

# SUPREME COURT OF QUEENSLAND

CITATION: *The Queen v Sinfield* [2019] QSCPR 3

PARTIES: **THE QUEEN**  
v  
**FREDERICK RONALD SINFIELD**

FILE NO/S: BS No 1627 of 2018

DIVISION: Trial Division

PROCEEDING: Application under s 590AA *Criminal Code*

ORIGINATING COURT: Supreme Court at Maryborough

DELIVERED ON: 9 April 2019  
Orders made 29 March 2019

DELIVERED AT: Brisbane  
Orders made in Maryborough

HEARING DATE: 27, 28, 29 March 2019

JUDGE: Davis J

ORDER: **Evidence of the interview between police and the accused on 4 July 2015 being Crown reference 2 on exhibit 1, the audio of the field interview and walk through on 9 July 2015 being Crown reference 7 on exhibit 1, and the interview between the police and the accused on 29 July 2015 being Crown reference 12 on exhibit 1 are all excluded from the evidence to be led at the accused's trial**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION  
TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – GENERALLY – where the applicant participated in police interviews on the understanding that he was being interviewed as a witness – where the police administered the caution – where the police arrested the accused at the conclusion of the first interview – where the applicant conceded that the interviews were admissible – where the applicant seeks to have the interviews excluded on the basis of judicial discretion – whether judicial discretion should be exercised in respect of excluding the interviews – whether it would be unfair to the accused to admit the statements into evidence – whether the evidence should be excluded on public policy bases

*Criminal Code*, s 227A, s 349, s 590AA

*Criminal Law Amendment Act 1894*  
*Evidence Act 1977, s 130*  
*Police Powers and Responsibilities Act 2000*  
*Police Powers and Responsibilities Regulation 2012*

*Attorney-General for New South Wales v Martin* (1909) CLR 713, cited  
*Banditt v R* (2005) 224 CLR 262, cited  
*Bunning v Cross* (1978) 141 CLR 54, cited  
*Burns v The Queen* (1975) 132 CLR 258, cited  
*Cleland v The Queen* (1982) 151 CLR 1, cited  
*Collins v The Queen* (1980) 31 ALR 257, cited  
*Edwards v R* (1992) 178 CLR 193, cited  
*McDermott v R* (1948) 76 CLR 501, cited  
*Police v Dunstall* (2015) 256 CLR 403, cited  
*R v Baden-Clay* (2016) 258 CLR 308, cited  
*R v Ireland* (1970) 126 CLR 321, cited  
*R v Leach* [2018] QCA 131, cited  
*R v Lee* (1950) 82 CLR 133, cited  
*R v Makary* [2018] QCA 258, cited  
*R v McKay* [1965] Qd R 240, cited  
*R v Playford* [2013] 2 Qd R 567, cited  
*R v Swaffield* (1998) 192 CLR 159, cited  
*R v Trebeck* [2018] QCA 183, cited  
*Sibanda v R* (2011) 33 VR 67, cited  
*Van Der Meer v R* (1988) 62 ALJR 656, cited

COUNSEL: M T Whitbread for the Crown  
 J P Benjamin for the Accused

SOLICITORS: Director of Public Prosecutions (Qld) for the Crown  
 Legal Aid Queensland for the Accused

- [1] An application was brought under s 590AA of the *Code* by Frederick Ronald Sinfield (the accused) for orders severing counts on an indictment presented against him and for orders excluding evidence to be led at his trial, being recordings of various conversations with investigating police.
- [2] The application was heard in Maryborough. Full argument was advanced in the application to exclude the evidence of the interviews. However, during argument on the severance application it became apparent that it was not clear exactly what evidence the Crown intended to lead at the trial, or for what purpose. Those issues have a bearing on whether count 4 on the indictment should be tried separately from counts 1, 2 and 3. The parties were clearly not in a position then to fully argue the severance application.

- [3] I made orders excluding the evidence of the various interviews between the accused and police, adjourned the severance application, and made directions to advance both that application, and trial preparation. These are my reasons for excluding the interviews. There is no need to record the other orders in these reasons.

### **The indictment**

- [4] An indictment has been presented charging the accused as follows:
- [5] That on a date unknown between the first day of February 2015 and the first day of May 2015 at Cooloola Cove in the State of Queensland, Frederick Ronald Sinfield without Complainant 1's consent, visually recorded Complainant 1, in circumstances where a reasonable adult would expect to be afforded privacy and Complainant 1 was engaging in a private act and the visual recording was made for the purpose of visually recording a private act.
- [6] That on or about the second day of July 2015 at Eli Waters in the State of Queensland, Frederick Ronald Sinfield raped [Complainant 2].
- [7] That on or about the second day of July 2015 at Eli Waters in the State of Queensland, Frederick Ronald Sinfield without [Complainant 2]'s consent, visually recorded [Complainant 2], in circumstances where a reasonable adult would expect to be afforded privacy and [Complainant 2] was in a private place and the visual recording was made for the purpose of visually recording a private act.
- [8] That on the sixth day of July 2015<sup>1</sup> at Hervey Bay in the State of Queensland, Frederick Ronald Sinfield murdered [Complainant 2].

### **Crown allegations**

- [9] Count 1 concerns the complaint of Complainant 1 (Complainant 1). She met the accused in about February 2015 through an internet dating service.
- [10] Complainant 1 and the accused struck up a relationship and on one occasion Complainant 1 allowed the accused to massage her vagina with baby oil. During this episode Complainant 1 was lying face down on a bed. She noticed though that the accused had been electronically recording his actions. While Complainant 1 had consented to the vaginal massage, she had not consented to the recording. She protested this to the accused who, after some argument, desisted.
- [11] Count 1 on the indictment alleges an offence against s 227A(1) of the *Code* which provides:

#### **“227A Observations or recordings in breach of privacy**

- (1) A person who observes or visually records another person, in circumstances where a reasonable adult would expect to be afforded privacy—

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<sup>1</sup> The police investigation commenced on 4 July 2015. This is the date [Complainant 2] was found injured. She died on 6 July 2015, hence the date in count 4.

(a) without the other person's consent;

and (b) when the other person—

- (i) is in a private place; or
- (ii) is engaging in a private act and the observation or visual recording is made for the purpose of observing or visually recording a private act;

commits a misdemeanour.

Maximum penalty—2 years imprisonment.

*Examples of circumstances where a reasonable adult would expect to be afforded privacy—*

- 1 A person changing in a communal change room at a swimming pool may expect to be observed by another person who is also changing in the room but may not expect to be visually recorded.
- 2 A person who needs help to dress or use a toilet may expect to be observed by the person giving the help but may not expect to be observed by another person.”

[12] Counts 2, 3 and 4 all concern [Complainant 2]. [Complainant 2] was an elderly lady living at [an address in Eli Waters] which is in close proximity to 12 Bushlark Avenue, Eli Waters where the accused lived with his elderly mother.

[13] [Complainant 2] was not in good health and required the assistance of carers. The accused, while not officially occupying the position of carer for the purposes of receiving Commonwealth benefits, visited [Complainant 2] regularly and assisted her with domestic tasks.

[14] After [Complainant 2]'s death (count 4) the police analysed the accused's mobile telephone. They discovered the recording of the incident with Complainant 1 (count 1) and also discovered a recording of a person, who the Crown alleges is the accused, digitally penetrating the vagina of [Complainant 2] who appears to be unconscious throughout.

[15] Count 2 is founded on s 349 of the *Code* which is in these terms:

**“349 Rape**

- (1) Any person who rapes another person is guilty of a crime.

Maximum penalty—life imprisonment.

- (2) A person rapes another person if—
  - (a) the person has carnal knowledge with or of the other person without the other person's consent; or
  - (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

- (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (3) For this section, a child under the age of 12 years is incapable of giving consent.
- (4) The Penalties and Sentences Act 1992, section 161Q states a circumstance of aggravation for an offence against this section.
- (5) An indictment charging an offence against this section with the circumstance of aggravation stated in the Penalties and Sentences Act 1992, section 161Q may not be presented without the consent of a Crown Law Officer.”

- [16] Unless there is some consent which can in some way be implied from an existing relationship, the penetration of a sleeping woman will constitute the offence of rape as an unconscious person cannot consent to the sexual act.<sup>2</sup>
- [17] Count 3 is founded upon s 227A(1) which is the same section which supports count 1.
- [18] Count 4 (the murder of [Complainant 2]) is alleged to have been committed by an assault upon [Complainant 2] at her home at [an address in Eli Waters] on about 4 July 2015. She died on 6 July 2015 of head wounds inflicted, the Crown says, by the accused. Murder is an offence by force of a combination of ss 291, 293 and 302 of the *Code*. It is unnecessary to set those sections out here.

### **The application by the accused**

- [19] The four counts on the indictment can be seen to arise from three incidents. Count 1 is the filming of Complainant 1 and is a separate incident to counts 2 and 3 which together were committed on the same occasion against [Complainant 2]. That was a different occasion to count 4, the murder of [Complainant 2].
- [20] The accused was the subject of various interviews and conversations with police: 15 were recorded and there were also some initial conversations which were not. These occurred at [Complainant 2]'s property at [an address in Eli Waters]. The Crown seeks to lead, at the accused's trial, evidence of the initial conversations at the scene together with an interview conducted on 4 July 2015,<sup>3</sup> a field interview and walk through of [Complainant 2]'s house on 9 July 2015<sup>4</sup> and a formal interview on 29 July 2015.<sup>5</sup>
- [21] It is conceded that evidence of all these conversations is admissible in the sense that they were undertaken voluntarily by the accused, and are relevant to count 4 (at least). The accused seeks their exclusion on discretionary grounds being:

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<sup>2</sup> *Banditt v R* (2005) 224 CLR 262 at [40]-[41], *Sibandit v R* (2011) 33 VR 67 at [54]; and see the observations of Sofronoff P in *R v Makary* [2018] QCA 258 at [54] that by s 348, consent must be “given”.

<sup>3</sup> Ex 9.

<sup>4</sup> Ex 11.

<sup>5</sup> Ex 12.

- (i) unfairness;<sup>6</sup>
- (ii) impropriety; the *Bunning v Cross* discretion.<sup>7</sup>

### **The accused's dealings with police after [Complainant 2]'s death**

- [22] On 4 July 2015 the accused rang emergency 000 and reported that he had found [Complainant 2] injured in her home. That conversation was recorded.<sup>8</sup> The person with whom the accused spoke is not a police officer. The Crown intends to lead that recording in the case against the accused and the accused does not suggest any basis to exclude that evidence.
- [23] The accused told the 000 officer that he was at [Complainant 2]'s house at [an address in Eli Waters]. He said he found [Complainant 2] in the home with an injury to the top of her head. She was breathing and conscious but not alert. He reported that there was a lot of blood. He told the 000 officer that [Complainant 2] had recently had falls at home.
- [24] After making the 000 call, the accused remained at [an address in Eli Waters] and was present when police arrived. He had conversations with Plain Clothes Senior Constable Wheeler. PCSC Wheeler in his statement<sup>9</sup> said that he arrived at [Complainant 2]'s house and:

“7. As I parked the vehicle and before I had a chance to alight, I was approached by one of these civilians. I would describe this male as being approximately 60 years of age, approximately 170cm in height, proportionate build with grey hair and wearing a shirt and glasses. This civilian was Frederick Ronald SINFIELD, the defendant in this matter.

8. As I got out of the Police vehicle, SINFIELD immediately stated to me words similar to ‘My name is Rick. I am [Complainant 2]'s Carer.’ SINFIELD repeated this on numerous occasions and went on to state ‘I started knocking on her door since 9:00am this morning but the front door was closed which is odd for her because the front wooden door is usually open with the security door closed. I knocked on her front door again at 11:00am and again at 1:00pm and the front wooden and security doors were closed. At around 2:00pm I went around the back and peered through the bedroom window and saw [Complainant 2] lying on the floor between the wall and her bed, surrounded by clutter.

9. I took down SINFIELD's personal details in my Official Police Diary and brief notes about this conversation. As SINFIELD lived close by, I advised him he could go home and I would speak with him soon.”<sup>10</sup>

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<sup>6</sup> *Evidence Act 1977*, s 130. That section preserves the discretion to exclude on the basis of unfairness, which may lead to the exclusion of evidence of statements made by an accused (*McDermott v R* (1948) 76 CLR 501), but not other evidence (*Police v Dunstall* (2015) 256 CLR 403).

<sup>7</sup> *Bunning v Cross* (1978) 141 CLR 54.

<sup>8</sup> Ex 5.

<sup>9</sup> Throughout this judgment, all excerpts from the transcript are set out as they appear in the exhibits even though there are some obvious typographical and clerical errors.

<sup>10</sup> Statement of PCSC Wheeler 17 November 2015, paragraphs 7-9.

[25] Later PCSC Wheeler said:

“32. Whilst I was speaking BABB,<sup>11</sup> I could see the front door of the house. The wooden door was open and the security door closed. I observed Frederick SINFIELD sitting next to the front door and it appeared as if he was attempting to listen to conversations inside.

33. I approached SINFIELD and had a conversation with him.

*(I advised SINFIELD he could go home and if I would contact him with any updates regarding [Complainant 2]. SINFIELD stated that he was concerned for [Complainant 2] because he was her carer.)* SINFIELD shook my hand with his right hand and walked towards his house on Bushlark Avenue.”<sup>12</sup>

[26] No challenge was made to the admission of evidence of these conversations with PCSC Wheeler.

[27] Detective Acting Sergeant Cameron was also at the house. She spoke to the accused and he agreed to accompany her to Hervey Bay police station. She drove him to the police station and there was conversation in the police car. That conversation was recorded.<sup>13</sup> Initially, DAS Cameron introduced herself and then:

“SGT Cameron: And I believe that you’re a witness and you’ve rang up the ambulance.

Sinfield: Yep.

SGT Cameron: Alright, we’re just wondering if you’re able to come down the station, give us a statement about what happened--“

[28] After a short discussion where the accused expressed concerns about leaving his mother:

“SGT Cameron: If you come down and give us a statement?

Sinfield: Yeah.

SGT Cameron: Yeah no worries, alright. Well I’ll take you down in that car if you like.

Sinfield. Yep.

SGT Cameron: And we’ll bring you back.”

[29] During the drive to the police station, the accused and DAS Cameron conversed about various things including some things relevant to the investigation. The Crown though does not intend to lead the contents of the conversation at the accused’s trial.

[30] During the drive, DAS Cameron received a telephone call from another officer. She said this, presumably within the accused’s hearing:

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<sup>11</sup> A paramedic called to the scene and who was treating [Complainant 2].

<sup>12</sup> Statement of PCSC Wheeler 17 November 2015, paragraphs 32-33.

<sup>13</sup> Ex 6.

“SGT Cameron: Good, good. I’ve just got um, we’ve just got a witness that’s gone over there and found her today and we’re bringing her back, bringing him back to the station. That’s Frederick Sinfield ...” (emphasis added)

- [31] Once the accused arrived at the police station, it was intended by police that he would be interviewed by two police officers, PCSC Wheeler (who had been at [an address in Eli Waters]) and Detective Senior Constable Dehnert. The two police officers entered the interview room with the accused and there was a conversation which occurred before the interview commenced (the conversation before the interview). It is not suggested that there is anything sinister in the police speaking to the accused before the commencement of the formal interview. The conversation before the interview was recorded.
- [32] The conversation before the interview is not intended by the Crown to be led at the trial but is relied upon heavily by the accused in the current application and it is appropriate to set it out in full:

“CW<sup>14</sup> Ok Now what we gotta do

FS<sup>15</sup> Yeah

CS Um as I said we gotta have a talk to you about what’s happened today

FS Hm

CW We used to do things like a typed statement but

FS You do videos

CS 2000, 2015

FS You do video tapes

CW Yeah

FS Yeah that’s OK

CW Um considering the nature of what’s happened today um she’s got some quite substantial injuries

FS Yeah

CW Um and to be honest we are not sure if she is going to live

FS What

CW Ok so um

FS You got to be joking

CW Yeah so she’s got some quite serious injuries

FS Fuck

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<sup>14</sup> A reference to PCSC Wheeler.

<sup>15</sup> A reference to the accused.



CW So this is basically how we get peoples' statements

FS Yeah

CW You won't be the only person we will be getting a statement from. A lot of people

FS Yeah I know. Shit

CW This is how we do it unfortunately so mate if you don't mind sitting over there for me

FS Yeah

UI

CW So for the moment I'll just have to grab it off you

GD<sup>16</sup> So is it Frederick Freddy Fred

CW Rick

FS Just call me Rick please

GD Rick Sorry I

CW Yeah (laughs) So what's your middle name

FS Ronald

CW Ronald

FS You're kidding

CW So she's still up at Hervey Bay Hospital

FS I don't know

CW She is she is still is at the Hervey Bay Hospital

FS Nice lady ....UI

CW Mmmmmm I have met her before

FS How much damage has been done?

CW Look she has got some head injuries

FS Yeah

CW Apart from that I'm not a doctor so I'm not sure and um

FS So if I don't go there if I didn't go there she would be dead

CW Quite possibly.....yeah

FS Fuck.....It was a shock to me when I saw her in there

GD Chris what is your number

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<sup>16</sup> A reference to DSC Dehnert.

CW 22320

GD What are we 04

CW 28.....So when we start I will read things out some proforma things out that get read to everyone they might sound a bit silly they might. You might be sitting there saying why are you saying this to me it's just a procedural thing ok

FS Ok I got a case against the Police already so

CW Against the Police

FS Especially when Police Prosecutors make false statements to the CMC

GD Sorry Um Rick so it's Frederick

FS Yeah Frederick

GD And your middle name

FS Ronald

GD Ronald

FS Sinfield

GD S I N F I E L D

FS Yep

GD And your date of birth

FS 24th 5th 55

GD How old does that make you mate

FS Hmm

GD How old are you

FS Ahhh 60....Yeah you will hear about it I'll tell you that now especially when the Police superintendent gets it

GD Ok this thing's just warming up

FS Makes it hard when you're talking to someone like an investigator

CW Sorry

FS Makes it hard when you're talking to an investigator

CW Yeah

FS Cause that's what I am

CW Yep

FS Ok..So I do work and I find out things what people do

CW Ok

GD We good?

CW Yeah we're good

FS Nothing against you

CW Yeah" (emphasis added)

[33] The interview then commenced. At the time of the interview police were unaware of the circumstances giving rise to counts 1-3. Their investigation then proceeded initially only into the assault of [Complainant 2], which ultimately lead to her death. During argument on the application I was referred to many passages in the interview. Some parts should be set out. The first exchanges, including the giving of the caution, are important:

"CW Okay now this is an interview being held at the Hervey Bay Police Station. It's now the 4th day of July 2015, Saturday the 4th day of July 2015. Now the time is nine minutes past six pm in the evening um now the date and time is set up on the screen there. Do you agree with that date and time?

FS I agree

CW Do you agree that we are at the Hervey Bay Police Station?

FS Yep

CW Okay now my name is Plain Clothes Senior Constable Chris WHEELER my registered number is 22320 and I'm from the, Maryborough Police Officer from the Maryborough Criminal Investigation Branch and that's my ID there okay because obviously I'm not in, I'm in arrr uniform?

FS Yeah Yeah

CW And what, I have an off sider here with me today

GD Okay my name is Detective Senior Constable Glen James DEHNERT my registered number is 7679 and I'm currently attached to Maryborough Criminal Investigation Branch

CW Alright and now just for the purpose of the tape do you mind explaining by introducing yourself, your full name?

FS My name is Frederick Ronald SINFIELD I live at 7 Bushlark Avenue, Eli Waters

CW What's your date of birth?

FS 24th of the 5th fifty five

CW Okay. Now is there anybody else in the room who hasn't, who has not identified themselves?

FS No

CW So there's nobody hiding behind

FS Nobody UI chair

- CW yeah screens or under tables or things like that
- FS Yeah
- CW Now have you been interviewed by police within the last 24 hours?
- FS No
- CW Now this evening I'm investigating an incident that's taken place um at [an address in Eli Waters], ok
- FS Mmhhmm
- CW Um it appears there's been an incident there involving an elderly lady
- FS Mmhhmm
- CW Ok. Who's now, who's received a, some head injuries. And she's at the Hervey Bay hospital, currently
- FS That's UI
- CW Um so you, you understand what we're talking about today
- FS Yes I do, yes
- CW is what I'm trying to get across
- FS I'm the one that called the ambulance
- CW Ok. Now I intend to ask you questions in relation to this matter in the form of what we call a record of interview
- FS Yeah
- CW Now by that I mean any questions I ask or answers you provide here today will be recorded on this electronic recording device. Now what I mean by that is the two black boxes on the table, they record everything you say
- FS Mmm
- CW Um and you can see the image there on the screen, you can see yourself, burnt onto CD that you saw us put in the machine before. Now at the completion of the interview you will be provided a copy of that recording if you so wish ok. Now do you understand the way in which the interview will be conducted today?
- FS Yes, yes
- CW Now if at any time during this interview you do not understand something that I have said um please tell me so I can explain it to you ok
- FS Ok

CW not that it will happen. Yeah. If there's something I'm saying that you're not quite understanding we'll explain it better, further for you ok

FS Ok

CW Now for the purpose of clarity and for later identification of who is speaking, would you please speak clearly and do not speak while someone else is talking. And obviously vice, versa. And do not answer questions by nodding or shaking your head

FS Right

CW

FS

You need to verbalise your answers. Do you understand that?

I understand

CW Now are you taking part in this interview of your own free will?

FS Yes I am

CW Ok. Now was there any threat or promise held out to you for you to take part in this interview?

FS No I'm happy to make a statement, UI a witness statement

CW Yeah fantastic. Now um do you understand what I mean by threat or promise?

FS Yes

CW Can you give an explanation as to what a threat or promise might be?

FS Promise ah by either the police saying that ah statement or give you a, we'll give you freedom

CW Ok. And the things like threats

FS Threats virtually the same, oh we'll kill you if you don't make a statement

CW And you agree nothing like that's happened to you this afternoon

FS No

CW Ok. Now do you understand that you're, that you're not under arrest?

FS I know that

CW Ok and that you're free to leave at any time unless you are arrested

FS Yeah

CW Ok. Now this bit's quite important. So I need you to

FS Yeah

- CW especially listen to this part. Before I ask you any questions I must tell you that have the right to remain silent. Ok. This means you do not have to say anything or answer any question or make any statement unless you wish to do so
- FS That's correct
- CW However if you do say something or make any statement it may later be UI as evidence
- FS Against you
- CW Now do you understand that?
- FS Yeah I do  
And what is your understanding of that?  
If you say something and then it's not true, it can be, it can be used against ya. So like UI what I'm doing about the police.
- CW Sure. So UI UI, this evening I'll ask you a series of questions ok. Um and it's completely your right to answer all of those questions, you can opt to answer some of those questions or you can answer no questions at all
- FS Yeah
- CW Ok it's completely up to you. Alright. But anything you do say is recorded in the manner which I've explained and can be used later on. Now do you consider yourself to be of aboriginal or Torres Strait islander?
- FS No
- CW UI UI. Now you also 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 any questioning
- FS No that's ok
- CW You also have the right to telephone or speak to a lawyer or a solicitor of your choice to inform that person where you are and to arrange or attempt to arrange for the lawyer to be present during questioning. Now if you wanted to telephone or speak to any of these persons we can delay the questioning for a reasonable time for that purpose. Now is there anybody you want to telephone or speak to a friend, relative 05:10<sup>17</sup>
- FS I think I thought I'm supposed to be a witness, not a a UI being accused of something. And that's what it sounds like there to me
- CW Well these are you know cautions, rights

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<sup>17</sup> A time recording reference.

FS UI basically when you're going to be a witness, you don't given false impressions in which you are given false impressions right now. Um now I'm a witness of something I found someone

CW Mmm

FS Right and to me I can understand why people don't want to be a witness

CW Mmhmm

FS because you turned the cards around. And that piece of paper it shows me that you're accusing me for something I never did

CW Look I'm not make any accusations

FS No but what it's got it down there is that you to understand I'm here to be a witness

Exactly right Right.

Not

CW And you can understand also that um there's been an incident this afternoon

FS Yeah

CW and that we have to speak to numerous people about that incident

FS Yeah

CW Ok. Um you're the first person I spoke to today

FS Yeah

CW at the, at the address

FS Yeah

CW Um so I need to speak to as many people I can

FS Ok I understand

CW to find out what has happened FS

Yeah<sup>18</sup> (emphasis added)

[34] What followed then was questioning by the police officers about relevant events and, quite frankly, a number of matters which seem barely, if at all, relevant.

[35] Then: "FS Ok. I've given my statement, a witness statement of what happened today

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<sup>18</sup> Transcript interview lines 1-150.

CW Yeah”<sup>19</sup>

[36] Some time later:

“CW Telstra as well. No worries. Alright what look I might just go over how you’ve come to be here today? Um I obviously spoke to you this afternoon at the front yard of [an address in Eli Waters] sorry. I had a short conversation with you there

FS That’s right

CW Now I believe in the meantime, approximately an hour, maybe two hours later Detective Kath CAMERON, a female Detective has spoken to you

FS Yeah

CW and UI she’s asked ya

FS to come down to make a statement. Ah a witness statement

Ok in relation to this. Now I was I’ve spoken, I’ve seen you again

Mmm

CW and we’ve driven to the Hervey Bay Police Station

FS that’s right

CW and here we are now. Alright. Ok

FS Yeah

CW Alright. You agree with those versions. FS I

agree.”<sup>20</sup> (emphasis added)

[37] As the interview progressed the accused began to become concerned about his elderly mother left at home. This exchange occurred:

“FS Can you make it quickly please cause I’ve got a mum and she’ll be hysterical at the moment. Ok

CW Is there anyone we can send around there?

FS Hey

CW Would you like, would you like police to

FS No

CW pay her a visit?

FS that UI that would scare the shit out of her

CW Not uniform police, we can send

<sup>19</sup> Transcript interview lines 209 and 210.

<sup>20</sup> Transcript interview lines 366-383.



FS No that'd scare her, she won't answer the door. And that's the way it is.  
She's dementia. I said an hour and it's nearly close to two hours.  
Oh sorry an hour and twenty minutes

CW Ok

DS since I been here

CW And as I said you're free to leave whenever you want. You're you're, we're  
not keeping you here

FS I'll answer your questions for another ten minutes but I need a lift home

CW Ok

FS if you don't mind"<sup>21</sup>

[38] Then a little later:

"FS And if we can finish this up please

GD Certainly. What were you wearing when you went around this  
morning?"<sup>22</sup>

[39] What followed then was detailed questioning about the accused's clothing. Various  
other topics were covered and then this exchange occurred:

"FS And if your gunna continue doing this I'm gunna ditch this interview  
with you. Because I am got to get back to my mum. Otherwise  
I'm gunna have a problem. My mum might have a heart attack and  
I'll end up suing the police

GD That's ok

FS Now I've made this

GD Rick can I just say one thing. I'm extremely concerned about this person  
that you saw around there at the house

FS Yeah

GD Ok. For obvious reasons. We know that ah [Complainant 2]'s in  
hospital and it's probably fair to say that she's fighting for her life

FS Yeah

GD Ok. And all of a sudden you've nominated this random guy ah being  
at the house there today. So it's very important I believe that we know as  
much about this person as possible. Ok FS Alright. All I can tell you is  
he's tall, six foot two. he's big um wide. And he's wide. And he's  
wearing the work shirt type of thing. Greyish. He's got a mo. Um and  
that's about it. I can't, the black car's a sedan. I don't take notice of

<sup>21</sup> Transcript interview lines 914-932.

<sup>22</sup> Transcript interview lines 1101 and 1102.

anybody else's cars. Um my memory's starting to go too. I'm starting to get dementia like my mum sometimes. Um but um I, all I can think of is he is tall. Ah I haven't seen him before. I believe [Complainant 2]'s talked about him. Um supposed to do shopping or something. I'm not too sure. I've seen different guys"<sup>23</sup>

[40] The reference to the "random guy" was a reference to statements made earlier by the accused in the interview to the effect that there was a man in a black car who he had seen at [Complainant 2]'s house. Then later on:

“FS Well. Yeah. Can we wrap this up? Sorry mate but ah my mum hasn't had tea and if she doesn't have tea, we're gonna have another victim in hospital. Ok and I'm not joking my mum's got a serious problem

GD UI UI I know I don't doubt that

FS UI I'm not being rude or anything

GD Nuh and I greatly appreciate

FS I was told, I was told UI only take an hour

GD But we didn't realise the extent

FS Yeah

GD of [Complainant 2]'s injuries.

FS Yeah

GD Ok. And also we believe that um we have suspicions that she's been assaulted ok

FS Yeah

GD So somebody has seriously assaulted her

FS Yeah

GD And as a result she's fighting for her life

FS Yeah

GD Ok. And you mentioned this this person ah come to her door

FS Yeah UI I mentioned it. And

GD It could be our guy

FS I don't UI, I don't know. It's hard to say. Ah UI I'm not gonna say it's that guy there. Or that guy there. I don't know and you can't accuse people

GD Ok alright. Well in saying that

---

<sup>23</sup> Transcript interview lines 1178-1200.

FS Right and that's it

GD Was it you?

FS No it wasn't. And I'm UI I'm afraid no"<sup>24</sup> (emphasis added)

[41] It can be seen that in this passage the police have asked the accused whether he assaulted the deceased. He denied that. Very shortly thereafter:

"FS Ah well the thing is I like to I'm gunna stop this interview now. Um cause I feel that I've been the victim now. I'm the, you're telling me I'm doing it. No way. Um I care for my people I love. Right. But the thing is I need to get her home, get home and cook tea up. It's now getting too late and it is, it's twenty five past seven. And my mum has to have tea at six o'clock.

GD Ok alright

FS Right you gotta understand I'm looking after someone and I don't want someone to be in hospital having UI UI

GD Ok. Alright Rick can, can you give me five minutes?

FS Alright give you five minutes

GD I just want to go and talk to ah talk to my boss, tell him where we're at and if so make some arrangements to give you a lift. Obviously you haven't got your car and all that sort of stuff. So you just want to hang sit here hang with Detective WHEELER

FS UI...UI

GD Perhaps if you might even want to go over um ah this other guys

FS Yeah

GD And perhaps more, just go over again what you saw when you first walked into that room. You know where [Complainant 2] was and what she did and all that sort of stuff. So just hang there hey (DEHNERT leaves room)"<sup>25</sup>

[42] It can be seen that DSC Dehnert indicates to the accused that he is arranging a lift home for him. That was not true. DSC Dehnert was in fact speaking to his superiors with a view to deciding whether or not to arrest the accused. When DSC Dehnert leaves, PCSC Wheeler continued to speak to the accused.

[43] The accused then raised with PCSC Wheeler that he wished to go home:

"FS Couldn't tell you much about it. Anyway look, I gotta UI UI um I'm more worried about my mum too

<sup>24</sup> Transcript interview lines 1451-1478.

<sup>25</sup> Transcript interview lines 1495-1514.

CW Yeah no fair enough. Um I think Detective DEHNERT's making some arrangements in relation to that. Um..."<sup>26</sup>

[44] Before DSC Dehnert's return to the interview room, this exchange occurred between the accused and PCSC Wheeler:

"FS Why does people why do youse treat witnesses like shit

CW Do you feel I'm treating you like shit today?

FS Yes

CW Well I don't mean to give you that impression. As I've said to you

FS You treat me and I'm gunna UI I'm, this is on the tape

CW No that's fine

FS Right. You treat me like I am the guilty one. I went there to do a job not to

CW Yeah mmm

FS Right and quote me this, why do police UI why do people now don't trust police anymore. I can tell you why. Cause the way put it you're pushing, you try turning cards around turn this, around turn that

around. When people try to tell you the truth you don't believe them. And this is fact

CW That's alright

FS And the fact is I've never like trust in police now after what a police prosecutor did. And I UI UI

CW And you mentioned that

FS Yeah and I'll mention it again. Straight out he made UI a false statement. Why do you police make fase statements?

CW It's a very generalised accusation you're making there

FS I am making an accusation and it's true

CW UI UI. That's a side

FS Now I'm gunna tell you the same thing I'm gunna like you're doing to me

CW Would you like me to explain ah the reason why I'm asking you questions tonight?

FS Look I understand but I was told and quote this it'll only take one hour. I've been here close to more than one hour. And I told my mum I would only be about one hour

---

<sup>26</sup> Transcript interview lines 1574-1577.

CW Sure

FS If I go home and she's down on the floor I'm gunna sue the hell out of you

CW Mmhmm

FS because you made a false accusation

CW Ok that's fine

FS Right now I'm

CW You're not, I explained to you you're not under arrest

FS I know that

CW and you can leave whenever you like

FS But I need transport

CW And I believe um Detective DEHNERTs making those arrangements now

FS Ok. Look I come down to help yous

CW The reason why we, you have to understand that what has happened to [Complainant 2] is quite serious, very serious

FS I know it's quite serious

CW and we have to do everything we can to find out what happened to [Complainant 2]. Say if you're mum

GS I'm

CW or if you were a victim or somebody you loved was a victim, you'd expect police to do their job and do it properly. Do you not agree?

FS I agree

CW Ok. Um and so you have understand if this was your UI

FS But after I seen, after I seen what was done, no you UI I'm gunna quote this

CW Say this was your UI your mother was injured for example

FS Yeah

CW You you would want us to um to find out what happened. And that's what we're trying to do today FS Yeah. Right.

CW I'm not accusing you of anything"<sup>27</sup>

[45] As I will later explain, PCSC Wheeler had been told by a superior to treat the accused as a suspect. It must have been obvious to PCSC Wheeler from the conversation before the interview, and the initial exchanges during the interview, that the accused believed

<sup>27</sup> Transcript interview lines 1613-1670.

he was assisting police as a potential witness and did not think police regarded him as a suspect. PCSC Wheeler actively encouraged the accused to hold a view that he (the accused) was a witness, not a suspect. In that context, to engage in some debate with the accused as to whether police had actually levelled an accusation against him was both pointless and disingenuous.

[46] Still while only PCSC Wheeler is in the interview room with the accused:

“CW Well I’m interested in what’s happened to [Complainant 2]

FS But the fact is I came here as a witness

CW Mmm

FS not as the person

CW We’re making arrangements to get you home right now ok FS Yeah ok. Look I’m trying to help you out. But when someone says one hour and it’s ended up gunna be two hours, three hours, four hours. And then I feel like what’s going on here. You’re accusing me for something I didn’t do

CW I haven’t accused you of anything

FS Ohhh that’s what it sounds like CW

And I and I apologise UI you fell that’s the

impression you’re getting. But I’m not

accusing you of anything.”<sup>28</sup> (emphasis

added) [47] DSC Dehnert then returned to the

interview room and this exchange occurred:

“FS Right there’s ten, it’s twenty to, you said five minutes at twenty five past. Ah I’m gunna say I’m closing this interview right now

GD Alright that’s fine, so that’s your position

FS I have to

GD Rick at this point in time you don’t want to answer any questions

FS Not now

GD Ok. Alright Rick um our UI investigations ongoing and at this point in time I’m placing you under arrest

FS What for

GD Placing you under arrest for the Grievous Bodily Harm

---

<sup>28</sup> Transcript interview lines 1684-1696.

FS I haven't done nothing

GD to [Complainant 2]

FS I am a witness

GD Sorry, [Complainant 2]. Ok you understand

FS I haven't done nothing

GD You're under arrest

FS What for

GD Ok, for Grievous Bodily Harm

FS I haven't done nothing

GD Its serious assault of [Complainant 2], which has resulted in

FS I haven't done nothing

GD Ok. That's ah, that's your statement

FS When did this take, when did this take place?

GD What, what, sorry what do you mean?

FS When did the assault take place?

GD Well we're alleging it's probably occurred sometime today

FS UI

GD I can't rule out that it did not occur yesterday

FS I only came in

GD but certainly within the next 24 hours

FS I came in at one fifty. If you allege that, if you charge me. But I will go to Facebook and I will say facts about the police department, about police prosecution. You're accusing me for something I didn't do. I came in as a person for faith to give an evidence, give a statement. I've been a witness. I did not do anything to anybody. I've been mowing my lawn today. The fact is I've got a lot of witnesses that seen me mowing my lawn. Now you're accusing me for something that I didn't do again, it's going to be very silly to you people first facts, find out when the damage was done. Don't accuse me of saying it was done today. Find out when it was done. Before you accuse me for something I didn't do. Because you are accusing me now"<sup>29</sup> (emphasis added)

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<sup>29</sup> Transcript interview lines 1780-1820.

[48] Despite the fact that the accused had been cautioned,<sup>30</sup> there seems to be some dispute as to whether he was a “suspect”. Apparently before the interview was commenced, there had been communications between the interviewing police officers and one of their superiors. The upshot of all that was that while the interviewing officers assert that they had not formed the view that the accused was a suspect, he was, by direction from above, to be treated as a suspect. This exchange occurred at the committal proceedings during the evidence of PCSC Wheeler:

“By that stage you’d already decided he was a suspect?---Not me personally, but it - - -

It had been - - - ?---It had been- - -

You’d been told he was a suspect?---Yes.

He was going to be treated as a suspect. He was going to be cautioned and warned as a suspect?---Yes.

Yes. Not a person of interest, a suspect, yes?---A suspect, yes.

So when you say in your statement at paragraph 43 that he was a person of interest and not a suspect that is inaccurate?---Forty-three [indistinct] It was decided that Sinfield was a suspect as opposed to a person of interest.

As a result of this conversation it was decided that Sinfield was not a suspect in this matter as opposed to a person of interest?---No, that’s a - that’s a typo.

That’s a typo. All right. So what you should say is he was a suspect - - - ? --- Correct.

- - - in this matter as opposed to a person of interest?---Correct.

He was a suspect as opposed to a person of interest. All right. So then you thought he was a suspect when you said to him this. This is in your recording with him prior to the interview. And this is you speaking. It starts off by saying it’s an interview transcript prepared by the police?--- Yes.”<sup>31</sup>

[49] What followed at the committal was cross-examination of PCSC Wheeler on the contents of the conversation before the interview.

[50] And then later at the committal:

“Thank you. But, you knew, he was, in fact, a suspect?---The he was to be treated as a suspect, but, I, myself, hadn’t formed that opinion.

But the police officer who was going to conduct the interview, and was right next to you, had formed that view?---I don’t know what opinion he had formed.

Well, didn’t - well, who was it who formed the opinion he was a suspect?--I believe it was the OIC.

<sup>30</sup> See ss 415 and 432 of *Police Powers and Responsibilities Act 2000*.

<sup>31</sup> Transcript committal proceedings 1-70 line 40 to 1-71 line 20.



Your senior officer?---Senior officer.

Senior to both of you, told you he's a suspect. Is that right?---Again, I don't - I was not present for all of the conversation.

No. No. But, you have told us you were present - - -?---But that was - that was the point that I walked away from the conversation with - - -

You told us you were present for the conversation where it was decided he was a suspect?---Yes. Yes.

Were you told by your senior officer, that he was a suspect?---Yes. And, yet, you tried to convey to him that he wasn't a suspect, he was a witness?--I was trying to treat him as a witness, because, at that stage, because, I, myself, hadn't formed that opinion that he was a suspect.

My goodness. Your senior officer had decided he was a suspect and you decided to treat him differently."<sup>32</sup>

[51] When the interview was completed police took the accused (now in custody) to the watch house. Conversation between the accused and the police continued and was recorded.

[52] Of course by the time these further conversations occurred, the accused could have been in no doubt that he was suspected by police of assaulting [Complainant 2].

[53] The opening exchange in this part of the conversation with police is as follows:

“FS And I refuse to take any more from you until you

GD That's fine Rick, that's your legal right

FS I have done nothing

GD Can I just get you to follow me please

FS I want a Solicitor too thanks GD

Certainly

FS Your charging me with something I didn't do

GD Again You haven't been charged with anything

FS Then why are you taking me to the Watchhouse for

GD So that I can continue my investigation. Can I get a Watchhouse Keeper Sergeant."<sup>33</sup>

[54] For various reasons the accused was taken to the watch house and then brought back into the interview room and the conversation continued, relevantly:

“GD So we're just going back to the interview room Rick

<sup>32</sup> Transcript committal proceedings 1-73 line 45 to 1-74 line 25.

<sup>33</sup> Transcript page 2 lines 1-11.

FS Ok

GD I get you to have a seat back where you were

FS Mmhhmm

GD At this point in the investigation, what we're doing is trying to preserve everything that, anything and everything of evidentiary value ok

FS That's ok

GD UI so obviously since you've been arrested we are obviously consider you a suspect for the offence, for the serious assault of [Complainant 2] 1:46:21

FS I didn't do nothing

GD And um UI

FS How could do I ... look I've been on my lawn today. I've been mowing lawn. Now right the fact is all day I've been outside mowing lawns, doing the edges. You can go around there, you can see. There's one part I haven't done. Right. There's, I've got a bad back. I have to get on my hands and knees and pull out things. I've said the truth. Now you only have to have a look at it. You can see it's been mowed today.

GD So do you want to answer some more questions or not

FS Yes<sup>34</sup>

[55] A little later:

"GD I, I'll just stop you there. Yep. Before you, you mentioned that you didn't want to answer any questions. You understand that

FS Mmm

GD Ok. And now we're asking you more questions

FS Yeah right

GD So just keep in mind that you don't have to answer any of our questions ok

FS I'll answer them

GD if you do it ... you're happy to do it

FS Yeah

---

<sup>34</sup> Transcript page 3 line 50 to page 4 line 68.

GD You understand that?

FS Yeah<sup>35</sup>

[56] And then:

“GD Ok so I don’t want you to think that if you sit here and answer some more questions that we aren’t going to take you down to that watch house

FS Yeah UI UI

GD So are you happy to answer more questions

FS Yeah. I’m here anyway<sup>36</sup>

[57] The discussion turned to various topics concerning a lady referred to by the accused as Cindy and other persons associated with the deceased. Then:

“FS Do you know what I should have done when I went up there? I should have gotten in, got Cindy and Cindy and I would have gone in together. That’s what I should have done, because ... having a witness to see UI now being accused of something I didn’t do. It’s unreal. It’s unreal. Have you got the reports back from the hospital when the injury occurred?”<sup>37</sup>

[58] The discussion continued. There were many questions about the accused’s movements and at one stage a type of re-enactment of the accused’s discovery of the deceased was initiated.<sup>38</sup> On numerous occasions during the second part of the interview the accused is invited to speak to the police and he does so.

[59] The police took steps to ensure that the accused realised that he need not speak to them. This exchange occurred:

“GD Um UI fact that you know continued to to answer questions. We’ve thrown different questions at you from you know from every different direction. And asking you to do things. So you understand that you’re doing this of all, your own free will

FS Yeah

GD You understand that. Are you

FS Yep

GD Do you feel pressured in any way to to answer these questions or do the things that we’re asking you to do or anything like that? FS I feel that I’m threatened, I’ve been threatened virtually

---

<sup>35</sup> Transcript page 10 lines 244-254.

<sup>36</sup> Transcript page 11 lines 262-266.

<sup>37</sup> Transcript page 16 lines 427-431.

<sup>38</sup> Transcript pages 23-24 lines 631-656.

GD How's that?

FS Saying oh you're under arrest

GD Ok

FS Um because I haven't done anything. And that's the problem. I went over there to do a job and when I went inside I found her. Now I'm being told I'm the one that's doing it. No that's not right

GD Except where you're not being charged. you understand that? You have not been charged

FS You first you said, well holding me, holding me like this it's virtually saying you're under arrest. you have been charged

GD No it means that you come under our suspicion

FS Well

GD Ok

FS Yeah

GD You're a suspect in my opinion"<sup>39</sup>

[60] The police then advised the accused that they intended to conduct a "non-intimate forensic examination" which involved seizing his clothing.<sup>40</sup>

[61] The police then invited further discussion:

"GD Once this guy comes in and you know does his examination Rick, takes possession of your clothes. You understand it might be the last opportunity I get to talk to you

FS Hmhhmm

GD It will be last opportunity you know for quite some time for you to tell me you know what you know about this matter

FS I'm telling you the truth. I don't know nothing about

GD Sometimes, sometimes people argue Rick, argue for whatever reasons. Push may come to shove FS There's no, there's no arguments between [Complainant 2] and I ok. If there was any arguments I wouldn't have gone shopping with her.

I wouldn't even help her. And even my my ah owner of the house Trea she can verify that she saw [Complainant 2] in the chair with me on Friday afternoon. And I don't have to lie about that. This she served um [Complainant 2]. And my and Trea's phone number is in my phone thing. You can leave a text. Cause I sent her a text,

<sup>39</sup> Transcript page 37 line 1025 to page 28 line 1049.

<sup>40</sup> Transcript page 53.

- Trea, for saying I was gunna charge her \$60 for rent ah holding your stuff.
- Didn't like that. But I am, what I'm saying is truthful. Yeah you can say what you like. I'll get a solicitor. I'll get all the paperwork too
- GD Like I said once this guy comes in and takes possession of your clothes and what not, it might be the last opportunity you get to talk to me about what happened
- FS Well I've got nothing else to say to yous though
- GD What if all of a sudden [Complainant 2] comes good and can tell us what happened
- FS Well she can tell ya
- GD Is she UI is she going to say, is she going to mention your name Rick
- FS I don't know. Because it straight out
- GD This is your chance Rick
- FS Look UI you have to UI
- GD If [Complainant 2] comes, comes good and she tells us what happened
- FS Look I'm gunna tell you again
- GD What is she gunna say?
- FS I don't know, sorry. I don't know. So you say [Complainant 2]'s come good
- GD No. I just wish and hope she would
- FS You're telling me, you're telling me
- GD or she does
- FS Yeah I'm hoping
- GD And she can tell me what's happened
- FS I'm hoping too. But I'm not getting accused of something I didn't do. Now you're saying I supposed to be done today. You're accusing me of saying I did it. And that's what you are saying. You can continue to do that because I will have a solicitor. And then I will sue the police force for wrongly accusing me. When you find out I am not the guy, then I will sue. Sue you like that
- GD Well who's to say there even is a guy? What's to say that [Complainant 2] hasn't just tripped and hit her head
- FS Well I don't know but you're accusing me of something I didn't do. I only went there to do my job. Alright now you're accusing me. I'll tell you what I will never help the police again. If I see something I'll just turn my eyes. Never help the police. UI refuse

to help any of you. Because you're accusing me for something I didn't do. That's pathetic. Lie to me from the start and you have lied to me.

I supposed to be a witness UI. Now UI saying you're under arrest. I believe you did it. You did it today. Come on, wake up to yourselves. You're gonna be more in strife when I get through with you. You want to charge, you charge I love it. Go for it

GD I found it interesting earlier there Rick when I spoke to you about, advised you that you know you're under arrest for causing Grievous Bodily Harm to [Complainant 2]

FS I did not

GD today, that you suddenly then went off on a tangent about it being today and

FS Tomorrow it could be

GD and perhaps why wasn't it perhaps yesterday or earlier

FS It could be done anytime, I don't know. But you're accusing me for something I never did"<sup>41</sup>

[62] Of course parts of this exchange are of a nature of cross-examination. By the question "Well who's to say there even is a guy", DSC Dehnert is suggesting (not too subtly) that the accused has some knowledge of the cause of [Complainant 2]'s injuries; by assault. Of course the police had by that stage put to the accused that they held the belief that she had been assaulted.

[63] Notwithstanding that the accused makes it quite clear that he doesn't want to speak, the police keep asking him questions, in some cases about innocent non-contentious matters before then returning to the subject of the investigation:

"FS Ah what the word you're using. Um you accused me of um what is it um, what what ever, what did you mention. You're holding me to it saying that I'm the one. I'm not. I only went over there to do a job. I didn't know where [Complainant 2] was. I thought she was out. And Cindy will back the same thing about the door business. I'm not talking now. Shut

SILENCE for 70 seconds

FS Mmm

GD What interests do you have?

FS Not much

GD Do you support a, support any certain sporting teams?

FS I support the Royal Fire service. I support the Heart Foundation. And I support the Qld Rural Fire Service. I support

---

<sup>41</sup> Transcript page 56 line 1577 to page 58 line 1641.

- GD In in what capacity?
- FS Donations
- GD You a volunteer or donate
- FS No I donate, donate fifty dollars to them. There's one on the table I was gunna pay too in NSW ah Rural Fire Service.
- GD So how do you fill your day in usually
- FS Oh I do tinker around the in the yard. I've got a trailer that needs fixing. I'm starting to weld that up. Um I do a lot of things. I do housework. Um clean. I do the washing, the ironing. Um do everything. Keeps me going. I even washed the walls down in the place. Go round vacuum cleaning. Um got a nice clean house. UI UI
- GD So what's the hold up?
- CW We're waiting for COLESY with a tarp
- GD Ok
- CW He's just finishing up at the hospital
- GD And what about your mum Patricia. Is she is a professional woman at all or
- FS She used to be. And ah until dementia and the heart problems and everything else. And strokes. Now she does trauma bears for the kids
- GD Ok
- FS And if she forgets a stitch in which she does and she remembers the next time or someone will tell her the stitch is. She is a very sick woman. And this is going to break her heart. I wouldn't be too surprised if she has a massive heart attack
- GD What's gunna break her heart
- FS What's yours done to me
- GD What have we done to you Rick?
- FS Well you lied to me from the start. You have lied. And for a UI for officers that turn around and say well we only, ah you're gunna be a witness. We'd like you to be a witness on what happened. The interview is only going to take one hour. No worries. You'll be home again. I said ok. Or if I knew this I'd a do it the next day. But um so I can feed my mum. Cook her tea up. She hadn't had nothing to eat since twelve o'clock
- GD She can't cook her own meals?
- FS No she can't

GD Can she make herself a cup of tea?

FS No

GD Can't even do that

FS No. I do it for her. She lifts her arms up, she has a heart attack.  
And if she has one tonight I'm gunna make it hit you

GD How does she drink her tea?

FS Hey black

GD No, if she can't lift her arms up, how does she

FS Oh no she she look, she can try and make her tea but if her arms go up  
certain level she has a attacks. She's got, she's got a block artery  
underneath the heart. She's got an aorta valve that's blocked. She needs  
a bag

GD Like I said there was blood splatters in the room where [Complainant 2]  
was found

FS I know nothing about it

GD How did we get blood splatters?

FS I would not have nothing to do with it. Sorry I don't know nothing about  
it. (singing - I don't know nothing about it. I have said the truth. And  
I've been convicted for something I never did) And these bloody idiots.  
Oh by the way I'd like to see a solicitor. Thank you.  
I'm not talking to you now until I see a solicitor

GD Yep

FS Ok

GD That's fine Rick. I can um

FS If you're not going to let me

GD I can get to I I can't get you a solicitor. I can get you a phone book to ring  
a solicitor

FS Nuh

GD It's up to them whether or not they want to come in and all that sort of stuff

FS That's right. Well I need, I need a solicitor if your gunna accuse me for  
something I didn't do

GD Yeah no I'm not, I'm not going to question you. I

FS You are accusing me for something I didn't do

GD Sorry I'm not gunna question you anymore. UI<sup>42</sup> (emphasis added)

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<sup>42</sup> Transcript page 62 lines 1774 to page 65 line 1855.



- [64] Also of note in this passage is that the accused squarely asserts that he was deceived into believing he was a witness not a suspect. He had made similar statements earlier. Neither of the police challenged him on the correctness of those assertions.
- [65] A search warrant was obtained from a magistrate to search the accused's house. That search warrant was executed in the presence of the accused and the proceedings were recorded. That occurred on 5 July 2015. There was a visit to the accused's house on 7 July and on 9 July there was a discussion with him arranging a walk through of the crime scene. All this was recorded but the Crown do not seek to lead those recordings in evidence in the trial.
- [66] On 9 July 2015 the accused consented to participate in the walk through procedure and on the same day he did so. He explained various things to the police during this procedure and answered numerous questions. The Crown seeks to lead that recording.
- [67] The accused was released from custody. He was then arrested and participated in an interview with police on 29 July 2015. That was recorded and the Crown seeks to lead it. At the conclusion of that interview he was arrested again and charged. There was yet a further interview (although very short) at the prison on 31 August 2015 which the Crown does not seek to lead.

#### **The cases for exclusion or admission of the interviews**

- [68] Statements made by an accused to police are prima facie hearsay but a statement against interest is an exception to the hearsay rule where it is voluntarily made. By s 10 of the *Criminal Law Amendment Act* 1894, a confession is not voluntary if induced by threat or promise. However, even if not vitiated by a threat or promise, a statement may not be voluntary as a result of other circumstances, sometimes called "basal involuntariness".<sup>43</sup>
- [69] For s 10 to be engaged, a statement against interest must be a "confession".<sup>44</sup> The accused here has not made any confession. Indeed, the statements are all intended by him to be exculpatory. During the discussions with police, he clearly and repeatedly asserts his innocence. That does not mean, of course, that the statements are irrelevant to the Crown case. Mr Whitbread for the Crown seeks to rely on the statements as lies constituting post-offence conduct amounting to an admission of a consciousness of guilt.<sup>45</sup> Mr Whitbread submits that apart from the lies contained in the various interviews, the accused makes statements describing things he has done which the Crown seeks to rely upon as post-offence conduct.<sup>46</sup> In addition, I am sure that the Crown will rely on some of the statements as being true and showing the relationship between the accused and [Complainant 2] and that will go to such things as opportunity and perhaps even motive.
- [70] Mr Benjamin for the accused does not submit that the statements were made other than voluntarily. He concedes therefore that the evidence of the making of the statements is

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<sup>43</sup> *McDermott v R* (1948) 76 CLR 501.

<sup>44</sup> *Attorney-General for New South Wales v Martin* (1909) CLR 713 at 734-735, *R v McKay* [1965] Qd R 240 at 242 and *R v Leach* [2018] QCA 131 at [191] per Applegarth J in dissent on other points.

<sup>45</sup> *Edwards v R* (1992) 178 CLR 193.

<sup>46</sup> *R v Baden-Clay* (2016) 258 CLR 308 and *R v Trebeck* [2018] QCA 183 and the cases considered there.

admissible. Those concessions are clearly properly made. Mr Benjamin seeks to have the statements excluded in exercise of discretion.

[71] There is of course no doubt that there are discretionary bases upon which evidence may be excluded in a criminal case. Different considerations arise for the exclusion of the evidence of statements made by an accused than arise for the exclusion of other evidence.<sup>47</sup> Here, Mr Benjamin relies on two recognised bases of discretionary exclusion, as previously outlined:

(iii) unfairness;

(iv) impropriety of the police.

[72] Unfairness is a basis to exclude statements by an accused when it is unfair to the accused to admit the statements.<sup>48</sup> What is critical is not whether the police have acted unfairly, but whether it is unfair to the accused for the Crown to lead the evidence in the accused's trial.<sup>49</sup> Often of course the relevant unfairness will arise because of the actions of the police; perhaps acting unfairly.

[73] Often, the admission into evidence of statements made by an accused will be unfair because the circumstances in which the statements were obtained by police cast doubt upon the reliability of the statements made. Reliability though is not the only characteristic which may lead to exclusion on the basis of unfairness to the accused. It is well recognised that if through circumstances the rights of an accused have been compromised and the compromise of those rights has led to the accused speaking to police in circumstances where he would otherwise have remained silent, then it may be judged to be unfair to admit the statements in evidence against the accused.<sup>50</sup>

[74] This is the primary submission made by Mr Benjamin. The accused did not give evidence before me on this application. There is therefore no direct evidence as to the accused's state of mind whilst being interviewed and no direct evidence from him that, but for the conduct of police he would not have participated in the conversations. Mr Benjamin though submits that having regard to the recorded conversations, I ought to infer that to be the case.

[75] Mr Benjamin submits that I should conclude that notwithstanding that police administered the statutorily required caution, their conduct led the accused to understand that he was participating in the conversations with the police not as a person suspected of committing the crime, but only as a person assisting the police with their inquiries: as a witness.

[76] As already observed, there comes a point during the accused's dealing with police where he becomes aware that he is a suspect. He makes many statements thereafter and indeed participates in a further formal interview on 29 July 2015.

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<sup>47</sup> *Police v Dunstall* (2015) 256 CLR 403.

<sup>48</sup> *Cleland v The Queen* (1982) 151 CLR 1, *Collins v The Queen* (1980) 31 ALR 257 at 312.

<sup>49</sup> *Van Der Meer v R* (1988) 62 ALJR 656 at 666 following *R v Lee* (1950) 82 CLR 133 at 154 and *Cleland v The Queen* (1982) 151 CLR 1 at 18 and *R v Swaffield* (1998) 192 CLR 159 at [53] following *Van Der Meer*.

<sup>50</sup> *R v Swaffield* (1998) 192 CLR 159 at [54].

[77] Mr Benjamin does not submit that any of those later statements were made other than voluntarily. He accepts that appropriate warnings were given and he accepts that if those statements stood alone, there would be no basis upon which their admission into evidence could be challenged. He submits though that the circumstances of the making of those later statements cannot be divorced from the circumstances of the interview conducted

on 4 July. He submits that the accused only participated in that interview on a particular understanding which was mistaken but then having given his version was effectively

“locked in” and that then led him to talk to police on later occasions attempting to maintain his position. In that sense, Mr Benjamin submits that the interview of 4 July adulterates all the accused’s subsequent dealings with police so it is unfair to lead any of the conversations against him.

[78] Mr Benjamin submits in the alternative that the evidence ought to be excluded due to impropriety being a breach by the police of s 431 of the *Police Powers and Responsibilities Act 2000* (the *PPRA*). That section provides: “**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.<sup>51</sup>
- (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 can not 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.”

[79] The term “relevant person” is defined in s 415 of the *PPRA* in these terms: “**415**

**When does this part apply to a person**

- (1) This part applies to a person (*relevant person*) if the person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence.
- (2) However, this part does not apply to a person only if the police officer is exercising any of the following powers—

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<sup>51</sup> Promulgated pursuant to the *Police Powers and Responsibilities Act 2000*.

- (a) power conferred under any Act or law to detain the person for a search;
  - (b) power conferred under any Act to require the person to give information or answer questions.
- (3) Also, nothing in this part prevents a police officer exercising a power under chapter 18A, including under the Road Use Management Act, section 80, as it applies under the chapter.

*Note—*

Chapter 18A applies the Road Use Management Act, section 80 for breath, saliva, blood and urine testing of persons suspected of committing particular assault offences.”

- [80] The *Bunning v Cross* direction is not concerned directly with the unfairness to the citizen, but rather the competing public policy considerations identified both in *Bunning v Cross* itself and *R v Ireland*;<sup>52</sup> the public interest in the conviction of those who commit crime, and the public interest in the protection of the individual from unfair or unlawful treatment.<sup>53</sup>
- [81] The *Bunning v Cross* discretion sits with the unfairness discretion as a separate basis for exclusion and can operate to exclude a confession.<sup>54</sup>
- [82] Mr Benjamin submits that the accused was with police “for the purposes of being questioned as a suspect”, so s 431 dictated that a caution be administered. While Mr Benjamin accepts that a caution was administered, he says that it is clear that the accused misunderstood the caution, yet the police failed to explain it to him as required by s 431(4). It is the breach of s 431(4) which Mr Benjamin relies upon to enliven the *Bunning v Cross* discretion. Mr Benjamin submits that once enlivened, the discretion ought to be exercised in the accused’s favour given, primarily, the conduct of police, the fact that there was a deliberateness about allowing the accused to labour under the misapprehension that he was a witness not a suspect, and the ease with which the police could have complied with the requirements of s 431(4).
- [83] Mr Whitbread for the Crown submitted that the admission into evidence of the initial interview is not unfair to the accused. He acknowledged, fairly and properly with respect, that there were some shortcomings in the way the police had handled the interview. He rightly pointed out that the issue is not whether the police had acted unfairly but rather whether it was unfair to admit the evidence.
- [84] Mr Whitbread’s submission was that various circumstances must have alerted the accused to the fact that he was a suspect. In particular, there was the continued use of the term “interview” and the fact that there was a high degree of formality about the process being undertaken by police. The accused has a significant criminal history and Mr Whitbread attributed to him a knowledge of police procedures.

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<sup>52</sup> (1970) 126 CLR 321.

<sup>53</sup> *R v Ireland* (1970) 126 CLR 321 at 335 following in *Bunning v Cross* (1978) 141 CLR 54.

<sup>54</sup> *Cleland v R* (1982) 151 CLR 1 at 8, 20, 23 and 33, *R v Swaffield* (1998) 192 CLR 159 at 188 and see the discussion of the principles by Dalton J in *R v Playford* [2013] 2 Qd R 567.

- [85] Not only did the accused always know he was a suspect, so submitted Mr Whitbread, but he took the opportunity to attempt to exonerate himself by speaking to police. Mr Whitbread developed this argument by reference to the transcript not only of the first interview, but later conversations with police where the accused very much protested his innocence and sought to explain himself.
- [86] As to Mr Benjamin's *Bunning v Cross* argument, Mr Whitbread submitted that police had not breached s 431. He submitted, quite correctly, that a caution had been given. However, he submitted that the evidence of PCSC Wheeler ought to be accepted which was to the effect that he, Wheeler, did not "reasonably suspect" that the accused had committed the offence. Wheeler was simply directed by a superior to treat the accused as a suspect.
- [87] Mr Whitbread submitted that if s 431 had been contravened by police, then the discretion ought to be exercised against excluding the evidence. He pointed to the seriousness of the offence and the fact that even if s 431 had been contravened, the accused well knew, he submitted, what the warning meant and well knew that he needn't speak to police.
- [88] Mr Whitbread, in a detailed written supplementary submission, identified parts of the interview of 29 July 2015 which he would seek to lead even if the first interview was excluded. He submitted that in the later interview the accused knew he was a suspect, received a warning, and spoke regardless, and in fact spoke of various things that he had not spoken about in the first interview.

### **Determination**

- [89] The accused, at least up until the time in the interview of 4 April 2015 when he was asked whether he assaulted [Complainant 2], obviously believed he was assisting police as a witness. He did not believe that he was a suspect. These are inferences that can be clearly drawn from the conversations with police.
- [90] DAS Cameron told the accused that she believed he was a witness and invited him to come to the police station to give a statement. During a conversation with one of her colleagues (who had telephoned her) and while the accused was in the police car being transported to Hervey Bay, DAS Cameron referred to him as "a witness".
- [91] The conversation before the interview was misleading. PCSC Wheeler told the accused "we gotta have a talk to you ...". That suggested compulsion.
- [92] It is hard to escape the conclusion that by telling the accused "we used to do things like a typed statement", PCSC Wheeler was trying to convey to the accused that he was a witness, not a suspect. In other words, notwithstanding that the interview would be recorded, as interviews with suspects are, all statements, including those taken from witnesses (as opposed to suspects) are recorded electronically. PCSC Wheeler was attempting to allay any concern that the accused might have with being involved in an interview which was being conducted as if he was a suspect.
- [93] The reference to police having to "read things out, some proforma things out that get read to everyone, they might sound a bit silly" always had the potential to dilute the

effect of the caution that was statutorily mandated. There is no legitimate reason why a police officer about to conduct an interview and about to administer a caution would speak like that to a suspect. For reasons explained later, it is very clear that the accused was in fact a suspect.

- [94] It is clearly open to conclude that PCSC Wheeler was deliberately attempting to dilute the caution, but there is no necessity to make a final finding about that.
- [95] When the caution was administered, PCSC Wheeler asked the accused to explain his understanding of it. The accused explained that any statement which he made which was not true could be used against him. That explanation is legally flawed. If the accused made a statement which was true, and inculpated him, then the statement may be used against him.<sup>55</sup> In any event the accused's stated understanding of the caution is completely consistent with what the accused obviously believed: he was assisting police as a witness, and as a witness, the accused thought, if he provided false information then there would be adverse consequences for him.
- [96] In the opening parts of the interview of 4 April 2015 the accused consistently referred to himself as a witness. The police did not tell him otherwise. When the police advised him of his rights to legal representation, the accused became concerned that accusations were being levelled at him. When he expressed those concerns to police, he said "I'm here as a witness". Rather than suggest otherwise, PCSC Wheeler responded "exactly". By responding in that way, PCSC Wheeler positively asserted to the accused that he, the accused, was being interviewed in the capacity as a witness; in other words, not as a person suspected as having committed murder. PCSC Wheeler's response misled the accused and effectively nullified the caution.
- [97] True it is that the accused had already given a version of events to the 000 operator. However, speaking to two police officers who suspected the accused of murder, is quite another thing. The accused realised that, hence his continued assertion that he was participating as a witness.
- [98] Mr Whitbread's submission that the accused seemed willing to keep talking to police has to be considered against the way in which the police were asking questions. On several occasions, the accused expressed a desire to terminate the interview, but through various techniques the police kept him talking.
- [99] There was nothing to suggest that the accused knew that he was a suspect at any time before he was expressly told that. The police had told him he was a witness and when the accused initially asserted that he was a witness, they agreed. Later, during the 4 July interview when he asserted that he was being interviewed as a witness, they did not correct him.
- [100] I find that the accused participated in the interview of 4 July 2015 because he believed that he was being interviewed as a witness, not a person suspected of assaulting [Complainant 2]. The accused continually asserted that he was participating as a witness and became concerned when the mention of the availability of legal advice suggested otherwise. That is when PCSC Wheeler misled him. Given the concerns

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<sup>55</sup> *Burns v The Queen* (1975) 132 CLR 258.

expressed by the accused at the thought of being suspected of the murder, it is easy to draw the inference that he would not have participated in the interview with police had he understood that he was a suspect. That is the inference which I draw.

[101] I therefore conclude that the accused waived his right to silence in circumstances where he would have maintained his silence had he understood the true position. In those circumstances, I find that it would be unfair to admit the interview of 4 July 2015 into evidence against the accused.

[102] It is true that after his status as a suspect was revealed, the accused continued to speak to police. It is also true that in relation to the interview of 29 July 2015, the accused was cautioned and was fully aware of his rights when he elected to speak. It is also true that

the accused took the opportunity on 29 July 2015 to attempt to exculpate himself and offered information he had not previously volunteered.

[103] The accused's participation in the interview of 29 July 2015 cannot be considered in isolation to what had preceded it. The police may have acted completely fairly in conducting the 29 July interview. That does not mean, however, that it is fair to admit the 29 July interview, or any part of it, into evidence against the accused. The accused's right to silence had been waived by him during the first interview. Labouring under a mistake induced by the police, the accused gave a version. He could not in late July (or for that matter any time), retract that version. There was effectively no point in him exercising his right to silence on 29 July because he had given a version on 4 July. The 29 July interview was really just a continuation of the course (to speak to police) that he had embarked upon earlier, and he had embarked upon that course because of his misunderstanding as to his status which was induced by the police.

[104] I have found that had the accused properly understood his status as a suspect, he would not have participated in the first interview. I find that if he had not participated in the first interview, he would not have participated in the later conversations with police, including the 29 July interview. It is therefore unfair to admit that interview into evidence against him.

[105] The same reasoning applies to the field interview and walk through on 9 July 2015. I exclude that evidence from the case against the accused.

[106] Mr Benjamin's *Bunning v Cross* argument gives rise to a question as to the proper construction of s 431 of the PPRA.

[107] Pursuant to the PPRA, the *Police Powers and Responsibilities Regulation* 2012 was promulgated.

[108] Regulation 26 provides as follows:

## “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.”

[109] By s 431 of the PPRA, the police officer is obliged to caution “a relevant person”, and that person must be cautioned in the way prescribed by the regulation.

[110] A “relevant person” is one “who is in the company of a police officer for the purpose of being questioned as a suspect”. PCSC Wheeler’s assertions that he did not personally suspect that the accused had murdered [Complainant 2] is beside the point. PCSC Wheeler had been directed to treat the accused as a suspect and to interview him accordingly; hence a caution was administered. Even if I did accept PCSC Wheeler’s assertion (which I do not), s 431 was engaged. By force of the superior officer’s direction, the accused was “in the company of [PCSC Wheeler] for the purpose of being questioned as a suspect”.

[111] Once s 431 was engaged, police were required to caution the accused in the terms of the regulation.

[112] PCSC Wheeler did caution the accused in accordance with the regulation in that he spoke the prescribed words to him. It is unnecessary to consider whether s 431 is complied with where, immediately before the caution is administered the accused is told that there are “proforma things” which will be said to him which “might sound a bit silly” and are “just procedural”. Those statements nullified the caution.



- [113] The intent behind s 431(3) and (4) is obvious: by s 431(3) the accused must explain the caution to the interviewing police officer upon whom an obligation then falls under s 431(4) to give further explanation of the caution if the police officer doubts that the accused understands the caution.
- [114] The obligation under s 431(3) only arises where the police officer “reasonably suspects the person does not understand the caution”.
- [115] Here, the procedure in s 431(3) was followed. In response, the accused said that he understood that any answers he gave could be used against him if the answers were not truthful. PCSC Wheeler must have known that the accused did not understand the caution, and didn’t understand the reason it was being given; that he, the accused, was a suspect.
- [116] PCSC Wheeler breached s 431(4) by failing to explain:
- (i) that the accused was a suspect;
  - (ii) that all answers, not just untruthful ones, could be used against the accused.
- [117] There was other improper conduct by police:
1. Leading the accused to believe that all witnesses (not just suspects) are interviewed electronically.
  2. Diluting the effect of the caution by reference to “proforma” and “procedural” steps.
  3. Agreeing positively with the accused’s assertion (at the beginning of the interview) that he was providing information as a witness not a suspect.
  4. Failing to inform the accused that he was a suspect when, on various occasions during the interview he asserted his status as a witness.
  5. Generally proceeding with the interview knowing that the accused was under a misapprehension as to the police interest in him.
- [118] In *Bunning v Cross*,<sup>56</sup> various considerations relevant to the exercise of discretion are identified. It is unnecessary to analyse them.
- [119] Here, the offence being investigated is very serious; the murder of an elderly lady in her own home.
- [120] However, the police positively misled the accused in circumstances where they could easily have corrected the accused’s misunderstanding. The reason they did not was, no doubt, because of a concern that the accused may not have spoken to them had he known the true position.
- [121] The police have breached s 431 of the PPRA and circumvented the accused’s right to silence.

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<sup>56</sup> (1978) 141 CLR 54.

- [122] I have excluded the interviews upon the basis of unfairness. I also find that they should be excluded on public policy bases.
- [123] For the reasons explained, I excluded the interviews from the evidence to be led at the accused's trial.