SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ferri* [2019] QCA 67
PARTIES:	**R** **v** **FERRI, John Michael** (appellant)
FILE NO/S:	CA No 211 of 2018 DC No 425 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 19 July 2018 (Muir DCJ)
DELIVERED ON:	18 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2019
JUDGES:	Sofronoff P and McMurdo JA and Bradley J
ORDERS:	**1. Appeal allowed.** **2. Conviction be quashed.** **3. A re-trial be ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of one count of dangerous operation of a vehicle causing grievous bodily harm – where a police record of interview with the appellant contained inculpatory and exculpatory statements – where the prosecution sought to tender the record subject to excising certain exculpatory statements on the basis that they were inadmissible hearsay – where the trial judge ruled that the exculpatory statements should be excised – whether the trial judge erred by not ordering that the whole record be admitted – whether the prosecution must tender a whole record of interview CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO A MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted of one count of dangerous operation of a vehicle causing grievous bodily harm – where the appellant sought to argue at trial the defence of automatism under s 23(1)(a) *Criminal Code* on the

basis that he was not conscious or was in a trance – where there was some evidence in support of that defence – where the prosecutor submitted that it was not enough for the appellant to raise the defence and that some evidence of his condition at the time of the offence supported by medical opinion was required before automatism could be properly raised – where the trial judge, on the basis of the prosecution's submission, directed the jury not to consider the possibility that the appellant was not conscious – where the trial judge redirected the jury to consider whether automatism was caused by involuntary or spastic movement only – whether a trial judge has the power to prevent even a weak defence case being considered by a jury – whether the trial judge erred by preventing the defence case from being considered by the jury – whether the trial judge erred by failing to redirect the jury consistent with the case for automatism put by the defence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where the prosecutor excluded from a police record of interview with the appellant evidence of the defendant's attempts to impress upon his police questioners that he was in a trance-like state at the time of the alleged offence – where the prosecutor then submitted to the jury that the appellant was not credible as he had failed to consistently reference this trance-like state – where the evidence excluded from the interview record effectively gagged the appellant's counsel at trial causing them to be unable to falsify the prosecutor's false submission – whether the prosecutor's submission was improper – whether the prosecutor failed to uphold a duty to be familiar with basic principles of evidence and judicial powers in criminal trials

Criminal Code (Qld), s 23

Cooper v McKenna; Ex parte Cooper [1960] Qd R 406, distinguished
Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, applied
Kilby v The Queen (1973) 129 CLR 460; [1973] HCA 30, followed
R v Falconer (1990) 171 CLR 30; [1990] HCA 49, distinguished

COUNSEL: R A Pearce for the appellant
C N Marco for the respondent

SOLICITORS: Cooper Maloy Legal for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant was charged with dangerous operation of a vehicle causing grievous bodily harm and a jury found him guilty of that offence.

At his trial the only issue raised for the jury's consideration was whether the Crown had proved that the appellant had voluntarily steered his car into the path of oncoming traffic.

[2] The evidence was in tight compass. At about 2.30 pm on 9 May 2014 the appellant was driving his car along Salerno Street, Surfers Paradise. His wife was in the passenger seat next to him. The appellant was taking her to a doctor's appointment. He entered a roundabout on the intersection between Salerno Street and Gibraltar Drive and began to cough violently. His wife offered him a bottle of water and he was able to say that he did not want it. The car left the roundabout and continued along Salerno Street. It then veered into oncoming traffic on Salerno Street and crashed into a van, seriously injuring its driver.

[3] The day was clear. Both vehicles were roadworthy. There was nothing in the appellant's car that might have interfered with his driving. The appellant had been driving for almost 40 years. He was unaffected by drugs, alcohol or fatigue and he was not speeding. The data from an electronic module in the appellant's car showed that in the five seconds before the crash his car had accelerated from 34 km/h to 47 km/h. It also showed that the appellant had applied the car's brakes half a second before impact.

[4] The appellant's wife, Ms Karen Nelson, said that as the car approached the roundabout her husband began to cough. She said that the coughing stopped as they departed the roundabout. The cough was a "normal cough" but "it was continued". Her husband's hands remained on the steering wheel throughout the whole episode. He turned towards her while he coughed and then turned to look straight ahead. He stopped coughing and she felt the car accelerate. Ms Nelson later told police that she "couldn't get through to him" and that her husband did not black out but he was "in some type of a trance or determined to keep going". She explained that "it was just like tunnel vision".

[5] The first police officer on the scene was Constable Daniel McShane. He checked to see that the appellant and his wife were safe. The appellant said to him, "I think I may have had a coughing fit and blanked out and then I was here." Constable McShane recorded those words in his notebook. Paramedics attended to give first aid. One of these, Ms Kerry Blank, tended to the appellant. He was fully conscious. He told her that he had had a coughing fit which made him lose control and veer off to the side of the road.

[6] About two weeks after the crash, Senior Constable Cornish and Senior Constable Hutchinson interviewed the appellant. Senior Constable Cornish asked the first question about the facts of the case:

> "SCON CORNISH: … Ok um as I explained to you earlier I am conducting an investigation to relation to a ah traffic collision around about 02:35PM on Friday the 9th of May. Can you please outline to me um to the best of your knowledge what you recall about this incident?
>
> FERRI: Um I came around the roundabout ah and then I had a coughing fit and that's all I remember. I've heard different things but I don't know what it, I can't remember a thing.
>
> SCON CORNISH: ***What have you heard?***

> ***FERRI: Um my wife said to me that um we s-, when we were at the doctor the other day, she said she tried, I had the coughing fit and I just went into a trance and she thinks I might've, my foots left the brake and accelerated and that's when I heard the collision.*** I can't remember much, I [INDISTINCT] black out, I just had that coughing fit, it's just come.
>
> SCON CORNISH: Did you say you didn't black out?
>
> FERRI: No didn't black out because I was, when someone hit, opened that door I spoke to them straight away."

[7] The appellant was then asked questions about the journey to the point of the crash, about his familiarity with the road and with his car, whether the car had any faults and other matters of that kind. The appellant's answers revealed no explanation for the incident. Senior Constable Cornish then invited Senior Constable Hutchinson to ask any question that he might have at that point:

> "SCON HUTCHISON: Ah just the driving? How do you know you had a coughing fit?
>
> ***FERRI: 'Cause I was coughing, my wife said to, my wife said I started coughing and I--***
>
> ***SCON HUTCHINSON: So it's from what your wife told you about the coughing fit? Or you actually physically recall having?--***
>
> FERRI: I recall the coughing.
>
> SCON HUTCHINSON: Ok.
>
> FERRI: [INDISTINCT]
>
> SCON CORNISH: So you c--
>
> FERRI: I recall the coughing but I dunno when it s-, when it stopped or anything else. From when it started I can't remember when it stopped.
>
> SCON CORNISH: Ok.
>
> SCON HUTCHISON: Ok.
>
> FERRI: That's when I, all I know is when I had it I heard the bang."

[8] Senior Constable Cornish resumed the questioning as follows:

> "SCON CORNISH: So you've kind of h-, as you said half way through the roundabout you started your coughing fit?
>
> FERRI: Mmhmm.
>
> SCON CORNISH: You remember you started coughing at that?--
>
> FERRI: Yes.
>
> SCON CORNISH: And then--
>
> FERRI: But it could have started before but around that--

SCON CORNISH: Around that, and then as you've sort of exited the roundabout that's when you've--

FERRI: Yeah.

SCON CORNISH: Sort o--

FERRI: Run into a trance my wife said.

SCON CORNISH: Lost what's happened--

FERRI: Yeah.

SCON CORNISH: And, and then you've yeah you've hit, you've collided with the other vehicle. Sorry Kyle.

SCON HUTCHINSON: You're right, well so-, your wife mentioned to you in Hawaii that you're coughing was getting worse, did you experience a coughing fit of the same magnitude?--

FERRI: No.

SCON HUTCHINSON: To cause you to--

FERRI: No.

SCON HUTCHINSON: And you've, you've never--

FERRI: Never had it.

SCON HUTCHINSON: Had it since.

FERRI: No it's first time."

[9] After some questioning directed to the appellant's medical condition, the following exchange occurred:

"***SCON HUTCHINSON: Um ah were, you said before um your wife didn't affected, [INDISTINCT] you remember. Have, are you aware if, when you went into that trance like state um have you, has your wife said that she had to try to g-ah control the steering at all?--***

FERRI: No, no.

SCON HUTCHINSON: Or she just didn't have time to--

FERRI: Yeah it was too fast."

[10] The questioning continued on the subject of the appellant's health and medications that he was taking, and then Senior Constable Cornish returned to the matter of the coughing fit:

"***SCON CORNISH: That's alright, I've just a few things. You mentioned before and I know this is a, a bit of, I know it is--***

FERRI: That's alright.

SCON CORNISH: Outright hearsay um you've said that you can't remember after the, in between when you started the coughing fit--

FERRI: Mmhmm.

SCON CORNISH: At the roundabout and at the time of the collision but you were privy to a conversation between your wife and her doctor--

FERRI: No well--

SCON CORNISH: Or--

FERRI: All I hear was Ka-, all I heard and this was right on the bang was John, and that was it.

SCON CORNISH: Ok--

FERRI: What my wife said to me is, you had the coughing fit and she looks, she tried to see if I was talk-, was talking to her and I wouldn't acknowledge her. I couldn't hear her voice until the time she said, John look out. And she thinks I've [put my foot off the break [sic] and accel-, accelerated that's what she thinks I've done, but I can't remember doing it.

SCON CORNISH: Ok you mentioned before that she um your wife obviously had suffered some injuries.

FERRI: She suffered a lot of injuries.

SCON CORNISH: Some injuries from it um and she was speaking to a doctor and she told her doctor what had happened--

FERRI: [INDISTINCT]

SCON CORNISH: You mentioned something before and was that, that conversation you were just [INDISTINCT]--

FERRI: That's while I was sitting next to her.

SCON CORNISH: Then that's that conversation when [INDISTINCT]--

FERRI: that's when I didn't know if-,and she said she thought I was angry at her 'cause what she said and I said I'm not angry I just want to know what happened.

SCON CORNISH: Alright.

FERRI: It's in my back of my brain I know I could probably bring it out later and that's about it but I got, I don't know what really happened."

[11] The appellant was asserting in different ways that his actions in steering the car into oncoming traffic were involuntary. He was saying that he had suffered a coughing fit and had lost his sense of situational awareness. His physical state at the time of his loss of control was variously described by him as "blanked out" (to Constable McShane), "a coughing fit and that's all I remember", "run into a trance" and "trance like state" (to Senior Constables Cornish and Hutchinson) and "a coughing fit which made him lose control" to the paramedic. Ms Nelson described his state as one in which she "couldn't get through to him" and as "some type of a trance or determined to keep going" and "just like tunnel vision". He was not saying that he lost control while coughing.

[12] After the jury had been empanelled, the prosecutor told the judge that he was going to tender the record of interview but that he wanted to "excise" those parts of it that were "hearsay". The statements that the prosecutor wished to exclude from the jury's consideration were the parts that exculpated the appellant. Those are the parts that I have emphasised in the quotations that I have set out.[1]

[13] Mr Pearce, who appeared for the appellant at the trial and on the appeal, objected to this course and submitted that if the prosecutor wished to tender the record of interview as evidence against the accused he had to take the good with the bad and was obliged to tender the whole record. In support of this proposition he cited *Jack v Smail*,[2] *R v Cassell*[3] and *R v Soma*.[4]

[14] The prosecutor frankly admitted to her Honour that he was "not familiar with that law … to be honest." He said that he did not have "any cases in relation to this legal argument, but simply on the basic principles of hearsay, those other passages are inadmissible". He submitted that, insofar as the appellant had been repeating what his wife had told him, his statements were inadmissible hearsay and, in relation to the wife's statement that the appellant was in a trance, "[s]he's swearing the issue. It's a matter for the jury whether, in fact, he had a trance".

[15] Mr Pearce submitted that, in any event it was relevant that the appellant had made the statements. The prosecutor's answer was that Mr Pearce could ask the appellant's wife about those things.

[16] The learned trial judge asked the prosecutor whether he was submitting that "the law that applies is not, as Mr Pearce … submitted … that … once that confession goes in, it goes in warts and all". The prosecutor answered "Well, that's so". He cited no authority for this proposition.

[17] This application by the prosecutor was made, as I have said, at the beginning of the trial rather than by way of a pre-trial hearing. Consequently, the learned trial judge was obliged to deal with it immediately. She considered the matter during the lunch adjournment and, upon the resumption of the hearing, her Honour ruled in favour of the prosecution. Relevantly, her Honour said:

> "In my view, the statements identified, with some qualification – which I will discuss with the parties shortly – are not admissible and I order that they be excluded. They do not fall within any exception to the rule against hearsay, and the fact that they are contained in the record of interview does not make them admissible. To the extent that it is an issue in trial that the defendant's wife may be changing her story about what happened with the coughing fit, again that does not make these statements otherwise admissible. The defendant's counsel can cross-examine her on those issues at trial."

[18] The Crown called Constable McShane, Senior Constable Cornish, Ms Nelson (and other witnesses not relevant to this appeal). The record of interview was played. It had been edited in the way desired by the prosecutor. Some evidence was led from the doctor who treated the appellant at the Gold Coast University Hospital immediately

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1 Other parts were also sought to be excised and were excised, but they are not material for this appeal.
2 (1905) 2 CLR 684.
3 (1998) 45 NSWLR 325.
4 (2003) 212 CLR 299 at 309 per Gleeson CJ, Gummow, Kirby and Hayne JJ.

after the crash. She said that the appellant had told her that he had a coughing fit and crossed into the path of oncoming traffic. She said that he had denied any loss of consciousness. She said that it was unlikely that somebody might lose consciousness and not know that that had happened, but acknowledged the possibility.

[19] Defence counsel cross-examined the doctor about the possibility that the appellant was suffering from some kind of medical condition that might have been influential in what had happened. He also quizzed Senior Constable Cornish about whether he had made any investigations into the appellant's medical condition. That line of questioning led nowhere.

[20] The appellant did not give or call any evidence. Her Honour heard submissions about the directions that she should give the jury. Mr Pearce submitted that the appellant's case was that he had had a coughing fit and that had caused him to lose control of the car and veer onto the wrong side of the road. He stressed that that did not mean that the appellant was still coughing when he lost control. He pointed to the evidence of Ms Nelson that the appellant had been in a "trance" and that he had "tunnel vision" when he lost control. He pointed to the appellant's statement to Constable McShane that he "blanked out". He also relied upon the fact that, otherwise, the appellant's acts were unexplained and inexplicable. He submitted that the fact that the appellant had said that he had not lost consciousness did not necessarily mean that his act of steering the car into a crash had been voluntary. He pointed out that the burden of proof was upon the Crown to prove to the satisfaction of the jury that the defendant voluntarily steered his car into oncoming traffic.

[21] In response the prosecutor read to the judge an annotation from *Carter's Criminal Law of Queensland* as follows:

> "Post-traumatic automatism can amount to a defence in a dangerous driving charge, but it is a defence which must be closely scrutinised. Black-out is one of the first refuges of a guilty conscience and a popular excuse; see *Cooper v McKenna; ex parte Cooper* [1960] QR 406."

[22] Seemingly in reliance upon that passage, the prosecutor agreed with the proposition put to him by the learned trial judge that it was the Crown's submission that "this is not a case where it goes to the jury". In support of his submission, he also referred her Honour to *R v Falconer*.[5] The prosecutor managed to persuade the judge that "it's not enough for an accused merely to assert that his acts were involuntary or that he suffered a loss of memory. Evidence of his condition at the time of the alleged offence supported by some medical opinion will be required before an issue of sane automatism can realistically be said to be raised." Her Honour's ruling was as follows:

> "Now, I have considered section 23 and the authorities I was referred to in the submissions, and in the context of the evidence in this case, that is the evidence of the defendant – of what the defendant said at the roadside to the paramedic and to the police and Ms Nelson's evidence and the evidence from the doctor we heard today, taking this evidence at its highest, I'm satisfied that there is insufficient, if any, evidence that the defendant was suffering from an unknown

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5 (1990) 171 CLR 30.

> medical affliction which caused him to blank out or to go unconscious which caused or contributed to the accident."

[23] By way of clarification, her Honour observed that she was "certainly satisfied that section 23 ought to go because there is evidence of coughing … [b]ut not, as was submitted, an unknown medical affliction caused – which caused him to go unconscious or black out that caused or contributed to the accident". That ruling was undoubtedly correct. There was no evidence that the defendant was suffering from any kind of medical condition.

[24] In his address to the jury, the prosecutor submitted that when a person coughs while driving a car "[w]e don't end up generally with wild physical movements such that it would pull a car severely to the right and into oncoming traffic". He said that the appellant "was conscious, according to [Ms Nelson], and he was looking straight ahead at the road, but that's not to say that his mind might not have been elsewhere, and if it was, that's dangerous".

[25] The prosecutor said:

> "If you're going to maintain an untruth, the difficulty is repeating it correctly on numerous occasions and at every single time. If he didn't blank out or he did blank out, then he – sorry, if he didn't blank out or black out, then he must have been conscious and in control of that vehicle. That's what he claimed – that's what he claimed to everyone except McShane who was at the scene - that he was awake. The point of that, I suppose, ladies and gentlemen, is really you can use that – his inconsistency, I suppose – as a tool to assess his credibility when you're considering his version of events. In my submission, that inconsistency puts a dark cloud over his credibility overall, so you can use that lack of credibility, in my submission, when you're juxtaposing or putting his evidence against that of Karen Nelson."

[26] In other parts of his address, the prosecutor referred to the appellant's various statements about "blanking out" and invited the jury to reject them. He emphasised that, on the evidence, the coughing fit had ended by the time the car left the roundabout.

[27] Mr Pearce submitted that the jury should have regard to the coughing fit as the source of the appellant's loss of control. He said:

> "See, he told Mr Cornish he didn't think he had lost consciousness but you might think there's some doubt about that. You might, at the end of the day, think there's some real doubt about whether he was conscious throughout this event or not, whether you've been satisfied beyond all reasonable doubt about that. At the very least you might think that the effect of his coughing went beyond that light-switch-type scenario. Didn't just stop when the physical act stopped. You might think there's features of the evidence that suggest that at some point to do with that coughing, he has lost control of his body."

[28] Mr Pearce was unable to refer to the parts of the record of interview that would have challenged the prosecutor's attack on his client's credit based upon inconsistency.

[29] The learned trial judge directed the jury about s 23 of the *Criminal Code* (Qld). After quoting the relevant part of the provision, her Honour said:

> "Relevant in this case is whether a coughing fit include[s] an involuntary or spastic physical movement of the defendant so as to cause his vehicle to veer into the path of the Toyota LiteAce van."

and said that the jury should ask itself

> "…if the prosecution has excluded beyond a reasonable doubt that possibility of an unwilled reflex or automatic motor action of the defendant as being the cause of the collision."

[30] This direction about s 23 had been settled by both counsel to reflect her Honour's earlier ruling.

[31] Her Honour then reminded the jury about the relevant evidence. She referred to the evidence of Constable McShane and the appellant's statement to the paramedic that he "had a coughing fit which made him lose control". She referred to Ms Nelson's evidence that "all of a sudden he wasn't coughing any more and he just turned – turned the car and put his foot on the accelerator and just kept going and smashed into the van". Her Honour also pointed out the evidence about the appellant's statement to the paramedic that "he didn't black out because he spoke to a nurse when she opened the door straightaway".

[32] Her Honour then gave the jury the following instruction:

> "Mr Pearce submitted to you that:
>
> > There might be some doubt whether the defendant was conscious throughout this event.
>
> You must ignore this submission. There is no evidence that the defendant blanked out or was unconscious such that it caused or contributed to the collision. The issue is, I told you, whether or not the coughing led to the defendant not being in control."

[33] The jury retired. After four hours of deliberation the jury sent a note to the judge as follows:

> "Is it just the coughing that we need to establish caused the accident or that the defendant was voluntarily in control of the vehicle <u>immediately</u> prior to the collision?" (emphasis in the original)

[34] After hearing submissions from counsel, her Honour directed the jury as follows:

> "Thank you for your question, ladies and gentlemen. I've marked this for identification G. And your question is, is it just the coughing that we need to establish caused the accident or that the defendant was voluntarily in control of the vehicle immediately prior to the collision? Now, the first part of your question that is, is it just the coughing that we need to establish caused the accident – and I'm not being critical of you for this, reverses the onus. It is not for you to establish that the collision was caused by the coughing. It is for the Crown to [indistinct] that possibility.

> So you need to be satisfied beyond reasonable doubt that there was no involuntary or spastic physical movement of the defendant as a result of the coughing so as to cause his vehicle to veer onto the path of the Toyota. And if you're not so satisfied, you must find the defendant not guilty. In practical terms then, and this comes into the second part of your question, if you look at the last page of exhibit G, I've set out there in practical terms the question then is whether you are satisfied beyond reasonable doubt that the defendant was voluntarily in control of his vehicle immediately prior to the collision. And if you are so satisfied, then you would find the defendant guilty.
>
> Now if you want to, of course, take some time to discuss the matter again and if they [*sic*] are any more questions that arise and if you feel that I haven't answered your question, then don't hesitate to rewrite it another way and we can deal with it again. I can see that there are some puzzled looks perhaps on your faces. So I'll ask the Bailiff to take you back outside and if you want me to answer the question again or answer another question, then I will do so."

[35] Ten minutes later the jury returned a verdict of guilty.

[36] The appellant has raised two grounds of appeal. First, he contends that her Honour erred in acceding to the prosecutor's intention to exclude from evidence parts of the record of interview before tendering it as part of the Crown case. Second, he submits that her Honour erred in directing the jury not to consider the possibility that the appellant might have suffered a momentary loss of consciousness.

[37] The prosecutor's submission to justify his tender of a censored version of the record of interview was misconceived and should not have been made. It has long been established that if the Crown wishes to tender a record of interview which contains a defendant's admissions then it must tender the whole record including any parts that are exculpatory.

[38] This rule is an instance of the more general rule that when any record is tendered, the party tendering it must offer the whole record in evidence because words other than those relied upon by the tendering party may affect the sense and import of all that was said.[6] As the learned editors of *Wigmore on Evidence* put it, a tribunal of fact must consider the whole record, otherwise there can be no certainty that the true sense and effect of the record has been understood.[7]

[39] Writing in 1716, Serjeant Hawkins stated that the principle was, even by then, a settled one:

> "It seems an established rule that, wherever a man's confession is made use of against him, it must all be taken together and not in parcels."[8]

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6 *Wigmore on Evidence*, Chadbourne Revision, 1978, Vol. VII at 606; see *R v Paine* (1696) 5 Mod Rep 163 at 165; *The Queen's Case* (1820) 129 ER 976 at 981; *Thomson v Austen* (1823) 2 Dowl & R 358 at 361; *Johnson v Powers* (1868) 40 Vt 611 at 612.

7 *supra*, at 601; the same text cites as a modern application of the principle the inadmissibility of an incomplete version of a tape recording: see at 604 footnote 9.

8 *Pleas of the Crown*, cited at *Wigmore on Evidence*, *supra*, at 623.

[40] The only exceptions are parts of such a statement that are irrelevant and parts that are more prejudicial than probative are inadmissible.

[41] The principle remains applicable today. The Court of Criminal Appeal of South Australia applied it in 1937 in *R v Karpany*[9] and applied it again in *Spence v Demasi*.[10] The Western Australian Court of Criminal Appeal applied it in *S v The Queen*.[11] In *Kilby v The Queen*,[12] Barwick CJ said that to the extent that a record of interview contains material that is relevant, it is admissible subject to the exclusion of irrelevant and inadmissible material. The reference to "inadmissible" matter must be understood as a reference to statements that are irrelevant to any issue, or that would be unfair to tender against an accused; this is apparent from his Honour's statement that "statements connecting the story it tells" are admissible as part of such a record. Moreover, notwithstanding the form of the exculpatory statements, once tendered by the prosecution, they become proof of the truth of their contents.[13] Of course, the weight to be given to such statements is another matter.

[42] The basis for the admission of incriminating statements in a record of interview against an accused is not the same as the basis for the admission of exculpatory statements in favour of an accused. It has been said that out-of-court admissions and confessions are admissible despite their character as hearsay because "what a party himself admits to be true [against that party's interest in the case] may reasonably be presumed to be so".[14] While that reasoning is apt to apply to an admission made with knowledge, at the time that it was made, that the statement was adverse to the maker's interests in the dispute, the same rationale would not apply to such a statement made at a time when it lacked that significance. Nevertheless, an admission is admissible even though, when it was made, there was no dispute and it was not then patently against the interests.

[43] The true rationale, as explained in *Wigmore on Evidence*,[15] is that the fundamental objection to the admissibility of hearsay does not apply to admissions and confessions. Unlike a statement made by a third party that is sought to be tendered as hearsay, an actual party to the litigation may elect to give evidence to challenge the statement attributed to him or her or may elect to give evidence to explain the context in which a statement was made. Therefore, unlike the case of an absent hearsay representor, there is no lack of opportunity for the party against whom an admission or confession is tendered to test or to challenge the reliability of such hearsay evidence. The same principle renders admissible an out-of-court prior inconsistent statement of a party, or of a witness, who is giving evidence. A party may go into the witness box to challenge such a statement. A witness being cross-examined has the same advantage immediately. The underlying objection that renders hearsay statements inherently unreliable, namely their immunity against being tested by cross-examination, simply does not apply in such cases.

[44] Self-serving out-of-court statements are generally inadmissible although there are exceptions, such as when they are relevant to rebut an allegation of recent

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9 [1937] SASR 377 at 379.
10 (1988) 48 SASR 536 at 541; see also *Barry v Police* (2009) 265 LSJS 326.
11 (2002) 132 A Crim R 326 at [26].
12 (1973) 129 CLR 460 at 472-473.
13 *R v Mule* (2005) 221 ALR 85 at [14]; *Lopes v Taylor* (1970) 44 ALJR 412 at 422 per Gibbs CJ; *R v Callaghan* [1994] 2 Qd R 300 at 302 and the cases there cited.
14 *Cross on Evidence*, 8th ed., at [33440].
15 *supra*, Vol. IV at 4.

fabrication. However, self-serving statements made as part of a larger set of statements containing admissions or confessions that have been tendered are admissible in order to ensure that the tribunal of fact has the whole sense of the document.[16]

[45] The basis for the admissibility of self-serving statements which are part of a record of interview does not lie in whether such statements would be admissible as a matter of form if the accused were to tender them as discrete pieces of evidence in the accused's own case. Their admissibility lies in their potential to ensure that the tribunal of fact understands properly the meaning and significance of the statements relied upon as incriminating statements by the tendering party.

[46] This is consistent with the proposition that an admission by an accused that is based upon what the accused has been told – that is to say, an admission based on hearsay – is admissible. Whether the accused admits, for example, that goods in possession are stolen because the accused actually stole them, or whether the accused makes the admission because the accused was told by somebody else that they were "hot" makes no difference. Both statements may be admissible as admissions although, of course, the weight that each type of statement carries may differ.[17]

[47] If the Crown wishes to tender a record of interview, or other statements by an accused, it is not entitled unilaterally to choose to tender only those parts of the statement that happen to help its case. Nor is it a matter for a trial judge to censor such evidence. In general, subject to the exclusion of irrelevant statements and the exclusion of statements that would be unfair to the accused to allow into evidence and, perhaps some other categories, the whole statement must be tendered.

[48] It is a curiosity of this case that, while the prosecutor strenuously sought to exclude the appellant's hearsay statements contained in the record of interview, the prosecutor made no objection to defence counsel's leading exactly the same hearsay evidence from Senior Constable Cornish, who related what Ms Nelson had told him. He was the only witness in the case to give evidence about what Ms Nelson observed and his evidence about that was entirely hearsay.[18]

[49] Her Honour's exclusion of the appellant's statements that he made during the interview, at the invitation of the Crown prosecutor, was an error of law.

[50] Ms Marco of counsel, who appeared for the Crown on the hearing of the appeal, did not seek to maintain the conviction on the basis that this error, if established, did not result in substantial miscarriage of justice. In my respectful opinion she was right not to do so. The exclusion of this evidence deprived the jury of important contextual information. It is true that the appellant acknowledged to police that he had not *blacked out*. He had never told anyone that he had. He told Constable McShane that he might have *blanked out*. That expression, the precise meaning of which was not explored by the Crown, was capable of being understood

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16 If a record of interview contains statements that are solely self-serving then, in general, it will be inadmissible: *R v Callaghan* [1994], *supra*, at 302 per Pincus and Thomas JJA.

17 *Mabbott v The Queen* [1990] WAR 323 at 331-332 per Kennedy J with whom Brinsden and Nicholson JJ agreed; see also *Anglim & Cooke v Thomas* [1974] VR 363; *R v Brady* (1980) 2 A Crim R 42.

18 As Mr Pearce candidly acknowledged during oral argument, he wished to avoid questioning Ms Nelson as much as possible, she being estranged from the appellant, and so he elicited her evidence in the form of hearsay from Senior Constable Cornish who had taken a statement from her.

consistently with the state described by Ms Nelson as a "trance" and as "tunnel vision". Yet the jury was denied this important evidence.

[51] The passage in which the appellant told police that his wife had told him that he "had a coughing fit and [he] just went into a trance and she thinks [he] must've, [his] foot's left the brake and accelerated and that's when [he] heard the collision" was particularly important because it connected the fit of coughing, which had passed, to the immediately following sensation experienced by the appellant, during which he claimed that he was not in voluntary control of his car. Also important was one of the questions put by Senior Constable Hutchinson. Being aware of what the appellant was saying in its entirety, an advantage denied to the jury, Senior Constable Hutchison understood that the substance of what the appellant was telling him was that he had gone "into this trance like state" and had lost control of the car. This was consistent with what he had said to Constable McShane, to the paramedic and to the doctor. Senior Constable Hutchinson even asked the appellant whether, while he was in that state, Ms Nelson had tried to take control of the car.

[52] The excluded hearsay would not merely have proved that Ms Nelson had told the appellant a fact. His evidence constituted his actual assertions about his state of awareness. That he made his assertion by reference to his wife's observations did not make any difference.

[53] These were matters for the jury to think about in considering the appellant's real case, which was that he had suffered a severe coughing fit, of a kind he had never experienced before, and that, having stopped coughing, he had not recovered his situational awareness sufficiently before he lost control of the car. It was common ground that the coughing fit had stopped before the car had left the roundabout. The only question was whether its effects had persisted thereafter so as to deprive the appellant of his power to control the car. Yet the jury was not allowed to consider this question although the jury showed, by its own note to the judge, that it was acutely aware that this was the important issue in the case and, indeed, the only issue in the case.

[54] The exclusion of this evidence materially prejudiced the appellant's chances of acquittal and resulted in an unfair trial. Instead, absent this evidence a guilty verdict was almost inevitable.

[55] There is another disturbing feature of this trial.

[56] As appears from paragraphs [21] and [22] above, the prosecutor submitted to the learned trial judge that she ought not allow the appellant's counsel to put to the jury a case based upon his loss of consciousness at the point of time at which he lost control of the car. He supported this submission by quoting an annotation from *Carter's Criminal Law of Queensland* and by giving her Honour a copy of *R v Falconer*.[19]

[57] The annotation relied upon appears in that part of *Carter* that is concerned with sane and insane automatism. *Cooper v McKenna; Ex parte Cooper*,[20] a case referred to in that part of *Carter*, was concerned with an accused who claimed that he had suffered a head injury on the day he drove his car along a footpath, "sending people

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19 *supra*.

20 [1960] Qd R 406.

screaming into doorways and the roadway". He claimed that he had blacked out and that his driving had been involuntary. A magistrate acquitted him and the prosecutor sought review of the acquittal by way of an order to review. The issue before the Full Court was whether, in such case, the onus of proof lay on the Crown to negative the application of s 23, or whether it lay on the accused to prove a defence under s 27, and so the case was utterly irrelevant to the present case. So too is *R v Falconer*. That was also a case about the intersection between s 23 and s 27 in cases of temporary or permanent "disease of the mind" or "natural mental infirmity" amounting to a form of what, as a legal term of art, is referred to as "automatism".

[58] The unfortunate result of this misconceived submission by the prosecutor was that it persuaded the learned trial judge that she was obliged to prevent the appellant's real defence being put before the jury. Not only did this submission rely upon irrelevant cases about insanity, but the prosecutor also led the judge to think that she had the right to make a judgment about the strength of the defence case and that, if she thought it was weak, she had the right to prevent the defence putting it to the jury.

[59] There is binding authority that a trial judge has no right to prevent even a weak *prosecution* case being put to the jury. In *Doney v The Queen*,[21] the High Court held that where there was evidence, even if it was tenuous or inherently weak or vague, which can be taken into account by a jury and which is capable of supporting a verdict of guilty, the matter must be left to the jury. A judge has no power to take such a case away from the jury.

[60] No authority is necessary for the proposition that this principle is *a fortiori* applicable to a defence case. Matters of fact are entirely for the jury to decide.

[61] In this case, as I have said, the defence case was that the coughing fit had, somehow, led the appellant to lose control of his car. On his case, he veered into the oncoming traffic involuntarily. He had put his case at various times in different ways:

(a) He had a coughing fit and blanked out: to Constable McShane.

(b) He had a coughing fit and lost control: to the paramedic.

(c) He was having a bit of a coughing attack and all of a sudden he wasn't coughing any more and he just turned the car and put his foot on the accelerator and just kept going and smashed into the van: according to Ms Nelson's account to Senior Constable Cornish.

(d) He didn't black out. He was in some type of a trance or determined to keep going and thereafter he had little memory of what had occurred: also according to Ms Nelson's account to Senior Constable Cornish.

(e) As he exited the roundabout he "run into a trance my wife said": in the record of interview.

(f) He had a coughing fit and his wife was talking to him but he couldn't hear her: in the record of interview.

[62] This was evidence which, if the jury accepted it, or if the jury had a doubt about it, would have justified a conclusion that the Crown had failed to prove that the appellant had voluntarily driven the car into oncoming traffic. It formed the basis

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21 (1990) 171 CLR 207.

for a view that he might have lost his sense of awareness for a short period before the crash. Whether the state being considered is called "blanking out", "blacking out", a "trance" or "tunnel vision" does not matter. The substantial issue for consideration was whether the Crown had proved that the coughing fit had not deprived the appellant of his ability to control his car.

[63] It was no part of the appellant's case that, while he was suffering from a coughing fit, the coughing spasms racking his body caused the car to veer to the right. As Mr Pearce put it to the jury, the appellant's case was that, having suffered the coughing attack:

> "… there's some real doubt about whether he was conscious throughout this event or not, whether you've' been satisfied beyond all reasonable doubt about that. At the very least, you might think that the effect of the coughing went beyond that light-switch-type scenario. Didn't just stop when the physical act stopped. You might think that there's features of the evidence that suggest that at some point, to do with that coughing, he lost control of his body."

[64] It was almost unarguable that the coughing fit had ceased by the time the car left the roundabout. The relevant time for the jury to consider in connection with any loss of control of the appellant's ability to control the car was, therefore, between the time the car left the roundabout and the time it crashed into the van. The factual question was whether the Crown had proved that during that period, the appellant had not been in a state that might be described in the terms which he or his wife employed.

[65] The learned judge's direction to the jury that they had to ignore Mr Pearce's submission to that very effect prevented the jury's consideration of the defence case. In addition, and unfortunately, coming as it did as a correction and apparent rebuke of defence counsel's conduct of the trial, it carried with it an additional prejudice to the merits of the defence case. Nor was such a direction supported by her Honour's ruling about the lack of evidence sufficient to raise any issue about a medical condition.

[66] The jury appreciated that the time just before the collision was a material time, as appears from the note that it sent to the trial judge. The jury was concerned whether it was open for it to consider whether "the defendant was voluntarily in control of the vehicle immediately prior to the collision". The jury had underlined the word "immediately". Surely, that was the only real question in the case, yet both her Honour's instruction to the jury to ignore Mr Pearce's submission about that as well as the re-direction prohibited the jury's consideration of that question.

[67] Those were errors that prevented the appellant's case being considered by the jury at all.

[68] There is yet another problem with the trial and the role of the prosecutor.

[69] Having succeeded in excluding from evidence the appellant's attempts to impress upon his police questioners that, being in a trance-like state, being unable to hear his wife's shouts, he had lost control of the car just before it veered away, the prosecutor then submitted to the jury that the appellant had not told police during the interview that he had lost consciousness. As appears from paragraph [25] above, he submitted that this failure constituted a significant inconsistency in the

appellant's account because he must have had difficulty repeating his story correctly. The necessary evidence to falsify this submission having been ruled out on the prosecutor's application, defence counsel was effectively gagged and unable to falsify the prosecutor's false submission.

[70] A submission that a defence should be rejected because it is a false defence is a powerful one if there is something to support it. Here there was something to support it but only because the evidence to controvert the submission had been excluded at the instigation of the prosecutor. Even if that evidence had rightly been excluded, this submission was misleading because the prosecutor knew what the jury did not, namely that the appellant's account had been consistent throughout. It was an improper submission and it should not have been made.

[71] It is the duty of both defence and prosecutor to make submissions of law only upon the strength of relevant authority that counsel has actually read and considered and the significance of which he or she can explain comprehensively and accurately to a judge. It is part of every counsel's duty to assist the court in this way.

[72] It is also the duty of a prosecutor appearing in court to be familiar with basic principles of evidence, such as the elementary and long established proposition that a prosecutor cannot censor a record of interview to exclude the parts that help the accused. A prosecutor should also be familiar with the principle that a judge has no power to rule that facts must not be put to a jury because the evidence is "insufficient". A prosecutor should not make a submission that a defence is not fairly raised on the evidence when it plainly has been. The failure to abide by these duties in this case has led to the judge being misled, to a wrongful conviction, to an unnecessary appeal and to a possible retrial.

[73] For all of these reasons I would allow the appeal and order a re-trial if, after due consideration, the Director of Public Prosecutions considers that such a course is justified.

[74] **McMURDO JA:** I agree with Sofronoff P.

[75] **BRADLEY J:** I agree with the reasons for judgment of Sofronoff P and the orders proposed by his Honour.