SUPREME COURT OF QUEENSLAND

CITATION:	*R v NP; ex parte A-G (Qld)* [2012] QCA 116
PARTIES:	**R** **v** **NP** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 361 of 2011 SC No 505 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 668A Criminal Code
ORIGINATING COURT:	Supreme Court at Maryborough
DELIVERED ON:	4 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2012
JUDGES:	Margaret McMurdo P and Holmes JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Questions answered as follows:** **Question (a) Yes, if the threat or promise was made by a person in authority.** **Question (b) Unnecessary to answer.** **Question (c) Unnecessary to answer.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – where the Attorney-General has referred points arising out of a ruling on an application to exclude certain evidence – where the respondent was charged on indictment with the offence of murder – where the respondent made a confession in a police interview – where evidence of the confession was excluded on an application on the ground that it was not given voluntarily – where a threat or a promise was found to have been communicated to the respondent by a person in authority through the medium of the respondent's lawyer – whether conduct constituting a threat or promise conveyed by the respondent's lawyer acting in the ordinary course of his

engagement engages the provisions of s 10 of the *Criminal Law Amendment Act* 1894 in relation to a threat or promise being communicated by a person in authority – whether reference involved points of law within the meaning of s 668A of the *Criminal Code* 1899

Criminal Code 1899 (Qld), s 590AA, s 668A, s 669A
Criminal Law Amendment Act 1894 (Qld), s 10
Penalties and Sentences Act 1992 (Qld), s 13A

Bownds v State 362 S W 2d 858 (Tex 1962), cited
Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16, cited
R v Heyward & Minter [2010] SASCFC 38, cited
R v Lewis; ex parte Attorney-General [1991] 2 Qd R 294, cited
R v NP, unreported, Dick AJ, SC No 505 of 2011, 28 November 2011, cited
R v PV; ex parte Attorney-General [2005] 2 Qd R 325; [2004] QCA 494, cited
Vetter v Lake Macquarie City Council (2001) 202 CLR 439; [2001] HCA 12, cited

COUNSEL: M J Copley SC for the appellant
J J Allen for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Holmes JA's reasons save that I am prepared to accept that question (c) in the Attorney-General's reference to this Court under s 668A *Criminal Code* 1899 (Qld) raises a point of law. As her Honour explains, however, it does not raise a point of law of general importance and broad application and was therefore inappropriately brought to this Court under s 668A: see *R v PV; ex parte Attorney-General*.[1]

[2] **HOLMES JA**: This is a reference by the Attorney-General under s 668A of the *Criminal Code* 1899. That section permits the reference to this court of a point of law arising in relation to a ruling given under s 590AA of the *Code*. In the present case, the ruling, made at a pre-trial hearing, was that admissions made by the respondent, Mr NP, should be excluded.

[3] The reference identified three questions as the relevant points of law:

> "a) In circumstances where the only conduct said to amount to a threat or promise is conveyed to a suspect by the suspect's lawyer acting in the ordinary course of their engagement, are the provisions of s 10 of the *Criminal Law Amendment Act* 1894 with respect to a threat or promise "by a person in authority" engaged?

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1 [2005] 2 Qd R 325, 326 [3]-[5], 331 [24] - [25].

b) Does the fact that the suspect has been provided with advice given by a lawyer in the ordinary course of their engagement serve, for the purposes of s 10 of the *Criminal Law Amendment Act* 1894, to displace the connection between something said earlier to the lawyer by a person in authority?

c) Having regard to the learned judge's findings of fact at [43], [44], [55], [61] and [64] did the judge err in not finding that the confessional statements were not induced by a threat or promise by some person in authority?"

[4] The application at first instance turned on s 10 of the *Criminal Law Amendment Act* 1894, 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".

[5] The respondent and two co-accused were charged with murder. One of the co-accused had implicated (by hearsay) the respondent in the killing. Police twice sought to interview him without success; on the first occasion he made no admissions, and on the second, a barrister acting on his behalf, Mr Veivers, advised them that he would not participate in an interview. Subsequently, the police officer in charge of the investigation had some discussions by telephone with Mr Veivers. The learned judge at first instance accepted that the police officer had told Mr Veivers the following things: that if the respondent did not co-operate with the police, he would be charged with murder; that if, on the other hand, he told the police "the whole truth" and where the victim's body was, he might only face a charge of manslaughter and in consequence, a lesser sentence; and that co-operation of that kind might also produce further mitigation of any sentence under s 13A of the *Penalties and Sentences Act* 1992. The first of those intimations, her Honour found, amounted to a threat, while those following constituted a promise.

[6] Mr Veivers, who gave evidence on the voir dire, said that he had relayed that information to his client. He went on to say that he had advised the respondent that he could co-operate with the police and take part in the interview, but he had the right to remain silent: he was under no obligation to prove anything. When the respondent asked him what he should do, Mr Veivers said that it was his decision, but, in his evidence, he added:

> "However, I used the word 'collateral damage' and I said, 'Perhaps you should take part in a record of interview and assist the police'."

After a conversation with a solicitor also present at the conference about the respective costs of a trial and a sentence, the respondent said that he wished to assist the police. Accordingly, Mr Veivers contacted the police officer to whom he had previously spoken, to advise that his client would be interviewed. The interview took place that evening at a police station, with Mr Veivers and the respondent's parents present. Before it commenced, Mr Veivers told the respondent again that he was under no obligation to proceed with the interview, but the respondent indicated that he wished to take part in it, and did so.

[7] The submission for the Crown at first instance, reflected in the first question in the reference, was that s 10 could have no application, because Mr Veivers was not a "person in authority". The learned judge rejected that submission; the words of the section, she said, did not require that the threat or promise be conveyed directly by the person in authority so long as the person subject to it understood that it came from such a person. Mr Copley SC, for the Attorney-General, accepted the correctness of her Honour's conclusion, helpfully directing this Court to two cases which, although not directly relevant, are of interest.

[8] The first, *R v Heyward & Minter*,[2] was a recent decision of the South Australian Court of Criminal Appeal. Although, like this, it was a case in which the police communicated the benefits of co-operation through the accused's solicitor, the question of whether that amounted to an inducement by a person in authority was not argued. It seems, rather, to have been assumed that that was the case; the submissions and the court's reasons turned on whether the inducement was still in operation when the accused made his admissions. The second, *Bownds v State*,[3] was a decision of the Court of Criminal Appeals of Texas. In that case the inducement emanating from the police had been put to the appellant, a high school student, by his "coach" (sport not specified). The evidence to that effect was excluded at first instance; that was, the appellate court concluded, an error, leading to the reversal of the conviction.

[9] The first question in the reference is not, in my view, as lucidly expressed as it might have been. It would be clearer if it read -

> "In circumstances where the conduct amounting to a threat or promise by a person in authority is conveyed to a suspect by the suspect's lawyer acting in the ordinary course of their engagement, are the provisions of s 10 of the *Criminal Law Amendment Act* 1894 engaged?"

However, the intent of the question, as worded, is clear enough; the issue it raises is whether the fact that a threat or promise by a person in authority is actually conveyed through the suspect's lawyer means that it is not made by the person in authority, so as to take it out of the purview of s 10. Notwithstanding the lack of authority clearly on point, the exercise in statutory interpretation is not difficult: the learned primary judge was plainly right to conclude that s 10 carried no requirement that the threat or promise be made in person. What the section requires is that the confession be induced by the threat or promise of the person in authority; how that threat or promise is to be conveyed is not the subject of any statutory limitation. It would be an odd result if the section's intended effect could be defeated by the use of the suspect's lawyer as intermediary in the offering of the inducement. Mr Copley submitted that question a) should be answered "Yes", if the threat or promise was made by a person in authority. I agree.

[10] Question b) is poorly drafted and incomplete; it meant, presumably, to ask whether the fact that advice has been given by a lawyer serves to displace the connection between something said earlier to the lawyer and the effect of that information when conveyed to the suspect. It seems, in fact, to be a garbled version of question c). Mr Copley suggested that the answer to question b) should be "It may do so if the advice is effective to dissipate the threat or promise". I consider that the question is

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2 [2010] SASCFC 38.

3 362 SW 2d 858 (Tex 1962).

unsatisfactorily worded, and so far as its intended meaning can be gleaned, the issue is better addressed in considering question c).

[11] Mr Copley endeavoured to frame question c) as a question of law. He adverted to *Hope v Bathurst City Council*[4] and *Vetter v Lake Macquarie City Council*[5] for the proposition that:

> "whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law".

Mr Copley pointed to the findings in the paragraphs from the primary judge's ruling listed in the question as admitting of only one conclusion under s 10: that the presumption of inducement was rebutted. The relevant findings were that the respondent had taken part in a record of interview in which he admitted guilt;[6] that the police officer had conveyed through Mr Veivers a threat that if the respondent did not co-operate he would be charged with murder and a promise that if he did co-operate he might be charged with manslaughter, receiving a lesser sentence;[7] that the information could only be interpreted by the respondent as coming from the police officer as a person in authority;[8] and that Mr Veivers had told the respondent that he did not have to answer questions and reminded the respondent of his rights before the re-enactment.[9] The provision of independent and comprehensive legal advice, Mr Copley said, necessarily dispelled the inducement offered.

[12] Assuming that Mr Copley is right in characterising as a question of law whether her Honour's findings permitted only the answer he suggests, it does not follow that it gives rise to "a point of law" of the kind contemplated by s 668A. The provision is in similar terms to s 669A(2), which permits the Attorney-General to refer a point of law arising at a trial, once the trial has been concluded by acquittal, conviction or nolle prosequi. The ambit of the expression "point of law" in that context was considered by the Court of Criminal Appeal in *R v Lewis; ex parte Attorney-General*.[10] Macrossan CJ drew a distinction between this statutory use of the expression and other contexts:

> "Whether or not it is possible to regard a point of law as being involved in situations which really only involve judgments of the sufficiency of evidence to satisfy some legal criterion or in the conclusions which it is proper to reach on an assessment of facts which arise for consideration, there is reason to think that the phrase 'point of law' is not used in this sense in s 669A(2)".[11]

His conclusion was that s 669A required the Court to express its opinion, or at any rate to answer the question posed, only where the point was of the character contemplated by the subsection. As to that, the subsection was -

> "concerned with a point involving principle capable of some general application as opposed to rulings which are dependent upon the

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4 (1980) 144 CLR 17.
5 (2001) 202 CLR 439 at 450-451.
6 *R v NP*, Unreported, Dick AJ, SC No 505 of 2011, 28 November 2011, at [43] and [44].
7 At [55].
8 At [61].
9 At [64].
10 [1991] 2 Qd R 294.
11 At 299.

> manner in which an assessment is made of particular factual situations which are not readily capable of wider application to other situations".[12]

[13] The reference in that case asked whether there was any basis in law for the trial judge to exercise his discretion to exclude certain items of evidence. Macrossan CJ considered that even if a wider approach were taken to the meaning of "point of law" than that he thought correct, the question posed would not qualify. What was being challenged was the judge's assessment of a factual situation. Connolly J reached a similar view: the exercise for the trial judge as one of assessing the evidence with regard to its probative value and its relationship to other evidence to be tendered and thus inevitably involving an assessment of fact. The third member of the court, Kelly SPJ, agreed with both.

[14] In *R v PV; ex parte Attorney-General*,[13] *R v Lewis* was referred to by this Court in considering a reference under s 668A. Margaret McMurdo P, with whom the other members of the Court agreed, noted that the phrase "point of law" in s 668A had the same meaning as it had in s 669A: it referred to a point of law of general application and importance. The President went on to observe,

> "Used appropriately, appeals under s 668A will be brought exceptionally and only to ensure that the occasional disputed ruling on a matter of general importance, particularly one gaining wide circulation in the criminal justice system, can be promptly determined at appellate level".[14]

[15] To sustain the contention that what is involved here is a question of law whose answer will be of general application, it is necessary to characterise a relatively common-place fact-finding exercise as a process so constrained that it admits of only one answer. What the Attorney-General seeks, in effect, is a ruling that as a matter of law, in any instance where a lawyer advises a person suspected of an offence of his right of silence, the presumption in s 10 is necessarily defeated. That must be so, on this argument, regardless of the context in which the advice is given or what may be said in addition. The endeavour, in that way, to convert an argument about the correctness of the primary judge's conclusion into a point of law cannot be accepted.

[16] As a matter of statutory interpretation, there is no warrant for adding to s 10 a gloss of the kind proposed. The question which the second part of s 10 actually poses is whether any threat or promise made has been shown not to have induced a subsequent confession. The feature of independent legal advice may be a very powerful indicator for an affirmative answer, but it must, nonetheless, be a question of fact in any case whether legal advice has indeed rendered an inducement inoperative. Resolution of whether the presumption is rebutted must entail an assessment of all the circumstances, which in this case included the barrister's advice that the respondent perhaps should take part in the interview. The learned judge's conclusion was open; her decision was one made on an assessment of the facts. Question (c) does not, in truth, identify a point of law, let alone one of general application.

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12 At 300.

13 [2005] 2 Qd R 325.

14 At [5].

[17] I would answer the questions posed as follows:

(a) Yes, if the threat or promise was made by a person in authority.

(b) Unnecessary to answer.

(c) Unnecessary to answer.

[18] **MULLINS J:** I agree with Holmes JA.