SUPREME COURT OF QUEENSLAND

CITATION:	*R v Duggan* [2015] QSC 113
PARTIES:	**R** (respondent) **v** **GLEN BRIAN DUGGAN** (applicant)
FILE NO/S:	SC No 776 of 2014
DIVISION:	Trial Division
PROCEEDING:	590AA Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	28 April 2015
JUDGE:	Ann Lyons J
ORDER:	**The recording of conversations on 10 April 2013 from the top of page 3 of the Transcript of Police Record of Interview which commenced at 2.25am until the commencement of the formal Record of Interview at 4.48pm be excluded from the evidence at trial.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – GENERALLY – where the applicant applies for an order that the records of interview in which he made confessional statements should be excluded from the evidence at trial – whether the records of interview should be excluded on the basis that they were unfairly obtained by police – whether the records of interview should be excluded pursuant to public policy considerations *Criminal Code* 1899, s 590AA *Police Powers and Responsibilities Act* 2000, s 7, s 415, s 418, s 419, s 423, s 431, s 442, Schedule 6 *Police Powers and Responsibilities Regulations* 2012, Schedule 9 *R v Adamic* (2000) 117 A Crim R 332, cited *R v Batchelor* [2003] QCA 246, cited *R v Ireland* (1970) 126 CLR 321, followed *R v LR* (2006) 1 Qd R 435, cited

R v Martin [2011] QCA 342, cited
R v Read [2005] QDC 403, cited
R v Swaffield; Pavic v R (1998) 192 CLR 159, followed
R v Tietie and Wong-Kee [2011] QSC 166, cited

COUNSEL:	C Cassidy for the applicant D Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions for the respondent

ANN LYONS J:

[1] The applicant, Glen Brian Duggan, is charged with the murder of Renee Todd on 10 April 2013 at Kingaroy. At trial, the Crown will be relying on admissions allegedly made by the applicant to police during conversations which commenced at 2.25am on 10 April 2013 and concluded with a formal electronic record of interview which commenced on 10 April 2013 at 4.48pm.

[2] This is an application pursuant to s 590AA of the *Criminal Code* 1899 by the applicant for an order that the evidence of all conversations between him and police and between him and his brother between 2.20am and 6.00pm on 10 April 2013 be excluded.

[3] The applicant applies to have those admissions and the records of interview excluded on the basis that the judge has a discretion to exclude them if they were unfairly obtained and pursuant to public policy considerations. The grounds of this application are that police denied the applicant his right to silence, questioned him whilst he was heavily intoxicated and failed to provide him with a support person in circumstances where police had reason to believe he was a person of impaired capacity.

The Crown's case

[4] The Crown alleges that the applicant murdered the deceased at around 1.30am on 10 April 2013. He had a brief sexual relationship with her 18 months prior to the alleged murder. After that relationship ceased, the applicant had reported to police that the deceased had been sending him threatening messages. He showed police the threatening text messages that she had sent him. After he attended the police station and showed police those messages, there was little contact between him and the deceased.

[5] At the time of the alleged murder, the applicant was living in a house with David Tindall at Gladys Street, Kingaroy. He had lived there for some months. The deceased lived in a unit in a complex which was next door to the home in which the applicant was residing.

[6] David Tindall states that the applicant had been suicidal, depressed and drinking in the weeks leading up to the alleged offence. He was also taking anti-depressant medication and on 9 April 2013 he told Tindall that he had not been sleeping due to nightmares. The applicant argues that he commenced drinking around midday on 9 April 2013 and continued drinking throughout the afternoon and evening. At 10.00pm, Mr Tindall went to bed at which point the applicant was described as being "fairly drunk unsteady on his feet and slurring his words".

[7] Mr Tindall states that around 1.45am on 10 April 2013, he was woken by the applicant knocking on the door. When he opened the door, the applicant was carrying a bottle of alcohol and said something like "I have just murdered someone", and went on to say that he had murdered "the bitch next door", saying that he had strangled her. The applicant then rang his brother and Mr Tindall rang police on triple zero. They arrived some 10 minutes later. Mr Tindall spoke to Detective Senior Constable Lawson outside the unit before Constable Lawson entered the unit to speak to the applicant.

Constable Lawson's evidence

[8] Constable Lawson's evidence is that he was notified of the job at Gladys Street at 2.19am via police radio. The information he received was that the applicant had killed his neighbour. He arrived at 2.25am accompanied by two other officers.

[9] Upon arrival at the applicant's address, Constable Lawson activated a digital audio recording device. That recording indicates that when Constable Lawson asked Mr Tindall if the applicant had been drinking, Mr Tindall stated that the applicant had been drinking and was "blind". The applicant argues that despite that information, Constable Lawson entered the house and questioned him without warning him of his rights. He also questioned him without attempting to clarify his state of intoxication. It would seem from Constable Lawson's evidence that the applicant immediately responded to police questioning by saying "I just killed someone". He was asked where it had occurred and he said "next door". He was asked when it had taken place and he said "three quarters of an hour ago".

[10] The recording indicates that it was not until after that initial series of questions that the police warned the applicant about his right to silence and his right to have a friend or relative present. At that point, the applicant told police the deceased's name was Renee and he had known her for about four months, that she was dead and that he had killed her. Police asked the applicant to run through everything that had happened. The applicant responded by stating "No. Can I talk to you about another, another day".

[11] Constable Lawson replied "of course you can", but he then continued on by stating that they needed to find out what happened on the night and continued to question the applicant in detail about the events of the night. He asked how much the applicant had had to drink. The applicant responded by saying "heaps", and then clarified by indicating it was in fact "shit loads". Despite the fact the applicant clearly indicated to Constable Lawson that he had consumed a large amount of alcohol, Constable Lawson continued to question him in detail and extracted a statement from the applicant which indicated "I murdered her and killed her about an hour ago". Sometime later, Constable Lawson asked the applicant if he had consumed any drugs and the applicant responded by saying that he was on anti-depressant drugs. When asked if he suffered from any mental health issues, he said that he suffered from depression and anxiety. Despite that information, Constable Lawson again continued to question the applicant.

[12] The applicant was then transported back to Kingaroy police station with the audio recording device continuing to record. During the time the device was recording, he made various statements adverse to his interests whilst at the station.

[13] It is clear that the applicant was intoxicated to a significant degree. A forensic examination occurred at 5.43am and the applicant told police he had consumed cannabis

the previous day. At 8.29am, police commenced a formal record of interview but it was suspended at 8.44am. At 8.41am, a breath test was performed which recorded a reading of 0.178 per cent. The detention period was then extended pursuant to an application to court. At 12.28pm another breath test was conducted with a reading of 0.122 per cent. At 2.24pm, the applicant again appeared in court via telephone in relation to an extension on the detention period. At 3.48pm, another alcohol breath test was performed on the applicant which recorded a reading of 0.062 per cent. At 4.40pm, police performed another breath test with a reading of 0.044 per cent and at 4.48pm, the police commenced a record of interview during which he made further statements adverse to his interests.

[14] It is argued that given the alcohol readings, it can be approximated that applying the elimination rate that when police first questioned him he would have had a blood alcohol content of approximately 0.285 per cent. That is clearly an approximation but I consider that given the readings, the applicant's blood alcohol reading must have been at least 0.20 per cent when he was first questioned, which is a very significant reading.

[15] Constable Lawson gave evidence at the hearing that the applicant "appeared a lot more sober than what the reading suggests"[1] and that his "indicia was not consistent with the reading".[2] He agreed, however, that there were indications that the applicant "was getting annoyed or angry".[3]

Relevant sections of the *Police Powers and Responsibilities Act* 2000 (PPRA)

[16] Section 7 of the PPRA provides:

> "**7 Compliance with Act by police officers**
>
> (1) It is Parliament's intention that police officers should comply with this Act in exercising powers and performing responsibilities under it."

[17] Section 415 of the PPRA provides:

> "**415 When does this part apply to a person**
>
> (1) This part applies to a person (*relevant person*) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence."

[18] The Crown prosecutor argues that s 415 provides that Part 3, which contains the safeguards ensuring the rights of and fairness to persons questioned for indictable offences, only applies once a person is a suspect which essentially means that the person is reasonably suspected of having committed or being likely to commit or of committing or of being likely to be committing a relevant offence.

[19] Schedule 6 provides that "reasonably suspect" means suspects on grounds that are reasonable in the circumstances. The prosecutor submits that before a person can reasonably be suspected and treated as a suspect, there must be an offence which is reasonably suspected of having been committed.

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1 Transcript of Proceedings dated 28 April 2015 at p 45 ll 2-3.
2 Transcript of Proceedings dated 28 April 2015 at p 45 ll 1-2.
3 Transcript of Proceedings dated 28 April 2015 at p 49 ll 45-46.

[20] The prosecutor argues that all Constable Lawson knew when he arrived was that someone was claiming to have killed an unnamed person and there was no body present. Furthermore, there were no signs of injury and that Mr Tindall, who made the triple zero call, had not seen the body either but was repeating what he had been told.

[21] The Crown argues, therefore, that up until that time that the body is seen, it is reasonable to ask questions to determine whether there in fact had been an offence committed. The Crown argues that up until that point in time, whatever is said is admissible, irrespective of compliance with the PPRA.

Was the applicant a suspect from the outset?

[22] It would seem clear that before he arrived at the unit, Constable Lawson knew the content of the triple zero call in which Mr Tindall told the operator that the applicant had murdered the person next door. I consider that the applicant became a suspect shortly after police arrived at the unit and confirmed that he was the person Mr Tindall had referred to in the triple zero call. It would seem to me that experienced police officers are able to assess very quickly whether they were dealing with a 'prank call' or not. Furthermore, when the applicant was asked at the very outset of the conversation with police what had happened he replied "I just killed someone".[4] In my view, at that point he was a relevant person for the purposes of the *PPRA* because he was in the company of police and from that point he was in fact being questioned as a suspect in the murder. I consider he became a suspect as soon as he made that admission in the presence of police irrespective of whether a body had been found.

Intoxication

[23] Section 423 of the PPRA provides:

> **"423 Questioning of intoxicated persons**
>
> (1) This section applies if a police officer wants to question or to continue to question a relevant person who is apparently under the influence of liquor or a drug.
>
> (2) The police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions."

[24] From the outset, it must have also been readily apparent to Constable Lawson that the applicant was under the influence of alcohol. Mr Tindall told the triple zero operator that the applicant had been drinking and in fact told Constable Lawson the same thing within minutes of his arrival at the unit. Mr Tindall clearly knew the applicant well given he lived with him. I also note that not only did Mr Tindall tell police that the applicant had been drinking but significantly he told them that he had been drinking heavily. The applicant was also holding a bottle of alcohol as Constable Lawson arrived. Police in fact had to stop the applicant from further drinking soon after their arrival and removed a bottle of schnapps from his hand. Significantly, Constable Lawson said to the applicant:

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[4] Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 2 l 54.

> "SCON LAWSON: Okay mate, no don't drink that, okay? Mate I'll take that off ya, because you, you're not allowed to drink that while I'm here. Okay? Okay, I'll talk to you, **but you're not allowed to get anymore drunk.** Okay? You're not allowed to drink anymore, **you got to be of sound mind while I speak to you**. Okay? Do you understand that?" [5] (my emphasis)

[25] Shortly afterwards when asked how much he had actually had to drink, the following exchange occurred:

> "SCON LAWSON: Mate how much have you had to drink tonight Glen?
>
> DUGGAN G: Heaps.
>
> SCON LAWSON: How much is heaps?
>
> DUGGAN G: Oh shit loads."[6]

[26] I have listened to the field tape and I consider that it reveals that the applicant does not always fully comprehend the question put to him, as he generally takes some time to respond to each question and he uses sentences that frequently do not contain a verb. On other occasions, the sentence he uses to respond to a question does not make complete sense.[7] He slurs his words on a number of occasions. He is also quick to get angry and is very emotionally labile. He gets very upset when he cannot hold his cat in his lap[8] or give his flatmate a hug. He is suspicious at times and angry on occasions when no real offense is being offered.[9] He also fails to understand the subtlety of some of the issues, particularly when he is asked to give a breath specimen so that police can ascertain the extent he was affected by alcohol.[10]

[27] Counsel for the Crown accepts that the applicant later in the interview showed significant intoxication by becoming obstreperous and abusive with police officers at the house and later at the police station. Counsel for the Crown argues that the fact that the respondent was intoxicated does not decide the question. This is because if Constable Lawson had reasonable grounds for being satisfied that the alcohol the applicant had taken was not affecting his understanding of his rights and his decision whether to answer questions, then he had complied with the PPRA. The Crown argues that there was no suggestion that the applicant was so intoxicated that he did not make a free choice as to speak or be silent. It is argued that the desire to confess is often strong. The Crown in particular relies on the comments by McMurdo P in *R v Batchelor*[11] who held that despite being intoxicated and in a drunken and emotional state, the confessions were reliable. In particular, it is argued here that the desire to confess was strong and the case was compelling.

[28] I consider that police could ask some initial questions which were directed towards confirming Mr Tindall's identity and that of the applicant and also in order to ascertain if there was some basis for the information which had been conveyed in the triple zero call

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5 Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 5 ll 19-24.
6 Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 6 ll 22-28.
7 Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 38 ll 28-33.
8 Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 37 ll 22-58.
9 Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 23 ll 29-54.
10 Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 39 ll 5-59.
11 [2003] QCA 246 at [13].

that a crime had in fact been committed. The questioning, however, should have been limited to that basic information. A series of questions, however, were asked by Constable Lawson which, in my view, went beyond that basic information before the applicant was informed of his right to silence. In response to those questions which were asked before the warning, the applicant not only admits that he has killed someone next door but admits that he was there for three quarters of an hour. It is clear that Constable Lawson continued to question the applicant despite his initial admission that he had killed the deceased. It is of great concern that police were fully aware when they arrived that the applicant was inebriated and that after a significant admission they continued to question him before any warning was given.

[29] I accept that after the warning, the applicant also tells police to do anything they have to do and also directs them next door to unit 1.[12] There was then further discussion about the identity of the deceased woman and the location of the killing. However, at that particular point the applicant states he wishes to speak later. Despite that clear indication, the questioning continues and the applicant provides further details of the admissions he has already made. In my view, the applicant's inability to resist the questioning by police was a product of the fact he was intoxicated. I am not satisfied that he had a strong desire to confess at that point in time given the indication he made to police that he wanted to speak later.

[30] I consider that there has been a failure to comply with s 415 of the *PPRA.*

Failure to warn

[31] Section 418 of the PPRA requires police to warn a relevant person prior to questioning that they have a right to communicate with a friend or lawyer as follows:

> **"418 Right to communicate with friend, relative or lawyer**
>
> (1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may—
>
> (a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
>
> (b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.
>
> ..."

[32] The Crown prosecutor again argues that s 415 provides that such a warning is only required if the relevant person is a suspect which essentially means a person reasonably suspected of having committed or being likely to commit or of committing or of being likely to be committing a relevant offence. The Crown argues that up until that time that the body is seen, then it is reasonable to ask questions to determine whether there in fact had been an offence committed. The Crown argues that up until that point in time, whatever is said is admissible, irrespective of compliance with the PPRA.

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[12] Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 3 ll 30-47.

[33] As I have already indicated, I am satisfied that the applicant was a suspect once he made the admissions to police. At that point, no warning was given to the applicant but rather he was questioned about where the killing had occurred, where he had been that night and how long he had been next door. It is clear that Constable Lawson questioned the applicant before the warning.

[34] Furthermore, pursuant to 431 of the PPRA, Constable Lawson was required to warn the applicant in a way that complied with Schedule 9 of the *Police Powers and Responsibilities Regulations* 2012 (PPRR), which is the Responsibilities Code. Section 26 of the Responsibilities Code provides that the caution regarding the right to silence must substantially comply with the following wording:

> "Before I ask you any questions I must tell you that you have the right to remain silent.
>
> This means that you do not have to say anything, answer any question or make any statement unless you wish to do so.
>
> However, if you do say something or make a statement, it may later be used as evidence.
>
> Do you understand?"

[35] Constable Lawson was therefore required to caution the applicant that not only did he have the right to remain silent but also that if he did say anything or made any statement it may later be used as evidence. Constable Lawson's warning was, however, as follows:

> "SCON LAWSON: I just want to let you know that you have the right to remain silent.
>
> DUGGAN G: Yep.
>
> SCON LAWSON: That means you don't have to say anything, answer any of my questions or make any statement unless you wish to do so. However if you do say anything or answer any of my questions.
>
> DUGGAN G: Do anything you got to do.
>
> SCON LAWSON: Mate everything you're saying here today and everything we say here today is being recorded on this little device hanging around my neck. Do you understand that?
>
> DUGGAN G: I understand.
>
> SCON LAWSON: Okay. Um you also have the right if we need to talk to you to speak to a friend or relative or a lawyer of your choice to arrange or attempt to arrange for that person to be present during questioning. And obviously we'll delay questioning for a reasonable time."[13]

[36] Constable Lawson did not in fact inform the applicant that anything he said could be used as evidence. The applicant was never asked whether or not he wished to speak or contact anyone including a lawyer prior to the questioning continuing. I agree with Counsel for the applicant that the effect of what Constable Lawson was saying was that if at some

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[13] Transcript of Police Record of Interview from 2.25am to 6.55am on 10 April 2013 at p 3 ll 21-45.

future point the police wished to speak to him, he would be given an opportunity to contact such people, rather than that the applicant could contact such people immediately as police intended questioning him there and then. At no point was the applicant given any opportunity to or even asked if he wanted to contact a friend, relative or lawyer prior to being questioned.

[37] In *R v LR*,[14] the trial judge's discretion not to exclude a confession was overturned by the Court of Appeal. In regard to the warning given to the appellant in that case, Keane JA said at page 45:

> "What is clear is that it was never squarely put to the appellant whether or not he wished to contact a lawyer as he was entitled to do and that the questioning would be delayed for a reasonable time for that purpose... That was a decision for the appellant. It was the responsibility of the interviewing officer however, pursuant to s 249(1), to ensure that the appellant understood that there was an important decision to be made and that that decision needed to be made decisively one way or the other."

[38] Similarly in *R v Read*,[15] the court considered issues such as those raised here. There the defendant was initially arrested for being drunk in a public place and police spoke to him some 8 hours later in regard to a kidnapping offence. The warning given in that case was similarly defective to the warning given in the present case in that it warned the defendant of his right to silence but failed to warn him that anything he did say could be used as evidence. In that case, it was held at paragraphs [39] to [40]:

> "It is clear, in my view, that in both the first and second interview there was a failure to caution the defendant in terms that were in substantial compliance with the provisions of PRC [*Police Responsibilities Code* 2000] s 37, which is mandated by the provisions of PPRA 2000 s 258. Critically, in both interviews, DSC Bosgra [Detective Senior Constable Timothy Bosgra] failed to advise the defendant that "if you do say something or make a statement it may later be used in evidence". I accept Ms Thompson's submission that the failure to advise the defendant of the use to which any statement could be put, means that the choice whether to speak or not is not informed.
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> ...
>
> His failure to follow the simple requirements of the PPRA 2000 s 258 to ensure substantial compliance with the required warnings in PRC ss 34 and 37, in the context of a police station video/audio record of interview is, in my view, utterly inexcusable. In short, DSC Bosgra failed to accept the important responsibility that the PPRA 2000 required him to accept, in return for the significant powers that the PPRA 2000 bestowed upon him."

[39] His Honour concluded at paragraph [46] that in those circumstances it would be unfair to use those statements against the defendant. At paragraph [49], his Honour also indicated that he would exclude those statements on public policy grounds.

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[14] [2006] 1 Qd R 435.
[15] [2005] QDC 403.

[40] In *R v Adamic*,[16] Holmes J excluded admissions made to police in circumstances where police had failed to provide the applicant with an opportunity to contact a friend, relative or lawyer prior to questioning. The circumstances of that case were almost identical to the present case; save that in that case police specifically said he would be afforded that opportunity at a later point in time.

[41] In the circumstances of this case, I agree with the submission from Counsel for the applicant that Constable Lawson essentially implied that they would not be questioning the applicant him at that point in time and did not inquire as to whether or not he wished to contact anyone.

Denial of right to silence

[42] Furthermore, I consider that after being given a compromised warning Constable Lawson asked the following to the applicant:

> "SCON LAWSON: Okay thanks mate, mate what happened tonight? Can you just, can you run it, run me through everything that happened---
>
> DUGGAN G: No.
>
> SCON LAWSON: From? The start of tonight, all the way through to now?
>
> DUGGAN G: *No. Can, can I talk to you about another, another day?*
>
> SCON LAWSON: Of course you can mate, okay? But obviously we need to find out what happened tonight. Okay? And that's why that officer is just gonna duck around there to see what's happening.
>
> DUGGAN G: She's dead.
>
> SCON LAWSON: And when you say, wh-, what, when you say, she's dead? Who, who are we talking about mate?"[17] (my emphasis)

[43] I consider that the applicant had indicated his decision not to be questioned at that point in time, but because he was intoxicated his will was able to be overborne. I am satisfied that there was a denial of the right to silence at that point in time.

Right to a support person

[44] Section 442 of the PPRA also required Constable Lawson to allow the applicant to have a private conversation with a support person prior to being questioned and to ensure that there was a support person present before being questioned. That obligation arose if Constable Lawson suspected that the applicant was a person with impaired capacity.

[45] Section 442 provides:

> **"422 Questioning of persons with impaired capacity**
>
> (1) This section applies if—
>
> (a) a police officer wants to question a relevant person; and

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[16] (2000) 117 A Crim R 332.
[17] Transcript of Police Record of Interview from 2.25am to 6.55am at p 4 ll 36-57.

(b) the police officer reasonably suspects the person is a person with impaired capacity.

(2) A police officer must not question the person unless—

(a) before questioning starts, the police officer has, if practicable, allowed the person to speak to a support person in circumstances in which the conversation will not be overheard; and

(b) a support person is present while the person is being questioned.

(3) Also, the police officer must suspend questioning and comply with subsection (2) if, during questioning, it becomes apparent that the person being questioned is a person with impaired capacity."

[46] Counsel argued that the applicant was a person with impaired capacity which is defined in Schedule 6 of the PPRA as follows:

"a person whose capacity to look after or manage his or her own interests is impaired because of either of the following—

(a) an obvious loss or partial loss of the person's mental functions;

(b) an obvious disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour."

[47] It was argued that Constable Lawson should have suspected that the applicant was a person with impaired capacity because he told him that he suffered from both depression and anxiety shortly after police started questioning him. Whilst he asked if the applicant was on medication, Constable Lawson made no real inquiry in relation to those conditions until the formal record of interview commenced at 4.48 pm that afternoon. The applicant told police during that interview that he was on medication namely Lexipro which he took to "calm his nerves" and to prevent him becoming suicidal.[18]

[48] Whilst it appears that the applicant may well suffer from a mental condition, probably manic depression and anxiety, the evidence indicates that he had been compliant with that medication regime. The evidence does not indicate that he was exhibiting any overt symptoms of that mental condition at the time of his arrest.

[49] I am not satisfied, therefore, that on the evidence before me there was any obvious indication that there had been a loss of the applicant's mental functioning due to his anxiety and depression such that his capacity to look after his interests or affairs was in fact impaired. In my view, any impact on his functioning was due to intoxication and not a mental condition or an obvious loss of mental functioning due to some permanent condition.

Should the records of interview prior to the formal interview at 4.48pm be excluded in the exercise of the fairness discretion?

[18] Transcript of Police Record of Interview from 4.48pm to 5.42pm on 10 April 2013 at p 7 ll 40-60.

[50] The discretionary power of a judge to exclude a statement on the basis that it was wrongly, improperly or unfairly obtained is well known in *R v Swaffield; Pavic v R.*[19] The High Court held that a number of questions should be answered in order to determine the admissibility of confessional material. It is clear that a trial judge can exclude confessional statements if in all the circumstances it is considered that they were improperly procured by police, even though the strict rules of law, common law and statute do not strictly require the rejection of the evidence. Amongst the issues to be considered are firstly, whether the confession was voluntary; secondly, whether the confession should be excluded based on considerations of fairness, particularly in relation to questions of reliability; and thirdly whether the confession should be excluded in accordance with the overall discretion taking into account all of the circumstances including the means by which the admission was elicited and whether forensic disadvantage may be occasioned by admission of the evidence and to determine whether the evidence was admitted or a conviction obtained at an unacceptable price having regard to contemporary community standards.

[51] In *R v Tietie and Wong-Kee*[20] Atkinson J stated at paragraph [24]:

> "Accordingly, where a statement has been obtained by police using "improper" or "unfair" methods, the judge may exercise a discretion to exclude it. It is important to note, however, that although the conduct of the police is undoubtedly relevant in considering the exercise of the discretion, the sole question is whether in all the circumstances it would be unfair to use the statement against the defendant. Indeed, as Brennan J, as he then was, said in *Collins v The Queen* (1980) 31 ALR 257 at 314, "the concept which governs the exercise of the discretion is unfairness, not contravention of the rules." In *Van Der Meer v R* (1988) 82 ALR 10 the High Court also held that notwithstanding irregularities in the methods used by the police, the proper test of including a confessional statement is whether it would be unfair to the accused person to use his statements against him, not whether the police have acted unfairly." (citations omitted)

[52] It is also clear that it is difficult to precisely state the occasions when the discretion to exclude evidence because of impropriety or unfairness arises and as the High Court said in *Swaffield*, that turn lacks precision and involves an examination of the particular circumstances of each case. It is also clear that in considering whether to exercise a discretion, there is a need to balance the public interest of ensuring that police can conduct investigations and that people who commit criminal offences are convicted against the public interest of ensuring that defendants are treated fairly.

[53] In *R v Ireland*,[21] Barwick CJ stated:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair

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19 (1998) 192 CLR 159.
20 [2011] QSC 166.
21 (1970) 126 CLR 321 at 335.

> treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

A judicial discretion to exclude evidence – the unfairness discretion and public policy

[54] It is clear therefore that the exercise of the discretion requires careful consideration of the public interest considerations as well as the circumstances surrounding the making of the statement or admissions.

[55] I accept that the admissions made by the applicant in the recorded interviews between 2.25am and 4.48pm are highly reliable. It is clear that he indicates where the deceased can be found and she is in fact found there. The applicant also tells police the way in which he killed her and that account is consistent with the opinion of the forensic pathologist. The applicant also gave an approximate time of death which is consistent with the pathologist's report. His account of events is also consistent with the account he actually gives in the formal interview at 4.48pm when he was not affected by alcohol.

[56] In my view, it must have been apparent to police on both a subjective and objective level that the applicant was under the influence of alcohol. They were specifically told that was the case and they also observed him drinking. It must also have been apparent to them that he did not fully understand his rights and was in no position to decide whether or not to answer questions. It is clear that the capacity a person requires to make a decision is decision specific and entails not only fully comprehending the nature and effect of the decision, but also freely and voluntarily making the decision required.

[57] In the present case, the applicant had to evaluate whether to exercise his right to silence or confess to police. In my view, given the significant quantity of alcohol he had consumed, he was not able to fully appreciate the legal consequences to him of making such a confession. I also consider that the alcohol he had consumed deprived him of the ability to voluntarily decide not only whether to answer the question or not but to sustain the decision he had made. The interview is replete with examples of the applicant saying he did not want to answer a question but then proceeding to answer it.

[58] It would seem to me that the applicant was clearly questioned when he was seriously intoxicated. He was questioned well before he was given any warnings about his rights to remain silent or contact a lawyer or a friend, and he was not sufficiently warned that any admission that he made or any evidence that he gave could later be used in court.

[59] In terms of the public policy discretion, it is clear there are two competing interests. I accept that this is the most serious charge known to law, namely murder. I do not accept, however, that the case against the applicant will be significantly weakened if the interviews which are tainted by his intoxication are excluded. I do not accept that there was any difficulty in delaying the questioning. The police very quickly ascertained that a woman was in fact deceased as admitted by the applicant. I also accept that the applicant was not subject to any physical force or any threats or coercion. I am satisfied, however, that there was a deliberate continuing of questioning once it became very clear that the applicant was intoxicated. Given that persistence combined with the failure to adequately warn in accordance with the requirements of the PPRA, I am satisfied that the entirety of the admissions made by the applicant to police until 4.48pm on 10 April 2013, except for the first admission he made at around 2.25am, should be excluded. In this regard, I note

the decision of the Queensland Court of Appeal in *R v Martin*[22] where McMurdo P stated at paragraph [24]:

> "Many judges may well have concluded that matters of public policy requiring police officers to comply with their responsibilities under the Act warranted the exclusion of the contentious evidence in this case, lest police officers be tempted to flaunt the requirements of the Act by taking investigative shortcuts. Further, a jury may place undue weight on the evidence without giving sufficient consideration to its unreliability as evidence of the appellant's true state of mind at the time of the killing because of his gross intoxication at the time of the conversation. Had the decision at first instance been mine, I would have excluded the evidence for these reasons".

[60] I am not, however, satisfied that the formal record of interview which commenced at 4.48pm should be excluded. There is no doubt that at that point in time the applicant was not overtly intoxicated and he had a blood alcohol reading at an acceptable level. I accept that the applicant had not had a lot of sleep, but there is some evidence that he was woken from sleep at various stages during the day which obviously means he had some sleep. I am satisfied that he was not therefore completely sleep deprived. I have viewed that formal record of interview and I am satisfied he does not appear unduly tired or distressed in any way. Furthermore, he is asked at the outset of the formal interview whether he felt well enough to participate in the interview. Constable Lawson in fact asks the following question "Okay, I know throughout the, day um, I've, I've noticed you've been, you've been asleep in the um, on the uh matts in the cell. Okay? Mate are you currently uh, tired at all?"[23] In response, the applicant clearly indicated that the questioning could continue and that he did not consider he was so tired that it would affect the answers or responses to the questions he would be asked. I am also satisfied that he was given all the appropriate warnings at the commencement of that interview.

Should the applicant's admission to his brother be excluded?

[61] Counsel for the respondent argues that if the conversations with the applicant are excluded in the exercise of the discretion, the recording of the applicant's confession to his brother during a phone call from the Kingaroy Police Station at around 8.00am in the morning should not be excluded. Counsel for the respondent argues that the recording device stayed in the room where the phone call was made and that the evidence is reliable. It is also argued that there has been no breach of the PPRA in this respect because s 419 only requires privacy for a conversation with a lawyer as follows:

> "**419 Speaking to and presence of friend, relative or lawyer**
>
> (1) If the relevant person asks to speak to a friend, relative or lawyer, the investigating police officer must—
>
> (a) as soon as practicable, provide reasonable facilities to enable the person to speak to the other person; and

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[22] [2011] QCA 342.

[23] Transcript of Police Record of Interview from 4.48pm to 5.42pm on 10 April 2013 at p 6 ll 34-37.

> (b) if the other person is a lawyer and it is reasonably practicable—allow the relevant person to speak to the lawyer in circumstances in which the conversation cannot be overheard."

[62] The applicant, however, seeks an order that the police tape recordings of his conversation with his brother during which he can be heard making admissions to the killing should also be excluded pursuant to the fairness discretion.

[63] In my view, the recording of those admissions should also be excluded. I accept that those admissions were freely made by the applicant to his brother. They were not statements made to police as a result of questioning, however, they were statements made after this exchange occurred:

> "SGT PRENDERGAST: We'll get that, we'll get you to give him a call, you can speak to him in private, and then we'll um.
>
> DUGGAN G: Oh you guys gonna be here doesn't worry me.
>
> SGT PRENDERGAST: Oh we'll just walk around the corner mate, you know you can have your conversation with your brother in private. Once that's done, we'll give you uh the opportunity to, well the opportunity is already there to, to, to---
>
> SCON LAWSON: Yeah.
>
> SGT PRENDERGAST: Participate in the interview.
>
> SCON LAWSON: Yeah we can do an uh, an interview if you wish, that can be done soon, or it can be done later it's completely up to you. It's up to you if you wish to participate in the interview, you don't have to, yeah, yeah, it's, it's, an op--- oh it's an option which is completely your decision mate.
>
> DUGGAN G: No I think I will do it, do the interview."[24]

[64] I accept that the applicant appeared not to be worried about speaking privately with his brother and was happy for police to listen to it. I am not certain, however, that the applicant actually realised that the conversation would be recorded given the earlier assurances about privacy. In my view, it is concerning that the telephone conversation was recorded when the applicant was significantly affected by alcohol given it occurred at some point between 7.27am and 8.28am. The evidence indicates that minutes later at approximately 8.30am his formal reading from the breath test was 0.178 per cent as follows:

> "SCON LAWSON: So that sample was taken at um, uh 8.41. [INDISTINCT], just okay, so it's just um locked off at a reading of 0 point ---
>
> SGT PRENDERGAST: 1-7-8.

[24] Transcript of Police Record of Interview from 7.27am to 8.28am on 10 April 2013 at p 31 ll 1-20.

> SCON LAWSON: 1-7-8. Which um, which basically still means that you still have a, quite a substantial amount of alcohol in your blood. Okay? So um I think we'll have to.
>
> SGT PRENDERGAST; In fairness.
>
> SCON LAWSON: Yeah in, in fairness for yourself, okay? [W]e'll have to uh delay we'll have to probably, we'll, we'll stop the interview now."[25]

[65] Furthermore, it is clear from an examination of the transcript that just before the phone call to his brother, the applicant was in fact behaving badly and Constable Lawson in fact indicates to him that "A bit of stress started to come through you, you were a little bit angry there".[26] The transcript also indicates that at that point the applicant was hungry, had just had what he called a "head spin", had just asked for water and Constable Lawson noted that he was "tripping over off your feet".[27]

[66] I am not satisfied that the admissions made to the applicant's brother were made at a point when the applicant could make a decision freely and voluntarily unaffected by alcohol. In my view, the recording of those admissions should also be excluded.

[67] I consider, therefore, that the recording of conversations with the applicant from the top of page 3 of the Transcript of Police Record of Interview which commences at 2.25am on 10 April 2013 until the commencement of the formal Record of Interview at 4.48pm on 10 April 2013 should be excluded from the evidence at trial.

Order

[68] I order that the recording of conversations on 10 April 2013 from the top of page 3 of the Transcript of Police Record of Interview which commenced at 2.25am until the commencement of the formal Record of Interview at 4.48pm be excluded from the evidence at trial.

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[25] Transcript of Police Record of Interview from 8.29am to 8.44am on 10 April 2013 at p 10 ll 42-58.
[26] Transcript of Police Record of Interview from 7.27am to 8.28am on 10 April 2013 at p 32 ll 20-21.
[27] Transcript of Police Record of Interview from 7.27am to 8.28am on 10 April 2013 at p 33 ll 1-40.