SUPREME COURT OF QUEENSLAND

CITATION:	*R v Taylor* [2016] QSC 116
PARTIES:	**R** **v** **TAYLOR, Tyson John** (applicant)
FILE NO/S:	Indictment No. 473 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application filed on 29 April 2016
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3, 4, 5 and 6 May 2016
JUDGE:	Burns J
ORDER:	**Application dismissed on 6 May 2016**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – VOLUNTARY STATEMENTS – VOLUNTARINESS – GENERALLY – where the applicant was charged on indictment with attempted murder and murder – where the applicant applied pursuant to s 590AA of the *Criminal Code* 1899 (Qld) to have statements made by him to covert police operatives excluded on the grounds of lack of voluntariness – where the admissions were obtained by an undercover police operation – where "scenario evidence" was gathered by the undercover police – whether the admissions were made voluntarily. CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – PARTICULAR CASES – where the applicant was charged on indictment with attempted murder and murder – where the applicant applied pursuant to s 590AA of the *Criminal Code* 1899 (Qld) to have statements made by him to covert police operatives excluded in the exercise of judicial discretion because of unfairness – where the admissions were obtained by an undercover police operation – where "scenario evidence" was gathered by the undercover police – whether the admissions ought be excluded in the exercise of the

court's discretion on the ground that it would be unfair to admit them in evidence against the applicant at his trial.

Criminal Code 1899 (Qld), s 590AA
Criminal Law Amendment Act 1894 (Qld), s 10
Police Powers and Responsibilities Act 2000 (Qld), Ch 11

Cleland v The Queen (1982) 151 CLR 1; [1982] HCA 67, cited
Collins v The Queen (1980) 31 ALR 257; [1980] FCA 72, cited
Cornelius v The King (1936) 55 CLR 235; [1936] HCA 25, cited
Director of Public Prosecutions (Vic) v Ghiller (2003) 151 A Crim R 148; [2003] VSC 350, cited
Donai v The Queen [2011] NSWCCA 173, cited
Em v The Queen (2007) 232 CLR 67; [2007] HCA 46, cited
Lauchlan v Western Australia [2008] WASCA 227, cited
MacPherson v The Queen (1981) 147 CLR 512; [1981] HCA 46, cited
McDermott v The King (1948) 76 CLR 501; [1948] HCA 23, followed
R v Cowan (2013) 237 A Crim R 388; [2013] QSC 337, cited
R v Cowan; R v Cowan; Ex parte Attorney-General (Qld) [2015] QCA 87, followed
R v Favata [2004] VSC 7, cited
R v Jelicic [2016] SASC 57, cited
R v Karakas (Ruling No 1) [2009] VSC 480, cited
R v Lee (1950) 82 CLR 133; [1950] HCA 25, cited
R v McKay [1965] Qd R 240, cited
R v Simmons; R v Moore (No 2) [2015] NSWSC 143, cited
R v Swaffield; R v Pavic (1998) 192 CLR 159; [1998] HCA 1, cited
R v Weaven (Ruling No 1) [2011] VSC 442, cited
Re Application by Chief Commissioner of Police (Vic) (2004) 9 VR 275; [2004] VSCA 3, cited
The Queen v Ireland (1970) 126 CLR 321; [1970] HCA 21, cited.
Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v The Queen (2007) 231 CLR 396; [2007] HCA 39, followed
Van Der Meer v The Queen (1988) 82 ALR 10; [1988] HCA 56, cited
Wendo v The Queen (1963) 109 CLR 559; [1963] HCA 19, cited

COUNSEL: P Nolan for the applicant
V Loury for the respondent

SOLICITORS: Moloney MacCallum for the applicant
Office of the Director of Public Prosecutions (Qld) for the

respondent

[1] On 19 June 2015, an indictment was presented against the applicant, Tyson John Taylor, containing one count of attempted murder and one count of murder. His co-accused on both counts was Susan Ellen Stewart.

[2] The victim in the case of each count was Anthony John McGrath. He was a retired public servant who lived alone in a house situated at Buranda. Prior to 2012, he met Stewart when she was working as a prostitute. He continued to see her in that capacity and, over time, transferred a considerable sum of money to her by way of gift. On the prosecution case, in 2012 the deceased was persuaded by a marriage proposal and a false claim of pregnancy to provide instructions to his solicitor to change his will so as to leave the whole of his estate to Stewart. Although a draft will incorporating those instructions was prepared and forwarded to the deceased, it was never executed. The prosecution case was that Stewart, wrongly assuming that the will had been executed, procured the applicant to kill the deceased.

[3] In brief, it was alleged that the applicant acted in concert with Stewart to make an attempt on the deceased's life in the early hours of 8 October 2012 culminating in the applicant setting fire to the deceased's house. Then it was alleged that, on 21 May 2013, the applicant lay in wait for the deceased in the garage of his house and shot him dead after he arrived home in his car. His body was discovered two days later.

[4] The evidence proposed to be led against the applicant included what has sometimes been referred to as "scenario evidence". A covert operation targeting the applicant was conducted between 14 November 2013 and 5 February 2014 during which police officers posing as members of a crime syndicate managed to convince the applicant that they were interested in recruiting him as a permanent member of the organisation and, further, that they were capable of ensuring that both he and Stewart would be immune from any police action with respect to the subject offences. Over the course of the operation, most of the interactions with the applicant were recorded but, most critically, the applicant made a series of recorded admissions to covert operatives on 4 and 5 February 2014 that amounted, if true, to a full confession to both crimes. It was not submitted by the prosecution that any of this evidence was admissible against Stewart.

[5] On the applicant's behalf, an order was sought pursuant to s 590AA of the *Criminal Code* 1899 (Qld) to exclude all of the evidence obtained in consequence of the covert operation from the evidence at his trial. Specifically, it was contended that the admissions made by the applicant to the covert police were involuntary or, in the alternative, that it would be unfair to admit them in evidence against him.

[6] Those representing the applicant first indicated at a review held on 28 August 2015 that such an application would be made. In due course, the application was set down for hearing to commence on 3 May 2016 on the understanding that, once determined, the trial would immediately follow. However, a late application was made on behalf of Stewart for a separate trial, so it became necessary to determine both applications before the trial commenced.

[7] The application for exclusion was heard over the course of three days commencing on Tuesday, 3 May 2016. On the afternoon of Friday, 6 May 2016, I dismissed the

application and indicated that I would publish my reasons in due course. On Monday, 9 May 2016, I heard the application brought on behalf of Stewart and ordered that she be tried separately to the applicant. On the following day, the applicant's trial commenced. It proceeded for 11 days until, on 24 May 2016, the jury returned a verdict of guilty with respect to both counts.

[8] These, then, are my reasons for dismissing the application to exclude the evidence obtained in consequence of the covert operation.

The evidence on this application

[9] Five witnesses, each of whom was a serving police officer, were called by the prosecution to give evidence on the hearing of the application. They were:

(a) *Detective Sergeant Southey* – At the time of the covert operation, DS Southey was attached to the Covert Operations Unit, Intelligence Counter Terrorism and Major Events Command ("Covert Operations") in Brisbane. As the controller for the operation, he formulated 14 separate scenarios and allocated the necessary human and other resources to implement them. He also liaised with the Homicide unit. After each scenario was "played out",[1] DS Southey met with the covert operatives to plan any necessary modifications to the next scenario, and this pattern was followed until the final scenario was concluded;

(b) *Brad* – The person known to the applicant as "Brad" was an undercover police officer attached to Covert Operations at the time of the operation. He reported directly to DS Southey who briefed him at the commencement of the operation, and subsequently. He knew that the applicant was a "possible suspect for [the] murder"[2] and that he was unemployed and living out of his car. He understood that his initial task was to attempt to befriend the applicant and "gain his trust".[3] Apart from his initial contact with the applicant, Brad recorded all of the conversations between them that took place in Queensland. When in New South Wales, he made contemporaneous written notes of their conversations. There was no dispute as to the accuracy of his recollection regarding those conversations as aided by his notes;

(c) *Mark* – An officer from Covert Operations posed as the head of the crime syndicate and was known to the applicant as "Mark". In this role, Mark met with the applicant at the Stamford Plaza Hotel on the evening of 4 February 2014 and, during the second of two conversations that evening, a series of admissions were made by the applicant regarding the murder;

(d) *Mal* – The person known to the applicant as "Mal" was another police officer who was attached to Covert Operations at the time of the operation. His role was to act as a "cleaner" who was responsible for locating and then disposing of any remaining evidence of the alleged offences. In this capacity, Mal participated in a "drive around" on 5 February 2014 with the applicant as well as Brad that resulted in the applicant making further admissions about the murder and a series of admissions about the attempted murder; and

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1 T. 1-18.
2 T. 1-30.
3 T. 1-30.

(e) *Detective Sergeant Lawler* – DS Lawler of the Dutton Park Criminal Investigation Branch was one of the principal investigating officers with respect to both the attempted murder and the murder. He liaised with officers attached to the Homicide unit as well as Covert Operations.

[10] The applicant also gave evidence on the hearing of the application, and was cross-examined. Although his evidence is considered in more detail later, he maintained that the admissions to the covert operatives were falsely made by him. He swore that he was pressured into thinking that they believed he had committed the offences and that the only way he could gain membership of the crime syndicate and secure protection against what he described as "harassment" by the police was to advance a version consistent with that belief. He said that he was in need of the income that membership of the crime syndicate would provide and that he believed that both he and his family would be in danger if he did not tell the covert operatives what he thought they wanted to hear.

[11] Although the applicant's evidence was very much in contest on the hearing of the application, there was no serious challenge to any aspect of the evidence of the police witnesses and it is principally from this body of evidence that the following summaries of the initial police investigation as well as the covert operation have been derived.

The initial police investigation

[12] Police and paramedics who attended at the scene after the body was discovered on 23 May 2015 initially thought that the deceased had fallen or suffered a cardiac arrest and died. It was not until a scan of the body was carried out at the mortuary on the following day which revealed the presence of a bullet in the brain of the deceased that a homicide investigation was commenced. The fire on 8 October 2012 had previously been investigated by police as well as electrical safety investigators and was not then regarded as suspicious. As police believed the murder and the fire were possibly linked, the circumstances of the fire were also re-investigated.

[13] A thorough scientific examination was carried out at the deceased's home at Buranda, but it failed to reveal any evidence as to the identity of the killer. A "door knock"[4] of the houses in the vicinity of the deceased's residence was also conducted and, although a number of neighbours heard a loud noise on the night of the murder and one had left her house to walk out to her car at around the time that noise was heard, none of them was able to identify any person in the general area at that time.[5] Some CCTV footage was obtained from nearby business premises that might have captured images of the killer's car, but it was inconclusive. A public appeal for information also failed to assist.

[14] Different areas of the deceased's life were explored as part of the investigation and, out of that, the police learned of Stewart and, subsequently, the applicant. Telephone records (including text messages) were obtained with respect to the applicant, Stewart and the deceased but nothing of great significance to the investigation was then thought to have been revealed by those records. An analysis of the financial affairs of the deceased, Stewart and the applicant was also undertaken but, aside from

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4 T. 3-13.

5 T. 3-13.

establishing that the deceased had gifted about $550,000 to Stewart and that the applicant had given her a compensation payment he had received in the sum of approximately $60,000, nothing implicating either the applicant or Stewart in the commission of the offences was thought to arise from the existence of those transactions.

[15] According to the prosecution outline of argument,[6] police first spoke with the applicant on 4 June 2013. He provided a statement along with his fingerprints and a sample for DNA testing. The applicant stated that he had seen Stewart as a prostitute from 2007 to 2010. He claimed to have maintained a friendship with her subsequently and that he knew that she was in a de facto relationship. He stated that she and her partner owned a brothel at Tweed Heads and that he had worked there as a driver. He also stated that he knew of the deceased through having crossed paths with him when they were both customers of Stewart. In winter 2012 he had, at Stewart's request, dropped some wine off to the deceased at his home in Buranda. He stated that on the night of the shooting (21 May 2013) he was either at the home of a friend, James King, or at the Coolangatta Sands Hotel. In this last respect, the police established that the applicant was not at the Coolangatta Sands Hotel on 21 May 2013, but King could not confirm what he was doing that evening or whether the applicant was then in attendance at his home.

[16] On 25 September 2013, information was provided to police to the effect that a person claiming to know the killer of the deceased had offered his story to a journalist in return for payment.[7] Police established that this person was a friend of the applicant, Luke Studeman.[8] This eventually led to the making of a decision by the investigators to commence the covert operation to target the applicant.

[17] By the time the covert operation commenced, the police had exhausted all conventional lines of enquiry in the course of their investigation over the preceding six months. By then, both Stewart and the applicant were suspects with respect to both of the alleged offences, but the police had insufficient evidence to charge any person with respect to either offence.

The covert police operation

[18] The covert police investigation involved 19 police officers from Queensland and Victoria and was carried out in Queensland, New South Wales and Victoria. Fourteen scenarios were enacted between 14 November 2013 when contact was first made with the applicant and 5 February 2014 when the applicant was arrested. As these scenarios progressed, it would have become obvious to the applicant that he was being asked to participate in what was portrayed as criminal conduct.

[19] Only relatively few details regarding the alleged offences were provided by the Homicide unit to Covert Operations but a criminal intelligence profile with respect to the applicant was amongst the information that was passed on. Before the covert operation commenced, a decision was made for the covert operatives not to engage in

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6 Outline of submissions on behalf of the respondent dated 28 April 2016. The accuracy of this summary was not disputed on the hearing of the application.

7 TT. 3-23, 3-27.

8 Studeman was spoken to by police, and gave a statement, but he did not implicate the applicant prior to the commencement of the covert operation. See T. 3-24.

any unlawful activities.[9] As such, the operation was not intended to be a "controlled operation" within the meaning of Chapter 11 of the *Police Powers and Responsibilities Act* 2000 (Qld) and, accordingly, no authorisation pursuant to those provisions was sought or, in the event, was necessary.

[20] As touched on already, Covert Operations knew that the applicant was unemployed and living out of his car and the scenarios were devised with these circumstances in mind.[10] In particular, they were designed to exert the "most pressure on him to become part of the [criminal] organisation by the use of inducements of money", and sums of money were in fact paid to him over the course of the operation.[11] Otherwise, it was known that the applicant was a suspect with respect to the murder and that he had a connection to Stewart who was also a suspect.

Initial contact

[21] Acting on information obtained from the criminal intelligence profile, the applicant was surveilled over a period of weeks before an undercover female police officer posing as a person conducting a market survey made contact with him on 14 November 2013. She approached the applicant with an offer to complete the survey in exchange for a free buffet meal at a local Golf Club and the applicant agreed.

[22] On the evening of 25 November 2013, the applicant attended at the Coolangatta and Tweed Heads Golf Club for his free meal and, while there, Brad approached him. They struck up a conversation. The applicant told Brad that he was undertaking a course to become a security guard. He mentioned that he hoped to get "four days a week work"[12] as a patrol car driver by Christmas. He also mentioned that he "had been having dramas with money".[13] Later in the evening, the applicant told Brad that he had been issued with a traffic infringement notice because his vehicle had a cracked windscreen. The applicant asked Brad about his employment. Brad told him that he did "odd jobs for a fellow, pickups and deliveries and whatnot".[14] Brad said that it was "pretty easy work and the pay is pretty good".[15] He said that the "boss is good"[16] but that another employee he was working with was "not working out".[17] Brad spoke about the importance of respect and loyalty before asking the applicant whether he would be interested in any "cash in hand work if it came up",[18] and the applicant indicated that he was. The applicant was told that the work would consist of "mainly collects and deliveries, [some] security type work, meetings, a little bit of everything really" and "nothing too hard or risky".[19] Brad then asked for, and received, the applicant's mobile telephone number and promised to speak to the "boss". Within a couple of days, Brad made contact with the applicant to offer him some work.

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9 T. 1-17.
10 TT. 1-20, 1-21.
11 T. 3-21.
12 T. 1-31.
13 T. 1-31.
14 T. 1-31.
15 T. 1-31.
16 T. 1-31.
17 T. 1-31.
18 T. 1-32.
19 T. 1-32.

The first scenario

[23] The first scenario took place on 28 November 2013. Brad told the applicant that he had spoken to the "boss" who was "happy with me taking you on board and seeing how you go".[20] The applicant was required to act as a "look-out" while Brad met with another man who, unknown to the applicant, was another covert police officer. The applicant was also asked to follow the man after Brad had met with him to attempt to ascertain the make and registration number of the vehicle the man was driving. The applicant was paid $100 in cash for this work. During the course of their conversations on this day, Brad emphasised the importance of mutual trust and loyalty. He told the applicant that he never carried a weapon and that violence was a "rarity".[21] Brad also told the applicant that that he should "never feel intimidated" by his employment and that "if you don't feel comfortable in doing anything" to let him know.[22] Brad told the applicant that there were "a couple of bosses" and that "Steve's our local boss".[23]

The second scenario

[24] The second scenario was played out on 3 December 2013. The applicant's task was to watch the baggage carousel at the airport at Coolangatta to identify which bag a particular traveller collected. This scenario was intentionally aborted.[24] During conversation with Brad, the applicant remarked that the syndicate Brad worked for "sounds like a pretty, big organisation".[25] He then said that it was like "private eye work" to which Brad replied that they did some of that but also a "bit of everything" and that it did not involve "cop work". [26] The applicant said that he "had an experience not long ago helping out cops and it just didn't go well".[27] He went on to explain that he had volunteered a DNA sample in an investigation, but he did not elaborate. He said that the police had painted him as guilty to his ex-wife as a consequence of which she would not allow him access to his daughter. He commented that he was not "a fan of cops" and that he hated it when police used "unlawful tactics to get their agenda filled".[28] The applicant was paid $100 and told that if he agreed to work the following Thursday the "boss" would get the windscreen fixed on his car.

[25] Two days later the windscreen was repaired at Tweed Heads and, while that was occurring, listening devices were implanted in the applicant's car without his knowledge. During the course of conversation between Brad and the applicant that day, Brad spoke about the need for loyalty and reliability. He confirmed that if ever the applicant felt uncomfortable about doing something he need only say so. He was told not to feel obliged to do anything that made him uncomfortable. Brad told him that the work they did was not always "legitimate or legal"[29] however there was never any risk to him and he had never had any problems. He added that "if you ever feel

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20 Exhibit 1, Transcript 1, page 4.
21 Exhibit 1, Transcript 2, page 2.
22 Exhibit 1, Transcript 2, page 3.
23 Exhibit 1, Transcript 2, page 1.
24 T. 1-34.
25 Exhibit 1, Transcript 4, page 2.
26 Exhibit 1, Transcript 4, page 2.
27 Exhibit 1, Transcript 4, page 2.
28 Exhibit 1, Transcript 4, page 3.
29 T. 1-36.

you don't want to do something, you can just walk away".[30]

The third scenario

[26] The third scenario was enacted on the same day, Brad and the applicant met another covert officer posing as a person who needed to create a false alibi. This person gave Brad $4,000 in return for a newspaper dated 27 April 2011. Brad asked the applicant to count the money to confirm the amount paid. During conversation, the applicant mentioned that his fingerprints would be put on a database when he completed his security course, and he asked brad whether that would be "a problem".[31] Brad replied that this "won't be a drama, unless you've done anything wrong", and then added that "if anything pops up … the boss can always sort stuff out".[32] The applicant then mentioned that he had "volunteered [his] fingerprints and DNA for [the] investigation".[33] Later, Brad assured the applicant that there would be "no weapons no violence"[34] in the carrying out of their duties.

The fourth scenario

[27] The fourth scenario also occurred on the same day (5 December 2013). Brad told the applicant that they were required to locate a particular motor vehicle and then take photographs of a man and woman associated with that vehicle. This was referred to as the "unfaithful spouse scenario".[35] Unknown to the applicant, both of those persons were undercover police officers. During the course of conversations on this date, the applicant discussed his interest in conspiracies, the methods adopted by police and how police used technology to intercept "text messages and everything"[36], and not always with the authority of a warrant. He told Brad that he found these things out on Google. He asked Brad whether the organisation used spy cameras and said that he had a spy camera in a key fob that he had with him in his car.[37]

The fifth scenario

[28] The fifth scenario was enacted on 11 December 2013. Brad and the applicant met up with the person used in the third scenario. On this occasion, they attended at Jupiter's Casino and, incorporating the newspaper dated 27 April 2011, created "doctored" CCTV footage of the person in a café at the Casino to create a false alibi for that date. Payment of $5,000 was made by this person to Brad and the applicant for that purpose.

[29] After that scenario was completed and as Brad was dropping the applicant back to his car, the applicant told him that he had "found a few microphones"[38] and transmitters in his car after his windscreen had been repaired. He asked Brad to look at them for him. He queried Brad whether his associates had anything to do with the implantation of the devices and whether the police had hired Brad and his "boss", Steve, to do so. After being reassured by Brad that this was not the case, the applicant concluded that the

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30 T. 1-36.
31 Exhibit 1, Transcript 6, page 4.
32 Exhibit 1, Transcript 6, page 4.
33 Exhibit 1, Transcript 6, page 4.
34 Exhibit 1, Transcript 6, page 14.
35 T. 1-47.
36 Exhibit 1, Transcript 6, page 20.
37 T. 1-38; Exhibit 1, Transcript 6, page 18.
38 Exhibit 1, Transcript 7, page 21.

police investigation into the subject offences must have been the reason for the implantation of the devices. He was told in effect that the Steve could find out about the police investigation. The applicant indicated that he wanted to keep working with Brad and Steve.

[30] On 12 December 2013 the applicant and Brad met to arrange the removal of the listening devices from his car. During a conversation that day, the applicant told Brad that he believed the police have put some software on his mobile telephone to "ghost it".[39] He also revealed to Brad that he was under investigation for murder. He spoke about his friends being questioned by police. He also said that he had "looked up the legislation about phone tapping"[40] and the procedures followed by police to apply for a warrant. He mentioned that, after he was approached by the female who offered him a free meal in exchange for completing a market survey, he searched for her name as well as the name of her company on the internet. He thought that "maybe she [was] trying to target me".[41]

[31] While the listening devices were being removed, the applicant indicated that he was becoming more trusting of Brad and Steve. He queried whether the syndicate might be able to "sort out my problem".[42] After Brad told him that he had seen the syndicate "sort out bigger problems than what you have", the applicant said that he "might need this help"[43] but that he would see what happens. Brad then said to him:

> "Steve can sort out your biggest problems. As long as he knows all of the details, he's able to fix anything, just like this here today. I'm sure you'll meet him soon, anyway. But whatever the details are, they're between you and him and the big boss, mate. I'm just on a need to know basis. Some things I don't need to know."[44]

[32] After the listening devices were removed, a "bug detector" was run over the applicant's car in his presence. Brad then purchased a new mobile telephone for the applicant and the applicant purchased a SIM card for it. When Brad dropped the applicant back to his car, he told him to "lay low for a couple of weeks".[45]

[33] On 19 December 2013 the applicant told Brad via text message that he had "a visit" from Homicide detectives wanting the return of the "electronic equipment". He told Brad via a further text that he had said "no comment"[46] to them. During a later conversation on 8 January 2014, he told Brad that the detectives had issued warnings about his rights, and that they "took 10 minutes explaining it to me".[47] On the following day, he sent a message to Brad advising that he needed to get the listening device equipment back "intact" because his "solicitors need that as evidence".[48]

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39 Exhibit 1, Transcript 8, page 4.
40 Exhibit 1, Transcript 8, page 17.
41 Exhibit 1, Transcript 8, pages 22-23.
42 T. 1-42.
43 T. 1-42.
44 T. 1-42.
45 T. 1-46.
46 T. 1-46.
47 Exhibit 1, Transcript 9, page 6.
48 T. 1-46.

The sixth scenario

[34] The sixth scenario was enacted on 8 January 2014. Brad and the applicant met with the undercover female police officer who had been used in the fourth scenario. She gave Brad $10,000 in return for a memory card which was said to contain the photographs which Brad and the applicant had taken during that scenario.

The seventh scenario

[35] The seventh scenario occurred on the same day (8 January 2014). Brad and the applicant met a police officer posing as a corrupt officer in a street near Police Headquarters in Roma Street, Brisbane. The officer was given $3,000 inside a rolled up newspaper.[49] During conversations that day, the applicant said that he thought that his car had been "bugged" again and he wanted to have the "bug detector" run over his vehicle.[50] He noted the coincidence of the recording devices being installed in his car when the windscreen was being fixed. He spoke of the detectives who had sought him out to recover the recording devices located in his car. He remarked that "it wouldn't take much to hook in a little battery operated GPS with a magnet".[51] He said that he "wouldn't mind having one just to keep [himself], so [he could] constantly check"[52] for tracking devices. He also said that he wanted to visit a spy shop in Ashmore to "have a look and see what's on the market".[53]

The eight scenario

[36] The eighth scenario occurred on the same day, Brad and the applicant met with another undercover police officer who posed as a "bookie". This meeting occurred near a racecourse at Doomben, Brisbane. The person gave Brad $10,000. At the end of the day, Brad gave the applicant $200 in cash as payment for his assistance.

The ninth scenario

[37] The ninth scenario was played out on 13 January 2014. Brad collected the applicant from the car park of the Beenleigh Tavern. They then proceeded to the Rocklea Markets where they collected $15,000 from a person who, unknown to the applicant, was an undercover police officer. They then proceeded to the car park of the Kedron Services Club and collected passport photos from another person who, again unknown to the applicant, was an undercover police officer. The passport photos were of this person who was referred to as "AJ". They then drove to the DFO car park near the Brisbane airport and met with an undercover police officer posing as a Customs Officer. He provided Brad with a blank passport in exchange for $5,000. Lastly, they proceeded to Park Road, Milton where the local boss of the syndicate, Steve, was having lunch at a restaurant with the "corrupt" police officer who had been used in the seventh scenario.

[38] The applicant was given the impression from the conversations that were had with Brad and others that day that AJ worked for the syndicate and was being sent to New

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49 T. 1-49.
50 Exhibit 1, Transcript 9, page 5.
51 Exhibit 1, Transcript 9, page 17.
52 Exhibit 1, Transcript 9, page 25.
53 Exhibit 1, Transcript 9, page 18.

Zealand for a short time. When Brad and the applicant met with Steve and the "corrupt" police officer in the restaurant, the money, passport and photos were given to him. The applicant was also asked to write his name and registration number down on a piece of paper which was then handed to the "corrupt" police officer. The applicant said to Steve, "I just wanted to thank you for everything and I enjoy working for someone who looks after loyalty".[54] He later told Brad that he believed in "positive confirmation" and that he wanted Steve to know that he appreciated the loyalty shown.[55] Later in the conversation the applicant raised suspicions about his car having been "bugged" again. Brad then used a "bug detector" to sweep the applicant's car. The applicant was paid $250 for his services that day.

The tenth scenario

[39] The tenth scenario occurred on 16 January 2014. The applicant and Brad met with a covert officer posing as a jeweller at a shopping centre at Broadbeach. The "jeweller" gave Brad a bag containing 48 fake diamonds which were for the head of the crime syndicate, Mark.[56] Brad and the applicant then drove to Burleigh where they collected AJ and then drove him to the Coolangatta airport. They gave AJ the passport, $10,000 in cash and a boarding pass. The applicant was given to understand AJ was being sent to New Zealand at short notice while a problem was sorted out. The applicant was paid $250 by Brad for his assistance.

[40] On the following day (17 January 2014), the applicant sent a text message to Brad in which he said, "Finally after all these years of work, I found someone who appreciates my efforts and loyalty. Happy days ahead".[57]

The eleventh scenario

[41] The eleventh scenario occurred on 21 January 2014 when Brad travelled with the applicant to Melbourne to deliver the fake diamonds to Mark. They were met at the airport by covert officers posing as members of the syndicate. They then proceeded to collect $5,000 from two separate people, both of whom were undercover Victorian police officers, before attending a restaurant where Mark, Steve and an undercover police officer posing as the local "boss" for New South Wales were dining. The diamonds were given to a covert officer posing as a minder for Mark. During the course of conversations throughout the day there was talk of a "big job" coming up in Queensland.[58] Later that day, the applicant flew back to Queensland and was paid $400 for his services. He told Brad, who remained in Melbourne, that upon his return to Queensland he would need his car swept for bugs again because the applicant believed that things had been moved in his car.

The twelfth scenario

[42] The twelfth scenario occurred on 28 January 2014. Brad and the applicant collected a USB stick from a locker at Southbank in exchange for $3,000 which was left in the locker. They then travelled to Goodna where they collected a further $15,000 from an

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54 Exhibit 1, Transcript 11, page 21.
55 Exhibit 1, Transcript 11, page 23.
56 Exhibit 1, Transcript 12, page 3.
57 T. 1-53.
58 T. 1-55.

undercover police officer. They then drove to Bulimba where they met Steve and gave him the USB stick and the money. The applicant was paid $250 and his car was again swept for bugs.[59] During their conversations that day, there was much talk of what Steve did for Brad including paying his rent and providing a car and fuel. Later, the applicant said that he was keen to be involved in the bigger jobs.

The thirteenth scenario

[43] The thirteenth scenario was played out on 31 January 2014. Brad together with the applicant purchased eight handguns from a person at Broadbeach who, unknown to the applicant, was an undercover police officer for a quantity of cash. He took a more active role in this transaction by standing in what he called "the interview stance"[60] so that, if the other man "came at" Brad, he would be ready. They then sold the guns to another undercover police officer at Helensvale, again unknown to the applicant. The applicant was again told that if he ever felt uncomfortable about any of the work he could leave. The applicant indicated that he was happy to continue working.

[44] During their conversations that day, the applicant told Brad that the police had been "harassing [his] friends, that they've tried to get statements off before".[61] He said that the police were from Dutton Park and Roma Street and that they were "trying to get statements on me".[62] He told Brad that "they must tell you … that you do not have to answer questions" and that "they can't force you to make a statement".[63] He said that he had obtained that information from a government website and that he had a copy of it. He later said that "in the organised crime world … in a group you'll always have a five eighth" who "watches everyone's back and plans the next move", and that he thought of himself "as more of a five eighth thinker than anything else".[64] He spoke of having seen the same Energex contractor around Kirra and Tugan which he found to be suspicious. He said, "I think paranoia can save you sometimes" and that he would rather "over think something than under think it".[65]

[45] Otherwise, the applicant said that he was hoping that the big job came through and that he would be included as a participant. Brad told him that he was, after both Mark and Steve had been consulted. The applicant commented that he did not feel that he had proven himself yet so he would understand if was asked to stay away. He raised the possibility of his phone having been intercepted by police again. The applicant commented that he hoped this did not put him out of the picture.

[46] Brad told the applicant that he should start looking for accommodation for rent, and that Steve would pay for it.[66] He was also advised that Steve would be able to provide some falsified employment records for the purposes of the rental application. He was told that if he wanted "Steve" to sort things out for him he needed to be truthful. Later that day the applicant was told that Mark was aware of the police investigation and

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59 T. 1-57.
60 T. 1-60.
61 Exhibit 1, Transcript 17, page 6.
62 Exhibit 1, Transcript 17, page 6.
63 Exhibit 1, Transcript 17, page 9.
64 Exhibit 1, Transcript 17, page 18.
65 Exhibit 1, Transcript 17, page 21.
66 T. 1-60.

that he had said "not to worry, everything's fixable".[67] Again the applicant's car was swept with a bug detector. The applicant was paid $250.

The final scenario

[47] On 4 February 2014 the fourteenth and final scenario was enacted which culminated in the applicant confessing his involvement in the killing of the deceased. Brad collected the applicant from the car park of the Beenleigh Tavern and drove towards Gatton where they were to collect a vehicle and dispose of it as part of an insurance fraud.[68] On the way, the applicant told Brad that he had been looking at purchasing an encrypted telephone and there was a discussion about software that could detect whether a telephone service was being intercepted.

[48] As they were driving towards Gatton, Brad received a telephone call from Steve in consequence of which they turned around because, the applicant was told, Mark was in town and wished to meet the applicant. He was staying at the Stamford Plaza Hotel.

[49] The applicant was taken to the Stamford Plaza Hotel where he met with and spoke to Mark. For the first hour and a quarter, the applicant maintained that he had nothing to do with the murder. He said that there was "heat towards … my direction" because he knew of "someone that … was in the will of this person that was murdered".[69] He said that it was "a friend of mine called Susan Stewart".[70] He said that he had met the deceased once, when he took some wine up to him one day. Mark said that he had information that put the applicant "a hundred percent in the frame for it".[71] He said that this information had "come straight from where they're doing the investigations".[72] In the face of further denials by the applicant, Mark expressed disappointment that Brad had "brought [the applicant] in now based on the fact that he said he trusted ya and now you know I'm starting to doubt it".[73] At one point the applicant asked, "If they have the evidence why haven't I been arrested yet?"[74] Mark told him that people had been telling the police things that "put [the applicant] in".[75] The applicant then asked, "Have you got the names of who's supposed to have said that?" Mark said that he didn't write the names down and that he would need to make some calls to "get that stuff".[76] Mark said that he did not believe the applicant was telling him the truth and that he was not prepared to take a risk allowing the applicant to be part of the syndicate, because he could not take the applicant "based on what [he had] been told".[77] The applicant said, "Well I'm not changing my position I'm not guilty".[78] A short time later, this exchange occurred:

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67 Exhibit 1, Transcript 18, page 1.
68 T. 1-61.
69 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 12.
70 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 12.
71 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 16.
72 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 17.
73 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 21.
74 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 28.
75 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 29.
76 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 29.
77 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 30.
78 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 31.

> "Mark: So it's an easy decision for me it's just (wd) cut the loss it's all good. Really you, you're really you're no, you're no risk to us or our organisation you don't know anything about it.
>
> Applicant: No.
>
> Mark: You know you've been out and about rolling around in a few cars whatever but so what you know.
>
> Applicant: It doesn't mean I'm gonna give up that information either.
>
> Mark: No, no exactly. But we've probably, probably brought you through quicker than we normally would it would've been just a bit of work here and there but we like I said we had a go."[79]

[50] Mark then told the applicant that he would arrange for Brad to come and get him while he made some calls and spoke to Steve.

[51] The applicant then left the hotel in the company of Brad. They went to a Mexican restaurant and had a meal. Throughout their conversation, the applicant maintained that he had nothing to do with the murder. He said that he felt like he was being "pushed into a confession".[80] At one point he asked Brad, "What if the whole thing is Mark's doing it to get a confession on tape and extort me?"[81]

[52] After approximately an hour, Brad returned to the Stamford Plaza Hotel with the applicant. A second conversation with Mark then took place. Mark told Brad that he had made some calls. He said, "Susan Stewart and Tyson Taylor, they're the two that they're lookin' for alright".[82] Mark told the applicant that he had learned that the applicant had given Stewart his compensation payout, that she was the beneficiary of the deceased's will, that she had "got him to change his will because she told him she was pregnant" and that she had "already got $550,000 out of him".[83] He told the applicant that Stewart had "organised for you to set that fire in that house and they are a hundred percent on that."[84] Mark then detailed some of the allegations concerning the fire. He then turned to the murder and said to the applicant that "the police believe that [Stewart] has put you up to that and that you have shot him basically on her instructions".[85] The applicant asked, "What evidence have they got to support that?".[86] Mark then provided some details including reference to the name of the person – Craig Morton – who had allegedly supplied the gun that was used to kill the deceased. Eventually Mark said, "I cannot take you on unless you tell me the truth", to which the applicant replied, "I feel like I'm being pushed into a confession".[87] Mark said, "No no no no because there's the door, if you're a hundred percent that you didn't do it, go for the door it's there, it's all you gotta do … Brad will take you back to your car it's done and dusted".[88]

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79 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 31.
80 Exhibit 1, Transcript 20, page 9.
81 Exhibit 1, Transcript 20, page 14.
82 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 2.
83 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 3.
84 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 3.
85 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 5.
86 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 5.
87 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 8.
88 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 8.

[53] The applicant did not leave, and the conversation continued. Then, after referring to Stewart, the following was said:

> "Mark: I'm just tellin' ya what I've been told. I've been … telling you what I've been told.
>
> Applicant: 'Cause it sounds like they're gonna get [Stewart] anyway and they're gonna try and pin me with it anyway.
>
> Mark: I can fuckin' I can guarantee you [Stewart] from what I'm told. That's based on what I've been told. And I like you're not you're not stupid I've told you what I was told about [Stewart], like they've convinced me. And like I said to you before, I'm not interested in saving her, but she's your girlfriend that's fair enough. I'm it's you, we sort out your shit we sort out her shit.
>
> Applicant: And what would I owe you?
>
> Mark: Truth respect honesty.
>
> Applicant: You got it.
>
> Mark: And that's it.
>
> Applicant: You got it.
>
> Mark: And we've got a relationship for the future.
>
> Applicant: Okay.
>
> Mark: So … let's just get to one truthful statement. Did you or didn't you shoot him, McGrath?
>
> Applicant: Yes.
>
> Mark: Alright well I'm not here to judge ya, I'm not here to judge ya mate, it's all about fucking covering our arses okay, and I've told ya, if it wasn't told that we could sort it you wouldn't be fuckin' sittin' here.
>
> Applicant: Can you help me?" [89]

[54] The applicant then proceeded to make several more detailed admissions about the murder, but not before he asked Mark whether he was "wearing a wire".[90] The applicant admitted that:

(a) The deceased had been shot in the head;

(b) He disposed of the "gun"[91] by burning the wooden components, grinding the metal parts down with an angle grinder and scattering the filings in bushland;

(c) He shot the deceased because Stewart had told him that he was a paedophile;

(d) He learned of the deceased's movements by probing Stewart "without her really realising what [he] was up to";[92]

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89 Exhibit 1, Transcript of the second Stamford Plaza conversation, pages 8-9.
90 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 10.
91 Exhibit 1, Transcript of the second Stamford Plaza conversation, pages 10-11.
92 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 14.

(e) He knew how to get to the deceased's house from when he had "been there before to deliver … wine";[93]

(f) He drove to the deceased's house from the Gold Coast "very covertly" by avoiding the "major highway" and "under the cover of darkness and shadows"[94]

(g) The "gun" had been obtained from Morton "a couple of weeks before"[95] and was a .22 calibre rifle;

(h) Morton helped him to shorten the rifle by "chopping down" the "butt and the … barrel as much as [they] could";[96]

(i) He left his mobile telephone at the Gold Coast to avoid being "triangulated";[97]

(j) He hid in the garage at the deceased's house "after eight"[98] and waited for him to return home from referees' training;

(k) He was wearing a balaclava, hoodie and gloves;

(l) After the deceased alighted from his car, he asked him to "get his wallet out";[99]

(m) The deceased "pulled out … money and put his wallet back into his pocket";[100]

(n) The money – about $100 – was placed by the deceased on the back of his car and the applicant took it after he shot the deceased;

(o) He did this to make it "look like a robbery";[101]

(p) He left the deceased's house and changed out of the clothes he was wearing before he left Brisbane;

(q) He put the clothes in a bag and later disposed of them by cutting them up and discarding the pieces at the same place where he had scattered the filings;

(r) When he returned to the Gold Coast he helped a friend, Kayla, who had been locked out of her house; and

(s) Later, he told King that he had shot the deceased.

[55] The applicant said nothing to implicate Stewart. To the contrary, he told Mark that Stewart "didn't want [him] to do it".[102] He also denied that he had anything to do with the fire at the deceased's house. He maintained that he did not know that Stewart was "the beneficiary of [the deceased's] will" when he shot him.[103]

[56] At the conclusion of this second conversation, arrangements were made for the applicant to be accommodated overnight at a motel in Hamilton, Brisbane. Brad drove the applicant to the motel and then collected him the next morning. They drove to the Brisbane airport where they collected Mal who was posing as the "cleaner" for the

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93 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 14.
94 Exhibit 1, Transcript of the second Stamford Plaza conversation, pages 30-31.
95 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 17.
96 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 15.
97 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 16.
98 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 18.
99 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 33.
100 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 33.
101 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 33.
102 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 12.
103 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 29.

syndicate, that is, the person responsible for locating and then disposing of any remaining evidence.[104] Under this pretence, and over the next several hours, they retraced the steps the applicant said he had taken in planning, committing and covering up the murder. During this "drive around", the applicant repeated a number of things he had told Mark at the Stamford Plaza Hotel and added some further details regarding the murder. He eventually made a series of admissions regarding an earlier attempt to kill the deceased by setting a fire to his house at a time when, he said, the deceased had been drugged and was unconscious. He also implicated Stewart with respect to both offences.

[57] Among these further admissions made by the applicant during the "drive around" were that:

(a) He had been wearing "sneakers" at the time of the murder;[105]

(b) He knew that the deceased would arrive home "around the nine o'clock mark";[106]

(c) He parked his car about "two blocks away" from the deceased's house, put on a black hooded top, balaclava and gloves and walked to the house via a creek "off the road";[107]

(d) The garage was unlocked;

(e) He walked in and hid behind some boxes;

(f) He only had to wait about five minutes before the deceased arrived home;

(g) After the deceased alighted from his car, he "ambushed him";[108]

(h) After the deceased produced money from his wallet, he "raised the gun to his face and pulled the trigger";[109]

(i) He shot him "somewhere in the face";[110]

(j) He pointed the rifle "towards his eyes" and, he assumed, the deceased was shot "between the eyes or through the eyes";[111]

(k) He fired only one shot;

(l) The deceased had dropped to the ground;

(m) Someone from the house "immediately to the left" of the deceased's house "went out to the car and drove off while this was happening";[112]

(n) He knew from Stewart that the deceased was a "loner" and that he would be in attendance at a referees' meeting on this night;[113]

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104 T. 3-8.
105 Exhibit 1, Transcript 22, page 39.
106 Exhibit 1, Transcript 22, page 40.
107 Exhibit 1, Transcript 22, pages 39, 42.
108 Exhibit 1, Transcript 22, page 42.
109 Exhibit 1, Transcript 22, page 44.
110 Exhibit 1, Transcript 22, page 44.
111 Exhibit 1, Transcript 22, page 65; Exhibit 1, Transcript 23, page 7.
112 Exhibit 1, Transcript 22, page 46.
113 Exhibit 1, Transcript 22, pages 48-49.

(o) He knew that this was at Fairfield Road and had "stalked that out as well a few times";[114]

(p) After the shooting, he ran back to his car along the same route that he had taken when he walked in;

(q) Before leaving Brisbane, he drove to Rocklea to change out of his clothes;

(r) He drove to King's place home at Terranora where he had left his mobile telephone;

(s) He disposed of the sneakers at two separate locations on Mount Tamborine;[115]

(t) He obtained the ammunition for the rifle from Morton;

(u) There were seven bullets and one was a hollow point;

(v) He fired the hollow point bullet;

(w) The hollow point bullet was "bronzie" in colour and the others were "just solid like lead" and grey in colour;[116]

(x) He returned the unused bullets to Morton; and

(y) He had a beard at the time of the shooting, but shaved it off afterwards.

[58] Towards the end of the "drive around", the applicant admitted having "lit the fire".[117] He said that he "put the heater on the curtain" to "bump [the deceased] off".[118] The applicant said that Stewart had asked him to "get rid of him".[119] He said that he wanted to "put Fantasy in his drink, enough that would kill him", which he sourced that from "a chick called Mel" and gave it to Stewart to "put in his drink".[120] The applicant said that, when that "didn't knock him", he devised a plan to set fire to the house so "that the smoke [would] knock him" because the deceased was "out to it so he wasn't and didn't have a chance of getting up".[121] He said that he was "parked up the road" and that Stewart rang or sent a text to him to "come and check [the deceased] out".[122] He was waiting there to "make sure it was done".[123] Stewart let the applicant into the house and then left. The applicant said that he then waited to see whether the deceased would stop breathing but then "thought about the fire".[124] He said that he "put the heater ring on the curtain".[125] He added that he "thought the smoke would be enough … to suffocate [the deceased] in that condition".[126] He said that he chose the heater to light the fire to make it "look like an accident".[127]

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114 Exhibit 1, Transcript 22, page 49.
115 TT. 3-4, 3-56.
116 Exhibit 1, Transcript 22, page 53.
117 Exhibit 1, Transcript 24, page 13.
118 Exhibit 1, Transcript 24, page 13.
119 Exhibit 1, Transcript 24, page 14.
120 Exhibit 1, Transcript 24, pages 15-16.
121 Exhibit 1, Transcript 24, page 17.
122 Exhibit 1, Transcript 24, pages 17-18, 29.
123 Exhibit 1, Transcript 24, page 18.
124 Exhibit 1, Transcript 24, page 20.
125 Exhibit 1, Transcript 24, page 20.
126 Exhibit 1, Transcript 24, page 20.
127 Exhibit 1, Transcript 24, page 26.

[59] The applicant also spoke about Stewart and said that she was "annoyed" when the fire "didn't work".[128] He said that "she wanted him [off] still".[129] He agreed that "she knew something was gonna happen" but said that she "didn't help plan after that".[130] He said that Stewart "knew [he] was plannin' something" and "would've known [he had] done it".[131]

The arrest

[60] At the conclusion of the final scenario, the applicant was arrested at Yatala and charged. He refused to participate in a record of interview with police.

Subsequently obtained evidence

[61] In addition to the admissions made to the covert operatives, the prosecution case included evidence of admissions the applicant had allegedly made to three of his associates on the Gold Coast – King, Studeman and Matthew Wessling. However, it was conceded by the prosecution on the hearing of this application that, without the evidence of the various admissions made by the applicant, there was insufficient evidence to establish a case against him with respect to either offence.

[62] It is important, though, to record that the evidence gathered by the police during the course of the investigation otherwise established that:

(a) .22 calibre ammunition had been used to shoot the deceased;

(b) The shot had been fired at close range;

(c) The deceased was shot between the eyes and to the side of the nasal bridge;

(d) A noise which "sounded like a .22 calibre rifle"[132] was heard by neighbours of the deceased at some time between 8.30 pm and 9.00 pm on 21 May 2013;

(e) A "young woman … left the house … to the left of" the deceased's house and "went out to her car at around about ten to 9 or thereabouts";[133]

(f) The deceased attended a referees' meeting at Fairfield that evening and arrived home between 8.30 pm and 9.00 pm;

(g) Boxes were located in the garage area of the deceased's house;

(h) Neighbours confirmed that the deceased usually left his garage door open;

(i) His wallet was found in the pocket of his trousers;

(j) There was no money in the wallet;

(k) The investigation of the fire established that there was a heater in the "vicinity of where curtains would have been" in the deceased's bedroom, that the deceased was found "unconscious on his bed" and had a "very low Glasgow Coma Scale score … consistent with him having been drugged";[134]

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128 Exhibit 1, Transcript 24, pages 20, 38.
129 Exhibit 1, Transcript 24, page 21.
130 Exhibit 1, Transcript 24, page 21.
131 Exhibit 1, Transcript 24, pages 25, 31-32.
132 T. 3-20.
133 T. 3-20.
134 T. 3-21.

(l) There was nothing in the medical records from his subsequent hospital admission "in terms of GHB"[135] but this was not a substance "that was tested for";[136] and

(m) The deceased told several people subsequently that Valium had been detected in his system.

The applicant's evidence

[63] When the applicant was called to give evidence, he accepted the accuracy of the evidence Brad had given with respect to the conversations between them that had not been recorded. He explained that, because a number of his friends had been questioned by police about the murder of the deceased, he considered himself to be a suspect by the time the covert operation commenced. He did not think that was the case at the time when he had been earlier interviewed by police and provided his statement. He said that he had read a number of things in the newspapers concerning the murder and that he had an interest in it because of his relationship with Stewart. He also said that the "Googled a lot" to "see what other media outlets had printed and published".[137]

[64] The applicant said that, at the time he was first approached by Brad on 28 November 2013, he had been living out of his car for two years, unemployed and trying to make ends meet by doing odd jobs for other people. He had previously run errands for the brothel but it was no longer operating. He said that he was desperate to find work. The applicant said that he had no idea that the covert operatives were police until he was arrested. He said that when he was offered work with their organisation, he was under the impression that the more work he did, the more income he would receive and that the work "looked to be pretty reliable … and constant".[138] As the scenarios progressed, it was obvious that the syndicate was involved in unlawful activities. He agreed that he was "being paid more and more money … the more illegitimate the scenario appeared".[139]

[65] The applicant was referred to the conversations with Mark at the Stamford Plaza Hotel on 4 February 2014 when he was "asked to talk about things [he] may have done in the past". First he was asked whether there had been any suggestion "prior to going to the Stamford that this was going to happen". The applicant replied that "Brad had mentioned … other stories where other people had their stuff cleaned up".[140] He was then asked what his state of mind was and whether he thought there was a need to "confess to something generally … to gain entrance to [the] organisation".[141] The applicant said:

> "Not until I'd gotten through – with sitting down with Mark and I was constantly telling him that I wasn't involved and he kept telling me that was – you know, be

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135 Which I take to be gamma-hydroxybutyrate or, as the drug is more commonly known, "Fantasy".
136 T. 3-21.
137 T. 3-31.
138 T. 3-33.
139 T. 3-34.
140 T. 3-34.
141 T. 3-34.

> honest. I said I was being honest by telling him I wasn't involved, but that just wasn't going to be accepted."[142]

[66] When the applicant was asked why he told Mark that he was involved, he replied:

> "Because after hearing that I wasn't going to be accepted for not being involved, that the only avenue I had left was to make a confession or walk out the door".[143]

[67] He was then asked whether he had any "reason to be in fear of being shown the door", and he said that he did. He agreed that "nothing appears on the tapes", but he said that he was "hiding [his] fear because [he] wanted to show that [he] was worthy".[144] He was then asked what "caused [him] to be concerned about [his] safety if [he was] shown the door"[145] and replied:

> "Well, there were a very well organised syndicate. They had international links. There were wired all across the country. They had police connections which – they had corrupt police on the take. They could get into, like, passports. Blank passports, things like that. So they were showing me they were very, very organised.
>
> Now, to walk away from something like that meant I was a loose end.
>
> …
>
> Knowing what people that I could bring them down with, I suppose."[146]

[68] The applicant agreed that "there was nothing [the covert operatives] said by way of a threat", but he assumed he would be in danger if he "walked out the door". He said that he made the confessions to secure long-term employment and because he "feared [for his] life if [he] had walked out".[147] He then added:

> "I had imagined that because they had their police contacts they could find out where my family lives. So it wasn't just a direct threat to me, it was all about my family as well."[148]

[69] Lastly, the applicant said that he was concerned about Brad if he failed to advance a confession. He said:

> "They had said to me that he would lose his job if they couldn't trust me and come forward with all this stuff. So he would be terminated from his employment."[149]

[70] When cross-examined, the applicant agreed that he was suspicious by nature, that he engaged in conspiracy theories and believed that the police engaged in unlawful activities at times. He accepted that when he was first approached by the undercover police officer posing as a person performing a market survey, he was suspicious. He went away and "Googled" her as well as the name of the company she said she was

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142 T. 3-34.
143 T. 3-34.
144 T. 3-34.
145 T. 3-35.
146 T. 3-35.
147 T. 3-35.
148 T. 3-35.
149 T. 3-35.

working for and "looked her up on Facebook".[150] He believed that there was a possibility that he had been "deliberately targeted".[151] He suspected that she might be working for the police. At different times he thought he might be under surveillance. He was suspicious of Steve and Brad when he found the listening devices implanted in his car and thought that their "organisation might have been hired by the police"[152] who were investigating him for the murder. He came to the view that the only time that the listening devices could have been implanted was when his windscreen was being repaired but he said that he was convinced by Brad that the crime syndicate was "legit".[153]

[71] The applicant agreed that not only did he know that he was a suspect in the murder investigation before the covert operation started, he had also "done some research on what [his] rights were" and had consulted a website dealing with that topic. He printed out a document from that website on 15 September 2013 that "set out what [his] rights were" and he agreed that he was aware that he had a "right to silence" and that he did not have to speak to the police.[154] The applicant agreed that, when he was asked by homicide detectives on 19 December 2013 to return the listening devices that had been removed from his car, they had warned him about his right to remain silent and, further, that he had exercised that right by telling them that he had no comment to make.

[72] He confirmed that, throughout the course of the covert operation, he was undertaking a security course with the view to gaining employment in the security industry. He said that he had employment "lined up" for "between one and four days a week" and eventually hoped to work full-time in that industry.[155] He said that he had completed the course and would have been able to start work once he raised enough money to pay for the licence, a sum of approximately $600.

[73] The applicant said that he was "paranoid" about his telephone being intercepted and agreed that he was "cautious in everything he said to Brad and Steve and Mark, even".[156] He accepted that he had once described himself as the "five-eighth of the organised crime world, the one that watches everyone's back and plans the next move".[157] He said that, as at 19 January 2014, he was not sure whether Brad, Steve and Mark were police but that he was "leaning towards [the conclusion that] they were legitimately who they said they were".[158]

[74] He agreed that he was "quite cautious" when he first spoke to Mark at the Stamford Plaza Hotel.[159] He said that he was "rolling with [Mark's] questions" and agreed that he had said to Mark that if the police had evidence he would have already been arrested.[160] He said that he was "very curious" about what information Mark had regarding the police investigation and accepted that he had specifically asked Mark for

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150 T. 3-36.
151 T. 3-36.
152 T. 3-37.
153 T. 3-38.
154 T. 3-38.
155 T. 3-40.
156 T. 3-39.
157 T. 3-40.
158 T. 3-40.
159 T. 3-41.
160 T. 3-41.

the "names of who [the applicant was] supposed to have talked to".[161] He agreed that he hoped that Mark could make "the whole police investigation … go away" but said that what he meant by this was that he hoped that "the police harassment would stop".[162] He agreed that, throughout the whole of the first of the two conversations with Mark lasting an hour and a quarter, he did not feel the need to confess and said that he "was being honest when [he] said [he] wasn't involved".[163]

[75] The applicant acknowledged that, at the end of the first conversation with Mark, he had been allowed to leave the Stamford Plaza Hotel and that he had not been threatened. He said that he had been invited back after Mark had made some "more phone calls"[164] about the investigation. Then there was this exchange:

> "There was no pressure placed upon you to go back?---Pressure as in to stay employed? Yes.
>
> Just to work with this organisation?---That's right."[165]

[76] The applicant was then asked about his conversation with Brad at the Mexican restaurant. He accepted that he spent just over an hour with Brad. He said that it was at this time that he "had little thoughts about what [the] repercussions would be to walk away",[166] but he said nothing about that to Brad. He agreed, though, that he did not have to return to the Stamford Plaza Hotel, although he said that there was "pressure on [him] to stay so [he] could get [his] wage".[167] He acknowledged that he returned because he "wanted to work with these people".[168]

[77] The applicant agreed that, after he returned, it was obvious to him that Mark had spoken to a corrupt police officer to obtain information about the investigation. Until then he was unaware that the police knew that he had given Stewart $59,000 from a compensation payment that he had received. He also did not know until then that Stewart had told the deceased that she was pregnant or that the deceased had given her $550,000. Based on this information, he accepted that Stewart was a suspect and that it "sounded like [the police] were going to target her".[169] He wanted to protect Stewart and said that he loved her.

[78] It was suggested to the applicant that he had confessed because Mark had told him that he "could sort things out for her as well as you",[170] but he rejected that suggestion. He said:

> "No. I confessed to save my life, because I feared I wasn't going to live if I walked out the door.
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> …

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161 T. 3-42.
162 T. 3-42.
163 T. 3-42.
164 T. 3-42.
165 T. 3-43.
166 T. 3-43.
167 T. 3-43.
168 T. 3-44.
169 T. 3-46.
170 T. 3-46.

> [They] were portraying themselves as a very networked organisation, just like a mafia, and it's a very common perception that mafias tidy up loose ends. And if I was to walk out the door, I was a loose end. I knew names, faces, movements, operations. Even the small jobs they were doing would be enough to attract attention to a syndicate like that, and that … was dangerous."[171]

[79] The applicant was then asked about being taken to his overnight accommodation at Hamilton. He accepted that there was no pressure placed on him to remain there. He said that he "felt reassured that [he] had a job and … would still be alive".[172] He felt a sense of relief.[173] He sent a text message to Stewart in which he told her that his day had been "stressful, but good in the end".[174] He explained that what he meant by this was that he achieved a "good outcome" in "trying to fix [the] harassment".[175] He agreed that he had not expressed any fears to Stewart, either that evening or the next day. He said that by the next morning:

> "[After] them telling [me] that they would fix this and they were going to help me out, that I've got employment, my fears were gone, because I'm trapped. I'm stuck there now."[176]

[80] He disagreed that he went on the "drive around" with Brad and Mal that day because he wanted to protect Stewart and, when it was suggested that he would have had no fear during that exercise, he said:

> "I'm sure there was fear in the back of my mind that I can't slip up, I've got to have this pressure on me to make sure that this gets cleaned up so they don't find out that I've falsely confessed."[177]

[81] The applicant said that the "challenge" was to "make it convincing". When asked where he had obtained the information about the attempted murder and murder that he conveyed to Brad and Mal, he replied:

> "From parts of the paper, other media outlets, things that I know that my friends had been questioned about, things I know [Stewart] had told me about of her friends being questioned."[178]

[82] When cross-examined about the detail that he included in his account to Mark, Brad and Mal about the murder, he said that he guessed or assumed that:

(a) The killer would have made it look like a robbery;

(b) There was no money found in the deceased's wallet;

(c) A neighbour had walked out to a car at around the time it happened;

(d) The murder weapon was a shortened .22 rifle;

(e) The ammunition used was a hollow point bullet and bronze in colour;

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171 TT. 3-46, 3-47.
172 T. 3-47.
173 T. 3-55.
174 T. 3-48.
175 T. 3-48.
176 T. 3-49.
177 T. 3-49.
178 T. 3-50.

(f) The killer had been given a mix of six grey bullets along with the hollow point bullet;

(g) The deceased had been shot between the eyes;

(h) The rifle was held up close to the deceased's face;

(i) The deceased had fallen straight to the ground after he was shot;

(j) There were boxes in the deceased's garage which the killer hid behind; and

(k) The killer had disposed of the shoes he had been wearing at two separate locations on Mount Tamborine.

[83] Further, the applicant agreed that the details referred to in (c), (e) and (j) in the preceding paragraph had not been included in the account he gave Mark at the Stamford Plaza Hotel and that he had also denied having had any involvement with the attempted murder. Then, when cross-examined along the same lines about the attempted murder, the applicant said that he assumed, or added by way of embellishment, the following details:

(a) That a heater had been placed under the curtains in the deceased's bedroom to start the fire;[179] and

(b) That the deceased had been drugged with GHB (as opposed to valium, a substance the deceased told Stewart, and Stewart in turn told the applicant, had been detected in his system after he was taken to hospital following the fire).

[84] The applicant said that all of the details set out in the preceding two paragraphs were lies but that he lied to protect Stewart as well as himself. He agreed that his only concern when speaking with Brad and Mal on 5 February 2014 during the "drive around" was "not to slip up … so that they didn't find out that [he] had falsely confessed".[180] He later said:

> "[If] it was found out that I was lying, then I'd be in the same fear boat as I was before".[181]

[85] Lastly, there was this exchange:

> "Can I suggest to you, Mr Taylor, that the reason that you confessed to police was to protect [Stewart]?---Well, I guess the harassment, yes.
>
> And the other reason was so that you could gain a position with this criminal organisation?---Yes
>
> And they're the only reasons?---And to stay alive.
>
> And I'm suggesting that you had no fear in relation to your life or that of any member of your family?--- That's not true. There was fear there."[182]

Discussion

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179 However, it should be noted that this was put to the applicant by Mark on the previous evening. See Exhibit 1, Transcript of the second Stamford Plaza conversation, page 4.

180 T. 3-55.

181 T. 3-55.

182 T. 3-57.

[86] As earlier stated, the applicant contended that the admissions made by him to Mark, Brad and Mal on 4 and 5 February 2014 were involuntary or, in the alternative, that it would be unfair to allow them to be proved in evidence against him.

[87] Before turning to a consideration of the principles to be applied in the determination of those questions, it is useful to first make some observations about the applicant's evidence because much depended on whether his evidence could be accepted. There was of course no issue that the various admissions were made by the applicant, but what was in issue was *why* they were made.

[88] The applicant asked the court to believe that his admissions were falsely made. He said that he was motivated to do so for several reasons: that he was pressured into thinking that Mark believed he had committed the offences and that the only way he could become a participant in the crime syndicate, earn money and secure protection against what he described as "harassment" by the police was to advance a version consistent with that belief; that he feared for the lives of his family and himself if he did not falsely confess; and that Brad might "lose his job".[183] However, for the reasons that follow, I did not accept his evidence in any of these respects.

[89] There can be little doubt that considerable pressure was applied to the applicant by Mark and Brad on the evening of 4 February 2014, and by Mal and Brad the next day, to confess if he had been involved in the subject offences. The questioning extended over lengthy periods and was, at times, persistent as well as probing. The lure of material gain from participation in the crime syndicate together with the prospect that any police interest in the applicant was capable of being dispelled no doubt operated as powerful incentives.

[90] But the fact of the matter is that, far from being overborne by this pressure, the applicant appeared to have little difficulty resisting it. On more than one occasion, he challenged Mark about the basis for his assertion that, in effect, it was only a matter of time before the applicant was charged. He queried why he had not been charged already if the police had gathered sufficient evidence to do so. He demanded to know the names of the persons to whom the police had spoken who were said to have implicated him. Indeed, my firm impression was that it was not until the applicant was satisfied that Mark had been speaking to one of the investigators and could actually assist both Stewart and him that he chose to make admissions during the second of their two conversations. In this regard, his satisfaction in that regard had only been won by the revelation of details of the investigation, some of which he had up until that point in time been unaware, and the admissions commenced immediately after Mark, referring to Stewart, assured the applicant that if they "sort out your shit we sort out her shit".[184] Once satisfied in both respects, the applicant made admissions with respect to the murder.

[91] Over the hours of interactions that were recorded during the course of the covert operation, the applicant revealed himself to be a cautious, scheming individual. He knew that both he and Stewart were suspects with respect to both of the alleged offences. He knew of and had researched his rights and, further, he had exercised them in connection with this very investigation. He was, I find, constantly alive to the risk

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183 T. 3-35.

184 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 9.

that the members of the crime syndicate with whom he was dealing might be police or agents of police. He was preoccupied with conspiracy theories to the point of paranoia and readily imparted his homespun views about the police acting unlawfully. He was forever alert to the possibility that his conversations were being recorded, including up to the point of asking Mark whether he was wearing a "wire"[185] before he made any detailed admissions. He also asked Brad in between the two conversations that evening whether Mark might be trying to "get a confession on tape [to] extort" him.[186] Then, when he made admissions to Mark, the applicant did so selectively; he chose to deny any involvement in the attempted murder and, further, he chose not to say anything that might implicate Stewart.

[92] To my mind it was clear that the applicant only made those admissions after carefully weighing the risks inherent in doing so. These included that the conversation might be recorded, that Mark might be a police officer or that he might be working for the police. It was equally clear that the applicant made a calculated choice to make the admissions in order to secure protection from the police investigation and, as an additional benefit, to ensure his continuing participation in the crime syndicate. To the point, he did not make the admissions because of any of the reasons he advanced, and there are several features of the evidence that support that conclusion.

[93] *First*, the feature that the applicant exercised a choice about what he said to Mark on the evening of 4 February 2014 does not sit at all well with the reasons advanced by the applicant for making the admissions. It is certainly inconsistent with the claim that he only spoke because he feared for his life and the lives of his family. If that was really the case, one would have expected there to have been a complete acceptance of what Mark told the applicant his sources had led him to believe, that is, that Stewart "organised for [the applicant] to set that fire in that house and they are a hundred percent on that".[187] Similarly, if the applicant truly believed that the only way he could become a participant in the crime syndicate, earn money and secure protection against harassment by the police was to advance a false version that coincided with Mark's belief about what he had done, it would be odd to only selectively make false admissions consistent with that belief.

[94] Of course, by the end of the conversations with Mal and Brad the next day, the applicant had made further admissions that included the attempted murder as well as the involvement of Stewart, but by then he was effectively set in his course. Having weighed the risks, the applicant chose to make admissions to Mark on the previous evening and, with the passage of time and the added persuasion Mal provided during the course of their conversations on 5 February 2014, a similar weighing exercise would have led to the choice he again made to speak. I have no doubt that this is precisely what occurred.

[95] *Secondly*, if the applicant only made admissions for the reasons he claimed, he did so because that was what had been demanded of him by Mark. As the applicant put it, the "only avenue [he] had left was to make a [false] confession or walk out the door".[188] It was then an unusual way of giving into that demand to ask Mark immediately before

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185 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 10.
186 Exhibit 1, Transcript 20, page 14.
187 Exhibit 1, Transcript of the second Stamford Plaza conversation, page 3.
188 T. 3-34.

and after admitting that he had shot the deceased, "What would I owe you?" and "Can you help me?" Indeed, far from providing any support for the applicant's claimed reasons, the asking of those questions further evidenced a weighing on his part of the risks inherent in choosing to speak against the potential benefits to the applicant of that course.

[96] *Thirdly*, in the versions he provided, the applicant included considerable detail about both of the alleged offences. If, for example, the applicant spoke to Mark out of mortal fear, all that he had to do was to advance a version consistent with Mark's stated belief about his involvement in the alleged offences, but he went much further than that. Then, when speaking to Mal and Brad the next day, the applicant advanced yet more detail, to the point of volunteering a number of details that he could easily have avoided providing. If the challenge that day was to not "slip up … so that they didn't find out that [he] had falsely confessed",[189] it is impossible to reconcile that objective with the provision of so much unnecessary detail.

[97] *Fourthly*, of the details of the offences that the applicant provided, he said that he guessed or assumed or added by way of embellishment over a dozen of them. The points just made may be repeated; there was no need to do so and a good reason not to do so. Furthermore the proposition that, in such circumstances, he resorted to guesswork simply defies belief.

[98] *Fifthly*, and perhaps most tellingly, the following details that the applicant said he had guessed or assumed could only have been known by the killer of the deceased or by someone who had communicated with that killer:

(a) The bullet used to shoot the deceased was a .22 calibre, hollow point bullet and bronze in colour;

(b) The shot had been fired at close range;

(c) The deceased was shot between the eyes;

(d) A neighbour had walked out to a car at around the time the murder happened;

(e) There was no money found in the deceased's wallet; and

(f) Boxes were located in the garage area of the deceased's house.

[99] It is inconceivable that these details could have *all* been accurately guessed or assumed by the applicant and I rejected his evidence to that effect. To the contrary, his evidence in these respects betrayed an actual knowledge of the murder. In that sense they were revealing of what was recently described by Peek J in *R v Jelicic*[190] as "esoteric knowledge"[191] of at least one of the subject offences. I will say a little more about that later but, for present purposes, it is sufficient to observe that the provision of these details by the applicant together with his accompanying assertions on oath that he had only guessed or assumed them reflected poorly on his credit. It also provided strong support for the reliability of the admissions he made.

[100] *Sixthly*, the claim that the applicant made admissions because he feared for his life and those of his family cannot be accepted. In addition to the points already discussed in

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189 T. 3-55.
190 [2016] SASC 57, on 28 April 2016.
191 Ibid [4].

this regard, at no time was either he or his family threatened by anyone posing as a member of the crime syndicate and those to whom he spoke made it clear on numerous occasions that the syndicate did not resort to violence and that he was at liberty to refuse to participate at any time. On the evening of 4 February 2014, he was offered the door by Mark but he declined that offer on each occasion. After he left following the first conversation, he knew (because he had been told) that Mark did not think that he posed any "risk to [them] or [the] organisation"[192] and that he was free to go. Despite that, the applicant returned for the second conversation, and he acknowledged in one part of his evidence that he did that because he "wanted to work with these people".[193]

[101] At no point during either conversation did the applicant appear or sound fearful. Of course, the applicant accepted in his evidence-in-chief that "nothing appears on the tapes", but said that he was "hiding [his] fear because [he] wanted to show that [he] was worthy".[194] However, I could not accept that the applicant was hiding any fear because he had no fear to hide. The only anxiety that could be detected on his part was that he might not become a participant in the syndicate, a concern he expressed on more than one occasion. During the conversations with Mark, the applicant very much presented as someone who was being interviewed for an employment position would be expected to present. He said that he felt a sense of relief after he spoke with Mark and sent a text to Stewart later that night in which he told her that his day had been "stressful, but good in the end".[195] He was "upbeat" the next morning. He then willingly participated in the "drive around" with Mal and Brad and can be seen and heard on the covert footage conversing spontaneously. At times he appears light-hearted and, throughout, he was sufficiently relaxed to make a number of observations during the course of their journey that had nothing at all to do with the subject offences.

[102] *Seventhly*, although the applicant's claim to be desperate for money may be accepted to some degree because he was unemployed and living out of his car for the duration of the covert operation, it must also be kept in mind that he had just completed a course of training that would, on payment of approximately $600, see him in gainful employment for between one and four days each week. The proposition that he was vulnerable to the syndicate's advances because of his financial predicament needs to be viewed in that light. In any event, that cannot have been a reason to confess to murder, whether false or not. In the same vein, the applicant's claim that the only protection he sought was from police harassment cannot be accepted. There was no harassment of the applicant. He had been questioned once and provided a statement. Listening devices had been implanted in his car and, after they were removed, Homicide detectives attended on him to ask for them back. Beyond that, he had no contact with the police during the course of the entire investigation or at least none of which he was aware.

[103] *Lastly*, the applicant was not a credible witness. In evidence-in-chief, he scarcely missed an opportunity to advance as a reason for making the admissions that he was in fear of his life. I have no doubt that he was well aware when giving evidence that this

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192 Exhibit 1, Transcript of the first Stamford Plaza conversation, page 34.
193 T. 3-44.
194 T. 3-34.
195 T. 3-48.

was a circumstance that might, if accepted by the court, have a significant bearing on the outcome of the application. He was generally not believable and, in particular, the answers he gave under cross-examination as to the sources of the information he supplied to Mark, Mal and Brad regarding the circumstances of the alleged offences were, in my assessment, plainly concocted. In short, the applicant was readily prepared to lie when giving evidence, and did so.

Consideration

[104] In *Tofilau v The Queen*; *Marks v The Queen; Hill v The Queen; Clarke v The Queen*,[196] Gleeson CJ observed that "the use by the police of deception in the hope of eliciting admissions is not new".[197] As his Honour explained, undercover police operations, the ploys used to extract jailhouse confessions and the various forms of covert surveillance are all examples of particular investigative techniques that rely on deception of the suspect to be effective. In this sense, the gathering of scenario evidence is no different.

[105] In the same case, Callinan, Heydon and Crennan JJ outlined how such evidence is typically obtained:

> "Undercover police officers pose as members of a gang. They solicit the cooperation of a person whom they think has committed a serious crime, although they do not believe that they are yet able to prove it. They encourage that person to take part in "scenarios" involving what the person wrongly thinks is criminal conduct. Provided that the person informs the head of the gang of anything which might attract the adverse attention of the police, they offer the person two advantages. One is the opportunity of material gain by joining the gang. The other is the certainty that the head of the gang can influence supposedly corrupt police officers to procure immunity from prosecution for the serious crime. This technique was developed in Canada and evidence obtained pursuant to it there has been held admissible by the Supreme Court of Canada."[198] [References omitted]

[106] Because the same investigative technique was deployed here, it does not surprise that there are many factual parallels between the covert operation in this case and the operations conducted with respect to the four appellants in *Tofilau*: Tofilau, Marks, Hill and Clarke. A similar operational template was deployed in *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)*[199] as well as in several other cases around Australia,[200] the most recent of which was decided only a few days before this application was heard.[201] In each of them, the confessional evidence was admitted.

[107] However, merely because scenario evidence has been admitted in other cases does not relieve the court from considering the question of admissibility afresh and with

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196 (2007) 231 CLR 396 ('*Tofilau'*).

197 Ibid 403-4 [5].

198 Ibid 465 [219].

199 [2015] QCA 87. See also the first instance judgment: *R v Cowan* (2013) 237 A Crim R 388.

200 See, e g, *Director of Public Prosecutions (Vic) v Ghiller* (2003) 151 A Crim R 148; *R v Favata* [2004] VSC 7; *Re Application by Chief Commissioner of Police (Vic)* (2004) 9 VR 275; *Lauchlan v Western Australia* [2008] WASCA 227; *R v Karakas (Ruling No 1)* [2009] VSC 480; *Donai v The Queen* [2011] NSWCCA 173; *R v Weaven (Ruling No 1)* [2011] VSC 442; *R v Simmons; R v Moore (No 2)* [2015] NSWSC 143.

201 *Jelicic* [2016] SASC 57, on 28 April 2016.

reference to the established principles. That is because, although the operational template used in those other cases may have been similar to that which was used in this case, the manner in which the operation was carried out and its effect on the will of the accused may well be different from one case to another.

[108] That made clear, it is convenient to first consider where the onus rests before turning to a consideration of the two bases advanced for exclusion of the confessional evidence, that is, that the admissions made by the applicant to the covert police were involuntary or, in the alternative, that it would be unfair to admit them in evidence against him.

Onus of proof

[109] Where the defence challenges the reception in evidence of admissions on the ground that they were involuntary, the onus rests on the prosecution to prove, on the balance of probabilities, that the admissions were voluntarily made.[202] The question of voluntariness is solely one for the judge to decide. Where the judge is not satisfied that the admissions were voluntarily made, the judge is required by law to exclude them from the evidence at the trial.[203]

[110] However, even if admissions are found to be voluntary and therefore admissible, the court retains a discretion to exclude the admissions from the evidence at the trial. In any such case, it is the accused who bears the onus of showing that there is reason for the judge to exercise the discretion to exclude the admissions.[204]

Voluntariness

[111] It is an immutable feature of the common law that a confessional statement will not be admissible unless it was made voluntarily,[205] and the same position obtains with respect to admissions falling short of a full confession.[206] In Queensland, the common law is supplemented[207] by s 10 of the *Criminal Law Amendment Act* 1894 (Qld) which is in these terms:

> No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown.

[112] It is to be seen from its terms that s 10 is concerned with threats or inducements made "by some person in authority". In this regard, it was established by the decision in *Tofilau* that an undercover police officer was not "a person in authority",[208] and so much was accepted by the applicant's counsel during the course of argument on the

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202 *Wendo v The Queen* (1963) 109 CLR 559; *MacPherson v The Queen* (1981) 147 CLR 512 at 519 per Gibbs CJ and Wilson J.

203 *Collins v The Queen* (1980) 31 ALR 257 at 310 per Brennan J.

204 *R v Lee* (1950) 82 CLR 133.

205 *McDermott v The King* (1948) 76 CLR 501 at 511 per Dixon J; *MacPherson v The Queen* (1981) 147 CLR 512 at 519 per Gibbs CJ and Wilson J.

206 *Tofilau* (2007) 231 CLR 396 at 403-4 [5] per Gleeson CJ.

207 *R v McKay* [1965] Qd R 240 at 241.

208 (2007) 231 CLR 396 at 406-7 [11], [13] per Gleeson CJ, 411 [29] per Gummow and Hayne JJ, 496-9 [322]-[323] per Callinan, Heydon and Crennan JJ. See also *R v Cowan; R v Cowan; Ex parte Attorney-General* (Qld) [2015] QCA 87 at [67] per McMurdo P (with whom Fraser JA agreed).

hearing of this application.[209] In the words of McMurdo P in *Cowan*, the covert operatives in this case "were not invoking the State's coercive power and were not reasonably perceived by the accused to have the lawful authority of the State to investigate the relevant offences".[210] Instead, the only reasonable belief that the applicant could have formed about them was that they were criminals and not authorised police officers, and that was the effect of his evidence on this point. As such, nothing they said or did could act as a threat or inducement by a person in authority within the meaning of s 10. It follows that, even if the challenged admissions were the product of some threat or inducement on the part of any one or more of the covert operatives, s 10 would not operate so as to render them inadmissible.

[113] It is therefore necessary to return to the common law.

[114] In *McDermott v The King*,[211] Sir Owen Dixon laid down what is still regarded as the authoritative statement of the common law on this subject:

> "At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made ... An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority."[212] [References omitted]

[115] Two years later, in the judgment of the High Court in *R v Lee*, Sir Owen Dixon's statement of principle was recognised by the Court as embodying "two imperative rules of the common law regarding confessional statements". They were then re-stated in this abbreviated form:

> "(1) that such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, and (2) that such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed."[213]

[116] The second of these two rules has been referred to as the "inducement rule"[214] or "definite rule voluntariness".[215] It has no application to this case for the same reasons

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209 T. 3-61.
210 Ibid [67] (Fraser JA agreeing).
211 (1948) 76 CLR 501.
212 Ibid 511.
213 (1950) 82 CLR 133 at 144.
214 See, eg, *Tofilau* at 469 [245] per Callinan, Heydon and Crennan JJ.
215 See, eg, *Tofilau* at 406 [10] per Gleeson CJ.

that s 10 of the *Criminal Law Amendment Act* 1894 (Qld) has no application; the covert operatives were not persons in authority. Rather, it is the first of the two rules, commonly described as "basal voluntariness",[216] that is potentially engaged.

[117] Under the "basal voluntariness" rule, before a confession may be admitted in evidence, it must be proved by the prosecution on the balance of probabilities to have been "made in the exercise of a free choice to speak or be silent".[217] Thus, in the language of the judgments in *McDermott* and *Lee* to which I have referred, if an accused makes admissions because he or she is overborne, if the admissions are the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, or if they were made "as a result of violence, intimidation, or of fear",[218] they cannot be voluntary and may not be received in evidence.

[118] In *Tofilau*, the High Court held by a majority (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ, Kirby J dissenting) that the deception practised on each of the appellants in that case had not overborne their will so as to render involuntary the admissions that they each made under such deception.

[119] In the course of discussing the basal voluntariness rule in the context of those appeals, Gleeson CJ said:

> "The law treats as voluntary a great deal of conduct about which a person, speaking colloquially, may say that he or she had no choice. Since the original rationale for the principle of exclusion of involuntary statements was concern about the unreliability of statements made under coercion, that will sometimes be a useful guide in making a judgment about what kind of conduct will be taken to render a statement involuntary. It is, however, of no assistance to the appellants in this case, because the deception practised upon them was not such as was likely to elicit a false confession.
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> To the extent that abuse of the state's coercive authority is another part of the rationale for the exclusionary rule, there are two difficulties for the appellants. The first has already been mentioned in dealing with the definite rule: the appellants thought they were talking to criminals, not police officers. The second is that deception is a very common method of seeking to obtain confessions from people suspected of crime.
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> …
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> Since possible forms of deception are bounded only by human imagination, and human gullibility, it would be dangerous to assert that no form of deception could deprive conduct of its voluntary character. Most deception used in the hope of eliciting admissions, however, including the form used in the present case, is calculated to induce a person to choose to reveal information that otherwise would be concealed. The appellants were subjected to powerful psychological pressure, but it is not unusual for people to reveal old secrets under pressures that are no less compelling. The law attempts to distinguish between external pressures and pressures personal to the confessionalist. That itself may be a distinction based on pragmatic rather than scientific considerations. The effect of

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216 See, eg, *Tofilau* at 407 [14] per Gleeson CJ, 411 [30] per Gummow and Hayne JJ, 469 [245] per Callinan, Heydon and Crennan JJ.

217 *R v Lee* (1950) 82 CLR 133 at 149 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ; *Cleland v The Queen* (1982) 151 CLR 1 at 5 per Gibbs CJ.

218 *Cornelius v The King* (1936) 55 CLR 235 at 245 per Dixon, Evatt and McTiernan JJ.

> external forces and circumstances on an individual is likely to depend on characteristics personal to the individual. That which a person of one disposition may regard as unbearable pressure may be a matter of indifference to another. The physical or emotional characteristics of a person, or that person's background or circumstances, will always be material to the effect of externally imposed pressure. The burden of guilt may weigh heavily on one person but may be borne lightly by another."[219] [References omitted]

[120] Gummow and Hayne JJ explained that it is necessary to focus on the sufficiency of the compulsion that is claimed to have to have overborne the free choice of whether to speak or to remain silent in any particular case. Their Honours said:

> "But as the reasons of Dixon J in *McDermott* show, application of the rule about 'basal voluntariness' also depends upon identifying the criteria that are to found the legal conclusion that a confession was not made 'voluntarily'. The relevant conclusion is described as the will being 'overborne'. The circumstances that yield that conclusion, and provide the criteria which govern the availability of the legal conclusion, are described as 'the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'. All are species of compulsion.
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> Further refining the content of the criteria that are engaged under the head of 'basal voluntariness' must take account of the way in which the tests will fall for consideration. 'Basal voluntariness' may be seen as a principle underpinning the whole of the law relating to confessions. But it is a principle that in practice will fall for consideration, if at all, only in cases not concerning a person in authority.
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> …
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> Confessions made to someone not known or believed to be a person in authority will thus fall to be considered under the test of 'basal voluntariness'. Basal voluntariness is concerned with confessions made under compulsion. The key inquiry is about the quality of the compulsion that is said to have overborne the free choice of whether to speak or to remain silent. In this context, 'overborne' should be understood in the sense described by Dixon J as 'the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'. It is necessary to focus upon the sufficiency of the compulsion.
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> In *McDermott*, Dixon J treated overbearing of the will separately from the fear of prejudice or hope of advantage. Fear of prejudice and hope of advantage were treated as the two species of the genus of inducements. But, by contrast, overbearing of the will was confined to circumstances like duress. Considerations of a fear of prejudice or the hope of advantage were seen as not only different from an overbearing of the will but also as relevant only to statements made to a person in authority.
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> Rarely, if ever, would the test of 'basal voluntariness' exclude confessions where some hope of advantage (as distinct from fear of prejudice) was held out to the person who made the confession. The 'basal principle' of which Dixon J spoke is 'a principle the application of which is flexible and is not limited by any category of inducements that may *prevail over a man's will*' (emphasis added). But there are few circumstances when an inducement in the form of a promise of advantage will compel a person to speak. Promises of advantage that are not made by a person whom the confessionalist knows or believes to be a person in authority would rarely, if ever, be such as could found the conclusion that the speaker did

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219 *Tofilau* at 408-9 [17]-[19].

> not have a free choice to speak or remain silent. That is not to say that the promising of an advantage may not bear upon the exercise of the discretion. It may do so.
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> Two further points should be made. The first is negative and identifies what does not suffice to show that the will has been overborne. The conclusion that a confessionalist had no choice to speak or stay silent is not required (and without more being established, would not be open) if it is observed that the confessionalist acted under some misapprehension or mistake, even if that misapprehension or mistake was induced by the person to whom the confession is made. Nor is that conclusion required (and without more being shown the conclusion would not be open) if it is observed that there was some imbalance of power between the confessionalist and the person to whom the confession was made.
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> The second point to make is that the conclusion that a confessionalist had no choice to speak or stay silent is not readily reached where the confession was not made to a person whom the speaker knew or believed to be a person in authority. In such a case, absent duress of person or intimidation, it will be necessary to articulate *why* there was no choice. Was the importunity, insistence or pressure so sustained or persistent that there was *no* choice? Why? By hypothesis, the confessionalist did not know or believe that the weight of the state or its agencies bore upon him or her. What, then, is said to have deprived that person of choice? For the basal voluntariness rule to apply it must be possible to identify what it was that is said to have deprived that person of choice."[220] [Emphasis in original] [References omitted]

[121] Callinan, Heydon and Crennan JJ highlighted the restricted meaning to be ascribed to the test for basal voluntariness:

> "Dixon J in *McDermott v The King* drew a distinction between confessions made in the exercise of free choice and those made by persons whose will was overborne. The examples he gave of an overbearing of the will – 'duress, intimidation, persistent importunity, or sustained or undue insistence or pressure' – are instructive, for they are restricted. In 1948, when *McDermott v The King* was decided, duress was the use or threat of either violence to the person or imprisonment. At that time duress of goods was not seen as sufficient to render a contract void, although money paid in order to obtain possession of goods wrongfully detained, or to avoid their unlawful detention, was recoverable in an action for money had and received. Nor was economic duress then recognised as a ground rendering a contract void. In any event both duress of goods and economic duress are factually remote from involuntary confessions. Intimidation is the threat of violence or some other illegal act. The expression 'sustained or undue insistence or pressure' implies that insistence or pressure which is less than sustained or undue does not produce involuntariness."[221] [References omitted]

[122] Turning then to the application of the principles discussed above to the case in hand, it was submitted by counsel for the applicant that the "critical thing" was whether I believed the applicant. For the reasons already expressed,[222] I did not. In particular, I rejected as untrue the reasons which the applicant advanced for why he made the admissions in question. Further, I found that the applicant only made the admissions after carefully weighing the risks inherent in doing so and then making a calculated

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220 Ibid 420-2 [58]-[64].

221 Ibid 502 [330].

222 See pars [86]-[103] above.

choice in order to secure protection from the police investigation and so as to ensure his continuing participation in the crime syndicate. Those findings were, as the applicant's counsel submitted, sufficient to dispose of this ground of challenge to the admissibility of the admissions.

[123] Otherwise, nothing that was said or done by the covert operatives in connection with the applicant constituted compulsion of a kind that would meet the criteria leading to the conclusion that the admissions were not made voluntarily. There was no duress or intimidation. The covert operatives did not use violence, and they did not threaten to use violence against the applicant or against any member of his family. They did not threaten any illegal act against the applicant or any member of his family. There was no importunity, insistence or pressure of a kind exerted by those to whom the confession was made that would found the conclusion that the applicant had no free choice whether to speak or stay silent. That he may have felt under the pressure that he himself generated by his desire to join the criminal syndicate and reap the financial rewards that entailed as well as protection from the police investigation is not to the point. At times the questioning was, as I found, persistent as well as probing, but it was not importunate. None of the questioning was such as to generate pressure that was so sustained or undue as to overbear the applicant's will.

[124] It only remains to deal with one of the submissions made by counsel for the applicant in support of his contention that the admissions were not voluntarily made. He submitted:

> "And what I'm going to submit to you is not what the High Court have ever been asked to answer. They have been asked to look at whether an undercover policeman is a person in authority. He's not on the current definition of 'in authority'. My submission is you've got to look at it as whether – forget that he's a policeman. It's got nothing to do with the argument. Is he a person who's in a position of power? Can he offer the accused something? Is he in a position where he can offer a realistic inducement for the accused to take a certain course? Now, that's got nothing to do with the current modern conception of what 'in authority' means."[223]

[125] The applicant's counsel went on to submit that the covert operatives were "people who exercised a certain degree of power as a result of their perceived connections and their ability to give [the applicant] employment".[224] He submitted that the admissions under challenge were "involuntary because that inducement [was] offered by someone who [the applicant perceived] has the power or the ability to effect the inducement".[225] He also submitted that, in addition to the presence of this inducement, the applicant made the admissions because he was "concerned about being eradicated afterwards".[226]

[126] I have of course rejected the proposition that the applicant was at all concerned for his safety at the time when he made the relevant admissions. What I wish to deal with here, however, is the proposition that, because there was some imbalance in power as between the covert operatives and the applicant which, as I understand the argument, was brought about because of the perceived ability of the operatives to "do what they

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223 T. 3-61.
224 T. 3-61.
225 T. 3-62.
226 T. 3-62.

were saying they would do",[227] that this gave rise to a level of compulsion of a kind that would render the admissions involuntary.

[127] Such a proposition has no merit. As Gummow and Hayne JJ held in *Tofilau*, "rarely, if ever, would the test of 'basal involuntariness' exclude confessions where some hope of advantage (as distinct from fear of prejudice) was held out to the person who made the confession".[228] Furthermore, their Honours later made the point that the conclusion that a confessionalist had no choice to speak or stay silent is not "required (and without more being shown the conclusion would not be open) if it is observed that there was some imbalance of power between the confessionalist and the person to whom the confession was made".[229] In the case of each of the appeals considered by the High Court in *Tofilau* as well as the other scenario evidence cases to which I have referred including *Cowan*, the same, or a similar, imbalance of power was seen to be present. That feature alone, without more, was not found in any of those cases to have the legal consequence contended by the applicant's counsel in this case. Indeed, it was a defining characteristic of the covert operations in each of these cases that the undercover police had led the suspect to believe that they had the ability to "do what they were saying they would do". That was an essential part of the deception and, without more, nothing turns on the applicant having been deceived in this way.

[128] Of course, the position would be otherwise if, regardless of which investigative technique was used, the applicant's will was overborne. However, I was satisfied that the prosecution had proved on the balance of probabilities that the will of the applicant was not overborne. The admissions he made were, in a legal sense, voluntary.

Discretionary exclusion for unfairness

[129] The alternative argument advanced on behalf of the applicant was that the court should exercise its discretion to exclude the admissions on the basis that it would be unfair to allow them to be proved in evidence against him. In this respect, it is helpful to record that this ground of discretionary exclusion was relied on by only one of the four appellants in *Tofilau*, Clarke, and rejected.

[130] Returning to the judgment of Sir Owen Dixon in *McDermott*, the discretion to exclude for unfairness was explained in this way:

> "[A] judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of police, even although he does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence."[230]

[131] Subsequently, in *Cleland v The Queen*, Gibbs CJ said this about the discretion:

> "A confession will not be admitted unless it was made voluntarily, that is in the exercise of a free choice to speak or be silent. But even if the statement was voluntary, and therefore admissible, the trial judge has a discretion to reject it if

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227 T. 3-66.
228 At 421 [62].
229 At 421 [63].
230 At 515.

> he considers that it was obtained in circumstances that would render it unfair to use against the accused."[231]

[132] At issue is not whether the covert police (or the police generally) have acted unfairly towards the applicant but whether it would be unfair to the applicant to use his admissions against him, in that the applicant's right to a fair trial may be jeopardised if the admissions were obtained in circumstances which affect their reliability. But whilst reliability is said to be the touchstone of unfairness, it is not the sole touchstone,[232] and sometimes unfairness and public policy will overlap.[233] Nevertheless, the "concept which governs the exercise of the discretion"[234] is unfairness and not contravention of rules. As such, if there are any irregularities in the methods used by police, the test is still whether it would be unfair to the accused to use his statements against him, and not whether the police have acted unfairly.[235] That is why in *Tofilau*,[236] after referring to the importance of unreliability to the exercise of the discretion, Gummow and Hayne JJ remarked that the chief focus was on "the fairness of using the accused person's out-of-court statement rather than upon any purpose of disciplining police or controlling investigative methods."[237]

[133] As earlier explained, the onus was on the applicant to persuade me that it would be unfair to receive evidence of his admissions at his trial. However, after a review of all the circumstances surrounding the making of the admissions in question, I was not persuaded that it would have been unfair to the applicant to do so.

[134] The police operation was conducted by appropriately trained officers from Covert Operations. It was appropriately resourced and adequately supervised. At no stage did any of the operatives act unlawfully or improperly, and care was exercised to ensure that the applicant did not commit any offence during his dealings with them. The applicant was not threatened or harmed in any way. The operation, elaborate though it was, was entirely justified given that, after the passage of almost six months, the more conventional methods of investigation had essentially failed.

[135] Unlike the operation conducted in the case of the appellant Clarke in *Tofilau*, where the police misrepresented the state of the available evidence, nothing of that kind occurred in this case.[238] Nor was any evidence fabricated as part of the deception.[239] To the contrary, when the applicant returned to the Stamford Plaza Hotel for the second of his two conversations with Mark on the evening of 4 February 2014, the information Mark then conveyed to him regarding some aspects of the investigation of the alleged offences was completely accurate and had, as Mark told the applicant, been sourced from someone "inside" the investigation.

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231 (1982) 151 CLR 1 at 5.

232 *R v Swaffield; R v Pavic* (1998) 192 CLR 159 at 189 [54] per Toohey, Gaudron and Gummow JJ; *Cowan* [2015] QCA 87 at [77] per McMurdo P.

233 *Swaffield* at 196 [74]; *Cleland* at 8-9, 33-4; *The Queen v Ireland* (1970) 126 CLR 321 at 334-5 per Barwick CJ.

234 *Collins v The Queen* (1980) 31 ALR 257 at 314 per Brennan J.

235 *Van Der Meer v The Queen* (1988) 82 ALR 10; [1988] HCA 56.

236 At 423 [68]. See also *Tofilau* at 432 [112] per Kirby J.

237 See also *Em v The Queen* (2007) 232 CLR 67; [2007] HCA 46 at [111] per Gummow and Hayne JJ.

238 The applicant's counsel accepted during the course of argument that this proposition was correct: T. 3-78.

239 As occurred in *Cowan*. See *R v Cowan* (2013) 237 A Crim R 388 at 417 [147].

[136] But, above all else, I was not persuaded that any of the challenged admissions were unreliable. For the reasons earlier discussed,[240] I found that the applicant had actual knowledge of details of the murder that could only have been known by the killer of the deceased or by someone who had communicated with that killer. That circumstance, together with the considerable amount of other detail the applicant was able to provide Mark, Mal and Brad on 4 and 5 February 2014, strongly supported the reliability of the challenged admissions.

Disposition

[137] For these reasons:

(a) I was satisfied that the admissions made by the applicant on 4 and 5 February 2014 were voluntarily made; and

(b) I was not satisfied that it would be unfair to the applicant to admit those admissions in evidence against him at his trial.

[138] The application was accordingly refused.

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240 See pars [85]-[102] above.