SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dubois* [2016] QSC 319
PARTIES:	**R** (respondent) **v** **GARRY REGINALD DUBOIS** (applicant)
FILE NO:	SC No 1046 of 2015
DIVISION:	Trial Division
PROCEEDING:	Pre-trial application to exclude evidence of White and Swindells
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	12 October 2016
JUDGE:	Applegarth J
ORDER:	**The application is dismissed**
COUNSEL:	D R Lynch QC and K E McMahon for the applicant D L Meredith for the respondent
SOLICITORS:	Howden Saggers Lawyers for the applicant Office of Director of Public Prosecutions for the respondent

[1] Mr Dubois applies to exclude at trial evidence of statements he reportedly made to Detective Senior Constable Bruce White and Detective Sergeant Frank Swindells in the course of being questioned on 29 February and 1 March 1976.

[2] The basis of the application is that:

(a) the alleged statements were not recorded as required by s 436(4) or s 437 of the *Police Powers and Responsibilities Act* 2000 (*PPRA*);

(b) pursuant to s 436(3) of the *PPRA*, the alleged statements are therefore *prima facie* not admissible in evidence;

(c) no special circumstances exist which would justify admission of the alleged statements in the interests of justice pursuant to s 439 of the *PPRA*;

(d) alternatively, in all of the circumstances it would be unfair to use the statements against the applicant.

[3] The respondent opposes the application and submits that:

1. the *PPRA* does not apply retrospectively to the statements;

2. even if it did, the evidence would be admitted pursuant to s 439(2) of the *PPRA*;

3. it would not be unfair to admit the evidence, appropriately edited, in the circumstances.

[4] The application concerns both the statutory framework governing confessions or admissions allegedly made in police interviews and the Court's discretion to exclude evidence on the grounds of unfairness.

[5] Three issues arise:

1. whether the *PPRA* provisions about questioning "relevant persons" apply to statements made before the Act was passed, such that the statements would be found *prima facie* inadmissible;

2. if so, whether, under s 439(2) of the *PPRA*, there are special circumstances that would justify their admission in the interests of justice; and

3. in any event, whether, at common law, it would be unfair to allow their admission at trial.

[6] I decided the first issue of statutory interpretation in an *ex tempore* ruling on 11 October 2016 and concluded that the requirements of the *PPRA* do not apply retrospectively. However, for completeness, I will later express my conclusion about admission pursuant to s 439(2) of the *PPRA*.

The relevant evidence

[7] The statements are alleged to have been made at the Darlington CIB in South Australia on 29 February and 1 March 1976. I shall assume for the purpose of the argument that the applicant was in custody at the time. Detective Senior Constable White, who was attached to the Consorting Squad in Brisbane, interviewed the applicant, with Detective Sergeant Swindells present. Mr Swindells has since passed away.

[8] In the course of the interviews, the applicant is alleged to have made statements that, in conjunction with other evidence, would circumstantially prove his involvement, together with Vincent O'Dempsey, in the disappearance and presumed deaths of the McCulkins in January 1974. The statements, in effect, include admissions of:

- the applicant's presence at the McCulkin house previously and on the night of their disappearance;

- his association with O'Dempsey;

- his belief that O'Dempsey was capable of murder;

- his being confronted by Mr McCulkin about the disappearances;

- his inability to offer any explanation as to why Mr McCulkin would suspect him and O'Dempsey for his family's disappearance;
- the fact that the applicant left Brisbane shortly after the disappearances;
- the reason he did so, namely that Mr McCulkin was blaming him and O'Dempsey; and
- the fact that he had had dealings with police previously, and that he left Brisbane to make himself scarce.

[9] It is not alleged the applicant made any direct admissions of responsibility or guilt in respect of the disappearance or deaths of the McCulkins.

[10] The respondent does not intend to lead some of the statements. These relate to the applicant's belief that O'Dempsey was capable of murder and his fear, or lack thereof, of O'Dempsey. The respondent accepts that this evidence is not probative of these particular charges. His claim that he did not know why Mr McCulkin suspected him will not be led either.

The circumstances surrounding the making of the statements

[11] At this stage, there is no evidence before me from the applicant, from his wife or from anyone else denying that the applicant was at the Darlington CIB on the dates in question or denying that he spoke to Mr White, in the presence of Mr Swindells, as alleged. There is evidence that he was living in South Australia at the time and that he was convicted on 1 March 1976 for a minor offence. This may explain why he was at a police station when Mr White spoke to him. Although it is unlikely that someone would be held in custody for such an offence, Mr White's evidence is that he travelled on short notice to South Australia with Mr Swindells on Sunday, 29 February 1976 and saw the applicant at the Darlington CIB that night. I assume the applicant was at the police station that night and the following morning because he had been charged by South Australian police with a minor offence, and also because Queensland Police wished to interview him.

[12] Mr White says that he made notes of the conversation with the applicant. A statement he gave in October 2014 indicates that he recorded statements made during separate interviews with O'Dempsey and Dubois in handwritten notes, which he then transcribed in comprehensive detail into his official police notebook immediately at the conclusion of the interviews. However, in November 2014, when Mr White gave evidence at committal proceedings, he corrected this and swore that the original notes were recorded contemporaneously and directly into his police notebook; with him writing out the question, asking it, and then writing down the answer given.[1]

[13] On 3 October 1979 Mr White prepared a statement for the purpose of giving evidence at a 1980 inquest into the McCulkins' disappearance and deaths. Mr White said the 1979 statement recorded the "total conversation".[2] He says that the 1979 statement was prepared using the notes taken at the time of the interviews on 29 February and 1 March 1976. Mr White's original notes apparently have been lost. The 1979 statement,

---

1 Committal transcript pp 2-93, 94.
2 Committal transcript p 2-94.

however, which is in a question-answer format, confirms that Mr White took notes. The last few questions and answers read:

> "I said, 'Do you wish to read these notes of our conversation?'
> He replied, 'No'.
> I said, 'Do you wish to sign these notes?'
> He replied, 'No, I won't sign anything.'"

[14] Mr White accepts that in the interviews he did not caution the applicant that he did not have to answer questions. This was because Mr White had not decided to arrest him for any offence.[3] This was in accordance with police practice at the time. The Judges Rules, which did not have the force of statute, required a caution when "a police officer has made up his mind to charge a person with a crime". Mr White made no such decision, and so there was no requirement for him to give a caution.

[15] He explained at the committal proceeding that the conversations were not electronically or tape recorded because that method was not an "accepted practice" at the time.[4] He also explained that he did not tape record his interview with the applicant on 29 February and 1 March 1979 because he did not have a tape, did not think the police department supplied them at that time, and did not ask for a tape recorder. He was aware that the making of alleged confessions was routinely challenged in court. However, the way he chose to record the interview was an acceptable practice at the time.

The s 439(2) issue

Section 439

[16] I have ruled, on a point of statutory construction, that the *PPRA* provisions relating to questioning of relevant persons do not apply to statements made before the Act became law. If they did, then the applicant's statements to Mr White were not recorded, as required by subsection 436(4) or s 437. Shortly stated, s 436(4) requires the questioning of a "relevant person" to be electronically recorded, if practicable. Section 437 applies if a record of a confession or admission is written. It imposes requirements for the record to be read to the person after an explanation is given, and for the person to be given a copy of the record. The person must be given an opportunity, during and after the reading, to draw attention to any alleged error in or omission from the record. An electronic recording must be made of the reading and everything said by or to the person during the reading, and anything else done to comply with s 437.

[17] The enactment of these and similar provisions reflected the availability and use by the 1990s of electronic recording by police. They also reflect a legislative intent that, save in special circumstances, statements made by a suspect about his or her involvement in the commission of an indictable offence made in the course of being questioned for that purpose should be electronically recorded.

[18] Subsection 436(3) of the *PPRA* provides that:

> "(3) If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence

---

[3] Committal transcript p 2-94,95.
[4] Committal transcript pp 2-90, 2-105.

> against the person in a proceeding only if it is recorded as required by subsection (4) or section 437."

Subsection 439(2) provides that where ss 436 and 437 have not been complied with:

> "the court may admit the record [of the confession or admission] only if, having regard to the nature of and the reasons for the noncompliance and any other relevant matters, the court is satisfied, in the special circumstances of the case, admission of the evidence would be in the interests of justice."

[19] The changes made to the criminal justice system by the introduction of the requirements contained in ss 436 and 437 (as originally included in the *Police Powers and Responsibilities Act* 1997) were, as the applicant submits, "designed to overcome the regular dispute by persons charged with criminal offences as to whether [confessions or admissions] were in fact made." Disputes often arose about whether a person who was questioned by police used the words alleged by police in their oral evidence or, as recorded, in unsigned records of interview or other forms of record. The enactment of the provisions was intended to eliminate such disputes by, as a general rule, making the admissibility of a confession or admission depend upon statements being electronically recorded or upon the electronic recording of the reading of a written record of a confession or admission. Section 439(2) contains an exception to that general rule.

Should the s 439(2) discretion be exercised?

[20] If, contrary to my view, the *PPRA* retrospectively imposed its electronic recording and other requirements, then "special circumstances" exist in this case. They are that the evidence is rendered *prima facie* inadmissible by requirements which were introduced more than 20 years after the making of the relevant statements. The police officers in question were not to know that such a law reform would take place decades later, and could not reasonably be expected in 1976 to adopt recording practices which were only required by a law passed so far into the future.

[21] The circumstances are special in that:

(a) they relate to statutory requirements for questioning which did not exist at the time the questioning occurred, unlike the usual case in which the requirements became law before the statements are made;

(b) the assumed retrospective operation of the requirements operates over a period of more than two decades before the requirements were introduced by statute to an era of different technology and vastly different police practices.

The officers, and Mr White in particular, adopted practices which were common and accepted at the time the statements were made. The matter is different to one in which, say, one week before the requirements of the 2000 Act came into force, and assuming the Act's retrospective operation, there was a failure to comply with its requirements.

[22] As noted, and as the applicant accepts, the *PPRA* requirements were introduced to eliminate disputes. Those disputes arose when individuals claimed, rightly or wrongly, that confessions and admissions had been wrongly attributed to them. It created a *prima facie* rule of inadmissibility if, practically available, electronic means of recording confessions or other statements were not used. Non-compliance with the requirements

does not result in automatic exclusion of such evidence. The Act recognises that there are circumstances in which it is not in the interests of justice to exclude probative evidence of admissions.

[23] If, as the applicant contends, the law has a retrospective operation, so as to render the statements *prima facie* not admissible in evidence, then s 439(2) is available to avoid what would be the injustice of making inadmissible probative evidence which was obtained lawfully and properly. Were it otherwise, the injustice would result of persons not being tried and convicted on the basis of evidence that was lawfully obtained by police who were not aware of, and could not be expected to comply with, statutory requirements enacted decades later.

[24] The interests of justice are served by the admission of probative evidence, provided it does not jeopardise a fair trial. The interests of justice are informed by the public interest in "bringing to conviction the wrongdoer".[5] The interests of justice also are informed by "the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law".[6] However, in this matter curial approval would not be given to disobedience by police of lawful requirements of which they were then aware. Instead, it would involve the admission of evidence which was obtained without complying with requirements which then did not exist and which were introduced into the law of Queensland a few decades later.

[25] I consider that the interests of justice are not advanced by excluding evidence which was not electronically recorded at a time when electronic recording devices were not made available to officers of the Queensland Police Force and, as a matter of practice, were not commonly used to record confessions and other admissions. At the time Mr White spoke to the applicant in South Australia in 1976, electronic recording was not required by law, administrative practice, police guidelines or the Judges Rules.

[26] The fact that Mr White did not use a method of recording in 1976 which legislatures and police authorities only introduced as a requirement some decades later should not render his evidence about the applicant's 1976 statements inadmissible.

[27] The fact that the statements which Mr White says he recorded were not electronically recorded places the applicant at a disadvantage in the sense that he does not have access to an electronic recording which would confirm or contradict the contents of Mr White's statement. Incidentally, Mr White and the Crown are disadvantaged by the absence of such an electronic recording in meeting possibly false allegations that Mr White's report is inaccurate because no such things were said or what was said was inaccurately recorded.

[28] As to the disadvantage and possible prejudice which the applicant suffers because the statements were not electronically recorded in accordance with (I assume for the purposes of argument) retrospective requirements, the applicant is not at a complete disadvantage. He is able to forensically examine Mr White about the circumstances under which he came to be interviewed and what was said during any conversation. He can rely upon the absence of a contemporaneous electronic record and seek to persuade the jury that Mr White's account of what was said in the conversation is inaccurate. The applicant

---

5 *Bunning v Cross* (1977-1978) 141 CLR 54 at 74.

6 Ibid.

also has the benefit of directions including (if the making of the statement is disputed at trial) a warning to the jury of the danger of convicting on the basis of statements which were neither electronically recorded nor adopted by the applicant signing Mr White's notebook.[7]

[29] Notably, in developing the common law so as to reflect the position which best serves the interests of justice, the High Court of Australia did not erect, even long after the events in question in this case, a rule that confessions and other admissions are not admissible unless electronically recorded or signed by the interviewee. Instead, the interests of justice were seen to be best served by a rule that, in general, an appropriate warning should be given to the jury.[8]

[30] If, at the trial of this matter, the applicant contests that he was interviewed by Mr White or contests that he said the things which are recorded in Mr White's statement, then it will be open to the jury, in accordance with their assessment of the evidence and appropriate warnings, to determine whether it is satisfied that the interview occurred and that Mr White's evidence accurately records admissions which were in fact made. I note in passing that it was not put to Mr White at the committal proceeding that he did not interview the applicant or that his statement does not record statements which were in fact made.

Summary: s 439

[31] If the *PPRA* requirements have a retrospective effect, unlimited in time, then s 439(2) may be said to have been enacted to permit, among other things, the admission of evidence in a suitable case in which police obtained evidence in compliance with the law and rules which applied to them at the time.

[32] In the special circumstances in which the assumed retrospective operation of the *PPRA* imposes requirements which were introduced more than 20 years after the interview occurred, I am satisfied that it is not in the interests of justice to exclude apparently probative evidence which the jury may find reliable, namely statements made in the circumstances which Mr White describes.

[33] It would not be in the interests of justice in this case for probative evidence to not be admitted where it was obtained in accordance with the law and practices which applied at the time the evidence was obtained. It is not in the interests of justice to exclude probative evidence of admissions because in 1976 Mr White (and Mr Swindells) did not comply with requirements enacted a few decades later.

[34] For the reasons that follow in connection with the unfairness discretion, there are no other factors relating to the evidence and the circumstances under which it was obtained which lead me to conclude that it is not in the interests of justice for the evidence to be admitted. I am satisfied that, if the 2000 Act applies, then, in the special circumstances of the case, admission of the evidence[9] would be in the interests of justice.

---

7 *McKinney v The Queen* (1991) 171 CLR 468.

8 Ibid.

9 The submissions on s 439(2) proceeded on the basis that the written statement prepared by Mr White, based on his earlier handwritten notes, constitute a record for the purposes of s 439(2).

Application to exclude of the grounds of unfairness

[35] The applicant submits that it would be unfair to admit the statements and that I should exercise my discretion to exclude them. He submits that:

- no information exists as to the circumstances in which he was in custody or came to be interviewed;
- he was questioned about the alleged offences without being warned he did not have to answer, or that his answers could be used against him;
- he was not offered the opportunity or means to obtain legal representation;
- he was denied means of reliably corroborating the detail of the conversations, for example by electronic recording;
- no complete account of the conversation is available;
- no original written recording of the conversation, or a copy, is available;
- no information exists as to whether any other conversation or circumstance was relevant to the making of the statements;
- doubt exists as to when the conversation occurred; and
- doubt exists as to how the written record of the conversation was created.

[36] In oral submissions the applicant advanced the argument that, although Mr White conducted the interview according to the Judges Rules and accepted practices in 1976, "contemporary standards of fairness"[10] should be applied and that the absence of electronic recording was relevant. That said, the applicant acknowledged that if his only complaint was about the dangers of receiving evidence that was not electronically recorded or signed by the interviewee, a *McKinney* direction might have been the appropriate way to deal with the matter.[11]

[37] It was the accumulation of the factors noted above which was submitted to render it unfair to admit the statements.

The unfairness discretion

[38] The essential issue is "whether it would be unfair to the accused to use his statement against him" at trial.[12] The inquiry is concerned with the accused's right to a fair trial. That right might be jeopardised, and the Court might risk that an accused is improperly convicted, if a statement is admitted that was obtained in circumstances which affect its reliability.

---

[10] T 2-8 l 44.
[11] T 2-9 20.
[12] *R v Swaffield* (1998) 192 CLR 159 at 174 [18] and 189 [53].

[39] The unfairness discretion is not confined, however, to questions of reliability. As Toohey, Gaudron and Gummow JJ observed in *The Queen v Swaffield*: "While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted".[13] Mason CJ in *Van der Meer v The Queen* had earlier found unfair the admission of a confession that might not have been made, or not made in the same form, but for the improper conduct of the police.[14]

[40] In *Duke v The Queen*, Brennan CJ explained:

> "If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded. … The fact that an impropriety occurred does not by itself carry the consequence that evidence of a voluntary confession procured in the course of the investigation must be excluded. The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case."[15]

[41] I shall deal with each of the matters raised by the applicant, before turning to their accumulated effect.

The circumstances in which the applicant was in custody or came to be interviewed

[42] These are not entirely clear. It may be that the applicant was in custody in respect of a minor offence for which he was found guilty on 1 March 1976. That he was present at the Darlington CIB when Mr White and his fellow officer, Mr Swindells, attended on 29 February 1976 seemingly is not in dispute. It appears that he came to be interviewed because Queensland police were alerted by South Australian police to his presence. The undisputed evidence is that the two Queensland detectives went to South Australia late on 29 February, 1976. Mr Dubois' brother says that during his stay at the applicant's home in South Australia, he saw the applicant and a man who he understood to be Mr Swindells having a friendly conversation.

[43] Mr White's diary records his travel to South Australia and the subject matters of interviews he and Mr Swindells conducted with the applicant and his partner on 29 February and 1 March 1976. It is quite possible, having regard to the available records, that the interview with the applicant commenced late on the night of 29 February 1976, and resumed the next morning when (according to Mr White's evidence) he said to the applicant that there were "a few other questions I would like to ask you."

[44] Mr White's evidence is that he recorded what the applicant said into his notebook at the time things were said. By contrast, in the case of a 17 April 1975 interview with O'Demspey, White says he took handwritten notes that were shortly afterwards written more fully into his notebook.

[45] The evidence about where and when the applicant was interviewed is plausible. The circumstances in which, and when, the applicant came to be interviewed are not so unclear as to make it unfair (in the sense described) to allow evidence of what he said to be given.

---

[13] At 189 [54]; see also Brennan CJ at 174 [18] – [19].
[14] (1988) 62 ALJR 656 at 662.
[15] (1989) 180 CLR 508 at 513.

The absence of a caution

[46] Mr White did not warn Mr Dubois that he did not have to answer questions. He was not required to do so before questioning him. Mr White was making inquiries and was not minded to charge the applicant. He observed the practice at the time of not doing so, and there was nothing unlawful or improper in that. There is no suggestion that the applicant was unaware of his right to remain silent, or that, if a warning had been given, the conversation would have been any different. It is not unfair to admit the evidence in the circumstances.

Legal representation

[47] There was no requirement at the time for Mr White to offer an opportunity or means to obtain legal representation. There is no suggestion that the applicant was unaware of his right to consult a lawyer, or that, if the opportunity had been given to him, the conversation would not have occurred or would have been any different. It is not unfair to admit the evidence in the circumstances.

Absence of electronic recording or other corroboration

[48] The conversation was not electronically recorded, but it was not the practice to do so at the time and there is no evidence that recording facilities or devices were made available to Mr White. The evidence is that they were not provided to him as a Queensland police officer and there is no evidence that it was the practice in South Australia to use such technology as it existed in 1976 to record such an interview.

[49] The applicant is recorded as having declined to sign the notebook record, after being given an opportunity to do so. A contrary version was not put to Mr White at the committal or before me. If, as appears to be the case on the evidence before me, the applicant was offered the chance to read the notes of the conversation and to sign them, then he deprived himself of the opportunity to have a verified account of the detail of the conversation.

The completeness of the record

[50] Mr White's evidence is that the complete conversation was recorded. I have no reason to reject this evidence. The conversation, as recorded in the notebook and later placed in statement form, appears to have begun with Mr White introducing himself to the applicant. This aspect does not make it unfair for the prosecution to rely on Mr White's evidence about his conversation with the applicant.

The original notebook

[51] The 1979 typewritten witness statement of Mr White was based on his notebook. Any suggestion that the statement did not record what was in turn recorded in Mr White's notebook might have been addressed after the applicant was charged with murder in 1980 and an indictment presented against him. Mr White says that he saw copies of his notes in 2014 when he prepared his statement,[16] and that the original notebook was tendered before the coroner in 1980, which was the last time he saw the original documents. The notebook may well have been available in 1981 after the applicant was first charged with the murder of the McCulkins. The fact that the original notebook is no longer seemingly

[16] Committal 2 -104.

available does not mean that it was not available, if required by the applicant, during the inquest or his original prosecution for murder.

[52] The applicant did not give evidence before me that no conversation occurred with Mr White or that the conversation is inaccurate. The applicant may adopt that course at the trial, but presently I do not have reasonable grounds to doubt that the conversation occurred.

[53] Mr White has given evidence of the recording of the conversation in his notebook, and its subsequent recording in the form of his statement. I am not persuaded that it is unfair to allow Mr White to give evidence of the statements that he says were made to him in 1976 because his original notebook is not now available.

The reliability of the evidence

[54] The applicant does not contend that the evidence is inherently unreliable or that factors affecting the reliability of the evidence are such that it should be excluded on the grounds of fairness. The evidence is apparently reliable, having regard to other evidence, and the jury can assess its reliability, with the benefit of cross-examination of Mr White about the circumstances under which it was obtained and after receiving suitable warnings in accordance with *McKinney's* case.

Overall assessment of alleged unfairness

[55] I am concerned with applying contemporary requirements for a fair trial, which may be different to the requirements of a fair trial some decades ago. I am not persuaded that it is unfair, according to contemporary standards for a fair trial, to permit the admission of evidence of police questioning which was conducted in accordance with the law and accepted practices at the time the questions were asked.

[56] The legislature, in my view, did not choose in 2000 to subject police questioning which occurred in 1976 to statutory requirements which were thought appropriate to conditions in 2000, including modern police practices and available technology.

[57] The problems associated with unsigned records of interview, and the potential unfairness to an accused of having such evidence relied upon at trial, have been addressed by the general law by the introduction of a *prima facie* requirement for a warning in accordance with *McKinnney*.

[58] The common law of Australia has not, in the interests of securing a fair trial or for other public policy reasons, developed a rule that such evidence is unfair and inadmissible. Instead, such evidence is subject to appropriate warnings. The common law has not developed a *prima facie* rule for the exclusion of such evidence, which may be proved at trial to be reliable and highly probative. Instead, the common law allows, as a general rule, the reception of such evidence, subject to appropriate directions. That rule was developed in 1990 to reflect "changed social conditions, including developments in technology and increased access to means of mechanical corroboration."[17] It is not obvious that the *prima facie* rule of practice for a warning, based on the ready access to and acceptance of electronic recording by 1990, requires a warning to be given in relation to a 1976 conversation, when such technology was not so advanced, accessible or

[17] *McKinney v The Queen* (1991) 171 CLR 468 at 478.

accepted as a sound police practice. I shall assume, however, in the applicant's favour, that a *McKinney* direction should be given in relation to evidence about statements he reportedly made in 1976.

[59] Mr White did not act illegally or improperly in conducting the questioning which he did on 29 February and 1 March 1976 and in not electronically recording his conversation with the applicant. The evidence before me indicates that Mr White made notes, which the applicant was not prepared to sign.

[60] The concerns raised by the applicant are capable of being explored at the trial, by cross-examination of Mr White about the circumstances under which he came to interview the applicant in South Australia and the conduct of that questioning.

Conclusion – discretion to exclude on the grounds of unfairness

[61] I am not satisfied that the exclusion of Mr White's evidence about statements which he says were made to him in South Australia in 1976, as recorded in his notes made at the time and later put in statement form, is necessary to ensure the applicant a fair trial.

[62] A fair trial is not jeopardised by the reception of probative evidence, which was obtained in accordance with legal requirements for its reception, subject to appropriate warnings to the jury. Considerations of fairness, including the applicant's right to a fair trial, do not require its exclusion. Instead, the evidence should be subjected to appropriate scrutiny at trial, and received subject to directions which the common law of Australia has developed since 1976 in relation to such evidence.

[63] Taken together, the matters raised by the applicant do not persuade me that this evidence should be excluded. The evidence is probative, apparently reliable and was properly obtained. I am not satisfied that it would be unfair to the accused to use the evidence against him. I dismiss the application to exclude the evidence of Mr White and Mr Swindells.