SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bennetts* [2017] QSCPR 3 ; [2017] QSC 181
PARTIES:	**THE QUEEN** **v** **Brenden Jacob BENNETTS** (applicant)
FILE NO/S:	No 1432 of 2016
DIVISION:	Trial Division
PROCEEDING:	590AA pre-trial hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	21-24 August 2017
JUDGE:	Ann Lyons J
ORDERS:	**1. The application to exclude the statement and police record of interview on 18 August 2015 is refused.** **2. The field tape of the search on 19 August 2015 from 5.14 pm to 7.25 pm is excluded.** **3. The application to exclude the police record of interview on 19 August 2015 from 8.25 pm to 9.58 pm is refused.** **4. The police record of interview on 21 August 2015 from 7.54 pm to 8.36 pm is excluded.** **5. The Facebook messages between the applicant and Ms Dillan Gilmore sent on 13 August 2015 are excluded.** **6. The application to exclude the Facebook messages between the applicant and Ms Dillan Gilmore sent on 15 August 2015 is refused.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – GENERALLY –

where the applicant is charged with one count of murder and one count of interfering with a corpse – where the applicant submits that a police interview commenced in breach of ss 418(1) and 431(1) of the *Police Powers and Responsibilities Act* 2000 (Qld) because at the time he was a suspect not a witness – where the applicant applies pursuant to s 590AA(2)(e) of the *Criminal Code* to exclude the record of interview on the basis of illegality –whether the evidence was illegally obtained – whether the evidence should be excluded

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – GENERALLY – where the applicant is charged with one count of murder and one count of interfering with a corpse – where the applicant was arrested after 5 pm on a Friday in a small town – where the applicant submits that the subsequent police interview commenced in breach of ss 418(2) and 431(3) of the *Police Powers and Responsibilities Act* 2000 – where the applicant applies pursuant to s 590AA(2)(e) of the *Criminal Code* to exclude the record of interview on the basis of illegality – whether the evidence was obtained illegally – whether the evidence should be excluded

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – VOLUNTARY STATEMENTS – VOLUNTARINESS – GENERALLY – where the applicant is charged with one count of murder and one count of interfering with a corpse – where the applicant submits he was subjected to undue pressure during police questioning – where the applicant applies pursuant to s 590AA(2)(e) of the *Criminal Code* to exclude police records of interview on the grounds of lack of voluntariness - whether an admission against interest was made voluntarily - whether the evidence should be excluded

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – GENERALLY – where the applicant is charged with one count of murder and one count of interfering with a corpse – where the applicant submits he was subjected to pressure and disbelief by police over several

interviews – where the applicant applies pursuant to s 590AA(2)(e) of the *Criminal Code* to exclude police records of interview on the grounds of unfairness – whether the evidence should be excluded

Criminal Code 1899 (Qld), s 590AA
Police Powers and Responsibilities Act 2000, s 415(1), s 415(2)(a), s 418, s 419, s 431
Police Powers and Responsibilities Regulation 2012, Div 1, r 23, r24, r 26

Bunning v Cross (1978) 14 CLR 54
Cleland v R (1982) 151 CLR 1
McDermott v The King (1948) 76 CLR 501
R v Adamic [2000] QSC 402
R v Clark; ex parte Attorney-General of Queensland [1999] QCA 438
R v Hein (2013) 117 SASR 444
R v Ireland (1970) 126 CLR 321
R v Swaffield (1998) 192 CLR 159
R v Tofilau (2007) 231 CLR 396

COUNSEL: M J Copley QC for the applicant
V A Loury QC for the Crown

SOLICITORS: Mulcahy Ryan for the applicant
Director of Public Prosecutions (Qld) for the Crown

This application

[1] The applicant Brenden Jacob Bennetts has been charged on an indictment as follows:

> Count 1. That on 14 August 2015 at Gatton he murdered Jayde Kendall.
>
> Count 2. That on 14 August 2015 at Gatton he improperly interfered with a dead human body.

[2] The trial is due to commence on 4 September 2017. Pursuant to s 590AA(2)(e) of the *Criminal Code* the applicant has applied for rulings:

(a) That evidence of questions asked of him by police officers after 5.45pm on 18 August 2015 and any evidence and answers be excluded from the prosecution case; and

(b) That certain evidence as set out in the application is inadmissible.

[3] The basis of the application is that (i) some of the answers given by the applicant were not voluntary; and (ii) the answers given by the applicant were provided in circumstances which enlivened the discretion to exclude illegally obtained evidence.

The prosecution case

[4] The deceased was last seen alive after she left school on Friday, 14 August 2015. Her body was not discovered until Wednesday, 26 August 2015, when she was found on rural land near Gatton. The case against the applicant is entirely circumstantial. Some of the factual matters in the prosecution case are:

1. The applicant and the deceased sent text messages to each other on 14 August 2015. The last text message from the deceased was to the applicant at around 3.20 pm that day.

2. The applicant picked the deceased up from school on 14 August 2015 in his red car around 3.20 pm.

3. The applicant was seen on Closed Circuit Television footage at 5.45 pm and 5.47 pm on 14 August 2015 making withdrawals from the deceased's bank account using her bankcard and her PIN at the Commonwealth Bank, Gatton.

4. No further withdrawals were made from the deceased's bank account.

5. The deceased's purse was found on the Warrego Highway outside Gatton by a walker on 18 August 2015.

6. The applicant spoke to DSS O'Connell by phone at 3.48 pm on 18 August and provided information to him. The applicant was then spoken to by police at a friend's address at 6.02 pm later that day.

7. The applicant accompanied police to the Grantham Police Station and provided a Statement to DSS O'Connell on Tuesday evening 18 August between around 6 pm and 8pm.

8. The applicant was then interviewed on 18 August 2015 by DSS O'Connell, Knight and Nixon at Gatton Police Station from 10.50 pm to 11.56 pm.

9. On 18 August at the request of police the applicant provided the t-shirt he said he was wearing in the CCTV footage from the Gatton Commonwealth Bank.

10. On 19 August 2015 a search warrant was executed at the applicant's home at 5.14 pm until 7.25 pm. During the search the applicant was detained and was questioned by DSS O'Connell, Knight, Nixon and Gillespie. The applicant was subsequently questioned whilst being driven to the Laidley Police Station.

11. On 19 August 2015 from 8.25 pm to 9.58 pm the applicant was questioned by DSS O'Connell and Gillespie at the Laidley Police Station.

12. On 21 August 2015 the applicant was arrested at 5.17 pm his home for the murder of Jayde Kendall. He was taken to the Gatton Watch House and placed in a cell around 5.30 pm. He requested that a lawyer be called.

13. On 21 August 2015 the applicant was questioned by DSS O'Connell and Gillespie from 7.54 pm until 8.36 pm when the applicant spoke to a lawyer and declined to answer any further questions. The applicant was later released without any charges being laid.

14. On 27 August 2015 the applicant was arrested in Brisbane and charged with the murder of Jayde Kendall on 14 August 2015.

The statements and interviews which are challenged

[5] In his statements and interviews between 18 August and 21 August 2015 the applicant did not confess to causing the death of the deceased, but rather made exculpatory statements, some of which were inconsistent, about his involvement with the deceased on 14 August. The case against the deceased is entirely circumstantial. The Crown wishes to rely on the applicant's inconsistent statements at trial to assert that he told a series of lies out of a consciousness of guilt of the crime of murder and will also argue that his answers afford evidence of an opportunity to have killed the deceased.

[6] The applicant argues that the statements and interview on 18 August are liable to discretionary exclusion because the applicant was at that stage a suspect in relation to his involvement in the commission of an indictable offence and as such, he was not accorded the rights or given the appropriate warnings by police as required by *Police Powers and Responsibilities Act* 2000 (PPRA).

[7] In relation to the answers given during a search of his home, in a police car and then obtained during a formal record of interview on 19 August 2015, it is a threefold application. First it is argued that the statements obtained on 19 August were obtained in a way that rendered them involuntary because of persistent importuning, sustained insistence to answer and undue persistence or pressure. Second, the circumstances surrounding the statements on 19 August enliven the discretion to exclude the evidence on the grounds it would be unfair to admit it. Additionally or alternatively it is argued that the interviews were unlawful as breaches of the PPRA occurred on 19 August when warnings were not given in appropriate terms in circumstances where the police should have appreciated that the applicant did not understand what he was being told and they did not clarify their words to him. Furthermore it is argued that police conveyed to the applicant that he had nothing to be, really, concerned about.

[8] In relation to the interview on 21 August the applicant argues that there was a breach of the PPRA because despite a clear indication by the applicant that he "wanted a lawyer"

when he was arrested for murder, the police persisted in interviewing him and continued to do so until a solicitor finally made contact with detectives at Gatton about 8.00 pm that night.

Applicable law

[9] In order to rely on an out of court confessional statement, the Crown must prove that it was voluntarily made in the exercise of a free choice. It is clear that an out of court confessional statement is not admissible unless it was made voluntarily. In *McDermott v The King*,[1] Dixon J said:

> "At common law a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made. This means substantially that it has been made in the exercise of his free choice. If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made: per Cave J. in R. v. Thompson …. The expression 'person in authority' includes officers of police and the like, the prosecutor, and others concerned in preferring the charge. An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority."

[10] In addition to the requirement that out of court confessional statements be voluntary, the Court also has a discretion to exclude evidence if that evidence has been obtained by unlawful conduct on the part of the police. The onus of persuading the Court to exclude such evidence lies on the accused. In *Cleland v R*[2] Deane J held as follows:

> "Apart from the particular discretion to exclude evidence of a voluntary confessional statement, a trial judge has a more general discretion to exclude evidence of relevant facts or things ascertained or procured by unlawful or improper conduct on the part of those whose task it is to enforce the law (see *R v Ireland* [1970] ALR 727; 126 CLR 321 at 334–5 *Bunning v Cross* (1978) 19 ALR 641; 141 CLR 54 at 64-5, 72 and 74-5) . The rationale of this principle is to be found in considerations of public policy, namely, the undesirability that such unlawful or improper conduct should be encouraged either by the appearance of

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1 (1948) 76 CLR 501 at 511.

2 (1982) 151 CLR 1 at 19-20.

judicial approval or toleration of it or by allowing curial advantage to be derived from it. Its application involves a weighing, in the particular circumstances of each case, of the requirement of public policy that the wrongdoer be brought to conviction and the competing requirement of public policy referred to above, namely, that the citizen should be protected from unlawfulness or impropriety in the conduct of those entrusted with the enforcement of the law. The question whether evidence should be allowed of relevant facts or things so ascertained or procured is, once again, a question to be determined by the trial judge on the *voir dire*. Once it appears that the evidence is relevant and otherwise admissible, the onus of persuading the trial judge that it should, as a matter of discretion, be rejected, lies on the accused."

[11] Additionally, the Court has a discretion to exclude evidence if it considers that the evidence was obtained in circumstances which would make it unfair to use against the accused person. Once again the onus of persuading the Court to exclude the evidence due to unfairness is on the accused. The question as to what constitutes unfairness depends on an evaluation of the circumstances. It is concerned not so much with whether the police have acted unfairly or unlawfully but whether it would be unfair to the accused to commit his statements to be used against him. The reliability of the statements does not necessarily mandate a conclusion that it would not be unfair to deploy them.

[12] In *R v Swaffield*:[3]

> "[53] The term "unfairness" necessarily lacks precision; it involves an evaluation of circumstances. But one thing is clear:
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> > "[T]he question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him … Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement."[77]
>
> [54] Unfairness then relates to the right of an accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted[78]. And once considerations other than

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3 [1998] 192 CLR 159 at 189 par 53-54.

> unreliability are introduced, the line between unfairness and policy may become blurred" (footnotes omitted).

[13] There is no doubt that the questions put by police which involve insistence, persistence and attempts to mislead are matters which might engage that discretion.

Discussion

[14] During the four day hearing of this application a series of tape and video recordings of the police interaction with the applicant in the period from 18 August to 21 August were played and made exhibits. I have also been assisted by the transcripts of those interactions which have been marked for identification. In addition, a number of police officers including DSS's O'Connell, Knight, Gillespie and officer Burke gave evidence of their interactions with the applicant and their involvement in the investigation into the disappearance of Jayde Kendall.

The statements and answers obtained on 18 August 2015

[15] The applicant argues that all of the statements obtained from him on the evening of 18 August, together with the subsequent hour and a half interview, should be excluded from evidence because it was obtained unlawfully in breach of the PPRA. It is argued that by the time the applicant arrived at the police station he was a suspect in an investigation into an indictable offence and that the provisions of the Act were not complied with because he was not accorded his rights, as a suspect, under that Act.

[16] The relevant provision is s 415 of the PPRA which provides that when a person is being questioned as a "suspect about his or her involvement in the commission of an indictable offence", then the suspect must be told of their right to silence and be given a series of cautions and warnings in the terms as set out in the Act. Police officers must also comply with the Act when exercising their powers and the Responsibilities Code is then set out in Schedule 9 of the Police Powers and Responsibilities Regulation. The Police Operational Procedures Manual also mandates compliance with the PPRA.

Relevant legislation

> "**415 When does this part apply to a person**
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> (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.
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> (2) However, this part does not apply to a person only if the police officer is exercising any of the following powers—
>
> (a) power conferred under any Act or law to detain the person for a search;

…"

[17] The provisions that then apply are found in s 418, s 419 and s 431 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. (2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).

(3) If the person arranges for someone to be present, the police officer must delay the questioning for a reasonable time to allow the other person to arrive.

(4) What is a reasonable time to delay questioning to allow a friend, relative or lawyer to arrive at the place of questioning will depend on the particular circumstances, including, for example—

(a) how far the person has to travel to the place; and (b) when the person indicated he or she would arrive at the place.

(5) What is a reasonable time to delay questioning to allow the relevant person to speak to a friend, relative or lawyer will depend on the particular circumstances, including, for example, the number and complexity of the matters under investigation.

(6) Unless special circumstances exist, a delay of more than 2 hours may be unreasonable.

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 (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.

(2) If the relevant person arranges for another person to be present during questioning, the investigating police officer must also allow the other person to be present and give advice to the relevant person during the questioning.

…

431 Cautioning of persons

(1) A police officer must, before a relevant person is questioned, caution the person in the way required under the responsibilities code.

(2) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(3) If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in his or her own words.

(4) If necessary, the police officer must further explain the caution.

(5) This section does not apply if another Act requires the person to answer questions put by, or do things required by, the police officer."

[18] Regulations 23, 24 and 26 of the Police Responsibilities Code provide as follows:

"**Division 1--Questioning relevant persons about indictable offences**

23 Right to communicate with friend, relative or lawyer

(1) If a police officer is required to inform a relevant person of the matters mentioned in section 418(1)(a) or (b) of the Act, the police officer must inform the person in a way substantially complying with the following—

'You have the right to telephone or speak to a friend or relative to inform that person where you are and to ask him or her to be present during questioning.

You also have the right to telephone or speak to a lawyer of your choice to inform the lawyer where you are and to arrange or attempt to arrange for the lawyer to be present during questioning.

If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable time for that purpose.

Is there anyone you wish to telephone or speak to?'.

(2) If the police officer reasonably suspects the relevant person does not understand the information, the police officer may ask the relevant

person to explain the meaning of the information in the person's own words.

(3) If necessary, the police officer must further explain the information.

(4) If the relevant person wants to speak to a lawyer, the police officer must, without unreasonable delay, make available to the person—

(a) if the police officer has available a list of lawyers for the region and the person has not asked to speak to a particular lawyer—the list; or

(b) a telephone directory for the region.

(5) A police officer must not do or say anything with the intention of—

(a) dissuading the relevant person from obtaining legal advice; or

(b) persuading a relevant person to arrange for a particular lawyer to be present.

24 Right to remain silent not affected

(1) This section applies if a person, the person's lawyer, or someone whose presence is required during questioning of a person indicates to the police officer questioning or intending to question the person—

(a) if questioning has not started—the person does not want to answer questions; or

(b) if questioning has started—the person does not want to answer any further questions.

(2) The police officer must clarify the person's intention to exercise the person's right to silence by asking the person—

(a) whether the person does not want to answer any questions generally or only questions about the offence for which the person is being questioned; and

(b) if any further question was asked relating to the offence or another offence, whether the person would not answer the question.

(3) If the person confirms the person does not want to answer any questions, the police officer must not question or continue to question the person.

(4) However, if the person later indicates that the person is prepared to answer questions, a police officer must, before questioning or continuing to question the person, ask the person—

(a) why the person has decided to answer questions; and

(b) if a police officer or someone else in authority has told the person to answer questions.

…

26 Cautioning relevant persons about the right to silence

(1) A police officer must caution a relevant person about the person's right to silence in a way substantially complying with the following—

'Before I ask you any questions I must tell you that you have the right to remain silent.

This means 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?'.

(2) If the police officer reasonably suspects the relevant person does not understand the caution, the police officer may ask the person to explain the meaning of the caution in the person's own words.

(3) If necessary, the police officer must further explain the caution.

(4) If questioning is suspended or delayed, the police officer must ensure the relevant person is aware the person still has the right to remain silent and, if necessary, again caution the person when questioning resumes.

(5) If a police officer cautions a relevant person in the absence of someone else who is to be present during the questioning, the caution must be repeated in the other person's presence."

Was the applicant a suspect on the evening of 18 August 2015?

[19] Counsel for the applicant noted in oral submissions[4] that the terms "suspicion" and "suspect" are not defined in the legislation and instead referred to the following definition of the verb 'to suspect' as contained in The Australian Concise Oxford Dictionary for guidance:

> "1. have an impression of the existence or presence of (*danger, a plot, foul play, collusion, a casual relation*); … believe without adequate proof *to be* (*suspect him to be my brother, a liar, dying*); be inclined to think that or *that* (*I suspect you once thought otherwise; you, I suspect, don't care*)."

[20] Counsel for the applicant submitted that the definition provided for the verb 'to suspect' aligns with what was said in *George v Rockett*[5] in relation to 'suspicion':

> "Suspicion, as Lord Devlin said in *Hussein v. Chong Fook Kam* (63), "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown."

[21] Accordingly, counsel for the applicant argues that the applicant was a suspect by the evening of 18 August because by the time he arrived at the police station, police knew the following which counsel submits provided the factual basis which grounded a suspicion:

1. That the deceased had been seen getting into a red car near the school at around 3.20 pm and that she had not turned up for her shift at McDonalds.

2. That the deceased's bank account had been accessed at 5.45 pm and 5.47 pm on 14 August by a male person with dark hair.

3. The applicant had the last known telephone contact with the deceased around 3.20 pm on 14 August and that there had been no further phone contact from her phone after 3.20 pm on 14 August.

4. There was no communication by any means from the deceased to her friends on social media since the afternoon of Friday 14 August.

5. That inquires with Greyhound Buses and three airlines indicated that the deceased had not purchased a bus or airline ticket.

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4 T4-105 l34 – T4-106 l20.

5 *George v Rockett and Another* [1990] 170 CLR 104 at 115.

6. That Matthew Ross had identified the applicant as the person who had been captured on CCTV at the Gatton Commonwealth Bank on 14 August.

7. That a red Toyota Corolla was parked at the Grantham residence where police had located the applicant on Tuesday 18 August.

8. The applicant had given an inaccurate account of his involvement with the deceased on 14 August.

9. The applicant had initially falsely denied he was the person captured on CCTV at the Gatton Commonwealth Bank.

10. That the Police Missing Persons Unit had called in Homicide Detectives by the afternoon of 17 August and they were deployed to Gatton on the morning of 18 August.

[22] All of the detectives who gave evidence during the hearing indicated that the applicant was not considered a suspect until 19 August when they formed a view he was a suspect based on the following information received during the course of that day;

1. At the morning briefing on 19 August they were informed that the deceased's wallet, containing her student card and other identification, had been found by a walker the previous day discarded beside the Warrego highway.

2. That the deceased's wages from McDonalds had been paid into her account on 18 August but had not been accessed.

3. That the shirt the applicant had provided to police late on 18 August did not match the shirt in the CCTV footage.

[23] Counsel for the applicant argues that despite the evidence of the detectives that they did not consider the applicant a suspect at that point in time, the actions of the officers on that night indicate that not only did they have a factual basis for a suspicion about the applicant's involvement in the commission of an indictable offence but they had in fact formed such a suspicion. It is argued that I should give greater weight to what the officers said and did at the time rather than what they said in evidence. Counsel submits that the officers may not necessarily have had a suspicion about an unlawful killing, but argues they had formed a suspicion nonetheless about an indictable offence having occurred, for example deprivation of liberty.

[24] There is no doubt that the evidence indicates that the detectives were worried for the safety of Jayde Kendall by the evening of 18 August. Detective Nixon agreed that by that stage he was "troubled". He stated[6] however that at that stage it was still a missing

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6 T 4-24 ll 20-40.

person investigation and that whilst the applicant was "definitely a suspect for the missing person" he had not at that point thought there was a possibility that the applicant had killed the deceased. In answer to the question whether there was a possibility that Jayde Kendall was being held somewhere against her will he replied; "No. Yet again, there was no evidence of her being taken into a vehicle forcefully or anything along those lines."[7]

[25] In my view the following factors are relevant to the determination as to whether or not the police had formed a view by Tuesday, 18 August 2015 that the applicant was a suspect:

1. The evidence indicated that the deceased had voluntarily got into a red car near the school on Friday afternoon, 14 August. There was no evidence that she had been forced into the car.

2. Whilst by Tuesday, 18 August there was a preliminary analysis of the call charge records from the deceased indicating that there had been text communication with the applicant's phone, there was no content to those text messages at that point in time.

3. When the applicant was first contacted at 3.48 pm on 18 August he told DSS O'Connell that he had last seen Jayde Kendall on Thursday 13 August but could not remember when he last had telephone contact with her.

4. The statement by the applicant to police that he had last seen the deceased on Thursday 13 August when he picked up Matthew Ross from work was reinforced by Matthew Ross' statement that he had also last seen the deceased on Thursday 13 August at McDonalds when he was picked up by the applicant after work.

5. When police attended at Matthew Ross' home on Tuesday 18 August they actually searched his home looking for Jayde Kendall.

6. When it was put to the applicant that Matthew Ross had identified him as the person in the image taken from the close circuit television at the ATM, the applicant accepted it was him.

7. The account given by the applicant was a plausible account involving an unhappy 16 year old girl who wished to leave home and that he had helped her obtain money and had given her a lift out of town.

8. The interview commencing at 10.50 pm was clearly designed to illicit information about the location of the deceased. The interview revealed that she had given the applicant her key card and her PIN number and that money had been withdrawn.

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7 T 4-24 ll 43-45.

9. The applicant's account that he had withdrawn the money at the deceased's request because she needed to get out of town, that he had then dropped her at the Windmill Markets on the Warrego Highway and that she had asked him to promise not to speak to anyone about her plan to run away was plausible.

10. There were numerous reports to Crime Stoppers from 15 August through to the morning of 19 August alleging sightings of the deceased at various points along the Warrego Highway.

11. The applicant voluntarily agreed to be interviewed, had provided his fingerprints and DNA and had surrendered his car, phone and other items to the police for testing.

12. The evidence at that point in time was consistent with Jayde Kendall having left town of her own accord.

[26] Accordingly I am satisfied on the balance of probabilities that at the time police took the statement from the applicant on 18 August 2015 around 6 to 8 pm, and at the time they interviewed the applicant on 18 August 2015 at 10.50 pm, there was no evidence whatsoever that a crime of any variety had been committed. Rather, the evidence was that a 16 year old girl was missing and that the applicant had assisted her by driving her to the bank to get some money, by driving her to the outskirts of town and by helping her cover her tracks as to her whereabouts. Viewed objectively, the applicant's actions were consistent with him assisting Jayde Kendall and not harming her. Furthermore when viewed objectively it is clear that police were still actively searching for Jayde Kendall on the evening of 18 August.

[27] I am satisfied on the balance of probabilities that on the evening of 18 August whilst the applicant was considered to be an eyewitness to the disappearance of Jayde Kendall he was not at that point in time a suspect in relation to involvement in an indictable offence.

[28] Accordingly as the applicant was not a suspect at that point in time the requirements of the PPRA which mandated that he be advised of his right to silence and be given the other warnings and cautions did not apply. Neither do I consider that there was any unfair or improper conduct on behalf of the police at that point in time. There is no evidence that the applicant was overborne or unduly pressured to make a statement or agree to an interview. Whilst the questioning in the interview was persistent it would seem to me that police were endeavouring to get information about Jayde Kendall's whereabouts so that she could be located. The questioning was directed at her disappearance. At no stage did the applicant show a reluctance to speak or decline to answer questions but rather he was very keen to give police his account which indicated he had assisted Jayde as a friend and that she was alive when he last saw her. I accept the Crown's submission that the statements he continued to make on 18 August can be seen as statements that were advantageous to him.

[29] The application to exclude the statement and the police record of interview on 18 August 2015 is refused.

The search and the interviews on 19 August 2015

The field interview

[30] The applicant argues that the evidence of conversations on 19 August are not admissible because they cannot be shown by the Crown to have been provided voluntarily. In particular, the applicant had been questioned by police at his home during the search from 5.14 pm to 7.25 pm and he was subsequently interviewed at the police station at 8.25 pm. It is argued that during the earlier questioning at his home the applicant had been subjected to sustained pressure.

[31] When the search warrant was obtained from the Magistrate there is no doubt that the documentation is support of the warrant stated that the applicant was a suspect in the murder of Jayde Kendall.

[32] I have listened to the tape of the search at the applicant's home on the evening of 19 August and heard the evidence of each of the Detectives involved in the execution of the search warrant. Detectives Gillespie, O'Connell, Nixon and Knight were all involved in the search. The applicant was clearly informed at the commencement of the search that police were investigating the murder of Jayde Kendall on 14 August 2015 and that they were searching for items, particularly her ATM keycard, bank receipts and the applicant's dark clothing thought to have been worn on 14 August 2015 and captured on CCTV.

[33] The applicant was told that "should we find anything here that we need to question you about", *then* they would "Give you warnings at that time okay."[8] The applicant was also informed of the "gravity" of the investigation and then clearly told he had the right to remain silent and that anything he did say would be recorded. Whilst he was advised he had a right to communicate with a solicitor or legal advisor it was put in the context of having that right "in the event" that he was questioned as follows: [9]

> "SGT KNIGHT: …in the event that you are questioned about anything that a-, about this offence, you have the right to communicate with a solicitor or

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8 Transcript of Police Record of Interview MFI D, p 4 ll 10-15.

9 Ibid at p 7 l 51 – p 8 l 38.

a legal advisor, and arrange or attempt to arrange to have them present during questioning. Do you understand that?

BENNETTS: Yes.

You also have the right to have present any other person of your choice as a, as a support person, um and you, and once again you can arrange to have them present during any questioning that may take place.

BENNETTS: Yeah.

SGT KNIGHT: Now if you wish to exercise any of those legal rights that I've just explained to you you need to tell me, and we'll ah assist you if need to ah to make contact with someone, or whatever--

BENNETTS: Yeah.

SGT KNIGHT: Okay.

BENNETTS: [INDISTINCT]

SGT KNIGHT: To give you, but I can't, I'm not a mind reader mate, so if you wanna make, exercise those rights you gotta tell me.

BENNETTS: Okay I will.

SGT KNIGHT: Does that make sense?

BENNETTS: Yep.

SGT KNIGHT: Okay. With that in mind, the reason we're here,

okay, is obviously for the purpose of that search. That's a photo I showed you yesterday--"

[34] In my view it was misleading for Detective Knight to indicate they were there for a search and *might* have to question the applicant when a number of detectives immediately began questioning him in a sustained way about his t-shirt and whether he was consciously avoiding the CCTV cameras at the Commonwealth Bank and in the main street of Gatton. The applicant was then informed that the deceased's wallet had been found and was then questioned about the movements of his car and asked to identify where he had dropped the deceased off.

[35] There can also be no doubt from the transcript[10] that the applicant's father was encouraged at the very beginning to accompany police on the actual search with the consequence that the applicant was at times alone with a number of the detectives and was subjected to persistent questioning from a number of them. I also consider that Detective Knight mislead the applicant when he responded to the applicant's question

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10 Transcript of Police Record of Interview MFI D, p 5 ll 39-45.

"Do I need a lawyer?"[11] as he gave the impression he was not a suspect in the murder as follows:

> "BENNETTS: Do I need to, a lawyer?
>
> SGT KNIGHT: I can't answer that for you mate. I can't answer that for you.
>
> BENNETTS: Well I'm the only—
>
> SGT KNIGHT: Mate the, the—
>
> BENNETTS: Suspect at the moment aren't I?
>
> SGT KNIGHT: Well you don't know that. No, and no-one's said that. Okay. Ah--
>
> BENNETTS: Is my mum still at the Police--
>
> SGT KNIGHT: Yes—
>
> BENNETTS: Station?
>
> SGT KNIGHT: She is mate. Yeah. Ah mate a-, a-, I said to you yesterday, and, and I'm, I'm, I'm being honest, the only reason we are talking to the people closest to you, and the only reason we're here now, ah is because of our enquiries in relation to you and your movements around this time. I'm asking you again, do you know what happened to her?
>
> BENNETTS: I'm telling you for the thousandth time, I have no idea.
>
> UNIDENTIFIED MALE OFFICER: Mmm. Mmm. Okay."

[36] I consider that the applicant was inappropriately put under sustained questioning and extensive cross examination as to his whereabouts since Friday 14 August. At one point during the questioning the applicant asked to speak to his father[12] but the questioning continued with an implication that his father was occupied elsewhere when he could have been contacted immediately as follows:

> "SGT KNIGHT: Okay. Trying to get access. Look what we, we, we wanna do, ah obviously this search will take as long as it takes, once it's done I can give you an opportunity to come with us back to Laidley Police Station to be interviewed.
>
> Okay.
>
> BENNETTS: Again?

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11 Ibid at p 14 ll 1-30.

12 Ibid at p 24 ll 1-30.

SGT KNIGHT: Yeah. Okay.

BENNETTS: What for?

SGT KNIGHT: Um because I'm still, need to be satisfied, this is my opinion, ah that this, ah about some of the details.

Okay. And again, I'm, I'm asking you, I'm asking you if you, if you'll come back there and speak with us again. Okay.

BENNETTS: Can I talk to my dad about it?

SGT KNIGHT: Sure. Let him finish doing what he's doing in there.

BENNETTS: [INDISTINCT] see what he has—

SGT KNIGHT: Okay.

BENNETTS: To say about it.

SGT KNIGHT: Okay.

BENNETTS: [INDISTINCT]"

[37] I also have serious concerns about the sustained pressure to answer questions and the other strategies that were employed against a teenage boy who had no previous involvement with police. Those strategies are manifest throughout the transcript and include not only disbelief at the applicant's account but emotional manipulation by questioning him in front of his father and essentially pressuring him to give an account to his father. They also put pressure on the applicant's father to get the applicant to make admissions as follows: [13]

"KADNIAK: Somewhere [INDISTINCT]. But [INDISTINCT], I know you're a good kid man, alright. I know that. These guys are giving you the, trying to help you here man.

BENNETTS: I know, and I appreciate it.

SGT KNIGHT: Can I ask this? This is probably a hard question mate, and I, and I want you to be honest.

BENNETTS: Mmm.

SGT KNIGHT: Regardless of what happens, right, regardless of what he says, you're still gonna love him as a father aren't you?

KADNIAK: Always.

SGT KNIGHT: I would expect nothing less. And, and I'm not, I'm not saying that lightly, you know.

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[13] Transcript of Police Record of Interview MFI D p 40 l 50 – p 42 l 43.

BENNETTS: Don't know what to say.

SGT KNIGHT: The truth [INDISTINCT].

BENNETTS: From when we [INDISTINCT] you started recording, I have been telling the truth.

SGT KNIGHT: Mate I don't know what to say.

BENNETTS: Neither do I.

SGT KNIGHT: What I'd like you to do, I want the, the search to continue until it's, until the Officers are satisfied that it's done, I'm gonna ask you to come down to Laidley Police Station with me, okay.

BENNETTS: When?

SGT KNIGHT: Now.

BENNETTS: Now?

SGT KNIGHT: Straight after the search.

BENNETTS: [INDISTINCT] where?

SGT KNIGHT: Laidley Police Station.

BENNETTS: Do you think I need a lawyer?

KADNIAK: I think it's 1-, it's, it's looking that way mate, but, okay. It's, it's looking that way for these guys, this, this is all serious man. You're the last one to see her mate. Come on Brendo.

BENNETTS: [INDISTINCT]

KADNIAK: So that's it.

BENNETTS: I have nothing more to add. I've told you everything.

SGT KNIGHT: Alright. I don't want you to say anything other than the truth. I'm not trying to put words in your mouth.

But as I said to you mate, I'm not gonna lie to ya, I still don't believe we're at the end of the truth. Okay. I'm, I'm tell, I'm being ho-, I'm being honest with you, okay. I know that you don't, you may not wanna hear that, alright, um but it is what it is mate. I'm not, I can't put words in your mouth, I'm not gonna try and put words in your mouth, okay,

I'm trying to be fair with you. Like I think I have been fair with you [INDISTINCT]. Is ah, is that the case? Alright.

Mate I just, I say it again, all I want is the truth. And the reason I want the truth is because Jayde and Jayde's family deserve the answers mate.

BENNETTS: [INDISTINCT]

SGT KNIGHT: Absolutely one hundred per cent. And we are--

BENNETTS: I agree.

SGT KNIGHT: And I am a very motivated person when it comes to trying to help a grieving family mate. And I, my honest opinion is, here we are now days into this investigation, my honest opinion and I, I, I hope I'm proven wrong, my honest opinion as I'm s-, speaking to you now is that ah she's no longer with us, with us, that's my honest opinion. Ah I'm being honest with you mate. It's never easy to start these conversations mate. Don't worry about it.

BENNETTS: Just [INDISTINCT].

SGT KNIGHT: I, I'm, I'm, mate I've told you what I think mate. As I said mate, I will happily be proven wrong. [INDISTINCT]

BENNETTS: I don't know how to react to that, but ah, I still can't, have nothing more to add [INDISTINCT].

SGT GILLESPIE: Have you had a chat to Dad? Tell him about stuff that we've talked about?

SGT KNIGHT: Because you hadn't told him about some of these details before tonight.

BENNETTS: [INDISTINCT]

SGT KNIGHT: And I understand, I understand that, okay. As I said to you mate, it's never an easy conversation to have.

BENNETTS: Like I just--"

[38] I accept that there are even more examples of the pressure that the applicant was placed under set out in the submissions of Counsel but I have outlined the most serious examples. There can be no doubt that the applicant said[14] on several occasions that he had nothing more to say but the questioning continued nonetheless.

Were the statements voluntary confessions or admissions?

[39] The Crown has the onus of proving that a confession is voluntary before it can be relied upon. The first issue which must be addressed is whether the statements made during the search were in fact confessions. In *R v Clark; ex parte Attorney-General of Queensland*[15] de Jersey CJ held that the exculpatory statements in that case could not

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14 Transcript of Police Record of Interview MFI D p 41 ll 40-50.

15 [1999] QCA 438.

amount to 'confessions' which had been induced by a threat or promise because they were not in fact confessions. His Honour held:

> "[28] In my opinion s10 did not apply to this material because it was not confessional. As I have said, it was exculpatory material, which, even when shown to be false and thereby providing the foundation for an argument that the appellant had told lies on material points because of a consciousness of guilt, did not take on a relevantly confessional character.
>
> [29] In any event, any suggested lack of voluntariness was excluded, as a matter of fact, by the appellant's clear confirmation of his willing participation in the interviews, directed towards exculpating himself. That emerges clearly from the passages from the evidence set out above. The question in these situations is whether any incriminating material was provided voluntarily, in the sense that the appellant exercised "a free choice to speak or be silent" (*R v Foster* (1993) 67 ALJR 550, 556 per Brennan J as he then was)."

[40] The question is whether a denial or an exculpatory statement is, when contradicted by subsequent evidence, to be regarded as an incriminatory document in the same way as a confession or admission. In *Clark,* McPherson JA considered the issue in the following terms:

> "[45] Telling a lie is a form of conduct. Some forms of conduct are capable of constituting a "confession" within the meaning of s 10 of the *Criminal Law Amendment Act 1894* or under the common law principle excluding confessions that are not voluntary. See *R v Beere* [1965] Qd R 370, 372, cited with approval in *Lam Chi-ming v The Queen* [1991] 2 AC 212, both of which are instances of that kind. It would, however, be an unusual case in which telling a lie constituted conduct amounting to a confession either under s10 or the general law. In *Edwards v The Queen* (1993) 178 CLR 193, 201, Brennan J said:
>
> > 'Whether the making of a statement proved to be false is capable of amounting to a confession depends on the terms of the statement, the circumstances in which it was made, the nature of the offence charged and the other evidence in the case. It may be that in some cases the falsity of a statement which is exculpatory in terms could give to the accused's conduct the character of a confession, but such a confession would be an admission by conduct.'
>
> Later, after discussing the circumstances in which "the true inference to be drawn from the accused's conduct is that he has confessed his guilt", his Honour said (178 CLR 193, 202):

> 'It would surely be a rare case in which it would be permissible to infer beyond reasonable doubt that an accused, by telling a lie, has confessed his guilt.'

His Honour's opinion is supported by a decision many years ago of the Appellate Division of the Supreme Court of South Africa in *R v Hanger* [1928] AD 469, 475, to the effect that an accused cannot be held to have confessed when he was intending to deny.

[46] The present case is plainly not one in which the lies told by the plaintiff in the course of the police interview amounted to a confession of guilt within s 10 of the Act or otherwise. It is, however, possibly less clear that telling a lie that falls short of amounting to a confession is necessarily incapable of attracting the discretion under the general law to exclude statements that are involuntary. In *Edwards v The Queen* (1993) 178 CLR 193, 210, Deane, Dawson and Gaudron JJ discussed the character and admissibility of a lie falling short of 'an admission against interest' by the accused. They concluded that:

> '… ordinarily a lie will form part of the body of evidence to be considered by the jury in reaching their conclusion according to the required standard of proof. The jury do not have to conclude that an accused is guilty beyond reasonable doubt in order to accept that a lie told by him exhibits a consciousness of guilt. They may accept that evidence without applying any particular standard of proof and conclude that, when they consider it together with the other evidence, the accused is or is not guilty beyond reasonable doubt.'

[47] Although their Honours in *Edwards* were not considering the rule that excludes involuntary confessions, admissions or similar statements, it seems to me, with respect, that they regarded lies falling within the latter class or category as something on a lower plane than the "admission against interest" to which they had previously been referring. The learned High Court Justices seem rather to have considered such lies as being admissible as circumstantial and therefore original evidence, which, when taken in conjunction with other evidence, may support an inference of guilt. One must, if possible, take care to avoid introducing into our law some of the invidious and unsatisfactory distinctions recognised elsewhere, and discussed in *South African Law of Evidence*, 345-350, by Lord Hoffman (as he now is), between 'confessions' and 'mere' admissions against interest; but the lies told by the appellant in the present case fall well outside the category of "admissions against interest" for purposes of that kind."

[41] The statements by the applicant during the field interview on the afternoon of 19 August do not contain any admissions by the applicant of his guilt of any offence. All his statements were statements which exculpated him as he clearly indicated that Jayde Kendall was alive when he dropped her beside the Warrego Highway on Friday night. He clearly did not admit to any wrong doing of any sort. I do not consider that the statements the applicant made during the search were statements that amount to confessions and accordingly, they do not attract the common law principle that confessions which are not voluntary should be excluded.

Should the statements be excluded on a discretionary basis?

[42] There is no doubt that the courts have a discretionary power to exclude voluntary admissions which have been obtained by police using improper, unlawful or unfair methods. As Barwick CJ held in *R v Ireland:*[16]

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

The field interview on 19 August 2015 from 5.14 pm to 7.25 pm

[43] Should the statements made during the field interview at the applicant's home be excluded on a discretionary basis because of the breaches of the PPRA and the unfairness shown to the applicant?

[44] Whilst there were breaches of s 418(1) and s 431(1) of the PPRA given the applicant was not specifically advised he had the right to have a friend or relative present during questioning and the warnings given to him were not clearly and unequivocally stated, I do not consider that such breaches alone would have warranted the exclusion of the evidence on the basis of unlawfulness.

[45] However, those breaches combined with the attempts by the Detectives to mislead the applicant, their unrelenting efforts to cross-examine the applicant to the extent they did and their indications to him that they did not believe him, in my view trigger the exercise of the discretion to exclude the evidence on the basis of unfairness. In *R v Hein*[17] Vanstone J stated that "It is clear that police officers interviewing a suspect may

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16 (1970) 126 CLR 321 at 335.

17 (2013) 117 SASR 444.

not mislead him"[18] and that if it becomes clear that a suspect has misunderstood something which has been said to him by an officer then he should be disabused of that misunderstanding:

> "[17] Questions conveying to a suspect that the interviewing police officer does not believe him and the belief that he is guilty are also improper. In *R v Croyden* (1846) 11 CCC 67 the words 'I dare say you had a hand in it; you may as well tell me all about it' were found to be an inducement such as to render the confession inadmissible. In *The King v Brown* (1931) 23 Cr App R 56 the Court rejected a confession which followed a statement by a police officer to the suspects in custody in these terms:
>
> > 'I am satisfied you both know something about taking the glass from the window in Ashwell's shop on the night of 20 April and stealing the goods.'
>
> In *R v Brown* (1988) 146 LSJS 326 at 330 King CJ, speaking for the Court of Criminal Appeal, approved of this line of cases, although the circumstances there under consideration were found to be distinguishable.
>
> [18] In this case the combination of the quite forceful indications by the police officer that he would continue to put "tough" questions to the appellant, the several expressions of belief that the appellant was involved in the robbery and the contribution the officer made to engendering a false belief that Lundberg had implicated the appellant all lead me to conclude that the questioning from question 49 should have been excluded, at least as a matter of discretion, in that there was police impropriety and it was unfair to use the evidence against the appellant. Such findings were available to the second judge, just as they are available to this Court. In my opinion the second judge should not have considered himself to be bound by the ruling of the second judge, so far as it related to the recorded interview."

[46] I consider therefore that the entire field tape of the search on 19 August 2015 from 5.14 pm to 7.25 pm, which includes the conversation in the police car on the way to the station, should be excluded on discretionary grounds due to unfairness.

[47] I understand from the submission of the Crown Prosecutor that the Crown will not lead the field tape of the search on 19 August 2015 between 5.14 pm and 7.25 pm at the trial. I will however formally rule that the field tape is excluded from evidence.

The formal interview from 8.25 pm to 9.58 pm

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18 Ibid at [13].

[48] After the field interview at his home the applicant voluntarily accompanied police to Laidley Police Station at around 7 pm. On the way to the station he agreed to take Detectives O'Connell, Knight and Nixon to the place where he stated that he had dropped the deceased off on the Warrego Highway. There is no doubt that the applicant had been upset during the search at his home, particularly when he had confessed to his parents that he had been maintaining a charade about having employment. That fact had been acknowledged during the drive to the Laidley station as follows: [19]

> "UNIDENTIFIED MALE OFFICER: Mate you've been terribly upset about how you've spoken, you know, how you've talked about your occupation with your parents and that, but the one thing your dad wants you to do is be truthful, isn't it?
>
> BENNETTS: Yeah. Yeah, it's the truth. Not gonna lie about it."

[49] The applicant argues that undue pressure was placed on the applicant during that drive and that infects the subsequent interview at the station. Having listened to the tape of that drive however I am not satisfied that there was undue pressure placed on the applicant during the drive to the station, although I note that there were a number of comments about his father being "a nice guy". I also am not satisfied that references to him being taken to a "watch house" were intended to be intimidatory given he was placed in an interview room and not a cell on 19 August.

[50] Whilst the detectives were asking questions of the applicant during the drive it would seem clear they were directed towards the applicant identifying the drop off point. Towards the end of the search at his home the applicant had been told clearly by his father that it looked like he needed a lawyer and that things looked "serious". As he left for the police station his father told him "Just hang in there son." Despite those warnings by his father it would seem to me that the applicant was more than willing to show the Detectives the spot where he states he dropped Jayde Kendall off and to once again assert his account of events on 14 August. In my view after he left his home the applicant was voluntarily trying to convince the Detectives that he had dropped the deceased off on the highway.

[51] The applicant and Detectives then arrived at the station at 7.23 pm and he was then placed in an interview room for an hour before questioning began at 8.25 pm. The applicant had been told that he was there voluntarily and was free to leave as follows:[20]

> "SGT GILLESPIE: …So Brenden um as I said, this is a electronic record of interview. By this I mean that um everything that we talk about in this room today's gonna be electronically recorded, okay. And these things in front of us are recording equipment, and that's gonna record everything that we say.

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19 Transcript of Police Record of Interview MFI D, p 65 ll 31-42.

20 Transcript of Police Record of Interview MFI E, p 2 l 48 – p 3 ll 9-33.

BENNETTS: Yeah.

SGT GILLESPIE: Alright, so Brenden do you agree that um you're here of your own free will?

BENNETTS: Yeah.

SGT GILLESPIE: Okay, you, do you know that you're not under arrest?

BENNETTS: Yes.

SGT GILLESPIE: And you're free to leave at any time unless you are arrested?

BENNETTS: Okay.

SGT GILLESPIE: Okay. So I'll just go back to the earlier events of this evening. We were out at your address. Can you state your address?

BENNETTS: Ah 34 Nandine Road--

SGT GILLESPIE: 34 Nandine Road.

BENNETTS: Lockyer Waters.

SGT GILLESPIE: Okay, so you agree that we were out there and you voluntarily come back to the Police Station?

BENNETTS: Yeah.

SGT GILLESPIE: And you agreed to talk to us today, okay. So um are there any persons in this room that haven't identified themselves?

BENNETTS: No.

SGT GILLESPIE: Okay."

[52] There is also no doubt that before the questioning began the applicant was once again advised of his right to silence and advised that any statements he made would be would be recorded and used as evidence. The warnings continued as follows:[21]

"SGT GILLESPIE: … So do you agree that earlier this evening um the Detective Senior Sergeant gave you some warnings, with your right, about your right to silence?

BENNETTS: Yeah.

SGT GILLESPIE: Okay. So I'm gonna give you those warnings again. So those warnings still apply. Okay.

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[21] Transcript of Police Record of Interview MFI E, p 4 l 30 – p 5 l 33.

BENNETTS: Yeah.

SGT GILLESPIE: If there's anything that you don't understand please stop me and tell me, and I'll try and explain to you better. Okay. So the first warning is that you have the right to remain silent. So this means that you're not, do not have to say anything, answer any questions or make any statements unless you wish to do so, however anything you do say, or any statements you do make will be recorded and may be later used as evidence. Do you understand that warning?

BENNETTS: Yeah.

SGT GILLESPIE: Okay. The second um, do you understand that you don't have to speak to me?

BENNETTS: Yes.

SGT GILLESPIE: Okay. And that anything you do will be recorded. Alright, and that may, may later be used as evidence--

BENNETTS: Mmm.

SGT GILLESPIE: Or played in Court. You understand that?

BENNETTS: Yeah.

SGT GILLESPIE: Okay. So um the second warning I have to give you is that you have a right to speak to a friend or relative to tell that person where you are and to have that person present during questioning. You also have the right to arrange or attempt to arrange to speak to a lawyer of your choice to tell that person where you are and to have that person present during questioning. And questioning may, may be dele-, delayed for a reasonable time necessary to have any of those persons present. So what that means is you can have a support person here, or something else with you when we're asking you questions this evening.

BENNETTS: It's alright.

SGT GILLESPIE: Is there anyone else that you wish to have here?

BENNETTS: Nuh, I don't think I need a lawyer or anything like that until you charge me.

SGT GILLESPIE: Okay. So do you agree that ah earlier this evening, that Detective Senior Sergeant Knight gave you those warnings?

BENNETTS: Yeah."

[53] Counsel for the applicant argues that despite those warnings the interview commencing at 8.25 pm was not voluntary and furthermore it should be excluded on the grounds of unfairness. Counsel argues that this interview was not simply exculpatory but contained

an admission against the applicant's interest, namely a confession by the applicant that the deceased had got into his car on 14 August. It is therefore an admission against his interest and the Crown has to prove that it was voluntarily given.

[54] It is also argued that despite the warnings that were given, the applicant did not fully understand his rights and did not appreciate that he could request a lawyer and as such, was essentially acting under a misapprehension.

[55] Furthermore it is argued that, even if it can be shown it was voluntary, the applicant's statement against interest should be excluded on the discretionary basis as it would be unfair to admit it, given the sustained questioning of the applicant during the search at his home and the inappropriate pressure which had been applied to him over several hours during that search and the subsequent drive and interview.

[56] Counsel argues that the interview must be considered against the background of what had occurred during the field interview that afternoon, particularly when the applicant had indicated that he did not wish to speak when he said "I have nothing more to add. I have told you everything"[22] and later when he said "I still can't, have nothing more to add."[23] Viewed objectively in the context of the conversation however I consider that when the applicant made those statements he was really conveying his view that he had already told them everything about the whereabouts of Jayde Kendall, and was not saying that he was refusing to answer any more questions.

[57] Furthermore it would seem to me that the applicant was well aware of his right to a lawyer given his father's earlier response that he thought it had already got to a point where he needed one. I consider that the applicant both in the car and during this interview was positively trying to convince the Detectives that he had left the deceased beside the Warrego Highway. He was in my view trying to convince them of his account and he exercised a choice whether to speak or not. I am satisfied that he did understand he could call a lawyer but rather freely made a decision not to call one, as he did not think he needed one at that juncture. In the interview on 19 August 2015 at 8.25 pm, the applicant gave the detectives the same account he had earlier given, namely he had picked the deceased up from school, she was upset and they talked, he withdrew some money for her and then he dropped her off on the Warrego Highway.

[58] I am satisfied that the interview was voluntary. Furthermore I am not satisfied that it would be unfair to the applicant for that evidence to be used in his trial. Whilst he was in an emotional and upset state during the field interview he had left home at around 7 pm and had arrived at the station at around 7.23 pm. He was then given an hour before he was formally interviewed. In my view he had time to reflect and consider his position. There was in my view a circuit breaker. He had time to gather his emotional

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22 Transcript of Police Record of Interview MFI D, p 41 ll 50-51.

23 Ibid at p 42 ll 29-30.

and mental resources and make a free choice in circumstances where unlike those of the search, he did not feel overborne to explain to his father what had happened. I consider that he did make a free choice to speak to detectives. In *R v Tofilau*[24] Gummow and Hayne JJ discussed this concept of compulsion and the choice to speak as follows:

> "Confessions made to someone not known or believed to be a person in authority will thus fall to be considered under the test of "basal voluntariness". Basal voluntariness is concerned with confessions made under compulsion. The key inquiry is about the quality of the compulsion that is said to have overborne the free choice of whether to speak or to remain silent. In this context, "overborne" should be understood in the sense described (120) by Dixon J as "the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure". It is necessary to focus upon the sufficiency of the compulsion."

[59] Neither do I consider he was treated inappropriately during the interview at the station and I do not consider there is a basis to exclude it because the questioning was overly aggressive or that the applicant was subject to undue pressure.

[60] As Dixon J held in *McDermott* I must form a judgment upon the propriety of the means by which a statement was obtained and to do that I need to review all of the circumstances. Whilst I consider there was improper conduct during the field interview, it did not continue during the interview that followed.

[61] Although there is an overlap between the fairness and public policy discretions, there is nonetheless a distinction to be made between them. In *Cleland*[25] Deane J explained the as follows:

> "[11] It follows that where it appears that a voluntary confessional statement has been procured by unlawful or improper conduct on the part of law enforcement officers, there arise two independent, but related, questions as to whether evidence of the making of the statement should be excluded in the exercise of judicial discretion. That does not mean that there will be a need for two independent inquiries on the voir dire. The material relevant to the exercise of both discretions will ordinarily be the same. The unlawful or improper conduct of the law enforcement officers will ordinarily be relevant on the question of unfairness to the accused and unfairness to the accused will ordinarily be relevant on the question of the requirements of public policy. The task of the trial judge, in such a case, will involve determining whether, on the material before him, the evidence of the voluntary

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24 (2007) 231 CLR 396 at [60].

25 Ibid at pp 23-24.

> confessional statement should be excluded for the reason that it would be unfair to the accused to allow it to be led or for the reason that, on balance, relevant considerations of public policy require that it should be excluded. In discharging that task, it is permissible to take account of the existence of any room for legitimate doubt as to whether the alleged confessional statement was made or was voluntary."

[62] Accordingly even if the applicant's statements during the interview could be considered to have been unfairly obtained, I would otherwise exercise my discretion not to exclude the interview on the grounds of public policy. In accordance with the principles set out in *Bunning v Cross*[26] the exercise involves the weighing of the competing interests and I do not consider there is a public policy basis for excluding the statements made by the applicant during that interview.

[63] The application to exclude the Police Record of Interview which commences at 8.25 pm on 19 August 2015 is refused.

Should the interview on 21 August be excluded?

[64] On 21 August 2015 police obtained from Optus the stored communications on Jayde Kendall's phone, which revealed the content of SMS text messages on that phone. An examination of those text messages[27] reveals that there was contact between Jayde Kendall's phone and the applicant's phone on the evening of 13 August which indicated that they were communicating or were to communicate by 'Snap Chat' given that a message from the applicant to Jayde at 4.40 pm says "Only on snap chat naughty" and at 8.31 pm she replies "Check snap cut (sic)".

[65] On the next day, 14 August, there are a further 18 text messages between the two commencing at 11.09 am and finishing with a message from the applicant to Jayde Kendall at 3.20 pm. It is clear that the text messages were flirtatious and indicate that there was an agreement to meet. The messages also indicate that the applicant was waiting in a red car "along the back fence on the top overall (sic)" which was "near the building". The messages show that sexual contact of some sort was anticipated.

[66] Detective Gillespie's evidence was that she received the information from Optus "late in that afternoon"[28] of 21 August after she had been out in a helicopter all day searching the Warrego Highway. She indicated that a decision was made to arrest the applicant that afternoon because at that point police had a reasonable suspicion that he had committed the offence of murder and a warrant was not required once that view was formed. Police also wanted to undertake a covert strategy that evening as a LEP with a

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26 (1978) 14 CLR 54.

27 Exhibit 24.

28 T4-53 ll40-46.

recording device had been placed in a cell and the applicant was to be arrested and placed in an adjacent cell. Anything he said to the LEP would thereby be recorded.

[67] At 5.17 pm Detective Gillespie attended at the applicant's home, formally arrested him for the murder of Jayde Kendall, handcuffed him and took him to the Gatton Station for questioning. They arrived at the Gatton Watchouse at 5.35 pm and the applicant was placed in a cell until the interview commenced at 7.54 pm. The interview continued until 8.36 pm when the applicant spoke to a lawyer on the phone and he declined to say anything further.

[68] Counsel for the applicant argues that the interview on 21 August was conducted in breach of s 418 of the PPRA as the applicant had indicated that he wanted to speak to a lawyer and questioning was not delayed for a reasonable time to allow him to contact one.

[69] There is no doubt that at that point in time he was interviewed on the night of 21 August Detectives O'Connell and Gillespie knew that the applicant wanted a lawyer because of the following factors:

- On 19 August during the search at the applicant's home his father had told the applicant that he needed a lawyer.
- On 19 August during the interview at the Laidley Station the applicant had stated he did not think he needed a lawyer until he was charged.
- When he was arrested on 21 August the applicant's father told him he was contacting a lawyer and not to speak to police.
- On 21 August the applicant's father told police the applicant was not to speak to anyone until he got a lawyer.
- On 21 August the applicant's father was at the Gatton station endeavouring to contact a lawyer.
- On 21 August when he arrived at the Gatton Station at 5.35 pm the applicant clearly stated that he wanted a lawyer.

[70] Detective Nixon gave the following evidence about the requests for a lawyer that evening during cross examination by applicant's counsel as follows:[29]

> "Brendon Bennetts' father materialised at the Gatton watch-house on the 21st of August, didn't he?---At the Gatton station. Yes.

---

[29] T4-40 l25 – T4-41 l5.

> At the Gatton station. And that was very, very shortly, if not at the same time as you arrived there he was there?---Yes. That's correct.
>
> And he spoke with you, didn't he?---He spoke with an officer.
>
> And I suggest to you that he spoke to you?---I don't recall that. I was dealing with the LEP side of things with – I had turned up at the watch-house and went straight into the watch-house to start telling the dad.
>
> And the father, I suggest, said to you, "He's not to talk to anyone until I get a lawyer."?---I believe that that was said at the house prior to Brendon's departure from the house.
>
> Do you believe the father said that at the house?---Yeah. I think – that's what I thought. Yeah.
>
> So you heard not just – you heard the father say he didn't want his – the son was not to be spoken to until a lawyer could be contacted?---Yes."

[71] Detective Gillespie also confirmed that the applicant had requested a lawyer as follows:[30]

> "Yes. But anyway, after he was arrested they took him back in the car to the Gatton watch-house – and if you look at a short transcript, dated 21 August, 5.17 pm to 5.22 pm?---Yes.
>
> And if you turn to page 4, you'll see there that you, correctly and properly, told him – gave him the caution about not – had the right not to answer questions. And you, correctly and properly, told him that he had the right to speak to a friend or relative, or to arrange for a lawyer to be present, and that questioning could be delayed for a reasonable time for that purpose?---Yes.
>
> And you asked him if he had any comment to make about that?---Yes.
>
> And he said, "I want a lawyer"?---Yes.
>
> So tell me about the step or steps that you took to ensure that his desire to contact a lawyer was realised?---So then Detective O'Connell said, "Yeah, your old man's sorting something out there, mate."
>
> Yep?---And – and he said, "All right." And then we didn't hear anything else.
>
> Right. So I'll just ask the question again, and I'll preface it by saying, "You're the one in charge here, you're the arresting officer." All right?---Yes.

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30 T4-74 ll1-42.

> That's what – that's evidence that's been given this morning: that you're in charge. Okay? And I'm asking you, as the person in charge, what step or steps did you take to ensure that Brenden Bennetts had access to a lawyer, after he made that remark to you?---So further – and if you look at the next interview, I've also gone through those warnings again.
>
> Yes?---And at any point, he could have stopped there.
>
> Yeah?---And refused to answer any questions without seeking legal advice.
>
> Granted. But what step or steps did you take, as the officer in charge, after he said, "I want a lawyer" to ensure that he had access to a telephone, or some means of communicating with a lawyer?---I was under the impression that his dad was organising it because Detective O'Connell said, "Yes, your old man is sorting something out there."
>
> You did nothing, then?---No.
>
> Not a thing?---No."

[72] There can be no doubt that despite the fact that both officers knew that the eighteen year old suspect had specifically requested a lawyer be present during his questioning and despite the fact his father had said he was not to be interviewed without a lawyer present, they proceeded to interview him nonetheless at 7.56 pm - the very time his father was at the station endeavouring to contact a lawyer.[31] That interview proceeded as follows: [32]

> "SGT GILLESPIE: So Brenden, do you wanna state your full, you did state your full and correct--
>
> BENNETTS: Yeah.
>
> SGT GILLESPIE: Name? Yeah. Um so do you agree that this evening we came to your house and you were arrested--
>
> BENNETTS: Yes.
>
> SGT GILLESPIE: Okay, for the murder--
>
> BENNETTS: Yeah.
>
> SGT GILLESPIE: Of Jayde Kendall? Now Brenden um what I wish to do is um talk to you further about some information, um that we have got, okay, but before I do that I have to go through the process again of

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31 Transcript of Police Record of Interview MFI G, p 3 l 9 – p 4 l 29.

32 Ibid at p 3 l 9 – p 4 l 29.

explaining things. Okay. So I'll just put that outta the way. As I said, this is a electronic record of interview. By that I mean everything that we talk about is ah going to be recorded. These are two microphones here, and the recording equipment's gonna record everything we say. Okay. So um this evening when we brought you into the Watchhouse, do you agree that I gave you certain warnings?

BENNETTS: Yeah.

SGT GILLESPIE: What were those warnings?

BENNETTS: Um I can remain silent. Um—

SGT GILLESPIE: Yeah.

BENNETTS: I don't have to answer. I have a right to have anyone here.

SGT GILLESPIE: Yeah. Do you wanna go through the warnings again?

SGT O'CONNELL: Oh you probably just should, yeah.

SGT GILLESPIE: Yeah. I'll go through them again, okay. So the first warning is that you have the right to remain silent. This means you don't have to say anything, or answer any questions unless you wish to do so, however if there is anything you wish to say or make, if you wish to say anything or make any statements, anything you do mate will be recorded and may be later used as evidence.

BENNETTS: Yeah.

SGT GILLESPIE: Do you understand that warning?

BENNETTS: Yes.

SGT GILLESPIE: Okay. The second warning is that you have the right to, to speak to a friend or relative to tell that person where you are, and to have that person present during questioning. You also have the right to s-, arrange or attempt to arrange to speak to a lawyer of your choice, to tell that person where you are, and to have that person present during questioning. And questioning may delayed for reasonable time necessary to have any of those persons present. Do you understand that warning?

BENNETTS: Yeah.

SGT GILLESPIE: Okay. So um as I said, we wish to speak to you again about um, you right?

BENNETTS: Yeah, just cold.

SGT GILLESPIE: You’re cold? Okay. Um about some further information that we got today, but I'm just gonna go through some questions

again, um it's part of our process, our interview process, okay. So um Brenden can you give, state your date of birth for me thanks?

BENNETTS: Ah thirty-first of August 1996."

[73] I consider that the applicant's rights were ignored. Having viewed that interview I consider that neither Detective made any effort to get a response from the applicant as to what he actually wanted to do. He clearly did not understand that he could request that the questioning be delayed until he spoke to a lawyer. They recited his right to silence and his right to have a lawyer present but it was no more than lip service. They did not respect his rights. They simply commenced immediately into their questions after a recitation of his rights and a repetition of the warnings but made no effort to allow him to exercise his rights. They made no attempt to allow him to make a choice. As Holmes J, as her Honour then was, stated in *R v Adamic*:[33]

> "[11] Although Mr Adamic was cautioned and advised of his rights to speak to a friend, relative or lawyer and that if he wished to do so "questioning will be delayed for a reasonable time for that purpose", he was not asked what his wishes were, and questioning was not delayed. Having told him what his rights were, including the right to telephone a solicitor, Constable Ottaway effectively negated that advice by making it clear that the option of contacting a solicitor was not presently available. He then proceeded to ask him a number of questions during the search of the car and the ride back to the Surfers Paradise police station. There was, in my view, a contravention of s 95.
>
> [12] Mr Cuthbert for the accused says that the questioning in breach of s 95 cannot be justified and should be excluded. Mr Weston for the Crown says that the accused had been warned and advised that he would have the opportunity to contact solicitors and nonetheless proceeded to answer questions. He did so, Mr Weston says, selectively, making denials at various points. Considerations of fairness did not therefore require exclusion of the answers.
>
> [13] I am however, satisfied that the advice provided to Mr Adamic by Constable Ottaway was such as to create the impression in him that he had no right at that time to seek the advice of a solicitor While there is nothing to suggest that the police officers on this occasion were engaged in any deliberate attempt to circumscribe Mr Adamic's rights, the manner in which the right to call a solicitor was put to him, so as effectively to create the impression that it could not be exercised until the party arrived at the police station manifested at best a careless disregard of the section 95 requirements. It is fairly described as a

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[33] [2000] QSC 402.

> "cutting of corners"; there was no reason that Constable Ottaway could not have contacted a solicitor nominated by Mr Adamic at the scene; and questioning could, in any case, have waited until they arrived at the police station and he had had the opportunities contemplated by s95(1).
>
> [14] While, having regard to other factors identified as relevant in *Bunning v Cross* (1978) 141 CLR 54 at 79 the evidence is cogent and the charge a serious one, it seems to me that this is a proper case for exclusion of the conversations which took place at the scene of Mr Adamic's apprehension and during the journey back to Southport. That exclusion does, not however, extend to questions asked of Mr Adamic as to his correct address, which were legitimately asked pursuant to s23(2) of the Act. Apart from the issue as to whether he was in custody when he was being questioned for the purpose of establishing his address, I see no unfairness in allowing evidence of such questions and answers, when a solicitor's advice must have been that he was compelled to give that information."

[74] In my view similar considerations apply here. Whilst the applicant was read his rights they were in effect negatived by the approach the Detectives took by immediately launching into their questions. Furthermore given both Detectives were specifically aware that the applicant wanted a lawyer present during his questioning, the fact that he was arrested on Friday evening at 5.15 pm after solicitor's offices would have closed for the weekend gives me serious concern that it was a deliberate attempt to frustrate his rights. That is particularly so given there was simply no great urgency to question him after hours. The content of the text messages could have been put to the applicant the following day or the following week. That evidence was not going to deteriorate or disappear. It is also significant that he was actually released after the interview.

[75] Neither did Detectives inform the applicant that they considered that a reasonable time had already expired and that they were therefore going to go ahead and question him despite his earlier request for a lawyer. Counsel for the applicant questioned Detective O'Connell about the warnings given by Detective Gillespie as follows:[34]

> "She said – after telling him about this right to have a lawyer present, she said:
>
> *...and questioning may be delayed for a reasonable time necessary to have any of those persons present.*
>
> ?---Yes, she does.

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[34] T3-50 l39 – T3-51 l13.

> And although you can't look into her mind – perhaps you might be able to help me with this, because you might've had a discussion with her – I'm suggesting to you that by even saying that to the accused, you police were betraying, that is, revealing, a view that any – he could still ask for a lawyer, that the time that was reasonable still hadn't elapsed? Yeah, okay, I take your point. I – I can't really explain that for Bronagh Gillespie, but I think that was more a case of she's – she's relaying those warnings verbatim.
>
> Yes?-- Like --
>
> But you didn't say, "Detective Gillespie, just a minute. Brenden, that last bit we've said to you no longer applies, because we gave you this warning at 5.30. No lawyer has materialised"?-- No."

[76] Rather than explicitly stating that a reasonable time had already expired Detective Gillespie told him again that he had the right to request a lawyer and they would wait a reasonable time for a lawyer to be found, but then immediately started questioning him. They did not offer to give him a phone so he could make a call or provide him with a list of local solicitors. As Detective Gillespie confirmed in her evidence, they simply did nothing.

[77] Detective O'Connell's evidence also reveals that no real effort was made to respect the applicant's rights as follows:[35]

> "There was nothing said to the accused there by either you or Nixon or Gillespie, "Well, look, we will delay the questioning to give you or your dad a reasonable opportunity to get a lawyer here"?---No, we didn't say that.
>
> No. And you didn't do that either, did you?---Well, yes, we did.
>
> No, the delay was so that you could get the LEP – and that's the law enforcement participant – into the watch house with him, wasn't it?---The LEP was already there.
>
> He was already there, was he?---Yes, he was.
>
> So you've got the LEP in the watch house with him after he says he wants his lawyer there?---That's right.
>
> And you're telling me that any delay from then until five to 8 when the interview started was to allow the accused's father to get a lawyer there?---That most certainly was part of that.
>
> And he'd been arrested at 5.17 on a Friday evening, after close of business for most solicitors firms, hadn't he?---Well, yes, that was the time.

---

[35] T3-49 l 33 – T3-50 l 39.

That's right. And the decision to go and to go at the time after 5 o'clock would have been a considered, thought-out decision by you police?---No, it wasn't.

The fact that the arrest was made after solicitors firms closed or could be expected to be closed was merely a coincidence, would you say?---Yes, I would.

What was the urgency?---Well, we got the information from the stored comms from Optus that day in relation to what was said between Brenden and Jayde on the day that she went missing.

Yeah. And all the stored comms did was tell you what words in English passed between the two people in the text messages, didn't it?---That's right.

And that evidence wasn't going to disappear or dissipate over the weekend, was it? You'd still have the stored comms on Monday morning?---That's right.

So the questioning of him could have waited until Monday about the text messages, couldn't it?---Well, I suppose if you put that way, yes, but this was – this was an evolving investigation that we were moving forward as we went.

Right?---And the information came to hand. We felt it was important to interview – talk to him about it, hence the decision that was made.

Well, what I'm going to suggest to you is that the only sensible inference that can be drawn from the timing of what you did and from the release later in the night was that you police arrested him at a time in the week when the chances of him having access to a lawyer were minimised so – for two reasons: so that you could get your covert police operative into the cells with him in the hope something might fall out and so that you could have another crack at him?---That was a lengthy question, but if you're asking me that we timed the arrest for close of business lawyers, no - - -

Yeah?--- - - - that's not correct.

Yeah?---That's not what we did.

And when he said at apparently 5.35 he wanted a lawyer here, you people only waited until six minutes to 8 to get cracking with the interview, didn't you?---I think that was two hours – somewhat two hours or a bit more after.

And you think that's reasonable?---Yeah, I do.

On a Friday evening?---Well, yeah, I do.

When he's in Gatton?---Yes.

> That's a reasonable time, you think, to delay the questioning for him to have a lawyer there?---I thought so.
>
> And you took no steps to contact his dad to say, "Listen, have you got on to a lawyer? Is there any lawyer we can talk to"?---No, I didn't."

[78] Having considered that evidence and the transcript of the interview I am satisfied that the obligation in s 418 requiring police to delay questioning for a reasonable time to allow the applicant speak to a lawyer was not complied with in the circumstances of this case. Section 418 (4), (5) and (6) provide that a consideration of what constitutes a reasonable time to delay requires a consideration of the particular circumstances of each case including the complexity of the matters under consideration and how far a person may have to travel. I note that s 418 (6) provides that unless special circumstances exist, a delay of more than 2 hours may be unreasonable.

[79] In my view there were special circumstances in this case:

- The applicant was 18.
- He stated he wanted a lawyer and they knew his father was in the process of getting one.
- The applicant was arrested after 5 pm in a Queensland country town.
- There was no urgent reason to question him.
- It was a charge of murder.
- The applicant was subsequently allowed to leave.

[80] In my view there was illegality. If the Court is satisfied that illegality is established then the discretion to exclude the evidence is required to be exercised by weighing up the two competing requirements of public policy as outlined in *Bunning v Cross.* The Crown submits here that in weighing up that decision, the question is whether the impugned conduct by police is so grave that it warrants sacrificing the community's need to bring to conviction those who are guilty in order to discourage the use of improper methods by police.

[81] In my view the conduct was deliberate and was a flagrant disregard of the applicant's rights. Police could so easily have complied with the requirements of the PPRA.

[82] The interview commencing at 7.54 pm on 21 August 2015 is excluded from evidence.

Facebook messages between the applicant and Dillan Gilmore

[83] The Crown wishes to rely on various Facebook messages sent by the applicant to a teenage girl named Dillan Gilmore in August 2015 to establish premeditation and

consciousness of guilt. The applicant had met Ms Gilmore earlier in 2015 through a mutual friend and shortly after meeting, Ms Gilmore relocated to England. The applicant and Ms Gilmore kept in contact via the Facebook Messenger service.

Messages exchanged on 13 August 2015

[84] The Crown wish to rely on the messages exchanged on 13 August 2015 to show that the applicant had premeditated the killing of Jayde Kendall. The following message thread was sent between 8.11 am and 8.17 am on 13 August 2015:

"**Dee Gilmore**

Are you texting and driving?

Brenden Bennetts

No

Dee Gilmore

how are you getting there then?

Brenden Bennetts

I'm messenging and driving

I'm on the high way for the next hour and a bit

Boring as shit

Dee Gilmore

Bye I will not be responsible for your death x

Brenden Bennetts

Funny

But fair enough

Should listen too Hollywood undead – bullet.

While I'm away"

[85] The message thread continues from 12.54 pm on 13 August 2015 as follows:

"**Brenden Bennetts**

Death such a weird concept

Brenden Bennetts

Have you ever lost anyone? I haven't but I have never understood if

It

Guess I'll know soon"

[86] No response was received to the messages sent by the applicant at 12.54 pm. The applicant sent further messages to Ms Gilmore between 1.39 pm and 3.12 pm the same day:

"**Brenden Bennetts**

I don't know if we can talk anymore

I like you, I don't want to bring you into thuat

This

Brenden Bennetts

Sorry a lot to read when you wake up ☺

Brenden Bennetts

Got that dawn song in my head want expecting that

Wasn't*"

[87] At 3.20 pm the conversation between the applicant and Ms Gilmore resumed:

"**Dee Gilmore**

Fkn what

Bruh

That was a quick change

To answer your question yes I have lost someone. I lost my grandma. It was one of the worst things that has ever happened to me and I didn't get to say goodbye

Hahaha have you got my song stuck?

And then why can't we talk?

I like how you Said we couldn't talk and then that resolve lasted about ten minutes and then you talked

Brenden Bennetts

Well

Um

Yeah my be harder then I had thought

May*

Dee Gilmore

Wait you like me?

Brenden Bennetts

Not like like

I care if you get hurt

Dee Gilmore

Oooohhh okay

Brenden Bennetts

I just don’t want to be the one that hurts you

Dee Gilmore

You won’t trust me

Brenden Bennetts

Uh ha

Dee Gilmore

No I’m serious

Because I’m also in England

And I don’t take what you say to heart

Brenden Bennetts

Oh rude :p”

[88] The Crown argues that the messages from the applicant to Ms Gilmore relating to the concept of death and in particular the quip about 'knowing soon' show a premeditation to kill Jayde Kendall. In oral submissions the Crown also noted the messages from the applicant to Ms Gilmore expressing uncertainty about whether or not they could continue to talk because the applicant "didn't want to bring [Ms Gilmore] into that".[36] On this basis the Crown argues that these messages are relevant and of probative value to the case against the applicant. The applicant submits that the messages are irrelevant and could relate to a number of things outside of the applicant's relationship with the deceased.

[89] The messages need to be considered in their true context and in light of the conversations between the applicant and Ms Gilmore on 13 August 2015 and prior. The general concept of death was in fact introduced into conversation on 13 August 2015 by Ms Gilmore when she said "Bye I will not be responsible for your death x", referring to the fact that the applicant was sending messages to her whilst driving. On this basis I do not accept the Crown's submission that the applicant sent the messages about death without prompting.[37]

[90] Whether those Facebook messages are relevant depends on the relationship between those messages and the issues being tried. Generally, relevant evidence is evidence which, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. In this case one of the issues the Crown must prove on a charge of murder is an intention to kill or cause grievous bodily harm. True it is that the messages refer to death, but they do not refer to an intention to kill or any fascination with death or an intention to seriously harm someone. In my view, an acceptance of the fact that the applicant might *know* about death soon enough says nothing about an *intention* to kill or cause grievous bodily harm.

[91] I also do not consider that the words "Guess I'll know soon" are a clear reference to a premeditation to kill in general or to kill Jayde Kendall in particular. Indeed while there is evidence that the applicant and Jayde Kendall were using the application 'Snap Chat' to communicate with each other, there is no evidence before me that at that point in time on 13 August the applicant and Jayde Kendall had even agreed to meet. A reference to 'knowing soon enough' about death could be a reference to any number of other things particularly given that they had been referring in their previous conversations to song lyrics with relatively depressing overtones.[38] In my view a reference to death in general is not relevant to the issue of an intention to kill or cause grievous bodily harm.

[92] Furthermore, the topic of cutting off contact with each other immediately after that conversation is not new and is referred to by both the applicant and Ms Gilmore in a

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36 T4-123 ll 31-40.

37 Outline of Submissions on Behalf of the Respondent, Exhibit 3 at [35].

38 T4-125 ll 10-45.

number of Facebook conversations before 13 August 2015. It is not clear that the applicant's messages about doing so on 13 August 2015 are any different in nature.

[93] I consider that the Facebook messages exchanged between the applicant and Ms Gilmore on 13 August 2015 are not relevant and should be excluded.

Messages exchanged on 15 August 2015

[94] The Crown wish to rely on the following messages sent by the applicant to Ms Gilmore on 15 August 2015 to establish a consciousness of guilt. Relevantly the messages read:

> "**Dee Gilmore**
>
> Wait why are you in bed at 4pm?
>
> **Brenden Bennetts**
>
> Tryg in sleep my troubles away
>
> To*
>
> **Dee Gilmore**
>
> I promise not to bring it up anymore but does it have anything to do with your gf?
>
> **Brenden Bennetts**
>
> No it doesn't"

[95] I consider that these messages are relevant and probative, given their timing and the fact that the applicant makes clear his 'troubles' do not relate to his girlfriend. I consider those messages do go to the applicant's state of mind at a time soon after it is alleged that the offence had been committed and in circumstances where the applicant has accepted he saw Jayde Kendall on 14 August and on his own admission, had her in his car and had assisted her on that date (the day before the messages).

[96] The application to exclude the Facebook messages on 15 August 2015 is refused.