SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tietie and Wong-Kee* [2011] QSC 166
PARTIES:	**R** **v** **TIETIE, Salomona Junior** (first applicant) **WONG-KEE, Joshua Francis** (second applicant)
FILE NO/S:	Indictment No. 312 of 2010
DIVISION:	Criminal
PROCEEDING:	Applications pursuant to s 590AA Criminal Code
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 February 2011
DELIVERED AT:	Brisbane
HEARING DATES:	6, 7, 10, 13, 14, 15 and 16 December 2010
JUDGE:	Atkinson J
ORDER:	**The records of interview between Salomona Junior Tietie and the police on 26 October 2008 and Joshua Francis Wong-Kee and the police on 25 October 2008 are excluded from evidence in the trial.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CONFESSIONS & ADMISSIONS – STATEMENTS – VOLUNTARY STATEMENTS – INDUCEMENT – the first applicant was charged with one count murder, one count grievous bodily harm and one count assault occasioning bodily harm, whilst armed, in company – the first applicant applied pursuant to s 590AA of the Criminal Code to have two records of interview conducted with police excluded on the grounds of lack of voluntariness or in the exercise of judicial discretion because of unfairness – whether any admissions made in the record of interview were made voluntarily and not as a result of any inducements – whether there are discretionary reasons to exclude the interviews CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – the second applicant was charged with one count murder, one count

grievous bodily harm and one count assault occasioning bodily harm, whilst armed, in company – the second applicant applied pursuant to s 590AA of the Criminal Code to have two records of interview conducted with police excluded in the exercise of judicial discretion because of unfairness – whether there are discretionary reasons to exclude the interviews because it would be unfair to the defendant to admit them

Criminal Code 1899 (Qld), s 590AA
Criminal Law Amendment Act 1894 (Qld), s 10
Equal Treatment Benchbook, Queensland Supreme Court (2005), 9.7.3
Police Powers and Responsibilities Act 1997 (Qld), s 436
Police Service Administration Act 1990 (Qld)
Youth Justice Act 1992 (Qld), Schedule 4

Attorney-General for NSW v Martin (1909) 9 CLR 713, cited
Basto v R (1954) 91 CLR 628, cited
Bunning v Cross (1978) 141 CLR 55, cited
Cleland v The Queen (1982) 151 CLR 1, cited
Collins v The Queen (1980) 31 ALR 257, followed
Cornelius v The King (1936), cited
Duke v The Queen (1989) 180 CLR 508, cited
Harris v Samuels (1973) 5 SASR 439, cited
Ibrahim v R [1914] AC 599, cited
MacPherson v The Queen (1981) 147 CLR 512, cited
McDermott v The King (1948) 76 CLR 501, followed
McNamara v Edwards [1907] St R Qd 9, cited
R v Adamic [2000] QSC 402, cited
R v B [1998] QCA 423, cited
R v Bailey [1958] SASR 301, cited
R v Baldry (1852) 2 Den 430; 169 ER 568, cited
R v Banner [1970] VR 240, cited
R v Bate (1871) 11 Cox CC 686, cited
R v Beble [1979] Qd R 278, cited
R v Beere [1965] Qd R 370, cited
R v Bellman [1933] QWN 1, cited
R v Bodsworth [1968] 2 NSWR 132, cited
R v Burt [2000] 1 Qd R 28, cited
R v Chadwick (1934) 24 Cr App R 138, cited
R v Czerwinski [1954] VLR 483, cited
R v Doherty (1874) 13 Cox CC 23, cited
R v Fieldhouse [1977] 17 SASR 92, cited
R v Hagan [1966] Qd R 219, cited
R v Harding [1934] QWN 23, cited
R v Ireland (1970) 126 CLR 321, cited
R v Kirk [2000] 1 WLR 567, cited
R v Lancaster [1998] 4 VR 550, cited
R v Lee (1950) 82 CLR 133, cited
R v McKay [1965] Qd R 240, cited

R v Plotzki [1972] Qd R 379, followed
R v Swaffield (1998) 192 CLR 159, cited
R v Szach [1980] 23 SASR 504, cited
R v Thompson [1893] 2 QB 12, cited
R v Voisin [1918] 1 KB 531, cited
R v W [1988] 2 Qd R 308, cited
Tofilau v R (2007) 231 CLR 396, cited
Van Der Meer v R (1988) 82 ALR 10, cited

COUNSEL: Mr T.A. Fuller SC and Ms D. Balic for the Prosecution
Mr P.E. Smith for the first applicant
Mr R.A. East for the second applicant

SOLICITORS: The Director of Public Prosecutions for the Prosecution
Fisher Dore Lawyers for the first applicant
Legal Aid Queensland for the second applicant

[1] Applications have been made pursuant to s 590AA of the Criminal Code with regard to the defendants, Salomona Junior Tietie and Joshua Francis Wong-Kee for the exclusion of their records of interviews with police. Applications made by OS and MAW were resolved after hearing but before decision and an application made by TJW was resolved on the day set for hearing by the prosecution's accepting pleas of guilty to manslaughter and assault occasioning bodily harm and not proceeding on the indictment which charged them with murder.

[2] The defendants each took part in records of interview with police with regard to their knowledge of, and involvement in, the unlawful killing of Richard Cecil Saunders and the assaults of Harold John Bond and Gordon Dale Wills in the early hours of the morning of Saturday 25 October 2008.

Statements not admissible unless voluntary

[3] The fundamental rule at common law is that admissions or confessional statements are not admissible unless they were made voluntarily. This requirement cannot be abrogated by statute.[1] In addition to the common law, the concept of voluntariness has long had statutory force in Queensland with s 10 of the *Criminal Law Amendment Act 1894* (Qld) providing that:

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

Section 10 does not exclusively govern the admissibility of confessions in Queensland but supplements the common law.[2]

[4] Where voluntariness is contested on a pre-trial hearing, the onus rests on the prosecution to prove, on the balance of probabilities,[3] that the mandatory

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1 *McDermott v The King* (1948) 76 CLR 501 at 511; *MacPherson v The Queen* (1981) 147 CLR 512 at 519.
2 *R v McKay* [1965] Qd R 240 at 241.
3 *MacPherson v The Queen* (1981) 147 CLR 512.

requirement of voluntariness has been satisfied.[4] The question of voluntariness and therefore admissibility is a matter to be determined exclusively by the judge in the absence of a jury.[5] Where the judge is not satisfied that the statement was made voluntarily, the judge is required by law to exclude it from evidence.[6]

[5] Notwithstanding being satisfied that the statements were made voluntarily and are thus admissible, the judge has the discretion to exclude admissions from evidence on the basis that it would be unfair to the defendant if they were admitted. In *Cleland v The Queen* (1982) 151 CLR 1 at 5, Gibbs CJ summed up the discretion in the following way:

> "A confession will not be admitted unless it was made voluntarily, that is in the exercise of a free choice to speak or be silent. But even if the statement was voluntary, and therefore admissible, the trial judge has a discretion to reject it if he [or she] considers that it was obtained in circumstances that would render it unfair to use it against the accused."

[6] The concept of 'unfairness' will be considered in detail later.

[7] For a confession to be voluntary it is well-established that it must be "made in the exercise of a free choice to speak or be silent".[7] Whether the defendant did or did not 'volunteer' the statement is irrelevant.[8]

[8] In the landmark High Court decision of *McDermott v The Queen* (1948) 76 CLR 501, Dixon J, at 511, elaborated on when a statement may be involuntary:

> "If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary."

[9] Drawing upon Dixon J's comments in *McDermott*, Bowen CJ in *Collins v The Queen* (1980) 31 ALR 257 at 258 further discussed the voluntariness requirement:

> "Before a confession may be admitted in evidence in a criminal trial, it must be proved by the Crown on the balance of probabilities, that it was voluntary (*Wendo v R* (1963) 109 CLR 559). This means substantially that it has been made in the exercise of the person's free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary, if it is preceded by an inducement held out by a person

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4 *R v Thompson* [1893] 2 QB 12; *R v Bellman* [1933] QWN 1; *R v Chadwick* (1934) 24 Cr App R 138; *R v Harding* [1934] QWN 23; *R v Hagan* [1966] Qd R 219; *Attorney-General for NSW v Martin* (1909) 9 CLR 713.

5 *R v Czerwinski* [1954] VLR 483 at 484 which was approved by the High Court in *Basto v R* (1954) 91 CLR 628 at 641.

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

7 *R v Lee* (1950) 82 CLR 133 at 149; *Collins v The Queen* (1980) 31 ALR 257 at 307-8 per Brennan J; *R v W* [1988] 2 Qd R 308 at 314; *Cleland v The Queen* (1982) 151 CLR 1 at 5.

8 *R v Lee* (1950) 82 CLR 133 at 149; *Collins v The Queen* (1980) 31 ALR 257 at 307 per Brennan J; *Cornelius v The King* (1936) 55 CLR 235 per Dixon, Evatt and McTiernan JJ at 252.

> in authority and the inducement has not been removed before the statement is made. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority (*McDermott v R* (1948) 76 CLR 501 at 511; *R v Lee* (1950) 82 CLR 133)."

[10] Such comments indicate that for a statement to be involuntary there will necessarily be an external factor which has overborne the defendant's free choice to speak or remain silent. Where a defendant may have a variety of reasons for his or her making of a statement, to what extent that external factor interfered with the defendant's free choice is a question of fact and degree and will depend on the circumstances of each case.[9]

[11] It follows that in the context of a police interview, admissions or confessional statements made by a defendant will not be voluntary where the circumstances surrounding the interview overbear the defendant's free choice.[10] For a statement to be rendered inadmissible because it was involuntary, it is insufficient for the judge to find that there has been an attempt to overbear the defendant's will by persons in authority. Rather, the essential question is whether the will of the person making the statement has actually been overborne.[11]

Assessment of particular circumstances

[12] In ascertaining whether the defendant's will has been overborne, it is the role of the judge to assess all the circumstances surrounding the making of the statement, such as the age, background and psychological condition of the defendant.[12] Statements will not be held to be involuntary simply because the defendant by nature or temperament is predisposed to confess or tell the truth.[13]

[13] It is also necessary to examine the conduct of police before and during a police interview as this impacts upon the circumstances in which the statements or confessions are made.[14] In considering the totality of these circumstances and the bearing they have had on the defendant's free will, the judge does not have regard to an objective standard but looks through a subjective lens. As Brennan J observed in *Collins v The Queen* (1980) 31 ALR 257 at 307, the judge is required to carry out "a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused."

[14] The need to consider the particular circumstances of the defendant in relation to the question of voluntariness was explored in the Queensland pre-trial decision of *R v W* [1988] 2 Qd R 308. There, Dowsett J considered the admissibility of confessional statements made during the course of police questioning of five defendants charged with a rape which occurred on Mornington Island. All five defendants were Indigenous, four of whom were fifteen or younger at the time of the alleged offence. Relevant to the matters of Tietie and Wong-Kee, one defendant, W, was seventeen at the time of the alleged offence and therefore

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9 *Collins v The Queen* (1980) 31 ALR 257 at 309 per Brennan J.

10 *McDermott v R* (1948) 76 CLR 501 at 511 per Dixon J.

11 *Collins v The Queen* (1980) 31 ALR 257 at 307 per Brennan J.

12 *Collins v The Queen* (1980) 31 ALR 257 per Brennan J at 307–309, cited by White J in *R v B* [1998] QCA 423 at [24].

13 *Collins v The Queen* (1980) 31 ALR 257 at 307 per Brennan J.

14 *Collins v The Queen* (1980) 31 ALR 257 at 307 per Brennan J.

regarded as an adult under Queensland law.[15] All five defendants challenged the admissibility of the statements on the ground of lack of voluntariness and on the discretionary ground of lack of fairness.

[15] Psychological assessment showed W to have an understanding of spoken English, equivalent to that of a non-Indigenous child aged 9 ½ to 11 ½ years. In considering the facts relevant to W, Dowsett J acknowledged that for the purpose of the legislation and the administrative directions in Queensland, W was not a child. According to Dowsett J however, "this seventeen year old boy has the verbal comprehension of a child aged nine and a half to eleven and a half. In the light of this, I would think that the arbitrary age of seventeen years has no relevance to the determination of the question of voluntariness."[16] Ultimately Dowsett J excluded the confessional statements of W, emphasising the benefit he obtained from seeing W give evidence on the pre-trial hearing. Dowsett J made the following observations at 321:

> "I had the benefit of seeing W. give evidence. I thought he was defensive in some areas, but this was understandable. I thought he was generally truthful although I think he had developed an awareness of the nature of his case. After some months this is not surprising. I thought that generally, he had only a limited appreciation of what was occurring. I certainly am not satisfied that he could understand the warning in the form used in this case. I am fairly sure that the pressure of interrogation at a police station would deprive him of any ability to exercise a choice as to speaking or remaining silent. I would also exclude his confession."

[16] Although the circumstances of W in *R v W* [1988] 2 Qd R 308 differ to those of Tietie and Wong-Kee, the decision emphasises the need to consider the unique background and circumstances of each defendant when determining whether a statement made during the course of a police interview was voluntary.

Inducements

[17] As canvassed above, a key example of a statement or confession not being voluntary is when it has been preceded by an inducement by a person in authority.[17] A "person in authority" includes any person involved in the arrest or prosecution of the defendant,[18] such as a police officer or a prosecutor.[19] Significantly, the Queensland Court of Appeal has also held that, in relation to s 10 of the *Criminal Law Amendment Act 1894* (Qld), whether a person is a 'person in authority' may be determined by the impression or perception the defendant might have in relation to the person, rather than the person's actual authority objectively ascertained.[20]

[18] It has long been held that a simple caution or mere exhortation to tell the truth by a person in authority does not render a confession inadmissible.[21] The law, however, does not treat lightly anything that could be construed as an inducement held out by

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15 Schedule 4 of the *Youth Justice Act* 1992 (Qld) defines an 'adult' as a person who is not a child. A 'child', as defined by Schedule 4, is a person who has not turned 17 years.

16 *R v W* [1988] 2 Qd R 308 at 321.

17 *McDermott v R* (1948) 76 CLR 501 at 511-12.

18 *Tofilau v R* (2007) 231 CLR 396.

19 *R v Plotzki* [1972] Qd R 379; *Collins v The Queen* (1980) 31 ALR 257 at 272 per Muirhead J.

20 *R v Burt* [2000] 1 Qd R 28 at 41.

21 *R v Baldry* (1852) 2 Den 430; 169 ER 568; *R v Bodsworth* [1968] 2 NSWR 132.

a person in authority such as a police officer. In the Queensland appellate decision of *R v Plotzki* [1972] Qd R 379 Matthews J at 384 said:

> "when the words of a person in authority may be considered as holding out an inducement or are such as could reasonably be considered to do so, the Court will not attempt, by fine analysis or the resolution of nice questions of construction, to minimise the effect of such words."

[19] Several decisions deal with the issue of inducements by police officers and other persons in authority. One of the earliest Australian cases to consider what constituted an inducement or promise by a person in authority was the Queensland decision of *McNamara v Edwards* [1907] St R Qd 9. There, it was held that a statement by a police officer to a defendant that "any statement made would be for his benefit" was a promise which would render the statement inadmissible. Although the court was ultimately satisfied that no such statement had been made by the police officer, the decision sheds light on the meaning of an inducement or promise.

[20] A defendant's confessional statement was excluded in *R v Bate* (1871) 11 Cox CC 686 after the defendant was told by a police officer that "it might be better for you to tell the truth and not a lie". In a similar vein in *R v Beere* [1965] Qd R 370, a statement by a policeman that it would be "better" for the accused to tell the truth was held to be an inducement, rendering the subsequent confession inadmissible. A confession was excluded on the basis that it was involuntary in *R v Doherty* (1874) 13 Cox CC 23 where the defendant was told that "it is better for you to tell the truth, and not put people to the extremities you are doing." However, it was held by the Court of Criminal Appeal in *R v Beble* [1979] Qd R 278 by Hoare J at 285:

> "There is nothing of which I am aware in any of the authorities which bind me to suggest that it is in any way improper for an investigating officer to point out to a suspect that some of his answers to questions in relation to the crime are, or appear to be, incorrect, thereby allowing the suspect further opportunity to explain any matters which appear to throw suspicion on him."

[21] Although these examples may provide guidance, the principle of voluntariness is "not limited by any category of inducements that may prevail over a man's will."[22]

Judge has discretion to exclude statement for unfairness

[22] As touched on above, even if admissions or confessional statements are voluntary and therefore admissible in law, they still may be excluded from evidence in the exercise of the judge's discretion.[23] It follows that whether a confession is voluntary is not at all relevant to the question of whether there are grounds for rejecting the confession as a matter of discretion.[24] Put simply, a statement must always be voluntary to be admissible in evidence and even then, discretion to exclude it resides in the judge. It is the defendant who bears the onus of showing that there is reason for the judge to exercise his or her discretion to exclude it from evidence.[25]

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22 *McDermott v The King* (1948) 76 CLR 501 at 512 per Dixon J.

23 *Ibrahim v R* [1914] AC 599; *R v Voisin* [1918] 1 KB 531; *McDermott v R* (1948) 76 CLR 501.

24 *Collins v The Queen* (1980) 31 ALR 257 at 312 per Brennan J.

25 *R v Lee* (1950) 82 CLR 133; *R v Bailey* [1958] SASR 301; *R v Banner* [1970] VR 240.

[23] A judge's discretionary power to exclude a voluntary statement on the basis that it was wrongly, improperly or unfairly obtained is well-established at common law. In *McDermott v R* (1948) 76 CLR 501 at 515 Dixon J discussed the discretionary power in the following terms:

> "Here as well as in England the law may now be taken to be … that a judge at the trial should exclude confessional statements if in all the circumstances he [or she] thinks that they have been improperly procured by officers of police, even though he [or she] does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence."

[24] Accordingly, where a statement has been obtained by police using "improper" or "unfair" methods,[26] the judge may exercise a discretion to exclude it. It is important to note, however, that although the conduct of the police is undoubtedly relevant in considering the exercise of the discretion, the sole question is whether in all the circumstances it would be unfair to use the statement against the defendant.[27] Indeed, as Brennan J, as he then was, said in *Collins v The Queen* (1980) 31 ALR 257 at 314, "the concept which governs the exercise of the discretion is unfairness, not contravention of the rules." In *Van Der Meer v R* (1988) 82 ALR 10 the High Court also held that notwithstanding irregularities in the methods used by the police, the proper test of including a confessional statement is whether it would be unfair to the accused person to use his statements against him, not whether the police have acted unfairly.

[25] How and when the discretion to exclude because of impropriety or unfairness arises cannot be exhaustively stated. As observed by the High Court in *R v Swaffield* (1998) 192 CLR 159 at 189, "the term 'unfairness' necessarily lacks precision; it involves an evaluation of circumstances." Commonly, however, the discretion will arise "when the evidence in question is of relatively slight probative value but is highly prejudicial to the accused."[28] It may therefore be necessary to weigh the probative value of the statement against the prejudicial impact upon the defendant.[29]

[26] In considering whether to exercise the discretion, there is also a need to balance the public interest of ensuring police have the freedom to conduct investigations and that people who commit criminal offences are convicted against the public interest of ensuring that defendants are treated fairly.[30] In *R v Ireland* (1970) 126 CLR 321 at 335, Barwick CJ made the following observations:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He [or she] must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions

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26 *Collins v The Queen* (1980) 31 ALR 257 at 260 per Bowen CJ.

27 *Collins v The Queen* (1980) 31 ALR 257 at 260 per Bowen CJ; *R v Lee* (1950) 82 CLR 133; *Bunning v Cross* (1978) 141 CLR 55 at 74 per Stephen and Aickin JJ.

28 *Bunning v Cross* (1978) 141 CLR 55 at 74 per Stephen and Aickin JJ.

29 *Collins v The Queen* (1980) 31 ALR 257 at 277 per Muirhead J.

30 *Van der Meer v The Queen* (1988) 82 ALR 10 at 18 per Mason CJ.

> obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."[31]

[27] The exercise of the discretion thus requires careful consideration of public interest requirements as well as all the circumstances surrounding the making of the statement or confession.

Examples of the unfairness discretion being exercised

[28] Whilst the concept of "unfairness" is imprecise and not limited by any particular situation, several decisions shed light on when the judge's discretion to exclude a statement on the basis of unfairness to the defendant may arise. For example, it is improper for a police officer to continue questioning a defendant when the defendant has said that he or she does not wish to further answer questions and any subsequent statement should be excluded.[32] Brennan J, in *Duke v The Queen* (1989) 180 CLR 508 at 513, also provides guidance on the discretion to exclude on the ground of unfairness:

> "If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded. Trickery, misrepresentation, omission to enquire into material facts lest they be exculpatory, cross-examination going beyond the clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification - to name but some improprieties - may justify rejection of evidence of a confession if the impropriety had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or to be silent."

[29] The failure of a police officer to delay questioning to allow a defendant to contact a friend, relative or lawyer may also give rise to the exercise of the unfairness discretion. The Queensland pre-trial decision of *R v Adamic* [2000] QSC 402 is a key example. In that decision, the defendant was charged with two counts of possession of a dangerous drug. He applied to exclude several conversations he had with police, one of which occurred when his car was pulled over and searched and he was apprehended by police for suspected drug dealing. The defendant contended that the conversation ought to be excluded on the basis that the police had contravened the *Police Powers and Responsibilities Act* 1997 (Qld).

[30] The facts of *R v Adamic* were that the police officer had advised the defendant of his right to telephone a friend or relative or lawyer to arrange for them to be present during questioning and for questioning to be delayed for that purpose. The police officer told the defendant, however, that he would be given the option of a telephone call when they got to the police station, and then proceeded to question the defendant about the substances found in his car. During this conversation the defendant ultimately made admissions that the substance found was heroin. In excluding part of the defendant's conversation with police from evidence, Holmes J emphasised the need for police to allow a defendant the opportunity to contact a lawyer, relative or friend. At paragraph 11 her Honour said:

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31 Cited in *Collins v The Queen* (1980) 31 ALR 257 at 316 per Brennan J.

32 *R v Ireland* (1970) 126 CLR 321; *Harris v Samuels* (1973) 5 SASR 439.

> "although Mr Adamic was cautioned and advised of his rights to speak to a friend, relative or lawyer and that if he wished to do so 'questioning will be delayed for a reasonable time for that purpose', he was not asked what his wishes were, and questioning was not delayed. Having told him what his rights were, including the right to telephone a solicitor, Constable Ottaway effectively negated that advice by making it clear that the option of contacting a solicitor was not presently available. He then proceeded to ask him a number of questions during the search of the car and the ride back to the Surfers Paradise police station. There was, in my view, a contravention … ."

[31] In circumstances where a person is being questioned in relation to an incident where a person has died, it would seem that fairness requires the person be told about the death. The case of *R v Fieldhouse* [1977] 17 SASR 92 is illustrative of this. There, the defendant was charged with the murder of his brother. He applied to have the whole of his detailed confessional statement excluded from evidence on the basis that he had been trapped into making unguarded answers to the police as he was not told that his brother had died, either prior to or during the interrogation, in spite of the fact that he had been inquiring about his brother's condition. The judge was satisfied that the defendant's brother had died approximately four hours prior to the interrogation.

[32] When the interview started, the defendant was warned that he did not have to answer questions but was not told towards which charge or charges the questions were directed. At some point early in the conversation the defendant was asked by police whether he knew anything about a shooting which occurred in the early hours of the morning. The defendant answered 'yes' and was then invited to say what happened. He made a long statement and after the interview was completed, he was charged with the murder of his brother.

[33] In his reasons, White AJ noted that there had been opportunity for the questioning police officer to warn Fieldhouse that he was being questioned about his brother's death. His Honour excluded the police interview having regard to a combination of factors, including "the seriousness of the charge, the accused's earlier uncertainty about his brother's condition, the inability of that officer to inform him, the continuing uncertainty in the mind of the accused, the nature of the custody, the vagueness of the warning given at the outset of the interrogation, the failure of the interrogating officer to inform the accused of the fact of death, and the relatively slight value of the confessional statement in proving responsibility for the shooting".[33]

[34] In a similar vein, the need for a defendant to be aware of the true nature and seriousness of a police investigation is emphasised in the English decision of *R v Kirk* [2000] 1 WLR 567. In that case, the defendant was arrested and questioned by police in respect of a number of offences, including the snatching of a shopping bag in the street from an elderly woman who later died as a consequence of injuries sustained in the incident. The defendant was not told of her death or of the risk of his being charged with robbery or manslaughter as a result before being questioned about the incident. Having admitted taking the woman's bag he was subsequently charged with robbery and manslaughter. His admissions were admitted as evidence

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[33] *R v Fieldhouse* [1977] 17 SASR 92 at 99.

at trial and he was convicted of both offences. The defendant appealed on the basis that the admissions should have been excluded from evidence.

[35] The court allowed the appeal and in delivering the court's reasons, Kennedy LJ observed at 572 that:

> "where the police, having made an arrest, propose to question a suspect or to question him further in relation to an offence which is more serious than the offence in respect of which the arrest was made, they must, before questioning or questioning further, either charge the suspect with the more serious offence … or at least ensure that he is aware of the true nature of the investigation…They must do that so that he can give proper weight to that factor, namely the nature of the investigation which is being conducted, when deciding whether or not to exercise his right to obtain free legal advice…and in deciding how to respond to the questions which the police propose to ask of him."

[36] Fairness, however, does not dictate that a person being interviewed by police be told about a death if police investigations are at a preliminary stage and a person is not yet suspected of being involved in the killing. The South Australian case of *R v Szach* [1980] 23 SASR 504 addresses this issue. In that case, the defendant, Szach, was charged with the murder of his partner and applied to exclude an interview he had with police during which he made admissions. The circumstances were that the defendant contacted police to seek assistance in relation to his missing partner, the deceased. The interview commenced on that basis, however, during the course of the interview, the police officer interviewing the defendant received a telephone call from a police superintendent who advised that a body, possibly the deceased but not yet identified, had been found and that Szach should be questioned about how he came to be using the deceased's car. The superintendent told the police officer not to tell Szach about the body. Following the telephone call, the police officer cautioned Szach and then questioned him about the circumstances surrounding his use of the deceased's car. The defendant was then charged with using a motor vehicle without the consent of the owner.

[37] On the following day, police further questioned Szach who was in custody. He was duly cautioned and informed that police inquiries were being made with regard to the finding of the body, which had by then been identified; and in answer to questions by police the defendant made further statements. On the pre-trial hearing it was submitted by the defence that the trial judge, in the exercise of his discretion, should exclude evidence of the statements made by the accused in the first interview on the ground that the accused had answered questions in circumstances that rendered it unfair to hold him to his answers, and that the later interview was affected by the taint of unfairness attaching to the first interview, and should also be excluded. The trial judge rejected these submissions and admitted both police interviews into evidence. On appeal by the defendant, counsel argued that the interviews should have been excluded by the judge in the exercise of his discretion as the failure of the police to inform the appellant that they believed the deceased to have been murdered, and that they were engaged upon an investigation into a probable murder in relation to which the appellant was a suspect, rendered it unfair in the circumstances to allow his answers to be used against him. It was also argued that the interrogation of the defendant in relation to the stolen motor vehicle was a deception.

[38] The court, comprised of King CJ and Legoe and Mohr JJ, refused the appeal, holding that the failure to disclose to the defendant that the deceased had almost certainly been murdered did not involve any impropriety or unfairness on the part of the police. A decisive factor was that at the time of the defendant's first interview with police, the police investigations were at a preliminary or undeveloped stage and it had not been determined authoritatively whose body had been found or that the body was the defendant's partner.

[39] In his reasons, King CJ emphasised that the police were entitled to employ all legitimate investigatory skills. His Honour noted, however, at 582- 583, that:

> "Such legitimate investigatory tactics are not to be confused with falsehood or dishonest trickery. Honesty is to be demanded of the police and other law enforcement agencies at all times. Falsehood, express or implied, and dishonest trickery must always bring the condemnation of the courts however worthy the ends sought to be achieved by such methods. The end can never justify such means, and the courts must be ever ready to use the discretion to exclude evidence obtained by such means, even if technically admissible, in order to preserve the stream of justice from pollution and protect the citizen from the possibility of oppression. Devices and stratagems have a part to play in police investigation, but they must not be allowed to degenerate into dishonesty in any of its forms."

[40] Significantly, King CJ highlighted the need to make a person fully aware of the nature of an investigation if, during the course of a police interview, the police focus shifts from merely obtaining information to interrogating a person with a view to charging him or her. The requirements of fairness change at this point and at 583, King CJ discussed the need for greater disclosure in detail:

> "A stage may come, moreover, in the course of police inquiries when some degree of disclosure is requisite. If the investigation proceeds successfully, it will reach a stage at which the police are satisfied about the nature of the crime which has been committed and believe that it was committed by a particular person. It then becomes necessary to interrogate that person, with a view to laying the foundation for charging him with the crime unless in the course of the interrogation he is able to exonerate himself. I think that at the stage of commencing such an interrogation, the dictates of fairness differ from those applying to the earlier stage of the investigation. The focus of the investigation has changed. The investigation has passed beyond the stage of merely putting questions with a view to eliciting useful information. It has hardened into an interrogation of a particular person who is likely to be charged with the crime unless he can exonerate himself. The requirements of fairness change in accordance with the changed situation. While the police are merely seeking information, fairness involves no more than that the questions asked be fair questions, that the person questioned be given a fair opportunity to make the reply which he desires, and that his answers be faithfully reported. When the prime suspect is being interrogated with a view to charging him, the emphasis changes. The decision which he must make as to whether to exercise his rights to silence becomes a crucial consideration. It is important that he should take the care in considering and formulating his answers

> which is appropriate to the seriousness of his position. Fairness to the suspect, in those circumstances, requires that he be made aware of the nature of the crime concerning which he is to be interrogated. These considerations led White J. to exclude confessions in *Reg. v Fieldhouse* and *Reg. v Hart*. I think that fairness may often require that the suspect be told the nature of the crime under investigation at an earlier stage than that at which the investigating officer is required to give the caution."

[41] Accordingly, it may be said that where a person is suspected of having been involved in a death, it is imperative that he or she is aware of the circumstances and facts of the incident so that an informed decision can be made about participation in the police interview and an informed decision can be made about the availing of rights such as the right to silence and the right to contact a lawyer, friend or relative. It is not necessary, however, for the person to be told of the potential offence in relation to its legal classification.[34]

Tietie

[42] With regard to Salomona Junior Tietie, the defendant applied to exclude two records of interview which took place between himself and Detective Senior Constable Burkin and Plain Clothes Senior Constable Arnott on the grounds of lack of voluntariness or because there were issues which enlivened the discretion to exclude them on the basis of unfairness.

[43] Mr Tietie (commonly called Mona) was born on 20 January 1991 and so was 17 years old at the relevant time. Pursuant to the *Youth Justice Act 1992* (Qld), he is regarded for the purposes of the criminal law in Queensland as an adult. Queensland is the only State or Territory in Australia in which 17 year old offenders are treated as adults.[35] While this means that the provisions of the *Youth Justice Act* do not apply to him, his youth is a relevant consideration.

[44] In order to rule on the admissibility of the records of interview it is necessary to set out in some detail the evidence relevant to precisely what occurred and resolve some differences in the versions given by various participants in those events.

[45] The police officers involved in Mr Tietie's record of interview were Detective Senior Constable Lorraine Burkin, who was then stationed at the Beenleigh Criminal Investigation Branch, and Plain Clothes Senior Constable Daniel Arnott, her corroborating officer. Both gave evidence on the s 590AA application.

[46] Detective Senior Constable Burkin was required to attend the major incident room at the Logan Central police station on 25 October 2008. She attended two briefings on that day and was given certain tasks. When she returned to duty on 26 October

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34 *R v Lancaster* [1998] 4 VR 550 at 555.

35 The United Nations Committee on the Rights of the Child has expressed concern in relation to this situation: UNCRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: Australia*, 4th session, UN Doc CRC/C/15/Add.268 (20 October 2005) [74] and the Australian Law Reform Commission has recommended that a person should be regarded as an adult for the purposes of the criminal law at the age of 18 in all Australian jurisdictions: ALRC, *Seen and Heard: Priority for Children in the Legal Process*, Report No. 84 (1997) [18.22]; see T Hutchinson, "Being Seventeen in Queensland: a human rights perspective on sentencing in Queensland" (2007) 32 *Alternative Law Journal* 81.

2008 she was directed to locate Mr Tietie with the assistance of Plain Clothes Senior Constable Arnott.

[47] Assisting in locating Mr Tietie were Detective Sergeant Grahame Pannowitz and Plain Clothes Senior Constable Sarah Boniface. The police officers attended two addresses before Senior Constable Burkin received a phone call to say that Mr Tietie was at the police station with his family. That phone call was at sometime between 11.00 and 11.25am. She and Senior Constable Arnott returned to the Logan Police Station. By that time Mr Tietie had been at the police station for some time.

[48] Senior Constable Burkin's oral evidence on the application was that she went to the front area of the police station. There were a number of people gathered there and one of them identified herself as the defendant's mother, Siupu Tietie. Senior Constable Burkin said she took Mrs Tietie into a room just off the front area and spoke with her. She advised Mrs Tietie that there had been an incident where a group of people were involved and as a result of that incident someone had died and two other people were seriously hurt. She said from their investigations it was their belief that Mr Tietie was one of the people involved and they "needed" to speak to him about it. Senior Constable Burkin said that Mrs Tietie said she had spoken to her son about it and was aware of a little bit of what was going on. Mrs Tietie asked who else had been spoken to. Senior Constable Burkin said that "it was agreed" that Mr Tietie would be brought into the room and Mrs Tietie requested that his uncle also be present.

[49] In her written statement, Senior Constable Burkin said that when she arrived at the police station she was advised that the defendant's mother was in an interview [*sic*] at the front of the police station and that the defendant was outside in the foyer with his father. She said in her statement that at 11.25am she and Senior Constable Arnott spoke with Siupu Tietie who advised that she was the defendant's mother. In her statement Senior Constable Burkin said that Mrs Tietie was advised of the investigation and that Senior Constable Burkin wished to conduct an interview with her son in relation to the death of a male person and the assault of two other persons. Mrs Tietie then advised that she wished the defendant's uncle to be present when he was spoken to.

[50] Senior Constable Burkin said another male person then entered the room who identified himself as Jacob Matuato. He was accompanied by the defendant who provided his name and date of birth and address and advised that he was called "Mona" by friends and family. Senior Constable Burkin said she then explained the situation to the three of them. She said at 11.35am she and Senior Constable Arnott left the room to give the defendant time alone with his mother and uncle and a few minutes later the defendant advised that he wished to take part in an interview with police. Senior Constable Burkin said that the defendant's uncle was then shown out to the foyer area of the police station and the defendant and his mother were escorted to a police interview room.

[51] In her oral evidence on the s 590AA application, Senior Constable Burkin said the defendant was brought into the room with his uncle, Jacob Matuato. She said she explained in front of the defendant what she was investigating, that one person had died and two others were seriously injured. She said she explained the warning that would be given prior to any conversation taking place. She explained that he had

the right to contact a solicitor and have a solicitor present and that questioning would be delayed if he wished to do so. She also advised him that he could have a support person in the interview with him. She said she explained that he had a right to silence and that a recording would be made of the conversation. She said she explained what all his rights were there and then before they went any further which was also designed to have his mother and uncle know what was going to take place. In her written statement she made no mention of explaining to Mr Tietie, his mother and his uncle what his rights were. Neither did she mention that in her evidence at the committal. When cross-examined on the s 590AA application, her evidence was that she knew she had given him advice about his rights before the record of interview formally commenced as that is her invariable practice.

[52] Senior Constable Burkin said when cross-examined on the application that Mrs Tietie said to her son several times in her presence that it would be better if he told the truth. Only a few questions later she said she did not recall Mrs Tietie saying to him that it was better if he told the truth. She said she recalled her saying "Tell the truth". Senior Constable Burkin said it was her understanding that it was part of their culture.

[53] Senior Constable Burkin could not recall whether she ascertained whether English was the first language of the three people she was speaking with. She said those notes would be in her partner's notebook because he took notes of all the questions asked before the interview began. She said they all seemed fluent in English and she did not think there was a communication problem.

[54] In his oral evidence, Senior Constable Arnott said he and Senior Constable Burkin attended the front foyer area of the police station. There was a brief initial conversation with Mr Tietie's mother and then a second conversation in a room to the side of the foyer where those present were himself and Senior Constable Burkin, Mr Tietie, his mother and his uncle. He said Senior Constable Burkin outlined the nature of the investigation and the defendant's rights. He did not recall the exact conversation. Contrary to what Senior Constable Burkin thought, he did not keep notes other than to record the names of the defendant, his mother and uncle. He made no mention of the conversation in his written statement. When he was cross-examined at the committal he denied being with Senior Constable Burkin for the whole of that conversation as he had left to prepare the interview room so he did not know if Senior Constable Burkin had mentioned that they were investigating a death. He said at the committal that he went straight from the front counter area to prepare the interview room.

[55] In oral evidence-in-chief on the application he said he and Senior Constable Burkin left the room together and when they returned the family had decided that Mr Tietie would take part in an interview. He then admitted in cross-examination on the application that his evidence-in-chief was a reconstruction based on reading his notebook. He then gave an explanation that he had not looked at his notebook before the committal when his own evidence at the committal showed, as he then admitted, that he had. An explanation for the unsatisfactory nature of his evidence appears to be that, as he admitted in his evidence, he accessed Senior Constable Burkin's statement on the police computer system a few days before giving evidence in this court and, whether deliberately or otherwise, added the details of what was in her statement to his account of what occurred.

[56] Senior Constable Burkin said she and Constable Arnott then left the room and allowed them to speak in private. Referring to her notes, Senior Constable Burkin said that she left the room at 11.35am and the record of interview commenced at 11.43am. She thought she had left the defendant alone with his mother and uncle for about five minutes. She said she and Constable Arnott stood outside the door waiting for them to tell them when they were ready. She said she was told that the defendant was going to take part in a record of interview. She could not recall who told her that the defendant would participate in the interview but it was either his mother or his uncle.

[57] She did not tape any of that conversation prior to the interview commencing nor did she take any notes of it. She had a tape recorder which she could have used. She could provide no explanation as to why she did not tape that conversation. There was therefore no objective evidence capable of resolving which of the various versions given by the five people involved was correct.

[58] An audio tape of the interview had been produced and the prosecutor, Mr Fuller SC, asked Senior Constable Burkin why there was no video of the interview. She said that there was a video tape recording. In her statement she refers to a video tape. Further enquiries by the prosecutor revealed that audio tapes of the interview had been tendered at the committal but not the video tape and that the police prosecutor still had it in his possession. This rather alarming omission was remedied by obtaining the video tape from the police prosecutor which was then produced to the court and the defence. The s 590AA hearing was then adjourned to allow counsel to view the video recording of the interview with the defendant.

[59] An examination of the video tapes revealed that there was a full video tape of the first record of interview and a video recording of the second record of interview until the tape jammed after which there was only an audio recording. It appears that the failure to produce the video tape was inadvertent rather than sinister. While the failure to disclose and provide a copy of the video tape to the defendant is absolutely unacceptable, the adjournment of the s 590AA hearing was fortunately sufficient to remedy any disadvantage suffered by the defence as a result.

[60] The first interview was conducted by Senior Constable Burkin in the presence of Senior Constable Arnott, the defendant and his mother. The video tape of the interview shows that she gave warnings to Mr Tietie. She said she had no concerns as to his understanding of what occurred. However although she made reference to it, she did not recount the previous conversation with him when the interview began to give him the opportunity to accept or reject her version of what had occurred. Neither did she explain on tape the nature of the investigation except by saying, "as we've explained to you before we're investigating an incident that took place on Saturday morning at the netball, at a parkland on the corner of Netball Drive and Ewing Road, Woodridge. [Mona] do you understand why we're here? Do you understand what we wish to speak to you about?" He replied, "Yeah".

[61] Senior Constable Burkin's evidence was that at the conclusion of the interview Mr Tietie was taken to the Logan CIB office and placed in a small room. His mother was escorted to the public area at the front of the police station. Senior Constable Burkin said that they were separated because as far as she was aware the matter was concluded. He was in police custody and his mother was not required any more as they were going to be processing Mr Tietie.

[62] Senior Constable Burkin's evidence on the s 590AA application was that her partner Senior Constable Arnott commenced the paper work to process Mr Tietie and she attended at the major incident room to update the staff there as to what had been said during the interview. She said she received feedback that other people had been interviewed and provided "just a slightly modified version of what the defendant's behaviour or actions had been." She said that as a result she went downstairs and spoke to the defendant and advised him "that it appears that his version was different to other versions, and I mentioned to him that other people involved had mentioned the use of a hammer."

[63] Senior Constable Burkin was alone with the defendant when she had this conversation. She did not record it. She made no effort to see whether his mother was still present at the police station before she had that conversation with him. She did not make any attempt to bring his mother who was the support person he had asked to have with him for the interview back into the room before speaking with him again and putting to him an important piece of information. She said that he responded that he had not mentioned that during the interview as he did not want to say it in front of his mother. She said that he agreed to take part in another interview to cover those aspects that he had left out of the first interview that he was not comfortable talking about in front of his mother.

[64] Senior Constable Burkin said that when she entered the room she found him alone and she expected to find him alone as she knew Senior Constable Arnott was sitting outside the room. She did not think of taking Senior Constable Arnott in with her. In fact she walked right past him to go into the room. Senior Constable Burkin then said that in recounting the "conversation" that she told Mr Tietie that during the other interviews there was mention of "hammers" being used by him and another: in other words that two hammers had been used. She said she said to him, "your version of the interview doesn't seem to match up with other versions that have been provided". She said that she said to him that others had mentioned him using a hammer during the incident. She said she had been told in the major incident room that the stories were that two hammers had been used during the incident by the defendants and he had used one of them. When cross-examined on the application she said "I mentioned that his version was inconsistent with the other versions and there was talk of a hammer being used."

[65] Senior Constable Burkin gave evidence that Mr Tietie then said he did not want his mother in the interview room with him. As best she can recall the words he said were, "I didn't want to say that in front of my mother". She said to him, "Did you wish to take part in another interview to clarify the issue of the hammer?" and he said, "Yes." She then said to him, "Do you want your mother to come back to sit in on the interview with you?" and he said, "No". She said she asked him if he wanted his uncle or his father or any other person to sit in on the interview with him and he said, "No". She said that nothing else was said and they went to the interview room.

[66] On her version of what occurred between the formal records of interview, she questioned Mr Tietie without electronically recording it contrary to the provisions of s 436 of the *Police Powers and Responsibilities Act 2000* (Qld) ("PPRA").

[67] Mr Tietie went back into the interview room with Senior Constable Burkin and Senior Constable Arnott. Senior Constable Burkin told her partner that they were

going to do another interview with the defendant and mentioned to him about a hammer being used and that they were going to ask some clarifying questions in relation to that aspect.

[68] Both Senior Constable Burkin and Senior Constable Arnott gave evidence that she did not speak to Arnott until after she had spoken to Mr Tietie. However when challenged on cross-examination by a different version he had given at the committal, Senior Constable Arnott said she had spoken to him first. At the committal he had said he could not recall seeing her go into the room where Mr Tietie was. His evidence on the application was different. His failure to go with Senior Constable Burkin into the room where Mr Tietie was can probably be explained by his inexperience. It is a little more difficult to find a benign explanation for the changes in his evidence.

[69] As to what happened between the interviews, Senior Constable Burkin's statement said that after the first interview the defendant's mother was escorted to the foyer of the police station and he was taken to the Logan Criminal Investigation Branch office. She said that she attended the major incident room and obtained a briefing as to the status of the investigation. She said in her statement that as a result of this briefing, she approached the defendant and asked if he wished to take part in a further record of interview. She said in her statement that she advised there were some inconsistencies in his version. She said that he agreed to take part in another interview however did not wish his mother to be present and did not request any other support person to be present.

[70] Senior Constable Burkin did not mention in her statement that she told Mr Tietie that others had said a hammer or hammers were involved and she made no mention in her statement that Mr Tietie said he did not want to say that in front of his mother.

[71] At the committal hearing under cross-examination Senior Constable Burkin said Mr Tietie was not arrested at that stage although he was in custody. When she was asked if any discussion occurred between herself and Mr Tietie during the half-hour between the two interviews, she said that she spoke to Mr Tietie and advised him that she had received information that his version differed to the information she had and asked whether or not he wished to do another interview. She said it was not tape recorded because she did not think of it.

[72] She was asked in cross-examination at the committal, "When you said that his initial version had differed from other information did you give him particulars of that?" Her answer was, "I don't believe so, no." She was asked "The differences. But you know one of them was the hammer?" She replied "Yes, that's correct." The next question was: "Was the hammer mentioned during that discussion?" Her answer was "I don't believe so, no." She was then asked "I mean, could it have been that because it's not taped, we just can't check on what was said?" Her response was "I honestly can't remember. Yes, that's correct."

[73] When she was questioned on the s 590AA hearing not only did she say that she did mention the hammer, she said that he admitted that he used a hammer.

[74] Not only did she not tape record this conversation with the defendant who was already in custody, but she made no notes about it in her notebook. The unexplained changes in her evidence showed the foolishness of not keeping any

record of her conversation with the defendant, as well as casting grave doubts on the reliability of the evidence she gave as to her memory of the conversation which had improved since the committal.

[75] Mr Smith acting for Mr Tietie questioned this apparent inconsistency in Senior Constable Burkin's version of the conversation. He pointed out that previously at the committal she gave evidence that she did not believe she mentioned the hammer to him in the off tape conversation and in evidence before this court she said she did mention the hammer to Mr Tietie in this off tape conversation. He asked her when she remembered that she had mentioned the hammer to him. Her answer was "I don't specifically remember mentioning the hammer to him but logic would dictate to me, the way I do things, is that I would be up front as to why there were inconsistencies with his version." She then admitted she had no actual memory of the conversation but was just reconstructing it on the basis of what she thinks she must have said.

[76] The second record of interview was then conducted with Mr Tietie without any support person being present.

[77] At the conclusion of the second interview Mr Tietie was again placed in the small room in the office. His identifying particulars, a photograph, finger prints and DNA were obtained. She said a search warrant had been obtained to search his house to recover the clothing and the hammer. She was not involved in the preparation of those search warrants.

[78] Then Senior Constable Burkin, Senior Constable Arnott, Detective Sergeant Pannowitz and Senior Constable Boniface went to Mr Tietie's residence in two cars. Senior Constable Burkin, Senior Constable Arnott, and the defendant were in one car and Detective Sergeant Pannowitz and Senior Constable Boniface were in another car. Senior Constable Burkin had no conversation with the defendant in the motor vehicle and activated her tape recorder prior to arrival at the address and again warned him about his rights and responsibilities in relation to the search that was going to be conducted. She tape recorded the search using a tape recorder which she always carried in her bag.

[79] She said she now regards it as prudent to tape record all conversations with defendants but said she did not think that at the time because of inexperience. However she had been a police officer at that stage for 16 years. She told Mr Smith in cross-examination that she had been a detective since mid 2007 and had been in plain clothes from 2003. She developed the habit of having a hand held tape recorder in her bag at all times. In fact she purchased her own tape recorder for that purpose. This was however the first murder investigation she was involved in.

[80] In the circumstances where the police officers failed to record significant conversations with the defendant and where there are contradictions within and between their evidence their reliability is significantly undermined. It is necessary to turn to the evidence given by the defendant, his mother, uncle and another member of his family who attended the police station to assist him.

[81] Mr Tietie gave evidence that he was born on 20 January 1991. During 2008 he was doing Year 12 at Marsden State High School but was excluded for not attending. At the time he was living at Muchow Road, Waterford West with his father, his two younger brothers and another of the defendants, Likisone Siliga. His mother was

living at another address in Woodridge with his eight-year-old sister. The family had migrated to Australia from New Zealand and had Samoan origins. Mr Tietie was born in Australia but has strong family, ethnic and cultural Samoan links.

[82] Mr Tietie's evidence was that after the fight in the park which led to the charges which Mr Tietie faces he went back home to the Muchow Road address with Likisone Siliga and his father. One of his cousins, Pua, rang and said that Len Wilson had already been to the police station and that someone had died that night. Mr Tietie then told his father about the fight the night before and that one of the men had died. He said he was pretty sad and his father was heartbroken about it. He went with his father to his mother's house where they stayed the night.

[83] On 26 October 2008 he woke at about 7.00am. He discussed the question of going to the police station with his parents who said that they should go to the police station. This conversation occurred at about 8.00am. His mother then rang her brother-in-law Jacob Matuato, and he came over at about 9.00am. Mr Tietie, his mother, father and uncle Jacob went to the Logan Central Police Station. When they arrived at the police station Mr Tietie said his mother told the lady on the front desk that he was there about the incident that happened at the park. Mr Tietie said he, his mother and uncle Jacob went into an interview room and about five or ten minutes later a police officer came into the interview room. He could not recall how long they had been at the police station when that occurred. The police officer who came into the room was Senior Constable Burkin.

[84] Before the interview started Mr Tietie said that Senior Constable Burkin said "It would work better in my favour if I did the interview". When asked who else was present he thought his mother was there. He did not remember if his uncle was there and there was no other police officer present. When she said that, Mr Tietie thought "Yeah, I should just do it, it'd work my way." He said she read him his rights and said he could have a lawyer but it would take too long. When asked what he thought when she said that he said he thought that "Because she said it'd work in my favour that I'd do it anyway." After that conversation he was left with his mother and uncle Jacob in a little room and they discussed whether or not he should do the interview. His mother and uncle Jacob encouraged him to do it and when the detectives came back in his mother told them that he would go through the interview.

[85] Mr Tietie said that after the formal taped interview he went into a little room and he thought his mother went to the foyer of the police station. He thought he had been arrested although no one had told him that. He did not think he was free to leave if he wanted to. Senior Constable Burkin came into the room and said that "One of the boys already said 'I had a hammer'." Mr Tietie asked her which one had said it and she said just one of the boys. She told him that he did not tell the full story in the first interview and that he had to do another one. As a result he "just thought I had to". She told him that his mother was gone. However during the second record of interview he was specifically asked if he wished his mother be present again for the interview and his answer was "No". He agreed in cross-examination that he could not really remember precisely what the police officer said. When it was put to him that he was given the opportunity to have his mother present during the second interview and that he elected not to he said that was "Because before that she said that my Mum was already gone." He did not avail himself of the opportunity offered to have someone else sit in because he thought there was no one there. He

agreed in cross-examination that it was his choice in the end whether he was going to be interviewed or not; but it obviously impacted upon him that his mother told him to tell the truth and the police officer said it would work in his favour if he did an interview.

[86] Mr Tietie was not sophisticated in his knowledge or dealings with the police. He had never been interviewed by the police before. He had received a fine for driving without a licence but had not had any other dealings with the police. He said in cross-examination that on the Sunday morning when he talked to his parents about going to the police he wanted to go and see the police and tell them what had happened because he did not want to put his parents in any more grief.

[87] Mr Tietie during his cross-examination displayed a marked tendency to agree with what was put to him by the prosecutor. Given his youth and his cultural origins, this tended to suggest that he was agreeing in part in order to be respectful rather than because he understood and adopted all parts of the question.

[88] When Mr Tietie was cross-examined about the conversation between the interviews he said that when Senior Constable Burkin said that one of the other boys had said he had a hammer he said "Yeah I did". She then said he had to have a second interview. He was adamant that he did not say that he did not want his mother there because he would have said it in front of his mother.

[89] The important aspects of Mr Tietie's evidence were that he did not take the opportunity to get a lawyer because Detective Senior Constable Burkin said it would take too long; he underwent the first interview because she said it would work in his favour and he underwent the second interview because she said he had to. In view of the lack of reliable contradictory evidence from the police as to what occurred I am inclined to accept his evidence.

[90] Mr Tietie's mother is Siupu Tietie. She gave evidence that on the Sunday morning she rang her brother-in-law Jacob. He came over and she asked him if her suggestion that they take her son to the police station was the right thing to do and he said that he told her that it was. When they arrived at the police station she spoke to the receptionist and said she was there to bring her son about the matter that had happened last night. They waited for about 20 or 30 minutes until Senior Constable Burkin came in.

[91] It is necessary to say something about Mrs Tietie's demeanour. She impressed in giving evidence as a quiet, sensible and very respectful person most concerned to do the right thing. She is not a highly educated woman but impressed as being extremely honest. She had no experience of dealing with the police but was most concerned to assist them if possible.

[92] She said after Senior Constable Burkin arrived she took her and her son into a room with another police officer. Jacob and her husband remained outside. All that Mrs Tietie could remember about the conversation was that Senior Constable Burkin said she was going to interview Mr Tietie and that someone had died. Senior Constable Burkin mentioned something about rights and then a lawyer but, when she was saying "a lawyer", she said if they had to wait for a lawyer it might take a bit longer. Mrs Tietie asked if it was all right if she was in the interview with her son. Senior Constable Burkin asked Mr Tietie if he wanted her to be there and he

agreed. Senior Constable Burkin then took them to the interview room and conducted the interview.

[93] Mrs Tietie did not recall any discussion with Senior Constable Burkin about the pros and cons of the interview before it commenced but Mrs Tietie did recall that she said to her son that he "has to tell the truth".

[94] This statement can be understood in its context as having a profound effect on her son. I refer to a report from Dr Meleisea, an expert in Samoan culture both in Samoa and with regard to families of Samoan origin living in Australia and New Zealand. Her evidence was:

> "Children in Samoan families, including children of migrant Samoan parents in Australian and New Zealand, are taught from early childhood to defer to and obey their elders.
>
> Salomona, to whom I will refer to by his everyday name, Mona (in Samoa his name is usually spelled Solomona) testified that on the Sunday morning, after being involved in a fight the night before, he heard from a cousin that a death had resulted. He told his father, Lone, about the fight and he and his father spoke about whether they should go to the police. His mother, Siupu, sought advice from her brother-in-law, Jacob, who came to the house where Mona and his parents were accompanied by his wife, (Siupu's sister Silivia), and then they all went to the police station. Mona was instructed by his parents, aunt and uncle to go with them to the police station so that the police could interview him about the fight.
>
> Mona told the police and his father that he was present during events leading to the death of an unrelated person. Mona's family are very likely to have believed that Mona was obliged to be interviewed by the police and that presenting himself voluntarily at the police station would be in his interests.
>
> In Samoan culture any serious offence between two persons is regarded as involving both their families. It is normal for the whole family of an offender to take responsibility for an offence committed by one of their members, and to make a collective formal apology (*ifoga*) to the whole family of the person offended against. The family of the offender will admit their responsibility without reservation and ask for forgiveness. In Samoa such apologies may be taken into consideration by the courts in sentencing.
>
> Accordingly, it is very likely that – as Mona testified – he was told in the presence of, and advised by his family that it was in his best interests to tell the truth; Mona's family would have interpreted the advice of the interviewing officer in this cultural context, and urged Mona to tell the truth. They are likely to have hoped that by doing so, the police and the subsequent processes of the law would be more lenient to Mona. As a child in the Samoan cultural context, Mona would have believed he should obey his father, mother and uncle, as well as authority figures such as the police.

> In the first police interview, Mona was interviewed in the presence of his mother and uncle. Before the interview he was urged to tell the truth by the police officer who, according to Mona's testimony …, said it 'would work better in his favour to do so'. (According to her testimony, Police Officer Burkin did not give this instruction but it was Mona's mother who gave this advice several times). Mona testified that the police advised him it was in his best interests to tell everything, advice that was endorsed by his mother and uncle. Mona was then interviewed without legal representation. It is evidence from the testimony of Mrs Ti'eti'e that she and other family members did not immediately think that Mona needed legal representation, but that it was more important … for him to come forward and give an interview as soon as possible."

[95] Mrs Tietie said that after the first interview was conducted Senior Constable Burkin said she would have to wait outside and she went outside to the reception area. She was there for more than an hour. While she was still in the reception area Senior Constable Burkin came out and said to her that she had done a second interview. When Mrs Tietie asked her why she was not there during that interview she said that it was because she asked her son if he wanted her to be there and he said that he did not. Senior Constable Burkin denied that any such conversation took place at the police station.

[96] The impression I formed that the defendant Mr Tietie in cross-examination tended to agree with the question out of respect rather than necessarily his assent to the whole of the content of the question, was reaffirmed by an answer Mrs Tietie gave in her evidence. She was asked about the degree of respect young people in her culture have for police officers and elder people in the community. Her answer was "Well, when they answer a question they always answer 'yes' instead of a 'no'." This is the phenomenon commonly known as "gratuitous concurrence". The term is explained in the Supreme Court of Queensland's *Equal Treatment Benchbook* (2005) at 9.7.3:

> "Gratuitous concurrence refers to the tendency of a speaker to agree with a proposition put to him or her, regardless of whether the speaker truly agrees with it or even understands the proposition."

[97] Mrs Tietie was asked in cross-examination whose decision it was to go to the police station. She said that she suggested it to her brother-in-law who agreed that it was the right thing to do. They discussed it with her son who she said had no choice because she was the mother and he had to listen to what they would say. At the time they went to the police station Mrs Tietie did not realise that someone had died. She said her husband knew but he had not told her. Mrs Tietie stayed at the police station because she was waiting for her son to come out. Mrs Tietie said that when she discussed the matter with her son after Senior Constable Burkin left, she thought it was best just to get the interview over and done with because she did not realise how serious it was. She said they did not want to get a lawyer because Senior Constable Burkin said the process would take much longer and they would have to wait for the lawyer and Mrs Tietie thought it was better just to get it over and done with.

[98] Jacob Matuato gave evidence that he and his wife went to speak with Mr Tietie and his family on the morning of 26 October 2008 after receiving a phone call from Mr

Tietie's mother. He said that Mr Tietie's parents felt that he should be taken down to the police station and Mr Matuato agreed with that. He said a decision was made to take him down to the police station. They were not aware of what was going to happen when they got there but they had decided to make their way to the police station. Five of them went to the police station: Mr Matuato and his wife, Mr Tietie and his parents. At the police station Mr Matuato, Mr Tietie and his mother were escorted to a room. Mr Matuato was told that he was not required in the interview so he was excused. When he came out of the small room into the front reception area he was greeted by Mrs Tietie's sister, Salani Faagase.

[99] Mrs Faagase asked where Mr Tietie was and when told he was just being interviewed she said that he should not be there without a lawyer. She was very upset and she said to the person on the front desk "You guys know very well the system, how it works, and that that boy shouldn't be in there." Mr Matuato said neither he nor Mr Tietie's parents had been in that situation before and were not very familiar with the idea of having a lawyer present. The officer on the front desk just responded with a brush-off gesture saying it was too late because the interview had already started. According to his evidence, which I accept, she arrived immediately after Mr Tietie and his mother were taken into the interview room.

[100] Mr Matuato is also obviously highly respectable and endeavoured to be helpful to the prosecutor when he was cross-examined. He was apologetic when he could not remember, when he did not know someone when asked about it by the prosecutor or when his memory was different from what was suggested to him by the prosecutor. Mr Matuato's impression was that the police wanted to get the interview done and as soon as they entered the small room it felt like they just wanted to get it out of the way. As soon as he explained that he was Mr Tietie's uncle straight away they said, "You can go now, we don't need you." He said that was how it felt in there. Mr Matuato said he did not know whether Mr Tietie was allowed to have a lawyer right there or then or that they could wait for a lawyer.

[101] Mr Matuato said it was part of Mr Tietie's upbringing to tell the truth because they were religious people. Mr Matuato said he did not really know they had options. He just felt that once they were in there "that was it". They had no option to get a lawyer or to get someone in or wait for someone or take Salomona and go home.

[102] Mrs Faagase's statement was admitted without the need for cross-examination. She attended at the police station on 26 October 2008 after she received a phone call from her mother. She is Siupu Tietie's sister. When she arrived at the police station she saw her brother-in-law, Jacob, and Mr Tietie's father, Lone. They told her he was inside. She said she hoped he was not doing an interview because he had to have a lawyer. She went to the reception desk and asked the lady behind the desk if she could go into the room and see Mr Tietie. She asked who she was and she said that she was his aunty. She said she wanted to see him because she thought he needed an adult with him. The lady told her she could not go in there. She then said to the lady that Mr Tietie needed to have a lawyer present. She told Mrs Faagase that the interview had already started and she could not go in there. There were two male police officers standing behind the lady at reception. Mrs Faagase said to the lady at reception that Mr Tietie could not give a statement unless he had a lawyer. The police officers just looked at her. Nothing was done by the police in response to Mrs Faagase's statement about a lawyer.

[103] The onus is on the prosecution to satisfy the court on the balance of probabilities that any confession was made voluntarily and therefore that the record of interview in which any such admission was made was conducted without threat, promise or inducement. This involves considering the personal circumstances of the defendant and the effect of what occurred on him. In this case it appears that there were a number of inducements:

- In accordance with Samoan culture, the family, of which he was a part, rather than the defendant as an individual, made the decision to go to the police station. None of the family involved at that stage were experienced in dealing with the police;
- Mr Tietie was influenced by his mother telling him repeatedly in front of the police that it would be better if he told the truth;
- Mr Tietie was further influenced by the police officer telling him before the first interview that it would work in his favour if he did the interview; and
- Mr Tietie was told by the police or deduced from what he was told that he was obliged to do the second interview to clear up inconsistencies.

[104] The prosecution has not satisfied me on the balance of probabilities that any admissions made in the interviews were made voluntarily and not as a result of those inducements. The records of interview are therefore inadmissible.

[105] In addition there are discretionary reasons to exclude the first and/or the second interview even if, contrary to what I have found, they were made voluntarily:

- The failure to delay the commencement of the interview to obtain a lawyer where the defendant, his mother and his uncle believed on the basis of what they were told by the police that it would take "too long" and where the defendant's aunt specifically said just after the interview commenced, that he should not be interviewed without first obtaining advice from a lawyer; and
- A police officer spoke to Mr Tietie alone after the first record of interview about the investigation and asked him some questions in the absence of his support person and without recording or taking a note of that significant conversation.

[106] I therefore rule that the records of interview conducted with Salomona Junior Tietie are not admissible on the trial.

Wong-Kee

[107] With regard to Joshua Francis Wong-Kee, the defendant sought to exclude records of interview that took place between himself and Detective Sergeant Dunn and Detective Acting Senior Sergeant Francis on the grounds of unfairness.

[108] Joshua Wong-Kee was just 17 years old at the time of the events in question having turned 17 on 22 October 2008. He lived in Woodridge with his mother, step-father and two sisters. He was a student at Mabel Park State High School. He was not a good student, but his report noted that he was co-operative and well-mannered, characteristics that were demonstrated both in his police record of interview and during his evidence in court. He had only had one previous encounter with police when he was cautioned about trespassing at another school. That occurred at his

home in the presence of his older sister when he was in Year 11. He had never been in a police car or to a police station or interviewed by the police before this investigation.

[109] The investigating officers with regard to Mr Wong-Kee were Detective Sergeant David Jeffery Dunn who was partnered with Detective Acting Senior Sergeant Kevin Francis. In 2008 Sergeant Dunn was stationed at the Child and Sexual Assault Investigation Unit and Acting Senior Sergeant Francis was the operations leader at the Child Sexual Assault Investigation Unit. Both were called down from headquarters in Brisbane to assist in Logan with this investigation. They attended a briefing at the major incident room on the afternoon of 25 October 2008. They saw some CCTV footage and tasked themselves to locate a person who had been identified from that. This person had been provisionally identified as Joshua Wong-Kee. He was shown holding back or restraining another person from assaulting a person who was lying on the ground.

[110] They located him at a house in Albert Street in Logan Central shortly after 5 o'clock in the afternoon. Sergeant Dunn's evidence was they went up the front stairs, knocked on the door and were greeted by a woman they believed to be Joshua's mother. They identified themselves as police and said they wanted to speak to Joshua. They were informed that he was home but asleep in one of the bedrooms upstairs. They entered the residence and were shown to the room where he was asleep. Mr Wong-Kee was then woken and Detective Senior Sergeant Francis and Sergeant Dunn identified themselves as police officers and explained that they were "investigating a matter". They said they wanted to see if he would come back to the Logan Central Police Station "for a chat and to provide a statement."

[111] Sergeant Dunn said at that stage they had no reason to believe that he was a suspect and he was simply a person who was at the scene at the time of the assaults. No cautions were given to him. Such cautions are required under s 431 of the PPRA when a police officer wishes to question a person as a suspect. As Acting Senior Sergeant Francis eventually conceded in his evidence, they were not certain whether he was merely a witness or involved in the offences. He should have been told at the very least that he was not obliged to come with them to the police station. Although the CCTV footage showed Mr Wong-Kee trying to prevent another man returning to strike another man who was already injured, he was also obviously part of the group of young men who had been in the park in circumstances where people had apparently been assaulted by men in that group. Sergeant Dunn said he agreed to accompany them back to the police station, went back downstairs with them, got into the police vehicle and went to the Logan Central Police Station. They knew he was 17 years and two days old. Sergeant Dunn had his tape recorder with him but did not record any of the conversation at the house or in the police car.

[112] In the car Sergeant Dunn said he explained "the outline of the investigation that we were investigating." He said he explained that there had been a disturbance or assaults in Ewing Park the night before as a result of which two people had been hospitalised and one person had died and they wanted to get a statement from him in relation to his knowledge of those events.

[113] Sergeant Dunn took Mr Wong-Kee to the Child Protection Investigation Unit office into a statement-taking room. Sergeant Dunn took short notes in relation to his personal particulars and then sat down and asked him some introductory questions

prior to commencing the statement. None of this was taped. He said his standard practice with a witness is to get them to tell everything in their own words without interrupting or taking notes. Once he obtains the full version he then goes back and commences typing up a statement. Sergeant Dunn said that Mr Wong-Kee provided him with a version as to his involvement in or knowledge of the incidents from the night before and Sergeant Dunn then decided that his involvement was more than just as a witness and that he was actually involved and therefore had become a suspect. Once Sergeant Dunn formed that opinion he stopped the version that Mr Wong-Kee was providing and went out and advised Detective Senior Sergeant Francis of what Mr Wong-Kee had told him.

[114] Once Sergeant Dunn had spoken to Senior Sergeant Francis they advised the major incident room of the version they had obtained and said that they were going to conduct an electronic record of interview. Sergeant Dunn said he then went back to Mr Wong-Kee and explained that they were not going to take a statement any more. They were going to "Get an electronic record of interview with him which was similar to taking a statement but it would not be type written it would be video recorded and audio recorded." They then went into the electronic record of interview room and commenced the record of interview. The interview was conducted between 6.17pm and 8.10pm.

[115] In the course of that interview, Sergeant Dunn explained to Mr Wong-Kee that he had the right to remain silent and that he had a right to telephone or speak to a solicitor or a lawyer of his choice and to advise them where he was and to have them present during questioning. He was asked if there was anyone he would like to contact at this point of time and Mr Wong-Kee replied there was not. Then Sergeant Dunn said "OK, and you've not arranged for a lawyer to be present. Um, a legal aid organisation can be notified that you're here um, and that, that you're going to be questioned by us. Are you happy for that?" To which Mr Wong-Kee replied "Yes sir". In spite of that neither Sergeant Dunn nor Acting Senior Sergeant Francis contacted a legal aid organisation about Mr Wong-Kee. They could give no explanation for that omission.

[116] Sergeant Dunn said that at the conclusion of the first interview they advised the major incident room of the version they had obtained from Mr Wong-Kee. The police officers were then asked if they could conduct a second interview with him and show him a series of photographs to see if he could identify any persons in the photographs. During the break Mr Wong-Kee asked what was going to be happening. Sergeant Dunn said Mr Wong-Kee was advised that there was a possibility that he would be arrested in relation to the two assaults but they would have to conduct further enquiries before that happened. He was taken out of the interview room, placed back into the witness statement-taking room for a short time and then taken back to the record of interview room for a second record of interview.

[117] I have had the advantage of seeing the video taped records of interview. Mr Wong-Kee seemed young for his age and quite vulnerable. He was very respectful. Many of his answers were "yes, sir" or "no, sir" suggesting that he was endeavouring to be very polite and respectful to the police officers. Two years later, while giving evidence on the application he still seemed young and relatively naïve. He wept when recounting some of the events.

[118] During the second record of interview Mr Wong-Kee was told he could have a support person present. However the police were not able to obtain any of the support persons he nominated so Sergeant Dunn said "he decided to continue with the interview by himself". He was told that he was free to leave but only because he was "not under arrest at this point in time." Sergeant Dunn said at the conclusion of the second interview Mr Wong-Kee was advised he was going to be arrested and charged in relation to the two assaults and he agreed to go back to his residence to collect the clothes that he was wearing during the incident at Ewing Park. He was handcuffed and the visit to his home at Albert Park was video taped. Both he and his family were obviously very upset and audibly weeping during the search.

[119] Forty minutes elapsed between the interviews. The police officers involved did not tape any conversation which occurred between the interviews nor the conversation after the second interview but before the search.

[120] Sergeant Dunn agreed in cross-examination that the CCTV footage only showed the last couple of minutes or so of what had occurred. In his statement he made no mention at all that he was asked to find Mr Wong-Kee and take a statement from him as a possible witness. Sergeant Dunn said it never entered his mind at all that he might be a possible suspect rather than a witness. On cross-examination he said that as best he could remember he said to the woman who answered the door, whom he assumed was Mr Wong-Kee's mother, that they were investigating a matter and they would like to have a chat to him. He thought that he said to Mr Wong-Kee when he was awoken that they were investigating a matter and they would like him to come to the station with them to have a chat and to provide a statement. There is of course no record of that conversation. It was not taped, there is no note in his notebook or diary and it was never put to Mr Wong-Kee in the interview with him. Sergeant Dunn admitted that they did not disclose to Mr Wong-Kee at the house what they wanted to talk to him about. His explanation for that was that Mr Wong-Kee did not ask.

[121] Sergeant Dunn said he did not tell Mr Wong-Kee what it was about until they were in the vehicle on the way back to the police station. All that Sergeant Dunn told his mother was that they would take him down to the station and they would bring him back. They certainly did not tell Mr Wong-Kee that he was not under arrest and did not have to come back to the police station if he did not want to. Sergeant Dunn gave evidence that in the car he told Mr Wong-Kee that he wanted to question him about an incident in the park where two people had been assaulted and ended up in hospital and one person had died.

[122] The evidence given by Sergeant Dunn as to the conversation he said he had in the car with Mr Wong-Kee was critical because he failed to mention at all in the record of interview the nature of the injuries suffered by the victims of the offences and that one of them had died. Sergeant Dunn said he thought he said that and it was only when he listened to the record of interview that he realised it had not been said. Prior to commencing the formal record of interview Sergeant Dunn did not tell Mr Wong-Kee that he was now a suspect in relation to the matter.

[123] In his statement, Sergeant Dunn merely said that Mr Wong-Kee voluntarily accompanied them to the Logan Central Police Station and that an electronic record of interview was commenced at 6.17pm.

[124] Mr Wong-Kee absolutely denied that Detective Sergeant Dunn said anything in the car about wanting to question him about an incident in the park where two people had been assaulted and ended up in hospital and that one person had died. He said that the first time he found out that someone had died was between the first and the second interview. This is consistent with his change in demeanour at the beginning of the second interview.

[125] On three separate occasions during the first record of interview Sergeant Dunn said to Mr Wong-Kee that they wanted to talk to him about "an assault or disturbance", a "disturbance" or a "matter". With regard to what was said to him at the house Sergeant Dunn said to Mr Wong-Kee during the interview "Do you also agree that I said to you that I wish to speak to you in relation to a, a matter and asked if you were willing to come back to the police station to talk to us?" Mr Wong-Kee replied "Yes sir". Sergeant Dunn then said "OK and do you then, do agree that we then hopped in the police car, drove back to the police station um, and this is where we are now, about to have a chat"?

[126] Clause 2.14.1 of the Police Operations Manual made by the Commissioner pursuant to his power under the *Police Service Administration Act 1990* (Qld) provides that police officers undertaking an interview should outline the matter under investigation. Sergeant Francis agreed that when Mr Wong-Kee was told between the first and the second interview that someone was deceased he appeared to be upset. Mr Wong-Kee gave the first record of interview completely unaware of the seriousness of the investigation and the potential consequences for him.

[127] Joshua Wong-Kee gave evidence as to what occurred after the events in the park on 25 October 2008. He said that he went home, arriving about 4 o'clock in the morning. He went to sleep in his bed in the garage and woke up about 6 o'clock in the morning when he had breakfast and got ready to spend the day at a church function. He went to the Methodist Church with his step-father, mother and two sisters leaving home at about 6.30am. The church is at Crestmead and they stayed until 4.00pm.

[128] During that Saturday Mr Wong-Kee saw nobody who had been in the park the previous night and there was no discussion about it at the church function. When the church function finished at 4.00pm he went straight home with his family, had something to eat and went to sleep upstairs in his sister's bedroom. He was woken not long afterwards by his mother in the presence of the detectives. Detective Dunn introduced himself and told him he needed to go down to the police station for an interview. He was not told what it was about.

[129] As he was leaving his mother spoke to him in Samoan, which is the language used in his home, and asked him where he was going. He did not know so he asked one of the detectives who told him that it was the Logan Police Station. His mother asked him in Samoan what had happened and he told her not to worry. As he was leaving the verandah area he stopped to talk to his mother again and one of the detectives gently took hold of the back of his arm and said "Come on mate. Let's go". Both police officers denied doing this but I accept that it is quite likely, given the disparity in age and their keenness to get him back to the police station, that it occurred.

[130] He said he went with the police because his whole upbringing had taught him respect for police officers and teachers and, clearly, any figure of authority. This is consistent with the evidence given by Dr Meleisea and my own observation of him.

[131] As I have already mentioned Mr Wong-Kee absolutely denied the version of the conversation in the car given by Detective Sergeant Dunn. On balance I prefer the version given by Mr Wong-Kee. He impressed as an absolutely truthful witness. Sergeant Dunn's evidence as to what happened in the police car was not corroborated by Senior Sergeant Francis who did not hear the conversation. Sergeant Dunn did not tape the conversation although he could easily have done so and no mention was made by him of that conversation in his statement. It was only once he had reviewed the record of interview and realised that he had failed to inform Mr Wong-Kee of the nature of the offences that they were investigating that he then "remembered" that he had told him in the police car.

[132] Sergeant Dunn was surprised to find that he had not told Mr Wong-Kee about the nature of the offences in the record of interview and in my view rather than facing the fact that he had made a mistake interviewing a vulnerable young man he purported to remember a conversation in the police car which did not happen. What Sergeant Dunn did say to Mr Wong-Kee in the police car was to ask him where he was between 12 and 1 the night before. When Mr Wong-Kee said he was not sure Sergeant Dunn said "I think you know where you were". Sergeant Dunn also asked him where he had been on that day and he told him he had been to a church function. He saw that Sergeant Dunn had a picture of him and a picture of Len Wilson which had come from a Facebook page and the police officers expressed some pleasure in having identified and found him.

[133] Mr Wong-Kee's evidence was that he knew when he was being interviewed by the police that they wanted to talk to him about what had happened in the park, but he did not realise that he was in serious trouble. He thought that the word assault meant a fight and that disturbance meant making noise. He said he did not know what a solicitor was at that time. His evidence was that he felt silly admitting it but he used to think that it was a doctor. He was uncertain what a support person was but thought it was someone like the Salvation Army. Mr Wong-Kee's evidence was that he did not think about leaving because they just wanted to interview him about a disturbance. His evidence about his real understanding of what he was asked showed not only that his agreement to various questions he was asked during the interview was because he was being polite and respectful; but was also an example of the gratuitous concurrence to questions asked by authority figures referred to earlier where he concurred with the question asked even if he did not really understand it.

[134] Mr Wong-Kee's evidence was that Acting Senior Sergeant Francis told him between the two interviews that one of the men had died and two of them were in hospital. Sergeant Dunn was present when that was said. Sergeant Dunn told him that he was going to be charged with the two assaults and that later on he might be charged in relation to the murder. That made him very frightened. As a result during the second record of interview he was very keen to have a support person present. The police did not do sufficient to ensure that this young disadvantaged man had a support person present for the interview when that was what he wanted or at the very least that he could contact someone by telephone. Mr Wong-Kee's evidence was that when he asked what would happen if he left he had in his mind

that it would be easier for him if he left to get to his family and tell his mother and ask her for some advice. He said he did not because the police officer said he only had a few questions left to ask and he thought if he did go to leave he would have "ten cops jumping on me." He thought he would be stopped from leaving the police station.

[135] Mrs Talavou Tina Wong-Kee gave evidence. She is Mr Wong-Kee's mother. She said that had she known that the police wanted to question her son about someone having been killed in a park, she would have woken her eldest daughter who is fluent in English, spoken to the rest of her family or her son's father and contacted the preacher at her church for assistance. She would not have allowed her son to go with the police or at the very least she would have gone with him.

[136] There are a number of reasons which have persuaded me that I should exercise my discretion to exclude the two records of interview on the ground that it would be unfair to the defendant to admit them:

- Mr Wong-Kee was not told that the police were investigating an unlawful killing and that he was suspected of involvement in that killing before or at any time during the first interview;

- The police told Mr Wong-Kee, who was young, vulnerable and inexperienced that they would contact a legal aid organisation to inform them that he was being interviewed by the police, but they did not; and

- When he asked for a support person the police did not ensure that he was able to speak to a support person and then continued the interview after telling him incorrectly, that there were only "a couple of more questions" they would like to ask him.

[137] Accordingly I rule that the two records of interview by the police with Joshua Wong-Kee should be excluded in the exercise of my discretion.