SUPREME COURT OF QUEENSLAND

CITATION:	*R v Griffiths* [2013] QCA 120
PARTIES:	**R** **v** **GRIFFITHS, Trevor Harry** (appellant)
FILE NO/S:	CA No 107 of 2012 SC No 155 of 2012 SC No 1030 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 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 – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – where appellant made inculpatory statements in impugned interview to police about involvement in double murder – where primary judge refused application, under s 590AA of the *Criminal Code Act* 1899 (Qld) for an interview to be excluded from evidence – where police gave appellant relevant warnings and cautions – where appellant sleep deprived – where appellant kept talking, and police continued questioning appellant, after appellant requested questioning cease – where police asked appellant to reveal location of bodies for sake deceased persons' families – whether inculpatory statements made voluntarily – whether, if voluntary, impugned interview should be excluded for public policy reasons or in fairness to the appellant *Constitution Act* 1982 (Canada), Part I (*Charter of Rights and Freedoms*) *Criminal Code Act* 1899 (Qld), s 590AA

Criminal Law Amendment Act 1894 (Qld), s 10
Police Powers and Responsibilities Regulation 2000 (Qld), sch 10 (*Responsibilities code*, cl 35)

Attorney-General (NSW) v Martin (1909) 9 CLR 713; [1909] HCA 74, cited
Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited
Cleland v The Queen (1982) 151 CLR 1; [1982] HCA 67, cited
Collins v The Queen (1980) 31 ALR 257; [1980] FCA 72, cited
Cornelius v The King (1936) 55 CLR 235; [1936] HCA 25, cited
Hough v Ah Sam (1912) 15 CLR 452; [1912] HCA 78, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
MacPherson v The Queen (1981) 147 CLR 512; [1981] HCA 46, cited
McDermott v The King (1948) 76 CLR 501; [1948] HCA 23, cited
R v Lee (1950) 82 CLR 133; [1950] HCA 25, cited
R v Oickle (2000) 2 SCR 3; [2000] SCC 38, considered
R v Playford & Griffiths [2012] QSC 17, considered
R v Thomas (2006) 14 VR 475; (2006) 163 A Crim R 567; [2006] VSCA 165, considered
R v Tofilau (No 2) (2006) 13 VR 28; (2006) 160 A Crim R 549; [2006] 13 VSCA 40, cited
The Queen v Swaffield (1998) 192 CLR 159; [1998] HCA 1, cited
Tofilau v The Queen (2007) 231 CLR 396; [2007] HCA 39, considered
Wendo v The Queen (1963) 109 CLR 559; [1963] HCA 19, cited

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

SOLICITORS: Peter Shields Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P**: The appellant was convicted of two counts of murder. His sole ground of appeal is whether the primary judge erred in an application under s 590AA *Criminal Code* 1889 (Qld) in ruling as admissible the appellant's interview with police officers Pannowitz and Galpin shortly before 2.00 pm on 30 January 2009 at the Beenleigh Watchhouse. Subject to the following, I agree with White JA's reasons for refusing his appeal against conviction.

[2] I note that White JA has listened to the impugned interview and to some of the appellant's other police interviews. As neither counsel submitted that the Court should listen to or watch any recorded interviews, or that the case turned on the sound, tone or actions of the protagonists, or that relevant portions of transcript were inaccurate, I have not undertaken that task.

[3] The issues below and on appeal were whether the interview was voluntary in the sense of not being induced within the meaning of s 10 *Criminal Law Amendment Act* 1894 (Qld) and whether it ought to have been excluded in the exercise of the judicial discretion on either fairness or public policy considerations. It is true, as the respondent submits, that the contention that the primary judge should exclude the interview because it was personally unfair to the appellant in the sense discussed in *R v Lee*[1] and most recently by this Court in *R v Playford*[2] was not argued as clearly or forcefully as it could have been. I agree, however, with Dalton J's analysis at [125] that this issue was raised by the appellant's counsel at first instance. It follows that it is an issue which this Court should also consider in this ground of appeal.

[4] The primary judge dealt jointly with the appellant's application under s 590AA and that of his co-accused Playford: see *R v Playford and Griffiths*.[3] The appellant contends the judge's reasons for refusing the appellant's application were inadequate and demonstrated error warranting the granting of the appeal and an order for a retrial. It follows that it is necessary to carefully review the judge's reasons.

[5] After some introductory paragraphs,[4] his Honour set out what he considered to be the relevant principles.[5] It is not contended that his Honour erred in his statement of these principles. His Honour then summarised Playford's application[6] and the application in respect of this appellant, noting that the appellant's interview was sought to be excluded on two bases:

> "(a) the admissions were not made voluntarily [under s 10] and/or; alternatively,
> (b) in the exercise of fairness and public policy discretions."[7]

[6] His Honour then dealt with matters concerning Playford[8] before returning to the appellant's impugned interview. His Honour's reasons in respect of this interview[9] are set out in full at [126] of Dalton J's reasons.

[7] The judge noted that although the appellant sought to exclude only the interview of 30 January 2009, his Honour would take into account prior conduct which might have a bearing on voluntariness or fairness.[10] His Honour next set out the conflicting evidence of the appellant and police officer Galpin.[11]

[8] His Honour accepted that the appellant had not slept for some time prior to the interview but that this was not a consequence of anything done by the police.[12] I do not accept the appellant's contention that, in so stating, his Honour found that sleep deprivation was irrelevant because it was not the result of police conduct. It is true, as the appellant contends, that the fact the sleep deprivation was not caused by police conduct was by no means a conclusive factor, especially as to voluntariness

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1 (1950) 82 CLR 133.
2 [2013] QCA 109.
3 [2012] QSC 17.
4 Above, [1] – [4].
5 Above, [5] – [6].
6 Above, [7] – [8].
7 Above, [9] – [11].
8 Above, [12] – [41].
9 Above, [42] – [49].
10 Above, [42].
11 Above, [43].
12 Above, [44].

and fairness. But the fact that the police were not responsible for the sleep deprivation was certainly relevant to whether the interview should be excluded on public policy considerations. As some considerations overlapped, the judge's reasons merged the discussion of the considerations of voluntariness, fairness and public policy. In those circumstances, I am unpersuaded that his Honour's reference to the police not being responsible for the sleep deprivation amounted to an error of law on the voluntariness question or contaminated the exercise of his discretion on the fairness or public policy questions.

[9] His Honour next noted that, although the appellant claimed to be unwell, he was examined by a nurse who made no note of any complaint or symptoms of ill-health and that he accepted the nurse's evidence.[13] This was a finding that the appellant was not ill and that he made no complaint to the nurse shortly before the impugned interview.

[10] His Honour found that, although the appellant was due to appear in the Beenleigh Magistrates Court at 2.00 pm just after the interview commenced, it was by no means certain that his case would be called on. After the nurse's examination, police officer Pannowitz received a message that the appellant wished to again speak to the police officers. His Honour noted that, during an interview two days earlier in Albury, police officer Pannowitz continued to question the appellant after he had said he did not wish to answer further questions. This was improper and the interview should have been brought to a close.[14] The police officers spoke to the appellant in a room at the Beenleigh Watchhouse not normally used for interviews and confirmed with him that, after speaking with the nurse, he wished to speak further to them about the murder investigation.[15] The only recording equipment was for a C90 audio tape. Considering the many earlier police warnings the appellant had received, police officer Pannowitz sufficiently warned him of his rights immediately before the interview. Police officer Galpin asked whether he would like to speak to a friend, relative or solicitor to which the appellant responded: "Not at this time, yet." The appellant then made a series of statements which were "not a result of prompting by any questions but rather a series of admissions."[16]

[11] His Honour did not accept that those admissions were "the subject of or as a result of any threat or inducement made by either detective".[17] They were "a result of his own decision made on that day."[18] The gap in the closed circuit television footage in the watchhouse was explained by the nurse's examination. His Honour concluded that, on the findings he had made, he was "satisfied on the balance of probabilities that the [interview] was voluntary and that the circumstances of it were such that any preceding conduct by the detectives did not mean it would be unfair to receive [it] in evidence."[19] His Honour determined the interview was admissible.

[12] It is undoubtedly prudent for judges determining applications of this kind to make comprehensive, relevant, factual findings and to clearly relate those findings to each issue said to render the impugned confession inadmissible. It is usually preferable

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13 Above, [44].
14 Above, [45].
15 Above, [46].
16 Above, [47].
17 Above, [48].
18 Above, [48].
19 Above, [49].

that each issue be addressed discretely. There is no doubt that the reasons discussed above, especially as they had been reserved for some time, were spartan but that does not make them inadequate.

[13] Whilst the impugned reasons were remarkably economical, I would infer the following from them read as a whole. The judge accepted the evidence of police officers Pannowitz and Galpin over that of the appellant where their evidence was in conflict. His Honour took into account in his determination all the admitted police conduct concerning the appellant which preceded the impugned interview, including the earlier breach of at least the spirit of the *Police Powers and Responsibilities Regulation* 2000 (Qld).[20] The appellant was not affected by ill-health or lack of medication, although he had not slept for some time. After many police warnings as to his rights, he made the impugned admissions understanding his right to remain silent, that he could refuse to speak to police until he spoke with his lawyer and that he could answer selectively. The respondent had demonstrated that the appellant made a free and informed choice to speak to the police in the impugned interview, despite any identifiable earlier inducements arising from the police evidence. Those facts and conclusions were open on the evidence.

[14] I would infer from a reading of the reasons as a whole that his Honour also rejected the contention the impugned interview should be excluded either on public policy grounds or on the basis of personal unfairness. On the facts found by the judge, which were all open on the evidence, those conclusions were consistent with a sound exercise of the judicial discretion.

[15] It follows that the sole ground of appeal is not made out. Like White JA, I would order that the appeal be dismissed.

[16] **WHITE JA**: On 30 March 2012 the appellant and Garry Allen Playford were convicted of two counts of murder. The appellant was acquitted of the third count on the indictment – unlawful wounding. Playford was convicted of that offence.

[17] Each accused had made applications pursuant to s 590AA of the *Criminal Code Act* 1899 (Qld) ("*Criminal Code*") for rulings that certain interviews and statements made by them to police be excluded from the evidence that was to be adduced at their trial. The appellant had sought to have excluded the following:

(a) a conversation said to have occurred between the appellant and a Detective Marshall (of the New South Wales Police Service) while the appellant was being transported to the Albury Police Station on 28 January 2009;

(b) a conversation said to have occurred between the appellant and a Sergeant Smith (of the New South Wales Police Service) in the charge room at the Albury Police Station at approximately 1.52 pm on 28 January 2009;

(c) an interview between the appellant and Detectives Pannowitz and Galpin conducted at approximately 1.48 pm on 30 January 2009 at the Beenleigh Watchhouse.

At the hearing of the applications the Crown indicated that it would not seek to lead evidence in respect of the conversations described in (a) and (b) above.

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[20] See Reprint No. 6B, para 35 of sch 10 (operational at the relevant time).

[18] Accordingly, in the case of the appellant, the primary judge was required to give a ruling only in respect of the interview which took place at the Beenleigh Watchhouse on 30 January 2009. His Honour observed in his reasons for the rulings:

> "It does not mean, though, that I cannot or should not take into account any conduct prior to then which might have a bearing upon the voluntariness or fairness of the interview."[21]

The appellant, both before his Honour and on this appeal, relied heavily upon preceding conversations other than those challenged at (a) or (b) above to support his contention that his confessional statements were not made voluntarily or, if the confessional statements were held to have been made voluntarily, ought to be excluded in the exercise of the judge's discretion.

[19] The primary judge, refusing the application to exclude, concluded that the confessional statements made on 30 January 2009 at the Beenleigh Watchhouse were made voluntarily:

> "… and that the circumstances … were such that any preceding conduct by the detectives did not mean it would be unfair to receive this interview in evidence."[22]

[20] A further application was made in the course of the trial to exclude the 30 January 2009 confessional statements, but it was not pursued after the co-accused's application to re-open pursuant to s 590AA(3) was refused. That application concerned an alleged change in her evidence by a detective interviewing the co-accused,[23] which is not relevant to this appellant. That refusal was not a ground of appeal by this appellant.

[21] At the commencement of the appeal hearing the appellant abandoned all but ground one of his grounds of appeal. He contends that:

> "The learned Trial Judge erred in ruling as admissible the interview conducted between the applicant and Detectives Pannowitz and Galpin conducted at approximately 1:48pm on 30 January 2009 at the Beenleigh Watch House."[24]

[22] In that interview the appellant had made confessional statements about his involvement in the killings that were much more inculpatory than earlier statements (not the subject of objection). The earlier statements, although placing him at the scene, gave scope for reducing or even excluding his criminal responsibility for the deaths. Mr M J Byrne QC for the appellant expressed the remaining ground in the following manner:

> "There are two bases upon which it is submitted that the learned trial Judge erred in not excluding the interview conducted at the Beenleigh Watchhouse on 30 January, 2009 –
>
> (a) Unfairness; and
> (b) That the admissions were the subject of inducements."[25]

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21 AR 344, Reasons [42].
22 AR 345, Reasons [49].
23 AR 1099.
24 AR 2269; Notice of Appeal, para 1.
25 Appellant's Outline of Submissions, filed 21 December 2012, para 8.

[23] The "unfairness" basis for exclusion was contended to be the discretion to exclude a voluntary confessional statement for public policy reasons relating to improper police conduct; and the discretion to exclude for want of fairness to the appellant because of matters personal to him – he was sleep deprived and unwell. The respondent maintains that this latter basis for seeking to exclude the interview was not part of the applicant's case below. Accordingly, insofar as the appellant is now critical of the primary judge for not dealing with that basis for exclusion, the respondent contends that his Honour was not asked to do so.

[24] The inducements which are submitted to have made the confession involuntary are said to arise primarily from urging by interviewing police of the appellant to consider the victims' families and reveal the location of their bodies; and an urging to tell the truth for everyone's sake in the pre-interview conversation. The respondent contends that these alleged inducements to confess were not advanced in submissions below, rather different inducements (contained in unrecorded conversations with police) were advanced.

Background

[25] As described by the primary judge in his reasons for the rulings, the prosecution case was that one Richard Brunelle facilitated the purchase of a large quantity of cannabis by the deceased from the appellant and Playford. On 23 January 2009, at night, Brunelle accompanied the two deceased men in a motor vehicle to an arranged meeting place near Greenbank. The appellant and Playford arrived in their vehicle and walked to the vehicle in which the three men were sitting. After a very brief exchange Playford shot and killed the two would-be purchasers and accidentally shot Brunelle in the leg.[26]

[26] Brunelle was a close friend of the appellant. The appellant had no previous criminal history. He had a profitable earth moving (or similar) business and a wife and child. The appellant never met or spoke to the principle drug dealer who travelled from Cairns for the deal. Police appear to have been aware that after the killings threats were made against the accused and his family.

[27] The appellant and Playford left Queensland. They were apprehended in New South Wales on 28 January 2009.

Dealings with police and the interviews

[28] It is necessary to refer to police dealings and interviews with the appellant in some detail to consider whether the primary judge erred in the relevant sense.[27] Different police officers, from both New South Wales and Queensland, dealt with each accused.

[29] The primary judge heard the relevant tapes. I have thought it necessary to do so too, particularly to consider the assertion that, in fairness to the appellant, his confessional statements made on 30 January 2009 ought to have been excluded, because of his distress and illness. Furthermore, it is necessary to have an understanding of the tone of the interviews as a whole, rather than just the isolated passages relied on by the appellant.

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[26] The victim of the unlawful wounding count.

[27] *House v The King* (1936) 55 CLR 499 at 505.

Chronology

[30] At 12.20 pm[28] on 28 January 2009 New South Wales police attended at a residence at Walla Walla where the accused were located in the kitchen and arrested for murder. The appellant was informed of his right to silence, which he confirmed later that day to Queensland police.[29] On arrival at the Albury Watchhouse, the appellant was received into custody by Sergeant Borg, the custody manager, by about 1.00 pm. Sergeant Borg asked the appellant a number of questions and made observations of him.

[31] At 2.05 pm, Sergearnt Borg read to the appellant a "Caution and Summary of Part 9 of the *Law Enforcement (Powers & Responsibilities) Act 2002* (LEPRA)".[30] It contains various items of information but relevantly, informs the appellant of his right to silence and his right to contact a lawyer.

[32] Shortly before he was given this caution, Sergeant Smith, a New South Wales detective, asked the appellant a number of questions. The appellant said in evidence before the primary judge that he had responded "no comment" and that he wanted to see his lawyer or talk to a lawyer.[31]

[33] Amongst the observations recorded was that the appellant showed no sign of illness. Sergeant Borg noted, in response to questions about medication, that the appellant was taking "sumbicourt and ventiline" and was receiving treatment for "astham".[32] According to the records he was conveyed to the local hospital at 2.18 pm and returned to the police station at 3.07 pm.

[34] Prior to that occurring the appellant had sought to obtain legal advice and a call was made to a legal practitioner – Michael Quinn. Subsequently a message was left with another legal practitioner – Michael Bosscher. Contact was made with Mr Bosscher at 3.10 pm. The appellant spoke with him for some four minutes.

[35] The appellant, in the course of his cross-examination in the s 590AA hearing, confirmed that he understood the warnings that were given to him and that the watchhouse staff had made facilities available to him to talk to a legal representative.[33] He agreed that he knew, even before police had informed him of those rights, that "[he] had the right to remain silent until [he] contacted a lawyer".[34] He said that he knew that he did not have to answer questions and that he knew he had those rights:

> "… throughout this entire process from – that is, from the time you first arrived at Albury to the time that you completed this conversation with the detectives at the Beenleigh watch-house? - - Yes, I agree with that, yes."[35]

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28 In January 2009, Queensland was on AEST, while New South Wales was AEST+1 (i.e. daylight saving time). The times provided in these reasons are AEST or AEST+1 depending on whether the event in question occurred in Queensland or New South Wales (respectively).

29 Exhibit 8, p 14. A complete copy of Exhibit 8 was provided by the respondent as there is only a partial copy in the Appeal Record.

30 The caution document is at AR 1263 and has been signed by the appellant.

31 AR 295.

32 AR 1265; Exhibit 1, Custody Management Record, p 2.

33 AR 308.

34 AR 306.

35 AR 307.

(i) Pre-formal interview conversation 28 January 2009

[36] When the appellant first met Senior Constable Pannowitz and Sergeant Galpin at the Albury Police Station on 28 January 2009 their conversation was recorded. Much of the early part is difficult to follow because the speakers are distant from the recording equipment. However, it is possible to make out more than appears on the transcript. In the initial introduction, Senior Constable Pannowitz told the appellant that Queensland police would like to interview him and question him "about it", adding "but that's entirely up to you".[36] She explained how any interview would take place. Sergeant Galpin added:

> "Yeah, basically the most important thing right now is for you to understand that you don't have to talk to the police. That's a warning that we're obliged to give you, we must give you that warning."[37]

The appellant was asked did he understand the warning and what did he understand it meant, to which he responded that it was his choice to say what he wanted to say and if he did not feel comfortable then he could wait for legal advice. He also understood that anything that he did say might be used later in court. An example was given to him by Sergeant Galpin and the appellant expressed his understanding. Senior Constable Pannowitz repeated the warning in summary, including that the appellant did not have to talk to them and that he could disregard some questions.

[37] They then had a short conversation about the appellant's legal representation and that the appellant had already spoken to Michael Bosscher. The appellant said:

> "Um, I just wanted to clear probably two very important things up, straight off the top. Um, the reason we um, the reason we, we're not hiding, we're just protecting [INDISTINCT] ah, in relation to this. Ah, obviously as, as the story's told obviously, I've put that together myself. Um and the most important thing is I did not, I did not kill anyone, anyone. Alright? I got a wife and kid and my main thing is to protect them, that's why I've left, you know?"[38]

What clearly emerged was the appellant's fear of reprisals from those connected with the drug purchasers. He had fled with his wife and child in an attempt to deflect any adverse acts against them.

[38] Sergeant Galpin stressed that it was important that if the appellant decided to speak to them that he should tell the truth. This is submitted[39] to be an inducement to confess:

> "SGT GALPIN: Like, like Jacinta said before, we really hope that you'll be completely honest with us, a-, a-, and we can't stress, if you do decide to talk to us, how important that is.
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> GRIFFITHS: Yeah.
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> SGT GALPIN: Ah, because once you start telling lies to us, we either know about it already - -

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36 Exhibit 8, p 2.
37 Exhibit 8, p 3.
38 Exhibit 8, p 5.
39 Appellant's Outline of Submissions, filed 21 December 2012, para 20.

> GRIFFITHS: Yep - -
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> SGT GALPIN: Or we will know about it.
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> GRIFFITHS: Yep.
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> SGT GALPIN: Um, so if you do elect to talk to us and I, I'm not saying that you are planning on lying or anything like that. I'm just stressing how important it is to tell the truth, not only for yourself, but for everyone else involved. And it's not just that core group of people, it extends to everyone's families a-, and that sorta thing."[40]

In response the appellant said:

> "GRIFFITHS: I'd just like to say too um, I've been willing to talk to the police and that, but it's that fear of being exposed and we have been told that, you know, if, if some, if [INDISTINCT] or, and you go to gaol, they're not so keen on it, you know? And that, you know, [INDISTINCT] - -"[41]

[39] Sergeant Galpin responded that police were aware that threats had been made and that they had been addressed. The appellant said it was more than just the threats. Although the next observation by the appellant as transcribed is said to be largely indistinct, listening to the tape it is possible to make out his concern that people know people and that the word gets passed around. He was reassured that his safety was very important to police.

[40] Sergeant Galpin explained that whether the appellant was willing to tell his side of the story was a matter for him. He was asked again whether his solicitor was attending. The appellant said that he had been told to "sit tight" and wait until he was contacted by someone from the Sydney office.[42] Sergeant Pannowitz asked the appellant was he happy "at this stage" to talk with them.[43] The appellant said he was prepared to answer some questions. The conversation was about police ascertaining if the appellant agreed to a formal interview. The police reiterated that he would be given formal warnings, both those for New South Wales requirements and the Queensland warnings. He was told that what he decided to say was completely up to him. The appellant said he wanted to go home to his family safely and added:

> "I'll answer the questions that I know. … Honestly and straight up and whatever I don't know or don't know how to answer, I won't be able to [answer] … . You're ha, you're happy for that? I'm happy to admit that like … I'll just tell ya what I know."[44]

[41] Sergeant Galpin asked the appellant was he happy to do so without further consultation with his legal representation. The appellant responded that he would rather him there but that "I can answer questions that I do know, honestly. There's no, no problem with that, you know?"[45] Sergeant Galpin said:

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40 Exhibit 8, p 6.
41 Exhibit 8, p 6.
42 Exhibit 8, p 7.
43 Exhibit 8, p 8.
44 Exhibit 8, p 9. The words in square brackets can be heard but were not transcribed.
45 Exhibit 8, p 9.

> "That is up to you. … Because you do have the right to have your solicitor present. As long as you understand that, um, if at a later date, um, you wish to, um, answer more questions, by all means, we can do that as well, so. … Okay. And you seem to understand that you don't have to answer all the questions or any of the questions, you can, you can tell us your version and [are in control]."[46]

[42] The appellant asked how that worked and that if he did not understand how to answer the question would that be against him. He was told that if he was not comfortable then he could say he was not comfortable with answering that question, to which the appellant responded: "Okay. And I can do that?"[47] A few minutes later he was again reassured that it was important for him to understand that he was aware of his rights to have a lawyer present. There followed an offer of refreshment and the Queensland police identifying themselves to New South Wales police. They were informed by those police as to how the equipment worked. The appellant was informed that under New South Wales legislation a police officer, independent of the interviewing police, would ask him some questions about the process in the absence of those who had interviewed him.

[43] The appellant was then asked to confirm or amend the account of his initial arrest at Walla Walla and him being conveyed to the police station by New South Wales police. The respondent has submitted that the appellant demonstrated his control of the interview in several places during this exercise. He was asked to confirm that he had told New South Wales police that he did not know where the bodies were and that "others" had disposed of them. He did not do so. Instead he asked Senior Constable Pannowitz, who was then speaking to him, "What's the rest about?"[48] referring to the balance of the New South Wales police account of their conversations with the appellant.

[44] When another question and answer passage from the New South Wales police account was read to the appellant he amended it by saying that he had said, "No comment", not what was recorded. Senior Constable Pannowitz explained that she would make any changes that he wished. She then read to him that police had said to the appellant that Queensland police would arrive later in the day and the appellant had responded, "I wanna talk to them and tell them everything. But I'll wait 'til they get here …".[49] She asked, "… did that happen?"[50] The appellant explained, in what sounds to be a puzzled voice, that he was referring to a solicitor because he had asked someone to talk to his solicitor.

[45] Just before the commencement of the formal interview, Sergeant Pannowitz asked the appellant if he wanted "tissues, bucket, anything like that - - ?"[51] The appellant responded "no", that there was nothing to worry about, that he was not going to be "sick or anything".[52] Sergeant Pannowitz mentioned his asthma medication and enquired if the appellant was "right", to which he responded "[I'm okay] I don't need it".[53]

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46 Exhibit 8, p 9. The words in square brackets can be heard but were not transcribed.
47 Exhibit 8, p 9.
48 Exhibit 8, p 15.
49 Exhibit 8, pp 15-16.
50 Exhibit 8, p 16.
51 Exhibit 8, p 23.
52 Exhibit 8, p 23.
53 Exhibit 8, p 23.

(ii) Formal record of interview 28 January 2009

[46] The formal record of interview then commenced. As Mr M R Byrne SC, for the respondent, noted in his submissions, the appellant indicated his knowledge of his rights and his ability to exercise them on nine occasions in the course of that interview.[54] This was particularly so in respect of his right to answer questions selectively. When he was asked questions about his co-accused he used expressions like "Can we move on?"[55] and later, when asked how $100,000 came into his and his co-accused's possession, said he was not prepared to say how they got it, "not without legal representation".[56]

[47] Later, after a toilet break just after 8.00 pm, shortly after the interview resumed and after answering a number of questions, the appellant said:

> "I'd just like to end it there with the questions. Um … And just, um, make a statement … Um, if you want me to sign something or whatever … Like we were talking about downstairs on the C-90 tape recorder."[57]

The appellant then made an exculpatory statement about the circumstances leading up to the killing. He said he had later received a phone call that "really spooked him", rang his wife and told her to get some things together ready to leave. The appellant, when asked what was said on the phone call, said he was not going to comment because he was "a bit iffy" and upset.[58] He said he did not wish to elaborate on the threats because it was upsetting and he would start shaking and panicking.

[48] Sergeant Pannowitz was trenchantly cross-examined on the s 590AA application hearing about her continued questioning after the appellant had indicated that he wished only to make a statement which he would sign and that the questions should cease.[59] She explained that some were clarification questions and that the appellant just kept on talking so she thought it was acceptable to keep asking questions. The primary judge described this as "improper" conduct by Senior Constable Pannowitz.[60]

[49] The second alleged inducement[61] appears in the formal interview in the following passages:

> "GRIFFITHS: Fuck, how hard is it? I look at my little boy, and I think, what's he gonna think of me? You know, what, how can I w-, how can I get out? How can you get this out of your mouth and do the right thing? Like - -
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> SCON PANNOWITZ: [INDISTINCT] And you certainly, um, you're right about that, like, o-, um, obviously with all the

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54 Respondent's Outline of Submissions, filed 23 January 2013, para 6.

55 AR 1399; Exhibit 9, Transcript 1, p 12.

56 AR 1430; Exhibit 9, Transcript 1, p 43.

57 AR 1452-1453; Exhibit 9, Transcript 1, pp 52-53.

58 AR 1456; Exhibit 9, Transcript 1, p 7.

59 See AR 126; T2-64.

60 AR 344, Reasons [45]. The continued questioning was in breach of cl 35 of the *Responsibilities Code*, being Schedule 10 to the *Police Powers and Responsibilities Regulation* 2000 (Qld). This reference is to Reprint No. 6B, which was in force as at January 2009.

61 Appellant's Outline of Submissions, filed 21 December 2012, para 21.

> conversations we've been having with Melissa[62] and your father-in-law and [INDISTINCT] between ourselves, it's, it's, like, how do you, how do you make this situation good, and, and how, and, and obviously you're here now, and you've talked to us, and, and cooperated as much as you feel comfortable, which, you know, i-, is, is a sign of good faith from you, it's a sign that, you, you know, prepared to tell us what you know, and, and help, and I know you've, you've gone interstate and that, and you've clarified that that is basically to protect Melissa and MacKenzie[63] - -" [64]

[50] In cross-examination, Senior Constable Pannowitz resisted the suggestion that she was encouraging the appellant to participate in the interview by suggesting to him that he could make the situation "good" for his family – whatever that might have meant.[65] She contended that she was showing empathy and acknowledgement for what the appellant had already been able to say in the interview so far.

[51] After further questioning, Senior Constable Pannowitz spoke to the appellant about the families of the two victims and their children and that they wanted to find them "and bury them, and give them some closure, so they're not living with a glimmer of hope".[66] She used emotional language to describe how those people might be feeling:

> "Now, I'd, I'd a-, just ask you, if you can, to put yourself in the situation if it was MacKenzie in this situation that these boys … Are in, and they're, to, to put it bluntly, rotting in a bush, or a shallow grave somewhere. You, a-, as a Dad, and, and Melissa as a Mum would just wanna bring him home and, and bury him and put him to rest. Is there a direction that you can point us in to look for these boys, so we can basically give their wives and their kids some peace?"[67]

To this the appellant responded: "No, not really, no comment."[68]

[52] The appellant was asked some more questions, particularly whether Playford had indicated to the appellant where the bodies were and again the appellant said that he did not wish to make any comment. He was asked by Senior Constable Pannowitz if he would be prepared merely to give some indication of a general area in the bush where the bodies might be found. The appellant said that he was "tore up" about it and did not know that these people had families or children and did not even know their names or what they looked like.[69] After some further comments Sergeant Galpin asked the appellant if he was involved in the disposal of the bodies, to which the appellant responded, "To a certain point."[70] However, when asked whether he wished to elaborate he responded, "No comment … Til I get legal advice on the question, like …"[71] He indicated that, "…I've gotta

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62 The appellant's wife.
63 The appellant's son.
64 AR 1459-1460; Exhibit 9, Transcript 2, p 11.
65 AR 119; T2-57.
66 AR 1469; Exhibit 9, Transcript 2, p 20.
67 AR 1469; Exhibit 9, Transcript 2, p 20.
68 AR 1469; Exhibit 9, Transcript 2, p 20.
69 AR 1470; Exhibit 9, Transcript 2, p 21.
70 AR 1471; Exhibit 9, Transcript 2, p 22.
71 AR 1471; Exhibit 9, Transcript 2, p 22.

sorta cover my a-, bum, and - -."[72] And when Senior Constable Pannowitz said, "we've gotta ask"[73], the appellant added that he knew it was their job. Senior Constable Pannowitz said:

> "[INDISTINCT] it's our job, and, and the families have asked us to ask. Um, so that's, that's why it's there, and, and I know that certainly I didn't wanna put you in a situation where you were feeling pressure, but we'd made promises to ask, and…
>
> It'd be nice for us, as opposed to some kid trail-bike riding or something one day to come across it …
>
> You know. Um, that, that's all it was, so. I appreciate your answer though."

Senior Constable Pannowitz agreed in cross-examination that she was asking on behalf of the families where the bodies were. This was the third inducement identified by the appellant on the appeal.[74]

[53] Later Senior Constable Pannowitz affirmed that the appellant could pick and choose what questions he wanted to answer. He indicated he was probably being loyal to Playford and that it was not for him to tell Playford's side of the story. He expressed that now he knew something about the victims he felt worse. Sergeant Pannowitz responded:

> "… please don't think that was my intention, to make you feel worse, I just was trying to put it to you, to you, like, it's, it was basically just a plea for the family …"[75]

The appellant said he was not going to say what others involved did or what he thought they said; he would merely tell police what he himself knew.

[54] After some short and indistinct passages, Sergeant Galpin said:

> "He's indicated he didn't wanna, do you want to continue asking, uh, as-, answer any questions in relation to this incident?"

The appellant responded:

> "Not at this time, I'm a bit fuzzed at the moment now hearing … About the other people, and I'm, I get really emotionally jumbled … Like, I can't, I can't even think straight now. … And I, like I said, I don't, I didn't know these people, I just heard that they were bad-arses that would … Kill us, and, oh, w-, beat us up and whatever, and I just wanted to de-escalate, and that w-, my intentions from the, from the start of walking over there."[76]

Sergeant Pannowitz said that it was not a good thing to answer questions when in an emotional state and that the appellant could "leave it now" and maybe he would be receptive to another chat back in Queensland, to which the appellant agreed.[77]

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72 AR 1472; Exhibit 9, Transcript 2, p 23.
73 AR 1472; Exhibit 9, Transcript 2, p 23.
74 Appellant's Outline of Submissions, filed 21 December 2012, para 22.
75 AR 1478; Exhibit 9, Transcript 2, p 29.
76 AR 1480; Exhibit 9, Transcript 2, p 31.
77 AR 1480; Exhibit 9, Transcript 2, p 31.

[55] However, the appellant continued speaking and emphasised that he did not run away from the law, just from the threats. Several minutes are taken up largely by the appellant's difficulty with sleeping and how he would manage in the cells with the lights on. He was then interviewed by a New South Wales acting sergeant in the absence of Queensland police, who asked, amongst other things, whether any promise was made to take part in the interview or any threat or inducement, meaning, was he forced into the interview, to which the appellant responded, "no".[78] The recording of the interview concluded at 9.10 pm.

(iii) The C90 interview at 9.45 pm

[56] Shortly after the conclusion of this formal record of interview (in respect of which there was no objection as to admissibility) the appellant indicated to Senior Constable Pannowitz, who was labelling the disks used in the interview, that he had something else he wished to say. He told her where the bodies were buried.

[57] At 9.45 pm the recording equipment was reactivated. Senior Constable Pannowitz stated to the appellant the nature of their unrecorded conversation with which he agreed. He was asked what he had said:

> "Um, I just, I thought, once I heard about the families. Like I said, I never knew these guys from a bar of soap, I never met 'em or seen 'em ah, to know that they're got family like I have family it's, it's pretty hard to sort of deal with. I mean, I'm not callous or anything. Um, yeah. And um, panicked and ah, and all I kept hearing was um, we've gotta get rid of him, we've gotta get rid of 'em. And I just acted on, on …"

Senior Constable Pannowitz suggested "Instinct?" and the appellant continued:

> "Sorta yeah on, whatever nat-, come naturally to me I didn't really think about it. My body was just running um, scared and, and ah, a million things were goin' through my mind. And, I just acted the first thing I heard, not what I was thinkin' and um, yeah we loaded the bodies up and, and ah, Richie did help load the bodies. And ah, we were all [INDISTINCT] and then I found out that Richie was actually shot and that's when I told him that it's gonna be okay. I'll and just not what I intended to happen and you know, [INDISTINCT] try and talk it out. It was just like um, yeah I heard, remember hearing now that um, someone said they had a gun, it was self defence. And, and I didn't know what, I didn't see what happened, I didn't know what happened I was just [INDISTINCT]. And yeah, um, just on instinct we just loaded the bodies in the back of the Hilux and took 'em down there and they were rolled off in the, in the hole."[79]

In the course of the following discussion about the location and the drawing of a map, Senior Constable Pannowitz noted that the appellant was "very emotional".[80]

[58] The account given by the appellant on this occasion also tended to be self-serving insofar as he told police that he had just gone to meet the deceased to tell them that

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78 AR 1493; Exhibit 9, Transcript 2, p 44.

79 AR 1497-1498; Exhibit 10, pp 2-3.

80 AR 1500; Exhibit 10, p 5.

the deal was off and that he was shocked when there was shooting. He thought that self defence might have been involved but did not see the gun. He denied that the hole into which the bodies were placed had been dug prior to the meeting.

[59] Sergeant Galpin asked the appellant:

> "T-, Trevor do you agree that um, after the interview in no way did we convince you to tell us this?"[81]

The appellant responded:

> "No I just, when you told me they had families and that mate, like, my God. I didn't know anything about these guys and I, I didn't shoot 'em. I wasn't gonna um, I just wanted to say, we're not doin' the deals, you know? Like, I don't wanna do this it's just not who I am or why I, I've never been involved."[82]

Again, Sergeant Galpin asked the appellant to confirm that the police had not threatened him in any way, had not promised him anything and had done nothing to make him "tell us what you've just told us".[83] The appellant responded that it was just the knowledge that the deceased had children.

[60] Senior Constable Pannowitz then brought the interview to a conclusion at a point where the appellant seemed to be wanting to continue to talk about the surrounding circumstances, although he shied away from actually talking about the deaths and the burials. That interview was recorded by C90 cassette tape. There was no objection to the admission of that interview.

(iv) Events on 29 and 30 January 2009

[61] At about 11.00 am on 29 January 2009 the appellant was approached by Detectives Burkin and Windeatt, the Queensland police officers concerned with the co-accused, Playford. Whilst there was some disagreement about the detectives' recollection of the conversation and that of the appellant, what was quite clear was that the appellant declined to speak with them because he wished to obtain (or had) obtained legal advice.

[62] The appellant said that unrecorded conversations occurred in the police car on the way to the airport at Albury on 30 January 2009 ("first conversation"). He was to be returned to Brisbane by police aircraft. Further unrecorded conversations allegedly occurred in the police vehicle from the Brisbane airport to the Beenleigh Watchhouse ("second conversation"). No conversations were alleged to have occurred in the plane. Throughout this journey, the appellant was in the custody of Senior Constable Pannowitz and Sergeant Galpin.

[63] In the first conversation, the appellant alleged that Sergeant Galpin told him that Playford had said that the deaths were pre-planned and the holes for the bodies dug prior to the shooting. Senior Constable Pannowitz allegedly spoke about the victims' families and the children. Sergeant Galpin was alleged to have said that the appellant was "in a position to make it right" and "Consider your position. Based on what Gary has said, that's – there's a good chance you will be convicted

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81 AR 1502; Exhibit 10, p 7.
82 AR 1502; Exhibit 10, p 7.
83 AR 1503; Exhibit 10, p 8.

on his evidence."[84] It was this first conversation, denied by police, which, was submitted below to have constituted the inducement to confess to police at the Beenleigh Watchhouse.

[64] In the second conversation, which occurred in the motor vehicle from the airport to the watchhouse, the appellant alleged that Sergeant Galpin informed him that Playford had said that the appellant had dug the hole for the bodies. The appellant said that he did not say a word from that point. The conversation was either denied or not recalled by police.

(v) Interview of 30 January 2009 at the Beenleigh Watchhouse

[65] The appellant said that after he had arrived at the Beenleigh Watchhouse and was in the biometrics room where his fingerprints and DNA were to be taken by a uniform officer, Senior Constable Pannowitz came in and said that she would complete the task.[85] Senior Constable Pannowitz told him that they had arranged for him not to appear in court that afternoon so that he did not have to appear before the "media frenzy".[86] Senior Constable Pannowitz then allegedly asked the appellant, "Have you given any thought to what Mr Galpin spoke to you about in the car on the trip?", to which he responded, "That's not going to happen. That's not true that – I understand, but it's not true."[87]

[66] The appellant alleged that Senior Constable Pannowitz said that he should consider his position, family and "forking out a lot of money".[88] The appellant's evidence was that he thought to himself "what choice do I have, really?", because "I was – I just felt alone. I was just helpless. I was tired, frustrated … exhausted. I didn't really have the strength to argue." Accordingly, he just responded, "I'd rather – I want to see my lawyer. He should be here." Senior Constable Pannowitz replied, "Oh, he'll be here to see you after he appears for you. I'm pretty sure he'll be down after that."[89]

[67] Senior Constable Pannowitz denied that the conversations that were put to her (the appellant did not give evidence of the second) occurred whilst she was taking his DNA, photographs and fingerprints or at all. Moreover, Senior Constable Pannowitz denied having even taken the appellant's fingerprints, because "I'm not … trained on the fingerprint machine".[90]

[68] The appellant said he became emotional and was taken to see a nurse after his biometrics had been taken. He told the nurse that he needed his medication, that he had not had it for a week and was starting to feel the symptoms coming on "a bit strong".[91] He said that he was tired and wanted to go to bed. His evidence was to the effect that he agreed to "line my story up with Mr Playford".[92] He said he felt "hopeless – helpless".[93] He said he broke down, was weak, exhausted and tired, and did not have the strength to argue.

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84 AR 301; T 4-76; Examination-in-Chief of Mr T H Griffiths.

85 The appellant's account of these events occurs during his Examination-in-Chief at AR303 T4-78, while Senior Constable Pannowitz's account occurs under Cross Examination at AR962 T10-13.

86 AR 303; T 4-78.

87 AR 303; T 4-78.

88 AR 303; T 4-78.

89 AR 303; T 4-78.

90 AR 962; T 10-13.

91 AR 304; T 4-79.

92 AR 304; T 4-79.

93 AR 304; T 4-79.

[69] In cross-examination he was asked what he meant when he said he had broken down. He said:

> "Just mentally. I was broken, … I was weak and exhausted and tired. Just didn't have the energy, it got me. They broke me down with the victims families and Gary's evidence and I just didn't know what to tell them. I just – as I said they led the questions, I agreed. Whatever."[94]

[70] He accepted in cross-examination that he had the right to see his lawyer before he was interviewed but said that he was "weak … exhausted … lost … alone" and "just rolled with it".[95] He agreed that he told the watchhouse officer that, when asked, his asthma was settling but that he would need his medication. In cross-examination, when asked was there anything to indicate any distress on his part during the tape recording of the interview, he responded:

> "A couple of – I believe a couple of drops in my voice up and down. I got lost and they started leading the questions, that is all I remember."[96]

[71] The recording has Senior Constable Pannowitz saying:

> "Do you agree that after speaking with the nurse you advised us you wished to speak further to us in relation to the matter [we are] investigating?"

and the appellants' answer, "Yes". The appellant said of this:

> "I understand what you are saying, yes, but I never advised them of that, that was incorrect. I just believe I just agreed to that."[97]

[72] Whilst the appellant said he was not intimidated by Senior Constable Pannowitz, he felt "sort of, compelled in some way to do this".[98] He said that he was just making it easy on his family and everyone else. In response to the question, "But it was your decision to give police that information from you?" he responded:

> "In that weakened state of mind I made that decision, yes. I wasn't rational, it wasn't a rationally thought out decision, no. I was broken down and emotional and I hadn't slept for a while. Like we both agreed I was just broken down."[99]

[73] The appellant agreed that the interview was suspended so that he could speak to his solicitor, which he did, and when he returned to the interview room he made no complaints. In response to the observation that he had made no complaint, or no complaint was made on his behalf, about the position he had been placed in by police, the appellant responded that they did not threaten him and he did not really understand what an inducement was.[100] The appellant said that he was not then strong enough to have any further conversation or make any complaint, even though

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94 AR 312; T 4-87; Cross Examination of Mr T H Griffiths.
95 AR 313; T 4-88.
96 AR 313; T 4-88.
97 AR 314; T 4-89.
98 AR 314; T 4-89.
99 AR 315; T 4-90.
100 AR 316; T 4-91.

he then had the protection of his lawyer. He conceded that police were very fair in the interview but were "precise and direct in what they were saying".[101] The most he was able to say of a condemnatory kind was that he found them "a bit leading mostly in a lot of the questions but I just went along with it".[102]

(vi) Examination by nurse

[74] Melissa Jane Kelly, a registered nurse then working with Blue Care at Mount Warren Park, Queensland, examined the appellant on 30 January 2009. This occurred immediately before he participated in the impugned interview with police. Her statement was admitted into evidence by consent. She had no independent recollection of the appellant but viewed the Admission Form and Progress Notes, the majority of the handwriting on which was hers. Blue Care, her then employer, held a contract to attend the Beenleigh Watchhouse at the request of police. The duties were rotational amongst all registered nurses employed by Blue Care. She was a nurse of some experience. In her view she was employed to provide "an independent, and trained, examination of the prisoners in lieu of police officers attempting to perform that function."[103]

[75] RN Kelly completed the Admission Form and Progress Notes by recording information provided to her by the appellant. He told her that he was an asthma sufferer who was prescribed Ventolin and Symbicort. She performed a physical examination by checking his blood pressure, his pulse and temperature (all of which she recorded). In her experience all of those readings were within normal range. She said:

> "I can say with certainty that prisoner Griffiths was not displaying any symptoms consistent with having an Asthma attack. I say this with certainty, as my normal practice was to make comprehensive notes on the Admission Form and Progress Notes."[104]

RN Kelly continued:

> "The absence of such notes demonstrates that prisoner Griffiths was not displaying any symptoms such as shortness of breath, raised temperature, [wheezing], excessive sweating, difficulty breathing, chest tightness, a dry persistent cough, anxiety, talking in short sentences, or the use of his accessory neck muscles, which can be attributed to Asthma sufferers. I base these assertions on my own medical experience, which includes performing duties within the Respiratory Unit at Gosford Hospital, New South Wales."[105]

[76] RN Kelly was permitted to prescribe Ventolin to prisoners within the Beenleigh Watchhouse without further consultation. But it was her practice to consult with the on-call forensic medical officer to discuss all examinations of prisoners. To that end she contacted a Dr Purton regarding her examination of the appellant. In her experience the doctor would review her examination and ask "in depth" questions about his medical status. In consultation with Dr Purton, RN Kelly prescribed both Ventolin and Symbicort for the appellant with instructions for the Ventolin to be

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101 AR 317; T 4-92.
102 AR 317; T 4-92.
103 AR 1671.
104 AR 1672.
105 AR 1672.

given when requested. In her experience prisoners "buzzed" the Beenleigh Watchhouse staff from their cells in order to request their medication. Her normal practice was to package the prescribed drugs and place them in a box with the medical chart prior to delivering the box to the charge counter area of the watchhouse.

[77] RN Kelly noted that Ventolin was administered to the appellant by a police officer at 8.30 am on 31 January 2009, but that no Ventolin was required at the time of her first visit as he was not then in any respiratory distress. RN Kelly noted that the documentary evidence revealed that she attended at the watchhouse on 31 January 2009 and at about midday administered the appellant with Symbicort. She concluded:

> "Again I can say with certainty that prisoner Griffiths was not displaying any symptoms consistent with an Asthma attack on 31 January 2009.
>
> I can also say with great certainty that if prisoner Griffiths was displaying any symptoms of an Asthma attack, they would have been noted in the Admission Form and Progress Notes and he would have been immediately escorted to Logan Hospital for further treatment."[106]

The applicable principles

[78] As mentioned, the appellant argues that the interview at the Beenleigh Watchhouse on 30 January 2009 ought to have been excluded on two grounds – that the appellant's admissions were not made voluntarily because they were induced by persons in authority or, if voluntarily made, should be excluded because it would be unfair to admit them against him on public policy grounds and because he was sleep deprived and unwell at the time.

(i) Voluntariness

[79] The evolution and development of the law in Australia of the admissibility of confessional statements and its rationale is most fully discussed in several judgments in *Tofilau v The Queen.*[107] In that case undercover police induced admissions of crime from the accused by deceiving him into believing that they – in the capacity of their undercover identities – had the capacity to influence corrupt officials in favour of the accused. The central issue in *Tofilau* was whether the deception practised on the accused was made by a person in authority. That question does not arise for consideration here, but in considering it, their Honours lengthily examined the development of the common law about the admissibility of confessional statements generally. It is unnecessary to reprise that history here save to comment that without some appreciation of how the rule (or, more correctly, the several rules) evolved a complete understanding of the present state of the law will not be achievable.[108]

[80] In Queensland the common law about the admissibility of confessional statements said not to have been made voluntarily is supplemented by s 10 of the *Criminal Law Amendment Act* 1894 (Qld). It provides:

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106 AR 1673-1674.

107 (2007) 231 CLR 396 at 412 [33] and ff per Gummow and Hayne JJ; at 438 [135] and ff per Kirby J; and at 468 [245] and ff per Callinan, Heydon and Crennan JJ.

108 As remarked by Gummow and Hayne JJ in *Tofilau v The Queen* (2007) 231 CLR 396 at 412 [33].

> "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."

That provision altered the common law principle (current at the time of enactment) that once a threat or promise was found to have occurred no enquiry was conducted into whether it was likely to have produced an untrue confession.[109] The legislative provision requires the confession actually to have been induced by the threat or promise made by a person in authority, not merely that inducements of that kind were made. In other respects, the common law applies.

[81] The following principles may be derived from the authorities:

(i) At common law a confessional statement made out of court by an accused person is not admissible in evidence against him upon his trial unless it is shown to have been made voluntarily[110]; that is, in the exercise of a free choice to speak or to be silent.[111]

(ii) The burden of showing that a confessional statement was made voluntarily lies on the party seeking to introduce it into evidence – generally, the prosecution.[112]

(iii) If there is nothing to indicate that the confession was involuntary there is a presumption that it was made voluntarily and the onus is thus discharged.[113]

(iv) In Australia, the voluntary nature of the confessional statement is not required to be proved beyond reasonable doubt.[114] This is because, as Taylor and Owen JJ observed in *Wendo v The Queen*[115], quoting from Starke J in *Cornelius v The King*:[116]

> "The judge merely decides whether there is prima facie any reason for presenting the evidence at all to the jury."

In *Tofilau v The Queen*[117] Callinan, Heydon and Crennan JJ said that this standard was "on the balance of probabilities".[118]

(v) It is common to divide confessional statements alleged not to have been made voluntarily into two categories. One is described as the "inducement

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109 See *Tofilau v The Queen* (2007) 231 CLR 396 at 478-479 [280] per Callinan, Heydon and Crennan JJ, especially footnote 345.

110 *R v Lee* (1950) 82 CLR 133 at 144 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.

111 *McDermott v The King* (1948) 76 CLR 501 at 511 per Dixon J; *MacPherson v The Queen* (1981) 147 CLR 512 at 519 per Gibbs CJ and Wilson J.

112 *MacPherson v The Queen* (1981) 147 CLR 512 at 519 per Gibbs CJ and Wilson J. A co-accused attempting to tender another's confessional statement will be required to prove its voluntariness: DM Byrne and JD Heydon, *Cross on Evidence*, 33605; *R v Attard* (1969) 91 WN (NSW) 824 (CCA).

113 *MacPherson v The Queen* (1981) 147 CLR 512 at 519 per Gibbs CJ and Wilson J referring to *Hough v Ah Sam* (1912) 15 CLR 452 at 457 and *Attorney-General (NSW) v Martin* (1909) 9 CLR 713 at 731-2.

114 *Wendo v The Queen* (1964) 109 CLR 559 at 572 per Taylor & Owen JJ, a proposition with which Dixon CJ agreed (at 562). This differs from the English and Canadian positions which require proof beyond reasonable doubt of the voluntariness of the confession.

115 (1964) 109 CLR 559 at 572.

116 (1936) 55 CLR 235 at 239.

117 (2007) 231 CLR 396.

118 At 480 [282].

rule". The other concerns what has, in my view inelegantly, been described as "basal" involuntariness.[119] The inducement rule states that a confessional statement will not have been made voluntarily "if it is preceded by an inducement, such as a threat or promise, by a person in authority, unless the inducement is shown to have been removed."[120]

The "basal" involuntariness rule is not relevant to this appeal, but it may be mentioned for completeness and to make clear the two different strands for excluding involuntary confessional statements. It does not require that "a person in authority" was the author of the operating force which brought about the confessional statement. The rule has been expressed variously but the statement of Latham CJ, McTiernan, Webb, Fullagar and Kitto J in *R v Lee*,[121] adopting the words of Dixon J in *McDermott v The Queen*, is regularly cited:[122]

> "… unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure."[123]

(ii) Fairness

[82] If it is concluded by a judge that the confessional statement was made voluntarily, it may still be excluded on what are conventionally described as "discretionary grounds". The discretion to exclude on the ground that it would be unfair to admit the confessional statement against an accused is generally considered under three heads.[124]

[83] The first concerns the discretion to exclude confessional statements obtained because of some impropriety by the authorities. The discretion to exclude illegally or improperly obtained real evidence enunciated in *Bunning v Cross*[125] was applied to confessions in *Cleland v The Queen*.[126] It is generally described as the "policy" discretion.[127] This involves the weighing exercise referred to by Stephen and Aickin JJ in *Bunning v Cross*.[128] That is, weighing against each other, two competing requirements of public policy – the desirable goal of bringing to conviction a wrong-doer and the undesirable effect of curial approval or encouragement to unlawful conduct of those whose task it is to enforce the law.

[84] Gibbs CJ in *Cleland*[129] agreed with the statement of Brennan J in *Collins v The Queen*:[130]

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119 Said in *Tofilau v The Queen* (2007) 231 CLR 396 at 499 [326] to be first found in the joint judgment of Dixon, Evatt and McTiernan JJ in *Cornelius v The King* (1936) 55 CLR 235 at 246.

120 *R v Lee* (1950) 82 CLR 133 at 144 per Latham CJ, McTiernan, Webb, Fullaghar and Kitto JJ; *McDermott v The King* (1948) 76 CLR 501 at 511 per Dixon J.

121 (1950) 82 CLR 133 at 144.

122 (1948) 76 CLR 501 at 511.

123 Quoted in *Tofilau v The Queen* (2007) 231 CLR 396 at 500 [327].

124 *R v Swaffield* (1998) 192 CLR 159 at 189, [52] per Gaudron and Gummow JJ.

125 (1978) 141 CLR 54 at 75.

126 (1982) 151 CLR 1.

127 *Tofilau v The Queen* (2007) 231 CLR 396 at 469 [246].

128 (1978) 141 CLR 54 at 74-75.

129 (1982) 151 CLR 1 at 9.

130 (1980) 31 ALR 257 at 317.

> "it is difficult to conceive of a case … where a voluntary confession which might fairly be admitted against an accused person would be rejected in the public interest because of unlawful conduct leading to the making of the confession."

His Honour commented that the purpose of rejecting the evidence on public policy grounds is to ensure the observance of the law by authorities. This is the concern of the public, rather than the fairness of the trial, which is the concern of an accused. In *Tofilau v The Queen*[131] Gummow and Hayne JJ observed that the chief focus of the discretionary questions remains upon the fairness of using the accused's statement rather than upon the method of obtaining it. Their Honours added:

> "To the extent to which questions of disciplining police or controlling investigative methods are said to be relevant, proper weight must be given to the seriousness of the crime being investigated …"[132]

[85] The second discretionary basis for ruling a confessional statement inadmissible derives in part from the statement by Latham CJ in *McDermott v The King*[133] that the voluntary confessional statement made by an accused may be excluded if, "… in all the circumstances it would be unfair to use it in evidence against him." Evidence of such unfairness may include irresponsibility of an accused on the occasion when the statement was made or failure to understand and appreciate the effect of questions and answers. This "fairness" is relied on by the appellant insofar as it relates to his own physical wellbeing.

[86] The third "discretionary" head is the application to confessional statements of the discretion to exclude evidence, the prejudicial effect of which is greater than its probative value.[134] That basis of exclusion is not relevant here.

Discussion

Primary judgment

[87] The primary judge in his reasons set out what the appellant alleged Sergeant Galpin said to him in the car on the way to the airport at Albury:

> ""You're a good guy. You're in a position to make this right", "Based on what Gary has said, that's – there's a good chance you'll be convicted on this evidence", and "Consider your position"."[135]

His Honour acknowledged Sergeant Galpin's denial of this conversation.

[88] His Honour accepted that the appellant "had not slept for some time", but observed that this was not the fault of police. Irrespective, however, of who was responsible, it may have impacted upon the voluntariness of the appellant's inculpatory statements. In relation to the appellant's assertion that he was unwell, the primary judge accepted the evidence of RN Kelly that "she did not note any complaint or symptoms during her examination".[136]

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131 (2007) 231 CLR 361 at 432 [112].
132 At 432 [112].
133 (1948) 76 CLR 501 at 506-7.
134 *R v Swaffield* (1998) 192 CLR 159 at 191-193 [61]-[65].
135 AR 344, Reasons [43].
136 AR 344, Reasons [44].

[89] His Honour recorded that the appellant asked to speak to the detectives, but that this request should be viewed in light of the continuation of questioning by the detectives (on 28 January 2009 at Albury) after the appellant had said that he did not wish to answer any further questions. His Honour noted that the appellant was sufficiently warned and declined Sergeant Galpin's offer for him to speak with a friend, relative or a solicitor. His Honour concluded about the nature of this interview that there were:

> "… a series of statements made by Mr Griffiths which are not a result of prompting by any questions but rather a series of admissions".[137]

This finding was in light of the appellant's evidence that he was led by police and just agreed. There is ample evidence to support this finding. The appellant can be heard speaking fluently and without prompting.

[90] His Honour then said:

> "In the light of those findings I am satisfied on the balance of probabilities that the statement made on 30 January 2009 was voluntary and that the circumstances of it were such that any preceding conduct by the detectives did not mean it would be unfair to receive this interview in evidence."[138]

This was not an express finding by the primary judge that the conversations described by the appellant in the car, said to have induced his confession, did not occur; rather the implication of his Honour's conclusion is that whether or not those alleged conversations occurred they did not operate to induce the appellant's confession.

[91] Sergeant Galpin and Senior Constable Pannowitz were cross-examined extensively by Mr B Walker SC below about many aspects of the questioning of the appellant, including what are now (on this appeal) submitted to be inducements. Yet there was never any submission made to his Honour that the passages in that interview constituted inducements. When asked by this court to provide the references to submissions below referring to the statements by police now said to have been operative inducements, none of those provided references did so.[139]

[92] It is not the appellant's suggestion now, nor was it below, that the want of proper sleep and/or the appellant's asthma in and of themselves rendered his confessional statements on 30 January 2009 involuntary. Any such contention would be quite unsustainable on the evidence.

Emotional manipulation

[93] Generally, an appellant will be confined to the case he ran at first instance,[140] however I propose to consider the appellant's contention that aspects of the earlier

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137 AR 345, Reasons [47].

138 AR 345, Reasons [49].

139 The Appellant's oral submissions (AR 322), Outline of Submissions (Supplementary AR 30) and Supplementary Outline of Submissions (SAR 73), from the pre-trial hearing, contain details only of the alleged car conversations and further conversations at Beenleigh about Playford's evidence which was the subject of the conversation in the car.

140 *Crampton v The Queen* (2000) 206 CLR 161.

interview did operate on his mind as inducements to confess on 30 January 2009. In effect, the complaint now is that emotional manipulation by police induced him to make his confessional statements which were admitted into the trial against his interests.

[94] The Court of Appeal in Victoria had occasion to consider the issue of emotional inducements in *R v Thomas*.[141] The court had to decide whether the appellant's inculpatory statements, made in the course of an interview conducted by members of the Australian Federal Police (AFP) in Pakistan, were not made voluntarily because of inducements held out to him. No question arose as to the truthfulness or reliability of those statements. It was also argued that they should be excluded on the discretionary grounds that it would be unfair to admit them against him or that it would be contrary to public policy to do so. It is necessary only to mention that that accused, prior to the interview with the AFP, had been held in solitary confinement, had experienced privations, had been interviewed at length by Pakistani and Australian agents, and had a well-founded fear of indefinite detention at Guantanamo Bay. Those circumstances were known to the AFP. One inducement held out the possibility that he might be going home to Australia if he co-operated. If not, he could remain in indefinite detention.

[95] The court referred to the following passage in the judgment of Brennan J in *Collins v The Queen*:

> "… The principle, focussing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused."[142]

[96] Their Honours made specific reference to the separate occasions in the course of the joint team interviews (prior to the AFP interviews) when the appellant was, first, shown a photograph of himself with his wife and daughter and, secondly, given a letter from his wife and invited to read it.[143] Their Honours observed:

> "It is unnecessary to consider whether what occurred was improper, but we have no doubt that these two incidents did constitute emotional manipulation of Thomas. The incident with the letter is capable of no other explanation. There was no occasion for the AFP officer to give the highly emotive prompts he did, referring to the letter having been held by the applicant's wife and having come from a house where he had once been. Whatever was intended by these references, they could have had only one effect on someone in the applicant's position – that is, to remind him of how badly he wished to be reunited with his family and, by clear implication, that his responsiveness to questions would affect the likelihood of that occurring."[144]

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141 [2006] VSCA 165.

142 *R v Thomas* (2006) 163 A Crim R 567 at 592 quoting Brennan J in *Collins v The Queen* (1980) 31 ALR 257 at 307.

143 *R v Thomas* (2006) 163 A Crim R 567 at 593-594 [76].

144 At 594 [77].

[97] The court referred to the following passage in *Tofilau*:

> "There are almost certainly, in any given situation, a multiplicity of situational and psychological factors operating on the mind of an individual when considering whether anything and, if so what, should be said about a matter that may affect them or others around them. The notion of a free choice does not require an absence of possible benefits or detriments upon which the will may operate, but the absence of pressure that overbears the individual's will thereby restricting the available choices or the manner of their exercise."[145]

Their Honours observed:

> "What is important is whether the applicant could, in any real sense, be said to have had a free choice to speak or remain silent."[146]

They concluded that he did not.

[98] A decision of the Canadian Supreme Court casts some light on the emotional manipulation of suspects by police. In *R v Oickle*[147] a suspected arsonist agreed to submit to a polygraph test which he was told was not admissible although anything he said would be. He was informed that he had failed the test. He was extensively questioned by police and incrementally confessed to lighting the fires. He appeared emotionally distraught, said that he was tired and wanted to go home, was seen to be weeping with his head in his hands, after he had confessed to setting seven of the eight fires. He had had little sleep in his cell and when asked if he would do a re-enactment, he did. The trial judge had ruled that the statements and video re-enactment were voluntary and admissible. The Court of Appeal excluded the confessions and entered an acquittal and the Supreme Court of Canada restored the conviction, Arbour J dissenting.

[99] There are differences between the approach of the Canadian courts to the issue of voluntariness and Australian courts. The judgment was concerned to discuss voluntariness at common law and whether its protections extended beyond those guaranteed by the *Canadian Charter of Rights and Freedoms*[148] and also the role of the polygraph. Nonetheless, it does offer some interesting observations on the role of emotional inducement to a suspect or accused person under interrogation. In the executive summary of the judgment the following appears:

> "The police may often offer some kind of inducement to the suspect to obtain a confession. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt[149] about the voluntariness of the confession. An important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise. Oppressive conditions and circumstances clearly also have the potential to produce an involuntary confession. In assessing oppression, courts

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145 *R v Thomas* (2006) 163 A Crim R 567 at 596 [89] quoting *R v Tofilau (No. 2)* (2006) 160 A Crim R 549 at [155]. The High Court judgment had not then been given.

146 At 596 [91].

147 [2000] 2 SCR 3.

148 See Part I of the *Constitution Act* 1982 (Canada).

149 The test for admissibility in Canada that voluntariness must be established beyond reasonable doubt.

> should consider whether a suspect was deprived of food, clothing, water, sleep, or medical attention; was denied access to counsel; was confronted with fabricated evidence; or was questioned aggressively for a prolonged period of time."[150]

As can be seen, some of those considerations would find their way into the fairness discretion in an Australian court.

The summary continued:

> "There was never any insinuation of a *quid pro quo*. The police did suggest that confession would make the accused feel better, that his fiancée and members of the community would respect him for admitting his problem, and that he could better address his apparent pyromania if he confessed. However, read in context, none of these statements contained an implied threat or promise."[151]

Further:

> "The Court of Appeal criticized the police for questioning the accused in such a gentle, reassuring manner that they gained his trust. This does not render a confession inadmissible. Lastly, to hold that the police conduct in this interrogation was oppressive would leave little scope for police interrogation. They were always courteous; they did not deprive the accused of food, sleep, or water; they never denied him access to the bathroom; they fully apprised him of his rights at all times, and they did not fabricate evidence."[152]

[100] Of some relevance to this appeal was the following:

> "A … threat or promise relevant to this appeal is the use of moral or spiritual inducements. These inducements will generally not produce an involuntary confession, for the very simple reason that the inducement offered is not in the control of the police officers. If a police officer says "If you don't confess, you'll spend the rest of your life in jail. Tell me what happened and I can get you a lighter sentence", then clearly there is a strong, and improper, inducement for the suspect to confess. The officer is offering a *quid pro quo*, and it raises the possibility that the suspect is confessing not because of any internal desire to confess, but merely in order to gain the benefit offered by the interrogator. By contrast, with most spiritual inducements the interrogator has no control over the suggested benefit. If a police officer convinces a suspect that he will feel better if he confesses, the officer has not offered anything.
>
> …courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other

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150 At 5.
151 At 7.
152 At 7-8.

factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne."[153]

Conclusion

(i) Voluntariness

[101] Here the appellant was treated with courtesy by police interviewing him. The tone of the questioning was mild. There were lapses from time to time from what was desirable – the primary judge condemned the continued questioning. However, it must be observed that the appellant demonstrated some desire to continue talking to police and the further questions were not badgering. Indeed, the quietness and friendly sounding tone, particularly of Senior Constable Pannowitz's voice, may have encouraged the appellant to want to continue speaking.

[102] Seeking information about the whereabouts of the bodies to allow the families to bury them, given that the appellant had readily admitted to involuntary involvement in their deaths, was not impermissibly emotionally manipulative. Some of the expressions used by police were clearly designed to appeal to the appellant's finer feelings. There was no suggested benefit to him in giving that information. They did not constitute improper inducements.

[103] Even if they were so characterised, the appellant was able to make a free choice to speak or not which he exercised on many occasions. He had already discharged any moral duty to disclose the location of the bodies well before 2.00 pm on 30 January 2009 in Beenleigh. There was no operative inducement to confess to his closer criminal responsibility in the killings.

(ii) Fairness

Unfairness personal to the accused

[104] The appellant is critical of the primary judge for failing to refer to his personal circumstances as an aspect of the "fairness" discretion to exclude confessional statements. As a perusal of the oral submissions and both sets of written submissions makes clear, the appellant's "severely sleep deprived state"[154] was mentioned in the context of the submission about voluntariness. In those circumstances the appellant "was highly susceptible to be influenced by any pressure and/or inducements made by the investigating police officers".[155]

[105] Again, in the supplementary submissions dated 3 October 2011, well after the conclusion of the s 590AA hearing, the appellants "highly emotional, sleep deprived state"[156] related to the conversation in the car to the airport and other off tape conversations and went to the issue of voluntariness. It is not surprising, then, that the primary judge did not address this matter as a separate basis for exclusion.

[106] In any event, the circumstances of his well-being and health were not such as to render it unfair to admit the confessional statement. Suspects will often be in an emotional state. In this case the appellant had participated in a violent confrontation; he was not hardened in crime and had been, with his family, the

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153 At 36-37 [56]-[57].

154 SAR 44; Appellant's Outline of Submissions, dated 12 September 2011, para 43.

155 SAR 44; Appellant's Outline of Submissions, dated 12 September 2011, para 43.

156 SAR 73; Appellant's Supplementary Outline of Submissions, dated 3 October 2011, para 13.

subject of retributive threats which frightened him. Those circumstances did not make the admission of his confessional statement unfair.

Public Policy

[107] The brief statement in his Honour's reasons that

> "… and that the circumstances of it [the statement] were such that any preceding conduct by the detectives did not mean it would be unfair to receive this interview in evidence."[157]

is plainly a reference back to the continuation of questioning by police after the appellant said he no longer wished to answer questions.

[108] This was a reference to the "policy" discretion. The appellant has not shown that his Honour erred in this conclusion. The "improper" conduct should not be condoned or given curial approval. But it was far from egregious. The appellant confessed in the free exercise of his will and no conduct by police would disentitle the exclusion of his confessional statements on the policy discretion ground.

[109] The appellant has pointed to no error in the primary judge's approach based on the case advanced below. On a consideration of the further issues that have been raised on this appeal, the so-called inducements have not been demonstrated to have operated on the voluntariness of the appellant's confessional statement and neither discretion should have been exercised in favour of the appellant.

Order

[110] I would dismiss the appeal.

[111] **DALTON J**: The facts of this matter are set out in the judgment of White JA. The appellant stood trial with Gary Allen Playford whose appeal is related to this one.[158]

Scope of Application Below

[112] There was a dispute before this Court about what matters were raised by the appellant before the primary judge. Accordingly it is necessary to look at some detail as to that. The application by the appellant was filed on 30 March 2011 and relevantly asked for:

> "1. Exclusion of alleged conversation with New South Wales Police at Albury Police Station on 28.01.2009;
>
> 2. Exclusion of Police interviews conducted by Queensland Police on 28.01.2009 at Albury Police Station;
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> …
>
> 4. Exclusion of Police interviews conducted by Queensland Police on 30.01.2009 inside Beenleigh Watchhouse."

[113] The application was amended the next day, but the amendments do not seem material to the issues which now arise.

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157 AR 345, Reasons [49].

158 *R v Playford* [2013] QCA 109.

[114] The matter came on for hearing on 13 September 2011. The appellant was represented by senior and junior counsel. In breach of directions made before the hearing, no written outline had been filed on behalf of the appellant before the hearing – AB25 – but one was filed with leave that day – AB27. One infers from argument about the lateness of the outline which occurred at the very beginning of the hearing – AB25-28 – that the outline was delayed because instructions from the appellant had changed, or were at least late. The written submissions filed 13 September 2011 show at paragraph 1 that the scope of the application which the appellant wanted determined was different from that in the application filed 30 March 2011 – SR30. The written outline stated that the application which the appellant wished to pursue was to exclude:

(a) A conversation between himself and a Detective Marshall on 28 January 2009, which allegedly took place in the police car travelling between the house at which the appellant was arrested and the Albury Police Station. Detective Marshall was alleged to have asked the appellant whether there was anything at the house where he had been arrested which would assist police in their investigation. The appellant allegedly replied that there was money in the glove-box of a car at the house. That conversation was not tape-recorded and occurred before the appellant had advice that he had the right to have a lawyer present.

(b) A conversation between a Sergeant Smith and the appellant in the charge room at the Albury Police Station at about 1.52 pm on 28 January 2009 in which the appellant was allegedly asked about the location of the bodies of Smith and Black and replied that his co-accused Playford had disposed of the bodies and he knew nothing about it. That conversation was not tape-recorded and the substance of it was disputed by the appellant.

(c) A tape-recorded interview conducted between the appellant and Detectives Pannowitz and Galpin beginning at approximately 1.48 pm on 30 January 2009 at the Beenleigh Watchhouse.

[115] Notably the outline of submissions did not seek to exclude the two formal interviews, recorded on DVD, and conducted on 28 January 2009, one beginning at 6.37 pm and one beginning at 9.40 pm, both of which were comprehended by paragraph 2 of the application filed 30 March 2011. The submissions filed 13 September 2011 do not list these at paragraph 1 as being part of the application and further, at paragraphs 38 and 39, expressly state that no objection is taken to those interviews. In both these formal interviews the appellant made serious inculpatory statements. Not only that, there was significant conversation between the appellant and Detectives Pannowitz and Galpin before the formal interviews – this is dealt with in the judgment of White JA under the heading "Pre-formal interview conversation 28 January 2009". Further, it was argued by the appellant before this Court that statements which amounted to inducements were made by police to the appellant in the "pre-formal interview" and in the first of the formal interviews of 28 January 2009. Notwithstanding the terms of paragraph 2 of the application filed 30 March 2011; the inculpatory nature of statements made during the interviews on 28 January 2009, and the statements made to the appellant before and during the formal interviews on 28 January 2009, it is clear from the submissions filed on 13 September 2011, at the commencement of the four day s 590AA hearing, that the appellant did not challenge the reception of the interviews of 28 January 2009.

[116] It transpired that the Crown undertook not to call evidence of the unrecorded conversations between the appellant and Detective Marshall on 28 January 2009 and the appellant and Sergeant Smith on 28 January 2009. Therefore, the only evidence which was the subject of challenge before the primary judge was the interview between the appellant and Detectives Pannowitz and Galpin of 30 January 2009. The challenge was that it should be excluded on the basis that the admissions were not made voluntarily and also that it ought to be excluded "in the exercise of the judicial discretion of fairness and public policy" – paragraph 8 written submissions filed 13 September 2011.

[117] As to the first point, voluntariness, the submissions filed 13 September 2011 put the appellant's case this way:

> "42. It is submitted that Mr Griffiths's [sic] admissions contained in the interview conducted at 1.48 pm on 30 January 2009 were not made in the exercise of a free choice to speak or be silent. Instead, his will was overborne by pressure and inducements which were made by Detectives Galpin and Pannowitz <u>on that day</u>." (my underlining).

[118] The following paragraph of the written submissions is to the effect that in assessing voluntariness it was significant that the appellant had been in police custody for two days since arrest; was inexperienced in the criminal justice system; had not had his asthma medication, and was in "a severely sleep deprived state". The submission continues that in those circumstances the appellant was highly susceptible to be influenced by "any pressure and/or inducements". There is nothing in the written submissions filed 13 September 2011 which sets out, or makes argument about, the pressures and inducements said to have been made by Detectives Galpin and Pannowitz "on that day", i.e. on 30 January 2009. Perhaps that is not entirely remarkable, for the submissions were delivered at the beginning of a four day hearing in which the appellant and Detectives Galpin and Pannowitz gave evidence. Supplementary submissions were filed two weeks after the conclusion of the hearing. These submissions contain three main headings: one corresponding to the unrecorded conversation between the appellant and Detective Marshall on 28 January 2009; the next to the unrecorded conversation between the appellant and Sergeant Smith on 28 January 2009, and the last to the interview at 1.48 pm on 30 January 2009. That is, the supplementary submissions affirm the scope of the application made by the appellant, as stated in the submissions of 13 September 2011. Again, consistently with the original submissions, as to the interview of 30 January 2009, the supplementary submissions rely upon four conversations which occurred on 30 January 2009 – see SR75-76 and SR49-51. In the supplementary submissions these alleged conversations were said to be:

(a) Detective Galpin: (i) telling the appellant that the co-accused Playford had given a version to police in which he said that he and Griffiths had not intended to carry out a drug deal on the evening of the murder and had dug holes to dispose of the bodies of the men before that evening; (ii) speaking of the families of the deceased men; (iii) saying that the appellant was "a good guy", was "in a position to make this right"; (iv) telling the appellant to "consider your position", and (v) telling the appellant that based upon what his co-accused had said, there was "a good chance you will be convicted on his evidence".

(b) Detective Galpin telling the appellant that his co-accused Playford had told police it was the appellant who dug the holes in which to bury the bodies.

(c) Detective Pannowitz asking the appellant if he had considered what Detective Galpin had said earlier and telling him that he should "consider your position that – family and forking out a lot of money", and saying there was a lot of money at stake.

(d) Both detectives engaging in further conversation about the appellant's position and agreeing to "line my story up" with the co-accused and again telling the appellant that his co-accused's evidence was "going to convict you".

[119] The supplementary submissions acknowledge that each of the four statements relied upon as an inducement was specifically denied by the detective concerned. They go on to say that if it is accepted that the statements were made, there is a question as to whether or not they are capable of being considered inducements within the meaning of s 10 of the *Criminal Law Amendment Act* 1894 (Qld).[159] There are three pages of submissions as to the findings the primary judge ought to make on the evidence before him as to whether or not the four statements relied upon by the appellant were made. Matters which occurred prior to 30 January 2009 are referred to in this part of the supplementary submission as matters which show that Detectives Galpin and Pannowitz had engaged in conduct since about 9.45 pm on 28 January 2009 which, it was submitted, involved "an erosion" of the appellant's rights, and which thus bore upon the question of credit which the primary judge had to decide – were the four statements said to be inducements made on 30 January 2009.

[120] The initial hearing before the primary judge took place between 13 September 2011 and 16 September 2011. Numerous witnesses were called and cross-examined. There was no argument of any substance. The supplementary written submission on behalf of the appellant referred to above was filed on 3 October 2011, and the Crown filed written submissions on 7 October 2011. On 2 November 2011 there was a further short hearing for the purpose of oral argument. In fact, there was little oral argument and counsel by and large relied upon the written submissions they had made. Neither senior nor junior counsel for the appellant during the September hearing appeared for the appellant on 2 November. Junior counsel appearing for the appellant on 2 November conceded at AB322 ll 40-50, that the Crown's decision not to rely upon the two unrecorded conversations of 28 January 2009 did not bear upon the voluntariness argument, but submitted that what was alleged to have occurred on those two occasions was "still relevant material in relation to the second aspect of the application which relates to the fairness public policy exclusion *Bunning v Cross* ground" – AB322. There was no oral submission on the part of the appellant which raised or relied upon any inducement other than those four which appeared in the supplementary written submission of 3 October 2011 and are set out above.

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159 It was not argued either before the primary judge, or before this Court that statements made were not capable of being inducements at law. As to this point, the appellant below relied upon *R v Plotzki* [1972] Qd R 379; *R v Beere* [1965] Qd R 370; *R v Richards* [1967] 1 WLR 653 and *McNamara v Edwards* [1907] St R Qd 9. In this regard I note the comments of Brennan J in *Collins & Ors v R* (1980) 31 ALR 257, 307-310 as to the desirability of reconsidering older cases dealing with admonitions to tell the truth because it will be better for the suspect, or worse for the suspect if he does not. It may be that there ought to be a reconsideration of those cases but this is not the case to do so.

[121] Before us, counsel for the appellant, who had not appeared before the primary judge on any part of the application, asserted that there were inducements given by police in what White JA has called the "pre-formal interview", and during the first of the formal interviews on 28 January 2009 – see paragraphs 20, 21 and 22 of the appellant's written outline before this Court dated 21 December 2012. The submission was made that these matters were not adverted to by the primary judge in his reasons. The inducements he relied upon were not raised before the primary judge.[160]

[122] I am not inclined to consider anything by way of appeal but the case made before the primary judge. In *Crampton v The Queen*[161] Gleeson CJ outlined the reasons why it was only in exceptional circumstances that an appellate court would deal with a point which had not been raised below. The first and second reasons he listed relate to the undesirability of proceedings below becoming a preliminary skirmish designed to test a strategy with the alternative of a new strategy, launched on appeal, held in reserve. The third reason given by Gleeson CJ is that neither a primary court, nor an appellate court really understands the tactical considerations which inform the decisions taken by counsel conducting a criminal case. Here, the appellant had experienced and competent counsel acting for him on the s 590AA application. Late, on instructions, his counsel changed the basis of the application. A decision was made to drop the challenge to the interviews of 28 January 2009, notwithstanding that they contained serious inculpatory statements, and notwithstanding that they contained statements now relied upon by the appellant as being inducements. In written submissions filed 13 September 2011, the inducements relied upon were limited to those made on 30 January 2009. That position was expressly affirmed in the written submissions of 3 October 2011, filed after all the evidence on a four day application had been heard, and after counsel acting for the appellant had over two weeks to make further written submissions about that evidence.

[123] It is the responsibility of counsel appearing on a s 590AA application to properly consider and define the point or points which are to be run. In this case there is no suggestion whatsoever that was not done. To the contrary, the indications (particularly no challenge being made to the 28 January interviews) are that deliberate tactical choices were made. No reason was advanced before this Court as to why the appellant should not be bound by the conduct of his case below. It is not the role of the Court in an adversarial system to cast around for points not raised by a defendant on a s 590AA application which appear to the Court to be more profitable to the defendant than those raised by the defendant's counsel. As Gleeson CJ points out in *Crampton*, the Court does not know the confidential information and instructions which defence counsel knows, and which can be presumed to inform tactical choices made in running a s 590AA application, or indeed a trial. Further, such a role is incompatible with notions of judicial independence and impartiality where the defence is represented by apparently competent counsel – see the last of the points made by Gleeson CJ in *Crampton*.

[124] The Crown on appeal contended that, apart from involuntariness, the case below was conducted only on the basis that the Court should exclude the interview of

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160 While a supplementary note was filed, it does not reveal that any inducements other than the four outlined above were put before the primary judge.

161 (2000) 206 CLR 161, 172-173; followed in *R v Hill & Ors* [2011] QCA 306, [166] per Atkinson J; *R v Sullivan* [2009] QCA 344, [15] per Muir JA; *R v Robinson* [2010] 2 Qd R 446, [101] per Fryberg J and *R v Kovacs* [2009] 2 Qd R 51, [66], per Muir JA.

30 January 2009 on the basis of the public policy discretion in *R v Ireland*.[162] That is, the Crown submission was that the distinct discretion to exclude statements for unfairness – *R v Lee*[163] – was not argued below. In my judgment in *R v Playford*,[164] I set out the history of the development of two discretions – exclusion on the basis of unfairness – *R v Lee* – and exclusion on the basis of public policy – *R v Ireland* – which may fall to be exercised where the admissibility of a confessional statement is challenged. These two discretions are distinct and separate and should be exercised independently. Counsel appearing for the appellant did not seem concerned to properly distinguish or differentiate between the two discretions in submissions made to the primary judge. As an example, in oral submissions counsel referred to, "the second aspect of the application which relates to the fairness public policy exclusion *Bunning v Cross* ground" – AB322. While this is probably the height of opaqueness in relation to this topic, the written submissions and other oral submissions also contain ambiguity as to what argument the appellant was making below.

[125] Nevertheless, having regard to both the language used, and the substance of the submissions made, I think that the appellant below did raise an argument that the interview of 30 January 2009 ought to be excluded on the unfairness ground as well as on the public policy ground. In the first written submission there is reference to, "the exercise of the judicial discretion of fairness and public policy" – SR32 paragraph 8; similarly the heading at SR44 is, "Unfairness and public policy discretion" and in paragraph 44 at SR44-45 there is reference to, "the fairness and public policy discretions". Lastly, at paragraph 46 at SR46, there is reference to, "the grounds of unfairness and public policy". Under the heading at SR34, "Judicial discretion to exclude statements for unfairness", cases such as *R v Ireland* and *Bunning v Cross* are discussed, but so are cases such as *Duke v The Queen*[165] and *R v Lee*, and passages from *Van der Meer*[166] are extracted, where Brennan CJ clearly discussed the exercise of the discretion to exclude evidence when it would be unfair to the accused to admit it. The supplementary submissions for the appellant (3 October 2011) refer at paragraph 24 to, "unfairness and public policy". In oral submissions, counsel appearing for the appellant referred to, "the fairness ground" – AB323. In a passage at AB232-234, the primary judge raised with the appellant's counsel the fact that it was not the police who had deprived the appellant of sleep. The reply of counsel for the appellant (to the effect that he was not suggesting impropriety on the part of the police in causing the deprivation, but that the matter was still relevant as one of the circumstances which must be considered by the Court) is consistent with reliance on the discretion to exclude for unfairness.

The Reasons of the Primary Judge

[126] The reasons for decision of the primary judge are as follows:

> "**Griffiths – interview on 30 January 2009**
>
> [42] As I have noted above, the Crown has submitted that it will not lead evidence in relation to two of the three conversations which are the subject of this application. That

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162 (1970) 126 CLR 321.
163 (1950) 82 CLR 133.
164 Above.
165 (1989) 180 CLR 508.
166 (1988) 82 ALR 10.

leaves only the interview conducted on 30 January 2009. It does not mean, though, that I cannot or should not take into account any conduct prior to then which might have a bearing upon the voluntariness or fairness of the interview.

[43] Mr Griffiths gave evidence that in the course of being transported from the Albury Watch House to the Albury airport, Detective Galpin said words to him to the effect: 'You're a good guy. You're in a position to make this right', 'Based on what Gary has said, that's – there's a good chance you'll be convicted on this evidence', and 'Consider your position'. That conversation was denied by Detective Galpin.

[44] The thrust of the argument on behalf of Mr Griffiths was that, at the time of the interview, he was sleep deprived and had been without his regular asthma medication for some time. I accept that Mr Griffiths had not slept for some time but that was not a consequence of anything done by the police. As to his physical health, he gave evidence of being unwell and asserted that he was unwell. He was examined by a nurse. Her evidence was that she did not note any complaint or any symptoms during her examination. Her evidence was unchallenged. I accept it.

[45] The circumstances of the interview were that Mr Griffiths was due to appear in court at about 2pm. There was evidence, which I accept, that the practice at the Beenleigh Court House was that the magistrate would, in effect, call up defendants when their particular matter was reached in the list. It was not certain that Mr Griffiths would be called up. Nevertheless, after being examined by a nurse, Detective Pannowitz received a message that Mr Griffiths wished to speak to them again. This must be viewed in the light of the interview which took place on 28 January 2009 in Albury when Detective Pannowitz continued to question Mr Griffiths after he had said he did not wish to answer further questions. This was improper conduct by Detective Pannowitz. Upon being told that he did not wish to be further questioned, Detective Pannowitz should not have continued and should have brought the interview to a close.

[46] When told by the nurse that Mr Griffiths wished to speak to them further, Detective Pannowitz and Sergeant Galpin took him into a room at the Beenleigh Watch House which is not normally used for an interview. He was asked:

> Do you agree that after speaking with the nurse you advised us that you wished to speak further in relation to the matter we are investigating?
>
> Griffiths: Yes
>
> S Con Pannowitz: In particular the murders of Paul Black and Aaron Smith on the 25th day of January 2009?

Griffiths: Yes

[47] Mr Griffiths then confirmed that there was no recording equipment apart from a C90 interview tape. Detective Pannowitz administered a warning which was not completely consistent with that required but was sufficient in the circumstances and in the light of earlier warnings. Later Sergeant Galpin asks him whether he would like to speak to a friend, relative or a solicitor and Griffiths says: 'Not at this time, yet.' There then follows a series of statements made by Mr Griffiths which are not a result of prompting by any questions but rather a series of admissions.

[48] I do not accept that anything said by Mr Griffiths was the subject of or as a result of any threat or inducement made by either detective involved. His conduct was, I find, a result of his own decision made on that day.

[49] Submissions were made with respect to the close circuit television recordings made in the watch house and that they were not consistent with the evidence given by the detectives as to their conduct. I am satisfied that the 'gap' in the footage is satisfactorily explained by a number of matters including that Mr Griffiths was being examined by the nurse at the relevant time. In the light of those findings I am satisfied on the balance of probabilities that the statement made on 30 January 2009 was voluntary and that the circumstances of it were such that any preceding conduct by the detectives did not mean it would be unfair to receive this interview in evidence."

[127] Paragraph [43] of the reasons below outlines only one of the four conversations relied upon as inducements by the appellant. The appellant below argued that his sleep deprivation and lack of asthma medication made him particularly vulnerable to inducements, so that this evidence was relevant to voluntariness as well as the exercise of the public policy and fairness discretions. The primary judge was against the appellant on the medication, but not the sleep deprivation point – paragraph [44]. Paragraph [45] must be read as a finding that Mr Griffiths did ask to speak to police at around 1.48 pm on 30 January 2009. This was in contest before the primary judge, although this is not apparent from the judgment. There are no reasons given for this finding, but it must have been a credit finding against the appellant. This finding is of course very relevant to the question of voluntariness, as are the findings at paragraph [47] as to the administration of a warning, refusal of legal advice, and the nature of the interaction between police and Mr Griffiths during the impugned interview.

[128] Having regard to the factual findings made by the primary judge to the end of paragraph [47] of his reasons, the point has been reached where the primary judge has outlined, but not resolved, the credit issue as to whether one of four alleged inducements has been made; determined that the appellant was not unwell; accepted that he had not slept for some time; found that it was the appellant who asked to speak to police on 30 January 2009, after having told those same police on

28 January 2009 that he no longer wished to speak to them, and found that after a warning and the opportunity to seek legal advice, the appellant freely gave inculpatory information to the police.

[129] On 29 January 2009 the appellant had refused to speak to police – see paragraph [61] of the judgment of White JA. The inducements alleged by the appellant took place after the refusal to continue with questioning on 28 January 2009 and after the refusal to speak to police on 29 January 2009. The interview of 30 January 2009 occurred fairly shortly after the alleged inducements were made – AB1509, 1511-1512. The *Police Powers and Responsibilities Regulation* 2000 provides, that if a person being questioned by police states that they do not want to answer questions, the police officer must desist, but if that person later indicates they are prepared to answer questions, the police officer must ask, before continuing to question them, why they have decided to answer questions, and whether a police officer or someone else in authority has told the person to answer questions.[167] The appellant took the point below that this provision was not complied with by police on 30 January 2009.

[130] The impugned interview was commenced shortly before the appellant's matter was listed to be heard before a magistrate – along with other matters. The appellant's matter was listed to be heard at 2.00 pm, although there was no certainty as to what time after 2.00 pm it would be reached. The appellant had a lawyer appearing for him before the magistrate. At 2.37 pm the interview of 30 January 2009 is interrupted so that the appellant can speak to his lawyer. After that it is recorded that his lawyer has informed police that the appellant no longer wishes to answer any questions and the interview is terminated.

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

> "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."

[132] The Crown conceded in argument before us that paragraph [48] of the reasons for judgment below was ambiguous as to whether or not inducements as alleged had been given to the appellant. I cannot interpret the two sentences at paragraph [48] as a finding that the inducements were not made. From the language of the first sentence, and the substance of the second, it seems to me that the finding is more likely one that relates to the second limb of s 10 – that whether inducements were given or not, the inculpatory statements were not induced thereby. This is consistent with the use of the word "any" in paragraph [49] of the reasons.

[133] There are factual findings which support the determination that the statements made by police did not induce the inculpatory statements made on 30 January 2009. There are the findings as to the appellant's state of health and his asking to speak to detectives, and the findings that the appellant was warned, and not led along by police in the interview of 30 January 2009, as he claimed. The first two sentences at paragraph [49] amount to a finding that the police had not engineered the opportunity to speak to the appellant at about 1.48 pm that day, which the appellant claimed had occurred.

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[167] In 2009 this was at paragraph 35 of Schedule 10 to the *Police Powers and Responsibilities Regulation* 2000.

[134] The only reason given for the determination in the first sentence of paragraph [48] is found in the second sentence of paragraph [48] of the reasons for judgment. The appellant attacked this as a mistake of law, relying on dicta in *R v Lee*[168] in a judgment given by all members of the High Court to the effect that, "The word 'voluntary' in the relevant connection does not mean 'volunteered'. It means 'made in the exercise of a free choice to speak or be silent'." The appellant's point, I think, was that, clearly enough, the appellant decided to speak to police on that day; the question for determination was whether that decision had been induced by the preceding statements by police. In circumstances where the only indication as to the primary judge's reasoning is that brief sentence, I am inclined to agree that the appellant's criticism in this regard is good.

[135] Whether the first sentence in paragraph [48] is read as showing that the primary judge determined that no inducements were given to the appellant, or as I prefer, is read as a finding on the basis of the second limb of s 10 of the *Criminal Law Amendment Act*, my view is that adequate reasons were not given, and this amounts to an appellable error. I refer to the judgment of Muir JA in *Attorney-General for the State of Queensland v Fardon.*[169] In principle the comments he makes there are applicable here. There is no analysis, elucidation or explanation as to the reasoning process which apparently led the primary judge to find that the Crown had discharged its onus of proving that the inculpatory statements were not induced by the statements made that morning to the appellant (or alternatively, led him to prefer the evidence of the police to the evidence of the appellant). The refusal of the appellant to continue to speak to police on 28 January 2009 is not dealt with, nor is his refusal to speak to police on 29 January 2009. Only one of the statements said to be an inducement is mentioned, and there is no consideration of the chronology in which two refusals to speak to police are succeeded by the alleged inducements, and then shortly, by the inculpatory statements which go substantially further than inculpatory statements made by the appellant on 28 January 2009. Nor does the judge deal with the decision to terminate the interview when advice is received.

[136] Turning to the appellant's agitation of the discretion to exclude the confession on the basis that it was unfair to receive the interview of 30 January 2009, or alternatively that it was against public policy that it ought to be received, there is no independent consideration of the factors going to these two distinct discretions. For reasons which I set out fully in *R v Playford*,[170] this is an appellable error in the exercise of discretion. This case is like *Playford* in that the confession is reliable, and is to very grave offences. There is a strong public interest in seeing the appellant convicted. This factor will weigh very heavily against the appellant, almost conclusively, I would have thought, in any proper exercise of the discretion to exclude the confession on the grounds of public policy. However, it is not relevant in the exercise of the discretion to exclude the confession on the grounds that it would be unfair to the appellant to receive it in evidence against him. For this reason, my view is that, as in *Playford*, the discretions had to be separately and distinctly exercised. If they were not, the result of the exercise of a discretion to exclude on the basis of unfairness to the appellant was a foregone conclusion. As well, in my view, there is not adequate explanation of the primary judge's reasons for the conclusion stated as to fairness. Again I refer to the reasons of Muir JA in *Fardon*.

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168 Above, p 149.

169 [2013] QCA 64, [81]-[82].

170 Above.

[137] As to the disposition of this matter, I would have no difficulty exercising the discretion to exclude the interview on the grounds of public policy at appellate level because, in my view, the public interest in securing a conviction must outweigh the matters raised by the appellant, even if every credit issue were determined favourably to him. However, I do not think the appellant's arguments as to excluding the evidence because it would be unfair to receive it, and as to voluntariness, can be dealt with on appeal. As to voluntariness, the appellant and the detectives concerned gave evidence and were cross-examined extensively. As well, the primary judge heard and saw DVD recordings of the unchallenged records of interview which took place on 28 January 2009, as well as tape-recordings of the impugned interview of 30 January 2009. There is little in the way of objective evidence to support one contention or the other, the result must depend almost entirely upon the view taken of the honesty and reliability of the witnesses. Credit findings in these circumstances should be undertaken by a judge who has heard and seen the witnesses.[171]

[138] In my view, for the same reasons, the discretion to exclude on the basis of unfairness should also be exercised by someone who has seen and heard the witnesses and seen and heard the DVD recordings, and tape-recordings. The appellant ran a case that he was sleep deprived, and deprived of asthma medication. The primary judge discounted any medical factors but misdirected himself, in terms of the exercise of the discretion to exclude on the basis of unfairness, when he discounted the sleep deprivation on the basis that it was not a consequence of anything done by the police. As well, the appellant relied on various breaches of the *Police Powers and Responsibilities Act* and *Code.* The appellant gave evidence as to his state of mind immediately prior to giving the interview of 30 January 2009 as to the cumulative effect of matters which had occurred since his arrest. This part of the evidence needed to be assessed along with the other parts of the evidence which I have mentioned. While I cannot feel sympathetic to the appellant's case on the unfairness discretion, I do not feel that I am in substantially the same position as a trial judge to assess the arguments having not seen or heard any of the witnesses, or the DVD and tape recordings.

[139] It follows that I would allow the appeal; quash the convictions; order a new trial and a re-determination of the points raised upon the s 590AA application.

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171 cf *Fardon* (above) [90].