SUPREME COURT OF QUEENSLAND

CITATION:	*R v Playford* [2013] QCA 109
PARTIES:	**R** **v** **PLAYFORD, Gary Allen** (appellant)
FILE NO/S:	CA No 103 of 2012 SC No 1030 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 February 2013
JUDGES:	Margaret McMurdo P and White JA and Dalton J Separate reasons for judgment of each member of the Court, Margaret McMurdo P and White JA concurring as to the order made, Dalton J dissenting
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of two counts of murder and one count of unlawful wounding – where the appellant made confessional statements to police officers during an interview and re-enactment – where the conduct of the police officers was improper and in breach of the *Police Powers and Responsibilities Act* 2000 (Qld) – where the primary judge found that the confessions were voluntary – where the primary judge found that the confessional evidence should not be excluded on the basis of unfairness or for public policy reasons – whether the primary judge erred in finding that the confessions were voluntary – whether the primary judge ought to have considered the unfairness and public policy discretions separately – whether the judge erred in exercising his discretion not to exclude the confessional statements *Criminal Code* 1899 (Qld), s 590AA *Criminal Law Amendment Act* 1894 (Qld), s 10 *Evidence Act* 1977 (Qld), s 130 *Police Powers and Responsibilities Act* 2000 (Qld), s 23(5), s 249, s 250, s 432, s 435

Police Powers and Responsibilities Regulation 2012 (Qld), sch 9, s 23

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, considered
Cleland v The Queen (1982) 151 CLR 1; [1982] HCA 67, considered
Collins v The Queen (1980) 31 ALR 257; [1980] FCA 72, cited
Duke v The Queen (1989) 180 CLR 508; [1989] HCA 1, cited
Foster v The Queen (1993) 67 ALJR 550; [1993] HCA 80, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Pollard v The Queen (1992) 176 CLR 177; [1992] HCA 69, cited
R v Barker (1978) 19 SASR 448, cited
R v Belford & Bound (2011) 208 A Crim R 256; [2011] QCA 43, cited
R v Dunning; ex parte Attorney-General (Qld) [2007] QCA 176, cited
R v Ireland (1970) 126 CLR 321; [1970] HCA 21, considered
R v Lee (1950) 82 CLR 133; [1950] HCA 25, cited
R v LR [2006] 1 Qd R 435; [2005] QCA 368, cited
R v Swaffield (1998) 192 CLR 159; [1998] HCA 1, considered
R v Tietie and Wong-Kee [2011] QSC 166, cited
Tofilau v The Queen (2007) 231 CLR 396; [2007] HCA 39, considered

COUNSEL: J R Hunter SC for the appellant
M R Byrne SC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant was convicted of two counts of murder after a 15 day jury trial. This appeal concerns the primary judge's decision to admit into evidence the appellant's confessions to police at a pre-trial hearing under s 590AA *Criminal Code* 1899 (Qld). As Dalton J has set out the relevant facts, my reasons for refusing the appeal can be stated more briefly than otherwise.

Voluntariness

[2] The appellant's first ground of appeal is that the primary judge erred in concluding that the appellant's admissions were voluntary. As the appellant's counsel has demonstrated in this appeal, there were concerning aspects of the evidence surrounding this issue. In particular, the extraordinary police-initiated contact visit between the appellant and his wife and young family in the watch-house after the conclusion of the police interviews was capable of providing support for the appellant's claim that he was induced to confess by police. On the evidence, a judge may not have been satisfied of the voluntariness of the appellant's

admissions. But I agree with Dalton J's reasons for concluding that the primary judge's relevant factual findings and conclusion that, on balance, the admissions were not involuntary, were well open on the evidence. It follows that the appellant's first ground of appeal fails.

Discretionary Considerations

[3] The second ground of appeal is that the primary judge, in the exercise of his discretion, should have ruled the confessions inadmissible. As Dalton J explains in her reasons, on the evidence in this case the admissions, though found to be voluntary, could have been excluded in the exercise of the judge's discretion on either of two bases.[1]

[4] The first was that it would be unfair to allow evidence of the admissions to be led because of the need for the law to protect an accused person's established rights. In exercising this common law discretion, the emphasis is on fairness to the individual. It is given statutory recognition in s 130 *Evidence Act* 1977 (Qld).

[5] The second was that, even if the admissions were both voluntary and fair, the police officers' conduct in obtaining them was so reprehensible that, as a matter of public policy, they should not be received as evidence in a court of law. See Toohey, Gaudron and Gummow JJ's observations in *R v Swaffield*[2] and Gleeson CJ's observations in *Tofilau v The Queen*.[3] The public policy discretion does not focus on individual fairness. Its emphasis is on whether the impugned conduct is sufficiently grave as to sacrifice the community's wish to see the guilty convicted in order to express judicial disapproval and to deter the use of such unacceptable methods in achieving a conviction. See Dawson J's observations in *Cleland v The Queen*.[4] The calculated flaunting of the spirit of the law by police officers empowered to enforce it undermines the essential integrity of the administration of criminal justice. See Deane J's observations in *Pollard v The Queen*.[5]

[6] The primary judge in his reasons did not refer to any wrong legal principles; his Honour, however, quoted lengthy passages from a single judge decision, *R v Tietie and Wong-Kee*,[6] which, in dealing with the apposite law in that case, did not make clear the distinction between the discretionary exercise concerning fairness and that concerning public policy. It is true, as Dalton J demonstrates in her reasons, that his Honour merged these two questions in exercising his discretion. But that is neither entirely surprising nor an error of law, as in this case the two questions overlapped to a considerable degree, as they often do. See *Cleland*;[7] *Foster v The Queen*[8] and *Swaffield*.[9] The instances where admissions are both voluntary and fair but excluded on a public policy basis are uncommon. No doubt that is a reflection of the desire of the vast majority of police officers to conscientiously apply the law in carrying out their wide-ranging, onerous and important powers and duties.

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1 It was not argued that the prejudicial value of the admissions outweighed their probative value: see *Tofilau v The Queen* (2007) 231 CLR 396, 402 [3] (Gleeson CJ).

2 (1998) 192 CLR 159, 189 [51]-[52].

3 (2007) 231 CLR 396, 402 [3].

4 (1982) 151 CLR 1, 34.

5 (1992) 176 CLR 177, 202-204.

6 [2011] QSC 166, [23]-[30], set out by the trial judge in *R v Playford and Griffiths*, unreported, Supreme Court of Queensland, SC No 1030 of 2010, 15 February 2012, [6].

7 (1982) 151 CLR 1, 23-24 (Deane J).

8 (1993) 67 ALJR 550, 554 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

9 (1998) 192 CLR 159, 210-211 [128] (Kirby J).

[7] His Honour dealt with the appellant's critical interview with police officers Burkin and Windeatt at Albury police station on 28 January 2009 under a discrete heading in his reasons, discussing voluntariness and the discretionary questions together. His Honour dealt with the evidence of the solicitor, Mr Carroll, under a separate heading. It is necessary to set out lengthy passages from that ruling in order to fully apprehend his Honour's reasoning concerning this ground of appeal.

[8] His Honour stated:

> "… *At [the time of the interview of 28 January], Detective Burkin had already been contacted by Mr Frank Carroll, a solicitor. He had told her that he was going to represent [the appellant]*.
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> …
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> [17] Both detectives denied that any of the conversation alleged by [the appellant] which would have amounted to threats or inducements had taken place.
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> [18] It was argued on [the appellant's] behalf that the prosecution could not establish, on the balance of probabilities, that the interview given by [the appellant] was voluntary. The following points were made:
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> …
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> (f) The evidence given by the detectives at this hearing was inconsistent with the evidence which they gave at the committal hearing. Of particular importance is the difference between what Detective Burkin said at the committal where she gave evidence that she had passed on the information to [the appellant] that the solicitor, Frank Carroll, had been in touch with her. In this application she conceded that that was incorrect. It was incorrect because *she gave evidence that she had made a deliberate decision to withhold the information relating to Mr Carroll from [the appellant] and that this decision was made after consulting with others*.
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> …
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> [20] *[The appellant] accepted in cross-examination that he had been told that he could get legal representation by speaking to the custodial officer at the Albury Police Station. He did not do so*.
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> [21] The DVD recording of the interview was played during this application. [The appellant] was, at several times, clearly very emotional and upset. He and [his co-offender] had been travelling for some time and had not had much sleep and that, no doubt, would have played some part in his demeanour. … *If anything, his answers to many questions appeared to be part of some possible claim that he had felt threatened by the deceased and that he acted in self-defence*.

[22] [The appellant] may not have had much formal education but he is not unintelligent. The answers which he gave in the interview were those of a person who understood what he was being asked. Similarly, in evidence, he was attentive to the questions and gave responsive answers. *He took every advantage of the open ended questions asked of him in cross-examination to advance his version of events when possible. His behaviour during the recorded interview and the manner in which he answered questions were consistent with a person who appeared to be anxious to be truthful and to 'get it off his chest'.*

[23] *The conduct of Detective Burkin with respect to the information concerning Mr Carroll is to be deprecated. It was clear that she was not convinced of the propriety of her actions in that regard because she sought confirmation of her conduct from senior officers.*

[24] Nevertheless, the task which has to be faced here is to make an assessment of all the circumstances surrounding the making of the statement including the physical condition of the particular person and the other matters to which I have made reference above. *[The appellant] has consistently accepted and given evidence that he:was warned, had the opportunity to decline to take part in an interview, and that he had the opportunity to seek legal assistance*. …

[25] Mr Hunter SC also raised other issues concerning the record of interview. He argued that there had been breaches of legislative and regulatory requirements by Detectives Burkin and Windeatt. They consisted, he argued, of breaches of s 435 of the *Police Powers and Responsibilities Act* 2000 (PPRA), a breach of s 41(1) of the *Responsibilities Code*, a breach of s 419 of the PPRA and s 34(4) of the *Responsibilities Code*, a breach of s 431(4) of PPRA and s 37 of the *Responsibilities Code* and a breach of s 34 of the *Responsibilities Code*.

[26] *These matters were also relied upon as evidence of unfairness which, it was argued, should lead to the exclusion of the interview on that ground.*

[27] The detectives appeared to both share a surprising … lack of familiarity with both the PPRA and the *Responsibilities Code*.

[28] *For reasons which I will later deal with concerning the likelihood of anything that Mr Carroll might have said influencing [the appellant], and working on the basis that there were the breaches contended for by the applicant*, I need to take into account the considerations set out, for example, in *Ridgeway v The Queen;* and *The Queen v Stead*. Exclusion of the evidence would have a substantial potential to damage the prosecution case. The fairness of the admission of such evidence must be considered against a broad background. If the applicant is, in truth, guilty and an acquittal resulted

> through the exclusion of this evidence, it would mean that a substantial social cost would attend suppression by the court of the truth of what occurred. *I will not exclude the evidence of the record of interview on the bases of either the breach of legislative or regulatory provisions or any unfairness said to arise from that*" (my emphasis) (citations omitted).

[9] In dealing with the appellant's further admissions during the re-enactment at various places in south-east Queensland on 31 January 2009, his Honour noted:

> "[35] As for the alleged breaches of the PPRA, they were not of sufficient concern to otherwise interfere with the reception of this evidence."

[10] After briefly determining another matter which has no present relevance, his Honour dealt with the evidence of the solicitor, Mr Carroll:

> "[37] *Mr Frank Carroll is a solicitor. He was engaged by [the appellant's] father to represent [the appellant]. On 28 January 2009 he spoke to Detective Burkin. The note he made at the time was to the effect that he left his details and told her that he was instructed to assist in and appear for [the appellant]*. He did not speak to [the appellant] at the time and he did not, either when speaking to police or in any message left for them, say that he objected to [the appellant] speaking to them. He did not ask to speak to [the appellant]. He made no further attempt to get in touch with [the appellant] after being informed that he would have to appear at Beenleigh Court on 30 January 2009.
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> [38] On 29 January 2009 he sent a facsimile to the police setting out his contact details and asking for the details of the charges to be sent to him. He later went to the Beenleigh Watch House and spoke to [the appellant] for the first time.
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> [39] It appears that there was some time constraint involved and as a result he did not have much time to speak to [the appellant]. Nevertheless, *I accept that he did warn [the appellant] about making statements and told him not to make any statement to any person and not to talk to anyone, even an alleged accomplice, about any allegations*. Mr Carroll told [the appellant] that he would seek more particulars of the allegations.
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> [40] [The appellant's] evidence concerning this conversation was uncertain. He recalled meeting Mr Carroll and that he asked him if he wanted to apply for bail. It was put to him in cross-examination that Mr Carroll warned him about not talking to people, not talking to police or accomplices or anyone and he agreed and said 'I heard him say that'. He appeared to want to move from that concession by later saying that he could not recall the conversation and that he could not recall that advice. Later still, he said the advice was never given to him.

> [41] *I accept Mr Carroll's evidence that he gave him that advice*. It is consistent with what a solicitor of Mr Carroll's experience would do. *Notwithstanding having been given that advice [the appellant] did then take part in the re-enactment*" (my emphasis).

[11] I would infer from those extracted reasons that his Honour made the following relevant findings. Mr Carroll told police officer Burkin by telephone prior to the interview on 28 January that he was a solicitor and was to represent the appellant. Police officer Burkin made a deliberate decision to withhold that information from the appellant, after consulting her superiors. The appellant had indicated earlier that he did not wish to answer questions until he spoke to a lawyer. Police officer Burkin's conduct was to be deprecated. Had police officer Burkin put Mr Carroll in contact with the appellant by telephone, as she should have, Mr Carroll would have spoken to him in terms similar to his conversation with the appellant on 29 January. That is, he would have warned him not to talk to anyone, even an alleged accomplice, about any allegations.[10] But at the time of the 28 January interview, the appellant was anxious to be truthful, to "get it off his chest" and to put forward a self-serving version. His Honour implicitly rejected the appellant's evidence that, had he been warned in these terms by Mr Carroll, he would not have spoken to police. In reaching that conclusion, his Honour took into account the appellant's later conduct, despite Mr Carroll's advice to remain silent, in making further admissions and participating in a re-enactment. I would infer from the extracted reasons that his Honour found that, even had Mr Carroll advised the appellant of his rights prior to the 28 January interview, he would have confessed to police in the interview.

[12] Although the judge merged the consideration of the fairness and public policy discretions, in the end I am satisfied from the extracted reasons that he did exercise both aspects of that discretion in declining to exclude the confessions as evidence. This was a finely balanced case where different judges could have made different factual findings. But the findings made were open on the evidence. On these facts his Honour determined there was no unfairness to the appellant arising from the improper police conduct because he would have made the admissions even had he been warned. His Honour also determined that, on balance and after weighing up the impugned police conduct, the confessions and the desirability of bringing the appellant to justice, the confessions should not be excluded on public policy grounds.

[13] The next issue is whether the judge erred in exercising those discretions. The *Police Powers and Responsibilities Act* 2000 (Qld) (PPRA) s 432 concerns police conduct when a lawyer asks for information about a person's whereabouts. The *Police Powers and Responsibilities Regulation* 2012 (Qld) sch 9 (Responsibilities Code) s 23 deals with the rights of a suspect to communicate with a lawyer. Section 24 deals with the procedure after suspects tell a police officer they do not want to answer questions. Police officers Burkin and Windeatt certainly failed to comply with the spirit of that legislation. As the primary judge recognised, their conduct was grossly unsatisfactory. The police officers also failed to meet some less significant requirements of the PPRA and Code.

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[10] The judge did not make this finding in terms but this was Mr Carroll's evidence (T 4-29.13-21 (AB 254)) and I infer from the extracted reasons that the judge accepted this evidence.

[14] Some judges may have accepted, on balance, the appellant's evidence that he would have taken Mr Carroll's advice to remain silent and not participated in the interview of 28 January 2009 or any subsequent interviews. They may then have excluded the confessions on the basis of unfairness to the appellant.

[15] The police officers deliberately decided not to put the appellant in contact with his solicitor when he had previously stated that he would not answer questions before speaking to a lawyer. Some judges may have been so outraged by this conduct that they would have excluded the confessions on public policy grounds. Police officers are entrusted with the powers and responsibilities of community law enforcement. They must understand that they undermine and put at risk the success of investigations when they flaunt the clear spirit and intention of the PPRA, the Code or other aspects of the law. Judges are loath to condone such conduct, no matter how serious the crime under investigation. It is a pillar of sound public policy that people are entitled to exercise their fundamental rights and be protected from the improper conduct of police officers. See Deane J's observation in *Cleland*.[11] Of particular concern in this case was that, on the evidence of police officer Burkin, her flaunting of the spirit of the PPRA and the Code was at least condoned and perhaps encouraged by more senior officers from whom she sought guidance. Such a deceptive culture must be strongly discouraged within the Queensland Police Service.

[16] But the appellate review of judicial discretion must be exercised in accordance with the well-known principles stated in *House v The King*.[12] It was equally open for the judge to find the facts he did and to determine from them that the unacceptable police conduct did not result in unfairness because, even if Mr Carroll had warned the appellant not to answer questions, the appellant probably would have made a free and informed choice to confess. His Honour exercised his discretion on public policy grounds after considering the nature of both the impugned police conduct and the appellant's confessions, as well as the community interest in bringing to justice perpetrators of a drug-dealing related double murder. His Honour was entitled to conclude, as he did, that public policy considerations did not warrant the exclusion of the confessions. In my view, the judge did not err in exercising either aspect of this discretion. This ground of appeal is not made out.

The application to reopen under s 590AA(3) *Criminal Code*

[17] The appellant's third ground of appeal is that the primary judge erred in refusing to reopen the pre-trial rulings under s 590AA(3) *Criminal Code*. The appellant contends that his Honour should have granted the application to reopen, ordered that the confessions were inadmissible and declared a mistrial.

[18] Section 590AA(3) provides that a pre-trial "direction or ruling is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to reopen the direction or ruling." What constitutes "special reason" will depend on the circumstances of the individual case: *R v Dunning; ex parte Attorney-General (Qld)*.[13]

[19] Under cross-examination at trial about her evidence at the committal hearing police officer Burkin said that when she first spoke to the appellant in Albury, she passed

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11 (1982) 151 CLR 1, 20.
12 (1936) 55 CLR 499, 507.
13 [2007] QCA 176, [2], [33].

on to him Mr Carroll's contact details. This was contrary to her evidence at the pre-trial hearing that her committal evidence was wrong and that she made a considered decision not to tell the appellant about Mr Carroll; she must have forgotten this when she gave committal evidence. Police officer Windeatt gave evidence at the pre-trial hearing[14] that they did not tell the appellant about Mr Carroll before the 28 January interview. Police officer Burkin also gave evidence at trial that she had no conversation with the appellant before the 28 January interview. This was also contrary to her evidence at the pre-trial hearing where she said she had given him a "Queensland warning" prior to the interview.[15]

[20] As her changed evidence at trial seriously affected her credit, the appellant asked the judge to reopen the s 590AA application and take into account her lack of credit in reconsidering whether she made any threats or offered inducements to the appellant.

[21] After re-reading his reasons for refusing the pre-trial application, his Honour stated that, although there were significant inconsistencies between the evidence of police officer Burkin at trial and her evidence at the pre-trial hearing, these also existed at the time of the pre-trial application. They did not raise a special reason within s 590AA(3). His Honour refused to reopen the application.

[22] In determining the application under s 590AA(3), his Honour had the distinct advantage of being both trial judge and the judge in the pre-trial application. As I have explained, I consider that his Honour, in refusing the pre-trial application, found as a matter of fact that police officer Burkin did not pass on Mr Carroll's details to the appellant. This finding was consistent with police officers Burkin and Windeatt's evidence at the pre-trial hearing. This aspect of his Honour's findings in relation to police officer Burkin's evidence was unfavourable to her. It is true that police officer Burkin's remarkable evidence at trial further undermined her general credibility. But it is implicit in his Honour's reasons for refusing the application to reopen that he considered police officer Burkin's lack of reliability as to whether she told the appellant about Mr Carroll prior to the interview on 28 January would not have affected his acceptance of her evidence as to the voluntariness of the confessions. Her evidence that she did not threaten or give inducements to the appellant to confess was supported by police officer Windeatt's evidence which his Honour apparently accepted. That being so, his Honour was entitled to find that police officer Burkin's surprising evidence at trial did not provide a special reason to reopen the application under s 590AA(3). This ground of appeal is not made out.

Conclusion

[23] As the appellant has not succeeded on any grounds of appeal, I would dismiss the appeal against conviction.

[24] **WHITE JA:** I have read the reasons for judgment of Dalton J and the additional reasons of the President. I agree with Dalton J and the President that the evidence supported the primary judge's conclusion that the appellant made a confession to police which was not prompted by threats or promises such as to render it involuntary. Nor were any other inducements operative upon his will.

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14 Set out in Dalton J's reasons at [36].

15 T 3-12.2-12 (AB 157).

[25] I do not, however, reach the same conclusion as Dalton J with respect to the discretionary basis for the exclusion. Her Honour has concluded that the primary judge erred in not separately and distinctly making findings about matters going to the personal fairness discretion. Not without some hesitation, I agree with the President's analysis that although matters going to fairness and public policy were merged, nonetheless, his Honour did reflect upon and make findings relative to both.

[26] It is then necessary to consider whether the primary judge erred in the exercise of his discretion. I agree with all that the President has written about the importance to public confidence in the administration of justice that police officers adhere to the spirit of their obligations, and, that a suspect/accused is entitled to be accorded his rights and not subject to improper police conduct. Although the present facts, like many areas where a discretion is exercised, may have caused another judge to come to a different conclusion, that does not entail a conclusion of error. This is one of those cases where judicial minds might well differ.[16]

[27] I agree with the further reasons of the President about the application to reopen the s 590AA application during the trial.

[28] I agree with the President that the appeal should be refused.

[29] **DALTON J:** The appellant appeals against his conviction on 30 March 2012 after a trial on two counts of murder and one count of unlawful wounding. The grounds of appeal are that confessional statements made by the appellant: (a) at Albury Police Station on 28 January 2009, and (b) at a re-enactment in South-East Queensland on 31 January 2009, should not have been left to the jury, either because they were not voluntary, or in the exercise of the Court's discretion. The confessional statements made by the appellant were the subject of a s 590AA application prior to trial. During the trial leave was sought by the appellant to reopen the pre-trial ruling. The refusal of that leave forms another ground of appeal to this Court.

[30] The facts of this matter are simple enough. The appellant and Griffiths had marijuana to sell. Brunelle acted as an intermediary for them, locating purchasers, Smith and Black. A time was arranged for the sale but it did not go ahead. The sale was rescheduled for 23 January 2009. On that date, Smith, Black and Brunelle drove to the meeting point and remained in their car. The appellant and Griffiths walked over to the car. The appellant killed Smith and Black with shots to their heads. Brunelle was wounded. In the interview of 28 January 2009 and the re-enactment of 31 January 2009 the appellant made comprehensive admissions.

Interview 28 January 2009

[31] Between 6.57 pm and 9.21 pm on 28 January 2009, Queensland Detectives Windeatt and Burkin interviewed the appellant at the Albury Police Station. The appellant had been arrested in New South Wales that day for murder. He was warned on arrest and again on arrival at the Albury Police Station. Further, soon after arrival at the Albury Police Station, the appellant was taken through, and given a copy of, a form which told him that the police would help him contact a lawyer, or a friend or relative. At the time of being given this information the appellant was

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16 *R v Belford & Bound* [2011] QCA 43.

asked if he wanted to speak to a solicitor and said, "Not at this stage." Later that afternoon New South Wales police asked the appellant whether he was prepared to tell them where the bodies of Smith and Black were. He replied that he did not think he should tell police "anything like that" until he spoke to a solicitor – AB1283. He was told that Queensland Police would come down later that afternoon so that he needed to make arrangements with the custody manager for a solicitor and to consider his position – AB1283. He did not attempt to make any such arrangements.

[32] On 28 January 2009 DSC Burkin travelled to Albury with a number of other detectives. At the s 590AA application she gave evidence that prior to arriving at the Albury Police Station she was contacted by a solicitor named Frank Carroll who said that he had been engaged by the appellant's family to represent the appellant. DSC Burkin said that Mr Carroll requested that she keep him up-to-date with the investigation. Mr Carroll's memory of this conversation was poor. He accepted that he may have asked to be kept up-to-date, "at least" – AB256. DSC Burkin spoke to New South Wales detectives and then the appellant – AB156. There was a recorded interview. Prior to the recording commencing she gave the appellant a warning in terms of the Queensland legislation.

[33] DSC Burkin was concerned about how she should react to the knowledge she gained from Mr Carroll having contacted her before she arrived at Albury Police Station. She rang back to Brisbane to ask senior officers (Godfrey and Swan) what her obligations were in relation to putting Mr Carroll and the appellant in contact with each other. The advice she received was that it was up to the appellant to request a solicitor – AB178. The decision made by DSC Burkin, after receiving advice, was that it was up to the appellant to request a solicitor and the solicitor himself had not asked for anything except to be kept up-to-date – AB183. DSC Burkin therefore did not tell the appellant that Mr Carroll had telephoned or pass on his details to the appellant. Neither did she tell Mr Carroll that police planned to interview the appellant that night. The issue of whether such information should have been given to him as part of keeping him up-to-date was not pursued below.

[34] At the committal hearing DSC Burkin gave evidence that:

> "I had phone contact with the solicitor. Here it is. Frank Carroll. He called me as soon as we arrived in Albury and advised that he was his legal representative and I passed that information on to Mr Playford, I believe. … When I spoke – when I first spoke to Mr Playford I advised him of those details." – AB184.

[35] The committal was in August 2009. On the s 590AA application in September 2011 DSC Burkin said that her evidence at the committal was incorrect and she had not passed the information about Mr Carroll on to the appellant. It was the appellant's case that the answer given at the committal necessarily implied that DSC Burkin had forgotten the deliberate decision she had taken, with advice via the telephone from Brisbane, not to tell the appellant that a solicitor had been engaged on his behalf. This was argued to reflect poorly on her credit.[17]

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[17] At the trial DSC Burkin said she could not remember whether or not she did tell the appellant that Mr Carroll had been engaged on his behalf. She thought maybe her version at committal – that she had told the appellant – was more accurate – AB708. This was the mainstay of the application made during the trial to reopen the s 590AA application.

[36] DSC Windeatt had this to say as to the decision not to tell the appellant that Mr Carroll had been engaged on his behalf:

> "You were concerned, weren't you, about what might happen if you did put him in touch with the solicitor whose contact details Burkin had. Do you agree?-- It was going to be introducing a third party that I didn't personally believe we needed to unless he asked to speak to that solicitor or asked to speak to a solicitor.
>
> But you were concerned about what might happen, weren't you?-- I was concerned that it could cause a complication in speaking to him.
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> That complication being that he might exercise his right to silence?-- Well, that might – that might occur.
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> That's a complication, is it?-- We wanted to speak to him as part of the investigation. We obviously wanted to obtain his version. Introducing a third party could have been helpful but there was nothing to suggest it was and unless he was going to ask for a solicitor, we made that decision, that that wasn't going to happen." – AB57
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> "…
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> Well, is it correct to say that if you didn't have to tell him, you certainly weren't going to? Do you agree?-- Yes.
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> Do you agree with me that the reasoning behind that decision was that if he was put in touch with a solicitor, the solicitor might give him advice to be quiet?-- That could occur.
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> And you wanted to avoid the risk of that happening, do you agree?-- That could occur and that we wouldn't like that to happen, yes." – AB58-59.

[37] At the beginning of the interview on 28 January 2009 the appellant agreed he had been warned outside the interview. He was warned again by a New South Wales police officer. He was then warned a second time by Queensland Police, as follows:

> "SCON WINDEATT: Sorry, but aren't you going to go <u>back</u> through our caution?
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> SCON BURKIN: Might [INDISTINCT] Oh, just for, uh, completeness, Gary, we'll go through our Queensland caution just so we don't have any dramas, it's [INDISTINCT] Before I ask you any questions I must tell you, you have the remo-, the right to remain silent. This means you do not have to say anything or answer any question or make any statement unless you wish to do so. However, if you do say something or make any statement, it may later be used as evidence. Gary, do you understand that warning?
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> PLAYFORD: Yes.
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> SCON BURKIN: What does that warning mean to you?
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> PLAYFORD; Uh, not, it doesn't really mean much, if you don't say anything.
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> SCON BURKIN: What it means is you don't have to--
>
> PLAYFORD: Yeah.

SCON BURKIN: Say anything, okay.

PLAYFORD: Yeah, I know but.

SCON BURKIN: The law says--

PLAYFORD: Yeah.

SCON BURKIN: You don't have to say anything.

PLAYFORD: Oh yeah, I understand that but that still makes no sense 'cause.

SCON BURKIN: Okay.

PLAYFORD: Yeah.

SCON BURKIN: But it says if you answer any questions--

PLAYFORD: Yeah, yep.

SCON BURKIN: They can be used in court.

PLAYFORD: Yeah.

SCON BURKIN: Okay, um, are you Aboriginal or Torres Strait Islander?

PLAYFORD: No.

SCON BURKIN: No. Um, you also have the right to speak to a friend and have them, probably a little bit hard to have them present during the interview--

PLAYFORD: Mm.

SCON BURKIN: But you certainly can have someone to sit in with you during this interview and the interview can be, um, suspended for a reasonable time for that to be organised. Did you wish to do that?

PLAYFORD: No.

SCON BURKIN: No.

PLAYFORD: There's no one here [INDISTINCT]

SCON BURKIN: Uh, you also have the right to speak to a solicitor or a lawyer and, um, have them present if you wish and the interview can again be suspended for a reasonable time for that to be organised. Did you wish to do that?

PLAYFORD: No, not, not now, not this point in time, no.

SCON BURKIN: No. Okay, but you know you have that right?

PLAYFORD: Yeah." – AB1892-3. (my underlining).

[38] Almost immediately after this part of the interview the appellant told police that, due to financial pressure, he and Griffiths had been persuaded by Brunelle to engage in a drug deal but had got cold feet and tried to call it off. When this occurred Brunelle told him that the people he had arranged the deal with were dangerous and that they would all be dead if they pulled out. The appellant then said that he was very scared, he needed to try to protect himself and his family somehow and that the

other party to the drug deal could not simply be told to go away, "so it was them kill us or us kill them basically and I had to protect my family. Good job isn't it, good job I did it them. … I had to shoot these guys to protect my family." – AB1287. The appellant goes on to make admissions about disposing of the bodies and setting fire to the car which the deceased men and Brunelle had arrived in.

[39] The appellant told police where he believed the bodies of the deceased men were buried and the following exchange occurred:

> "SCON BURKIN: If we went back to your place, would you be willing to assist us by looking at the layout of the land and s-, pointing out where the holes were and--
>
> PLAYFORD: Yeah.
>
> SCON BURKIN: S-, suggesting basically, you know, when you last left the land to look like that--
>
> PLAYFORD: Yep.
>
> SCON BURKIN: Type of thing.
>
> PLAYFORD: Yep.
>
> SCON BURKIN: Would you be happy to do that?
>
> PLAYFORD: Mm." – AB1340.

[40] Later in the interview the following exchange occurred:

> "SCON BURKIN: Um, I've asked you earlier about, um, if you were willing to go to your house to show us the lay of the land. Would you be willing to--
>
> PLAYFORD: Have a look around.
>
> SCON BURKIN: Basically run us through the whole scenario from that evening, where.
>
> PLAYFORD: From.
>
> SCON BURKIN: Where, like, you parked at Pub Lane, where you moved the bodies and things like that.
>
> PLAYFORD: Mmhmm.
>
> SCON BURKIN: Are you willing to do that?
>
> PLAYFORD: Yeah." – AB1360.

[41] Lastly, towards the very end of the interview after the recording had initially been terminated, the recording resumes and it was recorded that the appellant had said to police off-tape that he had remembered something which he wanted to add to his record of interview. There follows some further information which seems to have been intended by the appellant to be self-serving. Then, in accordance with New South Wales practice, a police officer who had not been involved in the interview so far attended and asked questions directed at whether or not the interview was voluntary and received answers to the effect that it was.

Re-enactment 31 January 2009

[42] By 31 January 2009 the appellant had been brought back to Queensland. At 9.55 am on 31 January 2009 a magistrate gave an order that the appellant be

removed from the Beenleigh watch-house to participate in a re-enactment. The order was given by telephone and the relevant paperwork signed by the magistrate on 2 February 2009. DSC Burkin applied for the removal order and was told by the on-call magistrate that the order would be made over the telephone. She questioned the magistrate as to whether that was "allowable". Another Magistrates Court was contacted. A second magistrate (who eventually made the order) again told DSC Burkin that she would make the order over the telephone – AB160-161.

[43] DSC Burkin and DS Godfrey, together with another unidentified officer, participated in the re-enactment. At the beginning of the re-enactment the appellant was warned. He was asked whether he understood the warning and paraphrased it. He was told he had the right to have a friend or a solicitor present or speak to them and said that he did not wish to do that.

[44] It appears that between the commencement of the tape at 10.46 am (AB1561) and 11.42 am (AB1565) the appellant was driven from the Beenleigh watch-house to his home in North Maclean. There is no recording during this time except for a fragment at page 5 of the transcript (AB1564). The police start and then stop the tape at 10.56 am. They start it again at some unspecified time, but, before DSC Burkin says anything of substance, DS Godfrey says, "Mate just before we kick off" and the recording is again stopped. It is clear that prior to the tape being switched off at this point, the appellant is with police in a police car and they are waiting for a scenes-of-crime officer to organise a video camera. There are further gaps in the recording during the re-enactment as the appellant travels to different relevant locations with police.

[45] During the re-enactment the appellant admits to digging holes prior to 23 January 2009 to bury the deceased men in, and arranging that Griffiths would bring the bodies to the holes and bury them after the shooting. He makes admissions to shooting Smith and Black and various other admissions as to his conduct afterwards and his motives. At the end of the recording he agrees that he has not been threatened or induced in any way and says that he is happy with the way the police have treated him.

Evidence given by the Appellant on the s 590AA Application

[46] A comparison of the watch-house records and the time commenced on the recording of the interview of 28 January 2009 reveals that the appellant was out of watch-house custody for 17 minutes before the interview commenced. The evidence was that the watch-house clocks operated independently of the recording system used for the interview, so there can be no precision about this time interval. The appellant gave evidence that in this time there was unrecorded conversation between himself and DSC Burkin, and that threats and inducements were made to him.

[47] DSC Burkin and DSC Windeatt acknowledged that there was unrecorded conversation in this time, but denied that it was anything more than an introduction and a warning given to the appellant. In cross-examination it was put to DSC Burkin that she had never mentioned before giving evidence on the s 590AA application that she administered a warning to the appellant before the beginning of the taped interview on 28 January 2009 – AB180. She accepted this.

[48] The appellant gave evidence that before the recorder was switched on, on 28 January 2009, he asked to see a lawyer and DSC Burkin took out her notebook and asked him what his lawyer's name was. When he said he did not know the name of any lawyer she closed her notebook and asked whether he wished to speak to anybody else. He said he wished to speak to his wife but did not have a phone number for her and DSC Burkin said she would see what she could do about obtaining a phone number. DSC Burkin denied this conversation occurred.

[49] The appellant gave evidence that before the recorder was switched on DSC Burkin told him that they had been speaking to Brunelle who had "told them what I've done" and that his co-accused Griffiths was "upstairs, currently rolling on me". Further, he swore that DSC Burkin told him that the police had interviewed the appellant's wife and that, "if I didn't start talking that they would charge her with accessory after the fact." DSC Burkin denied saying these things, although she allowed that the appellant was told the police were speaking to Griffiths.

[50] The appellant swore that he prevaricated (at extract at [37] above) when asked if he understood the warning because, "I wanted to bring up with her how come she told me before that I'd better start talking to her and now she's telling me all of a sudden I don't have to talk, so it didn't make any sense." – AB262.

[51] The appellant swore that after the unrecorded conversation on 28 January 2009 he felt "helpless"; that there was nothing he could do because of the threat made to charge his wife, and that there was no-one there to help him.

[52] As to his participation in the re-enactment on 31 January 2009, the appellant said that he took part in it because, "I was told by Detective Godfrey that if I participated in a re-enactment with them he would get me my last decent feed while we were out for that day and he would see what he can do to organise a contact visit with my wife and children." – AB265. He said this conversation happened in the cells at Beenleigh when only he and Detective Godfrey were present. Detective Godfrey denied this conversation took place – AB219.

[53] The evidence was that on the way back from the re-enactment, the police and the appellant stopped and bought a pie at Yatala – AB190. Further, that while he was at the watch-house at Beenleigh, DSC Burkin arranged a contact visit with his wife and children. DSC Burkin conceded that it was highly unusual to have organised such a visit, but said that she felt compassionate towards the appellant – AB167. DSC Burkin denied that she promised the appellant a contact visit with his wife and children if he continued to help police, or a decent meal if he continued to help police – AB190.

[54] In cross-examination the appellant conceded that on the DVD recordings of the interviews there was no apparent sign of reluctance on his part and that the police asked questions in a "mildly mannered" and "gentle" way – AB269. He could point to nothing in any of the interviews that indicated he had been threatened – AB270. He also conceded that he never made any enquiries of police as to their not having charged his wife because of his co-operation – AB278-279. That is, he never asked whether they had fulfilled their part of the alleged bargain, or indeed whether what he had given them was sufficient to entitle him to this. This is notwithstanding the fact that he had conversations with the detectives subsequently as to his concerns about his wife and children – AB285.

Voluntariness – Primary Judge's Findings

[55] The primary judge not only heard the recordings of the interviews in question but also heard and saw the appellant, DS Godfrey, DSC Burkin and DSC Windeatt give evidence on the s 590AA application. The credit of all of them was in issue by reason of the differing accounts they gave, as outlined above. Further, the application dealt with five interviews or statements and separate allegations made in relation to each of them, that is, more matters, and more matters bearing on credit, were dealt with on the application than we are dealing with on this appeal. It is evident from the reasons that the primary judge was assisted by his observations of the appellant's demeanour. Further, both counsel below made submissions as to the inherent plausibility of the versions advanced by the respective witnesses and made submissions that there were objectively proved matters which bore upon the likelihood of their witnesses' respective versions. The primary judge outlined those objective factors at paragraphs [18] and [19] of his reasons for judgment and then, as to his assessment of the appellant's credit, and his conclusion on voluntariness said this:

> "[21] The DVD recording of the interview was played during this application. Mr Playford was, at several times, clearly very emotional and upset. He and Mr Griffiths had been travelling for some time and had not had much sleep and that, no doubt, would have played some part in his demeanour. Nevertheless, his behaviour as recorded did not suggest to me one way or the other that he had been threatened or the subject of inducements. If anything, his answers to many questions appeared to be part of some possible claim that he had felt threatened by the deceased and that he acted in self-defence.
>
> [22] Mr Playford may not have had much formal education but he is not unintelligent. The answers which he gave in the interview were those of a person who understood what he was being asked. Similarly, in evidence, he was attentive to the questions and gave responsive answers. He took every advantage of the open ended questions asked of him in cross-examination to advance his version of events when possible. His behaviour during the recorded interview and the manner in which he answered questions were consistent with a person who appeared to be anxious to be truthful and to 'get it off his chest'.
>
> [23] The conduct of Detective Burkin with respect to the information concerning Mr Carroll is to be deprecated. It was clear that she was not convinced of the propriety of her actions in that regard because she sought confirmation of her conduct from senior officers.
>
> [24] Nevertheless, the task which has to be faced here is to make an assessment of all the circumstances surrounding the making of the statement including the physical condition of the particular person and the other matters to which I have made reference above. Mr Playford has consistently accepted and given evidence that he: was warned, had the

> opportunity to decline to take part in an interview, and that he had the opportunity to seek legal assistance. His evidence about the conduct of the police was unconvincing and the inconsistencies in the police evidence were not of sufficient weight to lead me to the view that I could not rely on them with respect to other matters. These matters, together with his volunteering further information, leads me to the view that the prosecution has established on the balance of probabilities that Mr Playford's will was not overborne when making the statement in the record of interview and that it should not be excluded from evidence." (my underlining).

[56] It was submitted on behalf of the appellant that there was no finding made by the primary judge as to whether the threats and inducements of which the appellant gave evidence were made. The Crown relied on the underlined passage in the extract above as such a finding, particularly in the context of the clear definition of credit issue at [17] and then at [18] and [19] of the primary judge's reasons. I think there is no doubt that the underlined part of paragraph [24] above was a credit finding against the appellant "about the conduct of the police." Given the allegations made by the appellant about what preceded the recorded interview on 28 January 2009, this must mean that the primary judge preferred the evidence of the police as to what was said in the conversation which took place before the recorder was turned on. On the facts of this matter, it is difficult to see that a credit finding "about the conduct of the police" could have been about anything else. In my view, it is a resolution of the issue defined at paragraph [17] of the reasons: "Both detectives denied that any of the conversation alleged by Mr Playford which would have amounted to threats or inducements had taken place." There were no inconsistencies in the police evidence as to those matters.

[57] Part of the appellant's submission to this Court involved the proposition that it was "simply not open" to the primary judge to conclude that the unrecorded threats and inducements alleged by the appellant were not made. That is not so, there was a clear issue for determination, and the primary judge resolved it, largely having regard to credit findings.

[58] Section 10 of the *Criminal Law Amendment Act* 1894 (Qld) provides:

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

[59] The conclusion of the primary judge at paragraph [24] is that the prosecution had proved that "Mr Playford's will was not overborne when making the statement in the record of interview …" This language seems to originate in the appellant's written submissions to the primary judge – [10], [17], [18], [54] and [56] of the first of those submissions. The words seem to me to be a reference to the last part of s 10 above, "every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown." That is, it seems to me that the primary judge has made a finding that the confessional statements made on 28 January 2009 by the appellant were not induced by any preceding threat or promise. Whether the alleged threats and inducements had been

made, and, if so, whether they induced the confessional statements, were both live issues before the primary judge. It is not unusual that the primary judge made findings as to both issues – cf paragraph [34] of his reasons, below.

[60] I can see nothing erroneous about the primary judge's approach to, or findings on, the issue of voluntariness.

Unfairness – Primary Judge's Findings

[61] The appellant's written submissions below made it clear that the application was to exclude the confessions both because they were unfair to the appellant, and for public policy reasons – see paragraphs [1], [10] and [19] to [23] of the first set of written submissions below. The primary judge's decision and reasons as to these discretionary considerations are as follows:

> "[28] For reasons which I will later deal with concerning the likelihood of anything that Mr Carroll might have said influencing Mr Playford, and working on the basis that there were the breaches contended for by the applicant, I need to take into account the considerations set out, for example, in *Ridgeway v The Queen*; and *The Queen v Stead.* Exclusion of the evidence would have a substantial potential to damage the prosecution case. The fairness of the admission of such evidence must be considered against a broad background. If the applicant is, in truth, guilty and an acquittal resulted through the exclusion of this evidence, it would mean that a substantial social cost would attend suppression by the court of the truth of what occurred. I will not exclude the evidence of the record of interview on the bases of either the breach of legislative or regulatory provisions or any unfairness said to arise from that."

[62] In the above passage, the primary judge refers to the likelihood of Mr Carroll's advice influencing the appellant. Mr Carroll spoke to the appellant for the first time very briefly at about 2.00 pm on 30 January 2009. Mr Carroll's evidence was that he told the appellant not to make any statement to any person and not to talk to anyone, even an alleged accomplice. The appellant first swore he could not remember this advice. Then he swore it was not given. This was in response to questioning as to why he participated in the re-enactment after being given the advice. The primary judge found that the advice was given. The primary judge does not find that, had the appellant been given advice to exercise his right to silence before participating in the interview of 28 January 2009, he would have disregarded it and made the confessions he made on that day despite advice. The decision of the appellant to participate in the re-enactment after advice (in effect) not to, bore on the question of what the appellant would have done had he received advice to exercise his right of silence before the interview of 28 January 2009. However, it was by no means determinative of it: by the time the advice was given the appellant had comprehensively inculpated himself in the interview of 28 January 2009. The decision to participate in the re-enactment contrary to advice was therefore made against a very different background to a hypothetical decision before giving the 28 January 2009 interview. The accused swore that had he been given advice to remain silent before the interview of 28 January 2009, he would have taken it – AB261. Mr Carroll swore he would have given such advice had he spoken to his client – AB254.

[63] On analysis, the appellant's submission as to the exercise of discretion is that the primary judge in this case made the same error as the primary judge in *Cleland v The Queen*.[18] That is, having found that the confession was voluntary, the primary judge considered whether to exclude it in the public policy (*Bunning v Cross*)[19] discretion, but did not separately consider whether or not it ought to be excluded on the grounds that its reception would be unfair to the accused (*R v Lee*).[20]

[64] The development of principles in relation to excluding confessions is traced in the judgments in *Cleland v The Queen*. The principle in *R v Lee*, dealing with the discretion of the Court to reject confessional evidence where its reception would be unfair to the accused, pre-dated the development of the principles in *R v Ireland*[21] and *Bunning v Cross*. Neither *R v Ireland* nor *Bunning v Cross* was a case involving confessional evidence and, at the time *Cleland* was decided, one of the reasons for granting special leave was that there was confusion in the State Courts of South Australia as to whether the principles in *R v Ireland* and *Bunning v Cross* applied to confessional evidence at all.

[65] In *Cleland* the High Court is very clear that the *R v Lee* discretion is different from the *R v Ireland* discretion. In that regard Gibbs CJ cited the following passage from *Bunning v Cross*:

> "What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking 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. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration."[22] (my underlining).

[66] The High Court in *Cleland* held that both the unfairness discretion and the public policy discretion applied in cases of confessional evidence, and that the older principle in *R v Lee* was not subsumed in or modified by the newer principle in *Bunning v Cross*. Gibbs CJ said:

> "There can be no doubt that the principles laid down in such cases as *R v Lee* remain quite unaffected by *Reg v Ireland* and *Bunning v Cross*. It would be absurd to suppose that the established rule designed to protect an accused person from being convicted on evidence which it would be unfair to use against him can be weakened by a newer doctrine whose purpose is 'to insist that those who enforce the law themselves respect it'."[23]

[67] Likewise Deane J said:

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18 (1982) 151 CLR 1, 4-5.
19 (1978) 141 CLR 54.
20 (1950) 82 CLR 133, 151.
21 (1970) 126 CLR 321.
22 *Bunning v Cross*, pp 74-75, per Stephen and Aickin JJ (Barwick CJ concurring).
23 *Cleland*, above, p 8, citing *Bunning v Cross*, p 33.

> "It is plain that there is nothing in the development or context of the more general principle involving the discretionary rejection of unlawfully or improperly obtained evidence [*R v Ireland*] which could warrant abrogation or modification of the well-established principle that evidence of an alleged confessional statement should not be admitted if its reception would be unfair to the accused."[24]

[68] And Dawson J said:

> "The principle affirmed by *Bunning v Cross* does not, as was pointed out by Stephen and Aickin JJ, entrench upon the quite special rules which apply in the case of confessional evidence."[25]

[69] The judgments in *Cleland* discuss the interrelation of the discretion to exclude on the basis of unfairness to the accused, and the *R v Ireland* discretion, particularly where, as must very often be the case, the basis for the unfairness alleged is the use of improper or illegal methods by police officers. After having recognised that the *R v Lee* and *Bunning v Cross* discretions were distinct, Dawson J went on to say:

> "That does not mean that the discretionary processes involved have entirely separate areas of operation and that there is no overlap between them. Clearly, if a confessional statement has been obtained by the use of improper or illegal means but nevertheless can be shown to be voluntary, a discretion is exercisable by the trial judge to exclude it from evidence on the basis that to admit it would be unfair to the accused. The exercise of that discretion will not turn upon the policy considerations which must otherwise exercise the judge's mind in the case of evidence which is improperly or illegally obtained. It will entail a consideration of the result of such methods and whether it would be unfair to the accused to admit it in evidence in the sense that to do so would result in an unfair trial. If it would, then that is the end of the matter and the confessional statement will be excluded from evidence. If it would not, then there still remains to be considered whether the policy considerations referred to in *Bunning v Cross* nevertheless require the rejection of the evidence. … The rule in *Bunning v Cross* posits an objective test, concerned not so much with the position of an accused individual but rather with whether the illegal or improper conduct complained of in a particular case is of sufficient seriousness or frequency of occurrence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end."[26]

[70] Of the interrelation between the two discretions, Deane J said in *Cleland*:

> "It follows that where it appears that a voluntary confessional statement has been procured by unlawful or improper conduct on the part of law enforcement officers, there arise <u>two independent, but related, questions</u> as to whether evidence of the making of the statement should be excluded in the exercise of judicial discretion. That does not mean that there will be a need for two independent inquiries on the voir dire. The material relevant to the exercise of

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24 *Cleland*, above, pp 20-21.

25 *Cleland*, above, p 33.

26 *Cleland*, above, pp 33-34.

> both discretions will ordinarily be the same. The unlawful or improper conduct of the law enforcement officers will ordinarily be relevant on the question of unfairness to the accused and unfairness to the accused will ordinarily be relevant on the question of the requirements of public policy. The task of the trial judge, in such a case, will involve determining whether, on the material before him, the evidence of the voluntary confessional statement should be excluded for the reason that it would be unfair to the accused to allow it to be led or for the reason that, on balance, relevant considerations of public policy require that it should be excluded."[27] (my underlining).

[71] It is plain that Deane J did not mean that consideration ought not be given to each discretion independently. Deane J concludes that the trial judge in *Cleland* was in error because, having determined that the confession there in issue was voluntary, he then applied *Bunning v Cross* principles and allowed the admission of it. The primary judge: "failed to advert at all to the question whether evidence of the alleged confessional statement should be excluded in the exercise of the particular and distinct discretion to exclude it on the ground that it would, in the circumstances, be unfair to the applicant to allow evidence of it to be led on his trial. In that, his Honour was in error."[28]

[72] Dawson J was of the same view. He noted that the trial judge in *Cleland* acted on the sole ground that, "to admit the evidence would not infringe the rule in *Bunning v Cross*." In Dawson J's view, this involved error:

> "… the trial judge ought also to have considered whether, in the exercise of his discretion, he ought to have rejected any confession alleged to have been made by the accused upon the basis that it would have been unfair to the accused to admit it."[29]

[73] It may be that a confession which would be admitted in the exercise of one discretion is excluded in the exercise of the other. This may be so even if the same factual circumstances are considered, for:

> "… when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy'."[30]

[74] Various comments have been made in the cases that it is difficult to imagine a case where a confession would properly be admitted in the exercise of the unfairness discretion but excluded in the exercise of the public policy discretion.[31] However, the possibility of such a case has been recognised.

[75] In *Cleland* Gibbs CJ thought that the factual circumstances of that case meant that the application of the *Bunning v Cross* public policy discretion was more likely to

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27 *Cleland*, above, pp 23-24.

28 *Cleland*, above, p 25.

29 *Cleland*, above, p 36.

30 *Foster v The Queen* (1993) 67 ALJR 550, 554, cited by the majority in *R v Swaffield* (1998) 192 CLR 159, 191.

31 For example, Gibbs CJ in *Cleland* at p 9 and Dawson in the same case at p 35, citing Brennan J in *Collins v The Queen* (1980) 31 ALR 257, 317.

produce a result favourable to the accused than the exercise of the *R v Lee* unfairness discretion, and for that reason dismissed the appeal – p 10. Because the *Bunning v Cross* or public policy discretion involves a weighing of factors, including the public interest in seeing that a wrongdoer is brought to conviction,[32] it may be that the application of the *Bunning v Cross* discretion is in some cases likely to favour admission of a confession where the unfairness discretion would not. This seems to be what Mitchell J had in mind in *R v Barker,*[33] "So that where confessional evidence is improperly obtained it is not sufficient that the weight of public policy favours its admission. It remains necessary to decide whether the evidence should be excluded upon the ground of unfairness to the accused. …" In a case such as this one, where the crime to which confession was made was grave and the confession was voluntary, and reliable, it may well be that matters weighed in the exercise of the *Bunning v Cross* discretion were more likely to lead to admission of the evidence, than matters to be properly considered in the exercise of the unfairness discretion.

[76] Since *Cleland's* case the High Court has continued to regard the discretion in *R v Lee* as separate and distinct from that in *Bunning v Cross – R v Swaffield; Tofilau v The Queen.*[34] In *Swaffield*[35] the majority recognised that there were "Four bases for the rejection of a statement by an accused person … to be discerned decisions of this Court" and went on to describe:

> "The second basis [*R v Lee*] is that it would be unfair to the accused to admit the statement. The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of the accused person. The third basis [*Bunning v Cross*] focuses, not on unfairness to the accused, but on considerations of public policy which make it unacceptable to admit the statement into evidence, notwithstanding that the statement was made voluntarily and that its admission would work no particular unfairness to the accused. The purpose of the discretion which is brought to bear with that emphasis is the protection of the public interest." (my underlining).

[77] The underlined part of the extract above is important as revealing the type of matters which fall to be considered when exercising the unfairness discretion. Further as to this, the majority in *Swaffield* said:

> "54. Unfairness then relates to the right of an accused to a fair trial; … 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. And once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred."

[78] In *Cleland* the High Court had remarked upon the overlap between the factual considerations relevant to the exercise of the unfairness discretion and the public policy discretion, particularly when police conduct was relied upon as being improper. The majority judgment in *Swaffield* records the following:

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32 *R v Cleland*, above, per Deane J p 20.
33 (1978) 19 SASR 448, 451, cited by Deane J in *Cleland*, above, p 22.
34 (2007) 231 CLR 396, 402.
35 (1998) 192 CLR 159, 188-189.

> "69. It is appropriate now to see how the argument developed in the present appeals. When the Court resumed after the first day's hearing, the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards."

[79] It is fair to say that the majority judgment does not give an unequivocal answer as to whether or not this new approach ought to be adopted. It continues:

> "70. … The question which arises immediately is whether the adoption of such a broad principle is an appropriate evolution of the common law or whether its adoption is more truly a matter for legislative action. Subject to one matter, an analysis of recent cases, together with an understanding of the purposes served by the fairness and policy discretions and the rationale for the inadmissibility of non-voluntary confessions, support the view that the approach suggested by the Chief Justice in argument already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material. The qualification is that the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained." (my underlining).

[80] Importantly in the factual circumstances here, it seems that the qualification which the majority put on the proposed new broad approach is that such an approach not diminish the independent focus of enquiries to be made when the unfairness discretion is exercised. This is in accordance with the strong statements of Gibbs CJ, Deane and Dawson JJ in *Cleland* that the application of public policy discretion to confessions should not weaken or abrogate the principles underlying the well-established unfairness discretion – see paragraphs [66], [67] and [68] above.

[81] Having made that statement, the majority in *Swaffield* turned to a further analysis of the unfairness and policy discretions, during the course of which they recognise that considerations relevant to the unfairness discretion and public policy discretion may, at times, overlap, but also recognise that they are separate discretions and evidence may be independently excluded under either of them.

> "74. One matter which emerges from the decided cases is that it is not always possible to treat voluntariness, reliability, unfairness to the accused and public policy considerations as discrete issues. The overlapping nature of the unfairness

> discretion and the policy discretion can be discerned in *Cleland v The Queen*. It was held in that case that where a voluntary confession was procured by improper conduct on the part of law enforcement officers, the trial judge should consider whether the statement should be excluded either on the ground that it would be unfair to the accused to allow it to be admitted or because, on balance, relevant considerations of public policy require that it be excluded. …" (my underlining).

[82] The judgments of Gibbs CJ (p 9), Deane J (p 24) and Dawson J (pp 33-34) in *Cleland* all discuss the three separate enquiries possible where a confessional statement is sought to be admitted: (a) whether it was voluntary; (b) whether its reception would be unfair to the accused, and (c) whether *Bunning v Cross* principles require it to be excluded. All three judges discuss these concerns in the same order. So does Brennan J in *Duke v The Queen*:

> "It was decided in *Cleland v The Queen* that an objection to the admission of confessional evidence may require a trial judge to determine (1) whether the confession is voluntary; (2) whether it is fair to use the confession against the accused; and – a distinct question – (3) whether, for reasons of public policy, the evidence should be rejected."[36]

The majority in *R v Swaffield* cite a passage from *Foster v The Queen*[37] to the effect that in cases where both the unfairness and the public policy discretions are relied upon, "it will commonly be convenient for the court to address first the question whether the evidence should be excluded on the ground that its reception and use as evidence would be unfair to the accused."[38] This is only consistent with an approach that considers both discretions separately.

[83] In *Tofilau* the High Court recognises the two distinct discretions to exclude confessional statements which are voluntary. Gleeson CJ said:

> "The first is a case where it would be unfair to the accused to admit the statement. The relevant form of unfairness is related to the law's protection of the rights and privileges of the accused person. The second is a case where considerations of public policy, such as considerations that might be enlivened by improper police conduct, make it unacceptable to admit the statement."[39]

[84] Gleeson CJ otherwise agreed with the judgment of Callinan, Heydon and Crennan JJ as to discretionary matters – [24]. That joint judgment contains the following passage:

> "399. Counsel for Clarke in this Court submitted that while it was conventional to analyse discretionary exclusion of confessions as involving two 'discretions' – to reject a confession the reception of which would be unfair, and to reject a confession that was illegally or improperly obtained on public policy grounds – in truth there was but a single

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36 (1989) 180 CLR 508, 512.
37 (1993) 67 ALJR 550, 554.
38 *Swaffield*, above, p 191.
39 *Tofilau*, above, p 402.

> discretion. It is not necessary to resolve this question, since the outcome of the appeal will be the same whatever the answer."

[85] In *Tofilau*, Gummow and Hayne JJ say that because of the factual limitations of the case, "it is neither necessary nor appropriate to attempt to chart the metes and bounds of the discretion" to exclude for unfairness – [65]. At [68] this judgment cites the majority in *Swaffield* to the effect that, "unreliability, although an important aspect of the unfairness discretion is not the only consideration that may be engaged" and cites *Foster v The Queen*.[40] Lastly the judgment notes that, "… the chief focus for the discretionary questions that arise remains upon the fairness of using the accused person's out-of-court statement, rather than upon any purpose of disciplining police or controlling investigative methods." – [68].

[86] In my view neither *Swaffield* nor *Tofilau* changes the approach taken by the High Court in *Cleland*, ie, that where both the unfairness and the public policy discretions are relied upon to exclude evidence, there must be a separate consideration of, and exercise of discretion in relation to, both. In my view the primary judge did not separately consider the question of whether in the circumstances it would be unfair to the accused to receive the confession of 28 January 2009. He cites two cases dealing with the public policy discretion and gives reasons as appropriate to the exercise of the public policy discretion. There is no separate consideration of the rights and privileges of the accused, and, in particular, on the facts here, his right to silence.

[87] I turn now to the cases which give some guidance as to the matters to be considered in exercising the unfairness discretion. In accordance with the qualification underlined at the end of paragraph 70 from *Swaffield*, extracted above, the majority judgment continues:

> "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. …" (my underlining).

[88] Further in this vein:

> "91. … In the light of recent decisions of this Court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that,

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40 (1993) 67 ALJR 550, 554-555.

> having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. …" (my underlining).

[89] In *Duke v The Queen*[41] Brennan J discussed the discretion to exclude reception of a confession as unfair. He said:

> "The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded. Trickery, misrepresentation, omission to 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 a 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." (my underlining).

[90] Speaking of the provisions which require that an accused person is told of his right to consult with a lawyer pursuant to s 249 and s 250 of the *Police Powers and Responsibilities Act* 2000 (PPRA), Keane JA said in *R v LR*,[42] "These provisions exist to ensure that a suspect is able to obtain advice about what should be said to the police. In other words, the purpose of these provisions is to ensure that a suspect is aware of, and in a position to exercise, the right to silence in the face of police questioning." The decision of Keane JA in *R v LR* continues:

> "The decision of the High Court in *The Queen v Swaffield*, and in particular the joint judgment of Toohey, Gaudron and Gummow JJ,http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QCA/2005/368.html - fn11#fn11 requires that the discretion to exclude confessional evidence should be exercised, where voluntariness is not in issue, by reference to considerations of reliability and respect for the right of an accused to stay silent. As their Honours said:
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> > '... 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

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41 (1989) 180 CLR 508, 513.

42 [2006] 1 Qd R 435, pp 449-450.

> being disadvantaged in the conduct of his defence.'" (footnotes omitted).[43]

[91] In *R v Belford & Bound*[44] all members of the Court recognised that in considering the discretion to exclude confessional evidence which was voluntary and reliable it was necessary to separately, and specifically, consider whether or not the police conduct was aimed at, or had the effect of, undermining the accused's right to silence.[45]

The Appellant's Case on Unfairness

[92] The appellant's case on unfairness below relied upon various breaches of the PPRA and Code, and the conduct of police in not telling the appellant that a solicitor had been engaged on his behalf.

[93] In breach of s 435 of the PPRA, the Queensland officers did not record the conversation which occurred prior to the formal recorded interview on 28 January 2009 even though that conversation, on the police version, included a caution. On the officers' account, which the primary judge accepted, that conversation consisted of nothing more than an introduction and a warning, and a reference to them interviewing Mr Griffiths. The recording device ought to have been turned on. No sensible reason was advanced as to why it was not. Further, the recorder having been left off, the conversation and caution should have been adopted once it was turned on. The opening words of the extract at paragraph [37] above do show some informal attempt was made in this regard so far as the caution was concerned.

[94] Next, the appellant relied upon a collection of rules which all had as their purpose that described by Keane JA in *LR*, facilitating advice to a suspect to ensure cognisance of the right to silence. The appellant did not contend that the letter of any rule had been breached, but argued that taken cumulatively, together with conduct in relation to Mr Carroll, the accused had been deprived of legal advice as to his right to silence when dealing with the police. This argument, based on the spirit of the rules, is consistent with the use of the PPRA and the Code by the Courts. They do not govern the admissibility of evidence, but they are to be "regarded as a yardstick against which issues of unfairness (and impropriety) may be measured".[46] I turn to the specific matters raised by the appellant.

[95] First, there was no investigation by the police as to why the appellant was willing to proceed with the interview without speaking to a solicitor, although he had been unwilling to speak to police without legal advice earlier in the day. DSC Burkin knew that earlier in the day the appellant had refused to answer questions as to where the deceaseds' bodies were without speaking to a lawyer. She recited this in the introductory part of the interview. She conceded that, had the appellant told her first that he wished to speak to a solicitor and then said to her that he did not wish to do so, she would have been obliged to ask what had made him change his mind, and in particular whether any person in a position of authority had asked him to change his mind or induced his decision – AB176. She said it did not occur to her to ask in

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43 *R v LR*, above, p 452, citing *Swaffield* at p 197.

44 [2011] QCA 43.

45 At paragraphs [51], [54], [62] and [64], per Holmes JA (who dissented in the result), [90], [92]-[98] per Fraser JA and [131]-[136] per White JA.

46 Keane JA in *R v LR*, above, 451-2, citing *Swaffield*, above, at 190.

the case of the appellant because he had not told her earlier in the day that he would not speak without a solicitor, he had told someone else – AB178.

[96] DSC Burkin also conceded that had Mr Carroll been at the front desk of the police station rather than on the telephone, she should have told the appellant that his solicitor was present and enquired whether he wished to consult with his solicitor. Mr Carroll however, was in Queensland. Further, had Mr Carroll asked about the appellant's whereabouts, s 432 of the PPRA would have obliged the detectives to tell the appellant of the request. But Mr Carroll did not ask that particular question. Instead he asked to be kept up-to-date. The obvious thing to keep him up-to-date, was to tell him of the plan to interview the appellant that night. Had he been told of this, Mr Carroll might have asked to be put into contact with his client so he could advise him. Mr Carroll's evidence was that, had he had the chance, he would have advised his client to say nothing until Mr Carroll had had a chance to assess his client's state of mind – AB254. He did give him advice like that when he first saw him on 30 January 2009. Mr Carroll could not recall what was said in the conversation he had on the afternoon of 28 January 2009 with DSC Burkin. He said his practice was to ask for a phone number to call in order to get in touch with his client – AB256. He thought he was left with the impression that the appellant was on his way back to Brisbane and that there was no point trying to contact the Albury Police Station – AB255 and 256.

[97] Section 23(5) of the PPRA Code requires that police officers must not do or say anything with the intention of dissuading a person from obtaining legal advice.

[98] As to not telling the appellant about Mr Carroll's engagement, DSC Windeatt was candid in saying that the detectives did not tell the appellant of Mr Caroll's engagement because Mr Carroll might have given the appellant advice to exercise his right to silence. In my view, in all the circumstances of this case, it was quite wrong of the police not to tell the appellant that a solicitor, engaged by his family, had contacted them.

Disposition

[99] For the reasons given at paragraph [86] above, I think that the primary judge's discretion to exclude evidence miscarried because he did not consider matters going to whether the evidence should be excluded as unfair to the appellant separately and distinctly from what he calls "social cost" considerations – see [28] of the judgment below. As stated above, on the facts here, the confession was voluntary and reliable and the crimes committed were grave. The public interest in securing a conviction in these circumstances was a matter which must weigh very heavily in favour of admitting the evidence when the *R v Ireland* discretion is exercised. It is that point however which gives such significance to the primary judge's failure to consider the matters going to the fairness discretion separately from considerations as to the public interest in securing a conviction. The reasoning of Gibbs CJ in *Cleland*[47] does not apply here. This is the opposite case: it must inevitably be that the exercise of the public policy discretion here will produce a result more favourable to the Crown than the accused. If the fairness discretion is not independently exercised, factors in favour of excluding the evidence must almost necessarily be overwhelmed by the public interest in securing a conviction.

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47 See paragraph [75] above.

[100] In my view there were substantial matters to be considered as to the conduct of the police and the effect it had on the appellant's knowledge and understanding of, and his ability to exercise, his right to silence before giving the interview of 28 January 2009. There are no factual findings as to the detail of the conversation had between Mr Carroll and DSC Burkin on the telephone before the interview; what, if anything, DSC Burkin told the appellant as to the engagement of Mr Carroll; what advice Mr Carroll would have given to the appellant had he spoken to him before the 28 January 2009 interview, and whether or not the appellant would have taken advice to remain silent had that been given before the interview. I reluctantly come to the conclusion that this Court cannot make those factual findings for itself. It would be possible for this Court to look at the DVD recordings of the interview of 28 January 2009, and, for that matter, the other DVD recordings, including that of the re-enactment of 31 January 2009. However, evidence as to the matters for determination was given by several witnesses on the s 590AA application, and indeed more evidence was given on the trial of the matter by DSC Burkin as to matters about her contact with Mr Carroll and what, if any, information she passed on about his engagement to the appellant. It was the further inconsistencies in her evidence on these topics at trial which gave the impetus to the application to reopen the s 590AA application during the trial.

[101] To succeed on appeal it needs to be shown that the error below caused a miscarriage of justice.[48] The appellant made comprehensive admissions to killing Smith and Black, and wounding Brunelle, in the interview of 28 January 2009. These confessions must have seriously adversely affected his prospects on trial, even though the confessional evidence from the appellant was not the only evidence the Crown led against him.

[102] There is an obvious connection between the appellant's case of unfairness connected with his exercising his right to silence before the interview of 28 January 2009, and his participating in subsequent interviews on 29 January 2009 and the re-enactment on 31 January 2009. In my view the question of whether they ought to be admitted against the appellant on discretionary grounds of unfairness and public policy will need to be re-examined and the matter retried. In the circumstances, I do not find it necessary to go on to deal with the appellant's arguments as to the re-enactment and the refusal to reopen the s 590AA application. I propose the following orders: (a) the appeal is allowed; (b) the convictions are quashed; (c) there should be a new trial on both counts of murder and the count of unlawful wounding.

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48 *R v LR*, above, [56].