Prosecutorial obligations to adduce evidence of a defendant's police interview

Nguyen v The Queen [2020] HCA 23

By Brett Hatfield

Introduction

The High Court has held that the rules and principles governing prosecutorial obligations will usually require a prosecutor to tender an accused's interview with police containing 'mixed' statements, that is, both admissions and exculpatory statements, and that it is inconsistent with the prosecutor's obligation of fairness for the prosecutor to refrain from tendering the interview for 'tactical' reasons.

Background

The appellant had been charged with two offences against the *Criminal Code (NT)* arising out of his attendance at a party. He was alleged to have struck one person to the head with a beer bottle, unlawfully causing serious harm, and to have thrown another bottle at a second person in an aggravated assault. The appellant had participated in an electronically recorded police interview. In the interview the appellant admitted throwing the bottles but gave an account effectively of doing so in self-defence.

In the appellant's first Supreme Court jury trial the police interview was played as part of the prosecution case, however the jury in that trial were unable to reach a verdict. At the commencement of a second trial the prosecutor indicated to the Court that he would not tender the recorded interview. The trial judge asked if that was because the prosecutor considered that the Crown had *"a better chance of winning"* without the recorded interview to which the prosecutor responded: *"To be blunt, your Honour, yes it's a tactical decision"* and indicated that the approach was taken so that the appellant would be subject to cross-examination on any exculpatory account.

Defence counsel sought a stay and argued that the recorded interview was properly characterised as a 'mixed' statement, in that it included both admissions and exculpatory statements, and that in fairness to the

appellant the Crown should tender it. The prosecutor disputed that it was a 'mixed' statement and asserted an absolute discretion to decide whether to adduce the recording. The trial judge referred two questions to the Northern Territory Full Court in relation to the admissibility of the interview and whether the Crown was obliged to tender it. The Full Court held that the interview was admissible, but the prosecution was not obliged to tender it. The appellant was granted special leave to appeal to the High Court.

The plurality in the High Court

In a joint decision Kiefel CJ, Bell, Gageler, Keane and Gordon JJ held (at [22]) that mixed statements may be admissible through a combination of s 81(1) and (2) of the *Uniform Evidence Act*, and that insofar as there may be doubt about the connection between an exculpatory statement and an admission, *'it should be borne in mind that what is to be made of a mixed statement is a matter for the jury'* and that 'no narrow approach should be taken to the relationship between exculpatory statements and admissions'. Mixed statements of that kind were invariably subject to a direction (in accordance with *Mule v The Queen* (2005) 79 AJR 1573 at [25]) that the jury may give less weight to exculpatory assertions than to admissions because exculpatory statements are not made against interest, are not made on oath and are not subject to cross-examination (at [24]).

The question of admissibility did not however determine the question of whether the prosecution may be under an obligation to tender such a mixed statement. The plurality answered this question by reference to the fundamental principles and rules which inform the practices and procedures of a criminal trial. One fundamental rule is that it is for the prosecution to decide which witnesses are to be called and what evidence is necessary for the proper presentation of the case for the Crown. Another fundamental principle is the that the prosecution must put its case both fully and fairly before the jury. The plurality observed that it was this latter principle which provided the foundation for the well settled rule that if the prosecution seeks to rely upon an out of court admission or other incriminating statement then the whole of the statement made by the accused must be put before the jury, including any exculpatory statements, and that the prosecution may not *'pick and choose'* between statements which bear out its case and those which do not (at [27]).

This duty of prosecutorial fairness was also identified as a basis for the established prosecution practice in Victoria of traditionally leading evidence of statements made to the police, whether incriminating or not, as a matter of fairness and to show the response made by the accused to the allegations at the first opportunity to do so (at [30]). The justification for the similar practice in New South Wales was identified as being that otherwise the jury would be left to speculate as to whether the accused had given any account of their actions when first challenged by the police (at [31]). While there were some differences in prosecutorial practices between the States, the plurality observed that there could be no doubt about the obligation on the prosecution to present its case fully and fairly which was reflected

both in the professional conduct rules and had been reiterated in a number of decisions of the High Court as a fundamental principle (at [32]). While the concept of a fair trial could not be comprehensively or exhaustively defined, there was no doubt that fairness encompassed the presentation of all available, cogent and admissible evidence (at [36]).

Referring to the Court's earlier decision in *Richardson v The Queen* (1974) 131 CLR 116 at 119, the plurality explained that prosecutorial *'discretion'* enables the prosecution to take into account many factors regarding evidence, such as whether it is credible and whether it is in the interests of justice for it to be tendered and that it was in light of those factors that a prosecutor must determine the course *'which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused'* (at [34]).

The decision identified further countervailing factors which may properly influence the decision to call evidence more generally, such as whether the prosecutor had grounds for believing that a proposed witness was not credible or truthful, whether a witness' account was carefully prepared or otherwise contrived, evidence which was no more than a scurrilous attack on the character of a witness, and where evidence could clearly be demonstrated to be false by other objective evidence. It was only in circumstances such as these, where the reliability or credibility of the evidence was demonstrably lacking, that the circumstances may be said to warrant a refusal to call the evidence. While a prosecutor was not expected to be detached or disinterested in the trial process, and some forensic decisions are required to be made, professional standards require a prosecutor to be concerned about the fair presentation of the case to the jury and a prosecutor should not make tactical decisions which merely advance the Crown case and disadvantage the accused (at [44]-[45]).

Nettle J

Nettle J agreed with the orders proposed by the plurality, although was unwilling to predicate as a proposition of general application that the Crown's obligation to put its case fully and fairly included a prima facie duty to adduce all cogent and admissible evidence. His Honour identified the adversarial nature of the proceedings and that there *'may well be unexceptional cases in which a prosecutor would be perfectly entitled to choose not to tender available, cogent and admissible evidence without risk of unfairness to the accused'* (at [48]-[49]).

Edelman J

Edelman J agreed that the appeal should be allowed and generally with the reasons of the plurality, qualified by observations that it could never be said with certainty prior to the conclusion of the prosecution case that a prosecutor's duty of fairness would necessarily require a witness to be called or video record of interview to be tendered. His Honour suggested that there could not be a free-standing obligation on the prosecutor to call a particular item of evidence prior to trial, although the unusual circumstances of this matter (an appeal prior to the commencement of a second trial) were such that the question could be understood as asking about the prima facie content of the prosecutor's duty in the circumstances that existed at that time (at [54]-[55]).

His Honour identified several impediments to recognising any free-standing pre-trial obligation on the prosecutor. His Honour considered that the exceptions and qualifications were such that the obligation could only be stated in vague, contingent terms. By way of example, Edelman J noted that there could be no obligation to call evidence when the evidence is immaterial, where it was plainly false or fanciful, or where it may be unfair to the accused to tender the evidence (at [62]-[65]). His Honour also considered that such an obligation would be impossible for a trial judge to enforce and that the appropriate time for an assessment of whether the Crown had met its obligations in relation to calling evidence was on appeal, which required an assessment of whether the failure to call the evidence gave rise to a miscarriage of justice when viewed against the conduct of the trial taken as a whole (at [66]-[67]).

Notwithstanding those qualifications, Edelman J agreed with the orders of the plurality and regarded the obligation as a prima facie rule of ethical practice. His Honour agreed that the prosecutor's conduct in the present case was not consistent with his duty of fairness. BN