SUPREME COURT OF QUEENSLAND

CITATION:	*R v Belford & Bound* [2011] QCA 43
PARTIES:	**R** **v** **BELFORD, Lochlan-Lee Brett** (appellant) **R** **v** **BOUND, Raymond John** (appellant)
FILE NO/S:	CA No 327 of 2009 CA No 335 of 2009 SC No 234 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2010
JUDGES:	Holmes, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made in CA No 327 of 2009, Fraser and White JJA concurring as to the order made in CA No 335 of 2009, Holmes JA dissenting
ORDER:	**In CA No 327 of 2009: The appeal is dismissed.** **In CA No 335 of 2009: The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where appellants convicted of murder – where there was evidence that the deceased had suffered blunt force trauma to the head – where appellants argued that expert opinion evidence given at a committal hearing and through a written report differed from evidence given at trial – where trial judge found that the difference between the evidence was the extent of the probability that the blunt force trauma caused unconsciousness and death – where appellants wished to adduce fresh evidence disputing this evidence – whether competing expert evidence fresh evidence – whether a miscarriage of justice occurred as a result of the change in expert evidence – whether a miscarriage of justice occurred on the basis that the interests of justice required an

adjournment to enable contrary expert evidence to be adduced at trial

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – PARTICULAR CASES – where appellant, Bound, interviewed by police – where Bound made it clear that he did not wish to speak further to police without first receiving legal advice – where police arranged a plan to introduce a covert police operative to Bound's cell – where police conduct undertaken in light of an apprehension that Bound, wished to exercise his right to silence – where Bound, made admissions to the covert police officer – whether the admissions were elicited – whether the appellant, Bound's, right to silence was impugned – whether the trial judge erred in law in ruling that the record of conversation between the appellant, Bound, and the covert police officer was admissible

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – PARTICULAR CASES – where appellant, Bound, had made non-recorded admissions to police officers – where the police officers sought to confirm and record these admissions – where, in confirming what Bound had said, the police officer put four distinct propositions to him – where the four propositions received a single affirmative answer – where the recording occurred after Bound had, on a number of occasions, expressed a desire to remain silent until he could contact a lawyer – whether the trial judge erred in law in ruling that the recording was admissible – whether the trial judge erred in admitting the evidence – whether a miscarriage of justice occurred

CRIMINAL LAW – EVIDENCE – HEARSAY – PARTICULAR MATTERS – STATEMENT OF VICTIM WHO LATER DIED – where the deceased's mother, grandmother and sister gave evidence under s 93B of the *Evidence Act* 1977 (Qld) that the deceased owed a drug debt to the appellant, Bound – where Bound argued that the learned trial judge failed to give sufficient weight to the unreliability of the material constituting the s 93B statements – whether the s 93B statements were inherently unreliable – whether the trial judge erred in declining to exercise his discretion under s 98 of the *Evidence Act* in favour of exclusion

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – GENERALLY – where close-up photographs of the deceased's injuries tendered in evidence – where appellant,

Bound, argued that the photos were highly prejudicial and not significantly probative – where Bound argued that expert evidence as to the extent of the deceased's injuries sufficed – whether the learned trial judge erred in declining to exercise his discretion to exclude the evidence

CRIMINAL LAW – EVIDENCE – RELEVANCE – where appellant, Bound, wished to cross-examine a police officer about the criminal history of the appellant, Belford's, uncle – where the trial judge found the probative value of the evidence to be slight – whether the learned trial judge erred in law by failing to exercise his discretion to exclude the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – CONTROL OF PROCEEDINGS – OTHER MATTERS – where the appellant, Bound, questioned the impartiality and objectivity of a forensic scientist who gave evidence in relation to DNA evidence found on Bound's shoe – whether trial judge erred in law by failing to comment on any potential partiality or lack of objectivity

CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – OF DEFENDANTS – where the appellant, Bound, argued that the trial judge erred by not directing that his trial be heard separately from the trial of his co-accused – where the co-accused had made statements regarding Bound that were inadmissible but had been adequately remedied by directions where Bound argued the jury would have been overwhelmed by the inadmissible evidence and would have ignored the trial judge's directions – where there are strong reasons of principle and public policy why joint offenders should be tried together – whether the trial judge erred in not allowing separate trials

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the trial judge allowed a transcript to be given to the jury of a tape-recording of the appellant's, Bound's, statements to a covert police operative – where the recording of Bound's statements to the operative were first played to the jury when they did not have a transcript – where the transcript was then given to the jury and the recording replayed – where the transcript was retrieved from the jury to ensure that excessive reliance was not placed upon it despite directions that the transcript should not be used that way – whether the trial judge erred in allowing the transcript to be given to the jury

CRIMINAL LAW – PROCEDURE – MISCELLANEOUS POWERS OF COURTS AND JUDGES – GENERALLY – where the trial judge refused an application by the appellant,

Bound, to give evidence after he elected not to call or give evidence in open court – where Bound made his decision not to give evidence with the benefit of counsel's advice and he did not criticise the competence of counsel – where the prosecutor had commenced final address – where Bound subsequently sought to apply to give evidence contrary to his election – where it was necessary for Bound to persuade the trial judge that such an order was in the interests of justice – whether the trial judge erred in refusing the application

Criminal Code 1899 (Qld), s 590AH(2)(f), s 590AI(4), s 618, s 619
Evidence Act 1977 (Qld), s 93B, s 98
Police Powers and Responsibilities Act 2000 (Qld), s 396, s 418

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited
Butera v Director of Public Prosecutions (Vict) (1987) 164 CLR 180; [1987] HCA 58, cited
Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47, cited
Dyett v Jorgensen [1995] 2 Qd R 1; [1994] QCA 277, cited
Em v The Queen (2007) 232 CLR 67; [2007] HCA 46, cited
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Mahmood v Western Australia (2008) 232 CLR 397; [2008] HCA 1, cited
R v Adamic (2000) 117 A Crim R 332; [2000] QSC 402, considered
R v Belford & Bound [2009] QSC 344, approved
R v Davidson [2000] QCA 39, cited
R v Herbert [1990] 2 SCR 151, cited
R v Ireland (1970) 126 CLR 321; [1970] HCA 21, cited
R v Pangilinan [2001] 1 Qd R 56; [2001] QCA 81, cited
R v Swaffield (1996) 88 A Crim R 98; [1996] QCA 236, considered
R v Swaffield (1998) 192 CLR 159; [1998] HCA 1, applied
Tofilau v The Queen (2007) 231 CLR 396; [2007] HCA 39, applied
Winning v R [2002] WASCA 44, cited

COUNSEL:

In CA No 327 of 2009:
M A Green for the appellant
M J Copley SC for the respondent

In CA No 335 of 2009:
D MacKenzie for the appellant
M J Copley SC for the respondent

SOLICITORS:

Legal Aid Queensland for the appellants
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellants were convicted of the murder of Wayne Leslie Williams, who died after a beating in a room at a Rosewood hotel. Both appeal their convictions on the ground that the trial judge erred in refusing to discharge the jury after a pathologist gave evidence about brain damage to the deceased which, it was said, went beyond her autopsy report and earlier evidence. Bound also raises a number of other grounds. He says that the judge erred in: refusing him a separate trial; refusing to exclude statements made by him to police officers, including a covert police operative, statements under s 93B of the *Evidence Act* 1977 (Qld) and photographs of the deceased's facial injuries; restricting cross-examination of the arresting officer; failing to comment on the alleged partiality of a scientific officer; and ruling that he could not change his election to give evidence. It is said that all those matters, cumulatively, gave rise to a miscarriage of justice and, if evidence of Bound's statements to the covert police operative would properly have been excluded, that the verdict was unreasonable.

The Crown case

[2] In 2007, both Belford and Williams boarded with Bound and his wife in a house at Flinders View. Mrs Bound gave evidence that Belford had lived there until November 2007 and that Williams had moved out on 26 December 2007. Prior to his departure, there had been an argument between Bound and Williams about the latter's failure to pay rent. She had intervened to prevent Bound from hitting Williams.

[3] Other evidence confirmed that there had been a confrontation between the two. Williams' mother said that on the evening of 26 December, he telephoned her and said that he had returned to the house to find his belongings disturbed and money taken from his room. Bound had hit him and was going to kill him. He disclosed that he had sold "speed" for Bound. Williams' mother telephoned the police and then rang her son again. He told her that Bound was drilling through his bedroom door. She could hear the sound of a drill and a voice threatening to kill her son. Williams had also rung his grandmother and told her that Bound had assaulted him. She too could hear the sound of a drill, which Williams told her Bound was trying to put through or under his door, and Williams also claimed that Bound had a gun. She heard Bound saying,

> "You're going down, big boy".

[4] Two police officers who went to the house said that Bound yelled to them that they were to get Williams out of his house. They spoke to Williams who told them that he was fearful of Bound, for whom he had been selling speed and to whom he now owed money. Part of the conversation with the two men was recorded; in it Bound can be heard complaining that Williams owed him $500 and was a liar, with Williams claiming that he was selling Bound's speed for him. Williams' sister came to the house; she saw that one side of her brother's face was red and puffy, and he told her that Bound had punched him. She waited with him until their grandfather arrived and took him back to his grandparents' house.

[5] The next day, Williams went to the Laidley police station and spoke to an officer there. He said that he had been assaulted by Bound, to whom he owed money, and was given advice on the option of obtaining a peace and good behaviour order. The following day, 28 December 2007, Bound approached an officer at the same police station, complaining of being owed money by a person to whom he referred

to as a "drugged out little fag". He said he was angry and going to bash someone, but after being taken into the police station, he calmed down. He reiterated that Williams owed him money and said that Williams had been selling drugs. He wanted his money and the return of the key to his house.

[6] The police officer spoke to Williams' grandmother and arranged the return of the key. Bound told the officer that he was a Vietnam veteran and had killed before; he would kill again if he did not get his money back from Williams. The officer obtained the key, returned it to Bound and told him to stop making threats. While the police were at the house of Williams' grandmother, one of them spoke to Williams, who said once more that he owed money to Bound as a result of his attempt to sell speed on his behalf.

[7] Belford was employed in a maintenance and cleaning job at a Rosewood hotel, where Williams also obtained employment in early January 2008. He was replacing a man named Carlo Carter in the position of chef. Carter gave evidence that over the couple of days before Williams started work, Belford told him that Williams was supplying him with drugs, although he wanted to get off them, and that he hated Williams. Belford expressed anger when he discovered that Williams had asked for a room at the hotel and said that he had better not get it or he would end up killing him. Belford already occupied a room there, but proposed when Carter finished up at the hotel to move into his room, which was number 6. As it transpired, Williams was also given a room in connection with his employment.

[8] During Carter's last shift on 6 January 2008, Belford sharpened some knives for him. While he was doing so, Williams came in to start work and Belford offered him a glass of wine. Williams was not supposed to drink on duty and Carter expressed some concern to Belford that he would get into trouble. Belford responded that Williams would not "be able to say anything after tonight". Carter, joking, offered him a pair of rubber gloves and asked if he needed a hessian bag; Belford took the gloves saying that he might need them and a bag and that he had duct tape upstairs. He said that his uncle was bringing a car for the night. Carter took none of this seriously. He finished his shift at 5.00 pm and, not long after, left the hotel to borrow a car so that he could move his belongings.

[9] Williams finished work that evening at about 9.30 pm. The manager of the hotel said that she heard a scuffling noise upstairs in the hotel at about 10.00 pm. She went to the bottom of the hotel stairs, but could hear nothing more. Soon afterwards, she went upstairs to look for some keys and saw Belford outside the bathroom wearing a towel. The occupants of a nearby room also heard some noises that evening, some thumps and the sound of a person moaning. Later Belford came to their room asking for something to drink. He had a conversation with one of them in which he said,

> "I murdered the cook because he had too many diseases and he was a poofter and he tried cracking onto me",

going on to say that if his listener told anyone, he would probably kill him.

[10] When Carter returned with the borrowed car he went to his room, number 6, to which he had given Belford the key. He opened the door to see Williams' legs on the ground in front of him, Belford standing with his back towards the door, and someone sitting on the bed. He heard the other man say, "[h]e's seen too much", to which Belford responded that he would help them. Belford came out and told him

that Williams was dead. He had tried to strangle him and Williams had bitten him through his rubber gloves. His knuckles were bleeding. Carter gave Belford the keys to the hotel courtesy bus and the PIN code for the hotel and told him to wait until midnight. He then went to the police.

[11] The police officers to whom Carter spoke went to the hotel at about midnight and saw Belford on the verandah. They recorded their conversation with him. They asked if he had hurt anyone and if he and his uncle had beaten anyone up. He denied having done so. They went into room number 6 where they saw Bound sitting on the bed, rolling a cigarette, and a body in a corner. At Bound's feet was a knife in a sheath, which Mrs Bound later said belonged to her, and which she had last seen under Bound's bed. There was a good deal of blood in the room, but the officers did not recall seeing blood on Belford's or Bound's clothes. However, in a shower room they found a pile of clothing, including a pair of jeans with blood stains, the pocket of which contained Belford's wallet. The taps in the shower and on the basin provided positive results for blood.

[12] In the bedroom, police found a sharpening steel, separated into its metal section and its plastic handle, and a heavy wooden pestle. (Both parts of the sharpening steel tested positive on a presumptive test for blood, and DNA consistent with Williams' DNA profile was found on the end of the steel. The pestle, which Mrs Bound later identified as her property, did not yield any results.) Both men were informed of their rights to remain silent and to contact a lawyer. Following that warning, Belford informed the police that he was bisexual; that Williams had AIDS and Hepatitis C and had not told him; and that Williams had stalked him for the last seven months. Asked where the weapon was, Belford said that he had "only hit him twice" with the sharpening steel. Bound's only statement at that time, apart from giving his personal details, was that Belford had rung him and asked him to come to the hotel.

[13] Belford was taken to a police station and interviewed; later he was taken back to the hotel for a re-enactment in which he elaborated on what he had said in the interviews; and later still he made a written statement. His account remained consistent throughout, with some additions of detail. According to him, Williams had constantly followed him around. He had recently got the job at the hotel and was upset when Williams was taken on there. On Saturday, 5 January 2008, a friend had told him that Williams had Hepatitis C and AIDS. He believed that he must have contracted those diseases; he and Williams had used the same syringe to inject amphetamine. He rang Bound, to whom Williams owed money, and they agreed that Williams had to be taught a lesson. Bound came to the hotel; the plan was that he would help Belford to get Williams down, tie him up and "give him a few hits".

[14] On Bound's arrival, he had told him that Williams was stalking him again. Bound had a machete and a pestle; he was wearing overalls and steel-capped boots. Bound hid in the toilet while Belford put on rubber gloves and arranged duct tape and zip ties in readiness, planning to put the tape over Williams' mouth and the ties around his hands. Williams came into room number 6 (into which Belford was moving after Carter's departure), carrying his chef's knives and his sharpening steel. Belford put his hands behind his back so that Williams would not see the gloves. Williams sat on the bed. Belford told him to lie down on his stomach, to put his hands behind his back and not to say anything. When Williams complied, he put a knee on his back. At that, Bound, who had been hiding in the toilet, appeared with his machete. On seeing him, Williams called for help and began to struggle.

[15] Belford put Williams in a headlock and put his hand over his mouth. Williams bit him and he punched him in the face a couple of times. While he was holding Williams in the headlock, Bound was punching Williams in the back and hitting him in the back of the head with the handle of his machete knife; three times he connected instead with Belford's knuckles. They struggled on the bed, Bound punching Williams in the back. Williams fell to the floor, initially face-up. He was kicking the door of the cupboard and making a lot of noise. Belford was accusing Williams of having AIDS and Williams was denying it. Belford accused him of lying, grabbed the sharpening steel and gave him two "decent hits" on the right-hand side of his head above his eye with the handle; the steel broke. Bound jumped on William's body and kicked and stomped on his head with steel-capped boots. Belford went outside to see if anyone had heard anything. When he left the room, Williams was bleeding from the head wounds he had inflicted with the sharpening steel, but was breathing, kicking and talking. Bound was holding him down and demanding his PIN number.

[16] Outside, Belford saw the occupant of the next room and asked him if he had heard anything. The man had responded that he had heard faint yelps and screams. Belford told him that they had bashed someone, but he was not to tell anyone. When he returned to the room after a "couple of seconds", Williams was in a different position, up against the wall with his head "up a bit". It "looked like Ray had kicked the shit out of Wayne". Bound told him he thought Williams was dead. Belford put his fingers in Williams' mouth and listened to his chest; Williams was gargling. The struggle had lasted for 15 or 20 minutes. He had planned to hurt Williams and teach him a lesson but he did not intend to kill him; it had got out of hand.

[17] When Belford realised that Williams was dead, he put a sheet over him. When he came out of the room a second time, the occupants of the adjoining room were still outside and he told them that the man was dead. He and Bound washed; in Bound's case, his hands, and in Belford's, his rubber gloves. The two returned to room number 6, sat on the bed and smoked a joint. He fell asleep. When he woke up, he had a shower.

[18] Bound was also interviewed on 7 January. He described how Belford and Williams had lived with him. On 26 December 2007, he had found syringes in the house and had confronted Williams about it. The police had been contacted and had ensured that Williams left the house. Williams then started a rumour that Bound was forcing him to sell amphetamines. He had not seen Belford since he left his house. On the night of January 6, Belford had telephoned him, distraught, so he went to Belford's room at the hotel, where he saw Williams' body. Belford told him that Williams had AIDS and that they had been sleeping together.

[19] Belford sought his help in disposing of the body, but he had done nothing. He had not brought anything to the hotel, but in Belford's room, he had seen a machete-style knife belonging to his wife that Williams or Belford must have stolen. He denied having agreed with Belford to teach Williams a lesson or having been involved in the assault of Williams. He agreed that there was some bruising on his hands and redness to the knuckles, which he said was from working with bricks. The boots he was wearing were his son's, which the latter had worn when working at an abattoir. The stains on them were either from the meatworks or from his standing near Williams' body. Belford had been talking about stealing the hotel bus to move the body and burning it. At one stage, Belford had moved the body from

one position to another. He, Bound, had not, at any stage, stood on the body, although he had put his foot on the leg and shook it.

[20] Later that day, however, Bound asked to see the interviewing detectives again. What passed between them and him was the subject of evidence in two forms. Sergeant Armitt, one of the detectives, gave evidence that Bound said that he wanted to tell the truth. He admitted that he was present during Williams' assault and had taken part in it, but, he said, it was Belford who went too far; he had warned him to stop hitting Williams or else he would die. That conversation was not recorded, but immediately after it, the two police officers took Bound to an interview room where, on tape, he was told (as he had been previously) that he had the right to contact a lawyer. Bound responded, "[t]hat's been done, hasn't it?"

[21] After a break in the interview, Sergeant Armitt reported that he had telephoned a named solicitor and left a message on his answering machine. Bound agreed with what Sergeant Armitt then put to him: that he had told the officers that he had a different version to give. However, asked whether he wanted to give that version then, he said that he thought he had better talk to a lawyer first. He reiterated twice that he wanted to tell the truth, but first wanted to speak to a lawyer. This exchange followed:

> "SGT ARMITT: Alright. If you don't mind I'll just give a brief summary of what happened and then you can, you can make comment or you, or you don't have to, okay? Ju, ah, just for the purpose of the tape, um, you called us into the room, um, you said that you just wanted to, ah, tell us what happened, that you were present, um, that you admitted that yes, you did take part in the assault on ah, ah Mr, ah, Williams, however that it was Mr Belford who had gone overboard and had, ah, you had warned him to stop hitting him, um, because you, he was, he was going to kill Mr Williams.
>
> BOUND: Yes.
>
> SGT ARMITT: Is that what you said?
>
> BOUND: Yes."

The interview was terminated then, at 1.54pm.

[22] Bound was then placed in the watch-house in the company of two covert police operatives, one using the name "Gallagher". They were in a cell together from 2.40pm for some hours, during which they spoke to each other. The conversations were recorded; parts of the tape are indistinct, but the significant portions of the transcript are as follows:

> "[PORTION OF RECORDING INDISTINCT]
>
> UNIDENTIFIED MALE SPEAKER 2: What, did your friend just call you up and say we're gonna fuckin' bash this cunt?
>
> UNIDENTIFIED MALE SPEAKER 4: [INDISTINCT] doesn't really matter.
>
> UNIDENTIFIED MALE SPEAKER 2: Hey?
>
> UNIDENTIFIED MALE SPEAKER 4: Doesn't really matter, the bottom line is I'm here and he's dead isn't it?

UNIDENTIFIED MALE SPEAKER 2: Yeah.

UNIDENTIFIED MALE SPEAKER 4: Yeah.

UNIDENTIFIED MALE SPEAKER 2: [INDISTINCT] is that your mate in there? Is he in there?

UNIDENTIFIED MALE SPEAKER 4: Hmm?

UNIDENTIFIED MALE SPEAKER 2: Your mate?

UNIDENTIFIED MALE SPEAKER 4: [INDISTINCT] I think.

UNIDENTIFIED MALE SPEAKER 2: Oh right.

[PORTION OF TAPE RECORDING INDISTINCT]

(A conversation followed with someone outside the cell about whether Bound could have a blanket.)

GALLAGHER: [INDISTINCT] how are you going?

BOUND: What?

GALLAGHER: [INDISTINCT] him.

BOUND: What?

GALLAGHER: He must be new or something?

BOUND: What?

GALLAGHER: That bloke there, just walked in. He wasn't out the front when we came in.

[PORTION OF TAPE RECORDING INDISTINCT]

BOUND: It was on the news today.

GALLAGHER: Oh well when ah six o'clock comes around we might see it.

BOUND: [INDISTINCT].

GALLAGHER: Oh you never know mate, fuckin' cunt it was the other guy that did it so just tell 'em that.

BOUND: Yeah, but they know I sunk my boots into him

GALLAGHER: You did?

BOUND: Yeah.

GALLAGHER: How do they know that? Did you tell 'em?

BOUND: Well, they got my boots from me

GALLAGHER: Oh fuck [INDISTINCT]

BOUND: They had blood on them

GALLAGHER: What's that?

BOUND: They had blood on them

GALLAGHER: Blood on your boots?

BOUND: Yeah.

GALLAGHER: Can't you say you walked in it and shit like that?

BOUND: Hey?

GALLAGHER: Can't say you walked in it when you turned up?

BOUND: But what about the boot marks on his back mate.

GALLAGHER: Oh yeah.

BOUND: You can see them

GALLAGHER: Fuckin' hell what'd this cunt do to you?

BOUND: [INDISTINCT].

GALLAGHER: Hey?

BOUND: [INDISTINCT] The young bloke mate.

[PORTION OF CD RECORDING INDISTINCT]

BOUND: [INDISTINCT] just kept going.

GALLAGHER: So how did you get in this, is he a good mate?

BOUND: Nah it's a long story mate.

GALLAGHER: Oh.

[PORTION OF CD RECORDING INDISTINCT]

BOUND: [INDISTINCT] I was sitting on the toilet when he came in [INDISTINCT]. He told him to come in [INDISTINCT]

GALLAGHER: What? You know you were gonna do that straight way?

BOUND: Hey?

GALLAGHER: Is that what he called you up for? [INDISTINCT] something?

GALLAGHER: Young bloke rang you up?

BOUND: [INDISTINCT] did yeah. At home, ask me what I'm doin' [INDISTINCT]

GALLAGHER: Did you know it was gonna go that way?

BOUND: No I didn't want it to but I just said like what happens [INDISTINCT].

[PORTION OF CD RECORDING INDISTINCT]

GALLAGHER: Oh [INDISTINCT] I don't think I could do that [INDISTINCT] fucking [INDISTINCT] wastes up time mate [INDISTINCT].

BOUND: No [INDISTINCT].

> [PORTION OF TAPE RECORDING INDISTINCT]
>
> GALLAGHER: He must be angry.
>
> [PORTION OF CD RECORDING INDISTINCT]
>
> BOUND: I can see it.
>
> GALLAGHER: [INDISTINCT]
>
> BOUND: No, no, no. Honestly, like I don't know how it happened. I'm not sure how it happened yeah 'cause in the end I was struggling you know like you know like young bloke [INDISTINCT] you know.
>
> [PORTION OF CD RECORDING INDISTINCT]
>
> GALLAGHER: [INDISTINCT] you can get yourself out of that.
>
> BOUND: What?
>
> GALLAGHER: [INDISTINCT] fucking bruise yourself, falling over, break your leg. Fucking You know anything like that?
>
> BOUND: Well um seen a lawyer he told us not to say anything.
>
> …"

Although at the beginning of the transcript the participants in the conversation are identified as "unidentified male", the context makes it clear that speaker 4 is Bound and that speaker 2 is, if not Gallagher, the other covert police operative, since they were the only persons in the cell with Bound.

[23] The boots worn by Bound were examined. Four areas tested positive to a presumptive screening test for blood and DNA profiles were obtained from samples from those areas. Samples consistent with Williams' DNA profile were taken from the left boot near the laces, on the toe area below the shoelaces, and on the inner side of the right boot. A sample from another area on the toe of the upper sole of the right boot revealed a partial DNA profile consistent with that of Williams.

[24] Williams' body was examined by a forensic pathologist, Dr Urankar. She described four lacerations over his scalp in the left forehead area, the largest of which was 7.5 centimetres in length. Two of them actually extended through the thickness of the scalp to the skull. There were other lacerations, bruising and abrasions to the forehead and the side of the face and extensive bruising to the jaw consistent with kicks or punches. The scalp lacerations could have been caused with the sharpening steel; a steel-capped boot was another possibility, although Dr Urankar preferred the sharpening steel hypothesis. The injuries to the other parts of the face entailed a broader application of blunt force. There were, however, no skull fractures, which indicated that the degree of force used to inflict the head injuries was at "the upper end of moderate".

[25] Beneath the scalp, Dr Urankar said, there were areas of bleeding over most of the head. The bleeding was likely to be the product of traumas which had not manifested in bruising on the outer skin. There was a small amount of subarachnoid haemorrhage; that is, bleeding between the brain and its overlying arachnoid

membrane. That bleeding was not extensive and would not have been fatal; it indicated only that there had been significant forces applied to the brain. The brain was swollen, suggesting the possibility of asphyxia. There was an area of abrasion and bruising over the neck with haemorrhage in the underlying muscle, which indicated that there had been a good deal of compressive pressure on the neck, consistent with a headlock. A moderate to severe degree of force would be required to cause the damage she had seen there. A neck hold could restrict the flow of blood to the brain, causing a swollen brain and leading to unconsciousness or death.

[26] There were a number of other bruises and abrasions on the trunk, including a contusion on the back consistent with the dimensions of the sharpening steel. On internal examination, Dr Urankar found areas of bruising in the fat and muscle of the back, buttocks and limbs. The lungs revealed contusions from the transmission of blunt force at the upper end of the moderate range. There was some bleeding in the heart muscle which could have been the result of injury or of poorly performed cardiopulmonary resuscitation. The liver showed some bleeding and bruising consistent with the application of a moderate degree of force. There was no sign of any natural disease in the internal organs.

[27] The injuries had all been sustained at around the time of death. As to the cause of death, Dr Urankar began by saying that there were a number of indications by way of haemorrhage and bruising to show that Williams had experienced significant blunt force trauma to the head. She continued:

> "I have got bleeding in the brain and all the evidence and all the experience and all the pathologists know this degree of blunt force trauma to the head will cause unconsciousness, okay, and we know that it will lead to death. Okay. So, those kind of head injuries can be fatal and we know that in most circumstances they are fatal."

There were also the findings of compressive injuries to the neck which could also cause blockage of blood flow and oxygen supply to the brain leading to death.

> "And in the autopsy report, you know, I say both of these can cause death, both of these are likely to have caused death and, in my opinion - you know, they are the cause of death. So, you know, the head injuries will cause death. The neck injuries will cause death. You can pull the neck injuries out. If you know he was conceivably shown to be alive after they were applied, if his conscious level could be proven - but I am not there to prove it - but I know those head injuries are fatal themselves, but I can't pull the two threads – I can't pull them apart. So, that's why my cause of death lists the two together.
>
> So it's the two in combination?-- Well, it could be the two in combination. I can't - if somebody - if he had the neck compressive forces while he was being kicked they would both cause his death. If he had the head injuries on his own, that would cause his death. If he had the neck compression on its own it would cause his death."

Because she could not separate the two possibilities, Dr Urankar explained, in her autopsy report she had identified both head and neck injuries as the causes of death. She elaborated to the effect that the head injuries could result in unconsciousness and hypoxia ending in death. The deceased might progressively have lost

consciousness because of repeated blows to the head or might have survived the many blows he had experienced, until one big blow rendered him unconscious and left him unable to protect his airway leading to death.

[28] Under cross-examination by Belford's counsel, Dr Urankar said that the degree and location of bruising in combination with the subarachnoid haemorrhage were severe and were,

> "likely in the range of – you know, above 95 per cent to cause unconsciousness and lead to death."

She was asked,

> "So, any person suffering injuries of that kind would always die?-- No. I didn't say 'always', I said 95 per cent leading to unconsciousness."

It was suggested to her that there was no damage to the brain. She responded that there was no damage which could be seen, because Williams had not survived the injuries and the brain cells had not had time to respond.

[29] Dr Urankar was cross-examined at length about the effect of unconsciousness, and maintained that a person who became unconscious and whose airways were compromised would potentially become hypoxic with death resulting. It was impossible to say at what point in the incident Williams became unconscious. It would not make any difference whether he were lying flat on his back or with his head at any angle to the wall; either way, if he were unconscious he would not be able to protect his airways. Challenged as to whether she could say that if Williams had been placed in the recovery position he would not have survived, Dr Urankar responded,

> "I can't say that he wouldn't have survived, but again you're talking about cardiac survival, so heart death and brain death are two separate things. I can't tell you whether his brain would have survived--
>
> Because?-- [B]ecause we're talking about a head injury, so a head injury that is survivable or non-survivable. This man may have been able to have been resuscitated, taken away in an ambulance, gone to hospital, put on life support, donated his organs, made a big difference that way, but his brain may have never recovered because of the injuries to his brain have been such that the brain could never have functioned again, okay, and that's - that's the cause of death, are those head injuries, not the fact that his heart stopped per se, it's the fact that his brain was injured, okay. So, yes, he may have survived if he had have got medical attention, but he may not have lived because his brain may have never recovered, and I think this is - this is the issue that you're confusing."

[30] It was put to Dr Urankar that she had made no suggestion in the autopsy report that there was brain damage which could not be seen; she responded that it was a given that a period of survival was needed for changes to become evident. She elaborated,

> "... it goes back to he's had head injury to the brain that has gone - that we know - that pathologists know, that neuropathologists know

> is going to cause these injuries to neurons. It's going to have caused injuries, it's caused unconsciousness. It's most likely - 95 per cent we know that it's going to have caused these injuries. We can't see them. We know in people who have survived after the instant of sustaining them that they don't recover, okay, that they end up on life support, their neurological function doesn't recover, and that down the track when we look at their brains we can see the injuries to the neurons."

A blow of sufficient severity to fracture a skull would probably lacerate the brain; then it would be possible to say with a hundred per cent certainty that there was damage to the brain. In the case of moderate force, Dr Urankar said, somewhat confusingly,

> "… I know above 90 per cent of the chance and there is that small chance that somebody may recover some degree of neurological function, but we're not talking a 50/50 per cent chance or just a - you know, 20 per cent chance, we're talking a much higher degree."

[31] Questioned further about the autopsy report, Dr Urankar said that it was written for experts, with the summary at the end meant for the lay person. It was a given, in the absence of any natural cause of death or any other traumatic cause of death, that there had been blunt force trauma injuries causing injury to the brain. She could not see gross injury to the brain, but the mechanism of death was a concussive blunt force head injury leading to unconsciousness as described in the conclusion to the autopsy report, which also raised the possibility of the neck compression as a cause of death. Under cross-examination at the committal, she had explained that she inferred the concussive type injury from the fact that there were multiple blunt force traumas to the head in particular areas which, combined with the subarachnoid haemorrhage, suggested that the brain had been disrupted.

[32] Dr Urankar conceded that she had not said at the committal that there must have been brain damage to such an extent that Williams could not survive, but, she said, her answers were addressing the question of concussion and unconsciousness. She continued,

> "I can't answer what the brain injury he sustained was, and I think the comment that I made, which you've taken on here, is that he sustained an injury that led to unconsciousness, the degree of blunt force as such was probably - probably gave him a brain injury that he may not have actually recovered from ... ."

Challenged immediately after that statement, however, about whether her evidence was that the head trauma probably caused a brain injury or definitely caused "massive brain damage", she said,

> "I'm probably mincing words or we're mincing words here. It's a brain injury. Unconsciousness is a brain injury, okay. Trauma to the brain is a brain injury. Disruption of neurones is a brain injury. So, you know, I am not certain what the problem is here. There was a brain injury leading to unconsciousness.
>
> Right?-- Okay. The unconsciousness led to death ... ."

Dr Urankar agreed that if Williams was still able to speak when Belford left the room, that suggested a certain level of consciousness, so that it was more likely than

not that there was some further trauma to the head, inflicted after his departure, which had left him unconscious.

[33] Cross-examined next by Bound's counsel, Dr Urankar agreed that the theory that Williams was knocked unconscious and died as a result of apnoea was a "best case scenario" and that she had, in her autopsy report summary, used expressions like, "possible", "can" and "is best attributed" because, as she said, there were "no definites in this field".

The application for discharge of the jury

[34] Immediately after Dr Urankar had completed her evidence, the appellants sought the discharge of the jury on the basis that her evidence had changed. The autopsy report had made no reference to brain damage of any kind. In summarising the cause of death in it, Dr Urankar had said:

> "In my opinion, this man suffered multiple blunt force trauma to his body, particularly to his head and thorax region. While an anatomical cause of death cannot be established, it is possible that he suffered a concussive type injury which can lead to apnoea and death. An element of neck compression cannot be excluded given the bruising to the neck. This can result in death on its own. No acute changes in the brain would be expected in this setting.
>
> In my opinion, based on the history and circumstances of the case in conjunction with the autopsy and investigation findings, the cause of death is best attributed to the combination of head and neck injuries."

[35] At the committal, Dr Urankar had given her opinion in terms of possibilities as to whether there had been a concussive type injury and whether the brain had been disrupted. In cross-examination there, she had not suggested that there had been irrecoverable brain damage inflicted or that there was brain injury not visible on examination because the deceased had not survived long enough for the resulting changes to become apparent. In evidence before the jury, however, she had asserted in definite terms that the physical trauma to the head would cause unconsciousness and would cause death. The accused were entitled to be told in advance that the expert would state her opinion in absolute terms so as to have the opportunity to have their own expert consider the correctness of the assertion. To have the evidence emerge in that fashion for the first time at trial was unfair and breached the Crown's obligation of disclosure and obligation to give sufficient notice of the expert's opinion.

[36] His Honour reserved his ruling to the following day. At the start of court that day, counsel for Belford said that he had had a brief opportunity overnight to speak to a person with medical qualifications who suggested that, in the absence of any visible internal injury, it was not possible to extrapolate from the external injuries that there must have been brain damage to the extent Dr Urankar described. He had not been able to contact a neuropathologist, but if the jury were not to be discharged, he would ask for

> "a reasonable opportunity to at least see whether I can obtain that information within a reasonable timeframe for the purposes of the trial."

The learned judge responded that that was "fair enough".

[37] The learned judge in his ruling identified two topics of significance in the expert evidence: the first, whether concussive injuries caused unconsciousness and the second, whether unconsciousness caused death. As to the first, there was no complaint of Dr Urankar's evidence that a concussive injury would cause disruption of the brain. There had been cross-examination at the committal about concussive head injury causing unconsciousness by reason of disruption to the brain not visible at autopsy; that area was not previously unexplored. The statement which caused concern, that

> "all the pathologists know [that] this degree of blunt force trauma to the head will cause unconsciousness, okay, and we know that will lead to death"

was made in reference to whether a particular degree of force assumed to have been applied would, generally speaking, produce unconsciousness, rather than by way of opinion as to whether the degree of force in the case in question did produce unconsciousness and death. Dr Urankar's view as to causation was not new; the difficulty was that she had differently expressed her view as to the extent of probability.

[38] That statement had been the subject of immediate cross-examination in which Dr Urankar had resiled from the absolute terms she had earlier used. She had also conceded in cross-examination that a concussive injury to the brain was not necessarily fatal; that what she could say was that it was "likely from the evidence" that the blows to the head caused unconsciousness; and subsequently, that she could not say which of the head or neck injuries "did it or that both didn't do it". She had also agreed that there were no "definites". His Honour concluded that any departure by Dr Urankar from her expected evidence by using the unqualified word "will" was addressed and remedied in cross-examination. He did not consider that the way in which her evidence-in-chief was expressed gave rise to unfairness or deprived the accused of the opportunity of a fair trial.

[39] No subsequent application was made for any adjournment to obtain other specialist evidence. However, in this court, the appellants sought to adduce further evidence from a forensic pathologist, Professor Duflou, to support the argument that if the jury had been discharged, evidence contrary to Dr Urankar's could have been obtained. The critical paragraphs from Professor Duflou's report are as follows:

> "9.4 I disagree with Dr Urankar in relation to her apparent central thesis in relation to the head injury, namely that although no injury to the brain was demonstrable there would have almost certainly have been severe and likely lethal brain injury. Although it is reasonably possible that the deceased may have had a diffuse brain injury (if so, likely diffuse axonal injury – DAI), there is simply no evidence for this condition at all at autopsy in this case. If the DAI was severe, there would have also have been characteristic areas of bleeding in the brain, in the corpus callosum and in the brainstem, and such bleeding would have been visible even if the deceased had died immediately after sustaining the DAI. Despite a detailed examination of the brain, by at least two neuropathologists as well as by Dr Urankar, no injury of any type was identified in the brain. It follows that in all

> likelihood, the brain injury was minor, and would certainly not have resulted in a high chance of severe longterm damage and even death. Most likely, the deceased was indeed concussed, as stated by Dr Urankar in her report, but by far the most common outcome following concussion is recovery with minimal if any longterm sequelae. It is my experience that the vast majority of assault victims who die of blunt force head injury do in fact have significant observable injury to the brain when that organ is examined by a neuropathologist, although I do concede that in a minority of cases all that may be present is external injury such as skull fracturing and extensive blood loss.
>
> ...
>
> 9.6 Dr Urankar is of the view that the airway would have been obstructed in this case if the deceased had been unconscious, and that this caused death. I agree that it is possible that this is the case, but it cannot be stated that a person on their back will always obstruct their airway and die of that if they have been rendered unconscious.
>
> ...
>
> 10. In conclusion, I do not believe that Dr Urankar can reasonably assert that death was the result of any injury to the brain which was not discernible at autopsy. An entirely reasonable possibility, if not a probability, is that the deceased did not sustain a significant generally life-threatening brain injury at all, and that the absence of any observable injury to the brain is evidence of just that."

[40] Professor Duflou also took issue with Dr Urankar on other matters. Decomposition could not be excluded as a reasonable, and perhaps the most likely, cause of the brain swelling which Dr Urankar observed. He was "not convinced" that a head-lock had caused asphyxia in this case because there were no petechial haemorrhages or other signs of asphyxia. Other less significant differences of opinion were as to the time interval to which the age of bruises could be confined and whether Williams' responses (as attributed to him by Belford) indicated full consciousness or not. (It should be said, however, that there were areas of agreement between the two specialists and Professor Duflou did not suggest that the autopsy was other than competently performed.)

[41] Asked his opinion as to the cause of death, Professor Duflou said, in an addendum report,

> "I agree with Dr Urankar that it is reasonable to expect the deceased to have been concussed and to have been unconscious, at least for a period of time, after he sustained the injuries to his scalp and face. If, during that time, the deceased was placed in a position which could result in obstruction of his airway, this could have resulted in death due to airway obstruction. Such airway obstruction would not necessarily be detectable at autopsy, and would not necessarily leave any pathological signs at the time of autopsy."

He went on to say that this was a hypothesis and concluded,

> "…that it is more likely than not that the deceased died of the effects of airway obstruction brought on by being placed in a position which obstructed his airway while unconscious which in turn was the result of blunt force injuries to the head."

However, Professor Duflou observed, none of the injuries described by Dr Urankar were, of themselves, likely to result in serious disfigurement or to endanger life if left untreated. Although he expressed the opinion, in consequence, that the injuries did not fall within the *Criminal Code* definition of grievous bodily harm, he did not comment on the probability of their causing permanent injury to health.

[42] The appellants contended that Professor Duflou's evidence could not have been adduced at trial by the exercise of proper diligence, because the need for it arose as a result of Dr Urankar's evidence. It was not unreasonable for the defence, in the circumstances, not to press the request for adjournment to obtain evidence such as Professor Duflou's because the learned judge in his ruling made it clear that he regarded Dr Urankar as having made the necessary concessions. It was unlikely, therefore, that he would grant an adjournment for any significant length of time to address the conflict contended for by the defence.

[43] Dr Urankar's evidence did not, the appellants submitted, moderate significantly in cross-examination. She had maintained that the injuries were more than 95 per cent likely to cause unconsciousness and lead to death and had asserted that Williams' injuries were such that

> "the brain could never have functioned again, okay, and that's - that's the cause of death, are those head injuries".

Her explanation that the extent of brain damage was a given, so that it was unnecessary to expand on it in her autopsy report, which was written for other experts with a summary at the end for lay persons, should not be accepted. She knew that the report was prepared for court proceedings and she knew of the obligations on an expert witness. She had been cross-examined at the committal and had not answered questions in terms of what would happen, as opposed to what could happen. There had been a significant denial of procedural fairness even without taking Professor Duflou's report into account.

[44] Professor Duflou's evidence was such as to give rise to a real possibility of acquittal. Even if the evidence were characterised as new rather than fresh, it would lead the Court to regard the verdict as unsafe. Professor Duflou confirmed that the assault did not entail any injury amounting to grievous bodily harm, which was relevant to any inference the jury might draw as to intent. Belford's counsel submitted that a significant feature of Professor Duflou's report was his opinion that the actual mechanism causing death was not certain, raising the possibility of an intervening act, which counsel identified as the positioning of Williams (presumably by Bound) in such a manner that his breathing was restricted.

[45] The essence of the complaint made at first instance was that Dr Urankar had said that blunt force trauma of the degree inflicted would have caused unconsciousness and would lead to death. His Honour observed, correctly with respect, that the difference between that evidence and Dr Urankar's other expressions of opinion was as to the extent of the probability of the events. There is some force in the appellants' submission that although Dr Urankar, at the beginning of cross-

examination, qualified that assertion, she reverted to more definite terminology later; as, for example, in the second of the passages set out in paragraph 33 above. On the other hand, the note on which Dr Urankar's evidence ended, so far as this issue was concerned, was that there were "no definites". In those circumstances, I respectfully consider that the learned judge was right to conclude that Dr Urankar had qualified her evidence in cross-examination.

[46] There was no evidence before us to indicate how quickly Professor Duflou's evidence could have been obtained and whether it was possible that it could have been called at trial. Accepting, however, for present purposes, that his opinion that although possible it was not inevitable that an unconscious person on his back would suffer from airway obstruction, leading to death, constituted fresh evidence, I do not consider that there was any prospect that it would have led to a different verdict. In the absence of any natural cause of death, the only rational conclusion was that Williams died as a result of the assault upon him; the question from the pathologists' perspective was as to the mechanism. Professor Duflou's opinion was that death was "more likely than not" the result of Williams' airway obstruction while he was unconscious as a result of his head injuries. It is impossible to see how that evidence, if given, would have made the jury any more likely to acquit.

[47] Belford's suggestion that Professor Duflou's opinion raised the possibility of an intervening act – the positioning of Williams so as to restrict his breathing – is untenable. Professor Duflou did not think it made any difference whether Williams was left lying flat on his back or had his head at an angle. And it is difficult to see how the jury could have come to any view other than that any problem of airway obstruction was a result of what was done to Williams, rather than the result of what was not done, i.e. that he was not placed in the recovery position.

[48] Professor Duflou's disagreement about what he described as Dr Urankar's "apparent central thesis" that there was "severe and likely lethal brain injury" does not, I think, fairly reflect the overall tenor of her evidence, which must be seen in the light of her equation of both trauma and the resulting unconsciousness with brain injury. Her statement about the possibility that Williams' brain may never have recovered was made in the context of answers about the effects of airway obstruction. Her repeatedly offered opinion, which did not differ from Professor Duflou's except as to degree of likelihood, was that Williams' unconsciousness and consequent inability to maintain his airway flow had caused his death.

[49] None of the other opinions in Professor Duflou's report could be characterised as fresh evidence. Dr Urankar had squarely raised the possibility of asphyxia from neck compression, and it was not suggested that what she had said about brain swelling was new. Nor was there anything to surprise the defence in what she had said about the aging of bruises; and her answers as to William's putative level of consciousness were elicited in cross-examination by Belford's counsel. As to brain damage not apparent on examination, there had, as the learned judge observed, been cross-examination at the committal about disruption to the brain not visible at autopsy. Professor Duflou's view that none of the individual injuries – lacerations, abrasions and bruises – constituted grievous bodily harm was not something on which Dr Urankar had expressed any contrary opinion. She had said that it was impossible to tell whether there had been a progressive loss of consciousness because of repeated blows or one single blow that rendered Williams unconscious, but none of the blows was delivered with more than moderate force. That evidence, at best then, was "new" evidence. None of it is such as to lead to the view that the jury must have acquitted as a result of it.

[50] I would receive Professor Duflou's report in evidence, but conclude that whether one takes it into account or not, the learned judge did not err in refusing to discharge the jury either on the basis that there was a miscarriage of justice as a result of the changes, such as they were, in Dr Urankar's evidence, or on the basis that the interests of justice required adjournment to enable contrary evidence such as that now adduced from Professor Duflou to be given.

The admission of Bound's statements to a covert police operative

[51] In his conversation with the covert police operative Bound made these significant statements: that he had "sunk [his] boots" into Williams, that there were boot marks on Williams back, and that he was in the toilet when Williams entered the room. Those statements gave the lie to his assertions in the earlier interview that he had not taken part in the assault on Williams, that the stains on the boots might be from the abattoir, and that he arrived when Williams was already dead. Counsel for Bound at trial sought the exclusion of the tape of the conversation, relying on *R v Swaffield*[1] and arguing that the use of the stratagem of putting the covert police operative in the cell to draw Bound out was an attempt to subvert his right to silence.

[52] The learned judge made the following ruling:

> "In this case the statements made by the applicant to the covert police officers were not completely unelicited. However, they were not elicited by active questioning by cross-examination. They certainly were not elicited by misleading questions or bravado or some other form of questioning which was likely to prompt someone who might not otherwise wish to speak to say something. There is no reason to doubt the reliability of the answers, given the circumstances in which the exchange occurred. I recognise the important public interest in ensuring that police do not adopt tactics that are designed simply to avoid the limitations on their inquisitorial functions the Courts regard as appropriate in a free society. I also take into account the important public interest recognised by, amongst others, Brennan CJ in *Swaffield* at paragraph 34 of having an accused's admissions available to the Court at trial. I note that similar considerations have exercised the consideration of the Court of Appeal in this State in earlier authorities which are essayed in *Swaffield* and other authorities.
>
> The question of fairness is not simply one concerned with the circumstances in which the evidence was obtained. As was observed by Toohey, Gaudron and Gummow JJ in Swaffield at paragraph 53, the term 'unfairness' necessarily lacks precision and, referring to earlier authority, they stated the question is not whether the police have acted unfairly, the question is whether it would be unfair to the accused to use his statement against him. Unfairness in this sense is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement.
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> Here one is not concerned with reliability, and the authorities make clear that the discretion exists to exclude statements which are

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1 (1998) 192 CLR 159.

reliable. The discretion exists to exclude them in circumstances in which the Court considers the appropriate exercise of a discretion is to exclude them in order to uphold the public interest in police officers avoiding an applicant's right to choose whether or not to speak to police.

The judgment in *Swaffield* at paragraph 91 raises the question whether the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. That begs the question of how a trial Judge or indeed any Court judges those community standards.

Doing the best that I can, I find it difficult to conclude that there is widespread community disapproval of the use of covert police operatives in the circumstances that covert police operatives were used in the present circumstance. I apprehend that there would be a large number of the community, perhaps an overwhelming majority of members of the community, who would find it completely acceptable that someone accused of murder who cho[o]ses to unburden himself to someone who he mistakenly thinks is a fellow prisoner should have apparently reliable admissions used in evidence against him.

In terms of judging community standards, I also note that [t]here is no legislative ban on the use of covert police officers being put into cells in cases such as this, and that is some indication that there is not some kind of community abhorrence or disapproval of such practices. I apprehend that there would be community acceptance of the present tactic as a legitimate thing to do.

That said, the issue is not simply one of gauging whether the community as a whole would regard such evidence as being obtained at too high a price. The issue is one of fairness in the sense that I've indicated and important issues of policy which require the weighing of competing public interests.

One starts with the proposition that although the applicant did not clearly state that he would not speak further to police, the police proceeded on the basis that it was likely that he would make that choice if given the choice. Accordingly, although the case is different from *Swaffield*, I consider that the police conduct was conduct undertaken in the light of an apprehension that the applicant would choose not to speak to police if asked whether he wished to.

The breach of the right to choose not to speak, however, was not a breach undertaken by police persisting in an interview in the purported exercise of authority. In that sense, it differs significantly from an intrusion upon the right to silence by police officers who are in a position of apparent authority and insist upon answers to questions or continue to question when they should not, or embark upon questioning when they should not in a position of authority.

Although the submission was made that this was as exercise in trickery, much depends upon what one means by 'trickery'. It was an exercise in subterfuge, but the use of techniques of subterfuge is not something that is frowned upon by the law.

> The subterfuge elicited the disclosure of information without any misleading statements being made, without leading questions, or any other questions which would encourage the applicant to overstate what he did. Although there were, as I have noted, questions, they were not intense questions. I do not regard any of the questions as having been unfair in themselves. They were not leading questions. They were not double-barrelled questions, and I do not, as I have said, consider that the conduct engaged in would be regarded as unacceptable by community standards.
>
> Ultimately, then, I have to weigh competing considerations of policy and in doing so I am not persuaded that the public interest in ensuring that police do not adopt tactics that are designed to avoid limitations on their powers to question is such as to outweigh the competing interest in having admissions available to the Court on the trial of an applicant.
>
> Although not an essential part of my conclusion in this regard, I do take into account the seriousness of the offence in coming to a conclusion that the relevant evidence should not be excluded in the exercise of my discretion."

[53] Bound's counsel here argued that the judge had exercised his discretion on only marginally relevant or irrelevant considerations; that the case was indistinguishable from the facts in *Swaffield*; and that the actions of the covert police operative were in breach of the *Police Powers and Responsibilities Act* 2000 (Qld) requirements in relation to the questioning of suspects. It should be said immediately that the second and third of those contentions are wrong, because s 396 of the *Police Powers and Responsibilities Act* provides that ch 15, which sets out the powers and responsibilities of those conducting investigations and questioning for indictable offences, "does not apply to functions of a police officer performed in a covert way". [2]

[54] The case is thus different from *Swaffield*, in which the undercover police officer was said to be obliged by the Judge's Rules to caution the suspect. (In *Swaffield*, the respondent, charged with arson had previously declined to be interviewed; no evidence was led at his committal; and the undercover operative, in the guise of a drug buyer, subsequently had a conversation with him about the events in the course of which he made admissions.) However, Bound's point that the use of the covert police operative was done with the intention and effect of undermining his exercise of his right to silence remains pertinent. The basis of the Court of Appeal's decision in *Swaffield* that the evidence should have been excluded was not simply that the undercover officer did not caution the respondent before questioning him; it was that the Judge's Rules had been circumvented by the expedient of having a police officer "assuming a suitable disguise and then proceeding to interrogate the suspect".[3]

[55] Similarly, Toohey, Gaudron and Gummow JJ in their majority joint judgment in *Swaffield* observed that the breach of the Judge's Rules permitted but did not dictate exclusion of the conversation. The significance of what had happened lay in the

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2 Section 396.

3 *R v Swaffield* (1996) 88 A Crim R 98 at 118.

impugning of the accused's freedom to choose to speak to the police, which engendered a discretion to reject the evidence. They outlined relevant considerations:

> "In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards."[4]

[56] In reaching their conclusions, the majority referred to the Canadian case of *R v Hebert*[5] quoting, in particular, this passage from the leading judgment of McLachlin J (as she then was):

> "When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police."[6]

[57] In order to succeed on this point, Bound must, of course, show that the learned judge erred in the exercise of his discretion in *House v The King*;[7] it is not, it hardly needs saying, sufficient that another judge or judges might have arrived at a different result. Bound identified these matters as errors: that the learned judge regarded the respondents' refusal to speak with police at all in *Swaffield* as distinguishable from Bound's refusal to speak with police after initially doing so; that he noted that police had already put in train a plan to install covert operatives into Bound's cell before he had exercised his right to silence; that he regarded the nature of the covert operative's questions as important, disregarding the public policy considerations identified in *Swaffield*; and that he had treated subterfuge as a legitimate forensic tactic, disregarding the complaint that in this case, the subterfuge took place after it was believed Bound would exercise his right to silence.

[58] I do not think there was any substance in the first three of those points. His Honour recognised that what was required of him was not a comparison between the factual circumstances of *Swaffield* and those in the present case, but an exercise of discretion by reference to the latter. He was factually correct in observing that the difference existed that in the present case, Bound had not said that he would not speak to police but that police, instead, proceeded on the basis that he would not do so and followed through on an already arranged plan to introduce covert police operatives to the cell. But, he went on to say, the difference was "rather marginal"; he found that the police conduct was undertaken in the light of an

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4 *R v Swaffield* (1998) 192 CLR 159.
5 [1990] 2 SCR 151.
6 At 185; quoted in *R v Swaffield* at 200.
7 (1936) 55 CLR 499.

> "… apprehension that the applicant would choose not to speak to police if asked whether he wished to".

[59] The learned judge found that there was a breach of the right to choose not to speak, but went on to make observations about the character of that breach. In that context, he noted that the questions were not asked by police officers in a position of apparent authority and that the questioning, in itself, was not of an unfair nature. That was a relevant consideration in examining what was actually done and whether it ran counter to the public interest.

[60] But Bound's remaining contention, that the learned judge failed to have proper regard to the effect of the police conduct in sabotaging his right to silence, has substance. His Honour's conclusion that Bound's statements "were not completely unelicited" seems to amount to an acceptance that they were, at least to some extent, elicited, but that it was not by cross-examination or unfair questioning. The conclusion that answers were elicited seems inevitable when one looks at the questions in the transcribed portion of the tape put before his Honour on the voir dire. The first question was a clear attempt to encourage disclosure, presumably in the context of some preceding, inaudible conversation. It was not particularly successful, but the covert operative continued the conversation with inquiry, encouragement, and suggestions of what Bound might say to police. The excerpt of the conversation relied on as evidence must have been prefaced by Bound's having given some detail of what had occurred, which does not appear on either the edited CD or the transcript, so it is impossible to say how it emerged. At any rate, what does appear on the tape and transcript shows the covert operative steering the conversation in a calculated endeavour to keep Bound talking about the events of the night in question.

[61] The considerations which the learned judge addressed were, in my respectful view, too limited. The significant factor in the case was the fact that the questioning by the covert police operative occurred after the interviewing police were aware, that Bound, having received legal advice, he was most unlikely to co-operate if further questions were asked. That apprehension was sound: Bound told the undercover police officer that the lawyer had told him not to say anything. Rather than confirm their belief to that effect by attempting another interview, the police resorted to the device of placing the covert operatives in the cell with Bound, where he formed a captive audience over some hours.

[62] While pointing out, correctly, that unfairness to the accused in this context was concerned with the accused's right to a fair trial, his Honour seems to have apprehended that the only possible question in that regard was one of reliability. The reliability of Bound's answers not being in issue, he moved immediately to consider the matter from the public interest perspective, and touched on unfairness again only in determining that the content of the questions asked was not unfair. But although the majority in *Swaffield* preferred the approach of a "broad discretion", combining questions of unfairness and public policy, the relevant considerations as to unfairness were not confined to questions of unreliability:

> "While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted"[8]

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[8] At 189.

and

> "Unreliability is an important aspect of the unfairness discretion but it is not exclusive ... [T]he 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 confession as statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence."[9]

[63] The learned judge did not consider the question of unfairness from the point of view of the impropriety of the police conduct in circumventing Bound's rights and its effect in producing admissions contrary to his previous statements, to his obvious forensic disadvantage. Similarly, in considering what community standards would dictate, his Honour focussed on the attitude of community members to the use of a covert police operative to obtain admissions and the absence of any legislative ban on doing so. But it was necessary to go further and consider specifically whether the use of a subterfuge to undermine the right to silence which police believed (correctly) that Bound would probably exercise was such as to offend community standards. The learned judge's broad reference to the public interest in

> "… ensuring that police do not adopt tactics ... designed to avoid limitations on the powers to question … ."

as being outweighed by the interest in having the admissions available, did not, in my respectful view, amount to addressing the question. And although the discretion here fell to be exercised on the facts of this case, it is of significance that the majority in *Swaffield* seems, from the result in that case, to have taken the view that the eliciting of admissions by an undercover police officer in breach of a right to choose whether or not to speak would offend such standards.

[64] There was error in the exercise of the discretion in these regards, in my view with the consequence that the evidence was wrongly admitted. Undoubtedly, it is a case in which questions of unfairness and public policy intertwine; but in circumstances where the police deliberately sought to overcome Bound's expected exercise of his right to silence, it was both unfair to Bound to admit the conversation and it was evidence

> "obtained at a price which is unacceptable having regard to prevailing community standards".[10]

The evidence should have been excluded.

[65] It is necessary then to consider some, but not all, of Bound's remaining grounds of appeal before addressing the question of whether, in the absence of the covert police operative's evidence, a guilty verdict against him must have been unreasonable. A consideration of those matters may also prove helpful in any new trial.

The admission of the recorded conversation with Sergeant Armitt

[66] Bound sought the exclusion of the recording of the conversation in which Sergeant Armitt purported to summarise his admissions to the effect that he had taken part in

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9 At 197.

10 *Swaffield* at 202.

the assault of Williams and he had responded affirmatively. Again it was submitted, relying on *Swaffield*, that it was unfair to admit that admission because it breached the appellant's rights and that public policy considerations militated against its being received. Four distinct propositions had been put to Bound: that he did take part in the assault; that he had said that Belford went overboard; that he had warned Belford to stop; and that he thought Belford was going to kill Williams. Those four propositions had received a single affirmative response. The recording occurred after Bound had, on a number of occasions, said that he wanted to talk to a lawyer. There had been a disregard of his rights similar to that which had resulted in exclusion of evidence in *R v Adamic*.[11]

[67] The learned judge ruled that it was appropriate for the police officers to confirm on tape what had been said. Bound knew of his rights and had been appropriately cautioned, and what was said was confined to confirmation of what had already been said. If there were any breach of s 418 of the *Police Powers and Responsibilities Act* in not delaying the recording of the conversation until a lawyer was present, it involved no flagrant disregard of the police officers' obligations such as that which occurred in *Adamic*.

[68] The learned judge, with respect, correctly distinguished *Adamic*. It involved a different set of circumstances: police officers informing the suspect that he was entitled to speak to a lawyer, telling him that he would be given the option of a telephone call for that purpose later, and immediately proceeding to question him, in what was found to be an effective negation of the advice as to his entitlement to contact a solicitor.

[69] No objection was taken at trial to Armitt's recounting of the conversation later summarised on tape, but he was cross-examined as to whether Bound had said that he took part in the assault or merely that he was present for it. That difference seems to have been the only point of possible disadvantage to Bound in the admission of the tape. The fact that four propositions were put at once was properly a matter for directions; it was not something which dictated exclusion. In circumstances where the appellant had already been twice informed of his right to remain silent; in the particular recorded conversation was told that he could comment, but did not have to; and the questioning was limited to a summary of what had been volunteered earlier, the learned judge was entitled to reach the conclusions he did. No error is shown in his exercise of discretion.

The admission of statements under s 93B of the *Evidence Act*

[70] Belford complained that the statements by Williams' relatives to the effect that Williams had claimed Bound was threatening him over a drug debt and had assaulted him should not have been admitted under s 93B of the *Evidence Act*. Section 93B permits hearsay evidence to be given of a representation of fact made by a deceased person. However, under s 98 of the *Evidence Act*, the court may exercise its discretion to reject such evidence if it seems to it to be "inexpedient in the interests of justice" to admit the statement.

[71] Bound's first point was that the prosecution had not complied with its obligation under s 590AH(2)(f) of the *Criminal Code* 1899 (Qld) to give a written notice stating its intention to adduce s 93B evidence, with prescribed details of that

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11 (2000) 117 A Crim R 332.

evidence, within 28 days of the presentation of the indictment. The failure to give the notice was the result of administrative oversight. It was not contended that any prejudice resulted from the late notice, and the relevant witnesses' statements had been in the possession of Bound's legal representatives prior to the committal. At the committal, there had been cross-examination of those witnesses on the statements they attributed to Williams. Taking those circumstances into account, the learned judge exercised his power under s 590AI(4) to extend the time for service of the notice. It was not explained why he was wrong in doing so; the submission was more in the nature of a general complaint that the discretion was exercised unfavourably to Bound. There is nothing in the point.

[72] Bound's second point was that the learned judge had failed to give sufficient weight to the unreliability of the material constituting the s 93B statements in assessing its probative value. The grounds for the assertion of unreliability were that Williams' mother and grandmother claimed to have heard a drill being used when they spoke to Williams, while his sister said that she saw drill holes in his bedroom door. In addition, Williams' grandmother said that Williams had told her Bound had a gun, and Williams' sister said that she saw a mark on Williams' face. As against that, the two police officers who went to Bound's house on Boxing Day were told nothing about any gun. Constable Longhurst did not recall any visible injury to Williams, and Constable Hillier did not see a drill or any drill holes.

[73] On the other hand, however, Constable Longhurst said there was an electrical drill in the bathroom; he did not see any drill holes in the door, but he did not look for any. Constable Hillier reported that Williams told her Bound had tried to use a drill on the bedroom door. She said she did not see the drill or drill holes, but she did not say that she had looked for them either. She did see a red mark on Williams' face.

[74] In those circumstances, there seems no reason to suppose that Williams' relatives were necessarily wrong when they talked of hearing a drill or, in his sister's case, of seeing an injury to his face. The grandmother's reference to a gun seems an exaggeration, but on its own does not seem sufficient reason to regard the group of witnesses as generally unreliable when they said that Williams told them he had been assaulted and that he had sold drugs for Bound. In any case, in the recorded conversation, Williams can be heard saying that he was selling Bound's speed for him, and he told the officers that night that he owed Bound money. Subsequently he told police officers that he had been assaulted by Bound and owed him money in connection with selling speed for him. It was not suggested that those officers were unreliable when they made those statements.

[75] There was no real reason to doubt, therefore, that Williams had indeed asserted that he had been assaulted by Bound and owed him money for drugs. Counsel also submitted that the proper inference was that Williams himself had invented his account, in retaliation for being ejected from the house, so that the claims should also be regarded as unreliable in that sense. However, there was objective evidence in the observation of Constable Hillier to support Williams' claim to have been assaulted by Bound; and the statement that he owed money in relation to selling speed was one against his interest, since it was an admission of criminal conduct. The statements which the Crown sought to have admitted under s 93B were not inherently unreliable; the learned judge did not find them so, and correctly declined to exercise his discretion in favour of exclusion.

The admission of photographs of Williams' facial injuries

[76] Bound's counsel at trial objected to the placing of three particular photographs of Williams' facial injuries before the jury, arguing that the pathologist's description of the injuries would suffice. The three photos in question show respectively, lacerations to the deceased's right forehead and areas of bruising above and below his right eye; a similar laceration and area of bruising above his left eye; and bruising on his neck.

[77] The learned trial judge considered that a description by the pathologist of the injuries and their location would not be as accurate or helpful as the photographs. They had a probative value in showing the nature and extent of the dead man's injuries and were relevant to intent and the possible cause of death and in identifying which of the two accused might have been responsible for the injuries, as well as bearing on the reliability of the accounts given by the accused in police interviews. That probative value outweighed the prejudice which existed in the capacity of the photographs to provoke an emotional response, particularly with the giving of appropriate warnings.

[78] Here it was argued that the photographs were highly prejudicial and not significantly probative: none of the injuries depicted amounted to grievous bodily harm or could clearly be identified as the cause of death. But the fact that the injuries may not, individually, have amounted to grievous bodily harm did not detract from their capacity to give some assistance as to the intent behind their infliction. Understanding their magnitude was relevant in an assessment of whether they were likely to have produced the unconsciousness which according to Dr Urankar was a cause of Williams' death. No error was shown in his Honour's process of reasoning.

The ruling against cross-examination of Sergeant Armitt

[79] Counsel for Bound at trial sought to cross-examine Sergeant Armitt about the criminal history of one of Belford's uncles. Asked to identify the relevance of the question, counsel said that because Carter had given evidence that Belford was arranging for an uncle to bring a car to the hotel, presumably to assist with the assault of Williams, he wanted to show that Belford indeed had an uncle with a disposition to violence. It emerged on a voir dire that one of Belford's uncles was fined for common assault in 1990. There was no evidence to the effect that either Belford or Bound knew anything of the conviction. The learned judge concluded that the evidence had very slight probative value which was outweighed by its potential to prejudice Belford's fair trial and refused to allow it to be adduced through cross-examination. Here, counsel sought to add to the submission below by suggesting the evidence went to support a theory that Bound's reason for arriving at the hotel with a machete knife might have been to protect himself against Belford's relatives.

[80] In my view, the only possible error on the learned judge's part was to overstate the probative value of the evidence as "slight". I would regard it as having none at all. There was no suggestion that any family members ever arrived at the hotel to assist Belford in assaulting Williams; the most probable inference was that Carter simply misidentified Bound as an uncle. A 1990 conviction for common assault resulting in a fine was less than compelling evidence of a disposition for violence; but putting that to one side, the disposition of an individual who had nothing to do with the

events on the night in question could not, by any stretch of the imagination, be relevant. Nor, since neither Belford nor Bound was shown to have known that the person had a criminal conviction, could it be said that it in some way bore on their appreciation of what he might be capable of, even had he something to do with the event.

The judge's failure to comment on the impartiality [sic] of the forensic scientist who examined Bound's boots

[81] The Crown called a forensic scientist to give evidence as to her examination of Bound's boots, on which there were findings of DNA consistent with Williams' profile. It transpired that Sergeant Armitt had sent an e-mail to Queensland Health's liaison officer in which he said that the boots taken from Bound boots were covered in what was believed to be Williams' blood, which required analysis urgently. He continued:

> "The proving of the victim's blood on the defendant's boots provides a much needed nexus between the co-accused's admissions and accusations and require [sic] physical evidence to show he also committed the murder."

The Queensland Health liaison officer, passing on this request by email to scientific officers at the John Tonge centre, abbreviated it to

> "you only need to put the victim's blood on the boots".

[82] It was suggested to the forensic scientist who gave evidence that this indicated a lack of impartiality, objectivity and integrity in her office. She disagreed. The only significance of the e-mail, so far as she was concerned, was that it indicated that the interest in testing the boots was in identifying the blood, rather than the wearer of the boots. Counsel for Bound said that the trial judge should have commented on the potential compromising of the forensic scientist's examination by the sending of the e-mail. No such direction was sought at trial.

[83] The offending e-mail was not a direction from the police but a relaying of their request within the Health Department itself. It is, generally speaking, not unreasonable to give information designed to confine the parameters of a forensic examination, in an area where resources are generally accepted to be scarce. So far as this e-mail suggested a result rather than an area of interest, it was unfortunately expressed; but one could hardly infer from it either that the Queensland Police were endeavouring to direct the outcome (since it was not their e-mail) or that the forensic scientist was in some way compromised by it (since it was not her e-mail). There was nothing which mandated comment by his Honour, and there is nothing in the point.

Conclusions

[84] Belford has not made out the sole ground of his appeal, which must be dismissed. The wrong admission of the evidence of what Bound said to the covert police operative resulted in his losing a real chance of acquittal; his conviction must be set aside. But I do not think that a guilty verdict on the remaining evidence would necessarily be unreasonable. That evidence included Bound's previous threats to Williams; the motive in the form of the drug debt; Bound's presence with Williams' body when Carter and the police in turn entered room number 6; Bound's admission

to Armitt of having taken part in the assault; the evidence of a machete knife and pestle from Bound's house in the room; and the stains on Bound's boots consistent with being the deceased's blood. Accordingly, there should be an order for a new trial.

Orders

[85] I would dismiss Belford's appeal. I would allow the appeal by Bound, set aside his conviction and order a new trial.

[86] **FRASER JA:** I agree that Belford's appeal should be dismissed for the reasons given by Holmes JA, which I have had the advantage of reading in draft.

[87] In relation to Bound's appeal, I respectfully agree with Holmes JA's reasons except in relation only to one aspect of the argument for Bound concerning ground 2 of his notice of appeal.

Ground 2: The trial judge erred in admitting evidence of statements allegedly made by Bound to covert police operatives at the Ipswich Watchhouse on 7 January 2008

[88] I gratefully adopt and will not repeat Holmes JA's analysis of the evidence and proceedings at the trial.[12] I can therefore turn directly to the aspect of ground 2 upon which I respectfully depart from her Honour's reasons.

[89] Holmes JA concludes that the trial judge erred in thinking that the only possible question in relation to the accused's right to a fair trial was one of reliability of the evidence of the admissions; that the trial judge did not consider the question of unfairness from the point of view of the impropriety in the police conduct in circumventing Bound's rights and the effect of that impropriety in procuring evidence of admissions contrary to Bound's previous statements and to his forensic disadvantage; and that the trial judge did not consider specifically whether the use of the subterfuge to undermine Bound's right to silence, which police correctly believed that Bound would probably exercise, offended community standards.[13] I acknowledge the force of that analysis, but I respectfully conclude that the trial judge did take the relevant considerations into account.

[90] Before giving the reasons quoted by Holmes JA,[14] the trial judge discussed the evidence and analysed the High Court's decision in *R v Swaffield*.[15] The trial judge referred to: the arguments on behalf of Bound that "the investigating police simply bypassed [Bound's] choice to remain silent by a ruse which was designed to avoid the limitations on their inquisitorial powers" and that Bound's case was "on all fours with" *Swaffield*;[16] the statement by Gleeson CJ in *Tofilau v The Queen*,[17] with reference to a passage in the joint judgment in *Swaffield*,[18] that in the case of the exclusion of a statement on the ground of unfairness to the accused, the relevant form of unfairness "is related to the law's protection of the rights and privileges of

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12 Reasons of Holmes JA at [2]-[33].
13 Reasons of Holmes JA at [62]-[63].
14 Reasons of Holmes JA at [52].
15 (1998) 192 CLR 159.
16 Transcript of the trial before Applegarth J, 7 December 2009 at 1-53.
17 (2007) 231 CLR 396 at [3].
18 *R v Swaffield* (1998) 192 CLR 159 per Toohey, Gaudron and Gummow JJ at [51]-[52].

the accused person";[19] and the statement in the joint judgment in *Swaffield*[20] 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*".[21] The trial judge also noted that the "more fundamental objection and the point taken on behalf of [Bound] is concerned with the broader question of whether what Mr Gallagher and other police officers did in participating in such a covert exercise was in violation of [Bound's] "right to choose whether or not to speak to the police"."[22]

[91] The trial judge went on to observe:[23]

> "It is the case that unlike Swaffield, the applicant here did not emphatically say that he was not prepared to speak to police. However, police proceeded on the basis that he would not do so, and rather than be confronted with the applicant saying that he was not prepared to undergo questioning, the police then simply followed through on what appears to have been an already arranged plan for covert police operatives to go into the cell.
>
> The position then is slightly different from one in which police were formally told that the applicant did not wish to be formally interviewed, but the difference is rather marginal. The police simply did not take the chance of being told what they apprehended there was every likelihood that they would be told, if asked."

[92] Finally in this respect, in a passage of the trial judge's reasons which immediately precedes the ruling which Holmes JA has quoted, the trial judge noted that paragraph 97 of the joint judgment in *Swaffield* recognised that the Canadian Supreme Court, "regards the use of a subterfuge to obtain a statement *as likely to be in violation of the choice whether or not to speak*, but even then would treat a quite unelicited admission as not calling for the exercise of the discretion to exclude."[24]

[93] I construe those passages in the trial judge's reasons as indicating that the trial judge took into account the question of unfairness relating to impropriety in the police subterfuge which circumvented Bound's freedom not to speak further to police. So much is also suggested by the trial judge's subsequent description in the ruling of "the police conduct… undertaken in the light of an apprehension that the applicant would choose not to speak to police if asked whether he wished to" as a "breach of the right to choose not to speak".[25] The context of the ruling makes it plain that the trial judge was alive to the effect of the police conduct in creating evidence of admissions contrary to Bound's earlier statements to police and obviously to his forensic disadvantage.

[94] That the trial judge did not confine consideration of Bound's right to a fair trial to the question whether the evidence of his admissions was reliable was made clear by the trial judge's reference to "the important public interest in ensuring that police do not adopt tactics that are designed simply to avoid the limitations on their

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19 Transcript of the trial before Applegarth J, 7 December 2009 at 1-54.
20 *R v Swaffield* (1998) 192 CLR 159 per Toohey, Gaudron and Gummow JJ at [69].
21 Transcript of the trial before Applegarth J, 7 December 2009 at 1-55. I have added the emphasis.
22 Transcript of the trial before Applegarth J, 7 December 2009 at 1-56.
23 Transcript of the trial before Applegarth J, 7 December 2009 at 1-56.
24 Transcript of the trial before Applegarth J, 7 December 2009 at 1-56. I have added the emphasis.
25 Transcript of the trial before Applegarth J, 7 December 2009 at 1-58.

inquisitorial functions the Courts regard as appropriate in a free society", and his Honour's statement that in this case "one is not concerned with reliability, and the authorities make clear that the discretion exists to exclude statements which are reliable". It is true that the trial judge did not then expressly refer to the question of unfairness to Bound with reference to the police subterfuge, but I am respectfully unable to conclude that the trial judge overlooked that perspective when his Honour had earlier quoted the statement in the joint judgment of *Swaffield* 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".[26]

[95] The trial judge subsequently referred to the discretion to exclude reliable statements "in circumstances in which the Court considers the appropriate exercise of a discretion is to exclude them in order to uphold the public interest in police officers avoiding an applicant's right to choose whether or not to speak to police".[27] That statement did not specifically advert to unfairness but I do not construe that as excluding reference to the question of fairness, especially since fairness and public policy overlap in this context:

> "While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted. *And once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred*." [28]

[96] It seems clear that the trial judge also considered in this context whether the police subterfuge offended community standards. The trial judge discussed community standards and noted that the joint judgment in *Swaffield,* "at paragraph 91 raises the question whether the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards".[29]

[97] Paragraph 91 of the joint judgment in *Swaffield* included the following observations:

> "In the light of recent decisions of this Court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards."

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26 *R v Swaffield* (1998) 192 CLR 159 per Toohey, Gaudron and Gummow JJ at [70].

27 Transcript of the trial before Applegarth J, 7 December 2009 at 1-57.

28 *R v Swaffield* (1998) 192 CLR 159 at [54]. I have added the emphasis.

29 Transcript of the trial before Applegarth J, 7 December 2009 at 1-57.

[98] The effect of the High Court's decision in *Swaffield* is that the use by police of a subterfuge which undermines an accused person's freedom to choose not to speak to the police does not in all circumstances require a trial judge to reject evidence adverse to the accused person which results from the subterfuge. That is consistent with the statement in the passage just quoted that "[w]here the freedom has been impugned the court has a discretion to reject the evidence." The fact that there is such a subterfuge enlivens the discretion and, in my view, must be an important consideration in the exercise of the discretion, but the manner in which the discretion should be exercised depends upon the circumstances of the particular case.

[99] I have concluded that in exercising the discretion the trial judge took into account the relevant considerations and I agree with the reasons given by Holmes JA for rejecting the other arguments for Bound under this ground. It follows that it is not open to this Court to intervene unless, although no particular error is apparent in the trial judge's exercise of the discretion, the ruling is unreasonable or plainly unjust.[30]

[100] In my respectful opinion, the trial judge's ruling did not itself evidence a miscarriage of justice when regard is had to the circumstances identified by the trial judge. Bound had not unambiguously stated that he was not prepared to speak to police (although police had correctly apprehended that he would do so if asked). Bound's entitlement to choose not to speak further to police was not circumvented by the purported exercise by police officers of their authority as police officers; rather, Bound voluntarily spoke about the alleged offence to a person who did not purport to hold any position of authority (albeit that the police had tricked Bound into thinking that the person was a fellow prisoner). Although the covert police operative elicited Bound's statements, he did so without using any misleading statements, leading or "intense" questions, or questions which were otherwise unfair in themselves. The trial judge also permissibly took into account the consideration that those statements included admissions relating to a very serious offence. In those circumstances I consider that it was open to the trial judge to conclude that the police subterfuge did not require rejection of the evidence in the interests of fairness to Bound or otherwise.

[101] As I have indicated, I would reject the other arguments advanced for Bound under ground 2 for the reasons given by Holmes JA. Accordingly I would reject this ground of appeal.

Ground 1: The trial judge erred in not granting Bound a separate trial

[102] It is necessary now to consider grounds of appeal which Holmes JA did not discuss in view of her Honour's decision that ground 2 of the appeal should be upheld.

[103] Bound's counsel argued that the trial judge erred by not directing that his trial be heard separately from the trial of Belford. The trial judge refused Bound's application for such a direction at a pre-trial hearing.[31] Bound's counsel subsequently made the same application, on very similar grounds, on the second day of the trial[32] and again after the close of the prosecution case (after the trial judge had refused to exclude the admission under s 93B of the *Evidence Act* 1977 (Qld) of statements by the deceased's relatives that the deceased had claimed that Bound had threatened him over a drug debt and had assaulted him.)[33]

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30 *House v The King* (1936) 55 CLR 499 at 505.

31 *R v Belford & Bound* [2009] QSC 344.

32 Transcript of the trial before Applegarth J, 8 December 2009 at 2-10.

33 Transcript of the trial before Applegarth J, 16 December 2010 at 8-87.

[104] Bound's counsel did not challenge the trial judge's analysis of the applicable principles.[34] Generally, there are strong reasons of principle and public policy why joint offences should be tried jointly. The mere fact that one result will be that evidence admissible against one accused but inadmissible against the other accused will be before the jury is not a sufficient reason for ordering separate trials. The strong reasons for a joint trial are strengthened where each of the accused deploys a "cut throat" defence of seeking to incriminate the other. Those and other considerations which favour joint offences being tried jointly must be weighed against the risk that evidence that would not be admitted at the trial of one accused may prejudice the fair trial of that accused. Cases where separate trials should be ordered include those where the evidence admissible against each accused "is impossible or at least extremely difficult to disentangle and the evidence against one is highly prejudicial against the other",[35] where the directions given by the trial judge to avoid prejudice require "remarkable mental feats" that the jury could not be expected to perform,[36] or where the prejudice may be such as to "cause a jury even to ignore the directions of a trial judge".[37]

[105] Bound's counsel argued that Belford's inadmissible statements that Bound dealt in drugs, that the deceased owed Bound a drug debt, and otherwise as to the conduct and character of Bound, might have so overwhelmed the jury that it might have ignored the trial judge's clear directions. He argued that the jury could not reasonably be expected to comply with the trial judge's direction to ignore that inadmissible evidence. Counsel emphasised his argument that there was a danger that the jury used inadmissible statements by Belford to prop up the Crown case that Bound assaulted the deceased over a drug debt because the only admissible evidence of the drug debt were statements attributed to the deceased by his relatives which were admitted in evidence as exceptions to the hearsay rule under s 93B of the *Evidence Act* 1977 (Qld). The deceased's mother said that on 26 December 2007, the deceased telephoned her and said that he had sold "speed" for Bound. Bound had hit him and was going to kill him. The deceased's grandmother said that Bound had assaulted him.

[106] As was submitted for Bound, the only admissible evidence that the deceased owed Bound a drug debt was hearsay but that evidence was nonetheless admissible under s 93B of the *Evidence Act* and it was apparently reliable. As Holmes JA points out,[38] in the recorded conversation on 26 December 2007, when police officers went to Bound's house at Flinders View, the deceased said that he was selling Bound's "speed" for him and that he owed money to Bound. Police officers said that the deceased told them that he had been assaulted by Bound and owed him money in connection with selling "speed" for him. It was not suggested that those officers were unreliable in making those statements. The inadmissible evidence of Belford upon the same topic does not seem to have added much to the admissible evidence, but even if the evidence was potentially and significantly prejudicial there seems no reason to doubt that the trial judge's directions were sufficient to guard against the prejudice.

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34 *R v Belford & Bound* [2009] QSC 344 at [5]-[8], citing *R v Davidson* [2000] QCA 39 at [12]-[13], *Webb v The Queen* (1994) 181 CLR 41 at [88]-[89], *Gilbert v The Queen* (2000) 201 CLR 414 and *R v Roughan & Jones* (2007) 179 A Crim R 389 at 398-399.

35 *R v Davidson* [2000] QCA 39 at [13].

36 *Winning v R* [2002] WASCA 44 at [42], cited in *R v Roughan & Jones* (2007) 179 A Crim R 389 at [56].

37 *R v Davidson* [2000] QCA 39 at [13].

38 Reasons of Holmes JA at [74]-[75].

[107] At the pre-trial hearing,[39] and again in the subsequent rulings during the trial, the trial judge considered and rejected the argument that Belford's statements were so prejudicial that their impact could not be addressed by appropriate directions. During the course of the trial, the trial judge directed the jury that the statements Belford made were not admissible against Bound, save for clearly identified exceptions. The trial judge specified the paragraph numbers of Belford's written statement that were admissible in the trial of Bound. The trial judge explained to the jury that those paragraphs were admissible because they tended to favour Bound; that only those particular parts of the interviews which Bound relied upon as being in his favour were admissible; and that the jury should not have regard to anything that Belford said against Bound.[40] In summing up, the trial judge again directed the jury that the statements by Belford to the police were not admissible against Bound and could not be used against him. The trial judge directed the jury that in determining the case of Bound the jury must "disregard unfavourable things that were said by Mr Belford about him"; that "[t]he only parts of Mr Belford's statement that can be used in the case of Mr Bound are the paragraphs I've mentioned and which you've marked, and statements to like effect in other statements that he made to the police"; and "[i]n deciding the case of Mr Bound, disregard all other statements."[41]

[108] The trial judge also gave clear directions that the jury could not use against a defendant evidence of bad character, the commission of criminal offences, including drug offences or assault, or that a defendant had been involved in other undesirable conduct as evidence of a disposition or propensity to commit the offence of murder or the alternative offence of manslaughter.[42] In relation to the evidence of the drug debt upon which the prosecution relied as explaining Bound's motivation to assault the deceased, the trial judge directed the jury that the evidence, "is not relied upon and cannot be relied upon as proving a propensity or disposition to commit the kind of violent killing that the prosecution alleges occurred in this case. Even if you accepted that Mr Bound assaulted [the deceased] on Boxing Day and had supplied drugs to him, that does not prove a disposition to commit a violent killing. The prosecution does not rely on that evidence as somehow proving a disposition or propensity to commit homicide and I direct you that you cannot rely on that evidence as showing such a disposition or propensity."[43]

[109] There is no reason in this case to depart from the usual assumption that the jury would follow the trial judge's directions.[44] No error has been shown in the trial judge's refusal of Bound's applications for separate trials. That refusal did not produce any miscarriage of justice.

Ground 3: The trial judge erred in allowing a transcript to be given to the jury of a tape recording of statements allegedly made by [Bound] to covert police operatives at the Ipswich Watchhouse on 7 January 2008

[110] Bound's counsel argued that the trial judge erred in allowing a transcript to be given to the jury of the tape-recording of Bound's statements which were the subject of Bound's appeal ground 2. The trial judge rejected the argument that the jury should

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39 *R v Belford & Bound* [2009] QSC 344 at [42]-[48].

40 Transcript of the trial before Applegarth J, 11 December 2010 at 6-15.

41 Transcript of the trial before Applegarth J, 18 December 2010, summing-up at 10-17.

42 Transcript of the trial before Applegarth J, 18 December 2010, summing-up at 10-15, 10-16.

43 Transcript of the trial before Applegarth J, 18 December 2010, summing-up at 10-17, 10-18.

44 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 at paragraph [13].

not have the aid of the transcript at all.[45] The recording of Bound's statements to the covert police operative was first played to the jury when they did not have a transcript. A transcript was then given to the jury and the recording was replayed. The trial judge then had the transcript retrieved from the jury to ensure that excessive reliance was not placed upon it despite directions that the transcript should not be used in that way.[46]

[111] It was submitted for Bound that the provision to the jury of the transcript operated unfairly against Bound because the tape was short, it would not have been unduly inconvenient for it to be replayed to the jury as necessary, there was nothing special about the language such as to require an interpreter, the tape was difficult to hear, and there was a risk that the jury would attribute more weight to the printed record than it deserved.

[112] The argument should be rejected. Bound's counsel did not point to any particular, possible error in the transcript but the tape was difficult to follow in some parts. The transcript was admissible for the purpose for which it was used, that is, as an aid for the purpose of better following the playing of the tape.[47] In light of the trial judge's directions, Bound was not prejudiced by the jury having the transcript for the short period during which the tape was played in court for a second time. No error has been identified in the trial judge's decision not to withhold the transcript from the jury on that one occasion.

Ground 10: In all the circumstances the guilty verdict was unreasonable

[113] Bound's counsel conceded that the ground of his appeal that the verdict was unreasonable could not be sustained if Bound did not succeed on grounds 2, 4, and 5. Because I would reject each of those grounds of appeal it is unnecessary for me to give separate consideration to this ground. I note, however, that if (contrary to my own view) ground 2 should be upheld, I would agree with Holmes JA's reasons for concluding that there should not be an acquittal and that there should instead be an order for a re-trial.[48]

Ground 11: The trial judge erred in ruling that [Bound] could not change [his] election to give evidence in [his] trial

[114] Section 618 of the *Criminal Code* 1899 (Qld) provides that at the close of the evidence for the prosecution, the proper officer of the court shall ask the accused person whether the person intends to adduce evidence in the person's defence. The evidence in the Crown case concluded in the afternoon of the seventh day of the trial. In the absence of the jury, Bound's counsel indicated that he did not need time with his client (inferentially, in relation to the question whether or not Bound would adduce evidence in his defence). Defence counsel then made the third application for a separate trial discussed earlier. After the trial judge refused that application, the jury returned and the associate called upon each of Belford and Bound. When Bound was called upon, he responded,

> "I neither wish to call or give evidence".

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45 Transcript of the trial before Applegarth J, 18 December 2010 at 7-13 to 7-16.

46 Transcript of the trial before Applegarth J, 16 December 2010, at 7-98.

47 *Butera v Director of Public Prosecutions (Vict)* (1987) 164 CLR 180 per Mason CJ, Brennan and Deane JJ at 187 to 188.

48 Reasons of Holmes JA at [84].

The trial judge then reminded the jury that the prosecution bore the burden of proving guilt beyond a reasonable doubt and explained that the decision by a defendant not to give evidence was not evidence against him and could not be considered at all when deciding whether the prosecution had proved its case beyond a reasonable doubt. In the absence of the jury the trial judge discussed administrative matters and issues concerning final addresses and the summing-up before the court adjourned until the following day.

[115] On the morning of the ninth day of the trial, some further preliminary matters were discussed before the jury returned. The prosecutor then addressed the jury for a little under one hour. The court adjourned for a short period. When the court resumed Bound's counsel told the trial judge that during the adjournment "in the middle of the prosecutor's address" Bound indicated that he had changed his mind about whether or not he wanted to give evidence. Bound's counsel added that when Bound was called upon his answer accorded with clear written instructions he had earlier given. The trial judge granted a brief adjournment to enable counsel to take further instructions. Upon resumption Bound's counsel told the trial judge that Bound wished to apply to give evidence contrary to his election. Bound wished to make that application himself from the dock. The prosecutor did not oppose the court granting leave to Bound to apply in person even though he was represented by counsel. The trial judge permitted that course and Bound addressed the court.

[116] Bound said that he felt that in many areas he had been described in an unjust manner. When the trial judge inquired whether that was by the Crown prosecutor in her address, Bound responded: "No, your Honour, in general... [w]ithin people's statements and I think that some things in the statements are unfair and untrue and in some areas I feel that I should have a right to reply." When the trial judge observed that the occasion to exercise that right was when he was called upon, Bound replied that he had taken defence counsel's advice, he felt that defence counsel was very capable, but he did not really want to agree with him. The trial judge inquired whether Bound wished to say anything else and Bound responded that, "being such a serious case and such a serious charge on me … I just feel that it would be unfair and unjust for me not to be able to take the stand". He added that he thought that he was being dealt with unfairly in the evidence in a lot of areas and would like the right to be able to reply, and that it was extremely important for his life and his welfare.

[117] The prosecutor opposed the application. She argued that Bound had overnight and that morning to consider the decision that he'd made, he hadn't raised the issue until halfway through the prosecutor's address to the jury, he was clearly wanting to give evidence because of what he had heard the prosecutor say in her address, and there would be no miscarriage of justice caused by refusal of the application.

[118] The trial judge refused Bound's application. The trial judge assumed that he had the power to allow Bound to give evidence and cited the statement in *R v Pangilinan*[49] that:

> "there is no right of re-election, and its grant would have depended upon an indulgence from the learned trial judge".

The trial judge noted that there was no suggestion by Bound that his counsel's advice was lacking in any respect or given at the last moment, that it should be

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[49] [2001] 1 Qd R 56 at 65, paragraph [38].

assumed (based upon statements made during the course of the trial in the absence of the jury) that the question of giving evidence had been under active consideration and the subject of advice for substantial time, that the trial judge had permitted time the day before for previous instructions to be confirmed, and that the essence of Bound's application was that he had had a change of heart and had made his application not at the start of proceedings, but halfway through the prosecutor's address. The trial judge held that it would be contrary to the interests of justice to allow Bound to change his election. He hadn't provided sufficient grounds for that indulgence, and the indulgence would disrupt the course of the trial, prejudice the presentation of the Crown's argument, disrupt the order of address, and prolong the trial without a proper justification. For those reasons, the trial judge refused the application.

[119] The appellant's counsel submitted that the disruption to the trial was largely irrelevant and that the main consideration should be whether or not the prosecution would be disadvantaged. He submitted that there would be no such disadvantage. Bound would be subject to cross examination and the prosecutor and Belford's counsel would be able to respond to Bound's counsel's closing address, effectively giving the prosecutor a second closing address. Bound's counsel argued that the right to answer the prosecution case was fundamental and of particular importance because this was a murder trial. The prosecution would not have been prejudiced by allowing Bound to change his mind and it would not create a dangerous precedent. Bound's counsel submitted that Bound had been denied natural justice because he was not permitted to be heard in his defence.

[120] The respondent's counsel emphasised that Bound had made his election not to give evidence upon advice which was not criticised and that question obviously had been discussed between Bound and his counsel during the trial. The respondent's counsel referred to the statement by Gleeson CJ, Gummow, Kirby and Kiefel JJ in *Mahmood v Western Australia*[50] that:

> "Courts are usually inclined to allow a re-opening to call evidence considered to be of sufficient importance, even after addresses [*Dyett v Jorgensen* [1995] 2 Qd R 1 at 5 per Pincus JA]. That is not to say that it is the only course which may be taken in a given case."

He submitted that the general rule applies in those cases where there has not been a deliberate decision to refrain from calling the evidence. He referred to the following passage in the judgment of Pincus JA in *Dyett v Jorgensen*:[51]

> "As has been pointed out, there was no suggestion that the course proposed would involve any substantial inconvenience or expense and the additional evidence appeared to be both brief and material. Where it does not appear that there has been any conscious decision to omit the additional evidence sought to be called, nor that there is any practical obstacle in the way of allowing a re-opening, I think a court would often incline towards allowing the defence a re-opening to call sufficiently important evidence, even after addresses, in a criminal case."

[121] The respondent's counsel argued that the judge had a discretion whether or not to allow the case to be re-opened and that a submission on appeal that the discretion

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50 (2008) 232 CLR 397 at 403 [15].

51 [1995] 2 Qd R 1 at 5.

miscarried should be considered in accordance with the statement of principle in *House v The King*.[52] Bound could not demonstrate any error in the exercise of the discretion where he had made a decision with the benefit of advice that he would not give or call evidence after he had heard all of the evidence adduced against him. No further evidence was adduced after he had made that election and, unlike the case in *Mahmood*,[53] the prosecutor's address was acknowledged to accord with the evidence.

[122] In my respectful opinion, no error has been identified in the trial judge's decision.

[123] The answer to the question required by s 618 of the *Criminal Code* 1899 (Qld) determines the order of addresses prescribed by s 619. We were not referred to any provision of the *Criminal Code* 1899 (Qld) that expressly confers a power upon trial judges to disregard that answer or to alter the order of addresses which flows from it. The point was not in issue in *Mahmood*.[54] Nevertheless the respondent accepted that trial judges have a discretionary power to permit an accused person to revisit the answer, there is much to be said for that view, and it is consistent with the passages in *Pangilinan*,[55] *Mahmood*[56] and *Dyett v Jorgensen*[57] quoted earlier. I consider that there is such a discretion and that it is to be exercised in the interests of justice according to the circumstances of the particular case.

[124] Bound was not denied natural justice merely because his application was refused. As an applicant for an order to alter the usual procedure prescribed by the *Criminal Code* 1899 (Qld) it was necessary for Bound to persuade the trial judge that such an order was in the interests of justice. It is not easy to see why it was. Bound made his decision not to give evidence with the benefit of his counsel's advice and he disclaimed any criticism of that advice. Bound's change of mind was not informed by his counsel's advice and it was not said to be the result of any oversight, change in circumstances, or a more complete appreciation of the matters he had earlier taken into account in deciding not to give evidence. Furthermore, despite the trial judge's invitations to Bound to elaborate upon his application he did not identify the topics of the proposed evidence with sufficient clarity to enable the trial judge to find that the evidence, if accepted by the jury, might assist in Bound's defence. That issue was discussed during the hearing of the appeal and there was no attempt to improve upon the vague statements Bound had made at the trial.

[125] It should be noted that the statements in *Dyett v Jorgensen*[58] and *Mahmood*[59] that courts incline to allow a re-opening were made in the context of a re-opening to call evidence considered to be sufficiently important to justify that course. It might ordinarily be assumed that an accused in a murder case would give important evidence. However no such assumption should be made in the circumstances I have outlined, particularly given Bound's informed election not to adduce evidence and the nature of the evidence which Bound identified when asked to explain the grounds of his application. There was no basis for the trial judge to find that permitting Bound to give evidence might help rather than harm his defence.

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52 (1936) 55 CLR 499.
53 *Mahmood v Western Australia* (2008) 232 CLR 397.
54 *Mahmood v Western Australia* (2008) 232 CLR 397.
55 *R v Pangilinan* [2001] 1 Qd R 56.
56 *Mahmood v Western Australia* (2008) 232 CLR 397.
57 [1995] 2 Qd R 1.
58 [1995] 2 Qd R 1.
59 *Mahmood v Western Australia* (2008) 232 CLR 397.

[126] The absence of specific prejudice to the Crown was a relevant consideration but it did not dictate the exercise of discretion favourably to Bound. There has been no particular error identified in the exercise of the discretion. It was open to the trial judge to exercise the discretion favourably to Bound, but for the reasons I have given, the refusal of Bound's application was not unreasonable or unjust in the particular circumstances of this case. Accordingly no ground appears for this Court to set aside the trial judge's discretionary decision.

Ground 12: There was a miscarriage of justice as the result of an accumulation of circumstances particularised as grounds 1 to 11

[127] Under ground 12, which was added by leave granted at the hearing of the appeal, Bound's counsel argued that the accumulation of errors identified in grounds 1 to 11 constituted a miscarriage of justice. I have concluded that none of the grounds of appeal are made out. Accordingly this ground must also be rejected.

Proposed orders

[128] I would dismiss Bound's appeal and Belford's appeal.

[129] **WHITE JA**: I have had the advantage of reading in draft the reasons for judgment of Holmes JA and of Fraser JA where the evidence and the competing arguments in respect of the grounds of appeal are set out and fully canvassed.

[130] I agree with Holmes JA that Belford's appeal should be dismissed.

[131] With respect to Bound's appeal, like Fraser JA, I agree with her Honour's reasons save for an aspect of ground two, which concerns the admission into evidence of Bound's statements made to covert police at the Ipswich Watchhouse on 7 January 2008. I respectfully disagree with her Honour's conclusion that the trial judge's discretion miscarried in failing to have regard, or sufficient regard, to the effect of the police conduct on Bound's right to silence.[60] I agree with Fraser JA that the trial judge did consider this important factor appropriately.

[132] The trial judge, as discussed by Holmes JA,[61], first ruled on the admissibility of the recorded conversation with Sergeant Armitt, confirming on tape what had been said when there was no recording equipment available after he was warned that he need not answer any questions. Bound had indicated that before he spoke further to police he had "better talk to a lawyer" and "I want to talk to a lawyer". Having ruled that that body of evidence was admissible, his Honour turned to the application to exclude evidence to be given by the two covert police (which had been electronically recorded) on the principles discussed in *Bunning v Cross*.[62] His Honour noted that it was likely that steps were in train on the morning of 7 January 2008 for covert police to be placed in the same cell as the applicant. By the time that occurred in the afternoon, his Honour concluded that it was likely that investigating police appreciated that there was a real prospect that Bound would not participate in any formal police interview, a surmise conceded below by the prosecutor. His Honour commented:

> "That concession [was] well made in the light of something the applicant said later in the recording with the covert police officer

60 At [60] and [63].
61 At [20]-[21] and [66]-[69] of her Honour's reasons.
62 (1978) 141 CLR 54.

> when he said that he had seen a lawyer and he had been told not to say anything."[63]

The transcript of the conversation in the cells is set out in Holmes JA's reasons at [22].

[133] The trial judge observed, in the course of giving his ruling,

> "Although Gallagher did pose questions, the impression that I gain from the transcript, and it's not suggested that the recording alters this impression, is that there was not anything in the nature of an interrogation. There was not cross-examination. There was no coercion. There was no statement by Gallagher, which, for example, big-noted his own criminal activity and which encouraged the applicant to, as it were, match that bravado by overstating things that he had done."[64]

He added:

> "… it would be wrong to interpret the exchange as one in which important statements about the use of the applicant's boots were elicited under leading questions or any kind of intense questioning. If anything, the nature of the exchange is rather conversational and it could be said that relevant statements were volunteered more than elicited."[65]

His Honour then made reference to the basis upon which the application to exclude had been brought - by-passing the choice to remain silent by police employing a ruse.

[134] The trial judge considered what is entailed in the concept of "the right to silence"[66] adopting the statement of Brennan CJ in *Swaffield*[67] at [33]-[34] that the "right to silence" is no

> "… wider than or different from the privilege that any person enjoys not to answer questions asked of him about an alleged offence by persons in authority, his entitlement to be treated in a lawful and proper manner by persons in authority engaged in investigating an offence and the immunity from the drawing of adverse inferences from his refusal to answer questions about the offence asked by persons in authority."

After a reference to the summary of the principles in *Cross on Evidence*[68] his Honour noted Gleeson CJ's endorsement in *Tofilau v The Queen*[69] of the

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63 AR 87.
64 AR 86.
65 AR 87.
66 See Lord Mustill's observation in *R v Director of Serious Fraud Office; ex parte Smith* [1992] 3 WLR 66 at 74 that "[t]his expression [the right to silence] arouses strong but unfocused feelings" where his Lordship discusses "a disparate group of immunities" which are compendiously referred to as "the right to silence".
67 *R v Swaffield* (1998) 192 CLR 159 at 185.
68 At para [33765].
69 (2007) 231 CLR 396.

principles relating to the discretion to exclude evidence of a voluntary confession summarised in *Swaffield* by Toohey, Gaudron and Gummow JJ.[70]

[135] His Honour gave more detailed consideration to *Swaffield* because of the particular reliance placed upon it by counsel for Bound who had submitted it to be on "all fours" with the present case. His Honour was conscious of the need to balance the competing interests of ensuring fairness to an accused person (of which the right to silence is an aspect) and the desirability of bringing to conviction a wrongdoer, as well as the undesirable effect of apparent curial approval to unlawful conduct by those whose task it is to enforce the law.[71] The trial judge referred to the passage in *Swaffield* that the discretion to reject evidence may be exercised even where no unfairness to an accused is involved but, having regard to the means by which the confession was elicited, the evidence has been obtained "at a price which is unacceptable having regard to prevailing community standards."[72] His Honour identified the fundamental objection to the impugned body of evidence as the violation by covert police officers of Bound's right to choose whether or not to speak to police.[73] His Honour noted that in *Swaffield* the accused had clearly refused to do so, whereas Bound had earlier been willing to speak but then declined until he had spoken to his lawyers. Having made some mention of the Canadian authorities referred to in *Swaffield* by the plurality and noting that those authorities were influenced in part by the Canadian Charter of Rights and Freedoms, his Honour considered how he should exercise his "broad discretion".[74]

[136] Noting that there was no issue about the reliability of Bound's statement, his Honour said:

> "The discretion exists to exclude [statements] in circumstances in which the Court considers the appropriate exercise of a discretion is to exclude them in order to uphold the public interest in police officers avoiding an applicant's right to choose whether or not to speak to police."[75]

He noted that *Swaffield* required a trial judge to have regard to prevailing community standards with whatever uncertainty that endeavour might entail. His Honour concluded that it would be unlikely that a large number of the community would disapprove of the use of covert police in similar circumstances. He noted that there was no legislative ban on doing so[76] but issues of fairness in policing required the weighing of competing public interests. His Honour said:

> "One starts with the proposition that although [Bound] did not clearly state that he would not speak further to police, the police proceeded on the basis that it was likely that he would make that choice if given the choice. Accordingly, although the case is different from *Swaffield*, I consider that the police conduct was

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70 (1998) 192 CLR 159 at 189 [51]-[52].

71 *Bunning v Cross* (1978) 141 CLR 54.

72 At [91].

73 AR 90.

74 Holmes JA has set out the balance of the trial judge's reasons at [52].

75 AR 91.

76 *Police Powers and Responsibilities Act* 2000 in Chapter 15 – Powers and responsibilities relating to investigations and questioning for indictable offences – expressly excludes the chapter from "the functions of a police officer performed in a covert way", s 396.

> conduct undertaken in the light of an apprehension that [Bound] would choose not to speak to police if asked whether he wished to.
>
> The breach of the right to choose not to speak, however, was not a breach undertaken by police persisting in an interview in the purported exercise of authority. In that sense, it differs significantly from an intrusion upon the right to silence by police officers who are in a position of apparent authority and insist upon answers to questions or continue to question when they should not, or embark upon questioning when they should not in a position of authority."[77]

[137] His Honour concluded that the subterfuge employed by police elicited the disclosure of information without any misleading statements; leading questions; other questions which would encourage the applicant to overstate what he did; and were not intense nor unfair questions in themselves. In weighing the competing considerations his Honour was not persuaded that the public interest in ensuring police do not adopt tactics designed to avoid limitations on their powers to interrogate was in this case greater than the competing interest in having admissions available in a criminal trial (impliedly, of a serious matter).

[138] In her reasons Holmes JA has recognised[78] that to succeed on this aspect of this ground of appeal Bound must show that the trial judge erred in the exercise of his discretion in the manner identified in *House v The King.*[79] His Honour had to grapple with the well recognised dilemma of resolving the tension between two conflicting principles. One involved a strong public interest in convicting a wrongdoer[80], particularly for a crime as serious as murder. To that end that interest would be concerned to have available to the trier of fact all reliable and relevant evidence probative of the matters in issue. Counter-poised was the undesirable effect of curial approval being given to unlawful conduct by those who enforce the law.[81] As Stephen and Aiken JJ observed[82], the resolution of this dilemma by the repository of the discretion means that "fairness" to an accused is not central to the consideration. In discussing these competing policy considerations their Honours noted sophisticated and covert detection methods and said:

> "In many such cases the question of fairness does not play any part. 'Fair' or 'unfair' is largely meaningless when considering fingerprint evidence obtained by force or a trick or even the evidence of possession of, say, explosives or weapons obtained by an unlawful search of body or baggage, aided by electronic scanners. There is no initial presumption that the State, by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or of chivalry. It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired. A discretion exercisable according to the principles in *Ireland's Case*

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77 AR 92.
78 At [57].
79 (1936) 55 CLR 499 at 505.
80 *R v Ireland* (1970) 126 CLR 321 at 355 per Barwick CJ.
81 *Bunning v Cross* (1978) 141 CLR 54 at 75 per Stephen and Aiken JJ.
82 *Bunning v Cross* (1978) 141 CLR 54 at 74.

> serves this end whereas one concerned with fairness may often have little relevance to the question."[83]

[139] As the cases make clear, where confessional evidence is voluntarily given, there is a real discretion to be exercised, and in weighing the several factors there would be circumstances where impartial judicial minds might well differ about where the balance should be struck. Cases such as *Em v The Queen*[84] and *Carr v Western Australia*[85] are examples.[86] In *Tofilau*, Callinan, Heydon and Crennan JJ, with whom, on the discretionary issue, Gleeson CJ agreed, said of the trial judge's decision:

> "… it cannot be said that he may any error of fact or law, took anything irrelevant into account or failed to take anything relevant into account; nor that the result was so unjust as to suggest some error not apparent on the face of his reasoning."[87]

[140] My reading of the whole of the trial judge's reasons for his ruling does not suggest that he did not give high importance to a person's freedom to choose not to speak to the investigating authorities. As *Tofilau*, *Em* and *Carr* make clear, the use by police of tactics which may undermine a defendant's freedom to choose not to speak to police will not, in all circumstances, require a trial judge to exclude inculpatory evidence obtained in that manner. The matters identified by the trial judge for refusing the application to exclude evidence of the conversation in the cells with the covert police officers were all factors appropriate to the exercise of the discretion, namely, that there was not the firm statement of refusal to speak to police as in *Swaffield* but noting that this was a minimal difference; that the police officers were not using their authority as police officers to override Bound's apparent choice not to speak; there were no misleading statements or close cross-examination of Bound and the questions were not unfair in themselves.

[141] I agree with Fraser JA's conclusion that in exercising that discretion the trial judge took into account the relevant considerations and gave them appropriate weight.[88] Like him, I agree with the reasons given by Holmes JA for rejecting the other arguments for Bound under this ground.

[142] Because of her conclusion on ground two, which would necessitate a retrial, Holmes JA did not consider the other grounds of appeal. Fraser JA has done so. I agree with his Honour's reasons in respect of those grounds for rejecting them.

[143] I agree with the orders proposed by Fraser JA.

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83 At [75].
84 (2007) 232 CLR 67.
85 (2007) 232 CLR 138.
86 *Em* at 136 [238]; *Carr* at 188 [171] per Kirby J.
87 At p 529.
88 At [14].