HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND HEYDON JJ

SHANE LESLIE KELLY APPELLANT

AND

THE QUEEN RESPONDENT

Kelly v The Queen
[2004] HCA 12
10 March 2004
H1/2003

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Tasmania

Representation:

K B Procter SC with D R Wallace for the appellant (instructed by Wallace Wilkinson & Webster)

T J Ellis SC with C J Rheinberger for the respondent (instructed by Director of Public Prosecutions (Tasmania))

CATCHWORDS

Kelly v The Queen

Criminal Law – Evidence – Admissibility of statement made to police after video-recorded interview was completed – Where statement was not made in response to any police question – Whether the statement was "made in the course of official questioning" within the meaning of s 8(1)(b) of the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas).

Evidence – Admissibility – Statement made to police after video-recorded interview completed – Where statement was not made in response to any police question – Whether the statement was "made in the course of official questioning" within the meaning of s 8(1)(b) of the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas).

Criminal Law – Appeal – Proviso – No substantial miscarriage of justice.

Statutes – Construction – Purposive construction – Use of definition sections to aid statutory construction.

Words and Phrases: "made in the course of official questioning", "confession or admission".

Criminal Law (Detention and Interrogation) Act 1995 (Tas), ss 8(1), 8(2)(a).
Criminal Code (Tas), s 402(2).

1 GLEESON CJ, HAYNE AND HEYDON JJ. The appellant appeals against the dismissal by the Court of Criminal Appeal of Tasmania of his appeal against conviction by a jury sitting in the Supreme Court of Tasmania[1]. The appellant was charged with murdering Tony George Tanner on or about 23 November 1990. He was tried with Michael John Marlow ("Marlow"), whom the jury also convicted of murder, and Gary Hilton Williams ("Williams"), whom the jury acquitted both of murder and of being an accessory after the fact.

The background

2 The jury verdicts against the appellant and Marlow reflect substantial acceptance of the following Crown case.

3 The Crown contended that Marlow disliked the victim for giving the police information about an incident of bungled stealing in 1987. As a result, Marlow was sentenced to eight months imprisonment after pleading guilty to being an accessory after the fact. The Crown also contended that the appellant hated the victim for being a police informant.

4 On the afternoon of 23 November 1990, the victim made an arrangement to meet the appellant and set out to fulfil it. There is no evidence that he was ever seen alive again except by the person or persons who murdered him. Paul Paget ("Paget") gave evidence that that evening he was present at a meeting between the appellant, Marlow and Williams, at which it was agreed that the appellant would lure the victim to a logging site where the appellant had been working. The plan was for Marlow to murder the victim at that place. The role of Williams, according to the evidence of Paget about which the jury must have experienced a reasonable doubt, was to drive the victim's car to the airport and leave it there, so as to suggest that the victim had departed from Tasmania.

5 Later, in the early hours of the morning, according to Paget, Marlow said that he had killed the victim with a shotgun for informing on him, and that the victim had been buried in a deep hole dug by the appellant with an excavator.

6 On 25 November 1999 the appellant said to the police that he and Marlow had murdered the victim. On 4 March 2000 during a video-recorded interview, although he accepted that he had confessed in this way, the appellant said that the confession was false and offered certain explanations for having made it. While Marlow made no admissions to the police, he did make statements to other people in the years between 1990-2000 which could be treated as admissions.

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1 *Marlow and Kelly* (2001) 129 A Crim R 51.

7 In March 2000 the victim's body was found with shotgun wounds in a hole which could only have been dug by a skilled excavator operator in a log landing site where the appellant used to work. The appellant was a skilled excavator operator. Found with the body was a considerable quantity of builder's lime, which was not a natural part of the soil at that place.

The special leave point

8 The appellant and Marlow appealed to the Court of Criminal Appeal of Tasmania. The appeals were dismissed. Both the appellant and Marlow applied to this Court for special leave to appeal. Only the appellant succeeded, and only on one point: whether a statement by the appellant to police officers on 4 March 2000 ("the impugned statement") was a "confession or admission" which should not have been received by the trial judge in view of its non-compliance with the requirement of video-taping contained in s 8(2)(a) of the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas) ("the Act"). The impugned statement was made between half an hour to an hour after the video recording of an interview of the appellant by police officers had ceased and no further questions had been asked.

The legislation

9 Section 8 of the Act at the relevant time provided[2]:

> "**8. (1)** In this section –
>
> '**confession or admission**' means a confession or an admission –
>
> (a) that was made by an accused person who, at the time when the confession or admission was made, was or ought reasonably to have been suspected by a police officer of having committed an offence; and
>
> (b) that was made in the course of official questioning;

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2 Section 8 was repealed with effect from 1 July 2002 and replaced by the *Evidence Act* 2001 (Tas), s 85A, which is in similar but not identical terms. Section 85A(1) corresponds with s 8(2), s 85A(2) corresponds with s 8(3), and s 85A(3) and the definitions in s 3 of "official questioning" and "serious offence" correspond with s 8(1).

'**official questioning**' means questioning by a police officer in connection with the investigation of the commission or the possible commission of an offence;

'**serious offence**' means an indictable offence of such a nature that, if a person of or over the age of 18 years is charged with it, the indictable offence cannot be dealt with summarily without the consent of the accused person and, in the case of a person under the age of 18 years, includes any indictable offence for which the person has been detained.

(2) On the trial of an accused person for a serious offence, evidence of any confession or admission by the accused person is not admissible unless –

(a) there is available to the court a videotape of an interview with the accused person in the course of which the confession or admission was made; or

(b) if the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why a videotape referred to in paragraph (a) could not be made, there is available to the court a videotape of an interview with the accused person about the making and terms of the confession or admission or the substance of the confession or admission in the course of which the accused person states that he or she made a confession or an admission in those terms or confirms the substance of the admission or confession; or

(c) the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why the videotape referred to in paragraphs (a) and (b) could not be made; or

(d) the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence.

(3) For the purposes of subsection (2), '**reasonable explanation**' includes but is not limited to the following –

(a) the confession or admission was made when it was not practicable to videotape it;

(b) equipment to videotape the interview could not be obtained while it was reasonable to detain the accused person;

(c) the accused person did not consent to the interview being videotaped;

(d) the equipment used to videotape the interview malfunctioned."

How did the impugned statement come to be made?

10 On 22 November 1999 the appellant, who had already been interviewed more than once about the victim's death, was interviewed by Detective Sergeant Lopes, Detective Allen and Detective Pretyman about a robbery that took place in 1991. The latter officer went away to look for the custody sergeant, and in her absence a discussion between Detective Sergeant Lopes, Detective Allen and the appellant took place. Detective Sergeant Lopes said that Marlow was going to be charged with the murder of the victim and there was a chance that the appellant could be charged also. They then discussed whether the appellant might receive an "indemnity" for cooperating with the police. On Detective Pretyman's return, the appellant was charged with the 1991 robbery and remanded in custody.

11 On 25 November 1999 Detective Sergeant Lopes and Detective Pretyman took the appellant into a police interview room in a city building in Hobart, but the appellant said he wanted to talk in the open air. Those officers and Inspector Little then accompanied the appellant to the roof. There the appellant admitted that he and Marlow, but not Williams, were involved in murdering the victim, and raised the subject of an indemnity. While Detective Sergeant Lopes and the appellant waited on the roof for the appellant's wife to arrive, the appellant requested an indemnity and bail. Thereafter the appellant said he did not wish to take part in a video-recorded interview, but he did write out a statement in his own hand describing how he assisted Marlow by telling him how to get access to, and to use, the excavator.

12 On 4 March 2000 the appellant was at liberty, having been granted bail on the robbery charge. He was then arrested on a charge of murdering the victim and taken to Launceston, where a video-recorded interview took place. Including breaks, it lasted from 5.57pm to 9.17pm. In that interview Detective Sergeant Lopes and Detective Pretyman reminded the appellant of the statement he had made on 25 November 1999.

13 The appellant contended that he had made the statements only because of police threats that if the statements were not made the appellant would be denied bail and every effort would be made to "stitch him up" on a charge of murdering

the victim, because he felt the need to obtain bail so that he could protect his family from a criminal named Jarvis and because of pressure placed on his family. Detective Sergeant Lopes denied these contentions. After much questioning on these subjects, and on various circumstantial connections between the appellant and the victim's death, the interview concluded as follows:

> "ML And so you're saying you've got no involvement in it whatsoever?
>
> SK No, no, I haven't got any involvement in it whatsoever.
>
> ML But in a matter of approximately three and a half months ago you told me that you and Marlow were involved in it.
>
> SK Yeah, and I told you why, you know why.
>
> ML Well I, I don't know why you've told me that and now you're saying to me that you don't know anything about it.
>
> SK You know why I've done it.
>
> ML Is there anything else you want to ask?
>
> AP No.
>
> ML Are you happy about the way you've been treated today?
>
> SK Yeah no complaints.
>
> ML Right, in that case then we'll conclude the interview and it's approximately 9.17pm."

14 The appellant then made some telephone calls. He was charged, fingerprinted and photographed. It was then proposed that he be taken to the Launceston General Hospital for the purpose of obtaining samples of blood and hair. Just before the appellant and accompanying officers got into the car, the appellant made the impugned statement. He said, according to Detective Sergeant Lopes and Detective Pretyman:

> "Sorry about the interview – no hard feelings, I was just playing the game. I suppose I shouldn't have said that, I suppose you will make notes of that as well."

The police officers did not respond to this statement. They made no note of it. They also did not attempt to return the appellant to the interview room with a view to making a video-recording of the appellant repeating what he had said so as to attract s 8(2)(b) of the Act. Detective Sergeant Lopes thought the appellant's statement was made thirty to forty minutes after the video-recording had ceased and the appellant had left the video interview room; Detective Pretyman thought it took place nearly an hour after those events.

<u>The fate of the appellant's objection</u>

15 The reception of the appellant's impugned statement was objected to at trial. The trial judge overruled the objection on the ground that the statement was not made in the course of official questioning. In the course of his summing-up the trial judge warned the jury about the disadvantages which the accused faced, the potential unreliability of the evidence, and the need to scrutinise the evidence of the statement with care.

16 On appeal no complaint was made about these directions of the trial judge. The sole complaint on appeal was that the statement should not have been admitted.

17 A majority (Underwood J, Evans J concurring) of the Court of Criminal Appeal agreed with the trial judge's reasoning. Underwood J found that the impugned statement was not made in the course of official questioning, because all questioning had ceased by the time the appellant had left the video interview room. His Honour said[3]:

> "The plain fact in this case is that the impugned admission was volunteered by the appellant … and was not made in the course of any questioning at all. The questioning had clearly come to an end at the time the appellant … left the video interview room and set off for the charge room. The evidence was that no other question was asked of him by Detective Lopes or Detective Pretyman thereafter. It would be straining the language of the legislature to hold that … the course of official questioning was still in progress when the impugned admission was made."

18 Slicer J, on the other hand, construed s 8 of the Act as conferring a protection which was "temporal, encompassing events (including statements against interest) occurring whilst a person is in custody[4]". He therefore disagreed with the majority, but he joined in the order dismissing the appeal on the ground that no substantial miscarriage of justice had actually occurred: *Criminal Code* (Tas), s 402(2).

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3 (2001) 129 A Crim R 51 at 76 [118] per Underwood J, Evans J concurring.

4 (2001) 129 A Crim R 51 at 86 [148].

Immaterial issues

19 The one material issue in this case was whether the impugned statement was "made in the course of official questioning".

20 No attempt was made to contend in this Court or the courts below that any of the possibly applicable exceptions referred to in ss 8(2)(b)-(d) of the Act applied; hence it is not necessary to consider them, save to the extent that they may throw light on what the expression "made in the course of official questioning" means.

21 One other potential controversy may be excluded from consideration. The trial judge had entertained doubt whether the impugned statement was a "confession or admission", on the ground that it was not an admission of guilt, but only an admission of making false allegations against the police in the video-recorded interview. In the course of argument in this Court a question was raised as to whether that doubt was soundly based. There is a debate as to whether the expression "confession or admission" includes, in addition to statements which are apparently intended to be inculpatory, those which are apparently intended to be exculpatory[5]. The point is important not only in various legislative contexts, but also in relation to the common law voluntariness rules[6]. If it is possible that an exculpatory statement can be characterised as an admission, it is also possible that the impugned statement, which is not in terms inculpatory but which casts doubt on the exculpatory explanations offered during the video-recorded part of the interview of 4 March 2000 to account for the making of the confession of 25 November 1999, can also be characterised as an admission. Since this important point was not argued in the Court of Criminal Appeal or in this Court however, and since the appeal fails on other grounds, it is undesirable to decide it one way or the other.

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5 The view that it is is supported by such cases as *R v Raso* (1993) 115 FLR 319 at 346 per Ormiston J and *R v Horton* (1998) 45 NSWLR 426 at 437 per Wood CJ at CL (Sully and Ireland JJ concurring); support for the contrary view can be found in such cases as *R v Arnol* (1997) 6 Tas R 374 at 382 per Zeeman J and *R v GH* (2000) 105 FCR 419 at 422-425 [14]-[22] per Spender J.

6 See *Miranda v Arizona* 384 US 436 at 477 (1966); *Piche v The Queen* [1971] SCR 23.

The problem of confessions to the police

22 Though for many years before the 1960s legal rules had been developed in some detail to regulate the proof of confessions to police officers, from the 1960s on concern about that topic increased. The key questions, from case to case, were whether a confession was made; if so, in what terms; whether it was to be excluded as involuntary; whether it was to be excluded in the court's discretion either as having been obtained unfairly, or as having been obtained illegally or improperly; and whether it was reliable. All these issues were capable of being affected by the means by which the confession was perceived, recorded or recollected, and then transmitted to the court.

23 Particular concern was directed to allegedly fabricated confessions. Thus in *Driscoll v The Queen*, Gibbs J said[7]:

> "It is very common for an accused person to deny that he made an oral confession which police witnesses swear that he made. The accused has an obvious motive to claim that police testimony of this kind is false. On the other hand it would be unreal to imagine that every police officer in every case is too scrupulous to succumb to the temptation to attempt to secure the conviction of a person whom he believes to be guilty by saying that he has confessed to the crime with which he is charged when in fact he has not done so."

But the problem went well beyond possible fabrication.

24 Disputes could arise in circumstances including the following:

(a) where an oral confession was not noted down;

(b) where an oral confession was noted down, whether contemporaneously (for example, by a police typist laboriously recording each question and answer) or otherwise, and whether by a single police officer, or by two or more police officers acting separately or collaboratively;

(c) where an oral confession was reduced to writing but not signed by its maker;

(d) where an oral confession was reduced to writing by police officers before being signed by its maker; and

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7 (1977) 137 CLR 517 at 539.

(e) where a confession was written out by its maker.

25 The disputes could turn on questions not only of fabrication, but also of misunderstanding, misrecollection, coercion, or oppression in a broad sense. Considerable amounts of court time were taken up, generally in the absence of the jury, in resolving disputes about confessions. Considerable amounts of police time, too, were taken up in interviews slowly recorded by officers operating typewriters or writing in notebooks. Grave allegations were commonly made suggesting police perjury, brutality and pressure. Unfounded though many of these allegations may have been, they were damaging to public confidence in the criminal justice system. Over time the courts, law reform agencies and legislatures began to respond to this state of affairs. In particular, as audio recording became more common in commercial and social life, and as the necessary equipment became more efficient, easier to operate, and cheaper, it was increasingly suggested that, either as a matter of sensible practice or as a precondition to admissibility, police interviews in criminal investigations should be electronically recorded. Pilot studies were conducted which suggested the utility of this technique. It was hoped that the introduction of a reliable means of recording confessions would not only save police and court time directly, and reduce the need for police officers to spend long periods at court, but also encourage more, and earlier, pleas of guilty. All this would save public money as well as improving the integrity of the trial process and the efficiency of the police.

26 There were suggestions of this kind by members of this Court. Thus in a case in which the police said that they had recorded a confession in a document composed by typing out their questions and the accused's answers, and the accused had refused to sign it, Murphy J observed[8]:

> "The liberty of the accused, the reputation of the police and the proper administration of justice are jeopardised by the failure, where opportunity permits, to provide a more independent record of police questioning."

In *Driscoll v The Queen*, another case involving an unsigned record of interview, Gibbs J (Mason, Jacobs and Murphy JJ concurring) said[9]:

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8 *Burns v The Queen* (1975) 132 CLR 258 at 265.

9 (1977) 137 CLR 517 at 542.

> "If the police wish to have supporting evidence of an interrogation there are other methods, such as tape recording, or the use of video-tape, which would be likely to be more effective than the production of unsigned records of interview, and would not be open to the same objection."

27 This Court decided that the following matters were relevant to the question of whether alleged admissions were in fact made: attempts by police officers to prevent a solicitor getting in touch with a client held for questioning, refusals by them to allow a solicitor to be present during questioning, and a failure to serve a copy of a record of interview on an accused person as soon as practicable after it was made (because it gives rise to a suspicion that the record may have been altered)[10]. These matters were also relevant to a discretion to exclude the evidence on grounds of unfairness[11]. A written record of interview was held to be admissible if in the accused's handwriting or acknowledged by the accused in the presence of some impartial person[12] or if otherwise adopted by the accused[13] though there was a discretion to exclude it on grounds of unfairness[14]. Where a written record of interview was neither signed nor otherwise adopted, it was held to be not itself admissible, though the officers who prepared it might refresh their memory from it[15]. More recently, in *McKinney v The Queen*[16] a majority of this Court held that the jury should be instructed to give careful consideration to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that

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10 *Driscoll v The Queen* (1977) 137 CLR 517 at 539-540 per Gibbs J, Mason, Jacobs and Murphy JJ concurring.

11 *Driscoll v The Queen* (1977) 137 CLR 517 at 540 per Gibbs J, Mason, Jacobs and Murphy JJ concurring; *Stephens v R* (1985) 156 CLR 664 at 669 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

12 *Stephens v The Queen* (1985) 156 CLR 664 at 669 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

13 *Driscoll v The Queen* (1977) 137 CLR 517 at 540 per Gibbs J, Mason, Jacobs and Murphy JJ concurring.

14 Thus in *R v Clarke* [1964] QWN 8 the document was excluded where though the accused assented to the truth of the facts recorded, he refused to sign it.

15 *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J, Mason, Jacobs and Murphy JJ concurring.

16 (1991) 171 CLR 468.

guilt has been established beyond reasonable doubt is a confession allegedly made in police custody, unless its making has been reliably corroborated[17]. This conclusion was reached after the practice of recording police interviews had begun to grow, and an audiovisual recording was seen as one type of reliable corroboration[18].

28 Simultaneously with the judicial development of these principles, law reform agencies and commissions of inquiry began responding to the problem. Thus in 1975 the Australian Law Reform Commission recommended[19]:

> "Interviews should preferably be (a) recorded by mechanical means or (b) corroborated by a third person and, if these measures are not practicable in the circumstances, (c) checked by a third person after being reduced to writing, or at least (d) reduced to writing and signed by the accused."

Both in the United Kingdom and Australia, numerous other bodies recommended that the admissibility of confessions to police should, in general, depend on whether they had been tape-recorded[20].

29 As a result, it came to be viewed as a commonplace, not only in circles favourable to defence interests but also in police circles, that, despite its financial cost, the electronic recording of police interviews, particularly video-recording, would generate real advantages. It would be useful in providing a means of establishing exactly what was said; in proving that requirements for cautioning

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17 (1991) 171 CLR 468 at 476 per Mason CJ, Deane, Gaudron and McHugh JJ.

18 (1991) 171 CLR 468 at 475 per Mason CJ, Deane, Gaudron and McHugh JJ.

19 Australian Law Reform Commission, *Criminal Investigation*, Report No 2, Interim, (1975) at 149 [345]; see the detailed justifications for these recommendations at 70-73 [154]-[162]. See also cll 35-40 of the Draft Criminal Investigation Bill in Appendix B.

20 See for example the Coldrey Committee: Victoria, Consultative Committee on Police Powers of Investigation, *Custody and Investigation: Report on Section 460 of the Crimes Act 1958,* (1986) at 82-88 [6.17]-[6.22] (a list of reports up to that time appears at 82 [6.17]); Gibbs Committee: Australia, Review of Commonwealth Criminal Law, Report by Review Committee established by the Attorney-General, *Interim Report: Detention Before Charge*, (1989) at ch 7; and New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest,* Report No 66, (1990) at 142-145 [6.8]-[6.18].

and other formalities had been complied with; in narrowing the time within which it could be alleged that threats had been made; in helping to estimate the fairness and propriety of the questioning; and in helping to evaluate, by assessment of the demeanour and manner of the interviewee in responding, the reliability of what was said.

The variety of available approaches

30 The debates on the problem, and the legislative responses to them, revealed a variety of possible solutions. Leaving aside issues about whether confessions of all, or only some, crimes should be recorded, and which particular exceptions to any general prohibition of non-recorded confessions should exist, the following are among the possibilities which arose.

31 *Universal exclusion: not adopted.* One approach would have been to require that no confession to a police officer be admitted unless video-recorded – whether or not the maker was in custody; whether or not the maker was suspected, or ought reasonably to have been suspected, of committing the crime confessed; and whether or not the maker had been asked any question by a police officer. This approach has attracted no significant support, and it has not been followed by any Australian legislature[21].

32 *Exclusion of confessions by persons who were or ought to have been suspected: Victoria.* A second and more limited approach requires that no confession to a police officer made by a person who was suspected or ought reasonably to have been suspected of having committed an offence should be admissible unless video-recorded. On this approach, it is necessary to video-record confessions made without stimulation by the police or without warning to the police[22].

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21 If s 8(2) of the Act were read by itself and "confession or admission" were not defined in s 8(1) in the way it is, the Tasmanian legislation would have adopted this approach. But the definition of "confession or admission" imposes two significant limits: the requirement for suspicion on the part of a police officer, and the requirement that the confession or admission be made in the course of official questioning.

22 This was the recommendation of the Coldrey Committee: Victoria, Consultative Committee on Police Powers of Investigation, *Custody and Investigation: Report on Section 460 of the Crimes Act 1958*, (1986) at 89 [6.22]. It has operated in Victoria since 1988: *Crimes Act* 1958 (Vic), s 464H, introduced by the *Crimes (Custody and Investigation) Act* 1988 (Vic).

33 *Exclusion of confessions by persons suspected on reasonable grounds: Western Australia and Northern Territory.* A third approach requires that no confession to a police officer made by a person who is suspected on reasonable grounds of having committed an offence be admissible unless it is video-taped[23]. On this approach too, it does not matter whether or not the police officer triggered the confession by a question – for though a non-video-recorded confession could be admitted if there were a "reasonable excuse" for its not having been video-recorded and three of the four instances of a reasonable excuse referred to an "interview", nothing in the legislation required that the confession be an explicit response to particular questions.

34 *Exclusion of confessions by persons who were or ought reasonably to have been suspects in the course of police questioning or interviewing: New South Wales, Tasmania and South Australia.* A fourth approach requires that no confession made by a person who is, or ought reasonably to have been, suspected by a police officer of having committed an offence is admissible if made in the course of official questioning or interviewing unless it is video-recorded[24].

35 *Exclusion of confessions made during questioning of persons in custody: Queensland 1997-2000.* A fifth approach requires that no confession made to a

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23 This was introduced in Western Australia in 1992: *Criminal Code* (WA), s 570D, introduced by the *Acts Amendment (Jurisdiction and Criminal Procedure) Act* 1992 (WA), s 5, not materially amended by the *Criminal Code Amendment Act* 1999 (WA), s 5. It has operated in the Northern Territory since 1992: *Police Administration Act* (NT), ss 142 and 143, introduced by the *Police Administration Amendment Act (No 2)* (NT), s 7. (The legislation in its primary operation rendered inadmissible both confessions made before the commencement of questioning and confessions made during questioning.)

24 This approach was adopted in 1995 in New South Wales, Tasmania and South Australia. In New South Wales it first appeared in the *Crimes Act* 1900 (NSW), s 424A introduced by the *Evidence (Consequential and Other Provisions) Act* 1995 (NSW) Sched 1 [3]. In 1999, s 424A was transferred from the *Crimes Act* to the *Criminal Procedure Act* 1986 (NSW) as s 108: *Crimes Legislation Amendment (Sentencing) Act* 1999 (NSW) Sched 2 [31] and Sched 3 [15]. In 2001 it was renumbered as s 281: *Criminal Procedure Amendment (Justices and Local Courts) Act* 2001 (NSW) Sched 1 [102]. In Tasmania this approach was embodied in s 8 of the Act. In South Australia it appears in the *Summary Offences Act* 1953 (SA), s 74D (the expression "in the course of official questioning" is not used: the duty is cast on an investigating officer "who proposes to interview" a suspect).

police officer during the questioning of a person in custody be admitted unless video-recorded[25].

36 *Exclusion of confessions to a police officer by a person being questioned as a suspect: Commonwealth, Australian Capital Territory and Queensland since 2000.* A sixth approach requires that no confession made to a police officer by a person being questioned as a suspect (whether under arrest or not) be admissible unless video-recorded[26]. The relevant legislation applies only where the maker of the confession is in the company of a police officer for the purpose of being questioned as a suspect. There is no provision relating to the case where the maker of the confession ought reasonably to have been suspected.

37 Few now doubt the advantages of the widespread police practice of video-recording confessions, and few now criticise the various types of legislation which underpin that practice. But neither the advantages of the legislation viewed generically, nor the varieties of the legislation viewed species by species, cast specific light on the construction of particular parts of it. It is of some interest, however, to compare s 8 of the Act with the legislation enacted around or before the time of its enactment. Section 8 of the Act did not adopt the techniques used, different as they are in other respects, in Victoria since 1991, Western Australia since 1992 and the Northern Territory since 1992, of imposing a duty to video-record independently of the existence of police questioning. It did adopt the expression "in the course of official questioning" used in the New South Wales legislation enacted in the same year, which may owe its origin to the reference to "being questioned as a suspect" in the Commonwealth legislation introduced in 1991: *Crimes Act* 1914 (Cth), s 23V(1).

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25 This was the approach adopted in Queensland in the period 1997-2000: *Police Powers and Responsibilities Act* 1997 (Q), s 104.

26 This is the approach adopted by the Commonwealth since 1991: *Crimes Act* 1914 (Cth), s 23V, introduced by the *Crimes (Investigation of Commonwealth Offences) Amendment Act* 1991 (Cth), s 3; amended, but not materially, in 2000: *Crimes at Sea Act* 2000 (Cth) Sched 2, cll 1-2. A similar provision prevails to some extent in the ACT: *Crimes Act* 1914 (Cth), s 23A(6) (indictable offences); *Crimes Act* 1900 (ACT), s 187 (summary offences). It was also the position recommended by the Criminal Justice Commission of Queensland, Report on a Review of Police Powers in Queensland, vol 4, *Suspects' Rights, Police Questioning and Pre-Charge Detention* (1994) at 738-740, and now adopted in Queensland: *Police Powers and Responsibilities Act* 2000 (Q), ss 246 and 263-266.

Explanatory materials

38 The Second Reading Speech of the Minister for Justice in support of the Bill which became the Act was delivered on 4 May 1995. The Minister referred to Report No 64 of 1990 of the Law Reform Commissioner of Tasmania, entitled *Police Powers of Interrogation and Detention* ("the Report"). He said that the Law Reform Commissioner[27]:

> "recommended that legislation be introduced to ensure that a police officer who has arrested any person, or has custody of an arrested person, either release the person or present him/her before a court within a reasonable time. In addition, the [C]ommissioner recommended that police confessional evidence must be by way of electronic recording unless the prosecutor can prove there was a reasonable excuse as to why an electronic recording was not made. The Government has accepted the Law Reform Commissioner's recommendations."

39 The Minister may have had some other source for s 8 of the Act in mind, since there is very little in the Report about electronic recording, and no recommendations. The Report deals almost entirely with questions about how long police officers may detain suspected persons in custody. It did contend that "legislation is required to proclaim the rights of arrestees, to define so far as possible the powers of the police, to supplement that definition by illustration and to provide sanctions"[28]. Although the Report did state that the legislation should "impose some recording duty on police officers to enable their actions and reasons to be scrutinized at a subsequent time"[29], nothing was said about electronic recording in its statement of recommendations. Recommendation 2(d) was that any officer having custody of an arrested person at a police station should, contemporaneously with the facts recorded, record various times, including the times when questioning commenced and ended, in a "custody book"[30]. In Appendix B the Report summarised various statutes and recommendations since 1986[31], noting that in March 1989 the Gibbs Committee

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27 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 4 May 1995 at 795.

28 The Report at 12.

29 The Report at 13.

30 The Report at 14.

31 The Report at 21.

recommended "the tape-recording (on audio-tape or video-tape) of cautioning, confessions and admissions", and that the court have power to admit evidence of a confession or admission which was not tape-recorded if this would not be contrary to the interests of justice[32]. Appendix B also referred to the recommendations of the Coldrey Committee[33] in 1986, which were adopted in 1988 in the *Crimes Act* 1958 (Vic). It noted that s 464G of that Act "imposes a duty on an investigating official to record (on audio-tape or video-tape) the caution, the advice of the suspect's rights, and the suspect's responses, if any". It also noted that[34]:

> "Section 464H makes admissible any evidence obtained by an investigating official which is in the nature of a confession or admission (or a confirmation thereof) which is made by a suspect who is charged with an indictable offence, as long as that evidence has been recorded on audio-tape or video-tape. Evidence which has not been so recorded may be admissible if the person seeking to adduce the evidence satisfies the Court on the balance of probabilities that the circumstances are exceptional and would justify the reception of the evidence."

40 The Minister argued before the House of Assembly that the Bill represented a compromise. On the one hand, the Minister pointed to the contention in the Report that some members of this Court in *Williams v The Queen* had unduly hampered the investigative powers of the police by saying that it was[35]:

> "unlawful for a police officer having the custody of an arrested person to delay taking him before a justice in order to provide an opportunity to investigate that person's complicity in a criminal offence, whether the offence under investigation is the offence for which the person has been arrested or another offence."

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32 Gibbs Committee: Australia, Review of Commonwealth Criminal Law, Report by Review Committee established by the Attorney-General, *Interim Report: Detention Before Charge*, (1989) at ch 7.

33 Coldrey Committee: Victoria, Consultative Committee on Police Powers of Investigation, *Custody and Investigation: Report on Section 460 of the Crimes Act 1958*, (1986) at 82-88 [6.17]-[6.22].

34 The Report at 22.

35 (1986) 161 CLR 278 at 295 per Mason and Brennan JJ, quoted in the Report at 9.

The Minister said that this would be remedied by cl 4(2) of the Bill, which enabled[36]:

> "every person who has been taken into custody, that is, who is under lawful arrest, to be detained by a police officer for a reasonable time after being taken into custody for the purposes of questioning the person, or carrying out investigations in which the person participates, in order to determine his or her involvement, if any, in relation to an offence."

On the other hand, the Minister saw it as necessary that there be "appropriate safeguards in response to the liberalisation of police powers"[37]. He then gave a lengthy description of the benefits of tape-recorded interviews, and summarised s 8 of the Act. But his speech cast no specific light on the meaning of the words "in the course of official questioning".

<u>The appellant's submissions</u>

41 The appellant submitted that s 8(1)(b) should be construed so as to promote the purpose or object of the Act. That submission may be accepted. But it raises two questions. First, what is the purpose or object of the Act? Secondly, what is the construction which promotes that purpose or object?

42 As to the first question, the appellant submitted that the purpose or object was to overcome "perceived problems with the so-called police 'verbal' which was dealt with by the High Court[38] in *McKinney's* case"[39]. The appellant described these "perceived problems" as including the possibility of police fabrication and the ease with which experienced police officers can effectuate it, the frequent lack of reliable corroboration of the making of the statement, and the practical burden on an accused person seeking to create a reasonable doubt about

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36 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 4 May 1995 at 796.

37 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 4 May 1995 at 796.

38 (1991) 171 CLR 468.

39 The words are those of Wright J in *R v McKenzie* [1998] TASSC 36 at [5], approved by Evans J in *R v Julin* [2000] TASSC 50 at [19], and echoed by Underwood J in the Court of Criminal Appeal in the present case: *Marlow and Kelly* (2001) 129 A Crim R 51 at 75 [117].

the police evidence[40]. The appellant submitted that those problems were experienced by him in view of the circumstances in which the appellant found himself at the time when the police officers said he made the impugned statement. The Crown submitted, on the other hand, that the perceived problems were somewhat narrower – that the real vice of criminal trials was not the attribution to the accused of brief admissions made at the scene of the crime or on arrest or while being driven to a police station, but the tender of elaborate and lengthy typed records of interview which were not signed and the making of which was not corroborated. That submission is to be rejected, and the appellant's submission is to be preferred: the problems perceived by both the courts and other observers included imperfections in both kinds of admission.

43 However, though it may be accepted that the purpose or object of s 8 of the Act was to overcome the "perceived problems" identified in many earlier cases, as the range of legislative responses shows, those problems can be overcome in different ways and to different degrees. The "purpose or object" identified does not compel any particular construction of the quite detailed language of s 8 of the Act. What the correct construction is must depend on the particular words used.

44 The appellant accepted that if a police officer arrived at the scene of a crime and asked what had happened, and a person there present at once confessed, s 8 of the Act could not apply, because the person was not, and ought not reasonably to have been, suspected. The same was true where a police officer picked up a telephone and a voice at the other end confessed to a crime. The appellant thus accepted that the point before which video-recording was unnecessary was the period leading up to the time when the police decided, or ought reasonably to have decided, that the maker of the statement was a suspect. But the appellant submitted that after that point, "questioning" extended beyond the posing of interrogative remarks. Its primary meaning included any words spoken between a person who is in custody and who is, or ought reasonably to have been, suspected by a police officer of having committed an offence, and a police officer investigating an offence[41]. The appellant submitted, in the alternative, that if that meaning were too broad, a narrower meaning was available by adding two qualifications: that the words be "spoken within a reasonable period following the conclusion of a period of formal questioning of the suspect by police", and that the words "seek to touch upon or to qualify or

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40 *McKinney v The Queen* (1991) 171 CLR 468 at 474-476.

41 The appellant thus adopted the approach of Slicer J in the Court of Criminal Appeal: *Marlow and Kelly* (2001) 129 A Crim R 51 at 86 [148].

modify anything said by the suspect during that period of formal questioning". Hence the narrower meaning applied in this case, where a statement was made close to the time of the video-recorded questioning and where that statement arose out of it in the sense that it modified what had been said during it. It was also submitted that "in the course of" official questioning meant "arising out of" or "as a result of" official questioning.

The construction of "in the course of official questioning"

45 A person may make admissions during a period in which police officers are conducting official questioning without those admissions being responsive to any particular question. This can arise in two ways. First, an answer proffered may simply be quite unresponsive or unrelated to the particular question. Secondly, deliberately or fortuitously, the persons asking the questions may fall silent, and the person who is with them may, whether because of a desire to fill the silence or for some other reason, confess. The legislation does not in terms require that the statement be made "in response to a question put" as s 86 of the *Evidence Act* 2001 (Tas) does, for example. That language is significant, because it appears in s 86 of the *Evidence Act* 1995 (Cth) and s 86 of the *Evidence Act* 1995 (NSW) as well. The language may be contrasted with the use of the expression "in the course of official questioning" in s 85(1)(a) of the three Acts. "Official questioning" is defined in each of the three Acts as meaning "questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence"[42]. That is in substance the same as the definition appearing in s 8(1) of the Act. The contrast between the language of s 86 of the three Acts and the language of s 8 of the Act suggests that a confession which is entirely non-responsive to any question, or is uttered during a pause in the flow of the questions without being stimulated by any particular question, is one which falls within s 8 of the Act[43]. The words "in the course of" do not require that there be any causal connection between the admission and the official questioning. Thus "a monologue in response to a

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42 *Evidence Act* 1995 (Cth), Dictionary, Pt 1; *Evidence Act* 1995 (NSW), Dictionary, Pt 1; *Evidence Act* 2001 (Tas), s 3(1).

43 Answers which are not "in response to a question put" could cover a wide range, from answers by highly intelligent persons which wholly or partly deal with the question while containing some material which, though related to the subject of the question, was not sought by its terms, to answers bearing no rational relationship of any kind to a question. The precise meaning of "in response to a question put" in s 86 must be left to cases in which deciding the question is crucial.

general enquiry about what happened"[44] has been held to be in the course of official questioning for the purposes of s 85 of the *Evidence Act* 1995 (NSW) and an answer volunteered by the person being questioned is in the course of questioning even though it is not directly responsive to any question[45].

46 However, that does not help the appellant. His case depends on the correctness of either the broad or the narrow constructions he has propounded and there are various difficulties in each of them.

47 First, the constructions are too restrictive. To require "custody" is to take a limiting step which the legislative language did not take. Some police questioning of suspects takes place even though the suspects are not in custody. To require that the suspect be in custody cannot be supported on any available approach to construction, whether purposive or otherwise.

48 Secondly, a major difficulty with the appellant's narrower constructions is that they involve inserting ideas which have no foothold in the language of s 8 of the Act. Section 8 requires that the confession or admission be made "*in the course* of official questioning" – not "within a reasonable period following the conclusion of a period of formal questioning", and not "as a result of" official questioning.

49 Thirdly, a major difficulty with the appellant's broader construction is that by seeking to include "any words" spoken between the suspect and the police officer, it gives no weight to the requirement that there be questioning. The appellant's broader construction means that s 8 of the Act applies where a police officer says to a suspect – "Let us go to the police station so that I can ask you some questions. I do not propose to question you until we get there" – and the suspect then volunteers a confession. An event cannot be said to have taken place "in the course of official questioning" if the official nominates a future time when that course of questioning will commence, and the event happens before that time. The appellant's broader construction also means that s 8 of the Act applies where the police officer says that no further questions will be asked and that the suspect is free to go home, and some time later the suspect confesses. These consequences of the appellant's broader construction are inconsistent with the statutory language and indicate that that construction is fallacious.

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44 *Donnelly* (1997) 96 A Crim R 432 at 437 per Hidden J.

45 *R v Julin* [2000] TASSC 50 at [12] per Evans J.

50 Slicer J concluded that the expression "in the course of official questioning" encompassed all "events … occurring whilst a person is in custody"[46]. He saw this as being the "widest interpretation permitted"[47]. He said that his construction "reconciled" the "competing considerations", though he acknowledged that it did so "imperfectly"[48]. He arrived at his construction by drawing an "analogy" with English cases on the *Police and Criminal Evidence Act* 1984 (UK), Code C[49]. The reasoning underlying the English cases has been put thus[50]:

> "If this interview was correctly admitted, the effect would be to set at nought the requirements of the Police and Criminal Evidence Act 1984 and the code in regard to interviews. One of the main purposes of the code is to eliminate the possibility of an interview being concocted or of a true interview being falsely alleged to have been concocted. If it were permissible for an officer simply to assert that, after a properly conducted interview produced a nil return, the suspect confessed off the record and for that confession to be admitted, then the safeguards of the code could readily be bypassed."

51 However, the English cases do not offer a sound basis for the appellant's construction. Parliament could have chosen to adopt a wider solution to the problem than that which appears in s 8 of the Act, but it is not open to the courts of this country to ignore or alter the meaning of s 8 in order to achieve what they might think is a better solution by creating safeguards which Parliament itself chose not to create. In numerous respects the legislature contemplated in s 8 that confessions or admissions could be admitted without being video-recorded by reason of matters resting wholly or partly on the oral uncorroborated evidence of police officers. One such matter is whether its maker was suspected or ought reasonably to have been suspected: s 8(1) of the Act. Another group of matters is whether it was practicable not to video-tape the confession or admission, or whether equipment was unobtainable, or whether the maker did not consent to being video-taped, or whether the equipment malfunctioned: s 8(3) of the Act.

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46 *Marlow and Kelly* (2001) 129 A Crim R 51 at 86 [148].

47 *Marlow and Kelly* (2001) 129 A Crim R 51 at 84 [143].

48 *Marlow and Kelly* (2001) 129 A Crim R 51 at 86 [150].

49 *Marlow and Kelly* (2001) 129 A Crim R 51 at 84 [143].

50 *Bryce* (1992) 95 Cr App R 320 at 326 per Lord Taylor CJ, Macpherson and Turner JJ.

Another matter is whether there are exceptional circumstances: s 8(2)(d) of the Act. And yet another relates to issues of when official questioning started and ended, and what happened outside that period. To identify the possibility of uncorroborated police evidence being admitted on these questions is not to identify absurd loopholes to be closed at any cost to the actual language employed. The legislature was attacking part of the problem of uncorroborated police evidence. Minds can differ on whether it should have attacked more of the problem. The question is: what part did it in fact attack? That question is not to be answered by presuming that all parts were attacked.

52 The expression "in the course of official questioning" in s 8 of the Act marks out a period of time running from when questioning commenced to when it ceased. It renders s 8(2)(a) of the Act relatively narrow in the sense that it does not provide that video-recording is a condition for admissibility of all confessions made by persons who are suspected or ought reasonably to have been suspected of having committed a crime: video-recording is only a condition for admissibility of those made "in the course of official questioning". It renders s 8(2)(a) of the Act relatively broad in the sense that it does provide that video-recording is a condition for admissibility of confessions made "in the course of official questioning", without any limitation turning on whether the maker of the confession is in custody or under arrest. The requirement that confessions be video-recorded extends to confessions made anywhere so long as they are made "in the course of official questioning" – whether in police stations, in police cars, at the scene of a crime, or during informal encounters. The difficulty of video-recording confessions in particular circumstances is met by ss 8(2)(b)-(d) and (3)(a)-(d) of the Act. But whether the expression "in the course of official questioning" is viewed as making s 8(2)(a) narrow or broad, it stipulates a relatively clear criterion, suitable for application by police officers, whose usual procedures are formal and methodical.

53 In this matter "the course of official questioning" ended when Detective Sergeant Lopes ceased to ask questions and said at 9.17pm: "[W]e'll conclude the interview". Other activities of the appellant not related to official questioning and other police procedures not involving questioning then took place. No further question was asked which triggered the impugned statement. To treat the impugned statement as having been made in the course of official questioning would be to ignore the statutory language. The impugned statement in this case is in the same position as the statement made by the accused in *R v Julin*[51] where, after questioning had ceased, the accused had been arrested and cautioned, and driven half a kilometre to the scene of the crime during which time no

51 [2000] TASSC 50 at [12] per Evans J.

conversation took place between him and the police officer: "[t]he official questioning of the accused concluded prior to the car trip when he was arrested and cautioned …".

54 The Crown submitted that the use of the word "interview" in ss 8(2)(a) and (b) and (3)(b)-(d) of the Act was significant, and that that word was synonymous with "the course of official questioning". There is authority against that submission[52]. It is not necessary to reach a view on the Crown's submission in order to decide the present appeal. Either "official questioning" is identical with an "interview" with an accused person, or it is broader, because it cannot be narrower. If the impugned statement was not made "in the course of official questioning", it does not matter whether or not it was made in an interview. For the reasons set out above, it was not made in the course of official questioning.

<u>The proviso</u>

55 Many arguments were devoted to the question whether, if the majority of the Court of Criminal Appeal had erred, the appeal should nonetheless be dismissed on the ground that no substantial miscarriage of justice actually occurred, pursuant to s 402(2) of the *Criminal Code* (Tas). In view of the conclusion arrived at above that the majority did not err, it is not necessary to discuss those arguments in detail, but it is appropriate to deal briefly with them as follows.

56 The appellant drew attention to the fact that although Slicer J had joined in dismissing the appeal by reason of s 402(2), the Crown had not relied on that provision in the Court of Criminal Appeal. That does not prevent reliance on it in this Court.

57 The appellant contended that there had been a substantial miscarriage of justice in admitting the impugned statement, because it caused him to lose a chance which was fairly open to him of being acquitted, since on the evidence, apart from the impugned statement, it could not be said that he would inevitably have been convicted. That contention fails for the following reasons.

58 At the trial the appellant argued that he was not involved in the murder of the victim, but did not advance any evidence as to who was. Beyond his denial, and beyond seeking to explain the 25 November 1999 confession which he admitted, in substance, making in chief, he called no evidence capable of

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52 *R v McKenzie* [1998] TASSC 36 at [14].

negating inferences arising beyond a reasonable doubt from the following circumstances.

59 On 23 November 1990 the victim's partner answered the telephone at their residence. The caller, a male, asked to speak to the victim. The victim spoke briefly on the telephone and the victim's partner heard him arranging to meet the caller. When the call terminated, the victim told his partner that he had to meet "Ned" at a K-Mart in Launceston. The only person whom the victim's partner had heard him referring to as "Ned" in the previous twelve months was the appellant. Neither the victim's partner, nor anyone else apart from the person or persons who killed him, ever saw the victim alive after he went to meet "Ned".

60 Marlow disliked the victim because he had informed on him in relation to the bungled stealing incident in 1987. The appellant had a strong dislike of informants.

61 On 1 March 2000 the victim's body was found in a hole approximately four metres deep. That hole could only have been dug by an experienced excavator driver. The hole had been made in an old disused log landing at Bellevue Tier in the Central Highlands of Tasmania behind a locked boom gate. The victim had been shot with a shotgun twice in the back and once in the head, at close range. In November 1990 the appellant's father-in-law was operating the log landing. Few people had access to the site. The appellant had worked on the site until about one month before the victim disappeared. He had access to the keys to the boom gate, which was supposed to be locked at all times, and the keys to an excavator which was on the site and which never left the site. The appellant was an experienced excavator driver.

62 According to Paget, in 1990 he was present at a meeting with Williams, Marlow and the appellant at which it was decided that the appellant would meet the victim, who was a drug addict, and would lure him with drugs to the log site operated by the appellant's father-in-law; that Marlow would shoot him there with a sawn-off double barrel shotgun; that the appellant would dig a grave with the excavator on the site; and that Williams would take the victim's car to the airport. He also said that later that night Marlow admitted shooting the victim, but said that when the victim was shot in the chest he was only wounded and began screaming, and that Marlow then blew his head off. He also said that the appellant told him later that he had buried the victim deep in a hole he had dug with an excavator.

63 While the appellant attacked the credibility of Paget strongly in this Court, and not without reason, Paget had told various details of his story to the police before the victim's body was found. These were: that the victim was to be taken to a bush work area where the appellant had been working, that the weapon used

on the victim was a shotgun, that Marlow had told him there had been more than one shot, that Marlow had told him that he had blown the victim's head off, and that the appellant had admitted burying him deep in a hole he had dug with an excavator. All these matters were confirmed in whole or in part by the discovery of the victim's body, and were matters of which Paget could have had no knowledge unless he had been told about them by the murderers.

64 The appellant knew the victim, Marlow, Paget and Williams. The other workers who had access to the site where the victim's grave was found did not know the victim, Marlow or Paget.

65 On 22 November 1999 the appellant expressed interest to police officers in discussing an indemnity from prosecution which the State Government had offered in order to obtain information about the victim's death.

66 Though Detective Sergeant Lopes and the appellant differed on the details, the appellant accepted in his evidence in chief that on 25 November 1999 he had confessed to Detective Sergeant Lopes that he and Marlow were involved in killing the victim. The appellant accepted in this Court that this concession was "crucial and, in the absence of any explanation, probably fatal to his chances of acquittal." The same concession was made in the video-recorded interview of 4 March 2000. Each concession was coupled with explanations. The credibility of the explanations was low. They were advanced at different stages, and the differences between some of them verged on contradiction. One was that Detective Sergeant Lopes threatened to "stitch him up" for the murder. Another was that pressure was being placed on his family. Another was that he wanted bail so as to protect his family from Jarvis, a violent criminal shortly to be released from gaol. Another was that the appellant saw Detective Sergeant Lopes as a corrupt officer, and was endeavouring to trap him by getting evidence of his corruption on tape. As Slicer J said, the assertions of the appellant during the video-recorded interview, in these and other respects, were "contradictory, evasive and indicative of 'playing a game'"[53].

67 Finally, Garry Armstrong ("Armstrong") gave evidence that while he was in prison he heard Marlow say in the presence of the appellant that he would murder the victim for his role in the botched 1987 stealing incident and for informing about it, and would dump him in the Central Plateau. He also gave evidence that Marlow and the appellant had confessed to him that they were responsible for the victim's death. Armstrong's credibility was attacked at the trial, but his evidence fitted closely with the circumstantial evidence and with the

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53 *Marlow and Kelly* (2001) 129 A Crim R 51 at 86-87 [152].

25 November 1999 confession, and by the time he gave evidence he had left gaol and had little to gain from giving evidence.

68 The appellant accepted that there was no flaw in the trial judge's summing-up. The appellant also accepted that the trial judge put the appellant's case very favourably in relation to matters such as the credibility of Paget and the need to look for corroboration of his testimony. Indeed, the acquittal of Williams was probably due to the jury's having attended to that warning and having failed to identify any corroboration of the case against Williams.

69 The explanations proffered by the appellant for the making of the 25 November 1999 confession, when taken into account with all the other evidence, even when allowance is made for significant difficulties in some of Paget's evidence, were not capable of raising a reasonable doubt. Their inherent deficiencies were such that the impugned statement did not cause them further damage.

70 In all the circumstances the admission of the impugned statement can have made no difference to the finding of guilt on the part of the appellant. There were numerous coincidences operating against the appellant, which cannot be explained by postulating his innocence and are only consistent with his guilt beyond a reasonable doubt.

71 The appeal is dismissed.

72 McHUGH J. The issue in this appeal is whether the appellant's conviction for murder should be set aside because the trial judge admitted into evidence a "confession or admission" by the appellant. The appellant denied making the "confession or admission". However, he contends that in any event it was not admissible because it was not videotaped, as required by s 8(2) of the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas) ("the Act")[54].

73 In my opinion, evidence of the "confession or admission" by the appellant was not admissible. Section 8(2) of the Act requires the judge at a criminal trial to reject evidence that a person made a confession or admission to a police officer if two matters are proved. The first is that the officer suspected, or ought reasonably to have suspected, that the person had committed an offence. The second is that the person made the confession or admission in the course of "questioning by a police officer in connection with the investigation of the commission or the possible commission of an offence"[55]. However, the section provides four broad exceptions to this general rule. The first is where the confession or admission was videotaped[56]. The second is where an acknowledgment of the confession or admission was videotaped[57]. The third is where "the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why" a videotape of the confession or admission and the acknowledgment of it could not be made[58]. The fourth is where "the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence."[59]

74 In the present case, police officers suspected that the appellant was a party to the murder for which he was convicted. The alleged "confession or admission" was made in connection with the questioning of the appellant in connection with the investigation of the murder. For the purpose of s 8, a confession or admission so made is made "in the course of official questioning". No videotape of the confession or admission or any acknowledgment of it was made. Neither at the trial nor in this Court did the prosecution contend that there was a reasonable explanation why a videotape of the confession or admission or an acknowledgment of it could not have been made. In addition, the prosecution

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54 Section 8 of the Act was repealed effective 1 July 2002.

55 *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8(1).

56 *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8(2)(a).

57 *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8(2)(b).

58 *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8(2)(c).

59 *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8(2)(d).

did not contend at the trial that the interests of justice justified the admission of evidence of the confession or admission. In these circumstances, evidence of the confession or admission was not admissible at the appellant's trial.

75 However, the case against the appellant was so overwhelming that evidence of the confession or admission could not have affected the result of the trial. The jury would have convicted the appellant even if the trial judge had rejected the tender of the evidence of the confession or admission. Consequently, the Crown has established that the erroneous admission of the "confession or admission" has not resulted in any miscarriage of justice. The appeal should be dismissed.

<u>Statement of the case</u>

76 In the Supreme Court of Tasmania, a jury convicted the appellant, Shane Leslie Kelly, and another man of murdering Tony George Tanner in November 1990. The Court of Criminal Appeal of Tasmania dismissed their appeals against their convictions[60]. Underwood J (Evans J agreeing) held that the confession or admission of Kelly was not made in the course of official questioning because, at the time, questioning of Kelly had ceased and the police had left the video interview room[61]. Dissenting on this point, Slicer J held that the statement was inadmissible because s 8 precluded the admission of any statement while a person was in custody unless the case fell within one of the four exceptions specified in s 8(2) of the Act[62]. However, Slicer J held that the Crown had proved that no miscarriage of justice had occurred by reason of the wrongful admission of evidence[63]. Subsequently, this Court granted special leave to Kelly to appeal against his conviction on the ground that a statement that he made to police officers was a "confession or admission" that was inadmissible by reason of the provisions of s 8 of the Act.

<u>The material facts</u>

77 In November 1999, two police officers took Kelly to a police interview room in a city building in Hobart where he said he wanted to talk in the open air. When taken to the rooftop area of the building, Kelly admitted that he and another man were involved in murdering Tanner. Later, he wrote out a statement

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60 *Marlow and Kelly* (2001) 129 A Crim R 51.

61 *Marlow and Kelly* (2001) 129 A Crim R 51 at 75-76.

62 *Marlow and Kelly* (2001) 129 A Crim R 51 at 86.

63 *Marlow and Kelly* (2001) 129 A Crim R 51 at 86-87.

in which he described how he had assisted the other man to obtain the keys to the excavator that was used to bury Tanner.

78 However, it was not until 4 March 2000 that Kelly was arrested and charged with murdering Tanner. He was taken to Launceston where he was interviewed by the same police officers. The interview took over three hours and was video-recorded. In the interview, Kelly claimed that he made the earlier incriminating statements only because of various threats that the police officers had made. He denied "any involvement in it whatsoever." The interview ended when one of the detectives, having been told by Kelly that he had no complaints about how he was being treated "today", said:

> "Right, in that case then we'll conclude the interview and it's approximately 9.17pm."

79 Kelly was then charged, fingerprinted and photographed. Afterwards, he was taken by car to a hospital to obtain samples of his blood and hair. According to the police officers, somewhere between 30 minutes and an hour after the video-recording had ceased, and just before Kelly got into the car, he said:

> "[S]orry about the interview, no hard feelings, I was just playing the game. ... I suppose I shouldn't have said that, I suppose you will make notes of that as well."

80 The police officers made no attempt to take Kelly back to the interview room to confirm that he had made this statement.

<u>In the course of official questioning</u>

81 At the trial and in the Court of Criminal Appeal, the Crown successfully argued that s 8 of the Act did not preclude the admissibility of the above statement concerning "playing the game" because it was not made in the course of official questioning, a pre-condition to the section's preclusion. The Crown contended that the course of official questioning had ceased at 9.17pm when the recorded interview terminated. In response, counsel for Kelly contended that the course of official questioning included anything said by a person in custody to a police officer investigating an offence and who suspects or ought reasonably to suspect that person of committing the offence. Alternatively, counsel for Kelly contended that the course of official questioning covered any words spoken within a reasonable time after the conclusion of formal questioning by the police and which pertained to matters referred to in the formal questioning.

82 At the time when Kelly was charged, s 8 of the Act provided:

"8. (1) In this section –

'**confession or admission**' means a confession or an admission –

(a) that was made by an accused person who, at the time when the confession or admission was made, was or ought reasonably to have been suspected by a police officer of having committed an offence; and

(b) that was made in the course of official questioning;

'**official questioning**' means questioning by a police officer in connection with the investigation of the commission or the possible commission of an offence;

'**serious offence**' means an indictable offence of such a nature that, if a person of or over the age of 18 years is charged with it, the indictable offence cannot be dealt with summarily without the consent of the accused person and, in the case of a person under the age of 18 years, includes any indictable offence for which the person has been detained.

(2) On the trial of an accused person for a serious offence, evidence of any confession or admission by the accused person is not admissible unless –

(a) there is available to the court a videotape of an interview with the accused person in the course of which the confession or admission was made; or

(b) if the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why a videotape referred to in paragraph (a) could not be made, there is available to the court a videotape of an interview with the accused person about the making and terms of the confession or admission or the substance of the confession or admission in the course of which the accused person states that he or she made a confession or an admission in those terms or confirms the substance of the admission or confession; or

(c) the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why the videotape referred to in paragraphs (a) and (b) could not be made; or

> (d) the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence.
>
> (3) For the purposes of subsection (2), '**reasonable explanation**' includes but is not limited to the following:
>
> (a) the confession or admission was made when it was not practicable to videotape it;
>
> (b) equipment to videotape the interview could not be obtained while it was reasonable to detain the accused person;
>
> (c) the accused person did not consent to the interview being videotaped;
>
> (d) the equipment used to videotape the interview malfunctioned."

83 If the words "made in the course of official questioning" are read with a temporal connotation and in isolation, without regard to the policy or purpose of s 8(2), the official questioning in this case ended at 9.17pm on 4 March 2000 when the recorded interview ended. The phrase "in the course of" ordinarily has a temporal and not a causal connotation[64]. Its primary meaning suggests that the preclusion in s 8(2) is directed to confessions or admissions made during a period of police questioning that, although commenced, has not ended. Further, the logic with which s 8 is constructed requires that the definition of "official questioning" in s 8(1) be read into s 8(2). If that is done, the apparent primary meaning of the definition when applied mechanically in s 8(2) confines the confessions or admissions to which that sub-section applies to those that are made *during a period* of police questioning. On that view, any confession or admission made before official questioning commences or after it ends is admissible in evidence.

84 However, a legislative definition is not or, at all events, should not be framed as a substantive enactment. In *Gibb v Federal Commissioner of Taxation*, Barwick CJ, McTiernan and Taylor JJ stated[65]:

> "The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found

64 *Kavanagh v The Commonwealth* (1960) 103 CLR 547.

65 (1966) 118 CLR 628 at 635.

> in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. ... *[Definition] clauses are ... no more than an aid to the construction of the statute and do not operate in any other way*." (emphasis added)

In addition, as Dixon CJ once pointed out, "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed."[66] At issue here is not the meaning of the phrase "in the course of official questioning" when read in isolation. The issue is the meaning of s 8(2) when read with the aid provided by the definitions of "confession or admission" and "official questioning" in s 8(1), by the evident policy of s 8 and by the mischief that it sought to overcome. When that is done, s 8(2) does not have the meaning for which the Crown contends and which the courts in Tasmania accepted. Subject to four exceptions, s 8(2) has the purpose of preventing evidence being given at a criminal trial of any incriminating statement made to a police officer by a person after the officer:

- had or ought to have suspected that the person had committed a crime;
- had questioned or intimated an intention to question that person about the crime;

and the statement was made in response to or was otherwise connected with any questioning or proposed questioning by the officer.

85 The four exceptions are:

(1) the statement was videotaped; or

(2) an acknowledgment of the confession or admission was videotaped and there was a reasonable explanation for the omission to videotape the statement when it was made; or

(3) there was a reasonable explanation for the omission to videotape both the statement and an acknowledgment of it; or

(4) the interests of justice justify the admission of the statement.

66 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397.

The mischief to which s 8 is directed

86 The reliability of confessions – particularly those made to police officers – have long troubled the common law courts. In *R v Thompson*[67], Cave J commented that it was remarkable how rarely evidence of a confession was given

> "when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; – a desire which vanishes as soon as he appears in a court of justice."

87 In 1912, the English judges of the King's Bench Division promulgated the Judges' Rules to deal with concerns about the voluntariness and reliability of confessions or admissions made to police officers by a person who was suspected of having committed an offence. Despite the adoption – expressly or by practice – in common law jurisdictions of the Judges' Rules or their equivalents, throughout the 20th century accused persons regularly complained that confessions that they had made or allegedly made had been obtained by physical force or unfair psychological pressure or had been invented.

88 Cases concerning professional criminals created a special problem. Where the accused was a professional criminal, often the only evidence sufficient to convict him or her was an alleged oral confession made to one or more police officers. Anecdotal evidence suggested that, in many of these cases, no signed confession could be obtained from the accused, despite severe physical or psychological pressure being placed on that person. In these circumstances, manufacturing an oral confession (the so-called "verbal") was an effective – often the only – means of convicting an accused person believed by unscrupulous police officers, often through reliable informants, to be guilty of an offence.

89 In the second half of the 20th century, another form of confessional evidence became widespread: the unsigned typewritten record of interview where the accused allegedly confessed freely and in great detail to a police officer but refused to sign the typed record of the interview. If the officer claimed that the accused had adopted the *typewritten document* recording the interview, the document was admissible as evidence against the accused[68]. In *Driscoll v The Queen*[69], Gibbs J said:

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67 [1893] 2 QB 12 at 18.

68 *R v Kerr (No 1)* [1951] VLR 211 at 212 per O'Bryan J; *R v Lapuse* [1964] VR 43 at 45 per Herring CJ, Adam and Little JJ; *R v Ragen* (1964) 81 WN (NSW) (Pt 1) 572 at 580 per McClemens J; *R v Harris* (1970) 91 WN (NSW) 720 at 725-728 per McClemens, Begg and Meares JJ; *R v Daren* [1971] 2 NSWLR 423 at 434 per
(Footnote continues on next page)

> "[I]f the accused has acknowledged or adopted the document as such – eg, by agreeing that it was a correct account of the interview – it is admissible. ... If part only of the document has been acknowledged, only that part is admissible."

The document was not admissible merely because, when read to the accused, he or she acknowledged its contents as true[70]. The accused had to adopt or acknowledge the document itself as correct before it was admissible in evidence.

90 In *Dawson v The Queen*[71], Dixon CJ had said of the document recording the interview in that case that it was admissible because the accused acknowledged its correctness after reading it aloud. Subsequently, in New South Wales – and no doubt in other States – it became a common practice for a police officer to allege that, although the accused refused to sign the record of interview, he or she had acknowledged the accuracy of the document after reading it – in some cases aloud[72]. Unsigned records of interview were a feature of, and the principal – sometimes the only – evidence, in many cases concerned with "heavy" crimes, such as gangland killings, armed hold-ups, safe-breaking and drug-related offences, for example, where the accused was a professional criminal.

91 No one has ever satisfactorily explained what psychological mechanism would induce a person, particularly a hardened, professional criminal – often with years of experience of the criminal courts – to refuse to sign the record of interview after sitting on the other side of a desk for an hour or more slowly and freely confessing in great detail to the offence. It may be true, as Lawton LJ once said[73]:

Isaacs J, Lee J agreeing; *R v West* [1973] Qd R 338 at 340 per Lucas J, Matthews and Kneipp JJ agreeing; *Driscoll v The Queen* (1977) 137 CLR 517 at 540-541 per Gibbs J, Mason and Jacobs JJ agreeing.

69 (1977) 137 CLR 517 at 540.

70 *R v Kerr (No 1)* [1951] VLR 211 at 212 per O'Bryan J; *R v Lapuse* [1964] VR 43 at 45 per Herring CJ, Adam and Little JJ.

71 (1961) 106 CLR 1 at 13.

72 See, eg, *R v Harris* (1970) 91 WN (NSW) 720 at 722-723 per McClemens, Begg and Meares JJ.

73 *Turner* (1975) 61 Crim App R 67 at 76-77.

> "It is a matter of human experience, which has long been recognised, that wrongdoers who are about to be revealed for what they are, often find relief from their inner tensions by talking about what they have done. In our judgment and experience this is a common explanation for oral admissions made at or about the time of arrest and later retracted."

However, this statement does not explain why the accused should refuse to sign the record of interview after having freely confessed to police officers in the knowledge that his or her answers to questions would be recorded – usually slowly – on a typewriter and would be used as evidence against him or her. In any event, it is highly unlikely that hardened, professional criminals would seek relief by way of confession from inner tensions generated by the knowledge that they "are about to be revealed for what they are".

92 There are good grounds for supposing that over the years many of these "records of interview" tendered in evidence have been fabricated[74]. This is so even though an objective fact or facts often seemed to point to them being an accurate record of a real interview. Frequently, the details of the offence were interwoven with or linked to some fact or facts, unconnected with the offence, that the accused admitted was true and which the police officer claimed had not been known to him until the accused confessed[75]. Further, the answers seemed to catch the jargon, idiom and speech patterns of the accused[76]. Sometimes, as the Wood Royal Commission found[77], the recorded answers did not directly inculpate the accused but were cunningly constructed to prejudice the jury against that person. Many records of interview, if they were fabricated, were works of art, worthy of an award-winning scriptwriter.

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74 See, eg, *Driscoll v The Queen* (1977) 137 CLR 517; *Wright v The Queen* (1977) 15 ALR 305; *Carr v The Queen* (1988) 165 CLR 314 and *McKinney v The Queen* (1991) 171 CLR 468 at 472 per Mason CJ, Deane, Gaudron and McHugh JJ, where it was recognised that an unsigned police record of interview might be fabricated.

75 For example, "Q. Where did you learn about explosives? A. Years ago, when I was working on road construction in New Guinea." This formed part of the allegedly fabricated statement in *R v Fernon* (1967) 85 WN (NSW) (Pt 1) 544.

76 For example, "Q. Police searched your home ... and found an arsenal of weapons ... A. They are just tools of trade Mr Morey, protection you know." (*Driscoll v The Queen* (1977) 137 CLR 517 at 531.)

77 New South Wales, Royal Commission into the New South Wales Police Service, *Final Report*, Volume 1: Corruption, (1997) at [4.13]-[4.14].

93 The dangers of admitting unsigned records of interview into evidence were convincingly pointed out by Gibbs J in this Court in *Driscoll v The Queen*. His Honour said[78]:

> "In *Reg v Ragen*[79], McClemens J suggested that it would be more satisfactory to put before the jury the contemporaneous record itself than to allow a witness to give oral evidence which he had probably learnt by heart after studying the record. The answer to this suggestion is that as a general rule such a record, if unsigned, will add nothing to the weight of the testimony of the police officers who give oral evidence as to what was said in the course of the interrogation, and will in itself be of little evidential value. The fact that a police officer has sworn that the accused adopted the record makes it legally admissible, but it is for the jury to decide whether they are satisfied that the accused did adopt it and if they are not so satisfied they may not use it in reaching their decision. The fact that the record had been prepared would in most cases be of no assistance to the jury in deciding whether the accused person had adopted it. The mere existence of a record is no safeguard against perjury. If the police officers are prepared to give false testimony as to what the accused said, it may be expected that they will not shrink from compiling a false document as well. The danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is out of all proportion to its real weight. For these reasons, it would appear to me that in all cases in which an unsigned record of interview is tendered the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded."

94 Notwithstanding repeated claims by accused that unsigned records of interview had been invented, for a long period – at least until the 1970s – judges[80] and juries appeared to find it difficult to accept that serving police

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78 (1977) 137 CLR 517 at 541-542.

79 (1964) 81 WN (NSW) (Pt 1) 572 at 574.

80 The direction given by the trial judge, Nagle J, in *R v Harris*, although against the accused, was more restrained than many. The judge told the jury:

> "There are five officers, if you accept the arguments of the accused through his counsel, who have all *deliberately perjured* themselves in the witness box." *R v Harris* (1970) 91 WN (NSW) 720 at 723 per McClemens, Begg and Meares JJ, citing Nagle J. (emphasis added)

officers would fabricate these unsigned records of interviews. They appeared to find it even more difficult to accept that senior police officers – often an inspector or higher rank – would falsely testify that, when called in at the end of the interview, the accused confirmed that he had said what was recorded but refused to sign the interview. However, a series of Commissions and Inquiries in Australia[81] and England[82] established that "the fabrication of evidence by police officers – particularly of confessional evidence – does occur"[83]. Commissioner Fitzgerald[84], for example, found that falsifying evidence was a routine feature of "police culture". He said[85]:

> "As part of that culture, many police are routinely involved in misconduct, in rejecting the applicability of the law to police, in improperly influencing the outcome of court proceedings, and in lying under oath as well as breaching their oath to enforce the law. ... Such verballing involves a rejection of fundamental standards."

95 As long ago as 1975, the Australian Law Reform Commission recommended that interviews with police should preferably be recorded by mechanical means or corroborated by a third person when the mechanical recording of the interview was not practicable in the circumstances[86].

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81 Victoria, *Report of the Board of Inquiry into Allegations against Members of the Victoria Police Force*, (1978) vol 1 at 78-93; Queensland, *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland*, (1977) at 13-31; Queensland, *Report of a Commission of Inquiry Pursuant to Orders in Council*, (1989) at 206-207; New South Wales, Royal Commission into the New South Wales Police Service, *Final Report*, Volume 1: Corruption, (1997) at [4.13]-[4.14].

82 United Kingdom, The Royal Commission on Criminal Justice, *Report*, (1993) at [49].

83 Queensland, *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland*, (1977) at [26].

84 Queensland, *Report of a Commission of Inquiry Pursuant to Orders in Council*, (1989).

85 Queensland, *Report of a Commission of Inquiry Pursuant to Orders in Council*, (1989) at 207.

86 Australian Law Reform Commission, *Criminal Investigation*, Report No 2, (1975) at [345].

Subsequently, other Commissions and Committees recommended similar procedures[87].

The legislative response to the mischief

96 Acting on the recommendations and findings of various Commissions and Inquiries, all Australian legislatures have enacted legislation[88] that seeks to protect the rights of accused persons during a period when their rights are vulnerable by reason of the mistaken recollection or lies of police officers. The enactments of the various legislatures are broadly similar in principle although they differ in detail. In general, they identify the period of vulnerability as commencing with the time when the facts raise a suspicion of the accused's guilt. In most jurisdictions, the period is thereafter open-ended. The enactments recognise that miscarriages of justice may occur when there is no mechanical record confirming an allegation by police officers that the accused has confessed to a crime or made a damaging admission after he or she was or ought reasonably to have been seen as a suspect. The evident policy of the enactments is that it is against the interests of justice to admit evidence of such confessions or admissions unless there is a mechanical record of such confession or admission or an acknowledgment of it, or in some jurisdictions that exceptional circumstances justify the admission of the evidence.

97 Given the mischief to which the Australian legislatures have directed their attention and the policy behind the enactments, it would not be defensible to make the admissibility of confessions or admissions made during the period of vulnerability turn upon fine verbal distinctions between the legislation of particular jurisdictions. Rather, courts construing the various legislative enactments should construe them in the same broad way that Dixon J in

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87 Consultative Committee on Police Powers of Investigation, *Report on Section 460 of the* Crimes Act *1958*, (1986) at [6.17]-[6.22]; Review Committee established by the Attorney-General, Review of Commonwealth Criminal Law, *Interim Report: Detention Before Charge*, (1989) ch 7; New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation after Arrest*, Report No 66, (1990) at [6.8]-[6.18].

88 *Crimes Act* 1900 (ACT), s 187 dealing with summary offences in the ACT; *Crimes Act* 1914 (Cth), s 23A(6) dealing with indictable offences in the ACT; *Crimes Act* 1914 (Cth), s 23V; *Police Administration Act* (NT), ss 142 and 143; *Criminal Procedure Act* 1986 (NSW), s 281; *Police Powers and Responsibilities Act* 2000 (Q), ss 246, 263-266; *Summary Offences Act* 1953 (SA), s 74D; *Evidence Act* 2001 (Tas), s 85A (commenced 1 July 2002); *Crimes Act* 1958 (Vic), s 464H; *Criminal Code* (WA), s 570D.

Little v The Commonwealth[89] thought that protective provisions, such as time limitation provisions, should be construed. As far as the statutory language will permit, the legislation of the various jurisdictions should be interpreted liberally and uniformly to give effect to what is a national policy behind this class of legislation. To so construe the legislation of a particular jurisdiction in this way is not to reject the will of the legislature of that jurisdiction. It is merely another application of the *dictum* of Dixon CJ that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed."[90] It also accords with the purposive theory of statutory construction.

Purposive construction

98 Purposive construction is the modern approach to statutory construction[91]. Legislative enactments should be construed so as to give effect to their purpose even if on occasions this may require a "strained construction" to be placed on the legislation[92]. The literal meaning of the legislative text is the beginning, not the end, of the search for the intention of the legislature. As Learned Hand J famously pointed out[93]:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

99 In the Second Reading Speech, made in support of the Bill which became the Act, the Minister for Justice said that the Tasmanian Law Reform

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89 (1947) 75 CLR 94 at 112.

90 *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397.

91 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA; *Bropho v Western Australia* (1990) 171 CLR 1 at 20 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

92 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 422 per McHugh JA.

93 *Cabell v Markham* 148 F 2d 737 at 739 (2nd Circ, 1945).

Commissioner in a Report entitled *Police Powers of Interrogation and Detention*[94] had:

> "recommended that legislation be introduced to ensure that a police officer who has arrested any person, or has custody of an arrested person, either release the person or present him/her before a court within a reasonable time. In addition, the commissioner recommended that police confessional evidence must be by way of electronic recording unless the prosecutor can prove there was a reasonable excuse as to why an electronic recording was not made. The Government has accepted the Law Reform Commissioner's recommendations."[95]

100 The Report makes only the first recommendation. It does not consider the second recommendation. Nevertheless, the Second Reading Speech indicates that the purpose of s 8 of the Act is to exclude confessions made while a person is in custody and has not been brought before a court. Such confessions would be admissible only if electronically recorded or there was a reasonable excuse for not so recording them.

101 Read without the definitions in sub-s 8(1), sub-ss 8(2) and (3) indicate a policy of excluding as evidence all confessions unless they are videotaped or the interests of justice require their admission or there is a reasonable explanation for the failure to videotape the confession. Moreover, a confession is not admissible even if it is proved that there was a reasonable explanation for the failure to videotape it. To make the confession or admission admissible, the prosecution must prove that there was a reasonable explanation for not subsequently videotaping an acknowledgment of the confession or admission.

102 However, s 8(2) must be read with the definitions of "confession or admission", "official questioning" and "serious offence" in s 8(1). Those definitions show that s 8(2) does not require the videotaping of all confessions or admissions, but only those made to police officers in respect of serious offences. This accords with the Minister's statement in the Second Reading Speech that it is directed at "police confessional evidence". The need to limit s 8's preclusion to police confessional evidence also explains the use of the awkward phrase "in the course of official questioning". Although the phrase is a pre-condition to the operation of s 8(2), given the mischief at which the section was aimed, it is better to treat the phrase as a concept rather than a precise criterion of legal rights and

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94 Law Reform Commissioner of Tasmania, *Police Powers of Interrogation and Detention*, Report No 64, (1990).

95 Tasmania, House of Assembly, *Parliamentary Debates* (Hansard), 4 May 1995 at 795.

duties. The fact that the phrase is in a definition clause and that the section must be construed purposively provides further support for doing so.

103 As I earlier pointed out, the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment. In so far as the judgment of Megarry J in *No 20 Cannon St Ltd v Singer & Friedlander Ltd*[96] suggests his Lordship thought that an interpretation or definition clause should be construed independently of the substantive enactment, I think his Lordship erred. The long title to the first *Interpretation Act* 1850 (UK) (13 & 14 Vict c 21) was "An Act for shortening the Language used in Acts of Parliament". The long title to the *Acts Interpretation Act* 1931 (Tas), is "An Act to provide certain rules for the interpretation of Acts of Parliament; to define certain terms commonly used therein; and to facilitate the shortening of their phraseology". These titles convey the true purpose of an interpretation or definition clause. It shortens, but is part of, the text of the substantive enactment to which it applies.

104 The mischief at which s 8 is aimed is clear: the attack on the integrity of the administration of justice by false or unreliable confessions or admissions allegedly made by suspects during a police investigation of a serious criminal offence. It should be interpreted, so far as possible, to overcome that mischief. The prohibition in the section may not be confined to oral confessions. Arguably, it includes written as well as oral confessions unless "in the course of official questioning" impliedly excludes a written confession or admission. In any event, however, the section's effect on the mischief that it was intended to overcome would be seriously undermined if "in the course of official questioning" were defined by the clock and the officer's testimony as to the times when questioning commenced and ended. To construe s 8(2) in the way that the learned judges did in the Supreme Court of Tasmania is to undermine its purpose and to fail to deal effectively with the mischief at which it is aimed. Such an interpretation would also make the section's operation hostage to the oral evidence of the police officers as to when the questioning commenced and ended.

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96 [1974] Ch 229 at 240.

105 When the definitions in s 8(1) are read into s 8(2), that sub-section shows that, subject to specified exceptions, evidence of a confession or admission is not admissible if it was made in the course of questioning by a police officer in connection with the investigation of the commission or possible commission of a serious offence in circumstances where the person was or ought reasonably to have been suspected by a police officer of having committed an offence. Given the purpose of the section and the mischief that it was designed to overcome, I see no difficulty in reading s 8(2), as defined, as applying to any confession or admission that is connected to questioning or proposed questioning by a police officer in connection with the investigation of a serious offence. Judicial expositions of the phrase "in the course of" show that, in particular contexts, it can have a meaning equivalent to "in connection with". Thus, in *In re Pryce; Ex parte Rensburg*[97], Bacon CJ denied that the expression "debts due to the bankrupt in the course of his trade" meant a debt incurred while engaged in his trade. The Chief Justice said[98] that the particular debt in that case had "nothing whatever to do with the bankrupt's trade." The headnote of the report interpreted the decision as meaning that the statutory expression covered "only debts connected with the trade". *In re Pryce; Ex parte Rensburg*[99] was followed and applied by the Divisional Court (Cave and Wills JJ) in *In re Jenkinson; Ex parte Nottingham and Nottinghamshire Bank*[100]. Similarly in *Davidson v M'Robb*[101], Lord Dunedin said:

> "'[I]n the course of employment' is a different thing from 'during the period of employment'. It connotes, to my mind, the idea that the workman or servant is doing something which is *part of* his service to his employer or master." (emphasis added)

106 Given the purpose of the section, there is no difficulty in construing the words "confession or an admission ... made in the course of official questioning" as referring to a confession or admission made in connection with police questioning. Nor do I think there is any difficulty in holding that the section applies to any confession or admission that is made in response to an intimation that the officer intends to question the suspect. The legislature is not likely to have intended the section's preclusion to operate only on confessions or

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97 (1877) 4 Ch D 685.

98 (1877) 4 Ch D 685 at 688.

99 (1877) 4 Ch D 685.

100 (1885) 15 QBD 441.

101 [1918] AC 304 at 321.

admissions allegedly made after a police officer has asked a question connected with the investigation, however trivial it might be. Of course, the confession or admission must be related to police questioning in connection with the investigation, but it will be so related if it is made in response to an indication that the suspect is to be questioned. It borders on the absurd to think that s 8 does not apply to a confession or admission made immediately after the officer has said, "I want you to come to the station for questioning", but applies to a confession or admission made in answer to the officer's first question: "What can you tell me about the assault on X?" To so hold would make "a fortress out of the dictionary". It would treat the term "questioning" as a precise criterion of admissibility rather than as an element in a compound conception that is concerned to limit the admissibility of "police confessional evidence".

107 In the present case, the alleged admission – if it was an admission, and I doubt that it was – was directly connected to the extensive questioning by the police officers that had occurred about an hour earlier. The Crown did not argue that it was not an admission. Because that is so, it was an "admission" to which s 8 applied. The learned trial judge should have rejected evidence concerning it.

108 However, as the evidence set out in other judgments demonstrates, the case against Kelly was so cogent that it is impossible to believe that the result of the trial was affected by the admission of the evidence concerning the "playing the game" statement. Accordingly, the Crown has established that no miscarriage of justice occurred in this case by reason of the wrongful admission of that evidence.

Order

109 The appeal should be dismissed.

110 KIRBY J. The point upon which Mr Shane Kelly ("the appellant") obtained special leave to appeal to this Court was the admissibility of an oral statement attributed to him by police witnesses.

111 At trial, the appellant denied making the statement. It was allegedly made within less than an hour of the conclusion of lengthy questioning of the appellant by police, recorded on video film. For the appellant, the impugned statement was precisely the kind of "police verbal" that had led to the enactment throughout Australia of laws providing for the recording of statements made between police and suspects. On this footing, the appellant submitted that the impugned statement was inadmissible. It should have been rejected at his trial pursuant to the applicable Tasmanian law, namely the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas) ("the Act")[102].

112 The trial judge rejected the appellant's submission. A majority of the Court of Criminal Appeal of Tasmania confirmed that ruling[103]. However, one judge in that court (Slicer J) dissented on this point[104]. He held that the Act rendered the impugned statement inadmissible and that it should therefore not have been received before the jury.

113 Notwithstanding this opinion, Slicer J, by reference to the other evidence adduced at the trial, found that the appellant's case was one for the application of the "proviso" governing criminal appeals[105]. Concluding that there had been no miscarriage of justice, he affirmed the outcome of the trial reflected in the jury's verdict that the appellant was guilty of the murder of the deceased. He had therefore been properly convicted of that crime.

114 Before this Court, the appellant supports the approach to the application of the Act accepted by the dissenting judge. However, he contends that the "proviso" was unavailable or ought not to have been applied in his case.

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102 s 8(2). The provisions of the Act have since been repealed and replaced by the *Evidence Act* 2001 (Tas). Section 85A of that Act is in substantially similar terms. See reasons of Gleeson CJ, Hayne and Heydon JJ ("joint reasons") at [9].

103 *Marlow and Kelly* (2001) 129 A Crim R 51 at 76 [119] per Underwood J, 88 [166] per Evans J.

104 *Marlow and Kelly* (2001) 129 A Crim R 51 at 88 [164] per Slicer J.

105 *Criminal Code* (Tas), s 402(2).

The facts, legislation and decisional history

115 The facts are stated in the reasons of the other members of this Court[106]. Also contained there are the relevant provisions of the Act[107], as it stood at the applicable time, namely "[o]n the trial of [the appellant] for a serious offence"[108]. The appellant's trial for the offence of murder was for a "serious offence" as defined[109].

116 The other reasons also contain an account of the dismissal of the objection to the admission of the impugned statement at trial[110] and the respective decisions of the majority[111] and of the dissenting judge[112] in the Court of Criminal Appeal. It will be necessary to say a little more about the reasons that led to the dissent. However, sufficient appears to demonstrate that this is another case concerning a dispute over statutory language in respect of which differing conclusions have been reached below and now in this Court. Those conclusions are influenced by the conflicting attractions to the judicial mind of the verbal expression of the statutory prescription and of the apparent purpose which that prescription seeks to attain.

The issues

117 The following issues arise on the appeal:

(1) *The confession/admission issue*: Whether, within the Act[113], the impugned statement was evidence of any "confession or admission" by an accused person[114].

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106 Joint reasons at [1]-[8], [10]-[14]; see also at [58]-[67]; reasons of McHugh J at [77]-[80].

107 Joint reasons at [9]; reasons of McHugh J at [82].

108 The Act, s 8(2).

109 The Act, s 8(1). See joint reasons at [9]; reasons of McHugh J at [82].

110 Joint reasons at [15]; reasons of McHugh J at [81].

111 Joint reasons at [16]-[17]; reasons of McHugh J at [76].

112 Joint reasons at [18], [50]; reasons of McHugh J at [76].

113 The Act, s 8(1).

114 The Act, s 8(2).

(2) *The course of questioning issue*: Whether, if the impugned statement did constitute evidence of a confession or admission, in the general sense, it fell within the statutory requirement, essential to attract the protection of the Act, namely that it "was made in the course of official questioning"[115].

(3) *The admissibility issue*: If the impugned statement was a "confession or admission" within the foregoing requirements, whether the trial judge erred, in the circumstances, in ruling that it was admissible and whether the majority of the Court of Criminal Appeal erred in confirming that ruling.

(4) *The availability of the proviso issue*: Whether, in the circumstances that the prosecution did not expressly rely in the Court of Criminal Appeal upon the "proviso", it was open to the dissenting judge to conclude that the "proviso" applied and whether, in any case, the "proviso" was available to this Court.

(5) *The application of the proviso issue*: Whether, if the impugned statement was inadmissible, and ought to have been rejected, and the "proviso" was available, it applies on the ground that no miscarriage of justice has actually occurred, so that the appellant's conviction ought to be confirmed.

<u>Narrowing the issues</u>

118 *The confession/admission issue*: I agree with the reasons of Gleeson CJ, Hayne and Heydon JJ ("joint reasons") that it would be undesirable in this case to resolve any controversy that may exist concerning whether the impugned statement was a "confession or admission" in the general sense of those words[116]. Although I am inclined to believe that the impugned statement falls within the ambit of those words, at least as they are used in this statutory context[117], it is not essential in this appeal to determine that point. It was not argued before the Court of Criminal Appeal. I will therefore assume that the statement, if otherwise falling within the requirements of the Act, was a "confession or admission". But I will not decide that issue.

119 *The admissibility issue*: Passing over the course of questioning issue, I can likewise dispose quickly of the admissibility issue. If, otherwise, the

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115 The Act, s 8(1), definition of "confession or admission".

116 Joint reasons at [21].

117 cf reasons of McHugh J at [107].

impugned statement was a "confession or admission", it certainly fell within the first statutory requirement of the special definition of that expression in the Act[118]. The impugned statement was made by the appellant as an "accused person". At the time it was made, he "was or ought reasonably to have been suspected by a police officer of having committed an offence". Indeed, at the relevant time, the appellant was about to be taken, in the company of Detective Sergeant Lopes and Detective Pretyman, to a hospital for the purpose of obtaining body samples for police investigative purposes. This was a course of conduct that could only be explained on the footing that, at that time, the appellant was, or ought reasonably to have been, suspected of having committed an offence. I did not take this point to be contested.

120 Nor could I conclude that, if otherwise the impugned statement was inadmissible, any of the qualifications and exemptions contained in the Act[119] were made out. Although an extensive videotape of a protracted police interview with the appellant was available to the court, there was no videotape of the impugned statement[120]. Nor did the prosecution prove that there was available to the court a videotape of an interview with the appellant "about the making and terms of the confession or admission or the substance [of it] in the course of which the [appellant] states that he … made a confession or an admission" in the same or substantially similar terms to the impugned statement[121]. Nor did the prosecution prove that there was a reasonable explanation as to why the videotape referred to in *both of the* preceding provisions (including a subsequent interview on videotape) could not have been made[122].

121 Finally, if all other requirements were established, and particularly because of the failure of the police officers to do what could readily have been done (take the appellant back to the interviewing room, recommence the interview and confront him with the impugned statement) I am unconvinced that "exceptional circumstances" have been demonstrated which, in the interests of justice, would justify the admission of the evidence in the case[123]. No such finding has ever been made by any judge who has considered the matter.

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118 The Act, s 8(1)(a).

119 The Act, s 8(2).

120 The Act, s 8(2)(a).

121 The Act, s 8(2)(b).

122 The Act, s 8(2)(c). Emphasis added.

123 The Act, s 8(2)(d).

122 On these assumptions, if otherwise the impugned statement was a "confession or admission" within the Act, it was not admissible and should have been excluded at the trial. I shall return to this issue.

123 *The availability of the proviso issue*: Whatever was the correctness of the approach of the dissenting judge in the Court of Criminal Appeal, in reaching his conclusions upon the basis of the "proviso" not relied upon in that Court (a matter upon which I say nothing), there was no legal inhibition upon the prosecution's reliance on the "proviso" in this Court. In this, I also agree with the joint reasons[124].

124 Before this Court, the question of the application of the "proviso" was fully argued and rightly so because of the nature of the appeal and the evidence adduced against the appellant at his trial. In the Tasmanian *Criminal Code* the "proviso" appears in conventional terms. It is addressed to the "[d]etermination of appeals", in the sense of appeals against the judgment or order of the court of trial, relevantly where a "wrong decision of any question of law" is shown[125]. The language of the *Criminal Code* permits the Court (meaning the Court of Criminal Appeal), notwithstanding the demonstration of error, to "dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred"[126].

125 This Court is empowered to make the order which ought to have been made below[127]. As the application of the "proviso" has been fully argued in this Court, if otherwise the appellant demonstrated the inadmissibility of the impugned statement, it would be necessary for this Court to decide the point. No inhibition or impediment arises because of the way in which the prosecution presented the issues in the Court of Criminal Appeal[128].

126 It cannot be suggested that there is any procedural unfairness to the appellant by adopting this course. The entire evidence at the trial is on the record. It is open to this Court to consider that record. So it did, on the footing

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124 Joint reasons at [56].

125 *Criminal Code*, s 402(1).

126 *Criminal Code*, s 402(2).

127 *Judiciary Act* 1903 (Cth), s 37.

128 The appellant pointed out that the issues argued in the Court of Criminal Appeal, relevant to his appeal, were addressed only to three grounds. See *Marlow and Kelly* (2001) 129 A Crim R 51 at 69 [86]-[87].

of extensive submissions about the case against the appellant, and the evidence and arguments presented at trial by both sides.

127 *The application of the proviso issue*: I agree with the reasons of the other members of this Court,[129] that the prosecution case against the appellant was overwhelming and compelling.

128 Although I was party to the decision to grant special leave to the appellant, I did so substantially upon the basis of the suggested importance of the course of questioning issue and because similar questions have arisen under like legislation in other States. A greater familiarity with the evidence in the appellant's case, permitted by full argument in the appeal, sustained, in retrospect, the submission of the prosecution at the special leave hearing. This was not, in the end, a very suitable case in which to resolve the contested point of statutory construction.

129 This was so because, even if the appellant's submissions were accepted, they cannot affect the outcome of his case. The evidence against him was overwhelming. His conviction was inevitable[130]. Although the jury deliberated for over 18 hours[131] this (as Slicer J observed) was an indication of their careful consideration of the mass of evidence, lengthy addresses and detailed summing up that followed a trial involving three accused and 70 witnesses which lasted over eight weeks[132]. One of the co-accused in that trial, Mr Williams, was found not guilty. The differential consideration of his case (where the inculpating evidence was much weaker and unconfirmed) provides one clear reason for the length of the jury's deliberations. So does the seriousness of the consequence of the verdict of guilty in the cases of the other accused, including the appellant.

130 Apart from everything else, so far as the "proviso" is concerned, two particular features weigh in my assessment of whether a "miscarriage of justice" is shown in the appellant's case. The first is the strong summing up to the jury by the trial judge concerning the particular care with which they should approach the weight to be given to the impugned statement, taking into account the fact that it

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129 Joint reasons at [55]-[70]; reasons of McHugh J at [108].

130 See eg *Conway v The Queen* (2002) 209 CLR 203 at 226 [63], 242 [106]; *Arulthilakan v The Queen* (2003) 203 ALR 259 at 275 [62], 276-277 [68]-[69]; cf Penhallurick, "The Proviso in Criminal Appeals", (2003) 27 *Melbourne University Law Review* 800.

131 *Marlow and Kelly* (2001) 129 A Crim R 51 at 87 [158].

132 *Marlow and Kelly* (2001) 129 A Crim R 51 at 87 [155].

had not been confirmed by recording or other independent means[133]. The directions given by the trial judge were harmonious, in this regard, with the instruction of this Court in *McKinney v The Queen*[134]. Counsel for the appellant properly conceded that the trial judge's direction was a "full" one, "warning of the dangers of relying on unrecorded incriminating statements said to have been made by accused persons" to those in authority.

131 Secondly, in the context of the entirety of the trial, and the very strong prosecution case against the appellant, the impugned statement would have played an insignificant role (if any) in the deliberations of the jury. I agree with the dissenting judge that the impugned statement was but a minor addition to other, more inculpatory contradictions, evasions and indications suggesting that the appellant was "playing a game", which was what he was alleged to have conveyed in the impugned statement. In that sense, viewed in context, the impugned statement, when received into evidence, "did little to enhance the prosecution's case". Isolated and put under a forensic microscope, the significance of the statement can be painted as important. However, in "the context of this case, the identified evidence does not suggest a 'miscarriage of justice'"[135].

132 A reflection of this impression may be found in the fact that, having lost the objection to the admissibility of the impugned statement, the appellant did not, at the trial, seek its exclusion on the basis of an exercise by the trial judge of his residual discretion to reject evidence where its prejudice outweighed its probative value. The course of the trial confirms my impression that the point of objection raised for the appellant was, and was only, a technical one of principle based on the language of the Act. It was not, as such, one based on the potency of the statement to prejudice the appellant's case, when that statement was viewed in the context of the trial as a whole.

133 The result is that, reserving for the moment the course of questioning issue raised by the meaning of the Act, all of the issues presented in the appeal are determined against the appellant with the result that his appeal must fail. I acknowledge that this involves taking the consideration of the "proviso" out of its proper order. In terms of the *Criminal Code* and logic, consideration of the "proviso" does not strictly arise until some "point raised by the appeal might be

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133 This is mentioned by Slicer J: *Marlow and Kelly* (2001) 129 A Crim R 51 at 77-79 [127], 86 [152].

134 (1991) 171 CLR 468.

135 *Marlow and Kelly* (2001) 129 A Crim R 51 at 86 [152].

decided in favour of the appellant"[136]. Relevantly, this occurs on a demonstration of a "wrong decision of any question of law" in the course of the trial[137]. As a matter of strict law, consideration of the "proviso" should therefore be postponed until any errors complained of by an appellant in a criminal appeal are determined and the accuracy and safety of the trial can then be viewed in their entirety[138].

134 Nevertheless, in this appeal I have proceeded directly to the "proviso" issue, on an assumption that a wrong decision on a question of law could be established on the course of questioning issue, warranting a decision in favour of the appellant. I have done so because the case against the appellant was so overwhelming that a real question was presented to my mind as to whether special leave should be revoked[139].

135 However, having come so far, and narrowed the issues as I have, it is appropriate to respond to the arguments of the appellant on the course of questioning issue, if only because, in the end, I have reached a conclusion different from the majority. But for the foregoing reasons, it is not a conclusion that warrants disturbance of the unanimous order of the Court of Criminal Appeal.

<u>The course of official questioning</u>

136 *The purpose of contested words*: I agree with much of the joint reasons on the remaining issue. Those reasons have explained the background against which the provisions of the Act in issue in this appeal have to be read. For some time, the problem of confessions to police, and specifically of so-called "police verbals"[140] bedevilled the administration of criminal justice in Australia, as in other countries. It came under particular attention in decisions of this Court in the 1970s[141] and 1980s[142].

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136 *Criminal Code*, s 402(2).

137 *Criminal Code*, s 402(1).

138 *Arulthilakan v The Queen* (2003) 203 ALR 259 at 272 [52].

139 cf *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249; *Thompson v Judge Byrne* (1999) 196 CLR 141; *Flanagan v Handcock* (2001) 181 ALR 184.

140 *Driscoll v The Queen* (1977) 137 CLR 517 at 539.

141 *Burns v The Queen* (1975) 132 CLR 258 at 265; *Driscoll v The Queen* (1977) 137 CLR 517; *Wright v The Queen* (1977) 15 ALR 305. In fact, the danger was recognised earlier: *Ross v The King* (1922) 30 CLR 246; *McKay v The King* (1935) 54 CLR 1; *Stuart v The Queen* (1959) 101 CLR 1; cf Kirby, "Controls Over

(Footnote continues on next page)

137 As the other members of this Court explain, public, judicial, police and other concerns about the problems of contested oral and written confessions and admissions to police resulted in law reform and similar reports[143], as well as insistence on the part of this Court upon heightened scrutiny by trial judges and intermediate appellate courts throughout Australia. Eventually, this Court, in *McKinney* established a new rule of practice. That rule obliged trial judges to give strong directions to juries, warning against findings of guilt based only (or substantially only) on confessions allegedly made in official custody, unless the making was reliably corroborated (as by electronic recording, especially video recording).

138 *Duty to the statutory language*: There is no doubt that the decision in *McKinney*[144] worked a considerable, and beneficial, change in police practice, prosecution conduct of trials, judicial vigilance and appellate scrutiny. It also stimulated legislative changes, introduced in federal, State and Territory law. These changes, and the variations amongst them, are explained in the joint reasons[145]. They support the observation that the solution to the legal issue remaining in this appeal is not to be found in generalities or perceived necessities to tackle globally the problem of unreliable confessions or admissions to officials or "police verbals". In each case, where legislation has been enacted to express the requirements of the law, such requirements will be found in the terms of the legislation.

139 Because that legislation varies, as the joint reasons have demonstrated, in significant ways in different parts of Australia (and in the case of Queensland in

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Investigation of Offences and Pre-trial Treatment of Suspects", (1979) 53 *Australian Law Journal* 626.

142 *Bromley v The Queen* (1986) 161 CLR 315; *Carr v The Queen* (1988) 165 CLR 314; *Duke v The Queen* (1989) 180 CLR 508. See also *R v Spencer* [1987] AC 128.

143 Esp Australian Law Reform Commission, *Criminal Investigation*, Report No 2, Interim, (1975) at 70 [154]. See *McKinney v The Queen* (1991) 171 CLR 468 at 479 per Brennan J. The other Australian law reform reports are referred to in the joint reasons at [28] (fn 20); reasons of McHugh J at [95] (fn 87).

144 (1991) 171 CLR 468 at 475-476. See Mason, "Opening Remarks, Fourth International Criminal Law Congress", (1993) 17 *Criminal Law Journal* 5 at 8-9; cf joint reasons at [27].

145 Joint reasons at [32]-[36]; reasons of McHugh J at [96].

different terms at different times)[146], it is essential to determine contested issues of admissibility by reference to each statutory prescription that governs the matter. If it should prove that such prescription is inadequate to meet every problem of disputed confessions and admissions or every case of "police verbals" perceived as offending against the principles stated in *McKinney*, the courts are not bereft of remedies. The rule in *McKinney* still applies. Trial judges must give the warning mandated by that decision for residual cases of contested confessions and admissions. This was done in the present case.

140 In appropriate circumstances, subject to any legislative prescription to the contrary, judges also retain a residual power to exclude such confessions and admissions where the prejudice of admitting them would outweigh their probative value[147]. What is not permissible, in response to the differentiated legislation enacted by the legislatures for the several jurisdictions of Australia, is the imposition by this Court of a common rule that ignores, or overrides, the terms of the law as validly enacted by those legislatures to govern such cases. Ultimately, in every case, where legislation has been enacted, it is the duty of courts if the legislation is valid to give effect to it according to its terms. Statutory construction is a text-based activity[148].

141 *Finding the legislative purpose*: Having said this, the meaning of the expression "in the course of official questioning" in the Tasmanian Act in issue in this appeal remains to be ascertained. The ambit of that expression will be clarified by the circumstances of particular cases. The task of a court, obliged to give meaning to the expression, is to apply the statutory words to the case in hand. The task of this Court, in elucidating the expression, is to do so by reference to general principles that will assist in the later application of the

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146 Joint reasons at [35]-[36] referring to *Police Powers and Responsibilities Act* 1997 (Q), s 104 now replaced by *Police Powers and Responsibilities Act* 2000 (Q), ss 246, 263-266.

147 *Bunning v Cross* (1978) 141 CLR 54 at 73-74; *Cleland v The Queen* (1982) 151 CLR 1; cf *R v Sang* [1980] AC 402 at 431-437 and see now *Evidence Acts* 1995 ((Cth), 1995 (NSW), 2001 (Tas)), ss 90, 135, 136, 137, 138; cf Australian Law Reform Commission, *Evidence*, Report No 26, Interim, (1985), vol 1 at 73 [148], 351-352 [644], 529 [957].

148 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Conway v The Queen* (2002) 209 CLR 203 at 227 [65]-[66]; *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]-[69]; 197 ALR 297 at 310-311; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 128 [133], 130-131 [145]-[148]; 202 ALR 233 at 264-265, 268; *Dossett v TKJ Nominees Pty Ltd* (2003) 78 ALJR 161 at 170-171 [57]; 202 ALR 428 at 441.

legislation, and like provisions, in a wide range of cases in which circumstances will inevitably be different and the statutory words will need to be given content.

142 To perform the function of elucidating statutory meaning, this Court, in recent times, has moved away from a purely verbal or linguistic approach to a broader, or "purposive", approach[149]. There are now too many cases in which the Court has endorsed the "purposive" approach to warrant a return to narrow textualism. Nothing in the reasoning of the joint reasons in this appeal contests these propositions. However, the majority feel compelled by the language of the Act, particularly when considered beside alternative legislative formulations, to conclude that the reference to "in the course of official questioning" excludes the circumstances of the impugned statement allegedly made by the appellant to police in the police carpark.

143 The "purpose" can, of course, only extend so far as the statutory prescription provides. Because that prescription is seen as amounting to a "compromise" on the part of the Tasmanian Parliament[150], it does not extend in the majority's opinion to a case such as the present. They conclude that, for a court to say otherwise, involves an invalid expansion of the legislative prescription in accordance with a "purpose" larger than that which the Tasmanian Parliament ultimately endorsed.

144 I accept the force of the majority's reasoning. As in most cases of statutory construction reaching this Court, there are arguments both ways. In the end, however, I have concluded, alike with McHugh J and Slicer J, that the words "in the course of official questioning" extend to circumstances such as those in which the impugned statement was made. I must therefore explain the steps that lead me to this conclusion.

145 *Official questioning during police detention*: First, it is proper to start the task of interpretation by viewing the contested phrase ("in the course of official questioning") in a context larger than the words taken in isolation. The differences in the legislative responses, in Australia and elsewhere, to the problem of contested confessions and admissions to officials and "police verbals" must be given due weight. But so must the generic problem to which, in their differing ways, the legislative texts respond.

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149 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424. See reasons of McHugh J at [98].

150 Joint reasons at [40].

146 As Slicer J points out in his dissenting opinion below[151], the problem presented by such confessions and admissions was not only that of protecting the innocent accused against wrongful conviction. It was also, in words of Lamer J in *Rothman v The Queen*[152], borrowed by Slicer J, "*the protection of the system* itself by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society". Because, in Australia, such protection lies substantially in the hands of the judiciary, in ascertaining the meaning of legislative prescriptions such as those in the Act, it is essential that real weight should be given to the serious problem for the administration of criminal justice that such legislation addresses.

147 I agree with Slicer J's remark, referring to the successive rulings of this Court in such cases as *Cleland v The Queen*[153] and *McKinney*[154]. His Honour observed[155]:

> "At one level a statement of those rights transcend the rights of an accused person. Instead, the statement is one touching the values of our society and defines who we are. A culture of law enforcement which permits possible abuse of power is not in the interests of society as a whole."

148 Abuse of power is not in the interests of the courts, of the accused or of public confidence in the police. It is therefore appropriate, where an Australian legislature has responded to the problems identified by this Court over a space of two decades in the 1970s and 1980s, to give to any ambiguity that appears in the legislation a construction that ensures that it responds to the problem, so far as the language permits. The days have passed when courts find any pleasure in concluding that reformatory legislation is addressed to a problem but has missed its target[156]. That is the important difference introduced by the adoption of the "purposive" approach to statutory interpretation. It has its limits. But in the

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151 *Marlow and Kelly* (2001) 129 A Crim R 51 at 80 [132].

152 [1981] 1 SCR 640 at 689 (original emphasis).

153 (1982) 151 CLR 1.

154 (1991) 171 CLR 468.

155 *Marlow and Kelly* (2001) 129 A Crim R 51 at 87 [153].

156 Lord Diplock, "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice*, (1978) 263 at 274 cited in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424 per McHugh JA; cf *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641 per Lord Macmillan.

present case, the existence of a relevant "purpose" is indicated by too many judicial statements, official reports and legislative enactments to deny its significance.

149 On the face of things, therefore, an interpretation of "in the course of official questioning" that was confined to the room at police headquarters in which video recording equipment was set up, and which did not extend to words used by the accused soon after departing that room when he was still in police detention, would seriously undermine the statutory "purpose" of requiring a video recording of such exchanges. It would also undermine so much of the "purpose" as was addressed to responding to the decision of this Court in *McKinney* and the direction which that case obliged judges to give to juries concerning the danger of "police verbals". Arguably, the impugned statement would fall within that description. The starting point of analysis, then, is that the statement would appear to fall within a legislative provision addressed generally to remedy contested and unconfirmed statements to police officers by accused suspects whilst detained by them.

150 Secondly, specific confirmation that this was the general purpose of the Tasmanian Act may be found in the nature of the Act and the statement of the Attorney-General explaining its object to the Tasmanian Parliament and the balance that it sought to strike.

151 The Minister for Justice, in his Second Reading Speech, told the Tasmanian Parliament that the Criminal Law (Detention and Interrogation) Bill 1995 (Tas) had its genesis in a report of the Law Reform Commissioner of Tasmania[157]. That report had been accepted by the Government. As its short title indicated, its purpose was to enhance police powers of detention of suspects but upon conditions that responded to the revealed problem of misuse of police powers. That problem included the contested attribution of confessions and admissions to accused persons in police detention which could not be confirmed in some objective and reliable way and against which the accused was in a very vulnerable position to launch an attack, especially if he or she had a criminal record.

152 In short, according to the Minister a new balance was to be struck in Tasmania. Police were to secure larger powers of detention. But they were also to be subject to new requirements to "videotape … an interview with the accused person, in the course of which [a] confession or admission was made" as a

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157 *Police Powers of Interrogation and Detention*, Report No 64, (1990). See *Marlow and Kelly* (2001) 129 A Crim R 51 at 84 [144].

precondition to the admission of evidence of "any confessional admission" in specified trials[158].

153 The word "interview" is used in the Act, although not precisely as it is in other legislative prescriptions[159]. It is clear that the Minister understood the expression "in the course of official questioning" in the Tasmanian Act to be generally equivalent to the expression "interview" which he adopted as a shorthand synonym. Textual support for the proposition that the Act was designed to strike a new balance between enlarged police powers and new protective requirements governing confessions and admissions can be seen in the short title of the Act, with its reference both to "detention" and "interrogation". Further, its provisions address each of these purposes. It would be contrary to the clear purpose of the Act, as explained by the Minister, to construe it so as to enlarge the powers of police detention without significantly enhancing the security of the confessions and admissions obtained during such detention. The construction favoured by the joint reasons undermines the balance apparent in the language of the Act.

154 Thirdly, there are other textual indications that the Act was to extend to confessions and admissions allegedly made whilst an accused was in police detention, in circumstances such as that involving the appellant when the impugned statement was said to have been made.

155 The "trigger" for the initiation of the application of the new protections was the moment, provided in s 8(1)(a) of the Act, when the police officer to whom the confession or admission was made suspected, or ought reasonably to have suspected, the accused of having committed an offence. Whilst it is true that this "trigger" would exclude from protection confessional statements made *before* that level of suspicion was reached (and hence would not protect a statement blurted out by a person at a crime scene or on the telephone before suspicion attached), the initiation of the obligation is significant. On the face of things, one would draw from the text an inference that the obligation would continue thereafter, so long as the accused was, or ought reasonably to have been, suspected and until the police officer concerned had discharged his or her policing function.

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158 Statement by the Minister for Justice to the Tasmanian Parliament cited by Slicer J in *Marlow and Kelly* (2001) 129 A Crim R 51 at 84 [144].

159 The word "interview" is used in the Act, s 8(2)(a) and (b); cf *Police and Criminal Evidence Act* 1984 (UK), s 60, Code of Practice, Code C, 6.6, 11.5-11.10; cf Archbold, *Criminal Pleading, Evidence and Practice*, (1995), vol 1 at ¶15-390. See *Marlow and Kelly* (2001) 129 A Crim R 51 at 81 [136].

156 Of its nature, the policing function involving the appellant was not concluded by switching off a video or audio recorder. It was only discharged by police taking the steps contemplated by the Act and transferring responsibility of the accused from the power of the Executive Government, to the power of an officer in the independent judicial branch of government. So much appears to be indicated by a *functional*, as distinct from a purely *verbal*, analysis of the Act with its reference to the initiation of police duties on the basis of actual or reasonable suspicion of an offence.

157 The problem presented by the Act is a new manifestation of an old controversy. In the past, the existence of an actual or reasonable suspicion of an offence was the "trigger" to impose upon police duties the responsibility to administer warnings to the accused and to bring the accused promptly before a judicial officer[160]. That duty continued until it was discharged. Given the reformatory purposes of the Act, it would be an odd construction to excuse the police officer of the duty to record the confession or admission on videotape whilst the accused was still under suspicion, in detention and before he or she had been brought before a judicial officer for disposition in accordance with the general law. The phrase "in the course of official questioning" takes its colour and meaning from that law.

158 Fourthly, there are still other textual indications in the Act that this broader view of its operation should be preferred. The width of the expression "questioning by a police officer" is demonstrated by the indication that it applies so long as the questioning is "*in connection with* the investigation of the commission or the possible commission of an offence"[161]. Such words of connection could not be broader. Certainly, at the time the alleged confession or admission was made in the form of the impugned statement, the appellant was in police detention in such a "connection". The "investigation" by police was continuing. The appellant was being taken to a hospital to procure body samples precisely for the investigative purpose.

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160 At common law police (and private citizens) had the power of arrest only for the purpose of taking the suspect promptly before a justice or magistrate to be dealt with according to law. See *Dallison v Caffery* [1965] 1 QB 348 at 366-367 per Lord Denning MR; *R v Banner* [1970] VR 240 at 249-250. Australian Law Reform Commission, *Criminal Investigation*, Report No 2, (1975), Interim at 38 [87]. As there pointed out, in most Australian jurisdictions, legislation gave statutory expression to the common law principle delimiting the permissible time by the use of various words of urgency: "forthwith", "without delay", "without undue delay", "as soon as practicable", "not longer than is reasonably necessary in the circumstances", "within twenty-four hours", and "within forty-eight hours … or if not practicable … as soon as practicable after that period".

161 The Act, s 8(1), definition of "official questioning". (Emphasis added.)

159 There are additional textual clues. One well-established technique of "questioning" persons in official custody involves prolonged silence on the part of the questioner. In such circumstances, the subjects of interrogation often feel a need to fill the silences with elaboration, explanation, justification, exculpation, pleas and excuses. It would be unthinkable, given the purpose of the Act, to suggest that statements of such a kind, made by a person in police detention to a police officer, who actually or reasonably suspects that person of having committed an offence, fall outside the protection of the Act because not responsive to "questioning". Clearly, "questioning" must include silences on the part of the police. Yet, if such silences are included whilst the accused person is in police detention in connection with the investigation of the commission or possible commission of an offence, in a police station or building, it is impossible in logic to exclude similar silences when the accused is under police detention in a nearby police carpark when identical or equivalent statements are made to the police officer engaged in the investigation. The line of demarcation cannot be drawn at the door of the police building, still less the door of the police facility for the video recording of confessions and admissions.

160 Fifthly, further confirmation that this is so is found in the textual provision contemplating that a confession or admission by an accused person, not recorded on videotape, should ordinarily result in a follow up interview with the accused person on videotape about the making and terms of the confession or admission or the substance thereof[162]. This provision indicates Parliament's purpose where a confession or admission is not recorded on videotape, namely that the opportunity should be taken immediately to provide the facility of a follow-up recording. Otherwise, the prosecution is required by the Act to prove that there was a reasonable explanation as to why the alleged confession or admission was not recorded on videotape or presented for follow-up recording[163].

161 Confronting the appellant with the impugned statement on video recording would not have been a difficult task in the circumstances of the present case. When the impugned statement was made, the police detaining the appellant were still in the vicinity of the police building, only minutes away from the video recorder. It would have been a small inconvenience to return the appellant to the videotape recording facility to confront him with the accusation of his alleged additional statement. Then, the jury would have had the benefit of a prompt and contemporaneous assertion by police of what the appellant had said and a recording of the appellant's immediate response.

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162 The Act, s 8(2)(b).

163 The Act, s 8(2)(c).

162 The object of the Act was to discourage "police verbals", to promote police integrity, to save court time and to ease the task of the jury by such procedures. I agree with the joint reasons that the prosecutor's argument, that the Act was addressed solely or mainly to unsigned written confessions, should be rejected[164]. The procedures spelt out in the Act indicate a parliamentary consciousness of the risks and difficulties presented by just such an oral exchange as was alleged to have happened in the appellant's impugned statement. Given the language and objects of the Act, it cannot be the case that it is left to police officers alone to determine conclusively when the "course of official questioning" is concluded.

163 Yet, by adopting the approach stated in the joint reasons, that "official questioning" concluded with the statement to that effect by the interrogating police officer, the switching off of the video recording and departure from the police recording room, effectively it is left to police to mark the boundaries of the obligations imposed upon them by Parliament. Such a construction is unacceptable given that the object of the Act was to put checks on the conduct of police officers. It would seriously undermine the achievement of that object to permit those placed under scrutiny to determine the limits and termination of the duration of their own scrutiny. A more objective criterion, consonant with the language and objects of the Act, must be adopted.

164 Sixthly, adopting such an objective criterion for the terminus of "in the course of official questioning" would also be consonant with the approach of the English courts to equivalent provisions in their law. It should not be thought that the problem of oral statements to police officers immediately *before*, and more particularly immediately *after*, the formal interviewing stage is one confined to the courts of Australia or Tasmania. On the contrary, soon after a law was adopted in England to require recording of certain events involving police investigation of offences, similar problems arose. This Court is also aware that like questions have also arisen elsewhere in Australia[165]. Whilst each problem of such a kind must be solved by reference to the applicable legislation, Australian courts can derive assistance from fifteen years of consideration by the English courts of the difficulties inherent in such legislation.

165 The common challenge is that, whatever verbal formula is adopted, it will not anticipate all of the circumstances by which, licitly or illicitly, attempts are made to adduce evidence of confessions and admissions to police occurring outside the formal part of an "interview" or "official questioning". The narrower the approach to those concepts, "the more likely it is that conversations,

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164 Joint reasons at [42].

165 *Coates v The Queen*, special leave granted, Perth, 23 October 2003.

discussions, informal chats, talks, introductory remarks and other expressions denoting communication between suspect and police officer will fall outside the ambit" of the legislation to the destruction of its effectiveness[166].

166 In 1989, in *Matthews*[167], Morland J, in the English Court of Appeal, said that it was "not within the spirit of the Act or the code that 'interview' should be given a restricted meaning". The same should be said about "in the course of official questioning" in the Tasmanian Act. There is no reason why this Court should adopt an approach different from that adopted by the English Court of Appeal. There is every reason of principle and policy why it should not.

167 The joint reasons contain reference to another decision of the English Court of Appeal in *Bryce*[168]. However, that decision by no means concludes the list of English cases. A number of them are collected by Slicer J in his reasons[169]. They extend from *Maguire*[170] and *Clarke*[171] in 1989 through to *Cox*[172], *R v Purcell*[173] and *Ward*[174]. I agree with the analysis of Slicer J that, despite some inconsistencies (as for example in *R v Younis and Ahmed*[175]), it can be said with certainty that "the theme of the English authorities is one designed to prevent the admission of 'verbals'"[176]. The falling off in the number of such cases in recent years in England suggests that the approach to interpretation adopted by

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166 *Marlow and Kelly* (2001) 129 A Crim R 51 at 81 [136] per Slicer J quoting Archbold, *Criminal Pleading, Evidence and Practice*, (1995), vol 1 at ¶15-390.

167 (1989) 91 Cr App R 43 at 47-48.

168 (1992) 95 Cr App R 320 at 326. See joint reasons at [50].

169 *Marlow and Kelly* (2001) 129 A Crim R 51 at 82-84 [139]-[142].

170 (1989) 90 Cr App R 115.

171 (1989) *Criminal Law Review* 892.

172 [1993] 1 WLR 188; [1993] 2 All ER 19.

173 (1992) *Criminal Law Review* 806. See also *R v Scott* (1991) *Criminal Law Review* 56.

174 (1993) 98 Cr App R 337.

175 (1990) *Criminal Law Review* 425.

176 *Marlow and Kelly* (2001) 129 A Crim R 51 at 83 [140], citing also *Canale* (1990) 91 Cr App R 1; *Hunt* (1992) *Criminal Law Review* 582; *R v Keenan* [1989] 3 WLR 1193; [1989] 3 All ER 598.

the English courts has had the desired result, so that alleged confessions and admissions of police, subsequently tendered by the prosecution in evidence at a trial, are almost invariably recorded on video film initially or presented to the accused on video film immediately after an impugned statement is made so that the accusation is recorded contemporaneously and has the chance to respond in a way that will be available to the jury.

168 The English cases are said to be distinguishable on the basis that the legislative language is different from that of the Act. It is true that there are points of difference. However, in my view, alike with Slicer J, it is open to this Court to construe the phrase "official questioning" to have the meaning preferred by the English Court of Appeal in respect of the conduct of interviews and the consequences of "anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made … in consequence thereof"[177]. The phrase in the Tasmanian Act is opaque and ambiguous. Only the construction that McHugh J and I favour gives full effect to the language consistently with the purpose and scheme of the Act. Only that construction avoids the effective self-determination by police of the conclusion of the "course of official questioning", inherent in the alternative view. That view cannot stand with the history of this legislation, its purpose and intended operation, derived from all of its provisions. It is not necessary to its language.

169 *Conclusion: ambit of recording obligation*: It follows that I prefer the approach of Slicer J in the Court of Criminal Appeal. However, I would not express the ambit of the obligation of recording of confessions and admissions to police officers in quite the same way as he did. Notably, I would not do so by reference, as such, to "custody" of that person.

170 Instead, using the language of the Act, I would conclude that the "course of official questioning" begins, in the case of an accused person who is or ought reasonably have been suspected of an offence and who is later tried for a serious offence, when that reasonable suspicion arose, or ought reasonably to have arisen, in the minds of the police officers detaining that person. It is not terminated or interrupted by silence on the part of the police officer. It includes responsive or unresponsive statements made whilst the accused is detained by the police officer in connection with the investigation of the commission, or the possible commission, of an offence. The official questioning is not concluded at the termination of any formal interview, the termination by police of video recording or other decisions wholly within the power of police officers. The termination only occurs when the investigation of the offence whilst the accused

177 *Police and Criminal Evidence Act* 1984 (UK), s 76(2)(b) cited in *Marlow and Kelly* (2001) 129 A Crim R 51 at 83 [142].

person is in police detention[178] is terminated either by the release of that person or by the action of police in bringing the accused to a judicial officer upon a charge laid by the police officer concerning an offence.

171 On the basis of this functional approach to the meaning of the Act, and on the assumption about the meaning of "confession or admission" in this context described above, the impugned statement, attributed to the appellant by Detective Sergeant Lopes and Detective Pretyman, was not admissible at his trial. It ought to have been excluded from the evidence before the jury. The trial judge, and the majority of the Court of Appeal, erred in deciding otherwise.

Conclusion and order

172 For the reasons already stated, this conclusion, concerning the admissibility of the impugned statement, does not require that the appeal be allowed. The prosecution is entitled to succeed in this Court upon the basis of the "proviso"[179]. On that footing alone, the appeal should be dismissed.

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178 See eg *Symes v Mahon* [1922] SASR 447.

179 *Criminal Code*, s 402(2).