisions governing admissibility of out of court admissions that are not recorded. But subject to that important consideration, it is not open to the prosecution to pick and choose between those statements, whether according to what is forensically convenient or on some other basis. And in leading evidence of out of court assertions which the prosecution alleges are inculpatory, the prosecution must take the out of court assertion as a whole; the prosecution "cannot select a fragment and say it bears out their case, and reject all the rest that makes against their case".
>
> Application of the last mentioned principle to the record of a lengthy interview or re-enactment may not be easy. But just as the prosecution in this case tendered the whole of the record of interview (apart from the undisputed excision of some irrelevant material) so too the prosecution could have, and should have, tendered the whole of the record of the re-enactment.
>
> In its supplementary submissions on this point the respondent relied on the decision of the Court of Appeal of the Supreme Court of Queensland in *R v Callaghan* and three Western Australian cases in which *Callaghan* has been considered. It was accepted in *Callaghan* that the interview, of which the accused had sought to tender evidence at his trial, "did not contain any inculpating statements". It was in this context that Pincus JA and Thomas J said in *Callaghan*:
>
> > "[I]f a prosecutor chooses to put into evidence a version which is in substance exculpatory, he makes it evidence in the case, and subject to matters of weight, it can be acted on as showing or tending to show the truth of its contents. There is no general obligation on the prosecution to call such

99 *Mahmood v Western Australia* [2008] HCA 1; 232 CLR 397 at [39]-[41] (citations omitted).

> evidence. The calling of such evidence is a benefit tendered by the prosecution and accepted by the defence."
>
> In Western Australia, *Callaghan* has been said to stand for the proposition that "[i]t is a matter for the prosecution to determine whether or not it wishes to lead the evidence as part of its case" of an out of court statement that contains both inculpating and exculpating material. The decision in *Callaghan* does not establish that proposition and it is a proposition that is not consistent with the proper presentation of the prosecution case. 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.

[77] Although Hayne J's observations have come to be regarded as *obiter dicta*, they should in my view be regarded as seriously considered dicta, rather than passing remarks.[100] His Honour's view cannot easily be put to one side, nor confined solely to the facts in *Mahmood*. Although part of the extracted portion clearly refers to the rule of fair play which does not permit the Crown to pick and choose different parts of the statements, it clearly stems from the broader position of fairness in dealing with out of court statements made by an accused. It may be noticed his Honour drew upon established authorities relevant to prosecutorial duties in support of the general proposition that the

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100 It may be noticed in a different context his Honour was a member of the Victorian Court of Appeal in *The Queen v Su Ors* (1997) 1 VR 1 where, at 69, with Winneke P and Southwell AJA, it was said of exculpatory statements "Such material is traditionally led by the Crown, whether incriminating or not, both as a matter of fairness and to show the "first opportunity" response…"

Crown call all available evidence to give a complete account of the events.[101]

[78] Although *Flowers v The Queen* ('*Flowers*'),[102] a decision of this Court, was central to the learned trial judge's reasoning in this matter, it does not specifically address the issue for consideration on appeal. In *Flowers* police spoke with the accused when he was intoxicated, during which the following exchange occurred:

> Q: What is your name?
> A: What for?
> Q: Are you NF?
> A: Yes I am.
> Q: NF, we are investigating a sexual assault upon a young girl, a 12 year old girl, and we want to talk to you about that matter.
> A: I don't even know that little girl.

[79] Later on the same day when the accused was sober, police conducted a formal interview with him during which he admitted knowing the complainant, but denied committing any offence, giving an entirely exculpatory version. The prosecution did not lead the subsequent

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101 Hayne J cited *Whitehorn v The Queen* [1983] HCA 42; 152 CLR 657 at 674 per Dawson J; *Ziems v Prothonotary of Supreme Court* (NSW) (1957) 97 CLR 279 at 294; *Richardson v The Queen* (1974) 131 CLR 116 and *The Queen v Apostilides* [1984] HCA 38; 154 CLR 563. It may also be noticed the Victorian Judicial College Manual states "As part of the obligation to call all credible and relevant witnesses, the prosecutor should generally lead evidence of any out-of-court statements by the accused, such as a record of interview. The whole of the statement should be led and the prosecution should not seek to extract only the incriminating portions": see Judicial College of Victoria, *Victorian Criminal Proceedings Manual* (at 3 August 2017) 7 Role of Counsel, '7.2 Counsel for the Prosecution' [27] citing *Mahmood v Western Australia* [2008] HCA 1; 232 CLR 397. This interpretation of Hayne J's statement would seem to acknowledge both the general duty of fairness to lead a record of interview and the requirement not to pick and choose.

102 [2005] NTCCA 5; 153 A Crim R 110.

formal interview, and as a consequence the trial judge indicated counsel for the accused could not proceed to cross-examine on it.

[80] Of the particular course of events Martin CJ (BR) observed:[103]

> This is not a case in which a sober suspect, having made an initial false denial, had time for sober reflection or to obtain legal advice before offering to the police and exculpatory explanation. When the accused first responded to police questions, he was so intoxicated that the investigating officer considered it was unfair to question him. When the exculpatory interview occurred a few hours later, in substance, it was the first occasion on which the applicant was confronted with the allegations at a time when he was in a sober state and able to respond properly.

[81] His Honour proceeded to express the view that the conduct of the Crown in leading the initial statement made the later exculpatory interview admissible. Martin CJ (BR) expressly noted that trial counsel for the applicant did not contest the right of the Crown to decline to lead the evidence.[104] Thus the issue central to resolving this appeal was not the issue in *Flowers*. The issue was whether defence could cross-examine the interviewing police officer to elicit evidence of a wholly self-serving statement that had not been adduced in the Crown case. As above, Riley J applied *The Queen v Callaghan*,[105] *Sampson v The Queen*[106] and *Middleton v The Queen*,[107] concluding that if the prosecution does not tender a statement of the accused which contains

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103 *Flowers v The Queen* [2005] NTCCA 5; 153 A Crim R 110 at [10].

104 *Flowers v The Queen* [2005] NTCCA 5; 153 A Crim R 110 at [4].

105 [1994] 2 Qd R 300.

106 [2002] WASCA 222; 132 A Crim R 326.

107 (1998) 19 WAR 179; 100 A Crim R 244.

both admissions and self-serving material, the accused cannot seek to elicit self-serving parts by cross-examination.

[82] Southwood J agreed with part of Riley J's analysis and also explained that unlike England there is no exception to the rule against prior consistent statements which would permit an accused to tender them.[108] However, Southwood J was also of the view that the applicant's earlier statement and statements made in the record of interview were part of a connected series of statements which should have been available for consideration by the jury as forming one narrative.[109] In this regard his Honour's reasoning and that of Martin (BR) CJ's accords with the approach seen later with respect to a similar issue in *Mahmood*. The varied reasoning evident in *Flowers* does not however resolve the principal issue in this appeal.

[83] Clearly the decision to bring a prosecution is the prerogative of the executive. More particularly, the Office of the Director of Public Prosecutions is entrusted to commence and conclude prosecutions and to make all relevant decisions associated with a particular prosecution including, consistent with the Crown's duty to present a full and fair case, the selection of witnesses and evidence to be adduced.[110] Once the

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108 *Flowers v The Queen* [2005] NTCCA 5; 153 A Crim R 110 at [52]-[56].

109 *Flowers v The Queen* [2005] NTCCA 5; 153 A Crim R 110 at [73]-[74].

110 *Richardson v The Queen* [1974] HCA 19; 131 CLR 116, 199; *The Queen v Apostilides* [1984] HCA 38; 154 CLR 563 at 575; *The Queen v Soma* [2003] HCA 13; 212 CLR 299 at [29]; *Whitehorn v The Queen* [1983] HCA 42; 152 CLR 657 at 674.

prosecution commences in a court, the concern of a trial court is to ensure the trial be conducted fairly.

[84] There is a tension, although rarely does it become a contentious issue, between the duties of a prosecutor and the duty of the Court to ensure a fair trial, including in a case which raises issues of this kind. That is evident from the different positions taken in remarks or comments in the judgments which have been drawn to this Court's attention on appeal. It is also evident from the observations about those different positions taken in different states made particularly by McClure P in *Ritchie* and Kourakis J in *Barry* mentioned above.

[85] Notwithstanding the Crown alone clearly bears the responsibility and exercises the discretion to choose the evidence to be adduced, there is an expectation decisions will be made consistently with the duty of fairness and full presentation of the case. A prosecutor cannot be compelled to adduce evidence or call a witness, however neither can a court transfer its own duty to ensure a fair trial to the prosecutor or the executive. In my opinion this does not mean that records of interview between police and an accused must invariably be adduced by the Crown. I do not see the range of cases relied on by the appellant as clearly standing for that proposition, given the varying contexts in which such statements are made. Further, there are instances where the leading of such evidence would be unfair to the Crown, especially for

example attempts by a suspect to discredit witnesses for extraneous reasons. It is also noted there can be no recourse to s 38 of the *Evidence (National Uniform Legislation) Act* (NT) ('*UEA*') which provides a safeguard for the Crown with respect to unfavourable witnesses. However, what is clear from the case law is that the decision by the prosecutor on whether to adduce evidence of this kind must not result in a trial that is unfair. The authorities relied on by the appellant, while not always directly on point, indicate trial fairness extends beyond the technical rules of evidence and procedure and remains an underlying governing or at least guiding principle.[111] Whether it will be fair to decline to tender an admissible record of interview will depend in large part on the issues and circumstances at trial. If choosing to decline to adduce admissible evidence of a record of interview leads to unfairness such that it deprives an accused of a reasonable chance of acquittal, an appellate court may intervene.

[86] This appeal can only be determined by an assessment of the circumstances and what transpired during this particular trial, bearing

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111 In *The Queen v Soma* [2003] HCA 13; 212 CLR 299 at [3] the plurality (Gleeson CJ, Gummow, Kirby and Hayne JJ) draw on *Richardson v The Queen* (1974) 131 CLR 116 and *Apostilides* [1984] HCA 38; 159 CLR 563 to suggest the prosecutor's obligation for fairness required the interview to be tendered unless there were positive reasons not to do so, however that case was primarily concerned with case splitting. *The Queen v Rudd* [2009] VSCA 213; 23 VR 444 at [59] refers to the duty of the prosecutor to lead all relevant evidence to the jury for a complete and fair understanding of the events upon which the prosecution relies, in the context of a ruling on tendering mixed statements. In *The Queen v Rymer* (2005) 156 A Crim R 84 Grove J, with Barr and Latham JJ agreeing, thought statements made by an accused should be put before the Court absent some particular reason, within the context of holding the statements in question were not admissible under s 66 of the *UEA*.

in mind the Crown has the discretion to choose the evidence to be adduced as well as the responsibility, within the framework of the underlying principles of the accusatorial and adversarial system, to put its case both fully and fairly before the jury.

Outline of the case before the jury[112]

[87] In brief, the Crown case was that the appellant was with three boys[113] who stole a wallet and $400 cash from a taxi driver while one of the boys (not the appellant) was armed with a knife. The three boys and the appellant entered the victim's taxi. While one of the boys possessed a knife, another entered the taxi with a piece of wood. The Crown's position was that the piece of wood was a "back up" weapon. The appellant sat on the bench seat directly behind the driver in the seat closest to the aisle.[114] To the taxi driver, the appellant was directly behind his left shoulder.[115] The boy with the piece of wood sat on the bench seat directly behind the appellant.[116] The appellant told the taxi driver to take them to Ryland Road. This was consistent with the booking made with the taxi company to be taken to Ryland Road.[117]

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112 This outline is drawn from the learned Crown prosecutor's addresses to the jury, portions of the evidence, senior counsel for the appellant's address to the jury and the trial judge's summing up: Appeal Book at 106-109; 159-161.

113 The co-offenders were youths aged 13 and 14 years. As they were referred to principally as "boys" throughout much of the trial, the same term is used here.

114 Appeal Book at 58.

115 Appeal Book at 28.

116 Appeal Book at 58.

117 Appeal Book at 60.

The appellant gave further brief directions including a direction to stop the taxi after turning onto Ryland Road. When the taxi stopped, the boy with the knife who had been sitting to the right of the appellant, directly behind the driver and closest to the window, held the knife to the left side of the victim's neck or throat area, not touching the skin.[118]

[88] The victim heard a number of voices say "Give me the money. Give me the money". The victim told them to take what they want. One of the boys took money out of the front pocket of the victim's shirt and from his wallet which was stored in the taxi's middle console. All four, including the appellant, ran away from the taxi towards bushland on the other side of the road after the taxi stopped. The Crown case was that while the appellant was not holding the knife or demanding money, he was a participant in the activity. Further, the boy with the piece of wood had placed it on the floor behind the appellant. The appellant did not get out of the taxi immediately after it stopped but took the piece of wood with him.[119] The appellant was the oldest in the group of offenders and was the uncle of one of the boys. On the Crown case he had engaged in an arrangement to commit the offence and was equally involved in the offending, either by being a party to a common purpose to rob the taxi driver or by aiding the other offenders to do so.

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118 Appeal Book at 106.

119 Appeal Book at 162.

[89] The appellant agreed the robbery had taken place but that he was not a party to a common purpose, nor did he aid the offenders.

[90] Senior counsel for the appellant addressed the jury in the following terms. While the appellant had not stood up or stopped the offenders and may have turned a blind eye to their offending, there was no evidence of prior agreement to engage in the offending. On one view the CCTV footage suggested one of the offenders tried to get the appellant involved but he was disinterested in the robbery. There was no backup weapon, nor did the appellant know there was a knife or a stick on entry to the taxi. He at one point held the stick, put it down and took it away. That the appellant ran away when the others did not mean he had participated in the robbery.[120]

[91] The substance of the evidence relied on by the Crown was principally CCTV footage from the taxi and evidence from the taxi driver. A number of significant facts were agreed between the parties.[121] The appellant did not give evidence.

[92] On the first day of the trial, counsel for the appellant advised the learned trial judge it was anticipated that the Crown would not be

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120 Appeal Book at 167-169.

121 Appeal Book at 58-60; 107-108.

leading evidence of the record of interview. Senior counsel for the appellant stated:[122]

> Mr Read: But in my submission, circumstances where certainly it is now accepted by the courts that hearsay evidence can be relevant and where it is in circumstances that in effect puts the defence case in the absence of other evidence.
>
> His Honour: Without the defendant being called?
>
> Mr Read: Without the defendant being called. And that traditionally in many practices that has been the usual course as a matter of fairness for the Crown. It may be a consideration purely in the Crown's hands but it may ultimately be a situation that if the Crown chooses not to lead evidence that may be regarded as relevant, if evidence is not called by the defence, then there may be an argument that there has been a miscarriage. But that is the nature of my submission, if that puts you on notice.

[93] During an exchange with the prosecutor about the relevance of s 65 of the *UEA* to the issue his Honour said:[123]

> His Honour: Sorry to interrupt you, the choice seems to be Crown tenders a record of interview or accused gets into the witness box and, if he wants to, bolsters his testimony by saying, "Well, this is what I said to the police a long time ago". There isn't a middle course open, that is that the accused just being able to tender the record of interview without getting in the witness box, I don't think.
>
> Ms Loudon: No, your Honour, because that evidence would go through untested and that would not be fair to the Crown and it would not assist the jury in placing what weight on it if evidence goes through to the jury that has been untested through cross-examination.

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122 Appeal Book at 103.

123 Appeal Book 121-122.

His Honour: I appreciate that, but the same can be said about any s 65 statement.

[94] A further part of the exchange was as follows:[124]

His Honour: [I]t seems to be the long and the short of it that as I mentioned a moment ago, I'm not in a position to be able to compel the Crown to lead this evidence. It seems to be the present state of the law, so irrespective of my view, that is, as to whether there are some broader principles of fairness of whatever it is, I can't force the Crown to lead that evidence. I think that is the position where we are at.

Ms Loudon: Yes, your Honour.

His Honour: Secondly, you say that the Crown can only lead admissible evidence anyway and you say this is not admissible because of hearsay and it doesn't fall within the definition of admission and we've had that discussion about what that means.

Ms Loudon: Yes, your Honour.

His Honour: And I think it is accepted that here are some admissions contained in the record of interview. I'm not sure that the debate about admissibility is – well I suppose you say that the only ethical obligation of the Crown can only extend to calling admissible evidence and you say if it's not admissible evidence, there's no obligation.

Ms Loudon: It's a decision that the Crown is to make in relation to what evidence…

His Honour: But you're saying…

Ms Loudon: …contained in that record of interview is admissible.

His Honour: Yes, but even in respect of admissible evidence you say the Crown has still got a choice as to whether or not to call it.

Ms Loudon: Yes, your Honour.

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124 Appeal Book 122-123.

[95] On the second day of the trial, counsel for the appellant made further submissions as to the tender of the record of interview. It was submitted "mixed inculpatory and exculpatory statements that – in an interview situation generally they have been played".[125]

[96] The trial judge then stated, after a further exchange with counsel for the Crown:

> Thank you for providing those further comments, but as I say, and I think it's acknowledged by you both, I'm not in a position to – it's not for me to rule, it's not for me to force you to tender the material and nor do I really think it satisfactory for me to express opinions as to the appropriateness or otherwise of the course that you are adopting in this particular case.
>
> I don't think it's appropriate for me to do that, so even though I might have made various comments on the way through yesterday and today, I think the situation seems to be yes, it's a matter of your choice. If the Court of Appeal somehow or other with its broader jurisdiction, says that that resulted in some unfairness or whatever it is, as Southwood J seems to have done in *Flower's* case, well so be it, but that is not something I can do anything about.

[97] On the afternoon of the second day of the trial, senior counsel made a further application to adduce the contents of the record of interview through cross-examination of the officer in charge. The application was made on the basis that the interview contained admissions, and that the entirety of the interview could be admitted in accordance with s 81(2) of the *UEA*.

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125 Appeal Book 133.

[98] The application on behalf of the appellant to cross-examine a police officer to place the interview before the jury was rejected. The ruling was made on the basis of *Flowers*[126] which as discussed above held a record of interview with police was not admissible at the behest of an accused seeking to adduce the contents through cross-examination of the police officer who conducted the interview. There is no challenge to the approach of the trial judge to this particular question of adducing the statement through cross-examination nor could there be.

[99] The trial proceeded as is likely to have been anticipated, which included the learned trial judge's detailed directions to the jury on the elements of the offence, instructions on the drawing of inferences about the appellant's state of mind and directions to the jury not to use the appellant's decision not to give evidence against him.[127]

[100] A further noteworthy matter raised in argument was counsel for the Crown's statement to the jury during the opening:[128]

> It is my job as the prosecutor to present to you all of the evidence that police have collected during the investigation of this matter.

[101] Counsel for the appellant raised this statement with the trial judge as a further reason supporting the position that the evidence of the record of

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126 *The Queen v Singh* [2018] NTSC 10; *Flowers v The Queen* [2005] NTCCA 5; (2005) 153 A Crim R 110.

127 Aide Memoire for the Jury, Appeal Book at 181-187; 191; 200.

128 Appeal Book at 109.

interview should be adduced.[129] It was submitted the record of interview should be considered evidence which had been collected, but was not proposed to be tendered.[130]

[102] On this point, counsel for the Crown confirmed the decision had been made not to play the record of interview and that the Crown would present all evidence that had been collected throughout the investigation. It was submitted that "Perhaps the Crown should have said all admissible evidence that has been collected through the investigation of this matter".[131] Further it was said the record of interview was hearsay, that the only admissible material would be admissions within the scope of s 81 of the *UEA* and that the statements made in the interview did not satisfy s 81.

Was the record of interview admissible evidence?

[103] The record of interview made on 8 July 2017 contained a number of admissions and associated statements including the following:[132] the appellant was drunk at the time of the offending and was following his nephew; he was walking back home and the boys were annoying him; they waved the taxi down, they jumped in and he sat in the middle; he knew his nephew had something in his hand and started sticking up the

129 Appeal Book at 110

130 Appeal Book at 110.

131 Appeal Book at 116.

132 Appeal Book at 234-273.

taxi driver; he (the appellant) walked out from the door; the item in his nephew's hand was a sharp object; he drew a diagram of where they sat in the taxi and gave a description of the driver; he saw the nephew hold a sharp object to the taxi driver's neck and walked "out from them"; he walked back home; the boys were running; he did not know the nephew had the knife; and he was intoxicated and denied saying "give me the money".

[104] It may also be noticed the appellant was not under arrest at the time of the record of interview. He told the interviewing police "I just want to get it cleared up".[133] It would also seem interviewing police treated the appellant to some extent as a vulnerable person, as they went to some considerable effort to administer an *Anunga Rules* style of caution,[134] notwithstanding the appellant is an English speaker. Interviewing police put the caution in a number of different ways to satisfy themselves of the appellant's understanding of the process. Later in the interview, when being asked about his ethnicity and appearance at the time the appellant told police he was Chinese and Aboriginal.[135] Although nothing turns on it in this particular case, a significant submission made on behalf of the respondent is there can be no unfairness as an accused may always elect to give evidence. It would

133 Appeal Book at 239.

134 Appeal Book at 237-239.

135 Appeal Book at 260-261.

be unsurprising if the same or similar factors that guide police officers to be cautious with persons who appear to have vulnerabilities are at play when a decision is made between counsel and an accused about giving evidence. While a neutral factor in this case, it must not be assumed that in every case when an accused does not give evidence it is for unworthy reasons.

[105] The record of interview would have been clearly admissible through s 81(1) and (2) had the Crown sought its admission. The explanations, qualifications or exculpatory parts of the interview were clearly connected to the core admissions made by the appellant of his presence during the robbery and actions before and after.

[106] Generally speaking, at common law mixed statements are admissible as a whole package if the prosecution chooses to rely on any admissions contained in the statement, provided the exculpatory parts are fairly connected with the admission.[136] In a number of cases, the question of the characterisation of the statement on whether it is purely or largely "exculpatory" or "mixed" has been of some importance to the final result.[137]

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136 For example *Spence v Demasi* (1988) 48 SASR; *The Queen v Rudd* [2009] VSCA 213; 23 VR 444.

137 For example *The Queen v Helps* [2016] SASCFC 154; 126 SASR 486 at [38]; *Flowers v The Queen* [2005] NTCCA 5; 153 A Crim R 110 at [3].

[107] Counsel for the respondent on appeal submitted the appellant's interview was exculpatory and therefore not admissible in any event. Further, it was argued such a characterisation, if made here, would be consistent with the approach taken by Martin CJ (BR) to the record of interview in *Flowers*.[138] Given the different charges, circumstances and subject matter as between *Flowers* and this case, it would not be safe to draw such a definite comparison. Each case needs be analysed according to its own facts and circumstances rather than by comparison with what occurred in unrelated cases. In any event, the *UEA* commenced in the Northern Territory in 2013 well after the decision in *Flowers* which was decided in 2005. It is no longer necessary to undertake the exercise of characterising the record of interview as being in one category or another. The question must be whether the representations to be adduced comply with s 81 of the *UEA*.

[108] The admissibility of representations against interest and associated statements is now governed exclusively by the *UEA*. Although the Australian Law Reform Commission commentary on s 81 indicates it was not proposed to change the existing law,[139] as mentioned, s 81 does not require a court to determine whether a record of interview is mixed or purely exculpatory and self-serving, although it is accepted the

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138 [2005] NTCCA 5; 153 A Crim R 110 at [3]. A summary of the content of the interview in *Flowers* is set out in the Respondent's Submissions at [5].

139 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 13th ed, 2018) at [81.240].

result of the application of s 81 in many cases may well be the same as under the common law.

[109] For similar reasons, s 81 of the *UEA* does not provide any separate basis for admission of an accused's exculpatory statements simply because he or she is being "first taxed", nor on the grounds of showing consistency of their account unless alternative grounds of admissibility are sourced in the *UEA*. In *Flowers*[140] Southwood J concluded the position in England was that evidence could be led from an accused's innocent reply to questions on arrest but that such evidence is not permitted to be led to establish the facts. However, his Honour stressed the position is different in Australia because where the whole statement, including the self-serving parts, are admitted, the whole statement will be used assertively.[141] Kourakis J also rejected the "first taxed" reaction approach in *Barry*.[142] Now that the *UEA* applies in the Northern Territory, admissibility of any such statements must in any event be found or sourced in the *UEA*.

[110] Although in a given case there may be alternative grounds to support the admission of exculpatory statements under the *UEA*,[143] it would

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140 [2005] NTCCA 5; 153 A Crim R 110.

141 *Flowers v The Queen* [2005] NTCCA 5; 153 A Crim R 110, 121.

142 [2009] SASC 295; 197 A Crim R 445 at 54.

143 If for example the accused is to give evidence (see *Ashley v The Queen* [2016] NTCCA 2) or conceivably, depending on the circumstances as a contemporaneous representation as to health, sensations or state of mind under s 66A of the *UEA*.

seem s 81 would not operate to permit a simple denial on arrest or when "first taxed" to be admitted into evidence. But this is to be distinguished from admissions and statements made shortly before or after to give proper comprehension to any admission. The question is whether any such out of court statements fulfill the requirements of s 81 of the *UEA*.

[111] Under the *UEA* the hearsay prohibition[144] does not apply to an admission. An admission is defined as a previous representation that is adverse to the person's interest in the outcome of the proceeding to which they are a party, which includes a defendant in a criminal proceeding.[145] From the summary above, it can be seen the record of interview contains admissions adverse to the appellant's interest. Further, s 81(2) provides the hearsay rule does not apply to evidence of a previous representation:

> (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.

[112] Section 81(2) was explained further by Barrett J in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd*:[146]

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144 *Evidence (National Uniform Legislation) Act* (NT), s 59.

145 *Evidence (National Uniform Legislation) Act* (NT), s 3.

146 [2009] NSWSC 769; ALR 598 as reproduced in Stephen Odgers, *Uniform Evidence Law*, (Thomson Reuters, 13th ed, 2018) at [81.240].

> The meaning of "shortly… after" is to be understood in the light of the purpose s 81(2) is intended to serve. It is an adjunct to s 81(1) which puts evidence of an admission beyond the operation of the hearsay rule. Section 81(2) recognises that some other hearsay statement may serve to give essential added content to an admission, in that the other statement is necessary to a proper understanding of the admission. But s 81(2) also recognises that the other statement will be of exculpatory or clarifying value only if intimately associated with the admission. The need to exclude the intervention of self-serving after-thought, re-construction or alteration is recognised by the words "made… at the time the admission was made, or shortly before or after that time".

[113] In my opinion the admissions and associated exculpatory or explanatory material contained in the record of interview were clearly admissible under the *UEA* at the instance of the Crown, appreciating the Crown chose not to adduce the evidence of the interview at trial.

Did the decision not to adduce the record of interview at trial lead to an unfair trial?

[114] Although it is concluded here the record of interview was admissible at the instance of the Crown, this does not resolve the issue of whether the decision not to adduce evidence of it resulted in an unfair trial. Had the interview not been admissible, no further consideration of the ground of appeal would be required. However as a piece of evidence admissible under the *UEA*, in part favourable to the appellant, consideration needs to be given on whether the trial was unfair because it was not tendered.

[115] As outlined above, the jury was told by the prosecutor that all evidence police collected during the investigation would be presented. It must be remembered a statement of this kind was over and above the broad understanding that the prosecutor stands as a model litigant in criminal cases. In this trial, the statement that all evidence collected would be presented was not correct. There was evidence in the form of admissions and qualifications to the admissions that went to the appellant's presence, conduct and state of mind at the time the offence was committed. What the prosecutor said during the opening in the ordinary course is a useful statement to the jury about the role of counsel for the prosecution, however, in this instance it was not correct. A determination had been made not to adduce a piece of admissible evidence. As a consequence, the prosecution obtained an advantage throughout the trial because the picture that was presented to the jury was that all relevant evidence was before it. It was not. In this instance, the Crown was not entitled to the advantage of being seen as the party who called all of the relevant evidence without satisfying the burden of having done so.

[116] An indication was given to the trial judge that perhaps the opening statement could be corrected by referring to admissible evidence only, however that too raises the same problem. The evidence was perfectly admissible at the instance of the Crown and if the remarks were

corrected in the manner suggested, a similar incorrect impression would have been conveyed, namely that all admissible evidence was before the jury.

[117] As set out above, the reason the Crown did not tender the interview was that the evidence would go to the jury untested which would not be fair to the Crown and it was said it would not assist the jury as to its weight. The strength of the respondent's argument on this point is acknowledged here as clearly expressed by Kourakis J in *Barry*, where it was stated "...it would be anomalous to require the prosecution to put before the Court as probative material the self-serving assertions of the defendant, whom it very obviously, does not consider to be a witness of truth".[147] That is of course a serious consideration in any given case. That is not however what counsel for the Crown suggested was the reason for not adducing the evidence. It was that the version was untested. The jury were to be asked by the Crown to infer the requisite awareness on the part of accused. Certain statements in the record of interview told against that conclusion. Although it is appreciated the question here is not on all fours with calling a witness in person, generally speaking witnesses are required to be called even if their evidence is not favourable to or inconsistent with the prosecution's

147 [2009] SASC 295; 197 A Crim R 445 at [68].

case.[148] With appropriate modification for the different context as between witnesses and suspects, there are some parallels. The record of interview was partially consistent and partially inconsistent with the Crown case in terms of what the appellant's awareness of the offending was. It was not a situation where the interview was full of gratuitous attacks on witnesses (which it is acknowledged here can occur and would often be regarded unfair to the Crown) or other significant inroads into the strength of the Crown case. As above, unlike with witnesses in person there can be no recourse to s 38 of the *UEA*, however, had the record of interview been played, the Crown would have had the benefit or protection of a direction of the kind set down by the High Court in *Mule v The Queen*,[149] where it was held to be legally correct for a judge to tell the jury they were not obliged to give the same weight to everything said in the record of interview. Further, a jury may be instructed that exculpatory assertions in a record of interview were not on oath and it is for the jury to assess what weight to give such assertions. In as much as the concern on the part of the Crown was that the evidence would be "untested" and the jury would not be assisted, there exists great scope for appropriate directions of this kind which are often given. It is the experience of the courts that juries conscientiously follow such directions. Additionally, of

148 *The Queen v Shaw* (1991) 57 A Crim R 425.

149 [2005] HCA 49; 156 A Crim R 203.

assistance to the Crown case, the prosecution had the benefit of knowledge of the defence case in advance through the record of interview and if necessary could rebut the defence case in its own. The theoretical disadvantage or prejudice the Crown could potentially suffer by adducing the evidence was minimal.

[118] Further, unlike some records of interview, there were a number of probing questions asked by police and answers given, particularly around the appellant's appearance at the time. It is acknowledged this does not equate to cross-examination, which is usually impermissible in a record of interview particularly as it appears the appellant was treated as having certain vulnerabilities. Nevertheless, there was some probing and the record of interview was not conducted as a free narrative, neither was it a prepared statement.

[119] It is also acknowledged that exculpatory records of interview should not be permitted to effectively take the place of unsworn statements which have long been abolished in this jurisdiction. However, it cannot be said that the interview was in the nature of an unsworn statement or a prepared statement that in times passed may have been given at trial. It is not of that character.

[120] The issue of whether a particular practice might exist in the Northern Territory as has been described elsewhere, in which it is said the Crown will generally tender, as a matter of fairness, a record of

interview which contains part exculpatory material, was not fully ventilated during the course of the appeal. I think it is uncontroversial that records of interview of that kind are not infrequently tendered. It is plain the development of a practice cannot have the status of law, however, if a good practice has developed, there may be some point at which departure from good practice becomes unfair. In the circumstances of this particular case, the way the trial was conducted with the jury understanding the Crown had tendered all of the evidence, together with the less than substantial reasons for the Crown's objections to adducing the evidence meant that admissible evidence which was in part supportive of the appellant's case was not before the jury. There was not a full presentation of the evidence derived from the investigation.

[121] The respondent submits the only reason the appellant pressed for admission of the record of interview was to have the jury consider his version without giving evidence and therefore avoiding being subject to cross-examination.[150] It is unsurprising that accused persons attempt to have exculpatory material placed before the jury but if the material is untested there are directions that may assist to protect the Crown's position. However I do not think, given the onus of proof in criminal cases, that the question of whether this trial was fair or unfair can be

150 Respondent's submissions at [18] and mentioned throughout argument.

determined by what the appellant could or should have done in his own case, or what his motivations may have been. There are many imponderables. If it was correct that the appellant was intoxicated at the time of the robbery, later evidence at trial may well have been more unreliable than answers given to police closer to the time of the offence. Those matters are simply unknown. There may be many reasons why the appellant in this case did not give evidence. The appellant's counsel at trial told the trial judge at the outset the appellant would not be giving evidence. If the question of whether there was a fair trial was to be resolved simply by recourse to the principle that an accused always has right and the opportunity to give evidence, that would seem to undermine the importance of the burden of proof and tend towards undermining indirectly the companion principle.[151]

[122] I would uphold the single ground, allow the appeal and order a retrial. It is understood the respondent concedes there would have been a miscarriage of justice if the prosecutor's discretion miscarried by not tendering the record of interview.[152]

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151 Although in different settings, the importance of the onus of proof in criminal proceedings and the accusatorial nature of the process has been emphasized in other proceedings relevant to the companion principle see, eg, *Lee v NSW Crime Commission* [2013] HCA 39; 251 CLR 196, 265-266 per Kiefel J; *Lee v The Queen* [2014] HCA 20; 253 CLR 455 at [32]-[34] per French CJ, Crennan, Kiefel, Bell, Keane JJ; *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92 per Hayne and Bell JJ at [124] and Kiefel J at [158]-[160].

152 Transcript 9 July 2018 at 73.

BARR J:

[123] I agree with Kelly J that the appeal should be dismissed, for the reasons given by her Honour.

THE ORDERS OF THE COURT:

The appeal is dismissed.
