SUPREME COURT OF QUEENSLAND

CITATION:	*The Queen v Nocon* [2011] QSC 271
PARTIES:	**THE QUEEN** (Respondent) **V** **PETA AIRINI NOCON** (Applicant)
FILE NO/S:	16/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	13 September 2011
DELIVERED AT:	Rockhampton
HEARING DATE:	8, 9 August 2011
JUDGE:	McMeekin J
ORDER:	1. The evidence of the conversations that took place in the course of the interview commencing at or about 9.19pm and concluding at or about 1.10 pm on 13-14 August 2009 between the applicant and police officers is inadmissible. 2. Evidence relating to a past history of the applicant self harming is inadmissible. 3. Evidence of the conversation between the applicant and Dr Mawer is inadmissible. 4. Evidence of the witnesses Adkins, Ford Kevin Scattergood, Hendry and Akaata is inadmissible.
CATCHWORDS:	CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE - POLICE INTERROGATION - Whether interview with police

admissible – whether applicant's participation was voluntary – whether applicant was being lawfully detained – where previous statements to police had already been made

CRIMINAL LAW - EVIDENCE - JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – relevance of evidence of applicant's history of self harm – whether probative value outweighs it's probable prejudicial effect

CRIMINAL LAW - EVIDENCE - ADMISSIBILITY – EVIDENCE GIVEN TO MEDICAL OFFICER - whether statements made to medical officer charged with recording applicant's injuries are admissible

CRIMINAL LAW - EVIDENCE - ADMISSIBILITY – whether evidence from lay witness relevant – where evidence has potential to cast doubt on one aspect of applicant's version of events – whether probative value of evidence outweighs its probable prejudicial effect

Police Powers & Responsibilities Act 2000 (Qld)

Police Powers and Responsibilities Regulations 2000 (Qld)

Bunning v Cross (1978) 141 CLR 54

The Queen v Stafford (1976) 13 SASR 392

R v Clarke (1997) 97 A Crim R 414

R v Hunt (1979) Qd R 8

R v Swaffield (1998) 192 CLR 159

R v Williamson [2010] QCA 277

Ridgeway v The Queen (1995) 184 CLR 19

Roach v R (2011) 276 ALR 406

Tofilau v The Queen (2007) 231 CLR 396

COUNSEL: A Boe and A O'Brien for the Applicant

M Byrne SC for the Respondent

SOLICITORS: Nyst Lawyers for the Applicant

Department of Public Prosecution for the Crown

[1] This is an application brought pursuant to s 590AA of the Criminal Code. Peta Airini Nocon is charged with one count of manslaughter. She seeks rulings preventing the prosecution leading the following evidence:

(a) confessional statements made by her in the course of a record of interview with police officers;

(b) statements and evidence in medical records concerning a prior history of self harm;
(c) conversations with a Dr Mawer;
(d) the evidence of various lay witnesses – Atkins, Scattergood, Akatta, and Hendry.

[2] At the relevant time the applicant was aged 18 years, nearly 19. The stabbing that resulted in the death occurred on the morning of 13th August 2009 at the applicant's residence. The applicant made a call to a triple zero operator seeking assistance on the morning of the 13th. A constable Woodward arrived at the applicant's residence at 11.43 that morning.

The Record of Interview

[3] As in any trial of a charge of manslaughter the relevant matters that the prosecution must establish are that there was a death, that the accused caused the death in question, and that the act causing the death was unlawful. The statements that the prosecution seek to lead go to establishing the second and third of the elements I have mentioned. The prosecution have a number of statements said to have been made by the accused that are not objected to, both recorded and unrecorded, that contain admissions that she caused the death by stabbing of the deceased. Those statements also include her version as to what occurred. The relevance of the remaining statements that are objected to go to the state of mind of the applicant (criminal negligence being one possible path to a verdict) and a precise analysis of what occurred.

[4] The confessional statements that are objected to were obtained in a record of interview held between the applicant and a Detective Senior Constable Groen-Int-Would which was video recorded and commenced at 9.19pm on 13 August 2009 and continued until 1.10am the next day.

[5] The objection to the record of interview is based on two grounds – that it was involuntary and alternatively that the applicant was unlawfully detained at the time and that it would be unfair to her to permit the conversations to be used at her trial.

[6] By way of background, at the time of the commencement of the interview the following matters are clear:

(a) The applicant had been in police custody since shortly after constable Woodward's arrival at the residence at 11.43 am – a period of over nine hours;
(b) This was the fourth account that the applicant had been asked to give to police of the events of the day;
(c) The applicant was a teenager with a history of mental instability known to the police;
(d) The applicant was plainly considerably distressed by what had occurred;
(e) The applicant had been injured and had required medical treatment;
(f) The applicant had not eaten since being taken into custody as she did not feel well enough;
(g) The applicant had had no access to legal advice. Her parents had indicated that they wished her to have legal advice. She had requested a solicitor and had made contact with one, or with a firm of solicitors, but the solicitor had not arrived at the station as expected;

(h) The applicant had had only limited contact with her parents during the day;

(i) The applicant was not told that the deceased – her boyfriend – was not expected to live, despite asking about him and despite the police knowing that was the medical advice. Thus she did not know that she was potentially facing a murder charge;

(j) The applicant had had no prior involvement with the criminal justice system.

[7] Further by way of background, the applicant was unlawfully detained at the time of the interview. That is not in issue. The unlawfulness arises in this way. A police officer is only permitted to detain a person for the purpose of questioning for a reasonable time but for not more than 8 hours unless the detention period is extended under Division 3 of part 2 of Chapter 15 of the *Police Powers and Responsibilities Act* 2000 ("the Act"): s 403(2) of the Act. The detention period was not lawfully extended. An approach was made to a magistrate to extend the period but a copy of the application was not given to the applicant, the applicant was not given the opportunity to respond to the application for extension, and relevant information was not given to the Magistrate, and it is not unfair to say that he was misled. Each of these matters involves a breach of the legislative requirements set out in s 405 of the Act[1] or s 44 of Schedule 10 of the *Police Powers and Responsibilities Regulations* 2000[2].

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[1] Section 405 provides: "Application for extension of detention period

(1) A police officer may apply for an order extending the detention period before the period ends.

(2) The application must be made to—

(a) a magistrate; or

(b) a justice of the peace (magistrates court); or

(c) if there is no magistrate or justice of the peace (magistrates court) available—another justice of the peace other than a justice of the peace (commissioner for declarations).

(3) However, if the total questioning period since the detention began will, if extended, be more than 12 hours, the application must be made to a magistrate.

(4) When making the application, the police officer must give to the magistrate or justice the information about any time out the police officer reasonably anticipates will be necessary.

(5) The person or the person's lawyer may make submissions to the magistrate or justice about the application, but not submissions that unduly delay the consideration of the application.

(6) If the application is made before the detention period ends, the detention of the person does not end, unless the magistrate or justice refuses to extend the detention period."

[2] Section 44 provides so far as is relevant: "Detention period extension application

(1) An application by a police officer for the extension of a detention period32 must be made in a way that allows the relevant person or the person's lawyer to make submissions about the application.

Example for subsection (1)—

If the application is faxed to a magistrate, the relevant person may speak to the magistrate by telephone.

(2) Before the application is made, the police officer must—

(a) tell the relevant person or the person's lawyer of the application; and

(b) give the person a copy of the application; and

(c) ask the person or the person's lawyer if he or she—

(i) agrees to the application or wants to oppose it; and

(ii) wants to make submissions or say anything to the justice or magistrate hearing the application.

(3) The application must state the following—

…..

[8] It follows that the confessions obtained in the record of interview were unlawfully obtained. Illegally obtained evidence is not, by reason of that alone, rendered inadmissible. I will return to this point later.

[9] The first submission made by the applicant is that the confession obtained in the course of the record of interview was not voluntary in the legal sense. The applicant contends that the involuntariness of the confession arises not because of it having been obtained by reason of any fear of prejudice or hope of advantage held out to her but rather under the wider ground identified by Dixon J in *McDermott v The King*,[3] where he said that a statement has been voluntarily made means "that it has been made in the exercise of [a person's] free choice". He explained:

> "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."[4]

[10] Here the applicant submits that the police conduct amounted to "persistent importunity or sustained or undue insistence or pressure". The principal point made is that the police were well aware that the applicant had requested a solicitor, that she was expecting that solicitor to be at the police station, and had no idea why he had not arrived and yet continued to press for yet another interview. Against that background it is said that the police should not have persisted in seeking a further interview with her.

[11] Reliance was placed on *The Queen v Stafford*[5] where Bray CJ wrote "that 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."

[12] If it was intended to rely on the decision as laying down a general proposition that such evidence so obtained must be excluded then in my view the submission is misconceived. *Stafford* was referred to in *R v Hunt*[6] where Connolly J said:

> "The circumstance that an accused person has been refused access to his solicitor will not render evidence of his subsequent interrogation legally inadmissible but it may well be a ground for the exercise of the discretion to reject the confession if

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> (c) whether, since the questioning or detention started, the person has asked to telephone or speak to a relative, friend or lawyer and has since spoken to a relative, friend, lawyer or support person;
> (d) when the detention period started, how long the person has been questioned, and what delays to questioning have happened;
> (e) the offence to which the questioning or investigation relates and information and evidence about the nature and seriousness of the offence;
> (f) information or evidence supporting a reasonable suspicion the relevant person has committed the offence mentioned in the application;
> (g) what investigations have taken place;
> (h) why further detention of the person is necessary;
> (i) the time sought for time out, the purpose of the time out, and the period of time sought for questioning.
>
> (4) The applicant must tell the justice or magistrate whether or not the relevant person or the person's lawyer wants to make submissions or say anything to the justice or magistrate."

3 (1948) 76 CLR 501
4 At 511
5 (1976) 13 SASR 392
6 (1979) Qd R 8

> the judge regards it as unfair to allow it to be used in all the circumstances. This is recognised by the judgment of Gibbs J. in *Driscoll v. The Queen* (1977) 51 A.L.J.R. 731 at p. 741, a judgment which was agreed in by both Mason and Jacobs JJ. In *R. v. Stafford* (1976) 13 S.A.S.R. 392 Bray C.J. referred to a course of authority in the Supreme Court of South Australia which establishes as clear law the proposition that 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, said the learned Chief Justice, the evidence should be rejected. In *Borsellino* [1978] Qd R 507 Dunn J. expressed, in similar circumstances, the view that the court should recognise principle C of the 1964 Judges' Rules, which reads:
>
> > 'Every person at any stage of the investigation should be able to communicate and consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so.'
>
> I am of the same opinion."

[13] This analysis makes it clear that the decision to exclude is a matter of discretion under the unfairness ground. That is consistent with the view in New South Wales where Hunt CJ at Common Law said in *R v Clarke*[7] that to the extent that *Stafford* might be seen to lay down a universal proposition of exclusion then it should not be followed.

[14] The question of voluntariness must turn on the facts of each case. The onus lies on the prosecution.

[15] Turning to the facts here, the difficulty for the applicant's argument is that she did not say at any point that she was unwilling to answer questions put to her until her solicitor was present. She had made plain earlier in the day that she wanted to see a solicitor. She was expecting to see one before further questioning took place. But at no point did she express the view that she was not prepared to answer questions until that occurred. It was said to her by the detectives that it was completely up to her whether she wished to answer questions or not, or whether she wished to again contact the solicitor. That she was alive to her rights is plain from the fact that she said that she was uncertain about involving herself in a video "walk through" at the scene. She agreed to be interviewed immediately after being reminded of these matters.

[16] I am satisfied that the applicant's decision to engage in the interview was a voluntary one.

[17] Where a voluntary confession is made the Court retains a discretion to exclude the evidence on "the grounds of unfairness, public policy, or because the probative value is small and the undue prejudice likely to be suffered is substantial."[8]

[18] Here the applicant invokes the first two grounds mentioned. The public policy ground is engaged because the police acted unlawfully. The unfairness ground relies on the claimed unreliability of the confessional statements and a concern that the fairness of any trial might be compromised by the fact of the prosecution

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7 (1997) 97 A Crim R 414

8 *R v Crooks* [2001] Qd R 541 at p546 per Atkinson J – citation of authorities omitted

tendering this evidence when, had proper procedures been followed, no confessional statements at all may have been obtained.

[19] In *R v Swaffield*[9] Toohey, Gaudron and Gummow JJ said this of the unfairness ground:

> **"[53]** The term "unfairness" necessarily lacks precision; it involves an evaluation of circumstances. But one thing is clear:
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> "[T]he question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him ... Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement."[10]
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> **[54]** Unfairness then relates to the right of an accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted[11]. And once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred."

[20] And later they said:

> **"[78]** Unreliability is an important aspect of the unfairness discretion but it is not exclusive. As mentioned earlier, the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence. Thus, in McDermott, where the accused did not admit his guilt, but admitted making admissions of guilt to others, it was hypothesised by Williams J that it might have been unfair to admit his statement if the persons to whom the admissions were made were not called as witnesses. In *R v Amad*, Smith J rejected admissions which were voluntary and which the accused accepted were true because the manner in which he was questioned led to apparent inconsistencies which might be used to impair his credit as a witness. And the significance of forensic disadvantage is to be seen in *Foster* where the inability of the accused to have his version of events corroborated was taken into account."

[21] The proper approach to the public policy ground was explained in *Ridgeway v The Queen*[12] by Mason CJ, Deane and Dawson JJ:

> "The trial judge has a discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police…
>
> "The discretion extends to the exclusion of both … non-confessional evidence

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9 (1998) 192 CLR 159

10 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26 per Wilson, Dawson and Toohey JJ.

11 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 662; 82 ALR 10 at 20 per Mason CJ; *Duke v The Queen* (1989) 180 CLR 508 at 513 per Brennan J.

12 (1995) 184 CLR 19 at 30-31; 38

> and confessional evidence… [I]n its exercise, a trial judge must engage in a balancing process to resolve 'the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and 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'. The basis in principle of the discretion lies in the inherent or implied powers of our Courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of 'high public policy' relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty…
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> "The weight to be given to the public interest in the conviction and punishment of those guilty of crime will vary according to the degree of criminality involved…
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> "The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence – the public interest in maintaining the integrity of the Courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement – will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings.
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> When assessing the effect of illegal or improper conduct, the relevance and importance of any unfairness either to a particular accused or to suspected or accused persons generally will likewise depend upon the particular circumstances. Ordinarily, however, any unfairness to the particular accused will be of no more than peripheral importance."[13]

[22] The considerations relevant to the two grounds in this case seem to me to be these.

[23] First, the crime is a serious one. A death has occurred. The maximum sentence is life imprisonment. It is in the interests of justice that those who perpetrate crimes be convicted.

[24] Secondly, there can be no doubt about the accuracy of what the applicant said – it was recorded.

[25] Thirdly, as I have said above, the applicant seemed to be alive to her rights. She chose not to exercise them.

[26] Fourthly, despite her youth she appears from the transcripts to be articulate and not unintelligent.

[27] Fifthly, whatever the reason for the disregard of the statutory safeguards, there is no suggestion that "the conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings."

[28] Each of those factors favours admission of the evidence.

[29] Against the admission are a number of matters. First, I observe that the courts are "cautious" in admitting into evidence a confession where its reliability is in doubt: *R*

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13 See also *R v Stead* [1994] 1 Qd R 665, at 671 – 672

v Swaffield (1998) 192 CLR 159 at 161 per Brennan CJ. Here while the accuracy of what was said is not in doubt the reliability of the statements made is. On two occasions the applicant expressly stated that her account of what had happened as given earlier in the day would probably be more accurate than her account given that night. That seems very probable. Words are used in this interview to describe events already described but in a different way. The prosecution seek to rely on these different accounts. Many hours had gone by between the crucial events, which probably happened over a few moments, and this interview. Factors such as fatigue, feeling unwell, hunger, and distress were all likely to impact on the applicant's ability to accurately recall events as well as the elapsing of time. It is the supposed accuracy of the confessional material obtained in this record that the prosecution will seek to use against the applicant.

[30] The reliability of the statements against interest is of considerable significance when judging their admissibility. In *R v Williamson* [2010] QCA 277, Chesterman JA said:

> "In cases concerning confessions or admissions, the chief focus is on the fairness of using the admissions against their maker. See *Tofilau v The Queen* (2007) 231 CLR 396 at 432 per Gummow and Hayne JJ. In *R v Swaffield* (1998) 192 CLR 159, Toohey, Gaudron and Gummow JJ observed that unreliability was a 'touchstone' of unfairness. Where voluntariness is not in issue, the admissibility of confessional evidence is to be decided by reference to the reliability of the evidence and the rights of the accused. Their Honours noted (197):
>
> > 'Unreliability is an important aspect of the unfairness discretion but it is not exclusive. As mentioned earlier, the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence.'"

[31] Secondly, the police behaviour in seeking to obtain the extension cannot be passed off as mere inadvertence of some sort. The officers must have realised that an extension was not for the asking. A judicial officer had to be persuaded to exercise a discretion in favour of the extension. It ought to have been plain to the officers that full and frank disclosure was necessary. The information given to the magistrate came nowhere near informing him of relevant matters and indeed misled him. An important statutory directive was ignored. The conduct of the officers was at least grossly negligent of the applicant's rights and, I think, if not to be characterised as deliberate, reckless.

[32] As Stephen and Aickin JJ observed in *Bunning v Cross*[14] in regard to legislative safeguards designed to protect the liberties of individuals:

> "These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable, however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be "a less evil

[14] (1978) 141 CLR 54

> that some criminals should escape than that the Government should play an ignoble part": per Holmes J in *Olmstead v United States* 277 US 438 at 470. Moreover, the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law. On the other hand it may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when, of their very nature, they involve no overt defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law."

[33] Thirdly, if the magistrate had been properly advised then I doubt that the extension would have been given. There was not the slightest urgency about again interviewing the applicant. There ought to have been concerns about the fragility of her mental state. The background matters that I have referred to are all against the granting of the extension – not least that the police had already spoken to the applicant on three occasions, had obtained a version implicating her, that she had herself been injured and said that she was unwell, that she wished to see a solicitor who for some unexplained reason had not appeared at the watchhouse, and that she had not been given any opportunity to place submissions before the magistrate as the legislation required. As a result the applicant was exposed to questioning at a time when the legislature has said that she should not have been.

[34] Fourthly, there is a distinct element of unfairness in that the applicant was not informed that she was potentially facing a murder charge. The manner in which she chose to exercise her rights – both as to her right to silence and her right to have a solicitor present before deciding whether to answer any questions - might well have been different if that had been revealed. This factor and the previous one provide grounds for thinking that the statements sought to be put into evidence would not have been made, or not made in the form that they were made, had the law been complied with or elementary fairness been extended to the applicant. There is the distinct prospect of procedural unfairness of the type discussed in *Swaffield*.

[35] Fifthly, the applicant had requested a solicitor. The police knew that was her parents' wish as well. It was not known why no solicitor arrived as expected. It would have taken little effort to obtain a solicitor for her. There was no urgency about the need for an interview. Given the gravity of the potential charge and the applicant's youth it is difficult to avoid a considerable feeling of disquiet about the police methods.

[36] Finally, the prosecution have versions from the applicant that implicate her in the stabbing of the deceased and reasonably detailed accounts given close in time to the event. Refusal of admission of the record of interview will not mean the prosecution case cannot proceed. The interest of the State in securing conviction of criminals is not thwarted by a ruling against the prosecution.

[37] The onus is on the applicant to demonstrate that the discretion should be exercised so that the evidence ought to be excluded.

[38] In my judgment the overall circumstances strongly favour the exclusion of the evidence contained in the record of interview. The concern about reliability alone is sufficient to justify rejection. When that is combined with the unlawfulness of the police conduct and the Court's proper insistence that the law ought to be obeyed and

the concern that unfairness in the relevant sense might well follow from that unlawful conduct the factors justifying rejecting the evidence are compelling.

The Statements of Self Harm

[39] The prosecution seek to lead evidence of a past history of the applicant self harming. The applicant made statements to that effect in a conversation with Constable Woodward earlier in the day and there are medical records to that effect.

[40] Mr Byrne of senior counsel for the Director submitted that the statements go to the applicant's emotional state when in domestic disputes with the deceased and are relevant to the question of her handling of the knife at the material time.

[41] In my view the claimed basis of relevance is very tenuous. I doubt that the degree to which one has become upset in the past has any bearing on how one might handle a knife in a different situation. But if that evidence has any probative effect the prejudicial effect of the evidence greatly outweighs any probative value the evidence might have.[15]

[42] The problem is that the evidence might suggest to the jury that the applicant was the sort of person liable to attack the deceased when under stress. Such propensity evidence is excluded: see *Roach v R*[16] for a recent exposition of the principles.

The Statements Made to Dr Mawer

[43] The applicant was seen at the hospital by a Dr Mawer. The applicant had certain injuries that she claims were caused by the deceased and sustained immediately before the deceased was stabbed. The police had a legitimate forensic interest in recording those injuries. That was Dr Mawer's task.

[44] Regrettably Dr Mawer went beyond her role. She insisted that the applicant inform her completely of what occurred. Her statements to the applicant included: "You have to start from the beginning…" and "I have got to obtain the proper story". The unspoken implication presumably is that in order to carry out the task of medically dealing with the applicant – and perhaps with some advantage to her - this must occur.

[45] Effectively Dr Mawer was acting as a detective. She did so under the guise of being a medical officer and apparently a person in authority. She appeared by the manner of her questions to assert the right to demand of the applicant her account of what had happened. She had no such right. Her actions in fact trampled on the applicant's right to remain silent.

[46] The applicant objects to the account given to Dr Mawer being admitted into evidence. The concern, I suspect, is in any adverse inference being drawn between one version and another.

[47] The prosecution concede that the account obtained should not be led. There is apparently an intention to lead a summary of the information provided and have the doctor say that the injuries observed are consistent with that version. Objection is taken even to that course.

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15 The discretion to exclude evidence that it would be unfair to the accused to admit is preserved by s 130 *Evidence Act* 1977 (Qld)

16 (2011) 276 ALR 406 at [14]-[15]

[48] In my view the prosecution should be restricted to simply leading from Dr Mawer the nature of the injuries that she observed on her examination and a statement that those injuries are in accordance with the version provided by the applicant, without further reference at all to what was said.

[49] In case this happens to be a practise I think it worth stating that, if it is, I consider it to be a most improper one. The difficulty is in the ambiguous role of the medical practitioner. A very clear warning was required so that a suspect or an accused remains well aware that they have the right not to answer any question at all if they so wish because what they say might be used in evidence.

Statements of Lay Witnesses

[50] The objection is to the leading of evidence from witnesses Adkins, Ford and Kevin Scattergood, Hendry and Akaata.

[51] Adkins, Ford, Scattergood and Hendry each were to be called to contradict assertions made by the applicant in the course of the impugned record of interview. As the interview is to be excluded no basis is advanced for the admissibility of their statements.

[52] Akaata's testimony goes to the sale by the deceased of a guitar and guitar pedals some months before his death. The applicant says in her interviews that she and the deceased were arguing over the sale of a guitar and that led to the altercation resulting in his stabbing. The prosecution seek to argue that Akaata's evidence goes to show that the claimed basis for the argument is a false one as the deceased sold a guitar and guitar pedals to Akaata and without complaint.

[53] The difficulty with the prosecution submission is that it by no means follows that a willingness to do something on one day is indicative of the deceased having the same attitude on another day months later. That argument involves little more than speculation. The evidence is of little, if any, probative value and has the disadvantage of illogically suggesting to a jury that the deceased sought to mislead the police in her statements.

[54] That prejudicial effect far outweighs any probative value the evidence might have.

Orders

[55] The rulings will be:

(a) The evidence of the conversations that took place in the course of the interview commencing at or about 9.19pm and concluding at or about 1.10 pm on 13-14 August 2009 between the applicant and police officers is inadmissible.

(b) Evidence relating to a past history of the applicant self harming is inadmissible.

(c) Evidence of the conversation between the applicant and Dr Mawer is inadmissible.

(d) Evidence of the witnesses Adkins, Ford Kevin Scattergood, Hendry and Akaata is inadmissible.