SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kassulke* [2004] QCA 175
PARTIES:	**R** v **KASSULKE, Gary Kenneth** (appellant)
FILE NO/S:	CA No 336 of 2003 DC No 2068 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 April 2004
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Convictions set aside** **3. New trial ordered on all counts**
CATCHWORDS:	APPEAL AND NEW TRIAL - NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS - MISCARRIAGE OF JUSTICE - CIRCUMSTANCES INVOLVING MISCARRIAGE - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - GENERALLY - where the appellant was convicted of wilful damage and threatening violence at night for firing gun shots into Department of Transport buildings and a police station - where the prosecution's case rested almost solely on confessions made by the appellant to a doctor during a consultation - where the appellant sought an assurance of confidentiality from the doctor prior to making the confessions - where the doctor contacted the police after the consultation - where the admission of the confessional evidence by the doctor was objected to at trial - where the appellant relied on s 10 *Criminal Law Amendment Act* 1894 (Qld) claiming that the doctor was "a person in authority" - where the appellant also relied on the unfairness discretion to exclude the confessional evidence - whether the learned trial judge erred in not excluding the confessional evidence

APPEAL AND NEW TRIAL - NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS - PARTICULAR GROUNDS - MISDIRECTION OR NON-DIRECTION - JUDGE'S SUMMING UP - OTHER MATTERS - where the appellant submitted that the learned trial judge failed to appropriately explain the defence case to the jury - where the appellant's mother gave evidence at trial that her son had a habit of claiming responsibility for criminal acts which he did not commit - where this was not summarised by the learned trial judge in summing up to the jury - where the learned trial judge failed to explain the consequences of the jury believing the appellant's mother's evidence - whether the learned trial judge's non-direction resulted in a miscarriage of justice

APPEAL AND NEW TRIAL - NEW TRIAL - IN GENERAL AND PARTICULAR GROUNDS - PARTICULAR GROUNDS - VERDICT AGAINST EVIDENCE OR WEIGHT OF EVIDENCE - VERDICT AGAINST WEIGHT OF EVIDENCE - GENERAL PRINCIPLES AS TO GRANT OR REFUSAL OF NEW TRIAL - where the verdict of the jury depended on the acceptance by the jury of the reliability of the confessional statements made by the appellant - whether it would be unsafe to allow a verdict of guilty on the evidence

Criminal Law Amendment Act 1894 (Qld), s 10

McDermott v The King (1948) 76 CLR 501, applied
R v Franklin; New South Wales Court of Criminal Appeal No 601971 of 1989, 17 September 1990, cited
R v Lowe [1997] 2 VR 465, cited
R v Swaffield; Pavic v The Queen (1998) 192 CLR 159, applied
RPS v The Queen (2000) 199 CLR 620, cited

COUNSEL: M J Byrne QC for appellant
M J Copley for respondent

SOLICITORS: J A Sherwood & Co for appellant
Director of Public Prosecutions (Queensland) for respondent

DAVIES JA:

1. The appeal

[1] The appellant was convicted in the District Court on 26 September 2003 on one count of wilful damage on 22 February 2002, two counts of wilful damage on 22 April 2002 and one count of threatening violence at night, also on 22 April 2002. Those verdicts were given after a six day trial in which the appellant himself did not give evidence.

[2] The appellant appeals against those convictions on the following grounds:

(a) the verdict of the jury was unreasonable on the evidence;
(b) a miscarriage of justice occurred by the ruling admitting the evidence of Dr Freeman and Dr Loughhead;
(c) a miscarriage of justice occurred in that the learned trial judge failed to appropriately explain the defence case to the jury.

In his written outline the appellant's counsel argued ground (b) first followed by ground (c) and then ground (a). In oral argument, at the Court's suggestion, ground (c) was argued first. Nevertheless it remains convenient to consider the grounds in the order argued in the written outlines because, for reasons which I shall explain, even if the appeal succeeds on grounds (a) or (c), it remains desirable to decide ground (b). Before doing so, however, it is necessary to say something about the relevant facts.

2. The relevant facts

[3] At about 3.40 am on 22 February 2002 shots were fired into the Department of Transport building at Cleveland. A witness Albert Gross, saw a car leaving the scene and cut across the path of a milk truck. The milk truck driver, Adam Heggie, described the car as a small two door red car with tinted windows. It was quite noisy as if it had a sports exhaust. He described the driver as reasonably tall and wearing a baseball cap.

[4] It emerged in cross-examination that Mr Heggie had, the next day, described the car to a police officer as a 1990's model Hyundai S Coupe. However in evidence he said that he could not say that that was the type of car he saw. All that he could say was that it was a small red car, a coupe, and that it had tinted windows. I mention all this because in this Court the appellant's counsel sought to contend that the car had been identified as a car which the appellant did not own or have access to. The appellant's car was a red Audi sedan with tinted windows.

[5] The evidence of identification of the car was, it seems to me, at best for the appellant, neutral. However I would be prepared to accept that there was nothing in the circumstantial evidence which tended to incriminate the appellant in this offence.

[6] The offences on 22 April 2002 were of firing shots from a .22 calibre rifle into the Department of Transport building at Macgregor at about 1.15 am and then, at about 1.55 am, firing shots into the Slacks Creek Police Station. There was no circumstantial evidence linking the appellant with those offences.

[7] About midday on 22 April the appellant's mother, concerned about the appellant's physical and psychological well-being, took him to the emergency department of the Princess Alexandra Hospital. It was in the course of a consultation with Dr Freeman, a medical officer at that hospital, that the appellant made admissions upon which he was ultimately convicted of these offences. Also present at that consultation was Eleanor Loughhead, then a medical student.

[8] Dr Freeman in his evidence said that, after he invited the appellant to accompany him to the consulting room, he introduced him to Ms Loughhead and asked if the appellant minded if she came into the room. The appellant said words to the effect: "Is everything going to stay within these walls?" Dr Freeman's evidence then was:

> "… I told him that at - at that point that I was an assessing doctor, I would have to be telling my seniors whatever we discussed, and I

> said that the rules that apply to me would apply to her, at which time he said, 'Yeah, okay, that's fine.'"

Dr Freeman also told the appellant that doctors could talk to other doctors about a case in order to effectively manage it.

[9] According to Dr Freeman the confessional evidence arose in this way. He asked the appellant why he had come into the emergency department. The appellant then told him that the previous night he thought he had done something that sane people do not do. Dr Freeman asked him then what was that and the appellant told him that he had fired some shots into some buildings. Dr Freeman asked him what buildings they were and the appellant told him that they were the Mount Gravatt Department of Transport and the Slacks Creek Police Station. Dr Freeman asked him why he had done that and the appellant replied that it was because the system had been giving him trouble. Dr Freeman asked him what he meant by "the system" and he said the Department of Transport and Police and that he had been issued with a number of fines for speeding and seat belt offences and that he was angry because they could act as a kind of judge and jury and issue fines.

[10] Dr Freeman then asked the appellant what sort of gun it had been and the appellant told him that it had been a semi-automatic rifle of .22 calibre. He said it was the kind that had been outlawed. Dr Freeman asked him where the rifle was then, what he had done with it, and the appellant told him that he had given it to a friend.

[11] Dr Freeman then asked the appellant whether he had done something like that before and the appellant told him that he had fired some shots into a building earlier in the year. Dr Freeman had previously asked questions about his medical and social history, about any previous diagnosis and as to what medications he was on.

[12] Dr Freeman's evidence was supported by that of Dr Loughhead. It was not challenged and, because the appellant did not give evidence, not contradicted.

3. Ground (b) - the admission of the evidence of Dr Freeman and Dr Loughhead

[13] The admission of this evidence was objected to at trial, apparently on two bases. The first was that it was induced by a threat or promise by some person in authority. And the second was that the learned trial judge, in the exercise of his discretion, ought to have excluded this evidence on the basis of unfairness to the appellant. It is convenient to deal with those contentions in that order.

(a) inducement by a person in authority

[14] Section 10 of the *Criminal Law Amendment Act* 1894 provides:

> "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."

[15] This exclusionary rule probably represented the common law at the time of its enactment. But it must be accepted that it did not exclude the common law rule which continued in force and may be somewhat wider. It was stated in the following way by Dixon J in 1948:[1]

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1 *McDermott v The King* (1948) 76 CLR 501 at 511.

> "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 also 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".

[16] The term "person in authority" is not defined in the *Criminal Law Amendment Act*. However immediately after the passage which I have cited, Dixon J said:

> "The expression 'person in authority' includes officers of police and the like, the prosecutor, and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority."[2]

[17] On the evidence which I have outlined there are, it seems to me, two insuperable obstacles in the way of excluding Dr Freeman's evidence, and that of Dr Loughhead pursuant to the above principle. The first is that, within the meaning of that principle, neither Dr Freeman nor Ms Loughhead, as she then was, was a person in authority. And the second is that there was no conduct by either of them which came within the ambit of that principle.

Dr Freeman was not a person in authority

[18] When Sir Owen Dixon defined the expression "person in authority" as including officers of police and the like, the prosecutor, and others **concerned in preferring the charge**, it seems to me that he intended to limit that expression to those persons exercising or purporting to exercise the authority of the State in the investigation or prosecution of a charge of a criminal offence. The reason for this was no doubt that one of two rationales for the principle, the more modern one, is the deterrence of State officers from engaging in conduct of the kind specified.[3]

[19] It seems clear that the determination of who is a person in authority, on Sir Owen's definition, is a purely objective exercise. However there is authoritative support for the view that that definition should be limited further by excluding from it a person who is within the prima facie objective definition but whom the accused could not

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2 Ibid.

3 The other, more ancient rationale for this principle is that "a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.": *The King v Jane Warwickshall* (1783) 1 Leach 263. In *R v Hodgson* (1998) 163 DLR (4th) 577 L'Heureux-Dubé J at [61] referred to these as "the two rationales of reliability and state deterrence". Her Ladyship went on to say that "the confessions rule is now primarily directed towards deterring improper use of prosecutorial state authority": at [65]. See also per Cory J at [24], [34].

have reasonably perceived was a person in authority.[4] An obvious example is an undercover police agent. The rationale for this appears to be that such a person would be unlikely "both to animate [the accused's] hopes of favour on the one hand and on the other to inspire him with awe".[5] However it is unnecessary to consider that question further because neither Dr Freeman nor Ms Loughhead was a person in authority within the objective definition of Sir Owen Dixon.

[20] There is also authoritative support for the view that the above definition should be expanded, by the notion of the reasonable perception of the accused, to include any person whom the accused reasonably believed was a person who had some power to control or influence the proceedings against him.[6] On this view it would not matter whether the person in question was, objectively, a person in authority within Sir Owen's definition. There may be many persons whom an accused might reasonably perceive were persons who had some power to influence proceedings, in the sense that such proceedings might only commence if that person complains; but who were not persons who in fact had the power to exercise the authority of the State in the investigation or prosecution of the accused.

[21] If the dual rationales for the principle stated in s 10 of the *Criminal Law Amendment Act* 1894 and in *McDermott* are, as I think they are, the deterrence of conduct there described by officers of the State and the risk that such conduct will induce unreliability in a confession then, in my opinion, the view expressed in the preceding paragraph does not serve either rationale. It plainly does not serve the first. And in my opinion it does not serve the second because police officers and those in similar positions, but not all of those persons who may be included in this view, may be presumed to animate hopes of favour and to inspire awe because they hold those positions, thereby risking the reliability of confessions which they obtain by such conduct. This view would include within the meaning of "person in authority" many who could not be presumed to have those effects. The likely explanation for this view, in my opinion, is historical rather than rational; that there was a time when complainants were persons of authority, in the sense in which Sir Owen used that term, because they would have had the power to initiate, stultify or prevent a prosecution.[7]

[22] The possible relevance of this view is that it was contended on the appellant's behalf that, because Dr Freeman was a doctor working in a public hospital the appellant may have reasonably perceived that he was a person in authority in that sense; and that question should have been investigated by the learned trial judge but was not. I would be reluctant to accept this view in the absence of binding authority or full argument. However there is no reason to consider it further. The appellant not having given evidence either on a voir dire or before the jury, we do not know what

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4 See, for example, *R v Todd* (1901) 4 CCC 514 (Man CA). That was the view of the minority judges in *Hodgson* at 163 DLR (4th) 577 at [65] - [67]; [70] - [73], [79], [80] - [84], [90] - [95].

5 The Privy Council in *Deokinanan v The Queen* [1969] 1 AC 20 at 33, quoting Bain J in *R v Todd* supra.

6 See the majority judgment in *Hodgson* at [32] - [36]. See also *R v Dixon* (1992) 28 NSWLR 215 at 229; White J in *R v Burt* [2000] 1 QdR 28 at [39], [48], Thomas JA at [7]. See however the minority judgment in *Hodgson* at the pars set out in fn 4.

7 See *R v Wilson; R v Marshall-Graham* [1967] 2 QB 406 at 415.

his perception was; and, in any event, I am of the opinion that any perception that Dr Freeman was a person in authority, even in the broad sense accepted by this view, would not have been a reasonable one.

Dr Freeman did not act in any way prohibited by the principle

[23] Secondly there was plainly no duress, intimidation, persistent importunity, or sustained or undue insistence or pressure upon the appellant by Dr Freeman, or indeed any form of threat or promise by him in order to induce the confession which the appellant made. All that Dr Freeman did, prior to the making of the confession was to say, in answer to the question "Is everything going to stay within these walls?" that he would have to tell his seniors whatever was discussed; and to ask the appellant why he had come into the emergency department. There was certainly nothing in the nature of any overbearing by Dr Freeman or any inducement held out by him. The confession was not in any relevant sense one which was not voluntary.

[24] For both of those reasons, in my opinion the appellant had no right to have his confession excluded. It would follow that, in any future trial of the appellant for these offences, if it is on the same evidence, the appellant's confession will be admissible.

(b) the unfairness discretion

[25] Before this discretion is enlivened there has to have been some illegality or impropriety on the part of law enforcement officers that results in the making of the confession.[8] It may well be that illegality or impropriety, for this purpose, may include illegality or impropriety by a police agent.[9] But Dr Freeman was neither a law enforcement officer nor a police agent and there had been no arguably improper conduct by any such person which resulted in the making of this confession.

[26] Secondly this conduct must have affected the reliability of the confession or the admission of the confession must have resulted in some forensic disadvantage to the accused. In *Swaffield*, Toohey, Gaudron and Gummow JJ in their joint judgment said:

> "When the Court resumed after the first day's hearing, the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards."[10]

[27] Their Honours said that, subject to one matter, an analysis of recent cases supported the view that the approach suggested by the Chief Justice in argument already

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8 *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at [26].

9 See *R v Fraser* [2004] QCA 92 at [97].

10 At [69].

inheres in the common law and should now be recognized as the approach to be adopted when questions arise as to the admission or rejection of confessional material. They then said:

> "The qualification is that the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained."[11]

[28] A little later their Honours said:

> "Unreliability is an important aspect of the unfairness discretion but it is not exclusive. As mentioned earlier, the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence."[12]

[29] Applying those principles to the facts which I have stated:

1. Dr Freeman was not a law enforcement officer or a police agent;
2. there was no impropriety by him or by any law enforcement officer in consequence of which the confession was made;
3. at the time the application was made to exclude the confession there was no serious reason to doubt its reliability;[13]
4. the appellant could not have been disadvantaged, by the admission of the evidence, in the conduct of his defence. He knew, well in advance, that the evidence of Doctors Freeman and Loughhead would be adduced and it remained unchallenged and uncontradicted.

It follows that ground (b) of the notice of appeal must fail.

4. Ground (c) - the failure of the learned trial judge to appropriately explain the defence case to the jury

(a) a fundamental flaw as to an element of the major offence

[30] In submissions to this Court by the appellant, that ground was expanded into a contention also that the summing up contained a fundamental flaw as to an element of the major offence as well as failing to properly put the defence case. The major offence referred to was of course count 4 which alleged that on 22 April 2002 at Slacks Creek the appellant "in the night, with intent to alarm the occupants of the Slacks Creek Police Station, discharged a loaded firearm".

[31] The fundamental flaw in the summing up in respect of this element of the offence, it was submitted, was that the learned trial judge told the jury that they could be satisfied that the accused had the relevant intent if they thought that it was a reasonable inference from the fact that he fired six shots into the lighted building, the carpark of which was occupied.

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11 At [70].

12 At [78].

13 The only evidence which may have cast a doubt on that reliability, that of the appellant's mother, was given much later.

[32] The relevant passage complained of was as follows:

> "The allegation is that the accused fired a number of bullets through the windows of the dayroom.
>
> Now, members of the jury, what would be a reasonable inference from that? Well, reasonable inference as suggested by the Crown, would be that the person who did that did so with an intention to alarm or cause fear to those inside the building. So if the Crown has proved that, you probably would come to the conclusion that that offence has been established as well."

A little later in his summing up his Honour again referred to facts from which it would be a reasonable inference that the appellant had the intent to alarm the occupants of the Slacks Creek Police Station.

[33] There is, in my opinion, substance in the appellant's contention that his Honour was telling the jury in these passages that they could conclude that the appellant's intention to alarm the occupants of the police station had been established if the Crown had proved that such intention was a reasonable inference from the facts. That was plainly a misdirection. What his Honour should have said was that unless such an inference was the only reasonable inference which could be drawn from those facts the jury could not be satisfied of that element of the offence beyond reasonable doubt.

[34] To that the respondent makes two submissions. First it submits that the objective facts were so strong that no other inference was reasonably open than that the appellant had the relevant intention. Those facts were the facts which I have stated in [31]; that he fired six shots into a lighted building, the carpark of which was occupied.

[35] Secondly it submitted that this element of the offence was not really in issue at the trial. That submission is based, in part, on a statement made by the appellant's counsel during the course of argument as to the admissibility of the evidence of some police officers who were in the police station when the appellant fired the shots. He said that "if the jury were to form the view that Kassulke fired the shots they would have very little difficulty with that element". That is by no means a concession that that element was no longer in issue. However the learned trial judge instructed the jury that there had not been any challenge to the fact that the offences were committed and no challenge was made by defence counsel to that statement. That is unsurprising because the case was conducted on the basis that the only question was whether it was the appellant who committed the offences.

[36] For those reasons in combination it seems to me, that, if this were the only sustainable criticism of his Honour's summing up, it may have been possible to conclude that no substantial miscarriage resulted from this misdirection.

(b) a failure to explain to the jury the effect of Mrs Kassulke's evidence

[37] The second and originally the only complaint under this ground was described as a failure to properly put the defence case. The defence case was, and had to be, that the statements which the appellant made to Dr Freeman were unreliable for two reasons.

[38] The first, which was relevant to all offences, was that, according to his mother, the appellant had a habit of claiming responsibility for offences he had not committed

but had heard reported on radio or television; and that, according to her, a report of the offences the subject of counts 2, 3 and 4 had been broadcast on the radio when they, the appellant and his mother, were having breakfast on the morning of 22 April 2002. From those facts and from the appellant's apparent psychological state on that morning it should be inferred that his apparent confessions were no more than another example of this habit.

[39] The second reason was that, again according to his mother, the appellant did not leave the family home on the night of 22 April. She inferred this, she said, from the fact that the appellant had no means of transport other than two family cars; and that if either of them had been moved from their places on the driveway during the night, she would have heard it. This reason, of course, affected only the reliability of his confession in respect of the offences of 22 April. But together, it was submitted, these reasons rendered the confessions, as a whole, unreliable.

[40] The complaint is that the learned trial judge failed to tell the jury that if they accepted Mrs Kassulke's evidence or if it raised in their minds a reasonable doubt as to its truth they should acquit the appellant on all counts. I shall return a little later to the question whether, if the jury had arrived at either of these conclusions, they should have acquitted on all charges. But first it is necessary to say something about the sequence of his Honour's summing up on the facts.

[41] His Honour correctly identified the central question in the case which was whether the statements which the appellant made to Dr Freeman were true. His Honour read out those statements to the jury and also the evidence of Dr Freeman that, after the appellant was told that the police had been called, he got upset and complained to Dr Freeman that he had trusted him. His Honour also told the jury that the appellant had the opportunity to commit these offences.

[42] His Honour then purported to summarise the evidence of Mrs Kassulke in the following terms:

> "And her evidence is this - it would be fresh in your minds, I am sure, but just to summarise it for you - what she said is this - we have a diagram of their house and we know that at the time, the 22nd of April, the accused was occupying what used to be a garage. And the driveway is gravel, a large gravel, and walking on it or driving on it is going to create noise, and the evidence of Mrs Kassulke is that it does make a noise. She went to bed, and her son went to bed after taking some medication that evening, a couple of Mersyndol, which affects her and makes her drowsy. We are not sure how it affects the accused, but maybe it makes him drowsy. But, anyway, that is a matter for you to take into account.
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> He went to bed about 8.15, I think it was, and she went off and was sleeping in the main bedroom. Her car was parked outside next to the wall. Her husband's car is shown in the diagram as 'Kev's van', I think it is.
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> Now, around the house there is security lighting. She says that if her car or the van had been started and driven out, she would have heard it and woken up. She did not. She said that if her van - or her car or the van had been moved or anybody walked down that area, the lights would have come on and she would have heard it. She did not. She gave evidence that going from the accused's sleeping

> quarters to the kitchen area, where the keys of the vehicle, that is the van, were kept, opening the door, closing the door, would have made a noise. She would have heard that.
>
> The upshot of the evidence from her is that that night she did not hear anything which in any way disturbed her sleep, and her evidence is that had the accused come out she would have heard him. Well, members of the jury, of course you take that evidence into account and weigh it up against all of the other evidence which you have heard.
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> She says that the next morning she woke at about 5 o'clock and at about 5.30, I think it was, she woke the accused, and it was a normal day. She prepared breakfast. She prepared their lunches for them - for her husband and the accused. That they went off to work in the normal fashion, that her husband drove the accused, and then later in the day she received a telephone call from the accused's partner. She went to the accused's partner's place and there she saw the accused. She said, on her evidence - it was quite clear on her evidence - that he was quite unwell. And she said for a long time he was not talking, that she held him and was concerned about him. He said he was sick. He was sick of being sick and he said that he wanted to die. She was saying to him that he needed a doctor. And then in the course of that he said to her, 'Did you hear on the radio about the cop shop being shot-up last night?' She said that he said to her, 'That was me.' He said, 'How crazy.', words to that effect. And she said to him, 'Why, Gary?' He wouldn't answer. So she asked him where he got the gun and he said he got it from a friend. He told her that he had given it back to the friend. She said to him, 'How did you get there?' He said, 'I took your car.' She said, 'That's rubbish.' She said she knew it was rubbish, basically her evidence is, because had he taken her car she would have known it, and she said the keys to her car were in her handbag in her room."

[43] That is an accurate summary of Mrs Kassulke's evidence with respect to the second reason, stated in [39], why the defence argued that the appellant's statements to Dr Freeman were unreliable. But his Honour did not summarise for the jury Mrs Kassulke's evidence with respect to the first reason stated in [38]. Nor did his Honour mention this evidence. His Honour then went on to say something about the difference between count 1 and counts 2, 3 and 4, about which a separate complaint is made which I shall discuss shortly.

[44] Not only did his Honour fail to summarise or even mention Mrs Kassulke's evidence about the appellant's bizarre habit but he failed to tell them what the consequences were of their believing Mrs Kassulke's evidence in either of the above respects or of remaining in doubt, after hearing this evidence, in either or both respects. If the jury were not satisfied beyond reasonable doubt, after hearing Mrs Kassulke's evidence about the events on the night of 22 April, that the appellant left the family home on that night, they would have been obliged to acquit the appellant on counts 2, 3 and 4. And unless, after hearing Mrs Kassulke's evidence that the appellant was in the habit of taking the blame for serious, even criminal acts which he did not do but about which he had heard on radio or television, they were satisfied beyond reasonable doubt that his statements to Dr Freeman were not the product of any such habit, they should have acquitted on all counts.

[45] The absence of directions of this kind, in my opinion, resulted in a miscarriage of justice. It is true that this appeared to be a strong case against the appellant in which, even if those directions had been given, the jury may well have convicted the appellant. But it was not a case in which, even if those directions had been given, the jury would have inevitably convicted. Because those directions were not given the convictions, in my opinion, should be set aside and a new trial should be ordered.

(c) the directions as to possible reasoning

[46] In the light of this defence the appellant also complains about a passage in his Honour's summing up and a further direction in answer to a question asked by the jury. The passage in the summing up is in the following terms:

> "Now, as I have said to you, look first, I would suggest, at counts 2, 3 and 4 because the evidence supporting them is different from the evidence in relation to the first count.
>
> Now, in relation to the first count on the indictment, the charge of wilful damage to the Cleveland transport office, the conversation there is, in relation to Dr Freeman, and it was also the medical student, he was asked this:
>
> > 'Now, did you ask him anything about whether he'd done this before?-- Oh, yes, I did ask that. I asked him whether he'd done something like this before. He told me that he'd done - he'd fired some shots into a building earlier in the year.'
>
> All right, now, you have to be satisfied, of course, that what he is talking about are shots into the Cleveland office, and on what basis would that be so?
>
> Well, it is contained within all of that conversation about the Slacks Creek Police Station and the MacGregor [sic] transport office, that he then admits firing shots into another building some couple of months before. We know those shots occurred on the 22nd of February. You have regard to the method that was used in relation to both matters and he also, of course, had the motive, the ongoing dispute with the offices of the police and the Queensland transport.
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> So add all those matters together, members of the jury, and on that basis the Crown says to you, 'Well, if you are satisfied beyond reasonable doubt that he is guilty in relation to counts 2, 3 and 4 then you would be satisfied on what he told Dr Freeman.' And of those other matters I have told you you take into account, that he is guilty in relation to count 1.
>
> Of course, as I have said, the proposition of the defence is that you wouldn't be satisfied the statements that he made to Dr Freeman are truthful, you would find him not guilty in relation to counts 2, 3 and 4 and, of course, it follows you must find him not guilty on count 1 if you came to that conclusion."

[47] The question from the jury was in the following terms:

> "In your summing-up yesterday you explained to us that the verdict we decide on for charges 2, 3, and 4 would determine the verdict on charge 1. Could you please clarify."

[48] His Honour answered this question by the following direction:

"Now, let me say this from the outset. Your verdicts on counts 2, 3 and 4 won't necessarily determine your verdict on count 1. But you can look at the evidence in relation to counts 2, 3 and 4 and it may assist you in deciding whether or not the Crown has proved its case in relation to count 1.

Now, as I said to you, the evidence in relation to counts 2, 3 and 4 is different from that which is brought forward to determine your verdict on count 1.

In relation to count 1, briefly what occurred is that on the 22nd of February you'll recollect that the gentleman who was the baker heard some noises. He looked and then went and continued his work. Now, the next morning, the Office of the Queensland Transport Department which was some two doors down was discovered between sort of 7 and 8 a.m. to have damage to the windows with fragments of bullets inside.

Now, then we go to the 22nd of April. There were two shootings, one at the Magregor [sic] Queensland Transport office and one at the Slacks Creek Police Station. Later that day at about 1.30 to 2 o'clock, the accused went to the Princess Alexandra Hospital. In the course of conversations at the hospital with Dr Freeman, he said that he had fired shots at the Slacks Creek Police Station and the Queensland Transport office.

If you accept that those statements are accurate and truthful as to what he did, then there's no doubt about what he's talking about, that he's talking about the Slacks Creek Police Station and the McGregor [sic] Queensland Transport office.

But then the doctor said this to him and counsel said to him:

> 'Now, did you ask him anything about whether he'd done this before?-- Oh, yes. I did ask that. I'd ask him whether he'd done something like this before and he told me that he'd done - he'd fired some shots into a building earlier in the year.'

All right. What was that building? If there was nothing more than that statement, you would not be able to say, beyond reasonable doubt, what he is talking about. Now, how can you link that statement to the Queensland Transport Office at Cleveland which occurred in February? And to do that you have to look - the only evidence you can look to is the damage that was done and why it was done and the statements that he makes about causing damage to the Slacks Creek Police Station and the Macgregor Queensland Transport Office. And from that, you have got to be satisfied, beyond reasonable double [sic], that when he said that a few months ago or it was earlier in the year, I should say, to put it correctly that he had fired some shots into a building earlier in the year that he's there talking about the Queensland Transport Office at Cleveland.

And the other piece of the evidence which there is involved and that, of course, is that at that time he also had that ongoing dispute with the Queensland Transport and the police in relation to his traffic history.

So that's when I say your duty, members of the jury, is to look at the evidence which is relevant to each charge, see whether or not the

> Crown has proved its case beyond reasonable doubt in relation to each charge but you should be able to see now that the evidence that supports counts 2, 3 and 4 is different to a certain extent from the evidence you must rely upon in relation to count one."

[49] The appellant's complaint is that his Honour's direction was contrary to the admonition in *RPS v The Queen*[14] that to attempt to instruct a jury about how they may reason towards a verdict of guilty (as distinct from warning the jury about impermissible forms of reasoning) leads only to difficulties of the kind which had arisen in that case.

[50] What his Honour was saying to the jury in those passages, it seems to me, is that the evidence on counts 2, 3 and 4 was different from and, by implication, stronger than the evidence on count 1 because, in the former, the appellant identified specific events which had occurred only earlier on the same day as his confession. And his Honour was telling the jury, correctly, that, if they were not satisfied beyond reasonable doubt as to the appellant's guilt on counts 2, 3 and 4, they could not be satisfied of his guilt on count 1.

[51] What his Honour was plainly not doing was directing the jury that if they convicted on counts 2, 3 and 4 they must also convict on count 1. Quite the contrary. Rather he was saying that they could not convict on count 1 unless they were satisfied beyond reasonable doubt on counts 2, 3 and 4 but that, if they were so satisfied, there would be less reason to doubt the reliability of the appellant's statement that he had fired some shots into a building earlier in the year. However his Honour also said that, in order to convict on count 1, they also had to be satisfied that the building which he had shot at earlier in the year was the Department of Transport building at Cleveland. In relation to that he referred to the fact that the appellant had a grudge against the Department of Transport and that there were similarities between the offences committed on 22 April and that committed on 22 February. His Honour had earlier directed the jury that they could return different verdicts on each of the counts.

[52] In giving those directions, his Honour may have been, to some extent, directing the jury as to how they should, rather than how they should not, reason to a conclusion in respect of count 1. But I do not think that his directions in this respect led to difficulty of the kind which occurred in *RPS*. Though these directions could have been more clearly stated, they did not, in my opinion, amount to a misdirection.

5. Ground (a) - the verdict was unreasonable

[53] It is plain that the case depended entirely on the acceptance by the jury of the reliability of the confessional statements made by the appellant to Dr Freeman. The appellant submits that it would be unsafe to allow the guilty verdicts to stand in the following circumstances:

1. it was undisputed that the appellant was, at the time, considered by his mother to be in need of psychiatric attention;
2. he was in the habit of seeking to "take the blame" for things reported in the media;
3. the salient details of the events had been on the radio that morning;

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[14] (2000) 199 CLR 620 at [41], [42] and [43].

4. there were negative findings on all possible supporting evidence (that is no gunshot residue, no gun found);
5. there was positive evidence that a vehicle other than his was involved in the first incident; and
6. he had an alibi in relation to the second incident.

[54] Of those points, 1, 2, 3 and 6 depended on acceptance of the mother's evidence. There can be no question but that the jury were entitled to reject her evidence.

[55] Point 4 is accurate but that means no more than that, as was plainly the case, guilty verdicts required acceptance beyond reasonable doubt of the reliability of the confessional statements and, in count 1, also the drawing of an inference from other evidence that the statement by the appellant about an earlier incident referred to the shooting on 22 February. Point 5 is not correct. It relies on a statement made by Mr Heggie to police, but the most reasonable inference to be drawn from his evidence, in my opinion, is that he could say no more than that the car was a small red car with tinted windows. The appellant owned a red Audi with tinted windows.

[56] A verdict of guilty was in my opinion plainly open to a properly directed reasonable jury. I would therefore reject this ground.

Orders

1. The appeal is allowed.
2. The convictions are set aside.
3. A new trial is ordered on all counts.

[57] **WILLIAMS JA:** I agree with the reasons of Davies JA and with the orders therein proposed.

[58] **JERRARD JA:** I have read the reasons for judgment and orders proposed by Davies JA and respectfully agree with those subject to the following remarks.

[59] I consider that the evidence led in the pre-trial proceeding, and to a lesser extent at the trial[15], shows that Dr Freeman made an entirely proper promise of confidentiality to Mr Kassulke when the latter first consulted Dr Freeman. In April 2002 Dr Freeman was a resident medical officer at the PA Hospital, relatively recently registered, and when Mr Kassulke asked whether "everything" (said by him) was going to "stay within these walls", Dr Freeman responded by explaining that he would discuss with a more senior doctor what Mr Kassulke told him. It appears Dr Freeman explained to Mr Kassulke that those doctors would be under the same obligation of confidentiality as Dr Freeman, explained as being that doctors can talk about a case to other doctors to manage it effectively.[16]

[60] Dr Freeman accepted in cross-examination in the pre-trial proceedings that what Mr Kassulke had wanted in their preliminary conversations was an assurance of confidentiality.[17] He was given that assurance, because Dr Freeman did not at that moment envisage that the circumstances would arise, as they did, in which it was

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15 There was considerable cross-examination on the point in the pre-trial proceedings, and far more limited cross-examination at the trial (AR 192).

16 See the record of the pre-trial proceedings at pages 18 and 27.

17 At page 27 of the record of pre-trial proceedings.

appropriate to breach the obligation of confidentiality to a patient. What happened was that at the completion of his medical assessment of Mr Kassulke, Dr Freeman had received what amounted to a confession to a number of serious criminal offences, and accordingly consulted with a more senior doctor about what to do. That resulted in the most senior doctor instructing that the police be called. When they arrived Mr Kassulke declined to be interviewed by them.

[61] I consider that in those circumstances Dr Freeman did make a promise of confidentiality before Mr Kassulke made his apparent confession. I agree with Davies JA that Dr Freeman was not a person in a position of authority within the meaning of s 10 of the *Criminal Law Amendment Act* 1894; and nor was there any basis for a finding, by the learned trial judge who heard a pre-trial application to exclude the confession, that Mr Kassulke had reasonable grounds for believing, or even an unreasonable belief, that Dr Freeman was in a position of such authority. The objective inferences are that Mr Kassulke knew he was speaking to a doctor, and distinguished between doing that and speaking with a police officer or on the record.

[62] I consider that Dr Freeman was correct in the understanding he described in those pre-trial proceedings, that overriding exceptions existed to his obligation of confidentiality to Mr Kassulke. Those exceptions included knowledge of conduct constituting criminal activity capable of seriously endangering the physical safety and welfare of other people, who in that instance were members of the Queensland Police Service performing their duty. Indeed, Mr Kassulke demonstrated a like awareness of those limitations on that obligation, because Dr Freeman's evidence in the pre-trial proceedings included that late in the piece Mr Kassulke had asked him "What's going to happen? Are the police going to have to be called?"

[63] On this appeal the appellant's outline of argument challenged the decision of the learned judge conducting the pre-trial proceedings, that the judge was not persuaded to exercise in the appellant's favour a discretion to exclude the admissions allegedly made. I note that the Crown had accepted in those proceedings that without Dr Freeman's acknowledgement of confidentiality Mr Kassulke would have been unlikely to make the admissions that he did. That almost inevitable concession gave Mr Kassulke grounds to argue that admission of his evidence was unfair, as described in *R v Swaffield* at [52]. This was because his privilege of confidentiality in conversation with a medical practitioner was disregarded by admitting the confession. But that privilege is subject to other considerations of public interest. The learned trial judge had referred to the remarks in *R v Franklin* (unreported decision of the New South Wales Court of Criminal Appeal given 17.9.1990) where Gleeson CJ, as he then was, referred with approval to the remarks of the trial judge in that matter describing the important public interest in the reception of admissible evidence at a criminal trial. Those approved remarks also accepted that the degree of public interest in maintaining the confidentiality of consultations between patients and a medical advisor was not sufficient to justify enforcement of an application of confidentiality in respect of information relevant to the proper investigation and prosecution of serious criminal activities.

[64] The learned judge hearing the pre-trial application in this proceeding also quoted with approval the remarks of the Court of Appeal in Victoria in *R v Lowe* [1997] 2 VR 465 at 485, to the effect that both common law and statute law subordinated private confidences to a wider public interest, at least when it came to disclosing

information in the interest of prosecuting serious crime and/or protecting public safety. After those relevant references, and others, the learned judge concluded his careful and well researched reasons by applying the test or approach commended by Toohey, Gaudron, and Gummow JJ at [69] of *R v Swaffield*, cited by Davies JA at [26] herein. The reasons for not excluding the confession disclosed no error.

[65] Finally, I note that the Crown did not cross-examine Mrs Carol Kassulke on her evidence[18] that the appellant would claim responsibility for foolish criminal behaviour being publicly reported when she and the appellant were watching TV or listening to the radio. As she had not given any example of that behaviour in her evidence in chief, the decision not to cross-examine is understandable; but it resulted in the jury not having the benefit of hearing potentially very significant evidence tested at all, making it difficult to reject it with confidence.

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[18] At AR 239-240.