SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* [2015] QCA 87
PARTIES:	**In CA No 77 of 2014:** **R** **v** **COWAN, Brett Peter (also known as Shaddo N-Unyah Hunter)** (appellant) **In CA No 53 of 2014:** **R** **v** **COWAN, Brett Peter (also known as Shaddo N-Unyah Hunter)** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 77 of 2014 CA No 53 of 2014 SC No 323 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane - [2013] QSC 337
DELIVERED ON:	21 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	26, 27 November 2014
JUDGES:	Margaret McMurdo P and Fraser JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The appeal against sentence is dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – PARTICULAR CASES – where the appellant was found guilty after trial of murder (count 1), indecent treatment of a

child under 16 (count 2) and interfering with a corpse (count 3) – where each count was charged as occurring on 7 December 2003 at Glasshouse Mountains – where on 9 August 2011, following an extensive covert police operation, the appellant confessed in Western Australia to undercover police officers whom he believed were part of a criminal gang – where the appellant thought he needed to tell them what he had done so they could supply him with a false alibi to give to a coronial inquest for which he was to be recalled later that year – where he said that he offered the child a lift, drove him to an isolated place and tried to pull down his pants – where the child resisted and was strangled – where on 10 August 2011, the appellant flew to Queensland with the undercover police officers posing as members of the gang – where the appellant took the undercover police officers to the areas he described and showed them what he did – where the appellant was arrested on 13 August 2011 in Queensland and declined to answer police questions – where in a pre-trial hearing the appellant contended the admissions and the derivative evidence should have been excluded either under s 10 *Criminal Law Amendment Act* 1894 (Qld) or in the exercise of discretion – where the judge found that the questioning of the appellant at the inquest did not operate as an inducement under s 10 – whether the primary judge erred in finding that there was no threat or promise made to the appellant at the inquest amounting to an inducement under s 10 – whether the judge erred in allowing into evidence the confessions and the derivative evidence

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – PARTICULAR CASES – where, if the questioning of the appellant at the inquest was a threat or promise amounting to an inducement under s 10, the prosecution had to establish on the balance of probabilities that when the appellant confessed to the undercover police officers, he was not still acting under that inducement – where the inquest occurred on 31 March and 1 April 2011 in Brisbane – where the confessions to those whom the appellant considered to be his criminal associates, were separated from that alleged inducement by time and distance, being some four months later in August 2011 in Western Australia – whether, if there was a threat or promise from a person in authority for the purposes of s 10, the appellant was acting upon it when he confessed to the undercover police officers – whether the primary judge erred in concluding that the appellant's confessions to the undercover police officers were not induced by any threat or promise held out at the inquest

CRIMINAL LAW – EVIDENCE – JUDICIAL

DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – PARTICULAR CASES – where the appellant contends that the primary judge erred in the exercise of her discretion in not excluding the confessions and the derivative evidence on grounds of unfairness – where the appellant did not ask the primary judge to exclude the evidence as an abuse of process or on public policy grounds but now contends that this Court should do so to avoid a miscarriage of justice – where the question is not whether the police acted unfairly but whether it would be unfair to the appellant to use his statements against him, in that the appellant's right to a fair trial may have been jeopardised if the statements were obtained in circumstances which affect their reliability – where there was no illegal conduct on behalf of the undercover police officers or in the dealings between the police, the coroner and his staff – where the coroner's notice to attend was issued for legitimate reasons – where the appellant did not exercise his right to silence and freely spoke to police on numerous occasions although he did consistently deny all involvement in the child's disappearance – where the appellant would not have made admissions had he known the true identity of the undercover police officers – where the appellant chose to confess so as to obtain a watertight, false alibi; to use the alibi to exonerate himself at the inquest when recalled; to enable him to remain in the criminal gang and to participate in the pending “big job” which would net him $100,000 – whether there was an abuse of process – whether questions of fairness or public policy, individually or in combination, otherwise warrant the exclusion of the confessional and derivative evidence – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant's case at trial was that the appellant falsely confessed to ingratiate himself into the criminal gang – where the appellant contended that it was reasonable to infer that his knowledge of the offences came from Mr Jackway, who was responsible for them, through Mr McLean – where the primary judge told the jury there was no direct evidence of Mr Jackway providing Mr McLean with information about the killing of the child or of Mr McLean giving that information to the appellant – where the appellant contends that the judge's directions to the jury failed to indicate that it was for the prosecution to prove his guilt beyond reasonable doubt – where the defence case was that, although there was no direct evidence, the jury could draw those rational inferences from indirect evidence – where the judge declined to give that redirection – where the judge directed that the jury could act on the appellant's

confessions to the undercover police officers only if they were satisfied both that they were made and also that they were true and that it was the defence case that the prosecution had not disproved that Mr Jackway committed the offences against the child – whether there was a misdirection on a matter of law – whether the primary judge's refusal to give the redirection sought was an error of law or led to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – PRINCIPLES APPLIED BY APPELLATE COURT TO CROWN APPEALS – where the respondent to the sentence appeal was found guilty after trial of murder (count 1), indecent treatment of a child under 16 (count 2) and interfering with a corpse (count 3) – where the respondent was sentenced to life imprisonment with parole eligibility after serving 20 years on count 1; to three and a half years imprisonment on count 2; and to two years imprisonment on count 3 – where the Attorney-General of Queensland has appealed against the sentence on count 1 under s 669A *Criminal Code* 1899 (Qld) contending that it is manifestly inadequate in that parole eligibility should have been postponed beyond 20 years – where the respondent's criminality was aggravated by his chillingly similar past offending, his complete lack of remorse and insight into his actions and his poor prospects of rehabilitation – where the sentencing judge noted the respondent's life sentence for murder meant that, whatever parole eligibility date was given, he will not be released unless the Parole Board considers release appropriate at some time far into the future – where this Court can only interfere with a sentence on appeal under s 669A where the sentence was so unreasonable as to amount to an error of law – where there is no previous instance in Queensland where the parole eligibility date for a single murder was postponed beyond 20 years – whether the sentence is manifestly inadequate

Coroners Act 2003 (Qld), s 3(a), s 39, s 64
Criminal Code 1899 (Qld), s 669A
Criminal Law Amendment Act 1894 (Qld), s 10
Penalties and Sentences Act 1992 (Qld), s 9(1)
Supreme Court of Queensland Act 1991 (Qld), s 31(1), s 31(2)

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited
Cleland v The Queen (1982) 151 CLR 1; [1982] HCA 67, cited
Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, cited
Foster v The Queen (1993) 67 ALJR 550; (1993) 66 A Crim R 112; [1993] HCA 80, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, 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
Pavic v The Queen (1998) 192 CLR 159; [1998] HCA 1, cited
R v Abell, unreported, Douglas J, 8 October 2013, cited
R v Cowan [2013] QSC 337, related
R v Hart [2014] 2 SCR 544; 2014 SCC 52, cited
R v Hayes [2008] QCA 371, cited
R v Maygar; Ex parte Attorney-General (Qld); R v WT; Ex parte Attorney-General (Qld) [2007] QCA 310, cited
R v Sica [2014] 2 Qd R 168; [2013] QCA 247, cited
R v Swaffield (1998) 192 CLR 159; [1998] HCA 1, cited
Ridgeway v The Queen (1995) 184 CLR 19; [1995] HCA 66, cited
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited
The Queen v Ireland (1970) 126 CLR 321; [1970] HCA 21, cited
Tofilau v The Queen (2007) 231 CLR 396; [2007] HCA 39, followed
Van der Meer v The Queen (1988) 62 ALJR 656; [1988] HCA 56, cited
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, cited

COUNSEL: P J Davis QC, with A J Edwards, for the appellant/respondent
A W Moynihan QC, with G P Cash, for the respondent/appellant

SOLICITORS: Bosscher Lawyers for the appellant/respondent
Director of Public Prosecutions (Queensland) for the respondent/appellant

[1] **MARGARET McMURDO P:** The appellant, Brett Peter Cowan, also known as Shaddo N-Unyah Hunter, was convicted on 13 March 2014, of murder (count 1), indecent treatment of a child under 16 (count 2) and interfering with a corpse (count 3). The trial extended over 30 days including eight days of pre-trial hearing. The victim in each count was 13 year old Daniel Morcombe. Each count was charged as occurring on 7 December 2003 at Glasshouse Mountains. The appellant was sentenced to life imprisonment with parole eligibility set after serving 20 years on count 1; to three and a half years imprisonment on count 2; and to two years imprisonment on count 3.

[2] He has appealed against his convictions contending that the trial judge erred in not excluding both the evidence of his admissions to undercover police officers and the evidence obtained as a result of those admissions. He also contends that the trial judge erred in misdirecting the jury as to drawing inferences in relation to the evidence of Douglas Jackway and Leslie McLean.

[3] The Attorney-General of Queensland has appealed against the sentence imposed on count 1, contending that it is manifestly inadequate.

[4] The appeals were heard by a Court constituted by Carmody CJ, Fraser JA and me. On 18 May 2015, Carmody CJ issued a certificate under s 31(2) *Supreme Court of Queensland Act* 1991 (Qld) stating that he is incapable of sitting on these appeals in

light of his recusal on 7 May 2015. In accordance with s 31(1) *Supreme Court of Queensland Act*, the Court is now constituted only by Fraser JA and me.

[5] These are my reasons for rejecting the grounds of appeal against conviction and dismissing both the appeal against conviction and the appeal against sentence. After setting out the background facts, I will deal with each of the grounds of appeal against conviction and will then discuss the appeal against sentence.

The appeal against conviction

The background facts

[6] It was common ground that on 7 December 2003, 13 year old Daniel Morcombe left his family home at Palmwoods on Queensland's Sunshine Coast to catch a bus to Sunshine Plaza, Maroochydore. He was wearing navy blue long shorts, a red Billabong t-shirt and grey Globe brand sneakers. He attempted to hail a bus at the Kiel Mountain Road overpass on the northern side of Nambour Connection Road at about 2.15 pm. There is a church near this overpass on the northern side and a caravan sales yard on the southern side. The bus did not stop as it was an express service. It was a replacement bus which had collected passengers from another bus which had broken down at the Woombye turnoff. The driver signalled to Daniel that another bus was not far behind. Witnesses in the bus saw at least one man standing some distance behind Daniel; none noticed any vehicle. By the time a shuttle bus came by about three minutes later, Daniel had disappeared. Some witnesses saw Daniel talking to, being watched by or being near a man or men associated with a boxy, blue, older model sedan at or near the overpass. Some witnesses said the man near the blue sedan had tattoos on his shoulder and calf and a goatee beard. Daniel's disappearance received a great deal of media coverage including the publication of much of this information.

[7] Douglas Jackway had a 1980 blue Commodore which broadly matched the description of the car seen by witnesses. He also had tattoos on his shoulder and calf and, in December 2003, a goatee beard. He was released from prison a month prior to Daniel's disappearance. He had been serving a sentence for abducting a young boy, pulling him into his car and sexually assaulting him. Mr Jackway was residing in Goodna, about an hour and a half drive from the overpass. He had planned to be in the Sunshine Coast area on the day of Daniel's disappearance, although there was no direct evidence he was there that day. He told police that his car broke down at or near the overpass the day after Daniel's disappearance. He initially lied to police and gave inconsistent versions about his whereabouts on 7 December 2003. He became violently upset when police took his car for scientific examination. He denied all involvement in Daniel's disappearance. His fiancée told police he threatened her to make her provide him with a false alibi. The prosecution case at trial was that neither a blue car nor Mr Jackway were involved in Daniel's disappearance.

[8] Other witnesses saw a man near the bus stop who was standing on one leg with his other leg against the wall. The appellant's former wife and police officers gave evidence that the appellant often adopted this stance. The appellant lived in the area where Daniel disappeared; attended the church near the overpass; and was a police suspect because of his criminal history for violent sexual offending against young boys.

One witness saw a white four-wheel drive near the bus stop.[1] The appellant owned such a vehicle at that time. When interviewed by police in 2003, 2005 and 2006, he denied all involvement in Daniel's disappearance. He maintained these denials when questioned in the coronial inquest into Daniel's death in March and April 2011.

[9] On 9 August 2011 in Western Australia, following an extensive covert police operation, the appellant confessed to the offences to undercover police officers whom he believed were part of a criminal gang. He did so in order they would supply him with a false alibi which he would then give to the inquest when he was recalled later that year. He told them that he offered Daniel a lift, drove him to an isolated place and tried to pull down his pants. Daniel resisted and in the ensuing struggle he strangled Daniel. He took the body in his car to an abandoned sandmining site and threw it over a bank. He removed Daniel's clothes and shoes and threw them from a bridge into the nearby creek. He covered the body with branches and went home. He returned about a week later. The body had mostly been taken by wild dogs or pigs. He smashed the few remaining bones with a shovel and buried them.

[10] He returned to Queensland with the undercover police officers and took them to the areas he described in his confessions, showing them what he did. When arrested on 13 August 2011, he declined to answer police questions.

[11] After an extensive search, police later found bones containing DNA consistent with Daniel's near the abandoned sandmining site. Remnants of clothing consistent with that worn by Daniel were also found in the nearby creek to which the appellant had taken undercover police officers. Although the appellant told police that he threw Daniel's shoes into the creek with the other clothing, the shoes were found in the sandmining area, not the creek.[2] The admissions he made were otherwise consistent with the subsequent location of that evidence. At trial the prosecution called expert evidence as to the likely effect of weather, flooding and animal behaviour on the location of this evidence.

[12] The appellant did not give or call evidence at trial but the defence case, as explained in opening and closing addresses and as put to witnesses (particularly Mr Jackway and another convicted offender, Mr McLean) was that the prosecution had not established beyond reasonable doubt that the appellant's confessions were true. Mr Jackway had a blue sedan of the kind described by witnesses. Mr Jackway was released from jail only one month before Daniel disappeared and was due to be in the vicinity of the overpass on the day of Daniel's disappearance. Witnesses saw a man in the vicinity with a goatee beard and tattoos which matched Mr Jackway's. When Mr Jackway was questioned by police, he lied about his whereabouts. Mr McLean seemed to know Mr Jackway from when they were in prison together and to have met with him later after their release from prison. Mr McLean had multiple personalities and sometimes did not remember what he said or did. He spoke to the appellant about Daniel's disappearance. The prosecution could not exclude the possibility that Mr McLean told the appellant the details of Daniel's killing, as explained to him by Mr Jackway. The appellant may then have used this information to falsely confess to criminal gang members so that they would provide an alibi to clear him in the inquest. The methods used by undercover police officers preceding his confessions were designed to extract an admission. Daniel's remains were not found at the spot he indicated because he had repeated what Mr McLean had told him; he did not

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1 Trial transcript 6-51.

2 Trial Exhibit 18.

know exactly where Daniel's remains were. He falsely told police that he threw the shoes into the creek; they were located elsewhere. For these reasons the appellant contended the jury could not be satisfied the confessions were reliable or that the prosecution had established its case beyond reasonable doubt.

The appeal against conviction

Should the admissions and the resulting evidence be excluded?

[13] In a pre-trial hearing the appellant contended the admissions and the evidence obtained as a result of them should have been excluded either under s 10 *Criminal Law Amendment Act* 1894 (Qld) or in the exercise of discretion. The first contention in this appeal is concerned with her Honour's rejection of that application. It requires a detailed review of the police interviews with the appellant preceding the coronial inquest; the questioning of the appellant and related matters at the coronial inquest; and the covert police investigation.

Police interviews with the appellant preceding the coronial inquest

[14] Police officers Martyn and King first spoke to the appellant on 21 December 2003. They gave evidence that the conversation was recorded. Although the recording was subsequently lost, they had notes of the conversation. The appellant said he left his home at Beerwah on 7 December 2003 at about 1.30 pm to travel to a friend's place to pick up a mulcher. He returned home by about 2.30 pm or 2.45 pm after travelling through the underpass where Daniel disappeared. Police officers drove this route on 22 December 2003 and found that the appellant's account left 45 minutes of unexplained time. Police officers MacLean and Wright spoke to the appellant on 23 December 2003. This conversation was not recorded. The appellant was not warned. He told them he arrived home after collecting the mulcher at 2.30 pm. On 24 December 2003 he consented to a police examination of his car but this found nothing to link him to Daniel's disappearance.

[15] On 6 July 2005 police officers Barnes and Wright interviewed the appellant. After warning him, they closely questioned him about his movements on the day of Daniel's disappearance. The appellant again denied any involvement.

[16] On 14 September 2006 police officers Wright and Hickey interviewed the appellant who at his request had his father present. They did not warn him. This interview focused on material he filed in a Family Court proceeding in which he swore that, between picking up the mulcher on 7 December 2003 and returning home, he went to the house of his drug dealer, Sandra Drummond. The lengthy interview extended over three tapes. Police again closely questioned him about his movements, particularly the "black period of time" for which he could not account and during which Daniel disappeared. He told them he was at Ms Drummond's house with her partner, Kevin, for "a good half an hour" and purchased cannabis for $50. He explained that he did not tell them about this earlier as he did not want to implicate Ms Drummond. The police reminded him that he had previously told them about another dealer from whom he purchased drugs and suggested he had just made up this explanation. They questioned him again about his movements throughout the day, emphasising "the extreme importance of telling [them] everything".

[17] At one point the appellant stated:

> "Can we get back on get back on (unintelligible) I just want to go (unintelligible).

> Police officer: Neither, neither have we but as I said you know as much as we can discuss tonight …
>
> Appellant: Yep.
>
> Police officer: Um, and there's a lot that we do … um, we want to rack your brain about and that's obviously what, what ah, this has been about. Um, so yeah, bear with us …
>
> Appellant: Yep."[3]

[18] Police noted the progressing level of violence in his convictions for sexual offending against boys. They said they believed Daniel was dead, adding: "This is why and if you say you're sitting there and you're responsible for Daniel Morcombe disappearing, you know what I'm talking about, that's easy, it's easy for us to then help you through that process to say we can help you get through this."[4]

[19] At the end of the interview he agreed that he would be prepared to talk with police again, in the presence of his father, "if something else comes up." He had no complaint about his treatment and was "quite happy". The police, the appellant and the appellant's father terminated the interview on amicable terms.[5]

[20] On 15 September 2006 Ms Drummond told police that the appellant was a frequent drop-in visitor. Neither she nor her partner, Kevin Fitzgerald, could recall if he had been at their home on 7 December 2003.

Agreement as to admissibility of the pre-coronial interviews

[21] The appellant conceded the conversations with police in December 2003 and 6 July 2005 were admissible at trial. It was common ground that, at least from the commencement of the interview on 6 July 2005, the appellant was a "suspect" under the *Police Powers and Responsibilities Act* 2000 (Qld). The prosecution accepted that the interview on 14 September 2006 was not admissible at trial as it breached the *Police Powers and Responsibilities Act*. Argument at the pre-trial hearing related solely to the appellant's admissions in August 2011 but evidence of all police interviews was relevant to the appellant's pre-trial argument.

The coronial inquest

[22] The coronial inquest into Daniel's death commenced on 11 October 2010. The appellant gave evidence on 31 March and 1 April 2011. He was not legally represented. He was extensively and sometimes aggressively cross-examined, largely by counsel assisting the coroner, but also by the coroner, counsel for the Queensland Police Service (QPS), and a solicitor for the Morcombe family.

[23] Counsel assisting the coroner told the appellant he was under suspicion as he could not account for his whereabouts at key periods on 7 December 2003 and his alibi that he was at Ms Drummond's was not supported.[6] He was one of the very few people in Queensland, perhaps Australia, who had an established history of kidnapping and sexually assaulting young boys after taking them from public areas. He was in the Sunshine Coast area when Daniel was abducted. A man fitting his

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3 Tape 2, 8.
4 Tape 3, 11.
5 Tape 3, 18.
6 Coronial inquest, Day 18, 31 March 2011, 78.

description was seen near the bus stop. A car like his was parked 100 metres from the bus stop. Police told him in 2005 that because of his criminal history they were concerned about a period of time for which he could not account. He claimed to police that he did not initially tell them he was at Ms Drummond's because she was his drug dealer and he did not want them to raid her; but he had told them earlier about obtaining drugs from another person whom he claimed was then a mate. The coroner's role at the end of the hearing was that, if he formed a reasonable suspicion that anyone had committed an offence, he would pass the relevant information to the Director of Public Prosecutions (DPP). This, counsel said, was the appellant's last chance to tell what had actually happened and to put forward any mitigating circumstances.

[24] Counsel referred to the appellant's "ridiculous alibi" but the appellant maintained it was truthful.[7] Later counsel repeated that the alibi, given three years after the appellant was first questioned, was "worthless" as it was unsupported by other evidence; he had between 35 and 50 minutes for which he could not account. He must account for this time. Counsel again pointed out the weaknesses of the alibi and explained that the role of the inquest was to find who had abducted Daniel and to rule out those who were not responsible.[8] Counsel suggested the appellant saw Daniel at the bus stop, adding:

> "To have us believe that you didn't see him is like suggesting to us that a snake might slide past an injured mouse and take no notice. Of course you saw him."[9]

Counsel put to the appellant that he had abducted and sexually assaulted Daniel and either accidentally or intentionally killed him. The appellant denied this and maintained he had nothing to do with Daniel's disappearance.[10]

[25] Counsel for the QPS and the solicitor for the Morcombe family also questioned the appellant about his unsupported alibi, emphasising that this unaccounted for time meant he could not be eliminated as the prime suspect for Daniel's abduction and murder.[11]

[26] At times the coroner questioned the appellant. He asked how he could have failed to see Daniel in a bright red shirt waiting for the bus when the appellant drove past. The appellant insisted he did not see him and claimed that he was concentrating on the road; he had nothing to do with Daniel's disappearance.[12] The coroner asked him why he did not tell police he was at Ms Drummond's place when they first approached him.[13] Why did he not raise this alibi for two and a half years, by which time he would have been confident she and Mr Fitzgerald would not be in a position to contradict him. The coroner pointed out that the appellant now said he had taken Mr Fitzgerald out to his car and shown him the mulcher, but if Mr Fitzgerald had no recollection of that then the appellant's alibi was "pretty shaky". The appellant maintained he was at Ms Drummond's place that afternoon. His Honour suggested

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7 Coronial inquest, Day 19, 1 April 2011, 7.
8 Coronial inquest, Day 18, 31 March 2011, 39.
9 Coronial inquest, Day 19, 1 April 2011, 24.
10 Coronial inquest, Day 19, 1 April 2011, 24 - 25.
11 Coronial inquest, Day 19, 1 April 2011, 29.
12 Coronial inquest, Day 19, 1 April 2011, 37.
13 Coronial inquest, Day 19, 1 April 2011, 36.

that the appellant's late alibi was a lie to explain a critical missing half hour. The appellant denied this.[14]

[27] The appellant was not warned at the inquest of his right to claim privilege when questioned about Daniel's disappearance. At the conclusion of his testimony on 1 April 2011 he was excused from giving further evidence.[15]

[28] Ms Drummond and Mr Fitzgerald gave evidence at the inquest on 6 April 2011. Mr Fitzgerald said the appellant did not show him a mulcher and, given his interest in machinery, he was likely to have remembered if he had. Both Ms Drummond and Mr Fitzgerald said that on Sundays they were often at the Beerwah RSL, a five to ten minute drive from their home, playing poker machines with their loyalty cards. Ms Drummond was unsure whether they went home immediately after playing or whether they stayed on. Police obtained documentation showing that the loyalty cards were used at the RSL at 2.20 and 2.22 pm on 7 December 2003. It was not possible to say what time each card had been inserted into the poker machines. This evidence further confined the appellant's alibi.

The covert police investigation

[29] A covert police investigation involving 36 undercover police officers in Queensland, Western Australia and Victoria commenced after the appellant left the inquest. An undercover police officer using the pseudonym, Joe Emery, met and befriended the appellant on his plane trip home to Western Australia on 1 April 2011. Over the ensuing months, Emery introduced him to a group of people who appeared to be a criminal gang but were in reality undercover police officers. They befriended the appellant and played out scenarios which appeared to involve the commission of more and more serious crimes for which the appellant was paid. He had lost his job and believed that the police were responsible. He began to spend more time with undercover officers known to him as Jeff and Paul. Over the following three months, he participated in 25 scenarios, all designed to culminate in a final scenario where he would meet the "big boss", Arnold, who would try to get the appellant to confess to Daniel's murder.

[30] The appellant was involved in scenarios which appeared to him to include collecting money, sometimes from prostitutes; blackmailing a bank manager with photos of him with a prostitute; bribing a customs officer at Perth International Airport; a burglary involving $50,000 worth of cigarettes; purchasing three pistols; purchasing false passports; collecting an allegedly stolen luxury car; collecting and transporting large sums of money; collecting and transporting "blood diamonds"; moving drugs for $8,000; and moving ecstasy pills with discussion of a future job worth over $1 million from which the appellant would receive ten per cent. In truth, no offences had been committed. The gang members emphasised the importance of honesty, loyalty and trust; the gang was powerful and could fix things with their Australia-wide connections, including in the police force. The gang also emphasised that the appellant had prospects of making a lot of money with them. All conversations during the operation were covertly recorded. The taped and transcribed conversations were tendered in the pre-trial hearing.

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14 Coronial inquest, Day 19, 1 April 2011, 70 - 72.

15 Coronial inquest, Day 19, 1 April 2011, 80.

[31] Meanwhile, on 29 July 2011, the Queensland Coroners Court issued a notice to attend for the appellant to be recalled to the inquest on 26 October 2011. The notice stated that non-compliance would result in a fine and a warrant.

[32] On 4 August 2011, Craig, an undercover police officer acting as a corrupt police officer, told Paul in the presence of the appellant, that there was a fresh "subpoena" for the appellant in the Coroners Court but that was something they could fix without any hassle.[16] The appellant told them about his prior sexual conduct of which he had been convicted but maintained he had nothing to do with Daniel's disappearance. He claimed his alibi was "a hundred percent" and police were pursuing him only because of his criminal history. He explained that was why he had changed his name. Paul emphasised the importance of the appellant being honest and that his prior convictions could be "fixed".[17] The appellant said that the "subpoena" would not "work" because he had legally changed his name.[18] Paul said, "I don't give a fuck what you've done or fuckin' anythin' man as long as you do the right thing by us and you're honest to us all the time man."[19] Paul later assured the appellant: "the bosses will just make everything cool".[20] Paul told the appellant he was a good mate and he wouldn't tell anyone about what the appellant said to him. The appellant responded, "I prefer nothing being said."[21] Paul explained that the bosses would find out in any event. The appellant said, "It's like I didn't want to say anything…other than that I'll leave it, if I'm asked about it that's when I can say, spill me guts about it."[22] Paul again emphasised the need to be honest and that the other members of the gang did not "give a fuck" about what he had done. The appellant stated that had he known there was going to be another "subpoena" he would have told Paul or Jeff[23] that he was a suspect in Daniel's disappearance. Paul emphasised that, despite the appellant's lengthy criminal record, "the brotherhood" would look after him. The appellant insisted that he was not involved in Daniel's disappearance.

[33] Jeff also emphasised to the appellant the importance of honesty and that whatever he had done in the past, gang members would not judge him badly;[24] it was honesty which bound them together.[25] Jeff would speak to Craig about the "subpoena". Jeff told the appellant not to stress; they would work it out. Jeff said that the gang could "work some miracles".

[34] Later the appellant agreed with Paul's suggestion that the appellant was worried. Paul assured him that "they'll make it go away"[26] and emphasised the importance of being honest. Although the boss was a "fuckin' mean lookin' dude and all that he's actually a real good bloke".[27] "Arnold knows fuckin' everyone."[28] Paul raised the possibility of sending the appellant away for a while. The appellant agreed as long

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16 Transcript 4 August 2011, 36.
17 Above, 40.
18 Above, 41.
19 Above, 42.
20 Above, 47.
21 Above.
22 Above.
23 Above, 48.
24 Above, 72.
25 Above, 73.
26 Above, 93.
27 Above, 94.
28 Above, 95.

as he could contact his parents at least once a month.[29] He told Paul that when police questioned him about Daniel's disappearance they kept "going over the same shit over and over." The last time they interviewed him, his father was present and the appellant told them "this is the last time, that's it…if you ever want to speak to me again you only arrest me for it…you know, take me to court".[30] Paul discussed a "big job" coming up and the appellant expressed his hope to be part of it. Paul responded that, from what he had heard, the "shit what happened today" (the "subpoena") would not affect that.[31] It was up to Arnold, but Paul thought they would clear everything up and the appellant would still be involved in the "big job".[32]

[35] On 8 August 2011, the appellant again spoke with gang members about his desire to remain part of the gang. They reassured him that the gang could fix anything. The appellant maintained he had nothing to hide. Paul told him that the boss, Arnold, would want to talk to him. They again discussed the notice to attend at the inquest and the "big job".[33]

[36] On 9 August 2011, whilst the appellant was with Paul, Arnold rang. Paul told the appellant that Arnold wanted to see him. The appellant asked if it was about the "subpoena". Paul told the appellant to just tell Arnold the truth and that the meeting might be about how to make it all go away. The appellant met with Arnold alone.

[37] Arnold said that there were a couple of things they needed to talk about. The appellant responded that he thought the "subpoena" was all dealt with. Arnold told the appellant they could sort it out but he needed to tell him everything because what they did was based on respect and honesty. He did not care what the appellant had done; all he wanted was loyalty, respect and honesty. The appellant told him about the appellant's convictions for two child sex offences in 1987 and 1993. He explained he was living in the area when Daniel disappeared and because of the appellant's previous offending the police had hounded him. He insisted he had nothing to do with Daniel's disappearance, but the police "reckon they've shot to pieces" half an hour of his alibi. He had lost his two eldest kids because people wrongly accused him of things. He was questioned at the inquest in March and April and thought that was the end of it. He was surprised when Craig told him there was now a "warrant" or "subpoena".

[38] Arnold said that he had further information that morning that the appellant had murdered Daniel. This did not bother Arnold; he could sort things out, find alibis, do what needs to be done, but he must know what he had to do. He was in a "real dilemma". He wanted to move forward with their "big job" but could not until this matter was sorted out; the appellant was "too hot". Arnold had information that there was a "subpoena" coming for the appellant. Arnold understood the appellant was good for the gang but he had to weigh up the risks. He read some material to the appellant from papers, including: "Coroner's inquests are recommencing shortly and [the appellant] will again be… in the spotlight. If you can't sort this out, I suggest you drop him like a hot potato."[34] Arnold again emphasised honesty, trust and respect. He would postpone the big job for a few months to sort this out because he

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29 Above, 115.
30 Above, 90.
31 Above, 103.
32 Above, 104.
33 8 August 2011, 6 -11.
34 9 August 2011, "Crime Boss Interview", 10.

had been told the appellant was loyal and had a good relationship with some of the boys who spoke highly of him.

[39] Arnold asked if there was "any D-N-A or that kind of shit". The appellant said there was no DNA; they searched his car but found nothing. The appellant then made the following chilling admissions to pulling down Daniel's pants, killing him and disposing of the body. I will set out a lengthy extract so that the text and context can be appreciated:

> "Arnold: So what do I need to fix
>
> Appellant: Yeah okay. No, yeah I did it
>
> Arnold: Alright, okay, so you did it but what I'm saying is, you know, I need to kind of know, I need to step you right back to the whole thing
>
> Appellant: Yep
>
> Arnold: So I, so if there's anything like. I don't know if they've got any D-N-A or that kind of shit
>
> Appellant: There's no D-N-A but (wds)[35]
>
> -Overtalk-
>
> Arnold: You know, obviously they haven't found the fuckin' body
>
> Appellant: They took my car, they searched my car, did all forensics in my car, they got nothing out of my car
>
> Arnold: Well look just, lead me through the whole fuckin' thing, how it happened, from woe to go. Then I'll think about things that we need to sort and fix
>
> Appellant: Um
>
> Arnold: -Clears Throat- want a coffee (wds)?
>
> Appellant: No I'm right thank you
>
> Arnold: Yeah
>
> Appellant: I don't know how it, I seen him standing there I did a loop around and came back (wds)
>
> Arnold: Okay, what, what time was this?
>
> Appellant: I don't know exactly, lunch time
>
> -Overtalk-
>
> Arnold: About lunch time (wds) morning
>
> -Overtalk-
>
> Appellant: Lunch time, afternoon

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35 "wds" refers to unintelligible words.

Arnold: You were going, where were you going, where?

Appellant: I was going up to my boss's father's place to pick up a wood mulcher

Arnold: Going to your boss's father's place

Appellant: Yeah

Arnold: To pick up a wood mulcher, yep

Appellant: `cause I'd done some tree lopping in our yard and (wds)

Arnold: Yep

Appellant: (wds) little one

Arnold: Yep

Appellant: Um, picked it up and on the way home there was a broken down bus

Arnold: Yeah

Appellant: (wds) bus broken down and then I seen Daniel

Arnold: Did you know him at all?

Appellant: No

Arnold: Okay, so you've seen him on the side of the road?

Appellant: Yep

Arnold: What you do a ewey or something or?

Appellant: No, I went up around the park in the church car park 'cause my car was never on the road so I don't know how they got (wds)

Arnold: Because there was some, I heard something about a white four wheel drive that they say

Appellant: Yeah, well it was not sitting on the highway at all

Arnold: So you parked behind the

Appellant: Behind

Arnold: Near the church or whatever it was

Appellant: Yeah, yeah

Arnold: Okay

Appellant: Ah, I walked down and sat there and then

Arnold: Did you talk to him for long or?

Appellant: I didn't talk to him at all when I got there, maybe just lookin' as though I was waiting for the bus

Arnold: Okay, yeah, fair enough, yeah

Appellant: Um, the bus drove past and that's when I said I'm going down to the shopping centre, do you want a lift?

Arnold: Yep

Appellant: And he's gone yep um -

Arnold: So he missed the bus or something did he or?

Appellant: No the bus drove past

Arnold: Okay

Appellant: Because he was given the orders not to pick up anymore passengers, `cause it was the broken down one and there'd be another bus through in a few minutes

Arnold: Yep, yeo, okay so you asked him if he wanted a lift and he said yeah

Appellant: Yep. He's jumped in

Arnold: Where, where did he sit in the car, the front, the back?

Appellant: Front seat

Arnold: Passenger's seat, front

Appellant: Front passenger's seat, yeah

Arnold: Yep

Appellant: Um, he, um, instead of taking him to the shopping centre I took him to a secluded spot that I knew of

Arnold: What was that?

Appellant: Ah, it's at Beerwah, just off (wds)

Arnold: What's it called `cause that's pretty important, what's it called?

Appellant: Beerwah

Arnold: Beerwah

Appellant: Yeah, -B- double -E- R-W-A-H. That's where I live

-Overtalk-

Arnold: Beerwah.

Appellant: Yep, that's where I lived, Beerwah

Arnold: Okay, so you know the area, you knew the area pretty well, you've taken him to Beerwah, where, how far away is that from where you picked him up?

Appellant: Oh, half an hour

Arnold: Half an hour?

Appellant: Approximately yeah

Arnold: I don't know the area, I've never really been to Queensland

-Overtalk-

Appellant: Yeah

Arnold: Alright, so you've taken him to Beerwah. Did you talk to him along the way or?

Appellant: Yeah, just chatted

Arnold: No, no problems?

Appellant: No

Arnold: Alright. Well like I said I'm not judging you at all

Appellant: Yeah

Arnold: Alright, so bear that in mind, alright?

Appellant: Yeah

Arnold: Just tell me what I need to fix. You've taken him to Beerwah

Appellant: Um, yeah, went to an abandoned house thing that I knew where

Arnold: Do you know exactly where that was?

Appellant: Yeah, end of Roys Road.

Arnold: Endaroys?

Appellant: End of Roys Road

Arnold: How do you spell that?

Appellant: No, Roys Road.

Arnold: Oh, Roys Road.

Appellant: Yeah

Arnold: R-O-Y-S or something is it?

Appellant: Yep

Arnold: Roys Road

Appellant: Yeah

Arnold: At the end

Appellant: Yep

Arnold: What we might need to do is (wds) get that sort, we're gonna need to get that sorted

Appellant: Yeah

Arnold: Alright? Um

Appellant: Um, there's nothing there, I went back (wds) just put it under bushes and I went back (wds)

Arnold: Okay, so

-Overtalk-

Appellant: It had already (wds)

Arnold: So you've taken him to the house?

Appellant: Yeah

Arnold: What happened in the house?

Appellant: Um – Pause - he

Arnold: Like I said, I'm not judging you alright?

Appellant: Yep. I never got to molest him or anything like that, he panicked and I panicked and grabbed him around the throat and before I knew it he was dead.

Arnold: Alright, and how long did it take you to strangle him out do you know?

Appellant: Ah lost track of time

-Overtalk-

Arnold: You probably don't think about (wds)

Appellant: Yeah, yeah

Arnold: So, what you were looking

-Overtalk-

Appellant: It didn't seem, it didn't seem long

Arnold: Alright. So you grabbed him around the throat, were you still sitting in the car?

Appellant: No no this is, we were out of the car

-Overtalk-

Arnold: You've taken him to the house

Appellant: Yeah

Arnold: Whereabouts in the house?

Appellant: Um, just in to the, there's no furniture or nothing it's just in the first room

Arnold: The first room?

Appellant: Yeah, in the door

Arnold: Did he fuckin' spit any blood, anything in that room?

Appellant: Not that I know of, no

Arnold: What about his clothing, did he have his clothing on still or?

Appellant: Um, yes he had his clothing on then

Arnold: Alright, so you've choked him out

Appellant: Yeah

Arnold: He's he's, he's died

Appellant: Yep

Arnold: In that room

Appellant: Yep

Arnold: What's, what have you done then with him?

Appellant: Um, taken him outside, took his, put him in the back of my car

Arnold: When you say the back of your car you're talking about the

Appellant: Yeah

Arnold: Was it a white four wheel drive or something?

Appellant: Yep

Arnold: Okay

Appellant: Pajero

Arnold: Okay

Appellant: So it had a, like a

Arnold: Like a big door at the back

Appellant: Yeah

Arnold: Did it have seats in the back as well or?

Appellant: It had the seats taken out

Arnold: Okay

Appellant: The mul', the mulcher was in there

Arnold: Alright, so you've lied him in the back of the car?

Appellant: Yep

Arnold: With the mulcher next to him?

Appellant: Yes

Arnold: Has he touched the mulcher or?

Appellant: Nothing

Arnold: Do you reckon you left any prints at the house or?

Appellant: No. The house has just gone

Arnold: Gone?

Appellant: Yep

Arnold: Alright so we'll get to that in a minute so you've taken him in the back of your car, how long has this taken you?

Appellant: Um, oh, I only had to go like from the house a hundred and fifty metres to where I 'cause it's all bush and it's an old

-Overtalk-

Arnold: Alright, so you've taken him from the house

-Overtalk-

Appellant: It's an old sand, it's an old sand mining site

Arnold: You picked him up from the hou', from the house

Appellant: Yep

Arnold: Put him in the back of your car

Appellant: Yep

Arnold: Then you've driven him a hundred and fifty metres or so

Appellant: Yep

Arnold: To, to where?

Appellant: Um, more secluded bush away from, oh it's in a fenced off area, I was actually goin' to lease the property to do sand blasting on

Arnold: Yep

Appellant: And, um, there's an embankment where there's like sand mining got up to and then it's all been grown over with trees and bush again and then you got the old lake, sand mining lake

Arnold: Yep. Look, I'm not familiar with the area, just draw us a little fuckin' map on that so that I, I know where you're talking about, just like from where the house was to where the, where the thing was

Appellant: The end of Roys Road comes in here like that to a macadamia or an avocado farm

Arnold: Yeah

Appellant: And that sorta spreads out around here like this and everything's a couple of sheds and then there was the house here

Arnold: Yep. This is the road here is it?

Appellant: There's the driveway, oh this is just the property area sorta thing

Arnold: Yeah, yeah

Appellant: Um, where the house is there's a little track that goes off down there through a gate

Arnold: Yep

Appellant: Down to it's nothing, there was a caravan and an old mobile (wds)

Arnold: About a hundred and fifty metres away ya reckon?

Appellant: Yep

Arnold: Alright, okay. So once you've done that, what have done with him then?

Appellant: I took him out of the car

Arnold: Yep

Appellant: Um, dragged him down the embankment and

Arnold: When you dragged him did you leave anything?

Appellant: Oh I

Arnold: How'd you drag him?

Appellant: Just

Arnold: By the feet by the arms or?

-Overtalk-

Appellant: Actually I didn't, I carried him over and threw him down the embankment and he sort of (wds)

-Overtalk-

Arnold: Okay, so you threw him over the embankment?

Appellant: Yeah

Arnold: How, how far was that?

-Overtalk-

Appellant: About a metre and a half

Arnold: A metre and a half down. Has he left any marks or?

Appellant: No way

Arnold: Okay you fuckin' pushed him

Appellant: Pushed him

Arnold: Like the old cowboy movies

Appellant: Pushed him

Arnold: Alright, so he's gone down the bank, down the embankment about a metre and a half?

Appellant: Yeah

Arnold: What have you done then?

Appellant: I went down there and just went on dragging him through, I don't know how far it was um, until I found somewhere I thought was

Arnold: A good spot

Appellant: Yeah

Arnold: So was that sand, grass, what?

Appellant: Sandy

Arnold: Did he still have all his clothes on, did you leave anything behind?

Appellant: Yes, no he had all his clothes on

Arnold: Yeah

Appellant: Um, I stripped him off

Arnold: Yeah.

Appellant: And um trees and all that sorta stuff, branches and covered his body with that. His clothes I took back with me and threw them into the creek

Arnold: You threw them in the creek

Appellant: (wds)

-Overtalk-

Arnold: Which creek?

Appellant: I'm not too sure (wds)

Arnold: Was the creek there?

-Overtalk-

Appellant: (wds)

Arnold: Right there or did you have

Appellant: No, no, it was on the way home, I had to go across (wds) I was still secluded and everything but like an old logging bridge type thing

Arnold: Right, you've gone over a logging bridge down a creek or something?

Appellant: Yeah there's a creek there it was fast flowing and I threw his clothes in there

Arnold: You just chucked them in there, did you have to put them in a bag or anything like that, just one by one or the whole lot or?

Appellant: I just threw them in there

Arnold: And what happened to them (wds)?

Appellant: Um, sank, sank and floated away

Arnold: They sank and floated away

Appellant: Nothing, none of that's ever been found

Arnold: You're lucky aren't you?

Appellant: Yep. And the house (wds)

-Overtalk-

Arnold: Alright, so, so after you, after you've done all that, now I've, I've heard something about a fuckin' watch, that you had a watch or some fuckin' thing, some

Appellant: Yep

Arnold: Did you have that, keep or?

Appellant: All went in

Arnold: The whole lot went in, everything. So you didn't keep anything?

-Overtalk-

Appellant: All. There's nothing

Arnold: There's no chance anyone's gonna find anything

Appellant: Nah

Arnold: Of his?

Appellant: No, nothing

Arnold: Alright, so you've left him there under the shrubs?

Appellant: Yeah

Arnold: What have you done then?

Appellant: I went home

Arnold: You've thrown, you've thrown the clothes

Appellant: Clothes

-Overtalk-

Arnold: In the, in the thing?

Appellant: Yeah

Arnold: You've gone home?

Appellant: Yep. I did, I did stop at my dealer's place and pick up some drugs

-Overtalk-

Arnold: Did ya?

Appellant: Yep. So they're lying when they say I wasn't there

-Background--Unknown Noise-

Arnold: Alright, okay so you did go to (wds)

Appellant: I did go, yes

-Overtalk-

Arnold: Mind you, from what I understand a couple of years later

Appellant: It came out, yeah

Arnold: That (wds) yeah and I mean she's probably that drug fucked she wouldn't know what, what day it was you know. Alright, so you've, you've, you've gone to your dealer's place on the, after you've thrown the clothes in the

Appellant: Yeah.

Arnold: In the river, you've gone to the dealer's house?

Appellant: Yep. I always (wds)

-Overtalk-

Arnold: Did (wds) there or?

Appellant: Yeah, yeah

Arnold: Yeah

Appellant: Yeah there was a fifty on

Arnold: Yeah

Appellant: Never bought big quantities (wds)

Arnold: What, just the way you were, okay yep

Appellant: Um, spent about fifteen twenty minutes there and which I always did

Arnold: Yeah

Appellant: And like to spend half an hour or so, just so I'm not walking in an out

Arnold: Yeah

Appellant: Um, went home, went inside, said g'day to my wife, told her I was back, then went out and started chipping the, the timber

Arnold: Okay. So, that's the end of that for them. Did you go back?

Appellant: About a week, not or within that week I went back

Arnold: Had it, had it hit the press by then or what, he's missing or?

Appellant: I think so, yeah, yep

Arnold: (wds)

-Background--Unknown Noise-

Appellant: Sounded like the door

Arnold: It might have been that door here (wds). Alright so you've gone back about, had it, it hadn't hit the press then?

Appellant: No. oh, yeah like as a missing person

Arnold: As a missing person

Appellant: Yeah

Arnold: Alright. So what you're thinking fuck I'd better get, do something here or?

Appellant: Yeah, just in case I went and took a shovel back

Arnold: Okay, so about a week later you've gone back

Appellant: Yeah

Arnold: And taken a shovel in the same, in the same car?

Appellant: Yes

Arnold: And where'd you go then?

Appellant: Um, went down to where I put him

Arnold: Yep

Appellant: And um, only found a fragment of bone, the rest of it was gone

Arnold: Fuck, in a week?

Appellant: In a week, the rest of him was gone like there was a patch of you could tell `cause some you could tell that like there was fat on the ground

Arnold: So what's hap' what do you reckon's happened there?

Appellant: I don't know, there's a lot of yabbies and animals and that sorta thing so

Arnold: (wds) hey?

Appellant: So yeah

Arnold: Alright, so what was left of him?

Appellant: A little piece of bone like that (wds)

Arnold: No skull no fuck all

Appellant: No

Arnold: So what (wds)

Appellant: I think that was part of the skull

Arnold: Yeah?

Appellant: And I, I just buried him like broke it up with the shovel

Arnold: So as far as you know it's still there 'cause that's gonna cause some problem we're gonna have to go and grab that

Appellant: No I broke it, like it's (wds)

Arnold: Yeah I know, nowadays they can do wonders with all this fuckin' shit, you know, D-N-A and all that kind of crap

Appellant: Yep

Arnold: So we'll have to, we'll have to, I'll have to get you (wds) there with some of the, we'll get a couple of the boys and sort all that shit out, right?

Appellant: Yep

Arnold: We'll sort that out for you. The shovel, you broke his, broke it all up with the shovel?

Appellant: Yeah"[36]

[40] Later Arnold asked him how he strangled Daniel:

"Appellant: Yeah we were like sort of, when he started to struggle like I started to pull his pants down

Arnold: Yeah

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[36] 9 August 2011, "Crime Boss Interview", 12 - 26.

Appellant: And he said oh no and started to struggle"[37]

[41] Arnold said that he would have to make enquiries. He would put the appellant up for the night somewhere and get him on a plane the next day with some of the boys to "sort all this shit out", and make "sure everything is fuckin' good".[38] The appellant said he was prepared to cut all ties, even to the extent of a death certificate.

[42] The appellant then had lunch with Paul to whom he repeated the admissions. During their discussion the appellant said there were reports that two people and a blue car were involved, but this was wrong; it was just he and Daniel. He said that he liked to take his father to police interviews and the last time "he had a go at the coppers for …the way they were conducting themselves".[39] He added, "next time they speak to me arrest me or fuck off".[40] He stated his concern about the inquest because he could not tell them "to fuck off".[41] He expressed the hope that any "subpoena" would not be issued in his present name, Shaddo Hunter, so that it would not have effect.[42]

[43] The following day, the appellant flew to Queensland with undercover police officers who were posing as members of the gang. Over the next few days he directed them to the site of the abandoned house, Lot 1, Kings Road, Glasshouse Mountains, and to an old sandmining site and pointed out where he left Daniel's body. He showed them a small bridge where he said he had thrown Daniel's clothing into the creek. Other police officers arrested the appellant at the Kings Road site on 13 August 2011. He declined to answer police questions.

Relevant evidence at the pre-trial hearing

[44] The appellant gave evidence at the pre-trial hearing that, had he been warned at the inquest that he could claim privilege and not answer questions, he would have done so. The nature of his questioning at the inquest led him to believe that the authorities did not accept his alibi. He apprehended that he was the only suspect and that the coroner thought he had committed offences against Daniel. He apprehended that if he did not come up with an airtight alibi, he would be charged. On the other hand, if he could establish a sound alibi, he thought he would be free to go. He understood that the coroner had the absolute power to have him charged and that the lawyers cross-examining him could influence the coroner.

[45] When the undercover police officers raised the "summons" with him, he thought about his unpleasant experience at the inquest and the problem with his alibi. He made the admissions to Arnold as he was told that Arnold would sort out alibis and witnesses so the appellant could exonerate himself at the inquest. Until then he had denied all involvement in Daniel's disappearance. He would not have made the admissions if Arnold had not raised the issue of an alibi. He also made the admissions because he wanted to get his record wiped, to stay part of the gang and to see his children again, but the main reason was to get the alibi. He understood he

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37 Above, 38.
38 Above, 29.
39 9 August 2011, "Lunch at the restaurant", 66.
40 Above.
41 Above, 67.
42 Above.

would have to go to the Coroners Court in answer to the subpoena. He planned to use the alibi provided by Arnold at the inquest to ensure he would not be charged. But for his earlier cross-examination at the inquest, he would not have confessed to Arnold.

[46] Counsel assisting the coroner gave evidence that he worked closely with the coroner in the investigative process surrounding the inquest into Daniel's death and he also worked closely with police. On 20 April 2011, he requested police obtain further statements from the appellant as to his alibi. Following the evidence of Ms Drummond and Mr Fitzpatrick, he decided to recall the appellant. He was also concerned that the appellant may have been affected by marijuana when he gave evidence. The issue of the notice to attend recalling the appellant was delayed at the request of the investigating police. The coroner was concerned about the delay and on 3 June 2011 said he wanted the appellant recalled on or about 29 August 2011. Ultimately, assistant commissioner Condon met privately with the coroner and asked him to delay the issue of the notice to attend. The coroner then told counsel assisting that the issue of the notice to attend would be postponed because of the police investigation; it would not issue until the police were ready.

[47] Police officer Carey gave evidence that police intended to use the notice to attend recalling the appellant to the inquest as a tactical method to trigger conversation about Daniel in the undercover operation and to use it to bring pressure to bear on him. The prime time in their investigation for the appellant to be recalled was from 24 October 2011. They passed on this information to the coroner's office. The notice for the appellant to attend the inquest on 26 October 2011 was signed on 29 July 2011. Undercover police officers raised it with him on 4 August 2011. Craig and Paul were briefed to raise it regularly in the lead up to his meeting with Arnold, keeping the pressure of it clearly in the appellant's mind.

The pre-trial ruling as to the admissibility of the confessions and the resulting evidence

[48] The appellant conceded for the purposes of the pre-trial application that reliability was not a matter which favoured his contentions.[43]

[49] The judge found that the questioning of the appellant at the inquest did not operate as an inducement under s 10 *Criminal Law Amendment Act.* It did not exceed appropriate boundaries and did not involve threats to the appellant. The 29 July 2011 notice to attend did no more than require the appellant's attendance at the inquest to give truthful evidence. Any inducement made by Arnold was not made by a person in authority under s 10.[44] The factual circumstances of this case bore striking similarities to those in *Tofilau*[45] which established that an undercover police officer was not a person in authority. It followed that nothing the undercover police officers said or did could act as an inducement by a person in authority, rendering the confessional material inadmissible under s 10.[46]

[50] After a careful review of both the relevant authorities[47] and the evidence, the judge considered that, as in *Tofilau*,[48] the police had been unable to collect sufficient evidence

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43 *R v Cowan* [2013] QSC 337, [24].
44 Above, [154].
45 Above, [31].
46 Above, [32].
47 Above, [33] – [42].

against the appellant by usual methods. Only then did they embark upon this covert police operation. They were investigating a serious matter involving the apparent murder of a child and it was reasonable for them to undertake this process. They acted in a careful, skilful and discriminating way, with considerable care to avoid any illegality.[49] No doubt the investigation involved the build-up of psychological pressure on the appellant, but that technique can also be used in conventional police interrogation. The appellant had experience with police questioning and knew he was not obliged to answer incriminating questions. He had not claimed any right to silence when previously questioned by police. He freely entered into the relationship with the undercover police officers and actively co-operated. They stressed the need to tell the truth and their method of questioning was not so disproportionate as to be inherently unfair.[50] The appellant was not a credible witness.[51]

[51] In late April or early May 2011, shortly after the appellant completed his evidence at the inquest, assistant commissioner Condon became aware that counsel assisting the coroner wished to recall the appellant. This was because he had admitted to being under the influence of cannabis when he gave evidence and because of further evidence obtained relevant to his alibi.[52] Assistant commissioner Condon was concerned that recalling the appellant early would have an adverse impact on the undercover police operation. On 3 June 2011 he arranged with the coroner to delay the appellant's recall to allow police to continue their undercover investigation. The coroner always intended to recall the appellant and always had a proper basis for this. The issuing of the notice to attend the inquest was not a ploy to be used by undercover police. Once police knew he would be recalled, they wove this fact into their covert investigation. In these circumstances it was not unfair for the police to request the delay of the issue of the notice to attend. Nor was it unfair for them to weave a legitimately issued notice to attend into their undercover scenarios. There was no bad faith, impropriety or illegality on the part of the coroner, his staff or the police.[53]

[52] The undercover police appeared to be part of a crime gang which allowed the appellant to become increasingly involved. The gang's structure was hierarchical and members stressed to the appellant the necessity for trust, honesty and loyalty. It did not actually engage in criminal activity. The appellant was constantly told he could leave at any time.[54] Once the notice to attend was issued, police used it as a catalyst to raise the topic of Daniel's disappearance with the appellant, but they did not request that the notice be issued.[55] After the meeting of 3 June 2011, assistant commissioner Condon did not have any discussions with the coroner as to the timing of the issue of the notice to attend, which was subsequently signed on 29 July 2011.[56] The undercover police used the notice to attend to keep pressure on the appellant and to open up communication about Daniel's disappearance.[57]

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48 (2007) 231 CLR 396; [413].
49 [2013] QSC 337, [119].
50 Above, [121].
51 Above, [123] and [124].
52 Above, [127].
53 Above, [128].
54 Above, [129].
55 Above, [130].
56 Above, [131].
57 Above, [133].

[53] The judge summarised the evidence from the undercover police officers concerning the appellant up until his arrest.[58]

[54] Her Honour concluded that the prosecution had proved on the balance of probabilities that the appellant's confessions were made voluntarily. The appellant had failed to prove on the balance of probabilities that, in the exercise of the judge's discretion, the confessions should be excluded on the basis that it would be unfair to admit them into evidence. The application to exclude the material was therefore unsuccessful.[59]

The appellant's contentions in this appeal

[55] The appellant's first contention is that his gruelling cross-examination at the inquest, particularly by the coroner and counsel assisting, amounted to powerful inducements to the appellant to provide the coroner with a tighter exculpatory alibi. If he did not, he would be prosecuted; if he could satisfy the coroner he was not involved in Daniel's disappearance, he would be exonerated. The investigation effectively used the issue of the notice to attend on 29 July 2011, the timing of which the police organised, to bring the uniquely coercive power of the state to bear against the appellant. Police did not serve the notice to attend on the appellant but used it tactically to induce him to make admissions. The undercover police officers referred to the notice to remind the appellant of the inducements given at the inquest. Until Arnold told the appellant he could provide him with an alibi, the appellant had denied all involvement in Daniel's disappearance. The appellant made the admissions as a result of the undercover police promise of an alibi, in light of the inducements earlier offered to him at the inquest.

[56] The appellant places emphasis on the following matters. He was interviewed by police on three occasions prior to the inquest and he consistently denied any involvement in Daniel's disappearance. He always exercised his right not to convict himself from his own mouth. In those interviews he made clear that he would not make any admissions to police in relation to Daniel's disappearance. At the inquest, his answers in cross-examination also made clear that he would not make any admissions implicating himself in these offences. During the recorded scenarios with undercover police officers prior to 9 August 2011, he said that he would not speak to police about these matters. It was clear that he did not intend to make admissions to persons in authority about Daniel's disappearance. His ultimate admissions to Arnold and Paul were the result of the inducement still acting on his mind from his harrowing experience at the inquest, namely, that if he did not come up with a satisfactory independently supported explanation for his movements at the time Daniel disappeared, he could be charged with Daniel's murder. As that inducement was operative and, indeed, emphasised and used by the undercover police officers at the time the appellant made the admissions, they were involuntary under s 10.

[57] The onus was on the prosecution to show on the balance of probabilities that the confessions were voluntary under s 10. As the prosecution had not established this, the confessions were legally inadmissible and the judge should have excluded them under s 10.

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58 Above, [134] - [162].

59 Above, [163].

[58] Alternatively, the appellant contends the admissions should have been excluded as they were unfair. He was not warned he had the right to claim privilege under s 39 *Coroners Act* 2003 (Qld). In his pre-coronial inquest interviews with police he told them that he did not wish to speak to them. During the police covert operation on 4 August 2011, he made clear that he did not want to talk to them about Daniel's disappearance, that he denied any involvement and he intended to refuse to speak to police in the future.[60] When he was arrested on 13 August 2011, he exercised his right to silence and declined to take part in an interview. The police acted improperly in using the ongoing inquest and the timing of the notice to attend to bring pressure to bear upon him. As his confessions were improperly obtained, it would be unfair to use it against him. The admissions were not the result of a free-flowing conversation between relative equals. Arnold was in a position of power over the appellant at a time when he had said he would not speak to police again. The improper use of the notice to attend in itself warranted the exclusion of the confessional evidence. Had proper investigative procedures been followed, the appellant would not have made the admissions.

[59] This case, the appellant contends, was distinguishable from that of the appellant, Clarke, in *Tofilau v The Queen*[61] where the confessions were held to be admissible. The serious effect of the improper conduct in the present case was exacerbated by the fact that it was encouraged by those in higher authority: *Ridgeway v The Queen*.[62] A consideration of the matters listed by Stephen and Aickin JJ in *Bunning v Cross*[63] warrant the exclusion of all evidence obtained as a result of the admissions, particularly because of the police officers' intentional manipulation of the inquest proceedings and the active participation of the assistant commissioner. The inquest proceedings were coercive and the coroner was exempted from giving evidence at the pre-trial hearing under s 89 *Coroners Act*.[64] A consideration of the factors identified as apposite to the exercise of the unfairness discretion in *The Queen v Swaffield; Pavic v The Queen*[65] warrant the exclusion of the admissions as unfair.

[60] In written submissions the appellant places emphasis on the recent Canadian Supreme Court decision, *R v Hart.*[66] In oral argument, however, senior counsel for the appellant submits that this aspect of the law in Canada has taken a different path to Australian law; *Swaffield* governs this Court's deliberations until the High Court determines otherwise.

[61] Although this contention was not made before the trial judge, the appellant submits in this Court that, in circumstances where police knew the appellant would not voluntarily make admissions, it was wrong for the police to use the timing of the notice to attend in the undercover operation to pressure the appellant to confess. This was both unfair and an abuse of process; public policy considerations warrant the exclusion of the admissions and the resulting evidence obtained.

Conclusion on this ground of appeal

a) Section 10 Criminal Law Amendment Act

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60 Set out in these Reasons at [31] and [33].
61 (2007) 231 CLR 396.
62 (1995) 184 CLR 19, 38.
63 (1978) 141 CLR 54, 78 - 80.
64 *Coroners Act*.
65 (1998) 192 CLR 159.
66 2014 SCC 52.

[62] The appellant contends his confessions and the evidence obtained as a result should be excluded under s 10 *Criminal Law Amendment Act* which provides:

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

[63] Under s 10, the prosecution must prove on the balance of probabilities that the confession is voluntary.[67] The appellant relied only on s 10 in his contention that his admissions were not voluntary. He did not rely on the common law rule known as basal involuntariness, under which confessions are excluded if not made in the exercise of a free choice but because the person is overborne and has confessed as a result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure.[68]

[64] As the appellant places such emphasis in this contention on the course of the coronial inquest, I will summarise the relevant provisions of the *Coroners Act*. Its objects include to establish the position of the State Coroner;[69] and to establish the procedures for investigations, including by holding inquests by coroners into particular deaths.[70] The act does not limit or otherwise affect the functions or powers of a police officer investigating a death.[71] The coroner may investigate a suspected death,[72] has wide powers,[73] and may issue guidelines and directions.[74] The Coroners Court is not bound by the rules of evidence and may inform itself in any way it considers appropriate.[75] The Coroners Court may order a person to attend an inquest until excused by the court; to give evidence as a witness; and to take an oath or answer a question.[76] If a person fails to attend an inquest as ordered, the court may issue a warrant for the person's arrest.[77] If a witness refuses to give oral evidence at an inquest because the evidence would tend to incriminate the person, the coroner may require the witness to give the evidence, if satisfied this is in the public interest, but the evidence is not admissible in any other proceeding other than a proceeding for perjury and nor is derivative evidence admissible against the witness in a criminal proceeding.[78] A coroner investigating a suspected death must, if possible, find whether or not a death in fact happened,[79] and if possible, how, when, where and what caused the person to die.[80] The coroner must not include in the findings, any statement that a person is or may be guilty of an offence or civilly

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67 *MacPherson v The Queen* (1981) 147 CLR 512, 519.

68 See, for example, *McDermott v The King* (1948) 76 CLR 501; Dixon J, at [11]; *Tofilau v The Queen* (2007) 231 CLR 396, Callinan, Heydon and Crennan JJ, [325] - [340].

69 *Coroners Act* 2003 (Qld), s 3(a).

70 Above, s 3(c).

71 Above, s 5(2).

72 Above, s 11(6).

73 Above, s 13.

74 Above, s 14.

75 Above, s 37(1).

76 Above, s 37(4).

77 Above, s 37(7).

78 Above, s 39.

79 Above, s 45(1).

80 Above, s 45(2).

liable for something.[81] If the coroner reasonably suspects a person has committed an indictable offence, the coroner must give the information to the DPP.[82]

[65] It is common ground that the inquest into Daniel's disappearance and death was started independently of the covert police investigation targeting the appellant and there were legitimate grounds for originally ordering him to attend and give evidence on 31 March and 1 April 2011. His discharge on 1 April 2011 was also unexceptional. It is also accepted that the coroner, independently and with proper grounds, then determined to recall the appellant to give evidence. There is no evidence that the police decision to conduct a covert operation targeting the appellant was made with the involvement of the coroner.

[66] In late April or early May, police learned that the coroner planned to reconvene the inquest and recall the appellant and asked police for dates suitable to them. Only then did they inform the coroner that an early date would adversely affect their covert operation. The coroner was not involved in the planning of the covert investigation but on 3 June 2011, when assistant commissioner Condon asked him to delay the appellant's recall, his Honour agreed. In late July 2011 when police advised that issuing a notice to attend would no longer adversely affect their investigation, the Coroners Court issued the notice. The appellant does not contend that anything done by the Coroners Court amounted to an abuse of process or unlawful conduct. Once the notice to attend issued, however, the undercover police officers used it to initiate discussions with the appellant about Daniel's disappearance.

[67] In *Tofilau*, during staged scenarios in four discrete, unrelated cases (*Tofilau*, *Marks*, *Hill and Clarke*), each of the four accused made admissions to undercover police officers pretending to be criminal gang members. The High Court[83] found that each accused was not making admissions to persons in authority. The undercover police officers were not invoking the state's coercive power and were not reasonably perceived by the accused to have the lawful authority of the state to investigate the relevant offences. For that reason, it is uncontentious in this appeal that the representations made by undercover police officers that they had the capacity to bring unlawful influence to bear, were not representations to the appellant by persons in authority under s 10.

[68] I am unpersuaded, however, by the respondent's contention that s 10 is only engaged when the confession is made to a person in authority and that, as these confessions were made to undercover police officers who were not persons in authority, s 10 therefore has no operation. That is not the effect of the clear terms of s 10 and nor is it consistent with the purpose of the section. For example, a police officer might tell a suspect that his wife will be charged if he does not admit to the suspect's best friend in the next room that the suspect had committed a particular offence. If the suspect went into the next room and, acting on that threat, confessed to his friend that he committed the offence, I consider s 10 would operate and the confession would be inadmissible. The mere fact that the appellant's confessions were not made to persons in authority is not sufficient for the prosecution to establish that s 10 has no operation.

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81 Above, s 45(5).

82 Above, s 48(2)(a).

83 Gleeson CJ, [13]; Gummow and Hayne JJ, [45] and [46]; Callinan, Heydon and Crennan JJ, [315], [317] and [320].

[69] The appellant's contention is that the coroner and all counsel at the inquest were persons in authority. Their questioning of the appellant may have led him to believe that if he could not satisfactorily and independently explain his movements at the time Daniel disappeared, the coroner would refer the matter to the DPP and he would be charged. This was an inducement under s 10 which remained operative when the undercover police officers told the appellant that he would be recalled to the inquest and that they could help provide him with a false alibi if he told them the truth about Daniel's disappearance. The appellant's confessions to Arnold and Paul were made after these inducements at the inquest and were therefore inadmissible under s 10.

[70] The difficulty with that contention is that the coroner had a statutory obligation to question witnesses like the appellant so as to ascertain whether Daniel had been killed and, if so, in what circumstances. Certainly the questioning of the appellant was much more robust than would have been appropriate in an accusatorial trial for a criminal offence. But in vigorously encouraging the appellant to give truthful answers under oath at the inquest, and in exploring the strength of the evidence against him, counsel cross-examining the appellant were acting in accordance with the *Coroners Act*. The coroner's questioning was also consistent with the coroner's statutory role. Neither the coroner nor counsel at the inquest acted improperly or made any threat or promise to the appellant amounting to an inducement under s 10.[84]

[71] The appellant referred to *X7 v Australian Crime Commission*[85] but that case is plainly distinguishable. There, X7 had been charged with criminal offences and was awaiting trial when he was cross-examined under the *Australian Crime Commission Act* 2002 (Cth) about the very offences with which he was charged. By contrast the appellant had not been charged with any offences the subject of the inquest.

[72] If I am wrong and the questioning of the appellant at the inquest was a threat or promise amounting to an inducement under s 10, the next question is whether the prosecution established on the balance of probabilities that, when the appellant confessed to the undercover police officers, he was not still acting under that inducement.[86]

[73] It is significant that the cross-examination at the inquest said to amount to an inducement occurred on 31 March and 1 April 2011 in Brisbane. The confessions were separated from that alleged inducement by considerable time and distance, being made four months later on 9 August 2011 in Western Australia, to those whom the appellant believed were his criminal associates. It is true that the undercover police officers used the notice to attend again at the inquest as a catalyst to raise the topic of Daniel's disappearance with the appellant. It is also true that the notice to attend was intended to, and did, place considerable psychological pressure on the appellant. The undercover police officers made clear to the appellant that he could not stay in their gang, participate in the much-anticipated "big job", and receive his $100,000 share of the proceeds whilst he was the principal suspect in Daniel's disappearance. They offered to provide him with a watertight, false alibi which would clear him at the inquest but they could only do this if he made a truthful and complete confession. I am satisfied the appellant made the confessions,

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84 *Tofilau*, Gleeson CJ [7]; *R v Travers* (1957) 58 SR (NSW) 85; *R v Zion* [1986] VR 609.

85 (2013) 248 CLR 92, [42].

86 *Foster v The Queen* (1993) 66 A Crim R 112, 128.

not because of any threat or promise held out at the inquest but voluntarily to remain part of the criminal gang, to participate in the "big job" and to receive his $100,000 share of the proceeds. If there was a threat or promise from a person in authority for the purposes of s 10, the appellant was not acting upon it when he confessed to the undercover police officers. The primary judge was right to conclude that the appellant's confessions to the undercover police officers were not induced by any threat or promise held out at the inquest. This aspect of the appellant's grounds of appeal against conviction fails.

b) Should the confessions and the derivative evidence be excluded as unfair or an abuse of process?

[74] The appellant alternatively contends that the primary judge erred in the exercise of her discretion in not excluding the confessions and the derivative evidence on grounds of unfairness. This Court will only interfere with such an exercise of discretion if the decision was unreasonable or clearly unjust or arose from error of fact or of law or failure to take into account a material consideration or from giving undue weight to any circumstance or matter.[87] The appellant did not ask the primary judge to exclude the evidence as an abuse of process or on public policy grounds but now contends that this Court should do so to avoid a miscarriage of justice.

[75] As Toohey, Gaudron and Gummow JJ noted in *The Queen v Swaffield*,[88] questions of voluntariness, reliability, unfairness and public policy considerations cannot always be treated as discrete issues and frequently overlap.[89] The appellant's contentions in this case on unfairness, public policy and abuse of process are interlinked and can conveniently be dealt with together.

[76] Dixon J explained the discretion in *McDermott v The King*:[90]

> "[A] judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of police, even although he does not consider that the strict rules of law, common law and statutory, require the rejection of the evidence."

[77] The question is not whether the police have acted unfairly but whether it would be unfair to the accused to use their statement against them, in that the accused's right to a fair trial may be jeopardised if the statement was obtained in circumstances which affect its reliability.[91] The appellant does not contend that unreliability is a factor which favours him in the exercise of this discretion. But whilst reliability is a factor it is not the sole factor. There is also a discretion to exclude confessional evidence even where there is no unfairness, if public policy requirements justify its exclusion.[92]

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87 *House v The King* (1936) 55 CLR 499, 507.

88 (1998) 192 CLR 159.

89 Above [54] and [74] and see *Cleland v The Queen* (1982) 151 CLR 1; *Foster v The Queen* (1993) 67 ALJR 550; 113 ALR 1 and *Ridgeway v The Queen* (1995) 184 CLR 19, 37 - 38.

90 (1948) 76 CLR 501, 515.

91 *Swaffield*: Toohey, Gaudron and Gummow JJ, [53] citing *Van der Meer v The Queen* (1988) 62 ALJR 656, 666.

92 *Swaffield*, [57]; *Cleland v The Queen* (1982) 151 CLR 1; 8 - 9; *The Queen v Ireland* (1970) 126 CLR 321, [334] - [335]; *Bunning v Cross* (1978) 141 CLR 54, 74.

[78] The appellant emphasises that when he knew he was speaking to police officers about Daniel's disappearance he denied all responsibility. Whilst he did not exercise strictly his right to silence in that he willingly participated in the pre-inquest police interviews, he expressed his "right not to incriminate himself". During the interview with police officers Wright and Hickey on 14 September 2006, he indicated some reluctance to speak to police.[93] When cross-examined at the inquest, he denied all involvement in Daniel's disappearance and he exercised his right to silence when arrested and charged.

[79] The appellant also emphasises the use of the coronial process, the issuing of the notice to attend, and its use by the undercover police officers to pressure the appellant to confess. Whilst not illegal, in light of the appellant's clear unwillingness to voluntarily inculpate himself, he argues it was an abuse of process; public policy considerations and questions of fairness required the rejection of his confessions and the derivative evidence.

[80] The appellant understandably places some emphasis on *Swaffield*. Swaffield confessed to an undercover police officer posing as a purchaser of illegal drugs about offences of stealing, entering a rowing club and arson of the club. Swaffield had been charged two years earlier with the property offences but was discharged at the committal hearing. The High Court by majority did not interfere with the majority of the Queensland Court of Appeal's discretionary decision that Swaffield's right to choose whether or not to speak to police about the offences was so clearly breached, it was unfair to allow the evidence to be used against him.

[81] By contrast, in *Pavic v The Queen*,[94] a case the High Court heard and determined with *Swaffield*, police interviewed Pavic in relation to the much more serious crime of murder. He was warned and advised he had a right to communicate with his solicitor whom he contacted. Acting on the solicitor's advice, he made no comment on the questions police put to him. Police told him they suspected he had committed the murder but they allowed him to leave. A witness assisted police with their investigation and as a result they believed they had sufficient evidence to charge Pavic with murder. The witness was fitted with a microphone and during a conversation with Pavic, the witness truthfully said that the police had recovered the witness's clothing stained with blood. Pavic then made inculpatory statements. Neither the trial judge nor the Court of Appeal excluded his admissions. Brennan CJ, Toohey, Gaudron and Gummow JJ found that there was no illegality in the method of obtaining these admissions as the witness was not an agent of the state. The witness set up the meeting with Pavic, not the police. There was no reason to interfere with the exercise of the discretion undertaken by the primary judge and upheld by the Court of Appeal.

[82] Neither *Swaffield* nor *Pavic* is of particular assistance to the appellant. Both cases illustrate the difficulty an appellant has in appealing from a discretionary exercise of this kind.

[83] Contentions similar to those made by the appellant in this case were rejected by the High Court in *Tofilau* in respect of the fourth appellant, Clarke. In the present case, the appellant submits that Clarke's case should be distinguished as the undercover police officers extracted the confessions by using the pressure of the earlier aggressive cross-examination at the inquest and the issuing of a further notice to attend the inquest.

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93 Set out in these Reasons at [16].

94 (1998) 192 CLR 159.

[84] There is little likelihood of finding another case with facts directly comparable to the intriguing matrix of the present case but there are similarities with Clarke's case. The investigation of a 20 year old killing was revived when a police officer visited Clarke's home, leaving a calling card and requesting that Clarke contact him. These events were co-ordinated with a covert police investigation which culminated three months later in a "Mr Big interview" with Clarke. The "boss" produced a three-page confidential police report which was false but which Clarke believed was true. It stated that Clarke was the only suspect in the murder and that, pending enquiries, approval would be sought from the DPP to charge him with murder. Clarke was told that the "boss" could fix anything and Clarke had to give him the absolute truth. The majority of the High Court rejected Clarke's contentions and concluded that it was open to the trial judge to allow the evidence to be given.[95] In my assessment, the use of a legitimate notice to attend again at an inquest, which had always been lawfully conducted, to assist in extracting a confession was no more unfair than the police visit to Clarke's house and the use of the false police report. Clarke's case does not assist the appellant.

[85] Some emphasis was placed by the appellant in his written submissions on the recent Canadian case, *R v Hart*.[96] In oral submissions, however, senior counsel for the appellant submitted that there was a divergence on the issue of the admissibility of confessional evidence between the common law of Australia and that of Canada so that *Hart* was of no real assistance in this case. Covert police operations of the kind used in the present case have been deployed in Canada for many years with approval by the Canadian courts.[97] In *Hart*, the Canadian Supreme Court found there was insufficient protection for accused people who confessed during undercover operations of this kind and recognised a new common law rule of evidence. The court stated its concern about an aura of violence in these covert operations with threats or acts of violence in the presence of the accused.[98] It was also important to protect suspects against the abuse of state power which threatened the integrity of the justice system.[99]

[86] Since *Hart*, admissions made in the course of such undercover operations are presumed inadmissible in Canada, unless the prosecution can establish on the balance of probabilities that the probative value of the confession outweighs its prejudicial effect. The probative value of such a confession turns on its reliability and the circumstances in which it was made. The court must then weigh the probative value and prejudicial effect of the confession and decide whether the Crown has met that burden.

[87] Even were *Hart* binding on this Court, it would be of no assistance to the appellant. The question of reliability is not a matter in his favour in seeking to exclude the evidence. Further, the present case, unlike *Hart*, did not involve threatened use of violence to those who were untrustworthy or who betrayed the criminal gang. But in any case, as the appellant has conceded, Canadian jurisprudence has taken a different path from the common law of Australia and it is the Australian authorities which guide and bind this Court.

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95 Gleeson CJ [24]; Gummow and Hayne JJ [114] and [115] and Callinan, Heydon and Crennan JJ [413] - [414].

96 2014 SCC 52.

97 *Tofilau v The Queen* (2007) 231 CLR 396, Callinan, Heydon and Crennan JJ [413].

98 2014 SCC 52, [78] - [116].

99 Above, [79], [111] - [120].

[88] In *Tofilau*,[100] Callinan, Heydon and Crennan JJ expressed concern about some types of covert operations requiring the exclusion of evidence obtained as a result. The covert operations in the present case, however, were not of that kind. There was no illegal conduct on behalf of the undercover police officers or in the dealings between the police, the coroner and his staff. The 29 July 2011 notice to attend was issued for legitimate reasons. There was nothing improper in police liaising with the coroner over its timing and then using it as a catalyst to discuss Daniel's disappearance with the appellant. The police employed this clever investigative technique to try to solve a serious crime only after traditional methods had proved unsuccessful.

[89] The appellant placed much weight on the fact that in the past he had exercised his right to silence in that he had not made any admissions to police when interviewed. But in fact he did not exercise his right to silence. He freely spoke to police on numerous occasions although he consistently denied all involvement in Daniel's disappearance. This was his right: *nemo tenetur se ipsum prodere* (no one is required to incriminate himself or herself).[101] But that cannot stop the police from continuing their investigations, especially of serious crimes involving the safety of children and young people. That is why police undertook this covert operation.

[90] It can be accepted that the appellant would not have made the admissions had he known the true identity of the undercover police officers. But they were not exercising the coercive power of the state when he confessed.[102] He believed he was amongst his criminal friends. They stressed the need for him to tell the truth so that they could help him. He was free to leave their company at any time. They were not threatening or violent and in truth had not committed offences with him. He chose to make detailed confessions to the offences involving Daniel so as to obtain a watertight, false alibi; to use the alibi to exonerate himself at the inquest when recalled; this would enable him to remain in the criminal gang and to participate in the pending "big job" which would net him $100,000. There was no abuse of process in the undercover scenarios leading up to and including his confessions.

[91] I am unpersuaded that questions of fairness or public policy, individually or in combination, otherwise warrant the exclusion of the confessional and derivative evidence. The primary judge's decision not to exclude the evidence was a sound discretionary exercise. The failure to exclude the confessions and the derivative evidence as an abuse of process or on public policy grounds has not caused a miscarriage of justice. This aspect of the appellant's grounds of appeal is not made out.

Did the judge err in directing the jury as to inferences in relation to the evidence of Douglas Jackway and Leslie McLean?

The appellant's contentions

[92] The appellant's remaining ground of appeal relates to the judge's directions to the jury. His case at trial was that it was open to the jury to infer that he may have falsely confessed to the offences to ingratiate himself with the criminal gang to which he believed the covert police officers belonged. It was open to the jury, he contended, to reasonably infer from the evidence that his knowledge of the offences

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100 (2007) 231 CLR 396, [416].
101 Above, [317].
102 Above, [320].

may have come through Mr McLean from Mr Jackway, who actually had committed the offences. The appellant then falsely confessed so that Arnold would provide him with a watertight, false alibi which would clear him at the inquest. While the trial judge gave uncontroversial directions to the jury about the process of drawing inferences,[103] the appellant contends that her Honour erred in directing them as to defence counsel's submissions concerning Mr Jackway and Mr McLean. The impugned direction is italicised in [112] of these reasons below. Trial counsel (junior counsel in the appeal) unsuccessfully applied for a redirection on this matter.

[93] The appellant contends that the judge's direction failed to recognise that it was for the prosecution to prove his guilt beyond reasonable doubt. The jury could do that only if they rejected all reasonably open inferences. This was the central issue in the defence case. The judge erred in declining to give the redirection sought. As a result, the defence case was not fairly left to the jury: *Domican v The Queen*[104] and *RPS v The Queen*.[105] The misdirection obscured the division between judge and jury, in effect telling the jury how they might more readily reason towards a verdict of guilt.[106]

[94] Before returning to the appellant's contentions, I will set out relevant aspects of the evidence of Mr Jackway and Mr McLean (which should be considered together with the background facts set out at [6], [7] and [12] of these reasons) and the judge's directions to the jury.

The relevant evidence of Mr Jackway and Mr McLean at trial

[95] Mr Jackway gave evidence via video link. In evidence-in-chief he denied he was involved in any way in the abduction and killing of Daniel.

[96] He was extensively cross-examined. He was in Moreton B Correctional Centre from 28 October to 12 December 1997. He could not recall a prisoner called Les McLean. He denied telling an inmate that he would abduct, rape, kill and bury a child in an area where the child would not be found.

[97] After his release from prison, he did not see a psychologist; he was not drinking heavily but he was "smoking pot". He spent time with a 15 year old boy who had dropped out of school and was going out with the daughter of Mr Jackway's fiancée. He agreed that after he was released from custody he purchased a blue 1980 Holden Commodore sedan. He knew the Noosa/Tewantin area well and had lived on the Sunshine Coast. He was in Goodna on 7 December 2003 and travelled to the Sunshine Coast on 8 December to visit his sister. He agreed that since Daniel's disappearance he had been charged and convicted for raping another [woman] between 1990 and 1994. He agreed he may have threatened to kill this [woman] when he got out of jail. He denied discussing Daniel's case with another prisoner, Trevor Bettiens.

[98] The prosecutor did not re-examine Mr Jackway.

[99] Mr McLean was called by the prosecution as a witness, but the prosecutor asked no questions other than his name and that he lived in Brisbane.

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103 Summing up, 4.
104 (1992) 173 CLR 555, 561.
105 (2000) 199 CLR 620, 637, [41] - [42].
106 *RPS v The Queen* (2000) 199 CLR 620, 637 [42] - [43].

[100] In cross-examination he agreed that he believed he had a multiple personality disorder; sometimes he was one person and sometimes another and sometimes he could not remember what the other person had done or said. He was imprisoned in the Moreton B Correctional Centre on 7 April 1997 for aiding a suicide. In January 1998 he went to a prison farm in Numinbah. He agreed the people in Moreton B Correctional Centre associated with each other through sport, the library or church. He was shown a photograph of Mr Jackway[107]; he knew this person as "Rat". He believed he told the prosecution that "Rat" might be someone he knew from prison in 1996 or 1997. After "Rat" was released from prison, he was once in a room where "Rat" was using heroin. Mr McLean did not know exactly when this was; it may have been any time between 2003 and 2005.

[101] The appellant sometimes visited him at his Stafford Heights house and Mr McLean would sometimes visit the appellant at his residence at Bli Bli on the Sunshine Coast. He sometimes stayed with the appellant and his wife, Tracey. On occasions they attended church together. He did not know a sandmining site in the Sunshine Coast hinterland. He did not recall the appellant working as a sandblaster. Mr McLean agreed that sometimes he did things that he could not later recall. He did not remember going to any demountable building near the Glasshouse Mountains. The appellant phoned him a couple of times when the appellant was living in Western Australia. The appellant once told him the police had interviewed him over Daniel's disappearance.

[102] Mr McLean denied that he told the appellant that he (Mr McLean) had been told something about Daniel's disappearance. He was adamant that he had no problem with his memory on these matters. He denied telling the appellant that someone told him where Daniel's bones could be found or that they could be found near a demountable building at a sandmining site down a gully. He denied telling the appellant he had been told by some unnamed person that this person abducted Daniel. He denied telling the appellant that Daniel's clothes had been thrown over a bridge into running water. He denied asking the appellant what he was going to do with the information he (Mr McLean) had given him. He denied telling the appellant that the appellant should not tell anyone what Mr McLean had said because Mr McLean was scared of being "beaten up for talking".

[103] On the morning of the appellant's arrest, Mr McLean said the appellant phoned him. He did not think he had tried to phone the appellant several times that day but he was unsure.

The relevant judicial directions to the jury

[104] In discussing this ground of appeal, it is important to consider the impugned direction in the context of the entire summing up. For that reason I have set out substantial extracts from the directions.

[105] As a part of an uncontroversial direction to the jury as to what constituted evidence, her Honour stated:

> "A thing suggested by a lawyer during a witness's cross-examination is not evidence of the facts suggested, unless the witness accepted the suggestion as true. That is, the lawyer's question is not evidence. Let me give you an example. Mr Jackway was asked by [defence counsel] – this is just a random example – 'And is it true to say that,

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107 Exhibit 197.

> prior to your release, you told an inmate that you would abduct, rape and kill a child and bury the child in an area where the child would not be found?' He answered, 'No.' The lawyer's statement in the question that he said those things is not evidence those things were said. The evidence is, instead, to be found in the answer of the witness, that is, that he did not say those things. There is no evidence at all that he said such a thing. Even if you don't believe the denial, there is still no evidence, unless someone else has given that evidence. Even if you don't believe the denial, that doesn't turn it into evidence that it's true."

[106] Later the judge gave the jury an unexceptional direction as to the drawing of inferences:

> "…you may also draw inferences, that is, deductions or conclusions from facts that you find established by the evidence. If you're satisfied that a certain thing happened, it may be right to infer that something else occurred. That's the process of drawing an inference from the facts.
>
> Let me give you an example that's often given to juries. Say you went home on a Friday afternoon and you thought, 'Will I do the mowing this afternoon or can I wait till the morning? It doesn't look like it's going to rain. It should be fine to leave it to the morning.' Or you thought, 'Will I hang out the washing tonight? It doesn't look like rain. It should be fine. I'll hang out the washing tonight.' When you got up in the morning – you've been asleep all night. You got up in the morning, the clothes you'd hung out were absolutely sodden and the grass was covered with water. There were puddles around. It had obviously rained during the night. You hadn't seen it rain, you hadn't heard it rain, but you could safely conclude, you could infer from the facts, that it had rained during the night. That's the ordinary process of drawing inference from facts. But, of course, there must be – you can only draw reasonable inferences and your inferences must be based on the facts you find proved by the evidence. There must be a logical and rational connection between the facts you find and your deductions and conclusions. You are not to indulge in intuition or guessing."

[107] The judge gave an equally uncontroversial direction as to the onus and burden of proof, explaining that no inference could be drawn against the appellant for not giving evidence.

[108] There is no complaint about the judge's summation of the evidence in the trial during which the judge referred to the appellant's admissions, first to Arnold and later to Paul, on 9 August 2011. The judge explained:

> "The prosecution relies on answers said to have been given by [the appellant] in this conversation as supporting its case against him. In order to rely on that evidence, you must be satisfied that he did give the answers that are attributed to him and that they were true…
>
> If you're satisfied that the statements were made by [the appellant], that is, the admissions of his guilt were made by him, the second aspect you must consider is whether those parts that the prosecution relies on as indicating guilt are true and accurate. It's up to you to decide whether you're satisfied those things said by [the appellant] which

> would tend to indicate that he is guilty of the offence were true, because if you're not satisfied you couldn't rely on them as going to prove his guilt.
>
> In the course of the discussion, it's said, [the appellant] made statements which the prosecution relies on as pointing to his guilt. If you accept them as having been made by [the appellant] and as true, it's up to you to decide what weight you give them and what you think they prove."

[109] During her summation of Mr Jackway's evidence, the judge reminded the jury that he denied all involvement in the abduction and killing of Daniel. He was cross-examined extensively by defence counsel about his criminal history which included an occasion where he dragged a boy into a car and committed a sexual offence against him. That was relevant to his credibility but the fact that he had a criminal history did not mean he was an untruthful witness. Although he agreed he was in Moreton B Correctional Centre he did not recall meeting another prisoner, Mr McLean. He claimed he was in the Goodna area on 7 December 2003 and travelled to the Sunshine Coast to visit his sister on 8 December. Her Honour continued:

> "He denied having any conversation with Mr Bettiens – a conversation that was put to him. So, as I said to you earlier about questions, there is no evidence that he did or he said those things that he is alleged to have said. He was again interviewed by the police on the 27th of May 2009. In the course of that interview, there was evidence that police had obtained a statement from Deborah Robinson, which asserted that Jackway had threatened her to provide a false alibi. He denied that. There is not evidence that he had, in fact, threatened her, but there is evidence that police said that such a statement had been obtained."

[110] In summarising Mr McLean's evidence, her Honour noted:

> "In the course of [defence counsel's] address, he had suggested to Mr McLean that he and [the appellant] had been to a particular sandmining site. That suggestion was not accepted by Mr McLean so there is no evidence that Mr McLean and [the appellant] had ever been to any sandmining site at all. He said he recalled [the appellant] telling him that he had been interviewed about the disappearance of Daniel Morcombe. He was adamant that he had never told [the appellant] where Daniel Morcombe's bones could be located. He adamantly denied telling [the appellant] that someone had told him where Daniel Morcombe's bones could be located and that it was near the demountable building at the sandmining site, down a gully near the sandmining site or that someone had told him that they had abducted Daniel Morcombe on his way to the Sunshine Plaza to get a haircut. He also adamantly denied that he told [the appellant] that the clothes had been disposed of by throwing them into a creek with running water. Now, as I've said to you before – and it is important that you remember this – the lawyer's statement in the question that he did say those things is not evidence that those things were said. The evidence is instead to be found in the answer of the witness.

> There is, accordingly, no evidence that Mr McLean ever said those things to [the appellant]."

[111] The judge also referred to the evidence of some witnesses that they saw a blue car near where Daniel was last seen at about the time of his disappearance.[108] Her Honour reminded the jury that Daniel's bones were not found at the precise site where the appellant said he dumped the body. There was, however, evidence of wild animals in the vicinity. The judge referred the jury to the evidence that Daniel's shoes were found in the sandmining area[109] whereas he told the undercover police officer he threw the shoes into the creek with Daniel's other clothes.[110]

[112] Later in summarising the defence case her Honour stated:

> "The defence submitted that, unless the Crown has disproved two possibilities – that Jackway was involved or that the blue car was involved in the abduction and murder of Daniel Morcombe – then you must find [the appellant] not guilty. He submitted that the prosecution says that detailed confessions and [the appellant] taking undercover police to the site of the bones and clothes was because he was the killer. He asked – has that been proved beyond reasonable doubt? He submitted that it's not seriously challenged that Daniel Morcombe met his death by foul play. The real question is who did it. Only if evidence proved beyond reasonable doubt, he submitted, that it was [the appellant] not Douglas Jackway or a blue car, can you find him guilty. He submitted this is not a popularity contest.
>
> He reminded you that Douglas Jackway had got out of jail one month before. He was due to drive past that day. Witnesses had seen a blue sedan on both sides of the road similar to a car, he submitted, which was driven by Jackway and Jackway had told lies about his whereabouts, had a goatee and broke down there on the following day.
>
> He referred to the evidence of Les McLean. *[Defence counsel] submitted that blinded by the promise of ill-gotten gains, [the appellant] played a convincing part and told the police someone else's deepest secret. He said that Jackway and the blue car were investigated by the police. Jackway told lies about what he was doing on the 7th of December 2003 during various police interviews and had to be restrained when the police took his car. He submitted that once you find that Douglas Jackway and the blue car were involved in Daniel Morcombe's abduction then you would acquit [the appellant]. He pointed to similar offending by Douglas Jackway in 1995. [Defence counsel] asked you to draw an inference that Jackway told McLean who told [the appellant] about where Daniel Morcombe's remains and clothes were found. But, of course, I remind you, as I have told you, that the questions he asked is not the evidence and there is no evidence to that effect, no direct evidence.*
>
> He submitted that, to convict, you would have to be satisfied that a blue car was not involved. It had been a focus of police

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108 Summing up Day 1, 20, 44.

109 Summing up Day 2, 15.

110 Above, 12.

> investigation. He invited you to conclude that the blue car was stalking Daniel Morcombe. He submitted that there was nothing unusual in the evidence that the man under the overpass was standing with one leg cocked. [Defence counsel] referred in detail to evidence given by witnesses who saw a blue car and then submitted that what you would – should take into account and what you should discard. He submitted that no one saw [the appellant] walking to the car park with Daniel Morcombe.
>
> He submitted that [the appellant's] confession was demonstrably false, that two others had made false confessions that led to searches that didn't find any remains. He submitted that the confession is questionable, that it didn't match what passers-by noticed and the confession came after eight years. [Defence counsel] asked why he would make up such a story, and he said it was for money and membership of the gang and to buy him an alibi. There was no downside to making a confession and he would do anything to be part of the gang.
>
> [Defence counsel] referred to the meeting with Craig on 4th of August and that [the appellant] was apparently stressed. The big job was dangled in front of him. He submitted that you might think it was easier to falsely confess than to fake his own death. He submitted that the scenarios were designed to get a confession no matter what, so you would find the confession unreliable. He submitted that [the appellant] got some details wrong and he could not have done things as quickly as he said he did. He submitted that he could have gone straight to his dealer's house from Frank Davis's place and he asked why would he take Leticha Harvey to the site if he was the killer.
>
> [Defence counsel] submitted it was more likely that men in a blue car stalked Daniel Morcombe and dragged him into a car. [Defence counsel] submitted that [the appellant] took police to the wrong spot because he didn't know where the bones were and he got the position of the shoes wrong. He submitted that [the appellant] knew it was down the embankment but didn't know where. He submitted the admissions do not match the objective facts because [the appellant] is not guilty. He submitted the Crown has not disproved that Mr Jackway did it" (my emphasis).

[113] Defence counsel asked for a redirection because of the italicised comments above. The judge had told the jury there was no direct evidence of Mr Jackway providing Mr McLean with information about Daniel's killing or of Mr McLean giving that information to the appellant. But the defence case was that although there was no direct evidence, the jury could draw those rational inferences from pieces of evidence in the prosecution case. The judge declined to give that redirection.

Conclusion on this ground of appeal

[114] The appellant contends that the judge's directions should have informed the jury that it was for the prosecution to prove his guilt beyond reasonable doubt. In this case the jury should have been told that before convicting they would have to be satisfied beyond reasonable doubt that the following inferences were not open:

- that Mr Jackway was involved in the offences committed against Daniel;
- that Mr Jackway told Mr McLean of these details;
- that Mr McLean passed on these details to the appellant; and
- that the appellant falsely made admissions to Arnold and Paul to ingratiate himself with, what he believed was a criminal gang.

[115] The extracts of the directions set out earlier and the question trail[111] provided to the jury make it clear that the jury fully apprehended the prosecution must prove its case beyond reasonable doubt. The judge was right in informing the jury that there was no direct evidence that:

- Mr Jackway was involved in the offending against Daniel;
- Mr Jackway told Mr McLean either that Mr Jackway was involved in the offences or the comprehensive details of that offending; or
- Mr McLean passed on the comprehensive details of that conversation to the appellant.

As the appellant rightly contends, the evidence at trial at its strongest for him included indirect evidence possibly linking Mr Jackway to Daniel's disappearance.[112] There was evidence of the opportunity after Daniel's disappearance for Mr Jackway and Mr McLean to have had a conversation; that Mr McLean agreed that he sometimes did and said things which he could not remember because of his multiple personalities; and that he spoke to the appellant about the investigation into Daniel's disappearance. In her Honour's summation of the evidence, the judge referred to evidence upon which the defence relied in explaining the defence hypothesis to the jury. Importantly, the judge directed that the jury could act on the appellant's confessions to Arnold and Paul only if they were satisfied both that they were made and also that they were true,[113] and that it was the defence case that the prosecution had not disproved that Mr Jackway committed the offences against Daniel.[114] When read as a whole, the judge's directions to the jury fairly explained the defence case and instructed them, before convicting the appellant, to be satisfied beyond reasonable doubt that the defence hypothesis was not open. There has been no misdirection on a matter of law. The judge's refusal to give the redirection sought was not an error of law nor has it led to a miscarriage of justice. The judge's impugned directions read in context in the summing up did not effectively tell the jury how to more readily reason towards a verdict of guilt. This ground of appeal is not made out.

Conclusion on the appeal against conviction

[116] As the appellant has not succeeded in either of his grounds of appeal, the appeal against conviction must be dismissed.

The Attorney- General's appeal against sentence

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111 MFI "AA".
112 See [6], [7] and [12] of these Reasons.
113 See [106] of these Reasons.
114 See [110] of these Reasons.

[117] The appellant, the Attorney-General of Queensland, contends that the primary judge's order postponing parole eligibility for the respondent, Brett Peter Cowan, also known as Shaddo N-Unyah Hunter, on his life sentence for murder by only five years, is manifestly inadequate and plainly unreasonable and unjust in the sense identified in *House v The King*.[115]

[118] Before discussing this ground of appeal I will summarise the sentencing proceedings and the appellant's contentions.

The submissions at sentence

[119] The respondent was 44 years old at sentence and 34 at the time of the offences. He had a gravely concerning criminal history in both Queensland and the Northern Territory.

[120] He was first convicted and placed on probation in Queensland for property offences at the age of 17. He continued to commit further property offences and in 1989 was sentenced to one month imprisonment for breach of probation. More relevantly, in September 1989, he was sentenced to two years imprisonment for indecently dealing with a boy under 14. He was convicted of this offence after a jury trial. He inserted his finger into the anus of a seven year old boy and fondled and sucked the child's penis. The offence occurred in a public toilet when the respondent was 18 years old. The sentencing judge considered the offence a bad instance of indecent dealing. In 1992, he was convicted and sentenced to short terms of imprisonment for possession of dangerous drugs and false pretences. In 1997, he was sentenced to 12 months imprisonment for burglary. He was convicted and fined for stealing as a servant in 2004 and for minor drug offences in 2006.

[121] In the Northern Territory in 1994, aged 24, he was convicted and sentenced to an effective term of seven years imprisonment for an aggravated act of gross indecency, unlawfully causing grievous harm and deprivation of liberty, all concerning a six year old boy. The child was alone and wearing only underpants as he looked for his sister in a caravan park. The respondent, a neighbour of the boy, took him for a walk in the bush. He pulled down the boy's underpants, removed his own shorts and masturbated, while holding onto the boy's leg. He ejaculated and used the child's underpants to wipe the semen from his penis. Still holding the boy with one hand, he inserted his right middle finger into the child's anus, causing the child to wince and struggle in pain. He tried to kiss the boy who struggled and was visibly distressed. He carried the boy some 300 metres through scrubland where he left him inside a rusty motor vehicle. About an hour later, the boy staggered into a service station, naked, dazed and distressed. He was taken to hospital and placed in intensive care. He had a collapsed and punctured left lung, deep cuts to the back of his head and the base of his scrotum, a bloodied nose, blackened eyes and scratch marks on his torso. The respondent initially denied involvement but later made a full confession and told police he needed help. The boy's injuries were consistent with his having sustained a complex series of injuries involving asphyxiation, blunt force injury, sharp force injury and anal penetration. It was accepted that the attempt to strangle the boy occurred incidentally during the assault.

[122] The prosecutor in the sentencing proceeding with which this appeal is concerned, understandably emphasised the chilling similarities between the appellant's past and present offending.

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115 (1936) 55 CLR 499, 504 - 505.

[123] The members of Daniel's immediate family all provided heartbreaking victim impact statements outlining the bitter reality of living through what is every family's worst nightmare. Daniel's father and older brother, Dean, read their statements to the court. The prosecutor read out statements from Daniel's mother and his twin brother, Bradley. All wrote and spoke eloquently of the family's deep love for Daniel and the unbearably dreadful effect on them of the respondent's offending.

[124] The prosecutor submitted that under the legislation in place at the time of Daniel's murder, the respondent would ordinarily have been eligible for parole on count 1 (murder) after 15 years but the sentencing court had a discretion to postpone the parole eligibility date beyond 15 years. The prosecutor urged the court to exercise that discretion, as was done in *R v Abell*.[116] The factors which justified this were: the respondent's criminal history; the gravity of this offending; his lack of remorse; and his denial of responsibility. His criminality was only discovered by a highly effective covert police operation. He had negligible prospects of rehabilitation. He was an ongoing danger to the community. The maximum penalty for count 2 was 14 years imprisonment. The maximum penalty on count 3 was two years imprisonment and as this offence was in the worst category, the maximum sentence should be imposed.

[125] Defence counsel emphasised that the respondent told the undercover police officers that he killed Daniel in a struggle, not to avoid detection. This made the offence more akin to a felony murder than a murder with an intent to cause grievous bodily harm or death. Whilst conceding the judge had a discretion to delay a parole eligibility beyond 15 years, defence counsel referred to *R v Sica*[117] and *R v Maygar ex-parte AG (Qld)*[118] where this discretion had been exercised. In both those cases, three people were murdered whereas this was a single killing. Defence counsel tendered a medical report referring to the respondent's emphysema.[119]

The judge's sentencing remarks

[126] The judge adjourned the matter overnight to consider the difficult question of sentencing the respondent. The next day her Honour complimented the Morcombe family for their determination and all involved with the investigation and trial for their professionalism. The judge summarised the dreadful facts of the crimes and their terrible impact on the Morcombe family. The respondent had shown no remorse. The judge also noted the impact of the offending on the wider community. Her Honour referred to the respondent's concerning criminal history, particularly his previous sexual offending. The respondent, her Honour observed, was a convincing and adaptable liar, adding: "Whenever anyone is considering the prospect of granting you parole many years in the future, they should mark my words that you are a convincing, plausible and adaptable liar and prepared to lie to advance your own interests. Any profession of being rehabilitated by you would have to be seen in that light." The judge was concerned that in admitting the offences the respondent was untroubled by the enormity of the crime to which he had confessed. He expressed confidence about not being prosecuted because he couldn't be "pinned" for it.

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116 Unreported Douglas J, 8 October 2013.
117 [2013] QCA 247.
118 [2007] QCA 310.
119 Sentence Exhibit 9.

[127] The judge referred to the purposes of sentencing set out in s 9(1) *Penalties and Sentences Act* 1992 (Qld). The only sentence available for the crime of murder was life imprisonment. In view of the respondent's criminal history and the enormity of his crimes, the judge determined to set a parole eligibility date after the respondent had served 20 years. Her Honour added: "let me make it clear that does not mean that I am of the view that you should be released in 20 years time. That is not under my control. That's a matter for the parole authorities. But, as I've said, they should take into account that you are a plausible and opportunistic liar before they consider any view you might have about whether or not you've been rehabilitated." The judge stated that she had taken into account the respondent's health problems but these could be managed in prison and did not warrant moderation of his sentence. On count 2 the judge sentenced the respondent to three and a half years imprisonment and on count 3 to two years imprisonment. A period of 945 days was declared as time served under the sentence.

The appellant's contentions

[128] The law applicable in this case provided the judge with a discretion to postpone the respondent's parole eligibility beyond the applicable 15 year minimum term. The appellant informed the Court that this is only the second time a Queensland court has exercised that discretion when a person was, as here, sentenced under s 305(1) not s 305(2) *Criminal Code* (Qld). The first such case was *Abell*. The parole eligibility has been postponed beyond the minimum time in cases where s 305(2) *Criminal Code* was engaged, that is, where a person is being sentenced on more than one conviction of murder or has a previous conviction for murder: see for example, *R v Hayes*;[120] *Sica*; and *Maygar*.

[129] These cases illustrate that relevant considerations in exercising this discretion are the adequacy of the punishment; protection of the community; denunciation on behalf of the community and vindication of victims and their families; and the offender's criminal history, lack of remorse and prospects of rehabilitation. The wilful killing of a child is regarded by society with particular abhorrence: *Sica*.[121] That offence is aggravated when a child is killed to avoid detection for other offending. Deterrence and denunciation are important considerations when people innocently going about their business, in public places, are attacked, especially when the victim is a vulnerable child.

[130] The respondent's criminal history demonstrates his real risk of committing further violent and sexual acts against children. Past attempts at rehabilitation have failed. He is a recidivist, dangerous sex offender. To postpone his eligibility for parole by only five years, is unreasonable in that it fails adequately to punish him for his evil offending; denounce his monstrous conduct and vindicate the victim and his family; deter others; reflect his complete lack of remorse; and adequately protect the community.

Conclusion on the sentence appeal

[131] There is no doubt that the respondent's offending deserved a heavy penalty to reflect pertinent sentencing principles of general and personal deterrence, protection of the community and denunciation of such wickedly antisocial behaviour. Few crimes are more serious than luring a child or young person from a public place, sexually

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120 *R v Hayes* [2008] QCA 371.

121 [2013] QCA 247 [158].

abusing and murdering them and then interfering with their body so that the grieving family is left in a state of uncertainty for years. The respondent's criminality was aggravated by his chillingly similar past offending, his complete lack of remorse and insight into his actions and his poor prospects of rehabilitation. His crimes have had a life-shattering impact on Daniel's parents and brothers. With great courage, strength and dignity they channelled their grief and anger into a gritty determination to find out what happened to Daniel and to ensure justice was done. They inspired the police investigating the crimes, and the wider community, locally, across the state, and nationally.

[132] The sentencing judge's remarks make clear that her Honour took all these factors into account in determining that the appropriate sentence for the respondent for Daniel's murder was life imprisonment, with parole eligibility delayed by five years beyond the minimum. The judge was completely familiar with the terrible circumstances of the case, having sat through a six week trial as well as the harrowing sentencing process. Her Honour empathised with the Morcombe family and appreciated the dreadful impact of the offending on them. She understood the respondent's poor prospects of rehabilitation and the evil aspects of his character. As her Honour noted, the respondent's inevitable life sentence for murder meant that, whatever parole eligibility date was given, he will not be released unless the Parole Board considers release appropriate at some time far into future. The judge specifically warned the Parole Board of the respondent's propensity to lie to achieve his own ends and correctly identified that merely setting a parole eligibility date does not mean that he will be released on that date.

[133] This Court can only interfere with a sentence on an appeal under s 669A *Criminal Code*, if, as the appellant contends, the sentence was so unreasonable as to amount to an error of law.[122] The sentencing judge carefully considered all relevant matters in setting the parole eligibility date. There was no previous instance in Queensland where the parole eligibility date for a single murder was postponed beyond 20 years. The respondent has not demonstrated any sentencing error on the part of the judge. The sentence is not manifestly inadequate. It follows that the sole ground of appeal is not made out. The appeal against sentence must be dismissed.

Orders

1. The appeal against conviction is dismissed.
2. The appeal against sentence is dismissed.

[134] **FRASER JA:** I have had the considerable advantage of reading in draft the comprehensive reasons of the President in these appeals.

[135] In relation to the appeal against conviction, for the reasons given by the President at [70] – [73] in particular I agree that neither the coroner nor counsel at the inquest made any threat or promise to the appellant and that the appellant's confessions to the undercover police officers were not induced by anything that occurred at the inquest. I do not find it necessary to make any other general observation concerning counsel's questioning at the inquest. I agree with the President's conclusion at [89] that the appellant did not exercise his right to silence but instead spoke freely to police and denied any involvement in the crime of which he was convicted. I reject the

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122 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [62].

appellant's argument that this amounted to the exercise of a right not to incriminate himself; making a positive and wholly exculpatory statement goes well beyond refraining from "self-betrayal or self-accusation".[123]

[136] In all other respects I agree with the President's reasons concerning the conviction appeal.

[137] In relation to the sentence appeal, the President has identified at [129] the main considerations of relevance in the exercise of the discretion in this case to postpone parole eligibility beyond the minimum 15 year term. The sentencing judge took into account all of the relevant considerations. The Attorney General did not argue that the sentencing judge made any specific error in exercising the discretion to defer the respondent's eligibility for parole by five years and, as the President has explained, the Attorney General did not show that the sentence was manifestly inadequate such as to justify this Court's intervention.

[138] I agree with the President that both the appellant's appeal against conviction and the Attorney General's appeal against sentence should be dismissed.

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123 *Tofilau v The Queen* (2007) 231 CLR 396 at [317]