SUPREME COURT OF QUEENSLAND

CITATION:	*R v Benton* [2011] QSC 14
PARTIES:	**R** **v** **BENTON, Darren Jeffrey** (applicant)
FILE NO/S:	SC No 368 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application pursuant to s 590AA Criminal Code
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 and 26 October 2010
JUDGE:	Peter Lyons J
ORDER:	**1. The statements made by the applicant in the course of the interview at the Morningside Police Station on 2 and 3 June 2009 be excluded from evidence at his trial.** **2. The statements made by the applicant in the course of the search of Unit 38, 10 Goodwin Street, Kangaroo Point, on 2 June 2009 be excluded from evidence at his trial.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – VOLUNTARY STATEMENTS – VOLUNTARINESS – GENERALLY – where the applicant was interviewed by the police at his unit and at the police station in relation to a number of offences – where the applicant had answered a number of questions and then declined to answer any further questions until he had the opportunity to seek legal advice – where the police continued to ask the applicant questions, and detained the applicant for a lengthy period – whether answers to these questions are admissible as evidence at the applicant's trial CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – GENERALLY – where the applicant was interviewed by the police at his unit and at the police station in relation to a number of offences – where the applicant had

answered a number of questions and then declined to answer any further questions until he had the opportunity to seek legal advice – where the police continued to ask the applicant questions – whether answers to these questions should be excluded from evidence at the applicant's trial

Criminal Code 1899 (Qld), s 590AA
Police Powers and Responsibilities Act 2000 (Qld), s 418

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited
Driscoll v The Queen (1977) 137 CLR 517; [1977] HCA 43, cited
McDermott v The King (1948) 76 CLR 501; [1948] HCA 23, cited
Pollard v The Queen (1992) 176 CLR 177; [1992] HCA 69, cited
R v Borsellino [1978] Qd R 507, cited
R v Hart [1979] Qd R 8, cited
R v Stafford (1976) 13 SASR 392, cited
The King v Lee (1950) 82 CLR 133; [1950] HCA 25, cited
The Queen v Swaffield (1998) 192 CLR 159; [1998] HCA 1, cited
Tofilau v The Queen (2007) 231 CLR 396; [2007] HCA 39, cited
Van der Meer v The Queen (1988) 62 ALJR 656; [1988] HCA 56, cited

COUNSEL: M Byrne QC for the applicant
B Merrin for the respondent

SOLICITORS: Brisbane Criminal Lawyers for the applicant

Director of Public Prosecutions (Queensland) for the respondent

[1] **PETER LYONS J:** At about 5:25 pm on Tuesday 2 June 2009, six police officers arrived at a unit at Goodwin Street, Kangaroo Point, to execute a search warrant. In the course of doing so, Mr Benton, who was at the unit, was interviewed. He then accompanied police to the Morningside Police Station, where a record of interview was conducted. He, together with another person, has since been charged with a number of offences. He has applied for rulings about the admissibility of the evidence of his statements to the police on both occasions, on the ground that the statements were not voluntarily made, or that they should be excluded on a discretionary basis.

Recorded conversations of applicant with police

[2] On the arrival of the police officers at the unit, a field recording instrument was activated. The recording, and a transcript of that recording corrected by the parties, were in evidence. Both Detective Sergeant Ward and the applicant gave oral evidence at the hearing.

[3] When the police arrived at the unit, the door was answered by the applicant. The police addressed him by his first name, and shortly after by his first name and surname. Sergeant Ward immediately took charge, giving instructions to "come through", and shortly afterwards telling the applicant where to sit. Sergeant Ward proceeded to introduce himself, and to state his reason for being at the unit. He said that he was present "to make investigations in relation to a complaint we received", and that he had a search warrant. He then produced the original of the warrant to the applicant, and gave him a copy. He invited the applicant to read the warrant, which the applicant appeared to do.

[4] The warrant was a search warrant, issued under s 151 of the *Police Powers and Responsibilities Act* 2000 (Qld) (*PPRA*). It recorded that the Justice issuing the warrant was satisfied that there were reasonable grounds for suspecting that evidence of the commission of an offence was at the unit, and that the warrant was issued in relation to an offence. Offences were identified as the unlawful supply of cannabis by the applicant to a named female, and the rape by the applicant of that female; and the unlawful and indecent dealing by an unknown person with a female who was a child under the age of 16 years. The warrant identified the evidence that might be seized as being cannabis sativa, some particular household items, a number of specified items of clothing, and a bottle of vodka. It recorded that the police officer entering the place and exercising the powers conferred by the warrant, was authorised to do a number of things, including to detain anyone at the place for the time reasonably necessary to find out if the person had anything sought under the warrant; and if the police officer reasonably suspected a person at the place had been involved in the commission of an offence, to detain that person for the time taken to search the place. The warrant also conferred a power to search anyone found at the place, for anything sought under the warrant that could be concealed on the person. The powers stated in the warrant reflected the powers conferred by s 157 of the *PPRA*.

[5] Sergeant Ward also told the applicant that he had a document called a Statement to Occupier which outlined the applicant's rights and obligations, and Sergeant Ward's rights and obligations, while the warrant was being executed. It is not clear whether the document was given to the applicant. Nor was it put in evidence.

[6] While the applicant was reading the warrant, Sergeant Ward invited him to ask questions about it.

[7] Sergeant Ward then informed the applicant that the police officers present were conducting investigations in relation to sexual assaults on three juvenile females (no doubt, including the two females named in the warrant). Sergeant Ward then advised the applicant of his right to remain silent, and gave a warning that any statement the applicant made might later be given to a court in evidence. Sergeant Ward then questioned the applicant with a view to establishing he fully understood what he had been told.

[8] Sergeant Ward then proceeded to ask further questions of the applicant. The questioning initially sought confirmation of the applicant's identity. Sergeant Ward then said to the applicant "… Whilst you're here, just understand that ah we will control this area … So if you do go anywhere, don't (be) offended when the police officers follow you."

[9] At this point, the applicant indicated he needed tissues. He was in fact suffering from an allergic reaction. While the manner in which they did so was not aggressive, the police officers made it clear that the applicant was to take a seat, while one of them found the tissues.

[10] The applicant was then asked about the ownership of the unit, and about the other occupant of the unit (who is the applicant's co-accused).

[11] Sergeant Ward then referred again to the warrant, and to the property named in it, and asked the applicant if he had anything to declare in relation to that property. The applicant said he could try to help the police officers find "some of the possible items".

[12] Sergeant Ward then had the applicant confirm that both he and the co-accused lived in the unit. He was then asked to identify his bedroom. The applicant also identified the bedroom of the co-accused. He was then asked general questions about the ownership of property in the unit. He was then told that Scenes of Crime and Scientific Officers were being called to attend at the unit and conduct examinations, and that a thorough search would then be carried out, which would include the use of scientific equipment and a video camera. In the course of this questioning, the applicant was given instructions about where to go, and when to be seated.

[13] After some further questions about the co-accused, the applicant said, "When can I speak to a lawyer?" He was advised that he had the right to telephone or contact a friend or relative or solicitor and to arrange for any of them to be present during any questioning. He was told that a reasonable time would be given for that to occur, but that the police officers would continue with the execution of the search warrant. Sergeant Ward then asked the applicant if he wished to contact a friend or a relative, to which he said that he probably needed time to think about something (what it was, is not shown in the transcript). Sergeant Ward asked the applicant if he wished to contact a solicitor and he replied, "Um yeah, I think I probably should, eh." He was then asked whether there was anyone in particular he wanted to contact, to which he replied, "No-one off the top of my head at the moment". Sergeant Ward then told the applicant that once the police officers had completed their investigation at the unit, they intended to ask him to return to the Morningside Police Station for the purpose of questioning in relation to the investigation. Shortly afterwards, Sergeant Ward said, "If (at) any stage that you do want to contact that solicitor or a friend or relative, make sure you advise me so we can do that for you". The applicant's response to that statement is unclear. For convenience, I shall refer to the conversation which has just been described as "the first discussion about a lawyer".

[14] Shortly after, the applicant asked if he might get changed, but was told that he could not do so "at the moment". However, "ugg boots" were brought to him, apparently at his request.

[15] At this point, a conversation then took place, to which I shall refer as "the second discussion about a lawyer". The applicant said, "Um, I really think I need to get legal counsel some time." He then said that he did not know whom to contact. He was given a telephone directory, identified as the Yellow Pages, and it was suggested that if he looked under the letter S, he would find solicitors.

[16] Sergeant Ward gave evidence that the applicant looked at the telephone directory "for a little while, sufficient enough to go through a couple of pages of solicitors". The transcript records Sergeant Ward saying, "… I'll keep talking to you anyway, like ah obviously aware that, your warnings that I gave you before," to which the applicant replied, "Yeah". The questioning continued. The recording indicates that this happened about ten seconds after the applicant commenced to look at the telephone directory.

[17] After some questions about his work, he was asked whether the names of the females which appeared in the warrant meant anything to him. He replied, "I need to talk to a lawyer first." Sergeant Ward then said, "Ok, that's no problems mate. You're, you're aware of your rights, so." The applicant then said that he had a friend whom he would like to contact, a Raman Williams. Sergeant Ward then said, "Ok. And ah for what purpose?" The applicant replied, "Um just to sort of give me some counsel (there is then an indistinct portion of the tape; the applicant then continued) he might be able to recommend a solicitor for me."

[18] Sergeant Ward then said, "Okay. Certainly. So I understand that you don't wish to answer any of my questions at the moment until you get some advice from a solicitor?" To which the applicant replied, "That's probably best". Sergeant Ward then responded, "Okay." Sergeant Ward then said, "That's fine mate, no that's certainly your right and I respect that."

[19] However, Sergeant Ward expressed a suspicion that the applicant might intend to use the opportunity to contact the co-accused, in order to tell him not to come to the unit. He then said "… I'll respect your right in relation to ah the fact that you don't wish to answer any further questions until you contact a solicitor …" He went on to say, "Once we secure (the co-accused)" when he arrived home, that he would let the applicant "make all those phone calls that you wish to make, okay. And that's the only reason at this stage that I'm putting a hold on that". I shall refer to the discussion following the applicant's statement that he wished to contact Raman Williams as "the Williams discussion".

[20] For a time after that, recorded discussion with the applicant was unrelated to the investigation. Indeed, at one point, Sergeant Ward said, "Mate so we're not just standing here like [the recording is then indistinct] if we ask you questions it, it won't be anything to do with the investigation. Okay? Or if you think that it, it is something to do with the investigation and you don't want to answer, by all means don't answer it mate. You understand?" To this, the applicant replied, "Sure".

[21] There was then further discussion generally unrelated to the investigation, though there was some discussion of the co-accused's employment.

[22] The applicant was then asked about his bedding, and in particular when sheets had been washed.

[23] A little later, at a time when Sergeant Ward, another police officer and the applicant were on the verandah of the unit, Sergeant Ward can be heard to say in a low voice, "on tape". After a short pause, he can then be heard to comment, in a substantially louder voice, about the view. Very shortly afterwards, Sergeant Ward referred to the recorder and then said, "Um obviously it's your prerogative what you want to do, okay? And I'm certainly not going to tell you either way but, like I said to you

before, if, I'm, I'll, I'll still talk to you, okay. If you don't want to talk to me that's fine." He then said that the police had received a complaint from "these girls" and that they had their version; and in addition "what we need to do in relation to the unit here, we need to talk to you, ah we, we would like to talk to you to get your version, okay. Obviously quite often there's always two stories, okay. Um if there's something you would like to tell us in relation to this, by all means, that's, that's your right to. Okay?" The applicant's response is unclear on the recording.

[24] Sergeant Ward then asked him what he thought about the charges which appeared on the warrant, to which he replied, "Not really sure at the moment … it's all very overwhelming." Sergeant Ward asked him whether he recognised the names mentioned in the charges in the warrant, and, without waiting for a response, whether the applicant was "a bit overwhelmed", to which the applicant replied, "Very". Shortly after that again he said, "Um I think I probably should speak to a, a lawyer first. (Then, after an indistinct portion of recording, the applicant said) …can't even think." (It is apparent that the applicant said, "I can't even think", as Sergeant Ward immediately responded, "You can't even think?")

[25] Sergeant Ward then asked him whether he had had three girls at the unit on the previous Wednesday (the day seems to be an error, by a week, and is at variance with the dates mentioned in the warrant); to which the applicant replied, "Mm I'm sorry guys, I can't, can't really answer anything." I shall refer to this as "the final discussion about a lawyer".

[26] Following that discussion, there was some other conversation for a period. The police had earlier taken possession of the applicant's mobile phone. The applicant was then asked to send a text message to his co-accused, under police supervision.

[27] A little later, the applicant was asked about what clothes he had been wearing on a particular Wednesday (the day of the alleged offences). He was then asked questions about clothing referred to in the warrant. He was also asked about going to Fortitude Valley (where contact with the complainants is said to have initially occurred). Questions relating to the investigation, and to the co-accused, were, in this period, mixed in with other conversation. Some of the questions of relevance to the investigation related to the applicant's use of marijuana; and some, to a bowl and some seeds found in the course of the search.

[28] Some time later, the co-accused returned to the unit. The recording indicates that this occurred more than two hours after the police had arrived, and about one hour and twenty minutes after the last conversation about a lawyer. The co-accused was then questioned over a period of approximately one hour and twenty minutes. The applicant appears to have been kept elsewhere in the unit while this occurred.

[29] Sergeant Ward then told the applicant that he had had a conversation with the co-accused, and was offering the applicant that opportunity. He asked the applicant to come to the police station, to which the applicant agreed. The applicant apparently stated that he had a chance to think about it. There is then an indecipherable portion of the recording, after which Sergeant Ward said, "… That's not what I'm about mate … it's got to be your decision and your decision only."

[30] Sergeant Ward then told the applicant that he would afford him the "opportunity to ... talk to me if that's what you want to do". He then stated that, with reference to

the applicant and the co-accused, "We keep you separated and for, for obvious reasons". He then stated, apparently with reference to the opportunity for the applicant to give his version of events to Sergeant Ward, "…We'll certainly give you that opportunity once we get back to the police station". The applicant then asked permission to change his clothes, which Sergeant Ward gave. He also asked permission to put his work clothes in the laundry, but that was denied.

[31] A little later, the applicant was told that other police officers were going to take the co-accused to the police station, and he was again asked if he was prepared to come back to the station and whether he wanted to make any phone calls. After further conversation, the applicant asked if he could contact his employer. He expected not to be able to go to work on the following day. He was permitted to make contact with the employer.

[32] The applicant was then taken to the Morningside Police Station. He indicated on two occasions that he was getting hungry, or getting a little bit hungry; and he also said that he wanted something to eat. He was not provided with food, but on arrival at the police station, he was given a soft drink.

[33] At 9:45 pm, not long after arrival at the police station, Sergeant Ward interviewed the applicant, resulting in a record of interview. The applicant was again reminded that he had the right to remain silent, and that anything he said might be used in evidence. He was also told he had the right to telephone a friend or relative, to ask someone to be present during the questioning; and that he had the same right in relation to a solicitor. He was asked if he wished to exercise any of those rights, and he answered in the negative. He was then questioned over a period of more than two and a half hours. His answers include cogent evidence of matters of direct relevance to the commission of offences.

[34] At the conclusion of the interview, the applicant was asked whether he had participated in it of his own free will, to which he replied in the affirmative; and whether he had been threatened or whether anything had been promised to him, to which he answered in the negative.

Further evidence of applicant

[35] In his oral evidence, the applicant stated that he was preparing dinner when the police arrived at the unit. He had not had anything to eat since about 10 am that day. He said that he was feeling quite sick and tired, and that his allergies were playing up. He explained that by saying he suffers from hayfever and gets a sort of congestion, and watering eyes. He said he had taken some antihistamines which make him a little bit drowsy.

[36] He also said that after he saw the search warrant, he was "shocked and quite overwhelmed by the whole situation". He found the arrival of the police "quite overwhelming and intimidating". He said that he "couldn't really concentrate at all … just trying to register what the charges had been and just the whole circumstance."

[37] With reference to the time when he was given a copy of the telephone directory, he said that while he was trying to find a solicitor, "Detective Ward continued questioning me, while I was trying to read through … I was having enough trouble trying to think clearly under certain circumstances and just couldn't focus at all with

the (additional) questioning". He also said that he "couldn't even really focus on any of the pages" in the telephone directory.

[38] With reference to the Williams conversation, and in particular to the response to his request to phone Mr Williams, he said that he "felt like I had no rights".

[39] With reference to the conversation on the verandah, he said that Sergeant Ward "became a bit more aggressive when he was questioning". He explained that by saying Sergeant Ward asked "a more direct question regarding the matter". After the conversations relating to speaking to a lawyer, and the conversation relating to Mr Williams, the applicant stated that he regarded his position with regard to getting assistance, or the exercise of his rights, as "hopeless".

[40] With reference to the request by Sergeant Ward that the applicant accompany police to Morningside Police Station, made shortly before they left the unit, the applicant said, "I felt like I didn't have an option. It was going to happen there or down at the station." The applicant also said that in respect of the request to go to the Morningside Police Station, "it didn't feel like an actual opportunity. It felt more like there was no choice." He also said that at that stage he was thinking that an interview was "the only way for this to proceed and for it to be over".

[41] With reference to the occasion at the Morningside Police Station when he was told that he had the right to call a lawyer, the applicant said that he did not try to exercise that right because he, "didn't believe I'd probably get one". He said that he participated in the interview because he "just wanted it to be over"; and that if he didn't take part in the interview at the police station he "(j)ust would prolong the investigation". He did not believe he would be able to leave the police station.

[42] With respect to his answers to the question whether he had participated in the interview at the police station of his own free will, he said that he thought that it was "a formality that I had to go along with otherwise it would have had to start all over again"; and that he did not really have any choice about the matter.

[43] He also gave evidence to the effect that he knew of his right to remain silent, and to call a friend or lawyer. However, he did not seem to be able to exercise those rights. The applicant also gave evidence that for most of the time while the police were at the unit, they had possession of his mobile phone.

Voluntary confessions: some legal principles

[44] It is well established that a statement must be voluntary in order to be admissible: see for example *The King v Lee*.[1] The judgment of the court in *Lee* went on to explain:[2]

> "The word 'voluntary' in the relevant connection does not mean 'volunteered'. It means 'made in the exercise of a free choice to speak or be silent'."

[45] It follows that a statement may be voluntary, notwithstanding that it is the result of some questioning, prompting, or other invitation made by a person in authority.

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1 (1950) 82 CLR 133, 144.

2 *The King v Lee* (1950) 82 CLR 133, 149.

[46] In *McDermott v The King*[3] Dixon J said:

> "… (I)t is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made … An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority. That is the classical ground for the rejection of confessions and looms largest in a consideration of the subject." (References omitted.)

[47] In the present case there has been no submission that the statements of the applicant were the result of an inducement by a person in authority. However, Dixon J did not limit the rule to cases of inducement. His Honour said.[4]

> "It is perhaps doubtful whether, particularly in this country, a sufficiently wide operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will."

[48] Earlier, his Honour had said with reference to a confessional statement by an accused person:[5]

> "If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary."

[49] In *Tofilau v The Queen*[6] Gummow and Hayne JJ discussed the rules relating to the exclusion of evidence as the result of inducement by a person in authority, and by reference to the principle of "basal voluntariness", as follows:[7]

> "As pointed out above, the overarching principle is that a confession cannot be admitted into evidence unless it is shown to have been made 'voluntarily'. Both the rules governing the exclusion of evidence of certain confessions made to persons in authority and the principle of 'basal voluntariness' take their place as aspects of this one principle. Both also identify criteria that found a legal conclusion: that the confession was not made 'voluntarily'.
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> That this is the way in which the rules operate is most obviously apparent in the rule concerning statements made to persons in authority. The particular content that is given to both the concept of 'inducement' and the concept of a 'person in authority' constitute the criteria that yield the relevant legal conclusion: that the confession was not made voluntarily. But as the reasons of Dixon J in *McDermott* show, application of the rule about 'basal voluntariness' also depends upon identifying the criteria that are to found the legal conclusion that a confession was not made 'voluntarily'. The

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3 (1948) 76 CLR 501, 511-512.
4 *McDermott v The King* (1948) 76 CLR 501, 512.
5 *McDermott v The King* (1948) 76 CLR 501, 511.
6 (2007) 231 CLR 396.
7 See *Tofilau v The Queen* (2007) 231 CLR 396, [57]-[58].

> relevant conclusion is described as the will being 'overborne'. The circumstances that yield that conclusion, and provide the criteria which govern the availability of the legal conclusion, are described as 'the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure'. All are species of compulsion."

[50] These passages indicate that the relevant criteria relate to the conduct of other persons, which resulted in the confession; and the conclusion that the confession was not voluntary follows from the establishment of at least one of these criteria. However, earlier, in a passage which Counsel for both parties at one point agreed to be a current statement of the law, their Honours said:[8]

> "When one turns to the common law respecting the inadmissibility of some confessional statements, it must first be said that the common law tests of voluntariness have never required a subjective inquiry into the mind of the confessionalist to determine why it was that he or she made the statement of which evidence is to be given."

[51] Their Honours then noted that such evidence is excluded because it is "deemed … unreliable as a class".[9]

[52] The statement that no inquiry is required into the state of mind of the confessionalist may not reflect the view of other members of the Court. In *Tofilau,* speaking of the questioning which produced the confessions, Callinan, Heydon and Crennan JJ said:[10]

> "The police officers were at times importunate. They were insistent that each appellant confess his guilt. By their questioning they applied pressure. The question whether each appellant confessed involuntarily first turns on whether the importunacy was so persistent, and whether the insistence and the pressure was so sustained or undue, as to overbear his will."

[53] In *The Queen v Swaffield*[11] Brennan CJ quoted from his earlier judgment in *Collins v R,*[12] where his Honour had said:

> "So the admissibility of the confessions as a matter of law … is not determined by reference to the propriety or otherwise of the conduct of the police officers in the case, but by reference to the effect of their conduct in all the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focusing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the

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8 *Tofilau v The Queen* (2007) 231 CLR 396, [53].
9 *Tofilau v The Queen* (2007) 231 CLR 396, [53].
10 *Tofilau v The Queen* (2007) 231 CLR 396, [376].
11 (1998) 192 CLR 159, 169-170.
12 (1980) 31 ALR 257, 307.

> effect of the actual circumstances of a case upon the will of the particular accused."

[54] His Honour continued:[13]

> "The curial concern about unreliability was subsumed by a concern about the nature of the inducement and its effect on the will of the confessionalist."

[55] He later stated:[14]

> "In determining objections to the admissibility of a confession that is said to have been made involuntarily, the court does not attempt to determine the actual reliability of the confession. Rather, it assesses the nature and effect of any inducement to make the confession in order to determine whether the confession was made because the will of the confessionalist was overborne by the conduct of a person or persons in authority."

[56] Finally, it should be noted that the onus is on the prosecution to establish on the balance of probabilities the confession is voluntary.[15]

Were the applicant's statements voluntarily made?

[57] For the applicant, it is submitted that his statements were the result of persistent importunity, or sustained or undue insistence or pressure.[16]

[58] It seems to me that the conduct of the police officers who conducted the investigation, and in particular the conduct of Sergeant Ward, needs to be considered in the context of the events which occurred on the evening of 2 June and the morning of 3 June 2009. Six police officers arrived at the unit in the early evening, at a time when the applicant was there alone. One of them produced a search warrant, alleging the commission of serious offences by the applicant. The police officers immediately took control of the unit, and of the person of the applicant. The applicant was not advised of his right to legal advice, prior to the commencement of questioning. When he himself raised the question of speaking to a lawyer, and he indicated that he wished to do so, although he was told that he might contact a friend or relative or solicitor, and he was given a telephone directory, he appears not to have been able to make use of it; nevertheless, the questioning continued. When he subsequently indicated that he wished to telephone a friend, so that the friend might recommend a solicitor, he was not permitted to do so. He was then told that he would not be asked questions relating to the investigation. Nevertheless, Sergeant Ward later clearly made a decision to continue with the questioning. The applicant indicated that he would not answer questions until he had spoken to a lawyer and that he found his situation to be "overwhelming". Although Sergeant Ward at that point ceased questioning the applicant in relation to the investigation, in the course of general conversation, police officers returned to matters related to the investigation. Notwithstanding what had been said earlier, when the co-accused returned to the unit, the applicant

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13 *The Queen v Swaffield* (1998) 192 CLR 159, 170.

14 *The Queen v Swaffield* (1998) 192 CLR 159, 171.

15 *Wendo v The Queen* (1963) 109 CLR 559; *Cleland v The Queen* (1982) 151 CLR 1, 12-19; *MacPherson v The Queen* (1981) 147 CLR 512, 522; *Pollard v The Queen* (1992) 176 CLR 177, 196.

16 See *McDermott v The King* (1948) 76 CLR 501, 511.

was not at that time offered the opportunity of telephoning his friend. When, at the conclusion of the interview with the co-accused, the applicant was asked if he was prepared to come to the station, he was not told that he was not under arrest, or that he was free to stay at the unit or go elsewhere. He was asked if he wanted to make "any of those phone calls"; but when shortly afterwards he thought he should inform his employer that he might not be at work the following day, he felt it necessary to ask permission; and Sergeant Ward asked for some explanation for the phone call. By this time, the applicant had been under the control of police officers at the unit for a period of approximately four hours.

[59] In this period, the applicant had obviously been experiencing some physical discomfort associated with his allergies. Notwithstanding the period of the evening, he had not been given the opportunity to have a meal. When the applicant later indicated that he was hungry, he was not given the opportunity to eat; rather, on one occasion, Sergeant Ward indicated that he himself did not need to eat at that time. At the police station, he was not told that he was not under arrest, or that he was free to leave. The time for which the applicant was in the company of police officers, after leaving the unit, until the completion of the record of interview, most of which was taken up with that interview, was approximately three hours.

[60] On the other hand, it should be pointed out that on a number of occasions the applicant was informed of at least some of his rights. At the unit, a telephone directory had been made available to him, which, no doubt, contained numerous names and telephone numbers of solicitors. On one occasion, he chose not to answer further questions. He later stated that he "had had a chance to think about it" (although what this meant was not explained, except by reference to the applicant's evidence of his state of mind, discussed below). He then agreed to go to the Morningside Police Station. There were periods of time at the unit, some of them substantial, when he was not questioned in relation to the offences.

[61] I should add that, as the transcript indicates, and as was evident from his conduct in the witness box, the applicant appears to have a somewhat submissive and rather ineffectual personality.

[62] In the submissions, no distinction was drawn between the statements made by the applicant at the police station when the formal record of interview took place, and answers he gave at the unit when the search was being conducted. Nevertheless, there seem to me to be some differences in the considerations relevant to each occasion. I shall first consider the statements made at the police station.

[63] Having regard to all of the circumstances, I am not satisfied that the statements made by the applicant at the police station were not the result of persistent importunity, or sustained or undue insistence or pressure. By the time he was taken to the police station, the applicant had been detained by police for several hours, in circumstances of some physical discomfort; his attempts to obtain legal advice had been unsuccessful, with some action taken by Sergeant Ward which impeded or was likely to have impeded the applicant's attempts to obtain legal advice; and it was not made plain to him that he was not under arrest, and had no obligation to attend at the police station. There was a deliberate decision by Sergeant Ward to continue questioning the applicant about the offences, notwithstanding the applicant's clear indications that he wanted to obtain legal advice, and despite an earlier assurance by Sergeant Ward that he would not ask the applicant further questions relating to the

investigation. Although the applicant declined to answer at this stage, this conduct of Sergeant Ward may have contributed to a belief by the applicant that, in reality, he would not be able to get the assistance of a lawyer, and would be detained, until he answered questions relating to the investigation.

[64] At times during the search of the unit, in response to questions from Sergeant Ward, the applicant gave answers which, with other evidence, might be used to prove his involvement in offences. For example, he identified clothing which he had worn on what is apparently the day when the offences occurred. He also answered questions about a visit to a bottle shop in Fortitude Valley; and made admissions about some cannabis and a bowl found at the unit. These things occurred during the period of about two hours after the police first arrived at the unit. In this period, the applicant indicated that he wanted legal advice; and he refused to answer questions where the answers were potentially more directly incriminating. It seems to me that, to the extent that the applicant answered questions at the unit, his answers were given voluntarily. In reaching this conclusion I am particularly influenced by the fact that the applicant exercised some choice in deciding the extent to which he would respond to questions; and that he gave these answers relatively early in the period in which he was in the presence of police officers.

[65] In case it is relevant to consider the applicant's mental and emotional state, I should make some reference to his statements about it. The transcript reveals that he said that he was overwhelmed. In his evidence, he said he was shocked and overwhelmed by the whole situation, and that he could not really concentrate, particularly with reference to using the telephone directory. He said that he felt like he had no rights and he felt that he had no option or choice about going to the police station. He also stated that he felt that unless he went to the police station and took part in the interview, that would only prolong the investigation. He also said that he thought that there was a possibility, which on one occasion he described as a strong possibility, that he would go to jail that night.

[66] The circumstances in which the applicant found himself give support for some parts of this evidence. His belief about his inability to obtain the assistance of a lawyer is supported by Sergeant's Ward reaction when the applicant asked to telephone Mr Williams. By the time he agreed to accompany the police to the Morningside Police Station, the applicant had been under the control of police officers for some hours. I accept generally the applicant's evidence of his mental and emotional state over the time he was in the company of the police officers. Again, taking this into account, I am not prepared to find that his statements to police at the police station were made voluntarily. While his emotional and mental state contributes to some doubt about whether the answers which he gave at the unit were voluntary, it does not lead me to alter the conclusion I have previously expressed.

[67] Accordingly, while I am not prepared to find that the applicant's statements to the police at the Morningside Police Station on the night of 2 June 2009, and very early the following morning, were given voluntarily, I am prepared to find that his earlier statements to the police at the unit at 10 Goodwin Street, Kangaroo Point, were made voluntarily. It is then necessary to consider whether these statements should be excluded on discretionary grounds.

Discretionary principles

[68] It is now well recognised that a voluntary confession may be excluded from evidence on discretionary grounds. In *The Queen v Swaffield*[17] three classes of case in which this might occur have been identified.

[69] One class of case, dealing with the question whether the prejudicial effect of the evidence is greater than its probative value, is of no present relevance. In another class of case, the evidence may be excluded on the ground it would be unfair to the accused to admit it (*the unfairness ground*). The third class of case focuses on considerations of public policy which make it unacceptable to admit the evidence, notwithstanding that any statement of the accused was made voluntarily, and notwithstanding that its admission would work no particular unfairness to the accused (*the public policy ground*).

[70] The relationship between the discretion to exclude evidence on the unfairness ground, and the discretion to exclude evidence on the public policy ground, was discussed by Deane J in *Pollard v The Queen.*[18] His Honour said:

> "The considerations relevant to the exercise of the two discretions overlap: the unlawfulness of the police conduct will be relevant to the question of unfairness to the accused and, since it is the policy of the law that a criminal trial be fair, considerations of actual or possible unfairness to the accused are likely to be relevant to the question of public policy. Ordinarily, it will be convenient for the question whether the evidence should be excluded on either ground to be dealt with on a single voir dire hearing since any evidentiary material will commonly be relevant to both grounds. Nonetheless, the two discretions are distinct and independent."

[71] Earlier statements recognise the interrelationship of these two discretions. In speaking of the discretion to exclude confessions by an accused, Dixon J said in *McDermott:*[19]

> "In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused."

[72] That proposition was adopted in *Lee*, where their Honours said:[20]

> "What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must depend upon the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions."

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17 (1998) 192 CLR 159, 189; see *Tofilau v The Queen* (2007) 231 CLR 396 per Gleeson CJ, [3].

18 (1992) 176 CLR 177, 201.

19 *McDermott v R* (1948) 76 CLR 501, 513.

20 *The King v Lee* (1950) 82 CLR 133, 151.

[73] Their Honours also observed:[21]

> "The 'unfairness' of using a 'statement' must arise from the circumstances under which it was made."

[74] It is in the nature of the exercise of a discretionary judgment that a balance of competing considerations is required. The seriousness of the crime has been identified as a relevant consideration.[22] A further consideration is "the desirable goal of bringing to conviction the wrongdoer".[23] A related consideration is "the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground."[24] However, there is also the "public interest in the protection of the individual from unlawful and unfair treatment".[25] Associated with this is "the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law".[26] In *Pollard*, Deane J spoke of the need "to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct,"; and of the need "to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process".[27]

[75] Although the occasion for the exercise of the discretion arises because the confession is found to be voluntary, the effect of circumstances on the freedom of the accused to choose to speak or not speak has been identified as relevant. In *Swaffield*, the joint judgment of Toohey Gaudron and Gummow JJ includes the following:[28]

> "However, the notion of compulsion is not an integral part of the fairness discretion and it plays no part in the policy discretion. In the light of recent decisions of this Court it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances."

[76] With respect to the unfairness ground, their Honours also noted that one touchstone "… may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted",[29] referring to *Van der Meer v The Queen.*[30] In *Van der Meer,* the criterion which had been applied was stated a little more broadly, in the following terms:

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21 *The King v Lee* (1950) 82 CLR 133, 152.
22 *Pollard v The Queen* (1992) 176 CLR 177 per Deane J, 203.
23 *Bunning v Cross* (1978) 141 CLR 54, 74.
24 *King v R* [1969] 1 AC 304, 315, cited in *Bunning v Cross* (1978) 141 CLR 54, 76.
25 *The Queen v Ireland* (1970) 126 CLR 321, 335.
26 *Bunning v Cross* (1978) 141 CLR 54, 74.
27 (1992) 176 CLR 177, 203.
28 (1998) 192 CLR 159, 202.
29 *The Queen v Swaffield* (1998) 192 CLR 159, 189.
30 (1988) 62 ALJR 656, 666.

> "Had the police observed the principles governing the interrogation of suspects, it might well have transpired that the statements would not have been made or not have been made in the form in which they were made."[31]

[77] In *Swaffield*, Brennan CJ discussed the unfairness relevant to the discretion to exclude a confessional statement on policy grounds, because the confession would not have been made, or would not have been made in the form in which it was made, noting the unfairness, if any, must consist of the admission of such a confession. His Honour then said that the disadvantage could only be considered to be unfair if "the conduct which produced the confession (was) of such a nature and degree that no suspect in the confessionalist's place ought to be subjected to it".[32]

[78] Although unfairness often provides support for the exercise of the discretion to exclude a confession on the public policy ground, that is not essential. In *Swaffield*, Toohey, Gaudron and Gummow J said:[33]

> "It was said by Gibbs CJ, Wilson and Dawson JJ in *Cleland* that it will only be in an exceptional case that a voluntary confession which it would not be unfair to the accused to admit could be rejected on the ground of public interest.[34] That is too narrow an approach, particularly in the light of *Ridgeway*."

[79] The role of impropriety in the investigation, in a determination whether to exclude a confession on the unfairness ground, was stated by Brennan J in *Duke v The Queen*[35] in the following terms:

> "Trickery, misrepresentation, omission to inquire 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 the free choice to speak or to be silent. The fact that an impropriety occurred does not by itself carry the consequence that evidence of a voluntary confession procured in the course of the investigation must be excluded. The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case."

[80] Before attempting to apply these principles, it is necessary to refer to statutory provisions regulating the conduct of investigations by police.

Statutory background to investigation

[81] Some provisions of the *PPRA* require consideration. They are found in Part 3 of Chapter 15 of that Act.

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31 *Van der Meer v The Queen* (1988) 62 ALJR 656, 662.
32 *The Queen v Swaffield* (1998) 192 CLR 159, 178.
33 *The Queen v Swaffield* (1998) 192 CLR 159, 198.
34 *Cleland v The Queen* (1982) 151 CLR 1, 9, 17, 34-35. See also *Collins v R* (1980) 31 ALR 257, 317.
35 (1989) 180 CLR 508, 513.

415 When does this part apply to a person

(1) This part applies to a person (***relevant person***) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence.

(2) However, this part does not apply to a person only if the police officer is exercising any of the following powers—
(a) power conferred under any Act or law to detain the person for a search;
(b) power conferred under any Act to require the person to give information or answer questions.

418 Right to communicate with friend, relative or lawyer

(1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may—
(a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
(b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.

(2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).

441 When sections 418–422, 432 and 434 do not apply

(1) Sections 418 to 422, 432 and 434 do not apply if a police officer reasonably suspects that compliance with the sections is likely to result in—
(a) an accomplice or accessory of the relevant person taking steps to avoid apprehension; or
(b) an accomplice or accessory being present during questioning; or
(c) evidence being concealed, fabricated or destroyed; or
(d) a witness being intimidated.

(2) Also, a police officer is not required to delay questioning if, having regard to the safety of other people, the police officer reasonably suspects questioning is so urgent that it should not be delayed.

(3) This section applies only for so long as the police officer has the reasonable suspicion.

[82] Additional relevant provisions are found in Schedule 10 of the *Police Powers and Responsibilities Regulation* 2000 (*PPR Reg*), described as the *Police Responsibilities Code* 2000 (*PR Code*). Part 5 of the *PR Code* deals with powers and responsibilities relating to investigations and questioning for indictable offences. This Part includes the following provisions:-

33 Asking persons to attend for questioning

(1) This section applies if a police officer wants to question a person as a suspect, other than a person mentioned in the Act, section 398.

(2) If the police officer approaches the person when not at a police station or police establishment, the police officer must caution the person in a way substantially complying with the following—
'I am (name and rank) of (name of police station or police establishment).
I wish to question you about (briefly describe offence).
Are you prepared to come with me to (place of questioning)?
Do you understand that you are not under arrest and you do not have to come with me?'.

(3) If the person, while not in the company of a police officer, attends a police station or police establishment for questioning, the caution must substantially comply with the following—
'I am (name and rank) of (name of police station or police establishment).
I wish to question you about (briefly describe offence).
Did you come here of your own free will?'

(4) Before the police officer starts to question the person, the police officer must caution the person in a way substantially complying with the following—
'Do you understand you are not under arrest?
Do you understand you are free to leave at any time unless you are arrested?'.

(5) If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in the person's own words.

(6) If necessary, the police officer must further explain the caution.

34 Right to communicate with friend, relative or lawyer

(1) If a police officer must advise a relevant person of his or her right to contact a friend, relative or lawyer, the advice the police officer gives must substantially comply with the following—
'You have the right to telephone or speak to a friend or relative to inform that person where you are and to ask him or her to be present during questioning.
You also have the right to telephone or speak to a lawyer of your choice to inform the lawyer where you are and to arrange or attempt to arrange for the lawyer to be present during questioning.
If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable time for that purpose.
Is there anyone you wish to telephone or speak to?'.

(2) If the police officer reasonably suspects the relevant person does not understand the advice, the police officer may ask the relevant person to explain the meaning of the advice in the person's own words.

(3) If necessary, the police officer must further explain the advice.

(4) If the relevant person wants to speak to a lawyer, the police officer must, without unreasonable delay, make available to the person—
(a) if there is a regional lawyer list available and the person has not asked to speak to a particular lawyer—the regional lawyer list; or

(b) a telephone directory for the region.

(5) A police officer must not do or say anything with the intention of—
(a) dissuading the relevant person from obtaining legal advice; or
(b) persuading a relevant person to arrange for a particular lawyer to be present.

35 Right to remain silent not affected

(1) This section applies if a person, the person's lawyer, or someone whose presence is required during questioning of a person indicates to the police officer questioning or intending to question the person—
(a) if questioning has not started—the person does not want to answer questions; or
(b) if questioning has started—the person does not want to answer any further questions.

(2) The police officer must clarify the person's intention to exercise his or her right to silence by asking the person—
(a) whether the person does not want to answer any questions generally or only questions about the offence for which the person is being questioned; and
(b) if any further question was asked relating to the offence or another offence, whether the person would not answer the question.

(3) If the person confirms that he or she does not want to answer
any questions, the police officer must not question or continue to question the person.

(4) However, if the person later indicates he or she is prepared to answer questions, a police officer must, before questioning or continuing to question the person, ask the person—
(a) why he or she has decided to answer questions; and
(b) if a police officer or someone else in authority has told the person to answer questions.

37 Cautioning relevant persons about the right to silence

(1) A police officer must caution a relevant person about the person's right to silence in a way substantially complying with the following—
'Before I ask you any questions I must tell you that you have the right to remain silent.
This means you do not have to say anything, answer any question or make any statement unless you wish to do so.
However, if you do say something or make a statement, it may later be used as evidence.
Do you understand?'

(2) If the police officer reasonably suspects the relevant person does not understand the caution, the police officer may ask the person to explain the meaning of the caution in his or her own words.

(3) If necessary, the police officer must further explain the caution.

(4) If questioning is suspended or delayed, the police officer must ensure the relevant person is aware he or she still has the right to remain silent and, if necessary, again caution the person when questioning resumes.

(5) If a police officer cautions a relevant person in the absence of someone else who is to be present during the questioning, the caution must be repeated in the other person's presence.

[83] Before dealing with the application of these provisions, it is convenient to make a preliminary comment on the operation of ss 34, 35 and 37 of the *PR Code*. Each makes reference to a "relevant person". The term "relevant person" used in these sections is not defined in the *PR Code*. However, both the text of provisions found in Part 5, and footnotes, refer to provisions of Chapter 15 of the *PPRA*, which deals with related matters. While the expression "relevant person" has different meanings in different parts of Chapter 15, in Part 3, which deals with safeguards for ensuring the rights of and fairness to persons who are questioned for indictable offences, the expression is defined to mean a person who is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence.[36] In my view, a person who is a relevant person for Part 3 of Chapter 15 of the *PPRA* is a relevant person for ss 34, 35 and 37 of the *PR Code*.

[84] At the hearing, an issue emerged as to whether Sergeant Ward had failed to comply with s 418 of the *PPRA*. It was accepted that s 415 did not affect the application of s 418 in the present case.

[85] There can be no doubt that when the police officers arrived at the unit, the applicant was a suspect in relation to the offences identified in the warrant. It has not been suggested that any suspicion that the applicant was involved in the commission of an offence was not reasonable. The warrant therefore authorised Sergeant Ward to detain the applicant at the unit for the duration of the search.

[86] It is apparent from the initial contact between Sergeant Ward and the applicant, that Sergeant Ward expected the applicant to be present at the unit when the police officers arrived to execute the warrant. It is also apparent from the fact that, almost immediately after producing the warrant and identifying himself, Sergeant Ward issued a caution in compliance with s 37 of the *PR Code*, that Sergeant Ward was, at that point, contemplating questioning the applicant in relation to the offences, for some of which he was clearly a suspect. Indeed, when a little later on Sergeant Ward explained what he intended to do, that included questioning the applicant in relation to those offences. There is nothing to suggest that that intention was formed at some time after the police arrived; rather, it seems clear that that was Sergeant's Wards intention from the outset.

[87] It should also be said that from the outset, Sergeant Ward manifested an intention to control the person of the applicant. I have previously identified a number of ways in which that intention was manifested. It seems highly likely from the Williams conversation, that if the applicant had attempted to leave the premises, he would not have been permitted to do so.

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[36] See s 415 of the *PPRA*.

[88] In my view, therefore, from the time the police arrived at the unit and found the applicant there, it can be said that he was in the company of Sergeant Ward and other police officers for the purpose of being questioned as a suspect about his involvement in the commission of indictable offences; although it might also be said that he was being detained pursuant to the powers conferred by the warrant.

[89] It will be recalled that Sergeant Ward did not advise the applicant of his rights under s 418 of the *PPRA* until he had asked the applicant a number of questions, and the applicant asked when he could speak to a lawyer. Those questions related to ownership and occupation of the unit; and the property identified in the warrant. It is apparent from the warrant itself that these items of property were believed to be evidence in relation to the offences. Prior to arriving at the unit, a police officer had obtained statements from the girls referred to in the warrant. It is apparent from the lengthy search which occurred at the unit, and the matters put by Sergeant Ward to the applicant during the interview at the Morningside Police Station, that those carrying out the investigation had reason to believe that the offences had been committed at the unit. In those circumstances, questions relating to the ownership and occupation of the unit were questions relating to the offences. Further, the invitation given by Sergeant Ward to the applicant to make a declaration in respect of the items of property referred to in the warrant was, in my view, questioning in relation to the offence.

[90] In those circumstances, it seems to me that at least once Sergeant Ward had established the applicant's identity, and had instructed him to take a seat, the applicant was in the company of Sergeant Ward and the other police officers at the unit for the purpose of being questioned as a suspect about his involvement in the commission of an indictable offence, with the result that Part 3 of Chapter 15 of the *PPRA* applied. Indeed, the fact that Sergeant Ward cautioned the applicant under s 37 of the *PR Code*, immediately after giving him a copy of the warrant, supports that conclusion.

[91] It follows that Sergeant Ward was required to comply with s 418 of the *PPRA* before he commenced to question the applicant in relation to the offences. It is of some significance that he did not do that. Indeed, the question of the right to speak to a lawyer was first raised by the applicant.

[92] The second discussion about a lawyer occurred shortly after the first such discussion. The applicant's evidence that, while he was looking at the telephone directory for the purpose of identifying a solicitor, Sergeant Ward continued to question him, is consistent with the transcript, which records Sergeant Ward at this point as saying, "… I'll keep talking to you anyway …". It also finds some support in what occurred in the course of the Williams discussion (described below). It was not challenged in cross-examination. Accordingly, I accept the applicant's evidence on that point. It must have been obvious to Sergeant Ward that the applicant was having difficulty in identifying an appropriate solicitor to call from the large number of entries in the telephone directory; yet he continued to question the applicant. I therefore find that Sergeant Ward did not delay questioning for a reasonable time, to allow the applicant to telephone a lawyer; and that in this respected also he acted in breach of the requirements of s 418.

[93] It may be said that the continuation of questioning at this point by Sergeant Ward did not amount to an attempt to dissuade the applicant from contacting a lawyer, but

it seems to me that this conduct is inconsistent with the general purpose of s 34(5) of the *PR Code*, and the purposes of ss 34(1) and (5) of that Code, and of s 418 of the *PPRA*.

[94] It also seems to me that, strictly speaking, the telephone call which the applicant sought to make in the course of the Williams discussion is not a telephone call referred to in s 418, though this point was not taken by the respondent. Nevertheless, the applicant sought to make the telephone call, to enable him to exercise a right conferred by that section. Sergeant Ward refused the applicant the opportunity to make contact with Mr Williams, for the purpose of exercising a right under s 418. In my view, even though Sergeant Ward's conduct might be said not to be in contravention of s 418, it was plainly inconsistent with the "spirit" of the legislation. The continued questioning was likely to have impeded the exercise of the rights which s 418 of the *PPRA* and s 35 of the *PR Code* are designed to protect.

[95] The explanation given by Sergeant Ward for refusing to permit the applicant to make the telephone call to Mr Williams is far from convincing. Sergeant Ward made no attempt to establish whether the telephone call was in fact to be made to Mr Williams for the purpose stated by the applicant. For example, he could have asked the applicant to give him the telephone number of Mr Williams, and then himself have made the telephone call, to establish whether it was answered by Mr Williams. Alternatively, he could have also sought to obtain the telephone number of the co-accused. It later emerged that there were text messages from the co-accused on the applicant's telephone, making it likely that the co-accused's telephone number was also recorded on the applicant's phone.

[96] For the respondent, it was submitted that s 441 had the effect that s 418 did not apply when the applicant said that he wished to telephone Mr Williams. The operation of s 441 depends upon Sergeant Ward holding a reasonable suspicion about the likely result of compliance with s 418. I have expressed some doubt about the explanation given by Sergeant Ward for refusing to permit the applicant to make the telephone call. Assuming the truth of Sergeant Ward's explanation, a question arises whether any suspicion held by him was reasonable. No basis for the suspicion was identified. It might be suggested that a basis is implicit in the fact that the applicant and the co-accused resided together; and, on the information available to police, had together been in the company of the complainants. On the other hand, the applicant had a short time earlier (and not surprisingly) indicated that he wanted to obtain the assistance of a solicitor. He had had obvious difficulty in identifying an appropriate solicitor. In those circumstances, and because steps could easily have been taken to check whether the applicant was in fact attempting to contact his co-accused, I do not consider the suspicion expressed by Sergeant Williams to be reasonable. Accordingly, his conduct was not justified by s 441.

[97] At this point, Sergeant Ward indicated he would not ask further questions about the investigation. For some little time, his conduct was consistent with what he had stated. Nevertheless, somewhat later, Sergeant Ward resumed questioning the applicant about the offences. In the context of what happened, the words recorded from Sergeant Ward "on tape" seem likely to have been said by him to ensure that the questioning was recorded. Notwithstanding that in the course of this conversation, the final discussion about a lawyer, the applicant made clear his wish to speak to a lawyer, Sergeant Ward immediately continued to question the applicant about the offences, asking the applicant whether he had "three girls back

here" on a previous Wednesday night. The questioning proceeded without giving the applicant any opportunity at this point to contact a lawyer. In my view, that conduct was again in contravention of s 418.

[98] For completeness, reference should be made to the period after the interview with the co-accused. The applicant was not told that he was not under arrest. Nor was he told that he did not have to accompany Sergeant Ward to the Morningside Police Station. At the police station, he was not told that he was not under arrest; and that he was free to leave, unless arrested. The requirements of s 33 of the *PR Code* were not complied with.

Exclusion of interviews on discretionary grounds

[99] There can be no doubt that the offences with which the applicant has been charged are serious offences. The statements made by the applicant to police officers, both at the unit and later at the Morningside Police Station, bear upon the charges. The statements made at the police station provide cogent evidence of the applicant's guilt. However, there are a number of factors which would favour the exercise of the discretion to exclude the evidence.

[100] By itself, the initial failure by Detective Sergeant Ward to advise the applicant of his right to contact a solicitor might be regarded as technical, and perhaps not particularly significant. However, in my view, Sergeant Ward's subsequent conduct was designed to prevent the applicant from exercising that right. At the very least, it had the effect of substantially interfering with attempts by the applicant to obtain legal advice.

[101] In *Driscoll v The Queen*[37] Gibbs J (with whom Mason, Jacobs and Murphy JJ agreed)[38] said that if police officers had prevented an accused from seeing a solicitor, "the conduct was … reprehensible"; and that it might provide a ground for a discretionary rejection of the confession as evidence. In *R v Borsellino*[39] Dunn J exercised the discretion to exclude a confession because an investigation had continued after an accused had made requests for legal advice which were denied, and had said that he wished to make no comment, but the investigation was persisted in. That approach was endorsed by the Full Court in *R v Hart.*[40]

[102] In *R v Stafford*[41] Bray CJ said:

> "… the police should not persist in questioning a man who has signified his unwillingness to answer them and *a fortiori* when he has asked to see a solicitor before answering. If they do so the evidence should be rejected."

[103] It is apparent that a substantial interference with the right of a person the subject of a police investigation to obtain legal advice is a matter of considerable significance in relation to the discretion to exclude confessional evidence.

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37 (1977) 137 CLR 517.
38 *Driscoll v The Queen* (1977) 137 CLR 517, 540, 543.
39 [1978] Qd R 507, 513.
40 [1979] Qd R 8, 13.
41 (1976) 13 SASR 392, 398.

[104] It also seems to me that, whether or not the applicant was detained lawfully at the unit, the circumstances (including the number of police officers present, the length of time that they remained in control of the unit, and the applicant, and his condition), all have the effect that to some extent, his freedom to speak or not speak was impugned.

[105] In addition, it is necessary to consider the circumstances in which the applicant accompanied the police to the Morningside Police Station. Notwithstanding the requirements of s 33 of the *PR Code*, the applicant was not told that he was not under arrest, and was free to leave at any time.

[106] This is a case where the considerations relevant to the public policy ground and those relevant to the unfairness ground overlap. In terms of the public policy ground, there have been some breaches of statutory requirements, and the underlying "spirit" which informs those requirements. It is a case where the impropriety has led the applicant to the view that he would not in fact be able to obtain legal advice before answering Sergeant Ward's questions; and where he was likely to be detained for a substantial period unless he did so. It would be unfair to the applicant to permit the evidence to be given, where it was obtained as a result of pressure, at a time when the applicant's freedom to speak or not speak had been impugned, and he was not, in the real sense, given the opportunity to speak to a solicitor.

[107] Accordingly, even if it could be said that the applicant had voluntarily made the statements to the police which are recorded in the exhibits, it seems to me that a proper exercise of the discretion requires their exclusion.

Proposed ruling

[108] Subject to submissions about the form of ruling, I would rule that the statements made by the applicant in the course of the interview at the Morningside Police Station on 2 and 3 June 2009 should be excluded from evidence at his trial. The basis for such a ruling is that it has not been established the statements were made voluntarily. However I would also be prepared to make that ruling based on discretionary considerations.

[109] I would also rule that the statements made by him in the course of the search of Unit 38, 10 Goodwin Street, Kangaroo Point, on 2 June 2009 should be excluded from evidence at his trial. I would also be prepared to make that ruling based on discretionary considerations.