

"I did it, but...": a prosecutor's obligation to tender mixed statements (*Nguyen v The Queen* [2020] HCA 23)

KEY POINTS

- ▶ A prosecutor must tender mixed inculpatory and exculpatory statements made by an accused to investigating officers, unless there is a good reason not to do so.
- ▶ Where the reliability or credibility of the evidence is demonstrably lacking, the prosecutor may be justified in refusing to tender such evidence.

FACTUAL BACKGROUND

Mr Nguyen was charged on indictment with offences against the *Criminal Code* (NT) when he allegedly threw a bottle of beer at someone after a singing game went awry. He had been interviewed by the police about the offences prior to being charged. The interview, which was recorded, contained admissions together with exculpatory statements in the form of a claim of self-defence ("mixed statements").

PROCEEDINGS BELOW

At the first trial the prosecutor played the recorded interview and the jury did not reach a verdict. At the second trial the prosecutor made a "tactical decision" not to tender the recorded interview as it would not assist the prosecution case. The defendant applied to stay the second trial.

Following previous NT appellate authority, the Full Court of the NT Supreme Court held that the prosecutor was not obliged to tender the interview as there was no general principle requiring a prosecutor to tender a record of interview simply because it contained admissible material.

HIGH COURT

The Court unanimously held that the prosecutor was obliged to tender the recorded interview, settling prior divergent judicial authority on this issue. Key points in the joint judgment of 5 judges included:

- The principle that the prosecutor is obliged to present its case fully and fairly is "fundamental" to the conduct of a criminal trial.
- Fairness requires the prosecutor to present "all available, cogent and admissible evidence".
- There may be circumstances where it would be unfair to an accused to tender a record of interview (eg. where the accused has refused to comment).
- However, the prosecutor should tender mixed statements in its case unless there is a good reason not to do so.
- It should only be in those rare cases where the reliability or credibility of evidence is demonstrably lacking that the circumstances may warrant the prosecutor refusing to tender mixed statements.
- The admissibility of mixed statements is a separate question from whether the prosecutor has a duty to tender them (although usually mixed statements in a record of interview will be admissible).
- Here the defendant's account was consistent and could not be described as demonstrably false simply because it differed from the account of others.
- The prosecutor's tactical decision not to tender the interview to favour the prosecution case did not accord with a prosecutor's duties.

IMPLICATIONS

Prosecutors should assume they are ordinarily obliged to tender mixed statements in recorded interviews. The High Court's decision confirms that this approach, which reflects professional practice in NSW and Victoria, is correct.

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