CITATION:	*The Queen v Nguyen* [2019] NTSC 37
PARTIES:	THE QUEEN v NGUYEN, Van Dung
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21633625
DELIVERED:	29 May 2019
HEARING DATE:	On the papers
JUDGMENT OF:	Kelly, Blokland and Barr JJ

CATCHWORDS:

Case stated for opinion of the Full Court pursuant to s 21 of the *Supreme Court Act* (NT) – Is the accused's recorded interview with police admissible in the Crown case? – 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

Case stated for opinion of the Full Court pursuant to s 21 of the *Supreme Court Act* (NT) – Is the Crown obliged to tender the recorded interview? – no duty to tender "mixed" records of interview

Supreme Court Act (NT) s 21
Evidence (National Uniform Legislation) Act (NT) s 3, s 81

Allied Interstate (Qld) Pty Ltd v Barnes [1968] HCA 76, 118 CLR 518; *Flowers v The Queen* [2005] NTCCA 5, 153 A Crim R 110; *R v Helps* [2016] SASCFC 154, 126 SASR 486; *R v Soma* [2003] HCA 13, 212 CLR 299; *Richardson v The Queen* [1974] HCA 19, 131 CLR 116; *Sampson v The Queen* [2002] WASCA 222; *Whitehorn v The Queen* [1983] HCA 42, 152 CLR 657, applied

Assafiri v Horne [2004] WASCA 40; *Barry v Police* [2009] SASC 295; *Middleton v The Queen* (1998) 19 WAR 179; *R v Callaghan* [1993] QCA 419, [1994] 2 Qd R 300*; R v Evans* [1964] Vic Rp 92, VR 717; *R v Helps* [2016] SASCFC 154; *R v Higgins* (1829) 3 C & P 603, 172 ER 565; *R v H, ML* [2006] SASC 240; *R v Kochnieff* [1987] QSCCCA 223, 33 A Crim R 1, followed

Barry v Police [2009] SASC 295, A Crim R 445; *Gilham v The Queen* [2012] NSWCCA 131; *Gonzales v Folkestone Magistrates Court* [2010] EWHC Crim 3428; *Gordon v The Queen* [2010] UKPC; *King v The Queen* [1986] HCA 59, 161 CLR 423; *Mahmood v Western Australia* [2008] HCA 1, 232 CLR 397; *Mule v The Queen* [2005] HCA 49, 156 A Crim R 203; *R v Rudd* [2009] VSCA 213, 23 VR 444; *R v Soma* [2003] HCA 13, 212 CLR 299; *Singh v The Queen* [2019] NTCCA 8; *The Queen v Anderson* (1991) 53 A Crim R 421; *The Queen v Familic* (1994) 75 A Crim R 229; *The Queen v Pearce* (1979) 69 Cr App R 365; *The Queen v Taufahema* [2007] HCA 11, 228 CLR 232; *The Queen v Tozer* (2002) 1 NZLR 193; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2009] NSWSC 769, 258 ALR 598, referred to

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

REPRESENTATION:

Counsel:

Crown:	D Morters
Accused:	M Abbott QC with A Abayasekara

Solicitors:

Crown:	Director of Public Prosecutions
Accused:	NT Legal Aid Commission

Judgment category classification:	B
Number of pages:	27

IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Nguyen [2019] NTSC 37
No. 21633625

BETWEEN:

THE QUEEN

AND:

VAN DUNG NGUYEN

CORAM: KELLY, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 29 May 2019)

Kelly J and Barr J:

[1] The accused Van Dung Nguyen is charged with one count of unlawfully causing serious harm to Muoi Nguyen, and one count of assault on Hung Tran aggravated by the use of an offensive weapon (a beer bottle).

[2] Both offences are alleged to have occurred on 18 June 2016 at Palmerston. The accused has pleaded not guilty to both counts.

[3] The Crown case against the accused on count 1 is that he either threw a bottle of beer at Muoi Nguyen, or hit him on the head with a bottle of beer, causing him serious harm (a fractured skull and subdural haemorrhage and

contusion requiring surgical intervention). The Crown case against the accused on count 2 is that he threw a (second) bottle of beer at Hung Tran.

[4] During the course of the trial in December 2017 ("the first trial") the Crown played a DVD of an interview conducted between police and the accused, recorded on 19 July 2016 ("the record of interview") in which the accused admitted throwing a bottle of beer at Muoi Nguyen and another bottle of beer at Hung Tran, but gave an exculpatory account of events in which he claimed he was acting in self-defence.

[5] During the first trial, the trial judge left defensive conduct to the jury. The accused did not give evidence. Ultimately the jury was unable to reach a verdict.

[6] The re-trial was listed to commence on 19 March 2018 ("the second trial").

[7] Before the commencement of the second trial, the prosecutor advised counsel for the accused and the Court that the Crown would not tender the record of interview in the second trial. He indicated that the decision was made for 'tactical' reasons. By way of further explanation, the prosecutor told the Court the accused's version given in the record of interview was exculpatory and if it was tendered in the Crown case the accused would not be subject to cross-examination on that exculpatory account. The prosecutor pointed out that the accused could give evidence about the matters in the record of interview if he chose to do so.

[8] On behalf of the accused, an application was made to stay the proceedings on the ground that the Crown's decision not to tender the record of interview amounted to an abuse of process and/or was a breach of the prosecutorial duty to present its case against the accused fairly and completely. Essentially, it was argued the decision of the prosecutor impinged on the accused's right to have a fair trial.

[9] It was argued on behalf of the accused that the recorded interview is properly characterized as a mixed statement in the sense that it is both inculpatory and exculpatory. It was submitted that it was therefore admissible in the Crown case and in fairness should be tendered.

[10] In response, the prosecutor first submitted that the Crown was not obliged to tender the record of interview in the second trial as the Crown considered it was properly categorised as being either wholly or substantially exculpatory. If categorised as either wholly or substantially exculpatory, the Crown submitted it would not be admissible and that no question of fairness arises.

[11] Counsel for the Crown further submitted that even if the record of interview was properly categorised as a mixed statement of both inculpatory and exculpatory material, or for that matter was entirely inculpatory, there remained an absolute discretion on the part of the Crown as to whether it would adduce the interview as part of the Crown case.

[12] The trial judge has referred the following questions of law to the Full Court pursuant to s 21 of the *Supreme Court Act* (NT):

Question 1:

Is the recorded interview of 19 July 2016 referred to in paragraph 4 above admissible in the Crown case?

Question 2:

Is the Crown obliged to tender the recorded interview?

[13] The same question of law arose in the Court of Criminal Appeal in *Singh v The Queen*[1] (*"Singh"*) in which the single ground of appeal was that the Crown, in choosing not to tender the appellant's record of interview, deprived the appellant of a reasonable chance of acquittal. This reference was listed for hearing following the hearing of the appeal in *Singh*.

[14] For the reasons set out more fully in the judgment of the Court of Criminal Appeal in *Singh*, we would answer the questions as follows:

Qn 1: Yes: the record of interview would be admissible in evidence at the instance of the Crown. The exculpatory parts of the interview are not admissible at the instance of the accused.

Qn 2: No.

Qn 1: Admissibility

[15] In summary:[2]

(a) The admissions in the record of interview are admissible in evidence (UEA s 81).

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1 [2019] NTCCA 8

2 See *Singh* at [11] to [16]

(b) If the prosecution wishes to rely on admissions contained in the record of interview it would be obliged to tender the entire record of interview, including the exculpatory parts "taking the good with the bad". [*R v Higgins;*[3] *Middleton v R;*[4] *Sampson v R;*[5] *R v H, ML;*[6] *The Queen v Helps;*[7] *R v Soma;*[8] *Singh*[9]]

(c) If the prosecution does not tender the record of interview, the exculpatory account given by an accused to police in the record of interview is not admissible at the instance of the accused, in the absence of particular circumstances rendering that evidence admissible according to the ordinary rules of evidence – for example to rebut a suggestion of recent invention. [*Singh;*[10] *Flowers v R;*[11] *R v Higgins;*[12] *Allied Interstate (Qld) Pty Ltd v Barnes;*[13] *Kochnieff;*[14] *R v Callaghan;*[15]

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

4 (1998) 19 WAR 179

5 [2002] WASCA 222

6 [2006] SASC 240

7 (2016) 126 SASR 486

8 (2003) 212 CLR 299

9 *supra*

10 *supra* at [16] to [23] cf *R v Rymer*

11 (2005) 153 A Crim R 110

12 *supra*

13 [1968] HCA 76; (1968) 118 CLR 518 at 585 per Barwick CJ

14 [1987] 33 A Crim R 1, 4 per Connolly J with whom the other members of the court agreed

15 [1994] 2 Qd R 300 at 304

Middleton v R;[16] *Sampson v R;*[17] *Assafiri v Horne;*[18] *R v H, ML;*[19] *R v Helps;*[20] *Barry v Police*[21]]

Qn 2: Is the prosecutor obliged to tender the record of interview?

[16] In summary:

(a) There is no general rule or principle that the duty of fairness requires the prosecution to tender a record of interview with an accused simply because it contains admissible material. [*Singh;*[22] *Middleton*;[23] *Callaghan*;[24] *Assafiri v Horne;*[25] *Barry v Police*[26]]

(b) The fundamental proposition is that it is a matter for the prosecutor to determine what witnesses will be called and what evidence will be adduced in the Crown case.[27]

(c) The prosecutor has the responsibility of ensuring that the Crown case is presented with fairness to the accused in all of the circumstances taking into account a multitude of factors including whether the evidence of a

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16 *supra*

17 *supra*

18 [2004] WASCA 40

19 *supra* at [25] to [27]

20 (2016) 126 SASR 486

21 [2009] SASC 295

22 [55] to [65]

23 *supra*

24 *supra*

25 *supra*

26 *supra*

27 *Richardson v The Queen* [1974] HCA 19; (1974) 131 CLR 116 at p 119 at [11] and [12]

particular witness is essential to the unfolding of the Crown case; whether the evidence is credible and truthful; and whether it is in the interest of justice for particular evidence to be subject to cross-examination by the Crown.[28]

(d) The court has no power to direct a prosecutor what evidence is to be called.[29] If the accused considers it would be unfair for the prosecutor not to adduce particular evidence, the remedy is an appeal (as in *Singh*) or an application for a stay of proceedings on the ground that the accused did not (or will not) receive a fair trial in the absence of that evidence, the onus being on the accused to establish relevant unfairness.[30]

(e) 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.[31]

[17] Applying these principles to the present case, the question whether the prosecution is obliged to tender the recorded interview comes down to this:

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28 Ibid

29 see, e.g., *Richardson v The Queen* [1974] HCA 19; (1974) 131 CLR 116, at pp 119, 121; *Reg v Evans* [1964] VicRp 92; (1964) VR 717, at p 719ff). *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657 at 663 – 664

30 *Singh* [67]

31 *Singh* [67]; *Barry v Police* at [67] to [71]; Examples of relevant unfairness from the decided cases include the Crown impermissibly splitting its case by not tendering a record of interview and then cross-examining the accused on prior inconsistent statements in the record of interview (*Soma*); and attempting to rely on part only of a statement or series of related statements by an accused (*Flowers*; *Mahmood v Western Australia;* (2008) CLR 397*; R v Rudd* (2009) 23 VR 444.)

"Would the accused be deprived of a fair trial if the prosecution failed to tender the record of interview at the second trial?"

[18] In this case, the accused has identified no relevant unfairness. Counsel for the accused posited the existence of a general duty on the prosecution to tender all "mixed" records of interview – a contention that was rejected in *Singh* – and the only unfairness is said to arise from the fact that, if the record of interview is not tendered, the accused will be obliged to give evidence on oath if he wants his exculpatory account to go before the jury. That, by itself, would not render the trial unfair. The High Court in *Richardson* specifically identified as a relevant factor for a prosecutor to consider in deciding what evidence to call in the Crown case "whether it is in the interest of justice for particular evidence to be subject to cross-examination by the Crown".

[19] As Kourakis J said in *Barry v Police*, once it is accepted (as it must be) that self-serving statements by an accused are not admissible unless introduced as part of the Crown case, the application of the common law rule against self-corroboration does not lead to any relevant unfairness. "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."[32]

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32 *Barry v Police* at [61]

[20] Therefore, the answer to qn 2 must be, "No."

[21] We have had the benefit of reading a draft of the judgment of her Honour Blokland J before publication of these reasons.

[22] We agree with her Honour that the principles applicable on a re-trial ordered after a successful appeal are not applicable in the instant case. Those principles are rooted in the law's abhorrence of double jeopardy. If there has been a successful appeal which exposed defects in the Crown case, a retrial should not be the occasion for allowing the prosecution an opportunity to "patch up" its case or to present a significantly different one. Even if those principles did apply, the course proposed to be adopted by the prosecution would not be in violation of those principles. We agree with her Honour that failing to tender the record of interview in this matter "could not be said to amount to a 'radically different way' of putting the case". As her Honour points out, the second trial will involve the same allegations and evidence but for the record of interview.

[23] We do not agree that failure to tender the record of interview will or could result in the overall perception of fairness being diminished. It may be, as Blokland J points out, that if the record of interview is not tendered, the issue of self-defence may not be left to the jury unless the accused gives evidence. For the reasons outlined above, that will not result in relevant unfairness, and, in our view, the fact that this is a second trial, following a failure by the jury to reach a decision in the first trial, does not make any

relevant difference to the fairness of the course proposed or to the perception of its fairness. The prosecutor's decision at the first trial to take a course arguably favourable to the accused does not make it unfair for the prosecutor to take a course at the second trial which is less favourable to the accused.

[24] We confirm that we would answer the questions referred to the Full Court as follows.

Qn 1: Yes: the record of interview would be admissible in evidence at the instance of the Crown. The exculpatory parts of the interview are not admissible at the instance of the accused.

Qn 2: No: the Crown is not obliged to tender the recorded interview.

Blokland J:

Introduction

[25] Van Dung Nguyen ("the defendant") is charged with two counts on indictment. Count one alleges he caused serious harm to Muoi Nguyen. Count two charges unlawful assault of Hung Tran with the circumstance of aggravation that Hung Tran was threatened with an offensive weapon, a beer bottle. The offences arise out of essentially one alleged course of conduct on 18 June 2016 at Palmerston. After the first trial and before the commencement of the second trial, two questions were referred to this Court:

Question 1: Is the recorded interview of 19 July 2016 admissible in the Crown case?

Question 2: Is the Crown obliged to tender the recorded interview?

The first trial

[26] The first trial was conducted between 18 and 22 December 2017. The jury was unable to reach a verdict and was discharged.

[27] The evidence from Crown witnesses in the first trial may be summarised as follows:[33]

> Hung Van Tran gave evidence that on the day of the incident he had a party at his house to which the accused and the other witnesses attended. They were drinking alcohol during the afternoon and they all played a game inside the house where they took turns singing Vietnamese songs. The accused sung the same song twice and, as per the rules of the game, had to drink a bottle of beer. He said that the conversations during the game were jovial and there were no arguments. However, in cross-examination, he said that the accused and Muoi had exchanged words in loud voices and he agreed that everyone was angry with the accused because he had disrespected Muoi and himself. He said that after the game, the accused and Muoi Van Nguyen were outside and he was inside the house when he heard Thong yelling out that they were fighting. He did not see what happened but went to Muoi at the door and saw that he was bleeding. Vu [Van Nguyen] called the police. Hung went out onto the road where the accused was and told him to wait until the police came. The accused kept on walking and Hung followed at a fast pace. The accused threw a bottle of beer at Hung which he dodged and the bottle smashed on the road.
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> Vu Van Nguyen gave evidence that at the party they were singing songs and the accused sang the same song twice. Muoi spoke to the accused about this. The accused sang the song a third time and Muoi again spoke to the accused which made the accused upset and he exchanged words with Muoi. The accused later went outside and Vu followed him. Muoi was also outside and Vu saw the accused hit Muoi on the head with a bottle. He then saw Chien [Van Do] and Hung following after the accused and the accused throwing a bottle at them which broke on

33 Summary of evidence as agreed between the parties, Court Book at Tab 2.

the ground. He then called 000. Another friend arrived and they drove Muoi to the Palmerston Clinic.

Thong Nguyen gave evidence that he attended the party and brought a box of corona which he left at the front door. They were all singing songs together and the accused sang the same song twice. The accused and Muoi had an argument but afterwards they shook hands and everything was fine. The accused, Muoi and Vu went outside the house. Through a window from inside the house, Thong saw the accused hit someone with a bottle who fell to the ground. He did not see who the person who fell to the ground was. Chien and Hung went outside the house and Muoi came inside the house bleeding from his head. Thong took his shirt off and tried to wrap it around Muoi's head like a bandage.

Chien Van Do gave evidence that he was playing the guitar whilst the others were singing. Muoi and the accused started arguing about whether the accused had sung the same song twice. Everybody else settled them down. Later, he was sitting inside with Thong and his wife and everyone else was outside when Thong yelled out that there was fighting. He saw Muoi coming into the house bleeding. Hung ran after the accused who had a beer bottle in his hand and Chien followed. The accused threw the bottle at Hung.

Muoi Van Nguyen gave evidence that Chien was playing guitar at the party. He went outside and the accused came outside after him. The accused held something in his hand and hit him on the top of the head.

A police officer, Sergeant Ronald Mummery, gave evidence that he attended Palmerston Clinic in response to a 000 call with his partner Senior Constable Tegan McClure. At the clinic he saw Vu, whom he knew personally, who initially provided some information about the incident. However, Vu said that he didn't see the alleged assault taking place. McClure told Sergeant Mummery that Muoi appeared uncooperative and did not want police assistance and this was confirmed through Vu. In cross-examination he agreed that Vu in some ways was discouraging any investigation. On 4 July 2016 Vu contacted him and said that he did witness the incident which started the investigation.

Although Senior Constable McClure did not give evidence at trial, agreed facts were tendered which included that at the clinic she asked Muoi what had happened and he had shook his head gesturing "no", that she had asked Vu to ask Muoi what happened and after a conversation between the two men Vu told her that Muoi did not wish

to speak to police about the incident and that she was present when Vu had told Sergeant Mummery that he did not see what happened and who had assaulted Muoi.

It was an agreed fact that Muoi Van Nguyen received a fractured skull resulting in a subdural haemorrhage and contusion requiring surgical intervention and that these injuries amounted to serious harm.

[28] During the course of the first trial, the Crown played a record of interview which was conducted between police and the defendant on 19 July 2016. The questions and answers were interpreted by a Vietnamese interpreter.

[29] In broad terms, the defendant told police the following during the course of the interview. The brother of Hung Tran ("Hung") was visiting. Hung phoned and told the defendant his brother had come over, so the defendant was also invited to visit. The defendant did not have a car and so he asked his daughter to give him a lift and he bought a box of beer. He thought Hung had already had some drinks but he did not know. After he arrived, they had a few drinks and Chin asked if he could invite Muoi Nguyen ("Muoi") to join them.[34] When they had some drinks, they started singing. One person would sing, then have a drink, then turn to the other person to sing.[35] While the defendant was singing, Muoi came and started to be angry towards him. Muoi said not to swear and the defendant said he thought he had not sworn. The defendant told him they were invited to be there, have

34 Transcript of Record of Interview dated 19 July 2016 at 8-9.

35 Transcript of Record of Interview dated 19 July 2016 at 9.

food and have a good time. The defendant told Muoi if he "do like that" he was not a good person.[36]

[30] Five of them went outside to have a smoke. Vu Van Nguyen ("Vu") and Hung were in that group and the defendant said they "wanted to be angry" with him. While the defendant was standing outside, Vu, Hung and another person wanted to try to hit him. Hung and Chin blocked the front door. Another person followed the defendant to the back door. The defendant said he knew they wanted to hit him. He saw the box of beer so he took a bottle of beer. The others wanted to follow him outside and hit him. They did not want to hit him inside.[37] He took two bottles of beer and told them "if you want to hit – you hit me and I will throw this bottle to you".[38] Muoi came forward towards the defendant. The defendant said he could not do anything. He had to throw the bottle of beer at him. If he did not do that, he said that Muoi would hit him. He threw the bottles so he would not be hit by them. When Muoi ran towards the defendant, he threw the bottle at him from a distance of two to three metres, striking him on the head. He ran outside to the road. Hung, Chin and another person followed him and he threw the other bottle as a warning.[39] After giving this outline of his version

36 Transcript of Record of Interview dated 19 July 2016 at 9.

37 Transcript of Record of Interview dated 19 July 2016 at 9-10.

38 Transcript of Record of Interview dated 19 July 2016 at 10.

39 Transcript of Record of Interview dated 19 July 2016 at 10.

of events, police asked appropriately probing questions revealing more details, but the elements of the defendant's version remained consistent.[40]

[31] The defendant did not give evidence. At the end of the first trial, the trial judge left defensive conduct to the jury. As mentioned above, the jury were unable to reach a verdict on both counts and were discharged.

Background to the questions referred

[32] As is set out in the Referral to this Court, before the second trial, counsel for the Crown in the first trial advised counsel for the accused and the trial judge that the Crown would not tender the record of interview in the second trial. The decision was stated to be for "tactical" reasons. Further, it was pointed out that the accused's version was exculpatory and if tendered the accused would not be subject to cross-examination. The accused, it was said, could give evidence about the matters in the record of interview if he chose to do so.

[33] The defendant made an application to stay the proceedings on the grounds that the Crown's decision not to tender the record of interview amounted to an abuse of process, was a breach of the prosecutorial duty to present the case fairly and completely and impinged on the defendant's right to a fair trial. Counsel for the Crown argued the record of interview was wholly or substantially exculpatory and in any event there was no obligation on the Crown to tender the interview. Both parties indicated a desire to appeal the

40 Transcript of Record of Interview dated 19 July 2016 at 10-23.

result in the event of an unfavourable ruling made before the trial. Given the proximity to the same issue that was to be dealt with in *Singh v The Queen* ("*Singh*"),[41] the parties requested the questions be referred to the Full Court.

Question 1: Is the record of interview of 19 July 2016 admissible in the Crown case?

[34] The record of interview is clearly admissible under s 81(1) and (2) of the *Evidence (National Uniform Legislation) Act* (NT) ("*UEA*"). Under the *UEA* the hearsay prohibition 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.[42] Clearly the record of interview contains admissions adverse to the defendant'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.

41 *Singh v The Queen* [2019] NTCCA 8 was not determined at the time of the Referral of the questions.

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

[35] Section 81(2) was explained by Barrett J in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd*:[43]

> 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 of the 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".

[36] The admissions and associated exculpatory or explanatory material which in this instance go towards the issue of defensive conduct were clearly admissible under the *UEA* at the instance of the Crown. The exculpatory parts are inextricably or intimately associated with the admissions. The interview was, after all, tendered without any difficulty by the Crown in the first trial.

[37] On behalf of the defendant in this Court it was argued the interview was admissible under s 81 of the *UEA* and at common law on the basis that it is a "mixed statement". It is accepted here that the weight of authority at common law would support the characterisation of a record of interview of this kind as a "mixed statement",[44] although reasonable minds may differ on the final conclusion. However, in my view it is no longer necessary to make

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43 [2009] NSWSC 769; 258 ALR 598 at 609 as reproduced in Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 13th ed, 2018) at [81.240].

44 See, eg, *Barry v Police* [2009] SASC 295; (2009) A Crim R 445 at [42]; *Gordon v The Queen* [2010] UKPC at 18 [35]; *The Queen v Tozer* (2002) 1 NZLR 193 at [24]-[28].

such a characterisation. Notwithstanding the result may in the end be the same as between a common law characterisation of the nature of a statement and a conclusion under s 81(1) and (2) of the *UEA*, the question of admissibility now falls to be determined under the *UEA*. Clearly the record of interview contains admissions that the defendant was present and had thrown the bottles of beer at the victims. The associated answers and explanations given by the defendant are of the kind contemplated in s 81(2).

[38] I agree with their Honours Kelly J and Barr J. The answer to question one is "Yes".

Question 2: Is the prosecutor obliged to tender the record of interview?

[39] Senior counsel for the defendant argued that in the case of a mixed statement or record of interview, the Crown ordinarily must lead the record of interview as part of the prosecution case. Relying at the outset on the English authority of *The Queen v Pearce*[45] ("*Pearce*") counsel argued it was only when a mixed statement falls within the three rules set out by Lord Chief Justice Widgery in *Pearce* that a prosecutor has discretion to choose to decline to lead it as part of the prosecution case. The three rules in *Pearce* said to govern the admissibility of evidence of comments made at the point of arrest, both inculpatory and exculpatory, are in brief as follows. The first rule is that an admission is always admissible. The second rule provides that a statement that is not an admission is admissible to show the

45 (1979) 69 Cr App R 365.

attitude of the accused at the time it was made or if not an admission, is admissible if made in the context of an admission. The third rule, an exception to rules one and two, was expressed as follows:

> 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.[46]

[40] It was argued the prosecution could only refrain from tendering a statement if it was of the kind contemplated by rule three. It may be noticed in *Flowers v The Queen*[47] ("*Flowers*") Southwood J distinguished the position stated in *Pearce* concerning the admissibility of mixed and exculpatory statements on the grounds that the English position did not permit the statements to be used assertively, however in Australia the opposite is the case. As pointed out by the defendant here, in *Flowers* the second record of interview was not considered to be a case of mixed statements, but rather an exculpatory account which could not be cross-examined into evidence by counsel for the accused. Admissibility in any event must now be governed by the *UEA*. It may be noticed *Flowers* was decided before the *UEA* was passed in the Northern Territory.

[41] Although the record of interview here is admissible under the *UEA*, whether an obligation to tender it can be derived from *Pearce* and subsequent authorities is problematic. Counsel for the defendant relied on *Gonzales v*

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46 *The Queen v Pearce* (1979) 69 Cr App R 365 at 369.

47 [2005] NTCCA 5; 153 A Crim R 110 at 121.

Folkestone Magistrates Court,[48] *The Queen v Rymer*,[49] *The Queen v Familic*[50] and the comments by Hayne J in *Mahmood v Western Australia*[51] to support the proposition that questions of admissibility aside, it is still only those statements falling in the third category of *Pearce* that may be withheld by the prosecutor. The defendant argued the Crown's obligation to tender statements of this kind is an incident of the prosecutorial duty to conduct the case fairly and fully.

[42] Counsel for the defendant also acknowledged authority to the contrary. A number of authorities pointing to the opposite view were relied on by the counsel for the Crown, both here and in the matter of *Singh* which raised a similar issue.[52] It was submitted by the defendant here that Peak J's dissenting judgement in *The Queen v Helps*[53] correctly set out the governing principle that the prosecution had a duty to present the case fairly and completely and that this principle "independently governs a situation where there is an argument about whether a prosecutor should tender a 'mixed

48 [2010] EWHC Crim 3428.

49 (2005) 156 A Crim R 84.

50 (1994) 75 A Crim R 229.

51 (2008) 232 CLR 397 at [41]; set out in *Singh v The Queen* at [76].

52 See, eg, *The Queen v Callaghan* [1994] Qd R 300; *Middleton v The Queen* (1998) 19 WAR 179; *Barry v The Police* (2009) SASC, although it was argued by counsel for the defendant that *Barry v The Police* could be distinguished as the statement there would have been a statement in the third category of *Pearce* as the accused attended the police station a month after with notes prepared as to what he would tell police; *Flowers v The Queen* (2005) 153 A Crim R 110 per Riley J.

53 [2016] SASCFC 154; 126 SASR 486.

statement'".[54] The Court was urged to adopt the following from Peak J's analysis:[55]

> The effect of these rules (read in the light of Widgery LCJ's earlier statements in Pearce) that exculpatory arrest comments should be tendered by the prosecution on the basis of fairness to the defendant, except in the comparatively rare situation of the defendant confecting an artificial state of affairs which cannot be said to possessed that 'vital relevance is showing the reaction of the accused when first taxed with the incriminating facts' which is the touchstone of admissibility here.

[43] Attention was also drawn to Peak J's discussion under the headings *The Governing Principle – the Prosecutorial Duty to Present the Case Fairly and Completely* and *Other Australian Jurisdictions* concerning the position in New South Wales which his Honour considered to reflect the prosecutorial obligation to tender all arrest statements, unless they came within the third category of *Pearce*. Further, his Honour commented to the effect that the position in Victoria was compatible with that in New South Wales. His Honour also noted the position in Queensland, Western Australia and the Northern Territory differed as there was no obligation on the part of the prosecution to tender all or any arrest statements, whether mixed or wholly exculpatory.[56]

[44] As a result of the judgment of the Court of Criminal Appeal in *Singh*, it must now be accepted, as held and discussed by Kelly J in *Singh*, with whom Barr J agreed, that in the Northern Territory there is no general rule or

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54 *The Queen v Helps* [2016] SASCFC 154; 126 SASR 486 at [338].

55 *The Queen v Helps* [2016] SASCFC 154; 126 SASR 486 at [245].

56 *The Queen v Helps* [2016] SASCFC 154; 126 SASR 486 at [303]-[304].

principle that the duty of fairness requires the prosecution to tender a record of interview with an accused simply because it contains admissible material or indeed is a mixed statement or is admissible under s 81(1) and (2) of the *UEA*. Further, it is a matter for the prosecutor to determine what witnesses will be called and what evidence will be adduced in the Crown case. In this jurisdiction, the prosecutor has the responsibility of ensuring whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, and whether it is in the interests of justice for particular evidence to be subject to cross-examination.

Notwithstanding I took a contrary view to the question of determining trial unfairness in *Singh*, as a matter of precedent this Court is bound in any event by the decision in *Singh*. No unfairness of the kind identified in *Mahmood v Western Australia*[57] or *The Queen v Soma*[58] has been identified here. Those cases found the conduct of the trials undermined the accusatorial and adversarial nature of a criminal trial. On the basis of the decision in *Singh*, and the authorities there accepted as representing a correct statement of the law in the Northern Territory, the answer to question 2 must be "No".

[45] That issue determined, there remains some concern about whether the re-trial will be perceived to be fair if a significant piece of partially

57 [2008] HSC 1; 232 CLR 397.

58 [2003] HCA 13; 212 CLR 299.

exculpatory material is withheld from the jury when it was tendered in the first trial. The reason the interview will not be tendered is effectively that the Crown case will be stronger without it. If the defendant does not give evidence as occurred in the first trial, defensive conduct will be diminished or possibly may not be left to the jury.

[46] Although it is accepted the prosecutor alone is to determine whether or not the record of interview is to be played to the jury,[59] respectfully, in these circumstances it would be appropriate for the prosecutor to reconsider the question of not tendering the interview in the second trial. Although a decision for the prosecutor, broader considerations of perceptions of fairness of the trial process are evident with this particular defendant in these circumstances. It is appreciated this perception does not reach the level of actual trial unfairness that may be subject to a stay or other remedial procedure, however the overall appearance of fairness is diminished in the circumstances of a re-trial and this particular defendant.

[47] First, although the re-trial is to be held as a result of the jury being unable to reach a verdict, rather than as a result of an order after a successful appeal, there should in my view be some consistency with the approach taken in cases where a re-trial is ordered after appeal. Cases which deal with the question of re-trials after appeal stipulate a re-trial is not generally ordered if the re-trial would allow the Crown the opportunity to make a case that

59 *Singh v The Queen* [2019] NTCCA 8.

was not made at the first trial. It seems it is unusual for the Crown to be permitted to make a materially different case at a second trial. It is appreciated that in one sense the second trial will involve the same allegations and evidence but for the record of interview, however in another sense the evidence in the Crown case will be materially different because of the omission of the record of interview.

[48] In *King v The Queen*,[60] Dawson J said:

> It is well established that the discretion to order a new trial should not be exercised when the evidence in the court below was sufficiently cogent to justify a conviction or to allow the Crown to supplement a case which has proved to be defective. In particular, the Crown should not be given an opportunity to make a new case which was not made at the first trial.[61]

[49] While in this case it is appreciated there will not be a new Crown case as such, the way the second trial is anticipated to be run may remove evidence of the principal issue relevant to the defendant's case. In *The Queen v Taufahema*,[62] the plurality of Gummow, Hayne, Heydon and Crennon JJ considered whether it would be oppressive for the prosecution to seek a second trial on a point not previously raised or based on a different particularisation of joint criminal enterprise. As the prosecution proposed to rely on the same evidence as called at the first trial but would characterise the facts and evidence in a different way, this did not amount to a "radically different way" of putting the case hence a new trial was ordered. While not

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60 [1986] HCA 59; 161 CLR 423.

61 *King v The Queen* [1986] HCA 59; 161 CLR 423 at 433 citing *The Queen v Wilkes* (1984) 77 CLR 511 at 518.

62 [2007] HCA 11; 228 CLR 232.

tendering the record of interview in this matter could not be said to amount to a "radically different way" of putting the case, it does mean the case is significantly altered.

[50] In *Gilham v The Queen*[63] it was held that the Crown may "remould" its case on a re-trial, but must retain the "basic factual premises that underlie the Crown case".[64] Further, it has been said a re-trial cannot be used by the Crown to reconstruct or "patch up" its case.[65] In *Gilham v The Queen*, McClellan CJ confirmed that one of the factors a court may consider when deciding whether or not to order a re-trial is whether a new trial would impermissibly give the prosecution an opportunity to supplement a defective case or to present a case significantly different to that presented to the jury in the previous trial. While it is appreciated the questions referred here do not involve questions of an order for a re-trial after an appeal, whether the Crown is to change its case by removing exculpatory evidence on a tactical basis is in my view, an appropriate subject for reconsideration by the trial prosecutor.

[51] A second matter of some importance is that in this case, after the interviewing police officers administered an *Anunga Rules* style of caution, no doubt undertaken because of the potential for miscommunication, the

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63 [2012] NSWCCA 131.

64 *Gilham v The Queen* [2012] NSWCCA 131 at [655].

65 *The Queen v Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ.

defendant was asked to explain back in his own words, the phrase (*inter alia)*:

> So I must also inform you that anything you do say or do will be recorded and may later be given in evidence.[66]

[52] The way the defendant explained this part of the caution in his own words was:

> Yeah. Whatever you ask and whatever I answer will be taken as evidence in the court.[67]

[53] The defendant's understanding appears to be that the interview "will" be taken as evidence in court, notwithstanding the interviewing police officers said it "may" be used as evidence.

[54] Consequently it is evident there is potential for miscommunication on the basis of language, notwithstanding police properly engaged an interpreter when conducting the record of interview. In those circumstances it would be unsurprising if in consultation with his counsel the defendant did not give evidence in the second trial because of the possibility of communication difficulties of the kind evident in the procedural parts of the record of interview. It might be thought the defendant would be unlikely to do his own case justice. Given the onus of proof in criminal matters and the potential communication issues, it is not entirely appropriate to resolve all

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66 Transcript Record of Interview dated 19 July 2016 at 5.

67 Transcript Record of Interview dated 19 July 2016 at 5.

issues of the appearance of fairness with reference to the defendant's right to give evidence.

[55] Should the prosecutor reconsider, notwithstanding the defendant's statements would not be tested beyond the probing of police officers during the record of interview, the Crown could seek the protection of a direction of the kind given in *Mule v The Queen*[68] with respect to the exculpatory parts of the record of interview. Additionally, on the facts of this matter the Crown can fairly address the issue negativing defensive conduct through the witnesses it anticipates will be called. The potential unfairness to the Crown appears slight.

[56] As mentioned above, I agree that the answer to question 2 is "No", however for the reasons mentioned, in my view, respectfully the prosecutor at the second trial should reconsider the question of the tender of the record of interview.

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68 [2005] HCA 49; 156 A Crim R 203.