HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

THOMAS NICHOLLS APPELLANT

AND

THE QUEEN RESPONDENT

Nicholls v The Queen
[2005] HCA 1
3 February 2005
P79/2003

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

J A Thomson for the appellant (instructed by Mullins Handcock)

S E Stone with L J Vanderende for the respondent (instructed by Director of Public Prosecutions (WA))

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

MARTIN GRAEME COATES APPELLANT

AND

THE QUEEN RESPONDENT

Coates v The Queen
3 February 2005
P81/2003

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of Western Australia made on 22 October 2002 in CCA 210/00 and in its place order that:*

   (a) the appellant's appeal to that Court be allowed;

   (b) the appellant's conviction be quashed; and

   (c) there be a new trial.

On appeal from the Supreme Court of Western Australia

Representation:

M J McCusker QC with J J Edelman for the appellant (instructed by Clark Whyte)

S E Stone with L J Vanderende for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Nicholls v The Queen; Coates v The Queen

Criminal law – Evidence – Admissibility of admissions made off-video during interview with accused – Whether reasonable excuse for not videotaping admissions – *Criminal Code* (WA), s 570D(2)(b), (4).

Criminal law – Evidence – Admissibility of evidence of prior inconsistent statement of witness – Whether evidence of statement went to issue – Whether admissible as exception to rule against admission of collateral statements – Whether exceptions of bias, interest or corruption applicable – Whether the detail of alleged statement indicating an exception to the collateral evidence rule must be put specifically to the witness in cross-examination.

Evidence – Criminal trial – Prior inconsistent statement of witness – Whether admissible as exception to rule against collateral statements – Admissions allegedly made off-video during interview by police – Whether reasonable excuse for not videotaping such admissions.

Criminal law – Evidence – Whether evidence of prior inconsistent statement hearsay – Whether exception to hearsay rule.

Criminal law – Jury directions – Whether trial judge's direction accorded with *McKinney v The Queen* – Appropriateness of reference to possible perjury on part of police.

Criminal law – Evidence – Admissions – Adequacy of trial judge's direction – Whether need for *McKinney* direction.

Words and phrases – "interview", "reasonable excuse".

Criminal Code (WA), s 570D.

Evidence Act 1906 (WA), s 21.

1 GLEESON CJ. I agree, for the reasons given by Hayne and Heydon JJ, that in the matter of *Nicholls v The Queen* the appeal should be dismissed. In particular, I agree with what Hayne and Heydon JJ have said concerning the collateral evidence rule.

2 As will appear from a reading of the reasons of the other members of the Court, the decision to dismiss the appeal in *Nicholls v The Queen*, which turns upon the matter of collateral evidence, is unanimous. In the course of argument, we were invited by counsel to re-define the collateral evidence rule, characterising it, not as a rule of law, but as a guide to discretionary case management. That invitation has been declined by six members of the Court. Alternatively, it was argued that the excluded evidence fell within one or more of the exceptions to the collateral evidence rule, specifically those relating to bias, interest or corruption. That submission took a number of forms, and has met with somewhat different responses, but, in the view of all members of the Court, it must fail in any event because, in the cross-examination of the critical witness, no proper foundation was laid for the tender of the evidence in question.

3 I also agree, substantially for the reasons given by Hayne and Heydon JJ, that in the matter of *Coates v The Queen* the appeal should be dismissed. In view of the difference of opinion within this Court on the question of the admissibility of evidence of certain admissions allegedly made by the appellant, I wish to add the following comments. They are directed to the evidence of what was said during "the second break" in the questioning by police of the appellant, which is when the potentially significant admissions were made.

4 It is submitted that the evidence was made inadmissible by s 570D(2) of the *Criminal Code* (WA) ("the Criminal Code"). So far as presently relevant, that sub-section provided that evidence of an admission by the appellant to police was not admissible unless either it took the form of a videotape on which the admission was recorded, or the prosecution proved, on the balance of probabilities, that there was a reasonable excuse for there not being a recording on videotape of the admission. Sub-section (4)(c) provided that there was a reasonable excuse if the appellant did not consent to the interview being taped. Section 570D was part of a Chapter of the Criminal Code dealing with "videotaped interviews". The expression "interview" was defined to mean "an interview with a suspect by a member of the Police Force" (s 570). The Chapter, apart from s 570D, contained various provisions regulating particular matters relating to videotapes and their use. They do not touch the present problem. The statutory context throws little direct light on the question that now arises.

5 Bearing in mind the two rulings of the trial judge, and the context in which they were made, it is clear that he found that the appellant did not consent to the videotaping of the part of his conversation with the police during which the admissions presently in question were made. The appellant sought and obtained an interruption of the videotaping for the purpose of having a conversation that

was not on tape. That finding was upheld by the Full Court. Miller J, in the Full Court, said that "the initiation by Coates himself of the off-video interview" was "a critical factor" in the decision that the evidence was admissible.

6 For the purposes of this appeal, it is important to distinguish between questions of fact, and questions of law concerning the construction of s 570D. At the trial, on an issue as to the application of s 570D(2)(b), the prosecution carried the onus of proving, on the balance of probabilities, that there was a reasonable excuse for there not being a recording on videotape of the admissions. As a matter of fact, the prosecution established to the satisfaction of the trial judge that, at a certain point in the interview then being recorded on videotape, the appellant requested that the videotaping cease, so that he could speak to police without there being a video recording of what he said. The decision of the Full Court creates concurrent findings on that matter of fact. Those findings were open on the evidence, and have not been successfully challenged in this Court.

7 The substantial question for this Court concerns the legal consequence, for the purpose of s 570D, of those findings.

8 Legislation such as s 570D seeks to strike a balance between competing considerations and interests. A search for legislative purpose needs to take account of the fact that legislatures rarely engage in the pursuit of a single purpose at all costs. Problems of statutory construction often arise because the extent to which the legislature intends to pursue a given purpose is unclear. When, as is so obviously the case with s 570D, Parliament adopts a compromise, a court may be left with the text as the only safe guide to purpose.

9 Section 570D(4)(c) assumes that the consent of a suspected person is necessary if the police are to videotape an interview. That assumption was not challenged in argument in this Court. Absence of consent to the interview being videotaped is, by definition, a reasonable excuse for there not being a recording on videotape of an admission made during the interview. Putting to one side, for the moment, the question of the interviewee who consents to some conversations being videotaped but does not consent to others, and subject to any other questions of admissibility that could arise, evidence may be received of an admission by an accused person in the course of an interview where the accused person did not consent to the interview being videotaped. In such a case, the interview is off-camera, but not off the record. Consistently with s 570D, a court may receive evidence of the admission. Because the accused person has not consented to a videotaping of the interview, there is a reasonable excuse for there not being a recording on videotape of the admission. That is the effect of the express language of the statute.

10 No doubt the general purpose of s 570D is to reduce the possibility of police fabrication of admissions, and to limit the potential scope for dispute about "verbal admissions". The reasons for that are too well known to require

restatement. Even so, each one of the forms of reasonable excuse provided by s 570D(4) for there not being a videotaped recording of an admission, including absence of consent of the interviewee, is capable of being contrived, or disputed. The present problem arises because, although the section deals expressly with the case where a person being interviewed does not consent to the interview being videotaped, it does not deal expressly with the case of a person who gives consent and later terminates it, either completely, or with respect to some particular subject, or for some limited time.

11 As the facts of the present case illustrate, there could be many reasons why a person would consent to being questioned on videotape about some matters, but not about others. It is difficult to understand why the legislature would have intended to distinguish between the case of a person who, at the commencement of police questioning, refuses to consent to any videotaping, and one who terminates or suspends consent, temporarily or indefinitely. It is the dependence upon the consent of the interviewee that gives rise to the present question, together with the obvious practical possibility that, during the questioning, consent might be terminated or suspended. There is nothing in the section to suggest that consent, once given, covers all that follows without any opportunity for bringing it to an end. It would be unfair if that were so. A person who, at the outset, expects to be questioned about a particular matter might find that the questioning develops in an unforeseen manner. The most natural meaning to give s 570D, in those circumstances, is that termination or suspension of consent has the same consequence, during the period of suspension, or following termination, as an initial refusal to consent. That is the way the trial judge and the Full Court approached the section, and I think they were right.

12 What is the competing possibility? Let it be supposed that a suspect initially consents to an interview being videotaped. Suppose that, at some point in the interview, the police ask the suspect what he knows about X, a criminal. Suppose that, for reasons perhaps related to the known propensities of X, the suspect says, or indicates, that he will answer the question, but not on camera, and the camera is switched off. Section 570D is concerned only with the admissibility of evidence; specifically, the admissibility of admissions made to the police. It does not regulate the power of the police to ask questions, and it does not impose any obligation on a person to answer questions. It does not require the whole, or any particular part, of an interview to be videotaped; it simply deals with a consequence of the absence of a videotape record of an admission. In the example given, whatever the effect of s 570D might be, it does not depend upon whether the person being interviewed is accompanied by a lawyer, or upon whether contemporaneous written notes are made of what is said off camera, or upon whether, when the videotaping is resumed, the police repeat, in front of the camera, what had occurred while the camera was switched off. If some discretionary ruling relating to a matter of fairness is required, those

circumstances might become relevant, but they have nothing to do with the question of construction of s 570D now under consideration. The argument for the appellant must be that, by temporarily withdrawing or suspending consent to videotaping, the suspect can say what he pleases about a particular topic without any risk that it might be tendered in evidence against him. That must be so, regardless of what precautions, if any, are taken to eliminate the possibility of dispute or fabrication. It would be so, for example, even if the suspect's lawyer is present and taking notes. That seems a very curious result. It is not one that is required by the language of s 570D, and it does not advance any rational legislative policy. I prefer the view of the section that was taken in the Supreme Court of Western Australia.

13 McHUGH J. These appeals by Thomas Nicholls and Martin Graeme Coates arise out of their convictions in the Supreme Court of Western Australia for the wilful murder of Clare Garabedian. There are two issues in Nicholls' appeal and four issues in Coates' appeal.

14 The first issue in Nicholls' appeal is whether the trial judge erred in rejecting evidence from a defence witness, Joseph Paul Ross, that the key prosecution witness had said that he was involved in the killing of Garabedian and that neither Coates nor Nicholls was involved in the killing. The second issue in Nicholls' appeal is whether the judge erred in rejecting evidence that the key witness had told Ross that he proposed to give evidence to implicate Nicholls and Coates in the murder. These issues turn on whether the statements were excluded by the collateral evidence rule. In particular, the issues turn on whether the statements were admissible under the "bias" or "corruption" exceptions to that rule or some development of them.

15 The first issue in Coates' appeal is whether the trial judge erred in holding that disputed oral admissions, allegedly made by Coates during a break in a videotaped interview with the police (and not subsequently confirmed on video), were admissible in evidence. That issue turns on whether the break in the interview constituted a separate interview to whose videotaping Coates did not consent and, if so, whether that constituted a "reasonable excuse" for not videotaping the alleged admissions within the meaning of s 570D of the *Criminal Code* (WA).

16 The second issue in Coates' appeal is whether the trial judge misdirected the jury in relation to the disputed admissions by saying "[a] question that might arise is … who is telling the truth and who is committing perjury". This issue turns on whether the judge's statement accorded with the decision of this Court in *McKinney v The Queen*[1].

17 The third issue in Coates' appeal is whether the trial judge was required by *McKinney* to direct the jury concerning the difficulties faced by an accused person when challenging evidence of a disputed admission when the admission is not the sole evidence against the accused.

18 The fourth issue in Coates' appeal is whether the trial judge erred in refusing to admit evidence concerning statements made by the key Crown witness. The statements were to the effect that the key witness was being encouraged to implicate Coates, that Coates was not involved in the murder and that the key witness intended to give false evidence. As in the appeal of Nicholls, this issue turns on whether the statements were excluded by the

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1 (1991) 171 CLR 468.

collateral evidence rule and whether they were admissible under the "bias" or "corruption" exceptions to that rule or some development of them.

19 If any of these issues is decided in favour of the appellants, further issues arise under the Crown's Notices of Contention concerning whether any errors made by the trial judge resulted in a substantial miscarriage of justice.

20 In my opinion, Nicholls' appeal should be dismissed because, although Ross's evidence was otherwise admissible, the statutory conditions for its admission were not met. Contrary to the direction in s 21 of the *Evidence Act* 1906 (WA), the circumstances of the key witness's statement were not sufficiently described to the witness to allow him to deny or admit the statements. Coates' appeal, however, should be allowed because the disputed oral admissions were tendered in evidence in breach of s 570D of the *Criminal Code*.

Statement of the case

21 In a jury trial conducted in August and September 2000 in the Supreme Court of Western Australia, Thomas Nicholls, Martin Graeme Coates and Amanda Kaylene Hoy were tried and convicted for the murder of Clare Garabedian in 1998. The Western Australian Court of Criminal Appeal dismissed appeals against their convictions. Subsequently, this Court gave Nicholls and Coates special leave to appeal against the orders of the Court of Criminal Appeal.

The material facts

22 The Crown alleged that Coates had asked Adam John Davis to pick up Garabedian, who worked as a prostitute, and give her a "hot shot" – a heroin overdose. Garabedian was the key Crown witness in other criminal proceedings against Coates and Hoy. Davis said that, for a payment of $2,000, he agreed to give Garabedian the "hot shot". He said that, using Hoy's car and mobile phone, Nicholls' clothes and a bag of heroin supplied by Coates, he picked up Garabedian one night in August 1998. Posing as a client, he took her to a motel. Davis said that he gave heroin to Garabedian, some of which she injected, and then about an hour and a half to two hours later he gave her another shot of heroin at her request. He then rang Hoy from a pay telephone and told her that Garabedian had used most of the heroin. Hoy said that she would leave a package for him under the driver's side wheel of her car, which she told Davis to park in a side street. Davis said that he subsequently collected a package containing a large syringe filled with heroin from under the wheel of Hoy's car. Some time later, Coates and then Nicholls called Davis separately on the motel room telephone and asked whether he had killed Garabedian. Davis told them that he had not done so.

23 Davis claimed that, about 15 minutes after the telephone call from Nicholls, Coates and Nicholls arrived at the motel room. Garabedian woke up, screamed and tried to make a run for the front door. Coates dragged Garabedian to the ground and Nicholls held a pillow to her face. Davis held her left arm while Coates pushed the syringe into her right arm several times before handing it to Davis, who then injected her in her left arm. Coates then stood on Garabedian's throat. Coates subsequently wiped Garabedian's body with a wet towel and Davis cleaned other areas in the motel room to remove fingerprints. Nicholls collected incriminating items and put them in a pillowcase.

24 The Crown case against Coates was based principally on the evidence of Davis who had pleaded guilty to the murder of Garabedian and had been sentenced to life imprisonment. His sentence was reduced to a minimum of 15 years on the undertaking that he would give evidence against Nicholls, Coates and Hoy. However, the Crown also relied on three other areas of evidence apart from the testimony of Davis:

1. admissions allegedly made by Coates during a break in a videotaped interview with police;

2. evidence of motive: criminal charges had been laid by Garabedian against Coates and Hoy; and

3. evidence that Coates had relied on his brother-in-law, Trevor John Bloomer, who had offered to testify falsely that he was at Coates' house with him on the evening in question.

The Crown case also relied on evidence of association and forensic evidence and telephone records placing Coates in the vicinity of the motel when Garabedian was killed.

25 The admissions allegedly made by Coates were unrecorded oral statements to police officers while Coates was in police custody being questioned about Garabedian's death. Detective Senior Constable Hawley gave evidence that, during a videotaped interview, Coates asked to go to the toilet. The videotape was stopped for about 45 minutes (this was the second time the videotape was stopped for a supposed "toilet break"; the first break lasted for four minutes). Hawley testified that, when the videotape was turned off, Coates said to him and Detective Senior Constable Hutchinson: "What are my options?", "What can I do?", "How much will I get?" and "I haven't even got 5 years in me. I'll neck myself." Two other officers, Detective Sergeant Kays and Detective Senior Sergeant Byleveld, gave evidence that they were called into the interview room during this break and that Coates told them that he did not want to go to jail where he would not last five minutes. They gave evidence that Coates also said that he wanted to do a deal and be charged with conspiracy to murder. Coates denied the substance of the police evidence. He also denied that

he had initiated the break. No reference was made to these conversations when the videotaped interview resumed. The police officers made no attempt to get Coates to confirm on videotape the substance of the admissions that he had allegedly made while the videotape was turned off. Nor were any contemporaneous notes taken of the alleged off-camera admissions. Hawley and Hutchinson claimed that they made notes of the conversation on the following day that included notes of the untaped portions. They said that these notes were subsequently lost or mislaid. Kays and Byleveld gave evidence that neither took notes of the conversation they claimed to have had with Coates.

26 The Crown case against Nicholls was also based on the evidence of Davis and on out-of-court statements made by Nicholls to police in a videotaped interview. The Crown case also relied on telephone records that placed Nicholls in the vicinity of the motel at the time when Garabedian was killed.

27 Coates and Nicholls denied Davis's version of events. In cross-examination, Davis could not explain how it was that only his fingerprints were identified in the motel room or the absence of fingerprints or DNA evidence of Coates and Nicholls in the room. No objective or other evidence linked Nicholls to the events that caused Garabedian's death. Nicholls' statements to the police did not amount to a confession of the offence. However, Nicholls admitted in an interview with the police that he had been present with Coates in the motel room when Garabedian woke from a sleep and recognised Coates. Nicholls admitted that he had grabbed Garabedian, but claimed that he then left the motel room. When he returned later, he found that it had been cleaned up, or was in the process of being cleaned up, by Coates.

28 Both Coates and Nicholls sought to tender evidence from a defence witness, Ross, that Davis had told him that Coates and Nicholls were not involved in the killing and that he, Davis, had been encouraged by the police to implicate Coates and Nicholls. The trial judge ruled that the evidence was inadmissible because it was collateral evidence and did not fall within the bias exception to the collateral evidence rule.

29 His Honour directed the jury that, unless they accepted the evidence of Davis, they could not convict Nicholls or Coates. He also directed the jury that, standing alone, the evidence of the unrecorded admissions was insufficient to convict Coates of any offence. The trial judge further directed the jury that the evidence of Nicholls' unrecorded admissions would not alone be sufficient to convict Nicholls, but that it would support the accuracy and truth of Davis's evidence. He did not warn the jury about the danger of relying on the evidence of Coates' unrecorded admissions to the police officers. The trial judge also did not give a *McKinney* direction in relation to those admissions.

30 The jury found Nicholls and Coates guilty of the wilful murder of Garabedian.

1. The admissibility of the evidence of Ross (the collateral evidence rule)

The evidence sought to be led from Ross

31 At his trial, Nicholls sought to lead evidence from Ross about a conversation that Ross had had with Davis in Casuarina Prison concerning the evidence that Davis was to give at the trial. Counsel for Nicholls told the trial judge that Ross would say that Davis had told him that he was involved in the murder of Garabedian but that neither Coates nor Nicholls was involved in her death. However, Davis had told Ross that he would give evidence implicating Nicholls and Coates in the murder because the police had offered him a deal if he did so. Counsel said that Ross would also say that Davis said that the police had told him what to say and that he, Davis, "was going to come to court and tell lies about that in order to secure the deal that was offered to him by the police to implicate Mr Coates and Mr Nicholls." Counsel for Nicholls sought to lead the evidence as an exception to the collateral evidence rule. During the cross-examination of Davis, counsel for Hoy asked:

> "Have you ever told anybody that the whole story – you've made up the whole story you've told us about the involvement of Coates and Nicholls is a lie? – No, I haven't.
>
> That you were told by police what to say? – No.
>
> And that you did it so that you would gain a benefit? – No.
>
> Never told anybody that? – No.
>
> Quite sure about that? – Very sure.
>
> Because it all is a lie, isn't it – the whole thing? – No, it's not."

32 Counsel for Nicholls asked Davis:

> "Did you in a conversation say that the police had told you what to say in order to implicate others? – No.
>
> Did you say in a conversation that you had given Clare Garabedian two shots and that Marty Coates knew nothing about it? – No.
>
> Did you say in a conversation that the police had offered you a deal if you cooperated and implicated Marty Coates and others in the murder? – No.
>
> Did you in a conversation confirm that yourself and Clare Garabedian had been 'an item' for some time prior to her death? – No, never.

So none of the things that I have put to you were ever said by you in any conversation to anybody? – No."

33 Counsel for Coates did not put any of these matters to Davis. Indeed, counsel for Coates did not put to Davis that he had told a third person that the story he had told police about Nicholls and Coates being in the motel room where Garabedian was killed was untrue and that Coates knew nothing about the killing. Nor did counsel put to Davis that the police had offered him a deal if he implicated Nicholls and Coates and that police officers had told him what to say. Counsel also failed to put to Davis that Davis intended to give false evidence about Coates' involvement in Garabedian's murder. Nevertheless, counsel for Coates sought to lead evidence from Ross that:

(a) Davis had told Ross that "Davis was being encouraged to implicate the others [Coates and Nicholls] and that the others indeed were not there and were not involved and didn't know anything about it";

(b) "[Davis] is telling someone in gaol effectively that he intends to give false evidence, that they [Nicholls and Coates] were not involved and yet he intends to give false evidence"; and

(c) "[Davis] will acknowledge in his evidence that he is being encouraged to implicate the others".

The admissibility of Ross's evidence

34 The trial judge ruled that the proposed evidence of Ross was inadmissible. The Court of Criminal Appeal upheld his ruling[2]. In the Court of Criminal Appeal, Miller J held that the evidence sought to be led from Ross was collateral and did not go to a fact in issue or a relevant issue. His Honour said that whether Davis had previously made an inconsistent statement about the presence of Nicholls and Coates in the room in which Garabedian was killed did not go to the issue of whether Nicholls and Coates were in fact in the room. The evidence of Ross could only go to the issue of whether Davis had said that Nicholls and Coates were in the room at the relevant time, not whether as a fact they were in the room[3]. This was a question of credibility. Miller J further found[4] that the evidence did not fall within any exception to the rule that answers to collateral

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2 *Hoy v The Queen* [2002] WASCA 275 at [106]-[134] per Miller J, Anderson J agreeing.

3 *Hoy* [2002] WASCA 275 at [121]-[122] per Miller J.

4 *Hoy* [2002] WASCA 275 at [124].

questions are final and conclusive and cannot be rebutted. Miller J[5] also upheld the trial judge's finding that "there was nothing to suggest that the relationship or any situation existing as between Davis and Coates/Nicholls established bias" so as to bring the case within that exception to the collateral evidence rule.

Submissions of the appellants in this Court

35 In this Court counsel for Nicholls and Coates contended that:

1. the collateral evidence rule did not apply because the evidence of Davis was the core or central evidence in the case, without which neither Nicholls nor Coates could have been convicted. In these circumstances, the issues of credibility and facts in issue were so inextricably linked that the distinction between matters of credit and matters going to the issue was reduced to "vanishing point";

2. alternatively, Ross's evidence fell within the bias or corruption exceptions to the collateral evidence rule. Counsel for Nicholls and Coates contended that the corruption exception was not limited to a relationship between the witness and one of the parties, but applied whenever a witness demonstrates a willingness to obstruct the discovery of truth by manufacturing or suppressing testimony; and

3. the collateral evidence rule should be relaxed where evidence going to credit has substantial probative value and it is in the interests of justice to admit it.

36 It is appropriate to consider each of these submissions in turn.

The collateral evidence rule: statement of the rule, exceptions to the rule and treatment of the rule

Statement of the collateral evidence rule

37 The central thesis of the common law concerning the admissibility of evidence is that it is admissible only when it is relevant, that is[6]:

> "if it tends to prove a fact in issue or a fact relevant to a fact in issue. A fact is relevant to another fact when it is so related to that fact that,

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5 *Hoy* [2002] WASCA 275 at [126]-[127].

6 *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1029-1030 [31] per McHugh J; 190 ALR 370 at 377.

> according to the ordinary course of events, either by itself or in connection with other facts, it proves or makes probable the past, present, or future existence or non-existence of the other fact." (footnote omitted)

In other words, evidence is relevant "if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding."[7] In a trial, a balance must be struck between considerations of justice and matters of practicality. Consequently, the general rule concerning admissibility is qualified by other rules of evidence. One qualification concerns evidence of matters collateral to the issues in the case.

38 The collateral evidence rule declares that answers given by a witness to questions put to him or her in cross-examination concerning collateral matters are final. Those answers cannot be contradicted or rebutted by other evidence[8]. Hence, the rule is often referred to as the "finality" rule. Collateral facts are "facts not constituting the matters directly in dispute between the parties"[9] or "facts that are not facts in issue or facts relevant to a fact in issue"[10]. In most cases, a fact that affects the credibility of a witness is a collateral fact. Hence, an answer given by a witness to a matter that relates to credibility alone – in other words, a collateral matter – is final and cannot be rebutted.

39 Policy considerations provide the rationale for the collateral evidence rule. The reasons for the rule are generally practical: it is based on principles of case management[11], such as the desirability of avoiding a multiplicity of issues and of protecting the efficiency and cost-effectiveness of the trial process by preventing the parties from litigating matters of marginal relevance. The rule is also based on the need to be fair to the witness[12].

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7 *Goldsmith* (2002) 76 ALJR 1024 at 1025 [2] per Gleeson CJ; 190 ALR 370 at 371.

8 *Cross on Evidence*, 7th Aust ed (2004) at 573 [17580].

9 *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 546 per Latham CJ; *Goldsmith* (2002) 76 ALJR 1024 at 1025 [3] per Gleeson CJ; 190 ALR 370 at 372.

10 *Goldsmith* (2002) 76 ALJR 1024 at 1030 [32] per McHugh J; 190 ALR 370 at 378.

11 White J in the Queensland Court of Appeal in *R v Lawrence* said that the finality rule "is a case management rule": [2002] 2 Qd R 400 at 416. See also *Natta v Canham* (1991) 32 FCR 282 at 300.

12 See, eg, *Natta* (1991) 32 FCR 282 at 298.

Tests for determining collateral matters

40 There are two tests for determining whether a matter is collateral. The first test, articulated by Pollock CB in *Attorney-General v Hitchcock*[13], defines collateral matter by reference to the issues upon which evidence may not be tendered by a party as part of its case during examination in-chief. The second test defines collateral matter in terms of credit.

41 Pollock CB explained the first test in *Hitchcock* when he said[14]:

> "[T]he test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence – if it have such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him."

42 Another formulation of this test is that relevance to an issue other than credit is a necessary condition of admissibility[15]. This test emphasises the importance that the information must have to prove the material facts in issue. However, it is problematic in that it does not identify the requisite degree of importance that information must have before it can be tendered in-chief. Nor does it identify how a court decides whether a fact is collateral[16]. For example, the English Court of Appeal said in *R v Funderburk*[17]:

> "The difficulty we have in applying that celebrated test is that it seems to us to be circular. If a fact is not collateral then clearly you can call evidence to contradict it, but *the so-called test is silent on how you decide whether that fact is collateral. The utility of the test may lie in the fact that the answer is an instinctive one based on the prosecutor's and the court's sense of fair play rather than any philosophic or analytic process.*" (emphasis added)

Sufficient relevance depends both on the importance of the fact in issue to proving a material fact and the degree to which further evidence can establish

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13 (1847) 1 Ex 91 [154 ER 38].

14 (1847) 1 Ex 91 at 99 [154 ER 38 at 42].

15 *Natta* (1991) 32 FCR 282 at 295.

16 *Narkle v The Queen* (2001) 23 WAR 468 at 479 per Murray J.

17 [1990] 1 WLR 587 at 598; [1990] 2 All ER 482 at 491.

that fact in issue. It is therefore virtually impossible to identify matters that will always be collateral or will always be relevant – each case turns on its own particular facts.

43 The second test for determining whether a matter is collateral is whether it is relevant only to a witness's credit in contrast to matters relevant to the facts in issue that can be rebutted by calling evidence[18]. The problem with this test is that it is often difficult to maintain the distinction between credit and issue. It is also often difficult to maintain the distinction between evidence that affects only the credit of a witness and evidence that is relevant to a fact in issue. The credibility of a witness is inevitably indirectly relevant to establishing facts in issue. Sometimes, the credibility of a witness is decisive of the facts in issue. It is a matter of degree, both in relation to relevance and to whether a fact is collateral. Whether a fact bears on the credit of a witness depends not only upon what the witness represents to the court[19], but also upon the nature of the party's case.

Criticisms of the rule

44 Given the deficiencies identified with respect to the tests for determining whether a matter is collateral, it is not surprising that the finality rule itself has been criticised in a number of cases[20]. In *Natta v Canham*, for example, the Full Court of the Federal Court said[21]:

> "The central rationale of the [rule] ... is less consistent with its characterisation as a hard and fast rule of law than as a well-established guide to the exercise of judicial regulation of the litigation process. While judges will be astute to confine or prevent exploration of secondary issues affecting credibility, the exercise of the judicial function in that regard should not be encumbered by over-nice distinctions between 'collateral' and other matters and the application of enumerated exceptions with a flavour of statutory proviso about them. And even where one of the exceptions can be invoked, as for example where there is an allegation of

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18 See *Harris v Tippett* (1811) 2 Camp 637 at 638 per Lawrence J [170 ER 1277 at 1278]; *Piddington* (1940) 63 CLR 533 at 545 per Latham CJ; *Natta* (1991) 32 FCR 282 at 300.

19 *Goldsmith* (2002) 76 ALJR 1024 at 1025-1026 [3] per Gleeson CJ; 190 ALR 370 at 372.

20 See, eg, *Palmer v The Queen* (1998) 193 CLR 1 at 23 [53] per McHugh J; *Lawrence* [2002] 2 Qd R 400 at 406 per McPherson JA; *Goldsmith* (2002) 76 ALJR 1024 at 1031-1032 [37]-[41] per McHugh J; 190 ALR 370 at 379-381.

21 (1991) 32 FCR 282 at 298.

> bias which is denied, 'a court would only permit such a diversion from the material issue if it were satisfied that the interests of justice, namely, the proper investigation of the material issues, demanded it': see *Bakopoulos v General Motors Holden's Ltd* [1972] VR 732 at 733 per Lush J."

45 The decisions of this Court in *Piddington v Bennett and Wood Pty Ltd*[22] and *Goldsmith v Sandilands*[23] illustrate the difficulties with the rule, as do decisions of the English courts[24]. One difficulty arises when a court has to determine whether the evidence concerns a collateral matter or a fact in issue or a fact relevant to a fact in issue[25]. The cases show that courts have blurred the distinction between collateral facts and facts in issue[26]. Questions of degree are frequently involved when deciding whether collateral evidence should be admitted[27].

46 In *Palmer v The Queen*[28], I said, and repeated in *Goldsmith*[29], that the credibility of a witness and the facts which the witness represents in court are both "relevant" matters, and there is no logical distinction between them for this purpose. However, the common law does make a distinction concerning them and generally regards answers to questions on credit as going to collateral issues. This has the result that an opposing party cannot tender evidence to contradict those answers. In *Goldsmith*, I said[30]:

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22 (1940) 63 CLR 533.

23 (2002) 76 ALJR 1024; 190 ALR 370.

24 Compare *Busby* (1981) 75 Cr App R 79 and *Harris v Tippett* (1811) 2 Camp 637 [170 ER 1277]; see also *Marsh* (1985) 83 Cr App R 165; *R v Knightsbridge Crown Court; Ex parte Goonatilleke* [1986] QB 1; *Chandu Nagrecha* [1997] 2 Cr App R 401.

25 *Goldsmith* (2002) 76 ALJR 1024 at 1031-1032 [40]-[41] per McHugh J; 190 ALR 370 at 380, citing *Piddington* (1940) 63 CLR 533 and *Busby* (1981) 75 Cr App R 79.

26 See *Goldsmith* (2002) 76 ALJR 1024 at 1032 [41] per McHugh J; 190 ALR 370 at 380-381.

27 *Goldsmith* (2002) 76 ALJR 1024 at 1046 [103] per Callinan J; 190 ALR 370 at 399.

28 (1998) 193 CLR 1 at 24 [56].

29 (2002) 76 ALJR 1024 at 1030 [32]; 190 ALR 370 at 378.

30 (2002) 76 ALJR 1024 at 1030 [32]; 190 ALR 370 at 378.

> "[L]ogically there is no distinction, so far as relevance is concerned, between the credibility of a witness and the facts to which the witness deposes. *The reliability of oral testimony cannot be separated from the credibility of its deponent*. But the common law has generally refused to act on the basis that there is no distinction between the credibility of a witness and the facts to which the witness testifies. *Because the common law regards answers to questions on credit or credibility as going to collateral issues, in most cases the opposing party cannot tender evidence to contradict those answers.*" (emphasis added, footnote omitted)

47 Because of what Starke J said in *Piddington*[31], I have long thought that the rule that answers in cross-examination on collateral questions are final is a rule of convenience, not a rule of law or a principle. In *Palmer*[32], I said that evidentiary rules based on the distinction between issues of credit and facts in issue "should not be regarded as hard and fast rules of law but should instead be seen 'as a well-established guide to the exercise of judicial regulation of the litigation process'." In *Goldsmith*, I said[33]:

> "Despite the longevity of the finality rule, it has increasingly come to be regarded more as a flexible standard than a fixed rule of law[34]. Starke J recognised this in *Piddington v Bennett and Wood Pty Ltd*[35] when he said that the finality rule was 'a rule of convenience, and not of principle'. Similarly, in *Natta v Canham*[36], the Full Court of the Federal Court said that the rule should be regarded 'as a well-established guide to the exercise of judicial regulation of the litigation process'."

48 As a result[37]:

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31 (1940) 63 CLR 533 at 551.

32 (1998) 193 CLR 1 at 23 [53], citing *Natta* (1991) 32 FCR 282 at 298.

33 (2002) 76 ALJR 1024 at 1031 [39]; 190 ALR 370 at 379.

34 *Palmer* (1998) 193 CLR 1 at 23 [53].

35 (1940) 63 CLR 533 at 551, citing Christian J in *R v Burke* (1858) 8 Cox CC 44 at 53.

36 (1991) 32 FCR 282 at 298.

37 *Palmer* (1998) 193 CLR 1 at 23-24 [55] per McHugh J.

> "For reasons of convenience, it is necessary to maintain the rule that independent evidence rebutting the witness's denials on matters going to credibility is not ordinarily admissible. … If evidence going to credibility has real probative value with respect to the facts-in-issue, however, it ought not to be excluded unless the time, convenience and cost of litigating the issue that it raises is disproportionate to the light that it throws on the facts-in-issue."

49 McPherson JA endorsed this approach in *R v Lawrence*[38]. His Honour regarded my remarks in *Palmer* as "correctly reflecting the state of the law as it now is in Australia."[39] The Full Federal Court took a similar view of the finality rule in *Natta*[40], noting academic commentary to the effect that the rule is productive of absurdity and that there has been a tendency in the courts to diverge from the rule when justice so requires. The Court in *Natta* also said[41]:

> "[Notwithstanding the decision of the High Court in *Piddington*,] the court is not bound to the view that the exclusionary rule is absolute or that the categories of exceptions to it are closed. It is a rule of practice related to the proper management of litigation. A trial judge should not be precluded from determining in an appropriate case that the matter on which a witness' credit is tested is sufficiently relevant to that credit as it bears upon issues in the case that such evidence may be admitted."

50 In *Lawrence*[42], White J characterised the finality rule as a "case management" rule and recognised the capacity for "exceptions" to the rule to develop incrementally where the evidence sought to be adduced to test the witness's credit is sufficiently relevant to the facts in issue. The separate judgments of Kirby J and myself in *Goldsmith*[43] also endorse a more flexible approach to the rule. We treated the rule as a flexible standard rather than a fixed rule of law.

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38 [2002] 2 Qd R 400.

39 *Lawrence* [2002] 2 Qd R 400 at 406.

40 (1991) 32 FCR 282 at 298.

41 (1991) 32 FCR 282 at 300.

42 [2002] 2 Qd R 400 at 416.

43 Kirby J emphasised the need to preserve the actuality and appearance of even-handed justice as a reason for admitting exceptions to the rule: *Goldsmith* (2002) 76 ALJR 1024 at 1037 [70]; 190 ALR 370 at 388.

51 The English courts also now support a more flexible approach and relax the finality rule where the interests of justice require it to be relaxed[44]. If credibility is inextricably linked with the principal issue in the case and that issue is incapable of being verified or tested except by evidence concerning credit, the English Court of Appeal has admitted rebuttal evidence involving prior inconsistent statements[45]. The relaxation of the rule has occurred principally in sexual misconduct cases, where the difference between questions going to credit and questions going to the issue is often indistinguishable.

52 In *Lawrence*, Thomas JA noted[46] that, at least in relation to sexual offences cases, issues about credit (for example, evidence showing a disposition on the part of the complainant to make or support false complaints) ultimately go to whether or not the offence was committed. His Honour referred[47] to *R v Lowrie and Ross*[48], where the Queensland Court of Appeal acknowledged that, although some of the cases could be explained under the "bias" exception to the collateral rule, others were "difficult to explain on any other basis than practice and the obvious injustice of excluding [the collateral facts]." This led the Court in *Lowrie and Ross* to conclude that although the finality rule itself is clear[49]:

> "[i]ndividual situations will no doubt be identified from case to case where it would be unjust to deprive an accused person of the right to lead evidence destructive of the credibility of another witness when the circumstances do not tidily fit within the recognised exceptions".

53 Given the problems with the finality rule and the cases that are not explicable in terms of the rule, common law courts should now regard that rule as a rule of convenience – a rule for the management of cases – rather than a fixed rule or principle. Once it is recognised that it is a rule of convenience, courts should take a more liberal approach to admitting evidence showing a lack of credit or credibility of a witness than the traditional approach of the common

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44 See, eg, *Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482; *Chandu Nagrecha* [1997] 2 Crim App R 401.

45 See, eg, *Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482; *Chandu Nagrecha* [1997] 2 Crim App R 401.

46 [2002] 2 Qd R 400 at 410.

47 *Lawrence* [2002] 2 Qd R 400 at 410.

48 [2000] QCA 405 at [43] per Thomas JA, McPherson JA and Muir J agreeing.

49 [2000] QCA 405 at [43].

law[50]. Where the interests of justice are likely to be advanced by admitting evidence tending to destroy the credibility of a witness, courts should hesitate to reject such evidence. Thus, where a circumstance affecting credibility is so inextricably connected with *a fact in issue* that it will probably determine that fact, a trial judge should generally admit evidence of that circumstance. Evidence of such a circumstance should not be excluded merely because it is not within the established exceptions to the collateral evidence rule. In *Natta*, the Full Federal Court concluded that a collateral matter could be pursued beyond cross-examination "in the interests of justice, whether or not it came within any of the traditional exceptions to the rule against evidence on collateral issues."[51]

54 In *R v LSS*, however, Thomas JA thought that in sexual offences cases collateral evidence should not be received merely because the facts in issue occurred in private, left few visible traces of having occurred and determination of the issues depended on an assessment of the credibility of the parties[52]. Thomas JA also said[53] that to use the privacy of the occasion and the lack of corroborative evidence "as a basis for departing from the general rule of finality would leave too wide a gap in that important rule." In *Bannister v The Queen*[54], Franklyn J also said that, if the collateral evidence rule applied in sexual offences cases said to have been committed in private where the issue is whether or not the acts complained of occurred at all, and not merely where the only significant issue is consent, it would logically apply "to any offence in respect of which there is no extrinsic evidence and no witness other than the offender and the victim."

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50 *Cross on Evidence*, 7th Aust ed (2004) at 604 [19030]; see also *Natta* (1991) 32 FCR 282 at 298, 300.

51 (1991) 32 FCR 282 at 300. Murray J endorsed this approach in *Narkle* (2001) 23 WAR 468 at 475-476.

52 [2000] 1 Qd R 546 at 554-555. Thomas JA was discussing the following statement in *Cross on Evidence*, 5th Aust ed (1996) at 532 [19070]:

> "[S]exual intercourse, whether or not consensual, most often takes place in private, and leaves few visible traces of having occurred. Evidence is often effectively limited to that of the parties, and much is likely to depend upon the balance of credibility between them. This has important effects for the law of evidence, since it is capable of reducing to vanishing point the difference between questions going to credit and questions going to the issue." (foonote omitted)

53 *LSS* [2000] 1 Qd R 546 at 555.

54 (1993) 10 WAR 484 at 494. Murray J agreed with Franklyn J's comments in *Narkle* (2001) 23 WAR 468 at 480.

55 The finality rule is important to the efficient conduct of litigation. Without it, the principal issues in trials would sometimes become overwhelmed by charge and counter-charge remote from the cause of action being litigated. In many cases, the finality rule also protects witnesses from having to defend themselves against discreditable allegations that are peripheral to the issues. But the common law should not have any *a priori* categories concerning the cases where the collateral evidence rule should or should not be relaxed. It should be regarded as a flexible rule of convenience that can and should be relaxed when the interests of justice require its relaxation. Avoiding miscarriages of justice is more important than protecting the efficiency of trials. And in cases where the rule needs to be relaxed, it is unlikely that any question of potential unfairness to a witness will arise. That is because the allegations will be inextricably connected with the issues. If unfairness to a witness is likely to arise – for example, because the witness is not in a position to meet the allegation – the trial judge can take steps to ensure that no unfairness arises. The statements of Thomas JA and Franklyn J to which I have referred are contrary to the approach of the Full Federal Court in *Natta*[55]. They should not be followed in so far as they state or imply that the rule should not be relaxed in any particular category of case.

56 The collateral evidence rule should therefore be seen as a case management rule that is not confined by categories. Because that is so, evidence disproving a witness's denials concerning matters of credibility should be regarded as generally admissible if the witness's credit is inextricably involved with a fact in issue. Consistently with the case management rationale of the finality rule, however, a judge may still reject rebutting evidence where, although inextricably connected with a fact in issue, the time, convenience or expense of admitting the evidence would be unduly disproportionate to its probative force. In such cases, the interests of justice do not require relaxation of the general rule that answers given to collateral matters such as credit are final.

Application of the collateral evidence rule to the present appeals

57 In the present appeals, the evidence of Ross goes to the credibility of the witness Davis. Whether Davis had said that he had been offered a deal by the police in exchange for falsely testifying that Nicholls and Coates were in the motel room when Garabedian was killed would not prove that Nicholls and Coates were not in the motel room at the time. It would not prove or disprove the killing of Garabedian. The evidence of Ross would not tend to prove or disprove, therefore, a fact in issue in the trial. But if Davis made a statement to

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55 (1991) 32 FCR 282 at 300; see also *Narkle* (2001) 23 WAR 468 at 475-476, 479 per Murray J.

the effect that he intended to give false evidence in order to secure the deal that the police had offered him, it would have had a material bearing on the credibility of his evidence.

58 No jury could reasonably convict Coates or Nicholls on Davis's evidence if Ross's evidence was accepted. In the interests of justice, therefore, Ross's evidence should have been admitted. In *Lawrence*[56], the appellant was convicted of raping a fellow prisoner. In cross-examination the complainant denied that he had told a witness that the complainant was going to set the witness up by telling prison officers that the witness had propositioned the complainant for sex. The Queensland Court of Appeal held that the trial judge had erred in failing to allow the witness to give evidence concerning this statement. The Court held that the evidence – even if it only went to the complainant's credit – became admissible once the complainant denied having made that statement or threat. The decision does seem to stretch even the flexible standard doctrine to its limits. It is difficult to escape the conclusion that the Court thought that the evidence of the witness was admissible because it was true and, hence, critically undermined the credibility of the complainant. Probably, the best justification for the decision is that the evidence, if admitted and accepted, would have showed that the complainant was a person who was prepared to make false claims of rape in prison. It should not be seen as a prior inconsistent statement case. In that respect, the case is like *Natta*.

59 In *Natta*, evidence of an out-of-court statement was allowed although it did not concern the facts in issue. In cross-examination during a personal injuries case arising out of a motor vehicle accident, the plaintiff denied that she had told a friend that an easy way of making money was to buy an old car and stage an accident. The Full Federal Court upheld the admission of defence evidence from the friend that contradicted the plaintiff's denial. The Court found that, if true, the fact that the plaintiff had been prepared to propose the pursuit of fictitious claims[57]:

> "demonstrated … an approach to the litigation and claim process that called into serious question the extent to which [the plaintiff] could be believed in what she told the court and her doctors in important areas concerning the extent and location of her pain which to a significant degree could not be independently verified."

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56 [2002] 2 Qd R 400.

57 *Natta* (1991) 32 FCR 282 at 300.

60 Accordingly, I think that the interests of justice required the admission of Ross's evidence. In addition, I think the evidence of Ross was also admissible under the corruption exception to the collateral evidence rule.

Exceptions to the collateral evidence rule: bias, interest or corruption

61 Among the circumstances where a witness's answer on a collateral matter is not final and may be contradicted[58] is where the witness is biased or has been corrupted. In *Piddington*, Latham CJ said[59]:

> "Any witness may be cross-examined for the purpose of discrediting him. But if questions affect only the credit of a witness and are not relevant to the matters actually in issue in the case, the witness's answers cannot be contradicted by other evidence except in certain exceptional cases. Exceptions to the rule at common law are that after cross-examination of his opponent's witnesses a party may give evidence to show that they are notorious liars, or have given their testimony from a corrupt or other wrong motive, or that they have previously made statements inconsistent with their evidence."

62 Evidence rebutting a witness's evidence may be adduced where the witness is affected by one of three "kinds of emotion constituting untrustworthy partiality"[60], namely, bias, interest or corruption. Wigmore refers to emotional partiality in three senses. The first is bias in the sense of "all varieties of hostility or prejudice against the opponent *personally* or of favor to the proponent personally"[61]. The second is interest in the sense of "the specific inclination which is apt to be produced by the relation between the witness and the *cause at issue* in the litigation."[62] The third is corruption in the sense of "the *conscious false intent* which is inferrible [sic] from giving or taking a bribe or from

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58 A more extensive list is set out in my judgment in *Goldsmith* (2002) 76 ALJR 1024 at 1030 [33]-[36]; 190 ALR 370 at 378-379.

59 (1940) 63 CLR 533 at 545.

60 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782 [945] (emphasis omitted).

61 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782 [945] (original emphasis).

62 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782 [945] (original emphasis).

expressions of a general unscrupulousness for the case in hand"[63]. Wigmore acknowledges that the "theoretical place" of the corruption exception "is not easy to determine. It is related in one aspect to interest, in another to bias, in still another to character (ie, involving a lack of moral integrity)."[64] Nevertheless, he observes that the essential discrediting element in relation to evidence showing corruption is "a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony."[65]

63 *Cross on Evidence* distinguishes bias "in the sense of underlying and undue sympathy or hostility felt by the witness towards a party" from corruption "in the sense of more specific interference with testimony, typically by way of bribery"[66]. However, Cross on Evidence notes that "similar principles" underpin both methods of attacking the credibility of an opponent's witness[67].

64 In *Hitchcock*, Pollock CB accepted that independent evidence may be given to prove a self-contradictory statement made by a witness or to rebut a denial given by the witness in relation to the witness's state of mind or feelings towards a party. He referred to "those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other."[68] Hence, evidence of what a witness said is admissible "to shew what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed."[69] While the "interest" and "bias" exceptions to the collateral evidence rule are typically limited to evidence about the feelings of the witness towards one party or the cause at issue, the so-called "corruption" exception is not so confined. In *Lawrence*, Thomas JA remarked that[70]:

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63 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782 [945] (original emphasis).

64 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 802-803 [956].

65 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 803 [956].

66 *Cross on Evidence*, 7th Aust ed (2004) at 601 [19015].

67 *Cross on Evidence*, 7th Aust ed (2004) at 601 [19015].

68 *Hitchcock* (1847) 1 Ex 91 at 100 [154 ER 38 at 42]. See also Maguire, *Evidence: Common Sense and Common Law*, (1947) at 67, cited in *Cross on Evidence*, 7th Aust ed (2004) at 575 [17580].

69 *Hitchcock* (1847) 1 Ex 91 at 101 per Pollock CB [154 ER 38 at 42].

70 [2002] 2 Qd R 400 at 409.

> "An offer to testify corruptly is a good and clear example of the 'corruption' exception. There is no doubt that a legitimate collateral issue is raised in such a case, and that evidence to support such an allegation may be independently called."

65 As indicated earlier, the complainant in that case denied in cross-examination that he had threatened to make a false complaint against a third party. The Queensland Court of Appeal held that the trial judge should have admitted the evidence of the third party against whom the threat was made. Thomas JA doubted[71] that evidence in relation to corrupt moral character is limited to a specific corrupt intention in respect of the case in hand, but rather applies where a witness has a motive for being untruthful.

66 Evidence of bias or corruption of a witness has been received in several cases, even though such evidence would not satisfy Pollock CB's test in *Hitchcock*. Such cases include *R v Phillips*[72], *LSS*[73] and *Lawrence*[74]. *R v De Angelis*[75] and *Smith v The Queen*[76] are more orthodox examples of the application of the corruption exception.

67 In *Phillips*, the English Court of Criminal Appeal held that evidence of bias ought to have been admitted to prove that a child who was a victim of and witness to an alleged incest had admitted that her mother had put her up to making the allegations. The accused denied the offence, claiming that the mother had schooled her child as to what to say. The Court held that the evidence of two women to whom the child had allegedly made the statements went directly to the accused's defence, not to the credibility of the child.

68 Evidence of out-of-court statements was also held to be admissible in *LSS*, where the accused was charged with incest and other sexual offences against his daughter. The Queensland Court of Appeal held that the trial judge should have admitted evidence from the daughter's brother that he had seen their mother (another Crown witness) coaching the daughter. In the Court's view, the

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71 *Lawrence* [2002] 2 Qd R 400 at 410, 412.

72 (1936) 26 Cr App R 17.

73 [2000] 1 Qd R 546.

74 [2002] 2 Qd R 400.

75 (1979) 20 SASR 288.

76 (1993) 9 WAR 99.

brother's evidence should have been admitted – not only as to what he *saw*, but also as to what he *heard*. The Court said that the brother's evidence was inextricably linked with the accused's defence. Thomas JA said[77]:

> "[E]vidence demonstrating the coaching of a witness, when there is a clear opportunity for a person apparently hostile to the accused to influence the witness, ought to be able to be called by an accused person."

69 Thomas JA also said that the evidence fell within the exception to the collateral evidence rule in favour of evidence of bias or partiality in a witness. His Honour acknowledged[78] that "any hostility on the mother's part was based upon her belief in the truth of her daughter's complaint." However, he said[79] that this sort of reasoning was circular when the ultimate issue was the truth of the complaint. Accordingly, his Honour said that[80]:

> "[T]he evidence foreshadowed from the brother could cast doubt upon the reliability of the complainant's evidence given the rather extended coaching that is said to have occurred, including encouraging the complainant to 'get emotional'."

70 In *Smith*[81], the Full Court of the Supreme Court of Western Australia held that the trial judge had improperly excluded evidence from a witness for the defence in a sexual offences case. The evidence concerned out-of-court statements made by the complainant that suggested bias on her part against the accused. In cross-examination the complainant, the foster-daughter of the accused, denied that she had made statements to the witness that she had been ejected from the home of her foster family because of her drug taking and had said to the witness: "Don't worry. They will all pay for it."[82] The Full Court held that, if accepted, the jury could conclude that the evidence revealed bias on the part of the complainant causing the fabrication of the charges about which the complainant had given evidence.

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77 *LSS* [2000] 1 Qd R 546 at 554, Pincus JA and Ambrose J agreeing.

78 *LSS* [2000] 1 Qd R 546 at 553.

79 *LSS* [2000] 1 Qd R 546 at 553.

80 *LSS* [2000] 1 Qd R 546 at 553.

81 (1993) 9 WAR 99.

82 *Smith* (1993) 9 WAR 99 at 101.

71 Evidence of out-of-court statements by a defence witness was also admitted to prove bias in *De Angelis*[83]. The Full Court of the Supreme Court of South Australia upheld the admission of evidence from police officers that a witness for the defence had said to them that "if required to go to court [the witness] would lie in order to avoid offending" the accused[84]. King CJ said[85] that the statement was "admissible under the common law rule which allows statements by witnesses indicating bias or partiality to be proved". His Honour said that[86]:

> "[A] statement to the effect that a person if required to give evidence will give false evidence out of a desire not to offend certain of the parties is a statement indicating partiality in relation to the parties or the cause, whether that partiality stems from friendship or fear."

72 In *R v Umanski*[87], however, the Full Court of the Supreme Court of Victoria held that a statement, although affecting the credibility of a witness, was not capable of proving bias. The accused in *Umanski* was charged with incest involving his step-daughter. The accused's wife was an important prosecution witness. The trial judge excluded evidence that the wife had threatened to give her husband up to the police unless she received a share of property from him. The wife denied making the statement. The Full Court held that the evidence was rightly excluded. The Court, "[n]ot without some hesitation", said that such evidence fell short of tending to establish bias or partiality that might lead the wife to give false evidence[88]. The Court said[89]:

> "Had the alleged statement been to the effect that [the accused's wife] would be revenged on her husband or that she would offer false evidence of the offence of incest unless he gave part of his property to her, the case would have been different. What she is alleged to have said, however, was the converse of this. In effect she alleged to have said that she was prepared to drop the case against her husband if he made such a gift to her,

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83 (1979) 20 SASR 288.

84 *De Angelis* (1979) 20 SASR 288 at 295 per King CJ, Jacobs and Legoe JJ agreeing.

85 *De Angelis* (1979) 20 SASR 288 at 295, citing *R v Umanski* [1961] VR 242.

86 *De Angelis* (1979) 20 SASR 288 at 295.

87 [1961] VR 242.

88 *Umanski* [1961] VR 242 at 244.

89 *Umanski* [1961] VR 242 at 244.

> not that she would invent a charge of incest against him if he did not. No doubt this indicates a willingness on her part to disregard her public duty for a price and so goes to her credit but we consider that this falls far short of evidencing a motive for giving false evidence."

73 Subject to certain limitations relating to relevance, hearsay and, potentially, s 21 of the *Evidence Act*, rebuttal evidence of corruption on the part of a witness should generally be admissible to show that the witness has a motive for being untruthful. *Cross on Evidence* acknowledges that it may be that "the only test [for the reception of the evidence] is the importance of the allegation in the context of the case."[90] This statement supports the view that the rules relating to the corruption exception should not be rigidly applied, particularly in circumstances where a more liberal approach would operate to be curative of injustice.

Probative value of Davis's out-of-court statements

74 If Ross's evidence was admitted, he would say that Davis had said to him that:

> "[A]lthough he, Davis, ... was involved in the killing of Clare Garabedian neither Coates nor Nicholls was so involved or present in the room but ... nonetheless he was proposing to give evidence to implicate the two of them in the murder."

Counsel for Nicholls submitted that the effect of this evidence was that at the time of making the statements, Davis intended to give false testimony at the trial of Nicholls and Coates. Counsel also submitted that the evidence of Davis's intention to give false testimony at the trial provided a basis for inferring that he also possessed that intention at the time of testifying at trial. He contended that this was evidence of Davis's corruption as a witness, and that it had the same probative value as evidence that Davis had accepted a bribe to testify falsely at trial. Counsel for Coates contended that Davis's stated intention to give false evidence implicating Coates was evidence of corruption, that is, "a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony."[91]

75 The Crown submitted that the evidence of Davis's out-of-court statements only went to show that Davis had been *offered* a deal or that he was being encouraged to implicate Coates and Nicholls. The Crown submitted that evidence that a witness has been offered a bribe is not evidence of a corrupt state of mind. Accordingly, evidence that Davis had been offered a deal or had been

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90 *Cross on Evidence*, 7th Aust ed (2004) at 606 [19040].

91 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 803 [956].

encouraged to implicate Nicholls and Coates likewise did not constitute evidence of a corrupt state of mind[92]. The Crown also contended that the evidence of Davis's out-of-court statements did not disclose an intention to give false evidence. Ross's witness statement did not actually say that Davis said that he, Davis, intended to give false evidence implicating Nicholls and Coates. Rather, this was sought to be inferred from Ross's evidence. As a result, this case was distinguishable from cases such as *Lawrence* and *De Angelis*. In those cases, the evidence sought to be led in rebuttal was that the witness had expressly stated an intention to give false evidence, those statements being probative of a corrupt state of mind.

76 The nature of the evidence that Ross would have given is somewhat vague. It is not clear whether Ross would have said that Davis claimed he had been offered a deal by the police or had actually done a deal with the police or whether he actually said that he would give false evidence. However, if admitted, a jury could find that Davis said that he had done a deal with the police and that he intended to give false evidence implicating Nicholls and Coates. If so, it would be evidence of a corrupt state of mind: it would be an example of a specific interference with testimony and evidence of "a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony." And the jury could infer from this finding that his evidence against Coates and Nicholls was actuated by this state of mind.

Whether Ross's evidence is hearsay and, if so, admissible as an exception to the hearsay rule

77 The evidence that Ross would give was not hearsay evidence. The purpose of the evidence was to demonstrate Davis's state of mind, that is, a mental state affected by corruption or bias. The evidence was not intended to prove the truth of the statements. As Pollock CB said in *Hitchcock*[93]:

> "It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in

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92 See *Hitchcock* (1847) 1 Ex 91 at 101 per Pollock CB, 104-105 per Alderson B, 106 per Rolfe B [154 ER 38 at 42-43, 44, 44-45]; *Lawrence* [2002] 2 Qd R 400 at 403 per McPherson JA.

93 (1847) 1 Ex 91 at 100-101 [154 ER 38 at 42].

> one way or the other. If he denies that, *you may give evidence as to what he has said, not with the view of having a direct effect on the issue, but to shew what is the state of mind of that witness*, in order that the jury may exercise their opinion as to how far he is to be believed." (emphasis added)

78 In *Walton v The Queen*[94], Wilson, Dawson and Toohey JJ pointed out that the making of a statement is frequently relevant in considering the mental state and subsequent conduct of the witness, quite apart from the truth of the content of the statement. A question of hearsay arises only if the words are relied upon as establishing some fact narrated by the words.

79 The Crown contended, however, that it was the content of Ross's statements that was critical and not the fact that they had been made. Evidence that Ross had had a conversation with Davis, without more, would not suggest corruption on Davis's part. In so far as the statements had value because of the assertions contained in them, the Crown contended that they constituted a "bare assertion"[95] about Davis's state of mind. Accordingly, because they did not amount to conduct from which a relevant inference could be drawn, the statements had to be excluded as hearsay. But these contentions misunderstand the relationship between statements that prove a state of mind and statements that infringe the hearsay rule. What is relevant in the present context is the state of mind of Davis when he gave evidence. That may be inferred from his conduct or from his statements.

80 Ross's evidence could not be used as proof that Davis had actually done a deal with the police: that would be hearsay. If the words demonstrated an intention to give false testimony, however, Ross's statement was evidence of Davis's mental state that established a corrupt motive that affected his testimony. In *Smith*[96], the Full Court of the Supreme Court of Western Australia upheld the admission of out-of-court statements on this basis. It held that evidence was admissible to prove that the complainant in a sexual offences case had said to a witness that she had been ejected from her foster home because of her drug taking and that "[t]hey will all pay for it." The Full Court said that the evidence might have revealed that the complainant had given her evidence from a corrupt or other motive.

81 In *Walton*[97], Wilson, Dawson and Toohey JJ remarked that in some cases:

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94 (1989) 166 CLR 283 at 301-302.

95 *Walton* (1989) 166 CLR 283 at 304 per Wilson, Dawson and Toohey JJ.

96 (1993) 9 WAR 99.

97 (1989) 166 CLR 283 at 302.

> "a person's statements about his state of mind will only have probative value if they are truthful and accurate and to rely upon them is to rely to some extent upon the truth of any assertion or implied assertion contained in them. To that extent an element of hearsay may be said to be present."

But it is probably more accurate to say that in cases like *Smith* the contents of the statement revealed bias or corruption and the *reasons* for that state of mind rather than the truth of their contents. In *Smith*, the statements were not admitted to prove that the complainant had taken drugs or had been ejected from her foster home. They were admitted to prove that she was biased against the accused for the reasons that she gave.

82 In *Phillips*, the English Court of Criminal Appeal held that evidence that the complainant's mother had coached her to give evidence was admissible. In *LSS*, the Queensland Court of Appeal held that evidence was admissible that a witness saw and heard the complainant being coached by her mother. The Court said that this evidence could cast doubt upon the reliability of the complainant's evidence.

83 Ross's evidence concerning Davis's out-of-court statements was not admissible for the purpose of proving the truth of the contents of those statements – that Davis had done a deal with the police or that Nicholls and Coates were not in the motel room at the time of Garabedian's death or were not involved in the murder of Garabedian. The evidence was admissible for the purpose of proving that Davis intended to give false testimony against Nicholls and Coates. That is, the evidence was admissible to prove a corrupt state of mind on Davis's part.

The procedure for adducing evidence as an exception to the collateral evidence rule

84 At common law, if a witness does not admit the making of a prior statement, the cross-examiner must identify that statement to the witness. Only if the witness still refuses to admit making the statement may the opposing party prove the oral statement[98]. Section 21 of the *Evidence Act* ("Cross-examination as to and proof of prior inconsistent statement") is to similar effect. Section 21 requires that the cross-examiner identify the particular occasion when the supposed statement was made. Only if the witness does not distinctly admit that he or she made the statement can evidence be tendered to prove that he or she in fact made the statement. Section 21 provides:

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98 *The Queen's Case* (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988]; *Crowley v Page* (1837) 7 C & P 789 at 791-792 per Parke B [173 ER 344 at 345].

> "Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.
>
> The same course may be taken with a witness upon his examination in chief or re-examination, if the judge is of opinion that the witness is hostile to the party by whom he was called and permits the question."

85 Section 21 is essentially declaratory of the common law[99]. It does not abrogate the common law principles[100]. Proof or admission of the prior inconsistent statement does not constitute evidence of the facts stated[101] unless the witness is a party (in which case the statement may amount to an admission). Section 21 prescribes the requirement that must be met before proof of a previous inconsistent statement may be tendered. That requirement is that the circumstances of the statement must be identified to the witness sufficient to designate the particular occasion. In other words, the circumstances in which the prior inconsistent statement was allegedly made must be identified to the witness in sufficient detail so that the witness has the opportunity to admit or fail to "distinctly admit" that he or she made the statement[102]. Only if the witness fails to "distinctly admit" that he or she made the statement can evidence be led of the making of the inconsistent statement.

86 Counsel for Nicholls and Coates submitted that s 21 of the *Evidence Act* does not apply to evidence adduced for the purpose of showing a corrupt state of mind. Counsel for Coates submitted that the purpose of proving a prior inconsistent statement is to raise doubt as to the reliability of the witness while the purpose of establishing a corrupt state of mind is "quite different".

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99 See *The Queen's Case* (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988]; *Crowley v Page* (1837) 7 C & P 789 [173 ER 344].

100 See *Umanski* [1961] VR 242 at 244. The Victorian Full Court in that case construed the "permission" in the equivalent s 35 of the *Evidence Act* 1958 (Vic) as not abrogating common law principles.

101 *Hammer v S Hoffnung & Co Ltd* (1928) 28 SR (NSW) 280; *Askew* [1981] Crim LR 398.

102 This is the common law position: *The Queen's Case* (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

Establishing a corrupt state of mind impeaches the supposed impartiality of the witness.

87 But the common law has long taken the view that the rules concerning proof of a prior inconsistent statement apply to cases where the statement goes to the issue of bias or corruption. *The Queen's Case*[103] is the seminal case on proof of inconsistent statements. There, Abbott CJ, giving the answers of the King's Bench judges to questions from the House of Lords, said that words spoken for the purpose of corruption were no different from words spoken for any other purpose. He said[104] that they "fall within the same rule and principle, with regard to the course of proceeding in our courts, as words spoken for any other purpose". The reason for this similarity of treatment is clear. It would be anomalous if the nature and circumstances of the statement were required to be put to a witness as a prior inconsistent statement before the witness's credibility could be attacked, but not if the witness had stated that he or she intended to lie in court.

88 Because s 21 is declaratory of the common law, the common law principles concerning proof of statements indicating bias or corruption apply to cases coming within the section. In addition, the case law also indicates that the section (or its equivalent in other jurisdictions) applies where a party seeks to tender independent proof of statements that tend to prove bias or partiality in a witness[105]. Moreover, imputing bias or corruption to a witness is a serious allegation. Fairness requires that a person who makes such an imputation should put the matters giving rise to it in sufficient detail to the witness so that the witness understands the allegation and those matters and has an opportunity to deny or explain them.

89 Counsel for Nicholls acknowledged that there was a failure to identify the circumstances of the statements allegedly made by Davis, such as the time, place and occasion of the statements. There was also a failure to identify the speakers, the essence of the conversation and the words used. As a result, both s 21 of the *Evidence Act* and the common law principle made Ross's evidence inadmissible. Counsel for Hoy only asked Davis whether he had "ever told anybody that the whole story … about the involvement of Coates and Nicholls is a lie", whether he was "told by police what to say" and that he "did it so that [he] would gain a benefit". Counsel for Coates did not put any such suggestion to Davis. Counsel

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103 (1820) 2 Brod & B 284 [129 ER 976].

104 *The Queen's Case* (1820) 2 Brod & B 284 at 315 [129 ER 976 at 988].

105 *Umanski* [1961] VR 242; *R v Harrington* [1998] 3 VR 531; cf *Narkle* (2001) 23 WAR 468 at 477-478 per Murray J.

for Nicholls asked Davis whether he had ever said "in a conversation" that the police had offered him a deal if he cooperated and implicated Coates "and others" in the murder, that he had been told by the police what to say in order to implicate "others" and that the story he had given the police about Coates and Nicholls being present in the motel room was "all bullshit". Counsel did not identify whether this was one conversation or several, or whether the statements were made to one person or more than one person. In these circumstances, it is impossible to hold that the circumstances and substance of the statements were put to Davis.

90 Moreover, because the making of the statements was the foundation for an inference of bias or corruption, fairness – and the rule in *Browne v Dunn*[106] in particular – required the precise nature of the corruption allegation to be put to Davis. Fairness required that he have an opportunity to deny that, even if he made the statements, he was biased or was giving false evidence against the accused. The failure of the cross-examiners to put to Davis that they were alleging bias or corruption against him is an additional reason for holding that the trial judge correctly excluded Ross's evidence.

2. Coates' unrecorded admissions

The circumstances in which the admissions were made

91 As part of its case against Coates, the Crown relied on several admissions that Coates had allegedly made while he was in police custody. The admissions were made during the second break in a videotaped interview of Coates. Filming was suspended during that time. During the second break, which lasted approximately 45 minutes, Coates allegedly made admissions to Hawley and Hutchinson and made further admissions to Kays and Byleveld. The transcript of the interview indicates that the second break in the filming occurred at the suggestion of either Hawley or Hutchinson who asked Coates:

> "Q. Do you want to go to the toilet?
>
> Q. Do you want to go to the toilet again, do you?
>
> A. Sure.
>
> Q. All right, I will suspend the interview again. It's 6 minutes past 5 and I will just turn the tapes off."

92 However, the videotape was apparently less clear about who made the request, because Coates had his head turned away from the camera at the time.

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106 (1893) 6 R 67.

In cross-examination, one of the police detectives, Hawley, said that Coates had initiated the request. Counsel for Coates did not question the other police detective, Hutchinson, on the issue. In his first ruling on the admissibility of admissions made to Hawley and Hutchinson during the second break, the learned trial judge, Murray J, merely noted the police officers' evidence that the suspension of the taping was initiated by Coates and that a break in the process of recording the interview had been contrived. His Honour did not make any finding about who requested the suspension of the interview. In his second ruling on admissions made during the second break to Kays and Byleveld, two more senior police detectives, the trial judge said that it was "clearly open … to conclude that the break which occurred in the interview was at the request of Mr Coates, and that was a toilet break." His Honour also said that "it is clear that the process was commenced by Mr Coates in my opinion and that he was seeking to speak off the camera". Miller J in the Court of Criminal Appeal[107] found that Coates had initiated the off-camera interview.

Coates' submissions

93 Counsel for Coates submitted that the trial judge erred in admitting the admissions allegedly made by Coates during the 45 minute break in the videotaped interview of Coates. The admissions were not later confirmed on videotape when the videotaped interview was resumed. Section 570D of the *Criminal Code* relevantly provided that evidence of any admission by an accused person on trial for a serious offence is not admissible unless there is a "reasonable excuse" for there not being a videotaped recording of the admission. Counsel for Coates submitted that the trial judge and the Court of Criminal Appeal erred in finding that there was a "reasonable excuse" in the circumstances for the lack of a videotaped recording of the admission.

The legislation

94 At the relevant time, s 570D of the *Criminal Code* ("Accused's admissions in serious cases inadmissible unless videotaped") provided:

> "(1) In this section –
>
> '**admission**' means an admission made by a suspect to a member of the Police Force, whether the admission is by spoken words or by acts or otherwise;
>
> '**serious offence**' means an indictable offence of such a nature that, if a person over the age of 18 years is charged with it, it can not be

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107 *Hoy* [2002] WASCA 275 at [145]-[146].

dealt with summarily 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 admission by the accused person shall not be admissible unless –

(a) the evidence is a videotape on which is a recording of the admission; or

(b) the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for there not being a recording on videotape of the admission; or

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

(3) Subsection (2) does not apply to an admission by an accused person made before there were reasonable grounds to suspect that he or she had committed the offence.

(4) For the purposes of subsection (2), '**reasonable excuse**' includes the following –

(a) The 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."

The *Code* defined "interview" to mean "an interview with a suspect by a member of the Police Force"[108].

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108 Section 570(1).

Trial judge's rulings

95 At the trial, Murray J made two rulings in relation to the admissions. In the first ruling his Honour said: "[I]t is my opinion that what occurred would constitute a reasonable excuse for there not being a recording of the material on videotape." In his second ruling, Murray J said that there was "no reasonable proposition" that the second break was "a break which was effectively manufactured by the interviewing police officers", that it was a "separate interview process" commenced by Coates and that Coates had not consented to the videotaping of it. Consequently, his Honour ruled that the admissions made by Coates during the second break in the interview were admissible.

Findings of the Court of Criminal Appeal

96 The Court of Criminal Appeal upheld the trial judge's decision to allow the reception of the admissions made during the second break. Miller J said that there was a "reasonable excuse" for the failure to videotape Coates' alleged admissions. Critical to this conclusion was the finding that Coates had initiated the 45 minute suspension of the videotaping. Miller J said[109]:

> "In the present case, it is the initiation by Coates himself of the off-video interview which is a critical factor in the determination of the admissibility of the admissions allegedly made by him. In my view, the learned trial Judge was quite correct in concluding that there was, within the meaning of s 570D(2)(b) of the *Criminal Code*, a reasonable excuse for the admissions not being recorded on video tape, namely that Coates did not want his statements recorded on video tape. According to the evidence of the officers he was anxious to speak off tape about the options that he might have if he was to implicate others. In my view, it is quite wrong to suggest that in these circumstances the admissions of an accused person or the admissions of a suspect are inadmissible by reason of the fact that they have not been videotaped."

97 The Crown did not dispute that the statements allegedly made by Coates to Hawley and Hutchinson and to Kays and Byleveld constituted "admissions" for the purpose of s 570D, nor that the charge was a "serious offence". Nor did the Crown contend that there were any "exceptional circumstances" that, in the interests of justice, justified the admission of the evidence under s 570D(2)(c). The issue, then, is whether there was a "reasonable excuse" for there not being a videotaped recording of the admissions within the meaning of s 570D(2)(b). Section 570D(4) defines "reasonable excuse" inclusively. Of the matters listed in

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109 *Hoy* [2002] WASCA 275 at [146].

s 570D(4), it was not suggested that any of pars (a), (b) or (d) of s 570D(4) applied. As a result, argument before the trial judge, the Court of Criminal Appeal and this Court turned on whether Coates "did not consent to the interview being videotaped" or that something similar to or "allied to" that had occurred, within the inclusive meaning of "reasonable excuse".

Interpretation of the legislation

98 Section 570D was inserted into the *Code* by s 5 of the *Acts Amendment (Jurisdiction and Criminal Procedure) Act* 1992 (WA). Nothing in the second reading or other speeches in the Legislative Assembly or the Legislative Council throws any light on the problem presented by the facts of the present case. Nevertheless, it is clear that the mischief at which the section is directed is the problem of admissions to the police and the perceived problem of the police "verbal". In *Kelly v The Queen*, the problem of the police verbal was described as including[110]:

> "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 the police evidence." (footnote omitted)

99 The broader problem of admissions to police includes not only possible fabrication of admissions or police perjury, but also problems associated with the perception, recording, recollection and transmission to the court of those admissions. It includes problems of pressure, coercion and oppression in relation to the making of the alleged admissions, and misunderstanding, inaccurate recording and misrecollection in relation to the perception, recording, recollection and transmission to the court of those admissions[111].

100 The Australian States and Territories have adopted a variety of legislative responses to these problems[112]. As I pointed out in *Kelly*, the legislation[113]:

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110 (2004) 78 ALJR 538 at 548 [42] per Gleeson CJ, Hayne and Heydon JJ; 205 ALR 274 at 286.

111 See *Kelly* (2004) 78 ALJR 538 at 543-544 [22]-[25] per Gleeson CJ, Hayne and Heydon JJ; 205 ALR 274 at 279-280.

112 Gleeson CJ, Hayne and Heydon JJ describe the different legislative approaches in *Kelly* (2004) 78 ALJR 538 at 545-546 [30]-[36]; 205 ALR 274 at 282-283.

113 (2004) 78 ALJR 538 at 558 [96]; 205 ALR 274 at 300.

> "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."

101 In *Kelly*, Gleeson CJ, Hayne and Heydon JJ said[114] that the identified purpose or object of the legislation under consideration in that case "does not compel any particular construction of the quite detailed language" of the relevant section. Their Honours said[115] that the correct construction depends on the particular words used. On the other hand, I emphasised that the protective purpose of the legislation required a liberal construction of the relevant section[116]:

> "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 *Little v The Commonwealth*[117] 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

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114 (2004) 78 ALJR 538 at 548 [43]; 205 ALR 274 at 286.

115 *Kelly* (2004) 78 ALJR 538 at 548 [43]; 205 ALR 274 at 286.

116 *Kelly* (2004) 78 ALJR 538 at 558-559 [97]-[98]; 205 ALR 274 at 300-301.

117 (1947) 75 CLR 94 at 112.

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.'[118] It also accords with the purposive theory of statutory construction.

…

Purposive construction is the modern approach to statutory construction[119]. 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[120]. 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[121]:

> '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.'"

Application of s 570D of the Criminal Code

102 Both the natural and ordinary meaning of "interview" and the purposive construction of s 570D favour interpreting that term in s 570D(4) to cover the entire time during which Coates spoke with and was questioned by the police. The term "interview" is used only in s 570D(4): the rest of the section refers to "any admission" or "the admission" or "an admission" without specifying that the admission must be made in the course of an interview, that is, without designating the occasion of the admission. The policy of the section is that no admission is admissible unless it falls within one of the three paragraphs in s 570D(2). Paragraph (b) – the reasonable excuse exception – is the relevant exception in the present case. That paragraph declares that "evidence of any

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

119 *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.

120 *Kingston* (1987) 11 NSWLR 404 at 422 per McHugh JA.

121 *Cabell v Markham* 148 F 2d 737 at 739 (2nd Cir 1945).

admission ... shall not be admissible unless ... the prosecution proves ... that there is a reasonable excuse for there not being a recording on videotape of the admission". Reasonable excuse includes that the accused "did not consent to the interview being videotaped."

103 The natural meaning of "interview" in s 570D is the entirety of a discussion between a police officer and a suspect carried out on a particular day for the purpose of eliciting statements[122] from the suspect concerning the commission of a "serious offence". It is unlikely that the Legislature in using the term intended it to mean each separate question and answer or statement made on a particular occasion, so that each such question and answer or statement constituted an "interview". It seems absurd to think that the Legislature intended the occasion of Coates' interrogation to constitute at least four separate interviews, consisting of two videotaped interviews and two unrecorded interviews during the toilet breaks.

104 A purposive construction also supports interpreting "interview" to mean the entirety of a discussion between a police officer and a suspect carried out on a particular day for the purpose of eliciting statements from the suspect concerning the commission of a "serious offence". Such a construction assists in having a record of the entire discussion between the police officer and the accused on a particular day at a particular place instead of records of parts of the discussion. In accordance with the policy of the section, it also reduces – although it cannot eliminate – the occasions for disputes between accused persons and police officers as to what was said in "interviews", particularly interviews at police stations. A purposive construction also provides an incentive to police officers to have off-camera admissions recorded or at all events referred to when recording resumes.

105 Hence, by interpreting "interview" to cover all exchanges between Coates and the police while he was under caution, s 570D applies to the times when filming was suspended. Because Coates did not withhold consent to the entire series of exchanges being videotaped, his refusal to consent to some of the exchanges being videotaped (if he did) did not fall within the meaning of "reasonable excuse" as defined in s 570D(4)(c).

106 Nor do the circumstances of the disputed admissions warrant their admission under the umbrella of "reasonable excuse" independently of the inclusive exceptions in s 570D(4). The focus of any inquiry directed to the application of the "reasonable excuse" exception must take account of the conduct of the police, as well as the fairness or otherwise to the accused of permitting the admissions to be admitted. In construing similar provisions in

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122 cf *The New Oxford Dictionary of English*, (1998) at 956.

MDR[123], Wicks J held that the conduct of the police officers was relevant to the question whether it would be "in the interests of justice" to admit evidence of admissions by the accused. His Honour thought relevant matters included whether non-compliance with the provisions was deliberate or the product of a reckless disregard of the provisions or was inadvertent or otherwise excusable. Such matters are also relevant in determining whether there was a "reasonable excuse" for not recording the admission. Most importantly of all, however, is whether the officers attempted to have the off-camera admission recorded. If, on-camera, the accused denies making an off-camera admission, it will be highly relevant in determining whether there was a "reasonable excuse" "for there not being a recording on videotape of the admission"[124]. Even then it will be necessary for trial judges to bear in mind the observations of Slicer J in a related context in *R v Heinicke*[125]:

> "[I]t would be a denial of the spirit of the [Tasmanian provision] if courts as a matter of course permitted the reception of a videotaped interview comprising denials followed by a recanting recording interview made after a short unrecorded series of events which were themselves not subject to verification or which had not been fully and openly adopted in the following recorded interview."

107 In this case, Hawley admitted in cross-examination that he had encouraged Coates to speak off-camera, that he deliberately chose to continue the interview off-camera and that this was not proper or careful practice. Hawley also admitted that it would have been possible during the second break in videotaping to have the video turned on and the disputed conversations recorded. Hawley did not say that Coates refused permission to do so. Moreover, there was apparently no attempt by the police, once the videotaping resumed, to have Coates confirm his admissions on tape. The police made no contemporaneous notes of the off-camera conversations, and the notes that Hawley and Hutchinson wrote the following morning were later lost or mislaid. These circumstances indicate a departure from proper police procedure. They indicate that the trial judge and the Court of Criminal Appeal erred in permitting the reception of Coates' admissions in evidence.

108 Moreover, even if the off-camera statements constituted an "interview" to whose recording Coates did not consent, the above circumstances made an overpowering case for the trial judge to exercise his general discretion

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123 (2002) 135 A Crim R 19 at 30, citing *R v Day* (2002) 82 SASR 85 at 89 per Perry J.

124 Section 570D(2)(b).

125 [2001] TASSC 93 at [23].

concerning evidence unfairly obtained to exclude the evidence[126]. The Legislature has set its face against admitting unrecorded admissions by suspects except in special circumstances. When interviewing police officers encourage the making of off-camera admissions, despite the presence of recording equipment, and then fail to refer to the admissions when the recording resumes, the policy of the legislation points strongly to excluding the admissions even though, if the officers' evidence is accepted, the case comes within an exception specified in s 570D(2). Given the legislative policy of recording interviews of suspects wherever possible so that disputes concerning admissions can be reduced to a minimum, attempts to avoid the effect of that policy should be perceived as unfair attempts to obtain evidence and such evidence should be excluded.

109 It is therefore unnecessary to determine whether the trial judge erred in failing to give a *McKinney* direction in respect of the disputed off-camera admissions. It is also unnecessary to determine whether the trial judge erred in commenting to the jury that the "simple question" in relation to the unrecorded admissions allegedly made by Coates to the police "might well be … who is telling the truth and who is committing perjury in this court in relation to what occurred at that time".

Conclusions

110 The issues in the appeal of *Nicholls* relate to the admissibility of the evidence of the defence witness, Ross. However, for the reasons outlined above, that evidence was inadmissible because counsel for Nicholls, when cross-examining Davis, failed to identify the particular occasion when the alleged prior oral statements were made. While counsel for Nicholls referred to a "conversation", he did not identify whether this was one conversation or several, whether the statements were made to one person or more than one person, or the time, place and occasion of the statements. The fourth ground of appeal in the matter of *Coates* essentially replicates the ground of appeal in *Nicholls* concerning the admissibility of the evidence of Ross. However, for the same reasons that require the rejection of Nicholls' appeal on this ground, Coates' appeal on this ground must also fail.

111 It also follows that Nicholls' appeal against his conviction must be dismissed.

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126 See *McDermott v The King* (1948) 76 CLR 501 at 513-515 per Dixon J; *R v Lee* (1950) 82 CLR 133 at 148-155; *Ridgeway v The Queen* (1995) 184 CLR 19 at 30-31 per Mason CJ, Deane and Dawson JJ.

112 However, *Coates'* first ground of appeal – the inadmissibility of unrecorded admissions made by Coates to police officers during a 45 minute break in a videotaped interview – has succeeded. Evidence against him having been wrongly admitted, his conviction must be quashed unless the Crown has established that nevertheless no substantial miscarriage of justice occurred by reason of the wrongful admission of this evidence.

Substantial miscarriage of justice

113 It was made clear to the jury that the unrecorded admissions allegedly made by Coates to the police, by themselves, would not be sufficient to convict Coates of any offences. Indeed, the trial judge twice directed the jury that they could not convict Coates of any offences on the basis of the alleged admissions alone. Furthermore, the evidence against Coates was reasonably strong. There was the direct evidence of Davis, evidence of motive, evidence of a false alibi and other forensic and circumstantial evidence that indirectly implicated Coates. However, if the unrecorded admissions had been excluded, the Crown case against Coates would have been weaker. Coates' unrecorded and clearly inculpatory admissions were important parts of the Crown case against him. As Gummow and Callinan JJ point out in their reasons, such admissions as Coates allegedly made are usually very powerful and persuasive evidence and are capable of tilting the balance in a case. In addition, while it is not possible to identify the precise effect of the exclusion of the admissions, the course of the trial would have been different if the Crown had not been permitted to rely on the admissions. In these circumstances, I am not satisfied that Coates would have been convicted without the evidence of those unrecorded admissions. Accordingly, the Crown has failed to establish that their admission resulted in no substantial miscarriage of justice so far as Coates was concerned. There must be a new trial in his case.

Order

114 The appeal of Coates should be allowed, his conviction quashed and a new trial ordered. The appeal of Nicholls should be dismissed.

115 GUMMOW AND CALLINAN JJ. These appeals raise serious questions as to the admissibility in evidence of unrecorded admissions and of statements of intention to give false evidence made by a key prosecution witness out of court.

Facts

116 In August and September 2000, Martin Coates and Thomas Nicholls, the appellants, and Amanda Hoy were tried and convicted in the Supreme Court of Western Australia (Murray J with a jury) of the murder of Clare Garabedian on or about 22 August 1998.

The prosecution case

117 The prosecution case against Coates was based principally upon the evidence of Adam Davis. He claimed that Coates had asked him to pick up the victim, a prostitute, and to give her a "hot shot" (a lethal injection of heroin). Davis agreed to do this for $2000. Hoy, who shared a house with Nicholls, told Davis that Clare Garabedian was a witness in other proceedings against Coates and her. Hoy was then pregnant to Coates who frequently visited her and Nicholls's residence. On 22 August 1998, Davis used Hoy's car to collect the deceased, and, posing as a client, took her to a motel in Rivervale. There, Davis administered heroin to Garabedian that was supplied to him by Coates. He then telephoned Hoy to tell her that he needed more heroin. A package containing a syringe filled with heroin was taken to, and left under the wheel of Hoy's car which was parked nearby. Davis collected the syringe, but emptied some of the heroin into the sink because, he claimed, he had become nervous about killing Garabedian.

118 A little later, Davis received separate telephone calls from Coates and then Nicholls, each of whom asked whether he had killed Garabedian. Davis said to them: "My money's run out. I have to go." Fifteen minutes later Coates and Nicholls came to the motel room. Coates pulled the deceased to the ground and Nicholls held a pillow to her face. Davis held her arm while Coates attempted to inject the heroin into her arm several times before handing it to Davis who injected her with heroin. Coates then stood on Garabedian's throat.

119 Afterwards, Coates wiped Garabedian's body with a wet towel and Davis cleaned other areas in the motel room to remove fingerprints. Nicholls gathered incriminating items into a pillowcase for removal. Davis could not explain, under cross-examination, how it was that only his fingerprints remained, and the absence of fingerprints, or DNA evidence of Nicholls or Coates.

120 Coates and Nicholls denied Davis's version of events during interviews of them which were videotaped by police officers.

121 In addition to the testimony of Davis, the Crown relied for its case against Coates upon admissions allegedly made by him during a suspension of filming of his interview lasting 45 minutes.

The trial

122 The Crown submitted that Coates had ample motive to commit the murder: that Garabedian was killed to prevent her from giving evidence in criminal proceedings against Coates and Hoy. The Crown also adduced evidence that Coates's brother-in-law, Trevor Bloomer, had offered to testify, falsely, that he was at Coates's house with him at the time of the murder.

123 Detective Senior Constable Hawley was one of the investigating police officers. He gave evidence about what had occurred when the recording of the interview with Coates was suspended.

> "He said, 'What are my options?'
>
> I said, 'Your options are you can cooperate and tell the truth or you can stick to your current story and take your chances. You know what I'm saying. You have been cautioned and you need to have a very careful think' – sorry 'You have been cautioned and it's up to you to say what you want to say or don't say anything at all. You're in a very serious position and you need to have a very careful think about what you want to say to us. This matter is dealing with the death of a Crown witness.'
>
> He said, 'I know. Just talk to me. What am I looking at?'
>
> I said, 'You're looking at a very serious offence.'
>
> ...
>
> He said, 'What can I do?'
>
> I said, 'What do you mean what can you do?'
>
> He said, 'How much will I get?'
>
> I said, 'I don't know. It's not up to me.'
>
> He said, 'I haven't even got 5 years in me. I'll neck myself.'
>
> I said, 'I can't make you any promises as I'm not in a position to do so.'
>
> He said, 'All right, just talk to me.'

I said, 'I have been talking to you. I've been straight with you all along. Martin, we know what you've been up to. We've had your phone tapped for the last 4 weeks.'

He said, 'I know, I know, but how can I get myself out of this situation?'

I said, 'I've already told you I can't make any promises. It's up to you. You're the only person that can help yourself at the moment. I think you could start by telling us the truth.'

He said, 'I know exactly what happened and it's not how you think. It's nowhere near it. It's 100 miles away from it.'

I said, 'Come on then, tell us your side of the story.'

He said, 'They went and did it. I was maggoted. I was at home maggoted.'

I said, 'Who is "they"?'

He said, 'Thomas and f…… idiot.'

I said, 'Who is f…… idiot?'

He said, 'Adam. That's what happened.'

I said, 'What are you going to say on video? We need to get this finished. Are you going to stick to your current "I don't know anything" story or are you going to tell us what really happened?'

He said, 'What's in it for me?'

I said, 'I can't make you any promises. If you're talking about deals and that sort of thing I'm not the boss. I can get the boss if you want to talk to him.'

He said, 'Yes, get him.'"

124 Detective Senior Sergeant Byleveld and Detective Sergeant Kays (neither of whom had been previously present) also spoke to Coates. The following extract from the evidence of Kays sets out what Coates said:

"COUNSEL: Coates informed you that he did not want to go to gaol? --- Mm.

> MURRAY J: Yes, I see? – Mr Coates said he didn't want to go to gaol, that he wouldn't last 5 minutes, and, yeah, that he would hurt himself. He would do himself some harm if he was faced with that prospect.
>
> COUNSEL: Did he then say anything to you? --- Yes. He indicated that he wanted to do a deal and that he wanted to be charged with conspiracy to murder.
>
> COUNSEL: What did he tell you about that? --- He also indicated that he would give evidence against Davis and Nicholls in exchange for that deal.
>
> …
>
> COUNSEL: Will you tell us what Mr Byleveld told Mr Coates, please? --- He told Mr Coates that we don't do deals, and if he wished to discuss the matter any further then he could do so on video with Detective Senior Constables Hutchinson and Hawley."

125 On the resumption of the interview on-camera, no attempt was made by any police officer to have Coates repeat the inculpatory statements that he had made during its suspension. In evidence, Coates denied that he had made the statements attributed to him during the suspension of the filming. Hawley accepted that he had never suggested to Coates, when the disputed off-camera admissions were being made, that "we need to get back on video" or anything to that effect. He said that he encouraged Coates to speak off-camera and that he "deliberately chose to continue this interview off-camera".

126 No notes were made of the alleged off-camera admissions by either Hawley or Hutchinson until the following day. These officers gave evidence that the notes were subsequently lost or mislaid. Their witness statements were prepared in consultation, and without the benefit of any notes.

127 Both Byleveld and Kays gave evidence that they did not take notes of the conversation they claimed to have had with Coates. Kays said that his witness statement, made 21 months after the interview, was based solely upon his recollection. Byleveld gave evidence that he compiled his witness statement, upon which his oral evidence was based, after speaking with Kays about what he should put into his statement.

128 Objection was taken to the reception of the admissions made off-camera. After reciting the circumstances in which the interview was suspended Murray J ruled as follows:

> "The question then in my opinion is whether in the circumstances the material may be within the category of material which under section 570D [of the *Criminal Code* (WA)] constitutes an exception to the general

proposition that in a case such as this evidence of any admission is inadmissible unless recorded on videotape. Reliance is placed generally upon section 570D(2)(b) and (c) which refer respectively to proof that there is a reasonable excuse for there not being a recording on videotape of the admission.

What is put there is that this should be understood as a process of the accused person making statements during a break which was taken, if not at his initiative, then with his agreement and so it is a process in which the suspension, as it is put, of the recorded interview occurred in circumstances where both he and the police officers accepted that that would happen. I have noted that the conversation which occurred was initiated according to the police officer's evidence by Mr Coates and not by them. So is that a reasonable excuse for it not being recorded on videotape?

Subsection (4) contains definitions of what a reasonable excuse will include but they are not all-inclusive. One of them refers to the accused person not consenting to the interview being videotaped. This is a situation which in my opinion is allied to that in the sense that although there's no direct reference to non-consent to these statements being made whilst the videotape was running, it is a situation in which, as I have said, a break in the process of recording the interview was contrived and the statements were initiated and made by the accused at that time.

By analogy and in regard to the circumstances to which I've referred, it is my opinion that what occurred would constitute a reasonable excuse for there not being a recording of the material on videotape. Because then I conclude that it involves the background narrative against which what follows may be interpreted, because it forms part of what is otherwise a mixed video-recorded statement and because it does of itself contain material which might, if the jury were so minded, be properly construed as declarations against interest, it seems to me that the material is admissible and I would not exclude it in the exercise of discretion because it refers at one point in what is said to something that Mr Nicholls was said by Coates to have done. In that respect the material falls well within the rulings I have already made. I would not think it necessary or appropriate in such a case as this to say that what I've described constituted an exceptional circumstance which in the interests of justice would justify the admission of the evidence. I would rest my judgment about that matter on section 570D(2)(b)."

129 His Honour made a further ruling in relation to the evidence of Byleveld and Kays in these terms:

"The matter has to be dealt with in terms of section 570D of the Code of course, so the question would be whether the prima facie inadmissibility of the material secured by that section is to be put to one side because in the present context there is a reasonable excuse for there not being a recording on videotape of what seems to me to be clearly capable of being understood to be an admission in the terms of the section, which therefore in terms of the common law would be clearly admissible and probative evidence.

The reasonable excuse phrase that the section contains has in subsection (4) some explanation provided as to what it may mean, but that's not an exclusive list of circumstances which will constitute a reasonable excuse and no others will. Nonetheless, one of them is that the admission was made when it was not practicable to videotape it, and another is that the accused person did not consent to the interview being videotaped.

Of course he did consent to the interview being videotaped and there was a videotaped interview, but I think it is clearly open, when one views that process, to conclude that the break which occurred in the interview was at the request of Mr Coates, and that was a toilet break. For myself, and I suppose it is my view which is of some importance in this context when I am ruling about whether the material should be excluded from evidence, there is no reasonable proposition that it was a break which was effectively manufactured by the interviewing police officers.

When the toilet break is mentioned there is nothing in the demeanour, or what occurred on the part of any of the three persons present, which would support that conclusion and so this is, what follows, in my view, to be taken as a separate interview process, if you like, which involves a discussion between Mr Coates and police officers.

It is fair to say that no police officer at any time during what is sought to be given in evidence said to Mr Coates, 'We can't talk to you about this any further except on the video.'"

Later his Honour said:

"… it is clear that the process was commenced by Mr Coates in my opinion and that he was seeking to speak off the camera, if that phrase is appropriate, to the police officers and to discuss with them, and the short discussion which follows, is of this content, what options he had to deal with the interview process when as is clear or anticipated it was resumed in an official way on the camera and was recorded.

He volunteers the material to the police officers. I see nothing in the course of that conversation to suggest that there is any point at which it would have been appropriate in the sense that what follows should be held to be inadmissible to say to Mr Coates, 'We can't talk to you any further', that would have been in my opinion artificial in the extreme and he was having the exchange with the police officers which he wished to have and which he initiated.

Indeed that continued to the point where when there was a reference to getting the boss Mr Coates asked for that to be done and it was for that reason that the two officers Byleveld and Kays came into the room and introduced themselves to Mr Coates. He complained about his incapacity to serve time in prison, it appears, and then himself informed the officers that he wanted to do a deal and what the nature of that deal was.

It was in response to that at a reasonable point in my opinion that Byleveld is said to have told Mr Coates that no deals would be done and if he wanted to talk further about the matter he should continue to do so on the video in the process of an interview which had been in that way suspended. In my opinion the requirements of the section are clearly satisfied to secure the admissibility of that evidence.

So far as the lack of a caution is concerned it seems to me that there is no question that I should be satisfied that what occurred so far as Mr Coates' statements are concerned was the making of statements which were entirely voluntary and I could see no grounds upon any application of common law principles outside the ambit of section 570D of the Code for the exclusion of the material."

130 During the trial, counsel for Nicholls put to Davis that he had told another unnamed person (in fact Joseph Ross) that he had lied to the police about Coates's and Nicholls's presence in the motel room on the evening in question. The questioning took this form:

"Did you at any time – do you recall a conversation that went along the lines of this: that you had told somebody the story you had given to the police about Marty Coates and Thomas Nicholls being present in the room in which Clare Garabedian was killed was all b... s...? --- No.

Do you recall saying in a conversation that it was also b... s... that Marty Coates had gone to Northbridge to point Clare Garabedian out to you? --- No, I never said that.

…

> Did you in a conversation say that the police had told you what to say in order to implicate others? --- No.
>
> Did you say in a conversation that you had given Clare Garabedian two shots and that Marty Coates knew nothing about it? --- No.
>
> Did you say in a conversation that the police had offered you a deal if you cooperated and implicated Marty Coates and others in the murder? --- No."

131 The trial judge refused to allow the appellants to lead any evidence from Ross that Davis had told him that Coates and Nicholls were not involved, and that he had been encouraged by the police to implicate them. It should also be noted that the appellants made no attempt to rely on s 21 of the *Evidence Act* 1906 (WA) which provides as follows:

> "**Cross-examination as to and proof of prior inconsistent statement**
>
> Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.
>
> The same course may be taken with a witness upon his examination in chief or re-examination, if the judge is of opinion that the witness is hostile to the party by whom he was called and permits the question."

132 The trial judge rejected the tender of the evidence of Ross with respect to Davis's statements to him, on the basis that it was collateral to the issues, and fell within no exception to the collateral evidence rule. As to the "bias" or "corruption" exception to the rule, the trial judge held that "[t]here [was] nothing to suggest that the relationship or that any situation existed as between Davis and Coates and Nicholls which establishes the bias in the relevant sense." It was for this reason that the trial judge interrupted, and stopped Ross from giving evidence after he had said, non-responsively, that "some [bloke] … that I've spoken to on a daily period for 4 months and for 4 months every day he told me the same thing, that … that these people weren't even there."

133 The case against Nicholls also was based on the evidence of Davis, and some statements made out-of-court by Nicholls to police in a videotaped interview. There was no objective or other evidence linking Nicholls to the events directly causing Garabedian's death. The statements made out-of-court by Nicholls did not amount to a confession of the offence. The trial judge therefore

directed the jury that unless they accepted the evidence of Davis, they could not convict Nicholls.

134 Nicholls denied the version of events given by Davis. He too sought to lead evidence from Ross similar to that sought to be adduced on behalf of Coates. It was again ruled inadmissible.

135 The interview of Nicholls taped on 7 October 1998 was played in an edited form at the trial. During the interview, Nicholls admitted that he had been present with Coates in the motel room when the victim woke and recognized Coates. Nicholls also admitted that he had grabbed Garabedian, but claimed that he had left the motel room without injuring her. He said that he returned later and found that it had been cleaned, or was then in the process of being cleaned by Coates.

136 The trial judge did not warn the jury about the danger of reliance on the evidence of Coates's admissions. Nor did his Honour give the jury a "*McKinney* warning"[127]. It was in these circumstances that the appellants were convicted.

The appeal to the Court of Criminal Appeal of Western Australia

137 The appellants appealed to the Court of Criminal Appeal of Western Australia (Anderson, Wheeler and Miller JJ). The principal judgment, with which Anderson J agreed, was delivered by Miller J. With respect to the ground of appeal relating to the rejection of Ross' evidence, his Honour said this:

> "Although reference was made to the provisions of s 21 of the *Evidence Act* during the submissions made on appeal, it is clear that the evidence of Ross, if admissible at all, had to be admissible as an exception to the common law rule that the answers of a witness to collateral questions are final. The preconditions to admissibility set out in s 21 of the *Evidence Act* were never met in this case, counsel for Nicholls disavowing any obligation to designate the occasion on which the statement was supposed to have been made.
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> …
>
> In this case there was an issue whether or not Coates and Nicholls were in the room at the time Ms Garabedian met her death. The Crown case was that they were and the evidence of Davis to this effect was relied upon. The two accused denied that they were in the room, although it is to

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127 *McKinney v The Queen* (1991) 171 CLR 468.

be noted that in his video record of interview Nicholls admitted to his presence in the room. At trial he denied the truth of what he had said in the video record of interview, but it was for the jury to determine that issue.

I am of the opinion that whether Davis may or may not have said on another occasion that Coates and Nicholls were not in the room at the time of Ms Garabedian's death did not go to the issue or a relevant issue. Whether he had previously made an inconsistent statement on the matter was a question of credibility, not a matter that went to the issue of whether the two accused were in fact in the room. At its highest, the evidence of Ross could only go to the question whether [Davis] had said they were or were not in the room, not whether as a fact they were. (See *Narkle v The Queen*[128], where the same point was made in relation to a statement allegedly made by the complainant in the case to a doctor).

I would only add that even if the provisions of s 21 of the *Evidence Act* were relied upon, they would take the matter no further. As Murray J pointed out in *Narkle*[129] the critical question remains whether a statement allegedly made by a complainant or other witness was a statement relative to the subject matter."

138 Miller J also rejected the ground of appeal based on the contested reception of the statements made by Coates off-camera. In so doing his Honour said:

"In the present case, it is the initiation by Coates himself of the off-video interview which is a critical factor in the determination of the admissibility of the admissions allegedly made by him. In my view, the learned trial Judge was quite correct in concluding that there was, within the meaning of s 570D(2)(b) of the *Criminal Code*, a reasonable excuse for the admissions not being recorded on video tape, namely that Coates did not want his statements recorded on video tape. According to the evidence of the officers he was anxious to speak off tape about the options that he might have if he was to implicate others. In my view, it is quite wrong to suggest that in these circumstances the admissions of an accused person or the admissions of a suspect are inadmissible by reason of the fact that they have not been videotaped".

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128 (2001) 23 WAR 468 at 476-477 [34].

129 (2001) 23 WAR 468 at 477-478 [37]-[38].

139 In dealing with the contention of the appellants that the trial judge should have given a *McKinney* direction, Miller J said this:

> "When the learned trial Judge came to direct the jury about this evidence it was stressed that, standing alone, the evidence could not be sufficient to convict Coates of any offences. The significance of it was put by his Honour in these terms:
>
> > 'Its real significance would be the extent to which his behaviour in that way is so revealing of a consciousness of guilt as to provide support for the truth and accuracy of Davis' evidence when he implicates Coates. It remains the case, I think, that you keep coming back to Davis and the need to rely upon him if you are to establish guilt and make decisions about guilt in this context as well as in relation to other accused persons.'
>
> Counsel for Coates argued that in the event that the off-video confession of Coates was admissible, the learned trial Judge was required to give a '*McKinney*' warning in relation to that evidence. That is, a warning in accordance with the decision in *McKinney v The Queen*[130], to the effect that whenever police evidence of a confessional statement allegedly made by an accused person whilst in police custody is disputed and its making is not reliably corroborated, the trial Judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone. I stress that the warning is required to alert the jury to the danger of convicting on the basis of that evidence 'alone'.
>
> It must be appreciated that in *McKinney v The Queen* and *Carr v The Queen*[131], the High Court was concerned with unsigned and uncorroborated records of interview containing disputed confessional statements. They were statements of the type commonly adduced in evidence in criminal trials before the use of video recorded facilities to produce video records of interview such as were adduced in evidence in the present case. In *McKinney v The Queen* the Court pointed out that an unsigned and uncorroborated record of interview creates a significant problem. Such records of interview may be fabricated and in certain circumstances isolation and powerlessness of a suspect held in police custody may allow for fabrication and may also be conducive to the suspect actually signing a false document[132]. As the Court pointed out,

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130 (1991) 171 CLR 468.

131 (1988) 165 CLR 314.

132 (1991) 171 CLR 468 at 474 per Mason CJ, Deane, Gaudron and McHugh JJ.

audio-visual recording is one means by which a confessional statement may be reliably corroborated[133]."

140 His Honour set out some of the directions which had been given by the trial judge which it is convenient to repeat here.

> "[Coates] says, you will recall, that when the break occurred, which was not at his request, there was no significant conversation at all that, indeed he couldn't recall what might have been said shortly to him by Hawley and Hutchinson but they very soon left the room, having no conversation of the kind to which they testified and of course they testified without any other aid to recollection except their recollection, there had been no [notes] which they had kept or made at the time and then Kays and Byleveld, he says, came into the room and immediately commenced to tell him what Davis and Nicholls were saying which implicated him and to give him that in some detail and that took some time.
>
> They put that material to him at that stage off-camera, is his evidence. A question that might arise is whether you think that his evidence may be right and the officers might be mistaken about what occurred, but you might find that a very difficult proposition and the question might well be, the simple question, who is telling the truth and who is committing perjury in this court in relation to what occurred at that time?
>
> Your consideration of that may be of some assistance to you in relation to the credibility matters generally. But again you would not accept their evidence of course unless – the real question I suppose is whether you accept the evidence of the police officers as to what occurred, which would give what follows a particular significance so far as the evidence against Coates is concerned or whether you would reject their evidence on the basis not necessarily that you accept as being correct what Mr Coates says, but at least that you think it may be true and that you do not reject his evidence of what occurred during this period as being a truthful account."

141 Miller J dealt with the appellant's criticism of these directions in this way:

> "It would, in this case, have been preferable had his Honour made no reference to the question of perjury, but it must nevertheless be understood that what the High Court was saying in *McKinney v The*

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133 (1991) 171 CLR 468 at 474 per Mason CJ, Deane, Gaudron and McHugh JJ.

Queen[134] related to a total challenge to police evidence of alleged confessional statements. Even assuming that what was there said relates to confessional material off-camera during the course of a video record of interview, the High Court pointed out that when considering the possibility that police evidence is untruthful, the question necessarily entails the possibility that police witnesses had perjured themselves. But, as the Court pointed out, that is a different question from the question whether the police had in fact perjured themselves. It is that latter question which the jury should not be asked to consider.

In the present case the learned trial Judge did not ask the jury to reach a conclusion whether the police had committed perjury in relation to the off-video statements of Coates. His Honour said that a question might well arise as to who was telling the truth and who was committing perjury, but fell short of indicating to the jury that they were required to answer that question. It would, of course, have been preferable to avoid a reference to the question of perjury at all, but, in my view, it cannot be said that there has been any miscarriage of justice occasioned by his Honour's reference in the course of what was otherwise a very clear and balanced direction in relation to the off-video statements allegedly made by Coates.

In my view, there was no requirement for a *McKinney* direction in relation to the off-video statements of Coates. The totality of what he told the investigating officers was recorded on video save for the period when, at his initiation, there was a break in the video in order that he could discuss 'a deal' with the officers. Even Coates conceded that such a break occurred, although he contended that it was not at his request. Further, he said that there was no significant conversation at all. As the learned trial Judge pointed out to the jury, consideration needed to be given to the way in which the interview was going in the period immediately before the break. His Honour posed the question to the jury whether things were becoming difficult for Coates and whether therefore Coates appeared to be in some difficulty.

In any event, his Honour did point out to the jury that they must look carefully at what the officers alleged Coates had told them off-video and 'measure what the evidence of those four officers was against the evidence which Mr Coates gives about what occurred there'.

I do not consider that a *McKinney* warning was required in the circumstances of this case.

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134 (1991) 171 CLR 468.

It follows that in my view ground 6 of the grounds of appeal of Coates has no substance and must be dismissed."

142 All members of the Court of Criminal Appeal were of the opinion that there was a "reasonable excuse" for failing to video record Coates's alleged admissions because, "[a]ccording to the evidence of the officers he [Coates] was anxious to speak off-tape about the options that he might have if he was to implicate others" and that it was "the initiation by Coates himself of the off-video interview which is a critical factor."

143 The appeals to the Court of Criminal Appeal of Western Australia were dismissed.

The appeals to this Court

144 The appellant, Coates, submits that the Court of Criminal Appeal erred because no evidence had been given that he was "anxious to speak off-tape about the options he might have if he was to implicate others." The evidence of Hawley was that he encouraged Coates to speak off-video and that he "deliberately chose to continue this interview off-camera".

145 Nicholls also contends in this Court that the Court of Criminal Appeal erred in holding that the learned trial judge correctly ruled that the appellant could not lead evidence from the witness Ross to the effect that: the key prosecution witness, Davis, had spoken to Ross; Davis had said to Ross that he was involved in the killing of Clare Garabedian, but that neither Coates nor the appellant was involved in the killing, or present in the room; and, that Davis had said to Ross that he proposed to give evidence to implicate Coates and the appellant in the murder.

146 By a Notice of Contention, the respondent asserts that even if the Court of Criminal Appeal and the trial judge erred in making the decisions that they did with respect to the evidence sought to be led from Ross, the Crown case was otherwise so strong that there has been no substantial miscarriage of justice.

147 The appellant Coates relied on several grounds of appeal.

1. The Court of Criminal Appeal erred in holding that disputed oral admissions, allegedly made by the appellant during a break in a videotaped interview (and not subsequently confirmed on video) were admissible into evidence because, according to disputed police evidence, the admissions were made during a conversation initiated by the appellant, and that constituted a "reasonable excuse" for failing to videotape the alleged admissions.

2. The Court of Criminal Appeal erred in holding that the trial judge's direction in relation to the disputed admissions (which were not videotaped or recorded and of which no contemporaneous notes were made) that "a question that might arise is ... who is telling the truth and who is committing perjury" was in accordance with the decision in *McKinney v The Queen*.

3. The Court of Criminal Appeal erred in holding that the trial judge was not required by the decision in *McKinney v The Queen* to give a direction in relation to disputed alleged admissions of the difficulties faced by an accused in challenging that evidence because that was not the sole evidence against the appellant.

4. The Court of Criminal Appeal erred in holding the trial judge was correct in refusing to permit the defence to lead evidence that the key Crown witness had said that: (a) the police had offered him a "deal" if he implicated the appellant; (b) the police told him what to say; (c) the appellant was not involved in the murder; (d) that he proposed to give evidence to implicate the appellant in the murder, and in particular erred in holding that such evidence was excluded by the collateral evidence rule and did not fall within the "bias" exception to that rule.

148 The respondent's notice of contention in Coates's appeal contends that even if any or all of the appellant's grounds of appeal succeed, in the circumstances of the case there has still been no substantial miscarriage of justice.

The admissions alleged to have been made off-camera

149 At the relevant time, s 570D of the *Criminal Code* (WA) provided as follows:

"**Accused's admissions in serious cases inadmissible unless videotaped**

(1) In this section –

'**admission**' means an admission made by a suspect to a member of the Police Force, whether the admission is by spoken words or by acts or otherwise;

'**serious offence**' means an indictable offence of such a nature that, if a person over the age of 18 years is charged with it, it can not be dealt with summarily 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 admission by the accused person shall not be admissible unless –

(a) the evidence is a videotape on which is a recording of the admission; or

(b) the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for there not being a recording on videotape of the admission; or

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

(3) Subsection (2) does not apply to an admission by an accused person made before there were reasonable grounds to suspect that he or she had committed the offence.

(4) For the purposes of subsection (2), '**reasonable excuse**' includes the following –

(a) The 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."

150 In *Kelly v The Queen*[135], Gleeson CJ, Hayne and Heydon JJ said that the purpose of legislation of this nature was to overcome perceived problems with so-called "verbals", 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 the police evidence."[136]

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135 (2004) 78 ALJR 538; 205 ALR 274.

136 (2004) 78 ALJR 538 at 547-548 [42]; 205 ALR 274 at 286.

151 In that case McHugh J said this[137]:

> "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."

152 If claims by interviewing police officers, that they "did not initiate" an alleged off-camera interview were enough to constitute "reasonable excuse" for a failure to record admissions on camera, the purpose of the legislation could easily be frustrated. The decision of the Court of Criminal Appeal does leave open the possibility that police officers may choose to continue an interview off-camera (without seeking to have an accused afterwards repeat on-camera an admission then made) and seek to secure the admission of the unrecorded evidence on the basis of a contention that they believed the accused was "anxious" to speak off-camera, and that he had initiated the conversation.

153 There is also substance in the submission that the approach of the Court of Criminal Appeal of Western Australia would add to the definition of "reasonable excuse" a definition neither stated nor intended by the legislature, such as, "an admission made during an interview not initiated by the police" or "an admission that a person was anxious to make off-, but not on-camera," a definition which, if adopted, would defeat the purpose of section 570D.

154 The legislation under consideration in *Kelly* was not identical with the legislation here. It was however designed to meet exactly the same mischief as provoked it, and the statements in that case to which we have referred are accordingly apposite to this case also.

155 There is no doubt that the off-camera statements here would constitute "admissions" under the statutory definition, and that the charge was a "serious offence". The section also makes it clear that it is for the Crown to prove, in the case of off-camera admissions, that there was reasonable excuse for not videotaping them[138], or that exceptional circumstances, in the interests of justice, justify the admission of the evidence[139].

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137 (2004) 78 ALJR 538 at 558 [96]; 205 ALR 274 at 300.

138 *Criminal Code* (WA), s 570D(2)(b).

139 *Criminal Code* (WA), s 570D(2)(c).

156 What occurred in this case answers none of the explicit descriptions of reasonable excuse contained in s 570D(4)(a), (b), (c) or (d). The appellant did not refuse to consent to his interview being videotaped[140]. We do not overlook that "reasonable excuse" is inclusively defined, and that therefore circumstances not within the explicit definition might still give rise to a reasonable excuse. In our opinion, however, what occurred falls so far short of, and is so different from, any of the defined circumstances that it could not amount to a reasonable excuse; nor could it be objectively regarded as a reasonable excuse. No attempt was made by any police officer to have Coates repeat on-camera what he was alleged to have said off-camera even though there was a reference to what he might say when the video resumed. It has been submitted however that the admission was made when it was not practicable to videotape it[141]. We disagree.

157 The fact, if it be a fact, that Coates "was anxious to speak off-tape" cannot of itself provide a "reasonable excuse". Anxiety to speak off-tape, especially during a suspension of a lengthy interview on tape, in the absence of unwillingness to consent to the videotaping of the "interview", could not of itself, as here, possibly constitute a reasonable excuse. Because of the absence of any evidence of an unwillingness to consent, it is unnecessary to decide whether s 570D(4)(c) should be read as meaning "… consent to the interview [or any part of it] ... ." Furthermore, there is a real question whether anxiety on the part of Coates to speak off-camera, was, in the circumstances, an inference that was available to the Court of Criminal Appeal, particularly when no invitation was given to Coates, either off-camera or on-camera, to repeat the inculpatory material which the Crown claims he had earlier volunteered. That Coates was anxious to speak off-camera appears to be no more than an assertion by the police officers conducting the interview.

158 This ground of appeal relied on only by Coates therefore succeeds. As to what should flow from that we will consider later.

The direction of the trial judge

159 In *McKinney v The Queen*, four Justices of this Court (Mason CJ, Deane, Gaudron and McHugh JJ) said this[142]:

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140 *Criminal Code* (WA), s 570D(4)(c).

141 *Criminal Code* (WA), s 570D(4)(a).

142 (1991) 171 CLR 468 at 476.

"Thus, the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and, accordingly, it is necessary that they be instructed, as indicated by Deane J in *Carr*[143], that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated. Within the context of this warning it will ordinarily be necessary to emphasize the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth. And, of course, the trial judge's duty to ensure that the defence case is fairly and accurately put will require that, within the same context, attention be drawn to those matters which bring the reliability of the confessional evidence into question. Equally, in the context of and as part of the warning, it will be proper for the trial judge to remind the jury, with appropriate comment, that persons who make confessions sometimes repudiate them."

160 Later their Honours added[144]:

"We add some brief comments of a general nature. It should be apparent from the above and from what was said in the judgments of Deane J and Gaudron J in *Carr* that the basis of a prima facie requirement that a warning be given in future cases involving an uncorroborated confessional statement allegedly made by an accused while involuntarily held in police custody without access to a lawyer or even an independent person who might confirm his account is not a suggestion that police evidence is inherently unreliable or that members of a police force should, as such, be put in some special category of unreliable witnesses. The basis lies, as we have explained, in the special position of vulnerability of an accused to fabrication when he is involuntarily so held, in that his detention will have deprived him of the possibility of any corroboration of a denial of the making of all or part of an alleged confessional statement. That basis is obviously a fortiori in a case such as the present where it is

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143 *Carr v The Queen* (1988) 165 CLR 314 at 335.

144 (1991) 171 CLR 468 at 478.

> common ground that the involuntary detention of the applicants in police custody was unlawful."

Their Honours continued by referring to the basic requirement in the administration of criminal justice which was engaged here, saying[145]:

> "The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law. It is obvious that the content of the requirement of fairness may vary with changed social conditions, including developments in technology and increased access to means of mechanical corroboration. In these circumstances what has been said by the Court in the past – even in the recent past – cannot conclusively determine the content of that requirement. Where a majority of the Court is firmly persuaded that the absence of a particular warning or direction in defined circumstances will prima facie indicate that the requirement of fairness is unsatisfied and will give rise to the detriments of the miscarriage of justice and a need of a second trial, it is incumbent upon the Court, in the proper discharge of its judicial responsibilities, to enunciate a prima facie rule of practice that such a warning or direction should be given in those circumstances."

161 The use of the expression "a *McKinney* warning" should not be understood as obscuring the need for the giving of a direction related to the circumstances of the particular case; there is always the need for an appropriate response to varying circumstances.

162 The trial judge did not warn the jury about the danger of reliance upon the police officers' evidence of Coates's admissions. The trial judge's direction was relevantly this:

> "A question that might arise is whether you think his evidence may be right and the officers might be mistaken about what occurred, but you might find that a very difficult proposition and the question might well be, the simple question, who is telling the truth and who is committing perjury in this court in relation to what occurred at that time?"

163 The substance of the holding of the Court of Criminal Appeal was that a *McKinney* warning was not required, and that the principles stated in that case were not misapplied by the trial judge, because his direction only related to a "total" challenge to police evidence of alleged confessional statements, and the trial judge had not directed the jury that they "were *required*" to resolve the question of perjury.

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145 (1991) 171 CLR 468 at 478.

164 The direction which the trial judge gave should not in our opinion have been given in the form in which it was. The immediate question was whether the off-camera admission had been made. To decide that matter, it was not necessary for the jury to decide whether anyone, in particular the police officers, had committed perjury. To suggest that it was necessary erroneously provided an undesirable distraction from the question which the jury had to answer. To that extent this ground of appeal also succeeds.

165 We do not accept however that the trial judge was obliged to give a *McKinney* direction. The alleged confessional evidence did not stand alone. There was a very considerable volume of circumstantial evidence implicating Coates. It was for the trial judge, having regard to all of the evidence in the case, to decide whether a *McKinney* direction was called for. We are unable to say that he was wrong to decline to give it here although the question was not, as the Court of Criminal Appeal formulated it, whether a "total" challenge was made to the police evidence.

Collateral evidence rule

Excluded evidence of Ross

166 Both appellants contended that the trial judge wrongly excluded the evidence of Ross that, in the words of the trial judge: "Davis … [had] said to [Ross] that although he, Davis, confessed that he was involved in the killing of Clare Garabedian neither Coates nor Nicholls was so involved or present in the room but that nonetheless he was proposing to give evidence to implicate the two of them in the murder". It was also expected that Ross would have given evidence, had he been permitted to do so, that Davis had told him that the police had offered him a "deal" if he implicated Coates "and others".

167 We have set out the relevant part of the cross-examination of Davis with respect to the statements that it is alleged Ross would have proved had he been allowed to do so. It can be seen from it that the cross-examiner made no attempt to identify Ross, or the date, place, or occasion of the alleged statements, although the substance of them was put clearly enough. Even if therefore the evidence sought to be led from Ross could otherwise have been led as an exception to the collateral evidence rule, there is still a question whether the appellants failed to satisfy a precondition of its adduction, that the relevant details of it should have been put to Davis.

168 Strict application of the collateral evidence rule can lead to injustice. The dividing line between collateral evidence and directly probative evidence is often

a very difficult one to draw. In the leading Australian case, *Piddington v Bennett and Wood Pty Ltd*[146], five Justices failed to agree upon the test which should be applied to determine whether the evidence there was in fact merely collateral[147]. In *Goldsmith v Sandilands*[148], McHugh J preferred the dissenting view of Latham CJ in *Piddington* to which Callinan J was attracted also but about which Callinan J found it unnecessary to form a concluded opinion as to the preferable test. McHugh J said this in *Goldsmith*[149]:

> "Thus, whether *the opportunity* to observe a relevant fact is or is not a collateral matter, the practice of the common law courts has been to admit evidence that shows that a witness did not have an opportunity to make the observation[150]. Common law judges have taken the view that the opportunity to observe an event is so closely connected with the observation that it should not be regarded as a collateral matter falling within the finality rule. So ordinarily a party may contradict an opposing witness' evidence concerning the time, place and lighting of, and distance from, the scene of an event, if the event is itself relevant."

169 In *R v Phillips*[151], the English Court of Criminal Appeal held that an accused should have been permitted to adduce evidence of admissions made out-of-court by prosecution witnesses that their testimony was false. This evidence was held[152] to be directed not merely to the credibility of the prosecution witnesses, "but to the very foundation of the appellant's answer to the charge." The editor of *Cross on Evidence*, has observed, correctly in our respectful opinion, that what was done by the Court there was curative of injustice[153].

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146 (1940) 63 CLR 533.

147 See the discussion in *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1044-1046 [97]-[103]; 190 ALR 370 at 398-400.

148 (2002) 76 ALJR 1024; 190 ALR 370.

149 (2002) 76 ALJR 1024 at 1030 [34]; 190 ALR 370 at 378.

150 cf *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 547 per Latham CJ.

151 (1936) 26 Cr App R 17.

152 (1936) 26 Cr App R 17 at 21. See also *R v LSS* [2000] 1 Qd R 546 at 553-554 [28].

153 *Cross on Evidence*, 7th Aust ed (2004) at [33800].

170 A similar approach was taken by the Queensland Court of Criminal Appeal in *R v Lawrence*[154]. The Court there held that the trial judge had erred in failing to allow evidence to be given by a witness that the complainant had told him that (the complainant) was "going to set [the witness] up by telling officers that ... [the witness] propositioned [the complainant] for sex"[155]. The trial judge had held that at its highest the evidence showed little more than a propensity to make false allegations. On appeal McPherson JA said that[156]:

> "[A] noteworthy feature of all of the cases in which the finality rule has been relaxed is the emphasis that has been placed upon the fact that the matter of credibility was inextricably linked with the principal issue in the case."

171 Thomas JA held[157] that evidence of the questions there establishing an offer to testify corruptly "[provided] a good and clear example of the 'corruption' exception" as defined by Wigmore.

172 White J approved comments[158] made in academic writing[159] and adopted in a decision of the English Court of Criminal Appeal[160] that in a case in which "the only issue is consent and the only witness is the complainant" the distinction between "questions going to credit and questions going to the issue [are reduced to] vanishing point"[161].

173 Wigmore states[162] that corruption as "the essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony": that a "willingness to swear falsely is, beyond any

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154 [2002] 2 Qd R 400.

155 [2002] 2 Qd R 400 at 401 [3].

156 [2002] 2 Qd R 400 at 405 [12].

157 [2002] 2 Qd R 400 at 409 [20].

158 [2002] 2 Qd R 400 at 415 [50].

159 *Cross and Tapper on Evidence*, 8th ed (1995) at 341.

160 *Chandu Nagrecha* [1997] 2 Cr App R 401.

161 [1997] 2 Cr App R 401 at 406.

162 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 803 [§956].

question, admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence."[163] The evidence here, in our opinion, answers the description given by Pollock CB in *Attorney-General v Hitchcock*[164] as evidence "affect[ing] the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other."

174 In *R v De Angelis*[165], the Court of Criminal Appeal of South Australia held that a trial judge was correct in permitting the Crown to call police officers to give evidence of statements made by a witness that "if required to go to court [the witness] would lie in order to avoid offending" the accused. The Court of Criminal Appeal said that those statements were admissible "under the common law rule which allows statements by witnesses indicating bias or partiality to be proved."[166]

175 It is unnecessary to make further reference to Wigmore or to any of the numerous other cases in which corruption of a witness has been considered as they are comprehensively reviewed by Hayne and Heydon JJ in their judgment. It is sufficient for us to say that we agree with their Honours' conclusion[167] that the evidence sought to be led from Ross was of "corruption" rather than bias on the part of Davis as a witness, although as will appear, we consider it appropriate to express a view about the potential admissibility of such evidence.

176 Hayne and Heydon JJ concluded that the evidence was not admissible on the basis that much more than the substance of it should have been put in cross-examination of Davis. They were of the opinion therefore that it was unnecessary to decide whether Ross' evidence offended the hearsay rule. It is to that question which we will now turn.

177 It is right, with respect, as their Honours say, that Ross' evidence of what he claims Davis said to him certainly bears at least some of the hallmarks of hearsay evidence. It is as well, however, to restate the two principal objections to the reception of hearsay evidence. Human experience tells that few people are capable of fully and accurately repeating oral statements of which they have not

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163 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 803 [§957].

164 (1847) 1 Ex 91 at 100 [154 ER 38 at 42].

165 (1979) 20 SASR 288.

166 (1979) 20 SASR 288 at 295.

167 See the reasons for judgment of Hayne and Heydon JJ at [269].

taken at least a contemporaneous note. Even note takers may succumb to a tendency, either conscious or unconscious, to edit, embellish or omit parts of what they have heard or failed to hear. The law is therefore wise to treat hearsay with great caution. The second objection is related to the first. The reliability of the original maker of the statements in question cannot be tested by his or her presence in court and subjection to cross-examination.

178 But the rules against the reception of hearsay evidence have never been, and are not now, absolute. In Lord Pearce's speech in *Myers v Director of Public Prosecutions*[168], which dissented from the result in that case but which has since been influential[169], his Lordship said[170]:

> "There is not now and never has been a rule for the *total* exclusion of hearsay without exception. Originally hearsay was usual and admissible. Through the sixteenth and the earlier part of the seventeenth centuries there was no objection to it. But in the later seventeenth century objections to it grew and by the early eighteenth century there was a general exclusion of hearsay evidence, with certain exceptions. There was a transitional period when such evidence was accepted as confirmatory though not as sufficient by itself. And during the eighteenth century some hearsay, namely, evidence of prior statements by a witness, might be accepted to confirm the testimony of that witness. The courts were gradually working out their own compromises to obtain satisfactory machinery for handling evidence and ascertaining the truth. They were adopting the hearsay rule in general with such adaptations and exceptions as would make it work and conduce to just decisions."

Lord Pearce continued[171]:

> "This process of improvement and evolution was carried out by the inherent power of the courts to conduct its process so as to prevent abuse and secure justice. I see no reason why at some stage the courts should decide that evolution was now complete and that thereafter no further change must occur, however great the absurdity or injustice."

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168 [1965] AC 1001.

169 See, for example, *Bannon v The Queen* (1995) 185 CLR 1 at 39.

170 [1965] AC 1001 at 1037-1038.

171 [1965] AC 1001 at 1038.

179 Accordingly, courts have recognised that the rules against the reception of hearsay evidence must yield to the interests of justice in particular circumstances.

180 Sometimes evidence of statements superficially having the appearance of hearsay are admitted because in truth they are probative of facts in issue. *Subramaniam v Public Prosecutor*[172] is a good example. There, the Judicial Committee advised that the appellant who had been convicted of possession of ammunition contrary to anti-terrorist regulations should have been permitted to give evidence of threats made to him by terrorists as proof of his state of mind, that he had been acting under duress at the time. In one of the cases referred to by Hayne and Heydon JJ, *R v LSS*[173] it was held that the "corruption" of the key prosecution witness could be proved by another witness who saw, and heard the former being coached. The Court of Appeal was of the view that the evidence, necessarily not only of what the latter witness saw, but also what he *heard* of the coaching should have been allowed. This was consistent with what was said in *Phillips*[174]:

> "The substantive part of his defence was that the children, upon whose evidence alone the case for the prosecution rested, were not speaking for themselves, but for the designer and controller of the whole matter, their mother.
>
> Whatever the merits of that defence might have been proved to be, it was, at any rate, a defence which the appellant was entitled to raise. The questions were directed not to the credibility of the two witnesses, but to the very foundation of the appellant's answer to the charge."

181 The last observation of Hewart LCJ, who delivered the Court of Criminal Appeal's decision, is of particular significance: that the evidence was not simply directed to credit but to the very matter in issue, whether the guilt of the accused could be proved, that is, whether he had an answer to the charge[175].

182 There are numerous other common law exceptions to the hearsay rule, for example, statements forming part of the *res gestae*, various forms of dying declarations and the contents of public documents, none of which it is necessary to explore here, except to notice that their existence demonstrates that despite the

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172 [1956] 1 WLR 965.

173 [2000] 1 Qd R 546.

174 (1936) 26 Cr App R 17 at 21 per Hewart LCJ, Talbot and Singleton JJ.

175 See *R v LSS* [2000] 1 Qd R 546 at 553 [28] per Thomas JA.

law's justifiable wariness of hearsay, there are occasions for its reception in the interests of justice.

183 In recent years in this Court there have been differences of opinion as to the admission of further exceptions. One example is *Pollitt v The Queen*[176]. There, Mason CJ, Deane and McHugh JJ favoured, although not in the same terms, a relaxation of the hearsay rule in favour of a "telephone" exception, while Dawson, Toohey and Gaudron JJ reserved for further consideration whether there should be such an exception. Thereafter, in *Bannon v The Queen*[177], various observations were made as to whether in an appropriate case hearsay statements should be admissible where the statements were made against the penal interest of the maker or where they were made in circumstances of necessity and were reliable.

184 Only one of the various exceptions does require further consideration: the reception of evidence of admissions made by a party. Indeed such admissions are often the core of the case against an accused in a criminal trial. The rationale for the reception of the admissions is a simple one[178]: "what a party himself admits to be true, may reasonably be presumed to be so."

185 There are similar arguments that can be advanced in favour of the admission of hearsay statements in proof of a witness', especially a key witness', "corruption". A key witness is not a party in a criminal trial, but if, as did Davis here, he has a real interest in its course or outcome, of different treatment by the police, the sentencing court, and ultimately the parole authorities, he is, in some respects not in a dissimilar position to a party who does have a direct interest in the result. A statement by any witness of dishonest intent with respect to evidence the witness is to give is, in a sense, a statement against interest because it is an admission of an intention to commit perjury. A second argument is that the evidence goes to the foundation of the charge, whether it has been properly brought and maintained, and whether the accused has an answer to it in the sense in which that was said to be so in *Phillips*. Indeed what was said in *Phillips* denies that such evidence is hearsay at all, but treats it as probative of an issue. A third argument, that the corruption of a witness would almost always be difficult to prove except by hearsay evidence, is less convincing. Difficulty of proof alone cannot justify the reception of evidence otherwise inadmissible as

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176 (1992) 174 CLR 558.

177 (1995) 185 CLR 1.

178 *Slatterie v Pooley* (1840) 6 M & W 664 at 669 per Parke B [151 ER 579 at 581].

hearsay. There is no doubt that much is difficult to prove, but difficulty of itself cannot provide reason for the jettisoning of long established rules of evidence.

186 A fourth argument does however have weight. It is that the overwhelming public interest in the conduct of a fair trial, and the integrity and purity of the process, and the corresponding necessity that that process not be subverted by corruption of any kind, including in particular the corruption of a witness, especially a key witness, requires that a rule be recognized to enable corruption to be proved, even by hearsay if that is its true character, if necessary.

187 Taken together, the arguments should, in our opinion, be accepted. Their acceptance is consistent with the view expressed by Wigmore to which we have referred. It is also consistent with the reasoning in *De Angelis*[179], *R v LSS*[180], and *Phillips*[181]. True it may be that what the "coach" said to the complainant in *R v LSS* was original, and not hearsay evidence in the strict sense, of the coaching itself, but the distinction between its character as original evidence and hearsay is not an easy one to draw. These other points should be made. It would be anomalous if evidence of oral coaching could be led from a person who heard the coaching, but not evidence that that person heard the complainant say that she had been coached. The second point is that, in the case of a witness, one of the principal objections to the reception of what he has said out-of-court, that it cannot be tested in court, does not arise. The witness, the maker of the original statement, is available in court to be cross-examined about what he has said out of court. We are of the opinion therefore that in the case of a witness, evidence of statements made out-of-court indicative of the witness' corruption may, subject to what follows, be received. It is unnecessary to decide whether that evidence should be classified as hearsay evidence or direct evidence in the sense in which the Court in *Phillips* regarded it.

188 There is a further question however, and that is whether it should be a precondition of the admission of that evidence, that the accused or his counsel has put, with particularity, the time, place, and other relevant circumstances of the making of the statements revealing the corrupt intention. As Hayne and Heydon JJ have demonstrated, both the common law and many enactments dealing with the proof of the making of prior inconsistent statements to damage the credit of a witness, insist upon observance of such a precondition. The appellants urge that all that should be necessary is that they comply with the rule

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179 (1979) 20 SASR 288.

180 [2001] 1 Qd R 546.

181 (1936) 26 Cr App R 17.

in *Browne v Dunn*[182], and that accordingly all that they were required to do, they did, by putting to Davis the substance, and none, or few of the details of the circumstances of the making, of the statement by him of his corrupt intention.

189 An imputation of corruption as a witness is a very serious imputation. A person making it ought, in fairness, be obliged to put it, and to put it with such a degree of particularity as to enable the witness to understand what is being put, and the circumstances of the making of the statement intended to be adduced against him. Not only fairness requires this, but also these considerations: the affording of an opportunity to the witness to enable him to give his reasons why he did make, or could not have made, the statement attributed to him; the non-prolongation of a trial in the event that the witness be prepared to admit the making of the statement; and that the same rules as apply at common law and by statute, in relation to proof of a previous inconsistent statement, should in general apply to evidence of the kind in question here, to ensure coherence in the law[183]. And last there is this. Unless there be such a precondition one of the rationales justifying the reception of the evidence would be undermined, that here, unlike in the case of most hearsay statements, the other side does have, and should be obliged to take, the opportunity of testing the reliability of the maker of the statement. That should therefore be the general rule in relation to evidence offered in proof of the corruption of a witness by way of the attribution to the witness of statements made by him out of court. The rule was not complied with here. There was no special circumstance which could justify departure from it. Ross' evidence of Davis's statement was therefore rightly rejected. It is accordingly unnecessary for us to decide whether, had the relevant matter been properly put by the appellants to Davis, the former should be regarded as having put the character of a prosecution witness in issue[184], such that evidence of the appellants' character may also have been introduced.

190 Nicholls's appeal must therefore be dismissed as his only ground of appeal related to Ross' excluded evidence.

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182 (1893) 6 R 67.

183 See *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

184 See ss 102-103 of the *Evidence Act* 1995 (NSW) and s 8 of the *Evidence Act* 1908 (WA).

Miscarriage of justice

191 The remaining question is whether, assuming that the respondent is entitled to rely on the notice of contention to which the appellant takes exception, because the contention was not advanced in the Court of Criminal Appeal, the case was so strong that despite the upholding of one ground of appeal, there has been no substantial miscarriage of justice.

192 Whether there has or has not been a substantial miscarriage of justice is a question of law for an appellate court. Here, on the approach of the Court of Criminal Appeal, no decision, as to absence or otherwise of a miscarriage of justice on the part of that Court was necessary. The respondent made it clear in written submissions to this Court that it would be contending as foreshadowed. The appellants have not been taken by surprise. The respondent is entitled therefore to rely on the notice of contention.

The respondent's submissions

193 The respondent submits that there are many reasons why there has been no substantial miscarriage of justice[185] even if the trial judge erred in any of the ways submitted by the appellant Coates, or indeed by Nicholls had his only ground of appeal been upheld.

194 The respondent's submission was that the effect of the trial judge's direction to the jury was that, standing alone, the off-camera admissions could not support the conviction of Coates of any offence: accordingly, it could not be said their reception caused Coates to lose a chance that was fairly open to him of

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185 See s 689(1) of the *Criminal Code* (WA) which relevantly provides as follows:

"**Determination of appeals in ordinary cases**

(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

acquittal. The instruction to the jury by the trial judge was stronger than a *McKinney* direction. The Court of Criminal Appeal was correct in approving the trial judge's direction with respect to the off-camera admissions. The critical passage in the directions has been set out above in [139] of these reasons.

195 The respondent adds that the off-camera admissions were relatively insignificant by comparison with more compelling evidence: of recorded lies told by Coates about his whereabouts at the time of the murder; his recorded failure to account for telephone records of his involvement in events at Rivervale; his recorded admissions as to his knowledge of the involvement of others in the killing of the deceased; and his tape recorded conversations with Bloomer and then Hoy concerning his false alibi.

The decision

196 There is, in our opinion, some, but not enough force in these submissions to persuade us that the appellant Coates has not lost a chance of an acquittal. In reaching this opinion we are influenced in particular by five matters. First, the purpose of s 570D of the Code is clear and is not to be circumvented. "Reasonable excuse" must be given real content. If what occurred here were to be held to constitute reasonable excuse, the decision would be a charter for evasion of the section and the thwarting of its clear purpose. The second matter is the failure of the police officers to invite Coates, on the resumption of the interview on-camera, to repeat what he was alleged just to have said off-camera. If for any reason the view were taken that such an invitation and what might follow would have a prejudicial effect outweighing its probative value, that exchange as the respondent concedes could have been deleted[186]. The fact that no invitation was offered is however significant. The third matter is the loss of the police officers' notes of what was alleged to have occurred off-camera, an unexplained and suspicious circumstance of itself. The fourth matter is that an admission is usually evidence of a very powerful and persuasive kind, well capable of tilting the balance in practically any case. The fifth matter is that the directions of the trial judge were, in two respects, erroneous. Those errors alone would not perhaps justify the upholding of the appeal, but they must be weighed in the balance together with the other more important matter of the reception of the off-camera admissions. It should also be pointed out that Coates gave evidence emphatically denying what was alleged to have taken place off-camera. These are matters which cannot be ignored, and inevitably cast doubt on so much, which is still quite a deal, of the Crown case as relies on the off-camera admissions.

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186 Section 570F of the *Criminal Code* (WA) provides for the editing of videotapes.

197 Accordingly we would allow the appeal by Coates, set aside the order of the Court of Criminal Appeal and in place thereof order that the appeal to that Court against conviction be allowed and that the verdict and sentence be quashed. We would dismiss the appeal by Nicholls.

198 KIRBY J. This is an appeal by two prisoners against a judgment of the Court of Criminal Appeal of Western Australia[187], dismissing their appeals to that Court against their convictions of murder.

The facts, legislation and issues

199 The facts of the prosecution case against Mr Thomas Nicholls and Mr Martin Graeme Coates are explained in the reasons of other members of the Court[188]. Also contained there are the relevant provisions of the *Criminal Code* (WA) ("the Code"). These are s 570D (relating to the videotape recording of interviews with accused persons) and s 689(1) (containing the "proviso" applicable to appeals in which error has been shown but where there is no "substantial miscarriage of justice")[189]. Also set out in other reasons is s 21 of the *Evidence Act* 1906 (WA)[190] (relating to prior inconsistent statements).

200 Five issues are presented for decision. It is logical to take first the issue relevant to both appellants and then the issues relevant only to Mr Coates' appeal, although the "proviso" issue arises in each matter, upon the assumption that a relevant error is shown. The issues are:

(1) *The collateral evidence issue*: Whether the courts below erred in ruling that the evidence of Mr Joseph Ross was inadmissible to prove that the key witness in the prosecution cases against the appellants, Mr Adam Davis, had said to Mr Ross words to the effect that his statement to police that the appellants were involved in, and present at, the murder of the victim was fake and advanced as a result of an arrangement with police to secure leniency for Mr Davis;
(2) *The unrecorded admissions issue*: Whether the courts below erred in accepting as admissible against Mr Coates admissions allegedly made by him to, or in the presence of, four police witnesses although such admissions were said to have been made by him during a break in the videotaped recording of a police interview, subject to the Code, s 570D;
(3) *The judicial warning issue*: Whether the courts below erred in ruling that it was unnecessary for the trial judge to give a warning to the jury

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187 *Hoy v The Queen* [2002] WASCA 275.

188 See reasons of McHugh J at [21]-[30]; reasons of Gummow and Callinan JJ at [116]-[121]; reasons of Hayne and Heydon JJ at [237]-[243].

189 Reasons of McHugh J at [94]; reasons of Gummow and Callinan JJ at [193], fn 185; reasons of Hayne and Heydon JJ at [293].

190 Reasons of Gummow and Callinan JJ [131].

of the kind required by the decision of this Court in *McKinney v The Queen*[191]. Whether the reference by the trial judge to whether the appellant, Mr Coates, or the police witnesses were committing perjury[192] was itself a departure from the requirements explained in *McKinney*[193] so as, without more, to require that the appeal by Mr Coates be allowed on that ground;

(4) *The listening device issue*: Whether the *Listening Devices Act* 1978 (WA)[194] applied to the questioning of Mr Coates so that the police could have no "reasonable excuse" within the law of Western Australia, for failing to record on videotape the conversations with Mr Coates during the contested break in the recording and, if so, whether this alone required the exclusion of such evidence and a strong *McKinney* warning to the jury; and

(5) *The proviso issue*: Whether, if error be shown upon the foregoing issues or any of them, notwithstanding such error, the appeal of each or either of the appellants should be dismissed on the footing that no substantial miscarriage of justice had actually occurred. This issue arises on a notice of contention filed by the prosecution in this Court. The appellants contested the entitlement of the prosecution to raise such an issue for the first time in this Court. Their objection to the contention thus arises as a preliminary question should the Court come to the proviso issue.

The collateral evidence issue

201 *Admissibility of the collateral evidence*: The evidence of Mr Davis against the appellants was clearly critical. The trial judge told the jury, correctly, that, in considering the entire evidence of the lengthy trial, "you keep coming back" to Mr Davis's evidence "and the need to rely upon him if you are to establish guilt [of Mr Coates] and make decisions about guilt in this context as well as in relation to other accused persons"[195].

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191 (1991) 171 CLR 468 at 476, 478. See reasons of Gummow and Callinan JJ at [159]-[160].

192 See extract from the charge to the jury of the trial judge (Murray J) set out in the reasons of Hayne and Heydon JJ at [365]-[366].

193 (1991) 171 CLR 468 at 476.

194 In force at the time of Coates' interview (7 October 1998). It has since been repealed and replaced by the *Surveillance Devices Act* 1998 (WA).

195 Trial judge's charge to the jury. See reasons of Hayne and Heydon JJ at [366]. Although addressed to the use to be made of the off-camera admissions allegedly made by Mr Coates, the direction, in terms, had a wider focus.

202 One can understand the traditional reluctance of the common law to permit the admission of collateral evidence relevant to the issue of credibility[196]. It has the potential to permit issues to be pursued that are only marginally relevant to the trial or that involve disproportionate expense in time and focus that outweighs its utility. However, proof of the fact that the "key witness" had repeatedly stated that the evidence he had given, or would give, was false; that the evidence was offered in a criminal trial of persons accused of murder as a result of an alleged deal to his own advantage with police; and that it wrongly implicated the accused in the murder of the victim although they were not present when the victim was killed – is so clearly relevant and important to the central issue for trial that a rational system of evidence law would permit that testimony to be placed before the ultimate decision-maker, here the jury, for their evaluation[197]. At least, it would allow that to happen where the evidence is of substantial probative value and is received under proper conditions. These include those necessary to avoid the trial going off into protracted side issues and to avoid procedural unfairness to the person accused of false testimony on a matter in issue in the trial.

203 The recognition by the common law of the injustice of adhering rigidly to the rule applied by the trial judge in the trial of the appellants is illustrated by the large number of "exceptions" recognised in particular circumstances. This has produced an unacceptably complex set of "rules". They are difficult for judges and trial counsel to remember and to apply with accuracy in the often stressful circumstances of a trial. Clearly, there is a need for a simpler set of rules that observe concepts rather than the wilderness of instances acknowledged by the courts in their so-called "exceptions"[198].

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196 *Palmer v The Queen* (1998) 193 CLR 1 at 22-23 [51]-[53]; Gans and Palmer, *Australian Principles of Evidence*, 2nd ed (2004) at 307-308 [14.2]. See also reasons of McHugh J at [38]-[39].

197 See reasons of McHugh J at [53], [55]-[56].

198 A more flexible approach has been endorsed by this Court in *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025-1026 [3], 1031-1032 [39]-[41], 1037 [70], 1041 [83], 1044 [96]; 190 ALR 370 at 372, 379-381, 388, 394, 397. See also *Natta v Canham* (1991) 32 FCR 282 at 300; Gans and Palmer, *Australian Principles of Evidence*, 2nd ed (2004) at 316-317 [14.4.2]. By the Uniform Evidence Act, the decision of sufficient relevance "must be dressed in clothes of relevance beyond credibility alone". See Professor Ligertwood, *Australian Evidence*, 4th ed (2004) at 555 [7.144].

204 The appellants invited this Court to re-fashion the law of evidence in their case, as a judge-made body of law in need of further refinement. However, that would not be an appropriate course. The Australian Law Reform Commission conducted a major national review of evidence law quite recently[199]. Legislation based on the Law Reform Commission's report has been substantially adopted federally[200] and in other Australian jurisdictions[201]. I am not convinced that this Court should engage in a significant task of law reform when some, at least, of the problems addressed in the appeal would be solved by the adoption of the Uniform Evidence Act that is presumably still under consideration in those Australian jurisdictions that have not yet adopted it.

205 Within the rules of the common law applicable in Western Australia at the time of the appellants' trial (and within the space left by the operation of the *Evidence Act* of that State) I incline with McHugh J[202], and Gummow and Callinan JJ[203], to the view that the evidence of Mr Ross should have been admitted in the appellants' trial. At common law it fell within the so-called "corruption" (but not the "bias") exception to the prohibition upon the receipt of the collateral hearsay evidence as proffered from Mr Ross[204].

206 My reasons for this conclusion are essentially the same as those of Gummow and Callinan JJ[205]. Any other conclusion would be difficult to

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199 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985); Australian Law Reform Commission, *Evidence*, Report No 38, (1987). The Uniform Evidence Act makes express what is implicit in the common law. Thus s 102 provides that "Evidence that is relevant only to a witness's credibility is not admissible". But s 103(1) provides that "The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence is of substantial probative value". See also s 106. The foregoing rules assume that a distinction can readily be drawn between evidence relevant to "credit" and an "issue" in the case. In fact, that line is often difficult to draw: Ligertwood, *Australian Evidence*, 4th ed (2004) at 548-549 [7.136], 553-554 [7.143].

200 *Evidence Act* 1995 (Cth). This Act applies in the ACT, see s 4.

201 *Evidence Act* 1995 (NSW), *Evidence Act* 2001 (Tas).

202 Reasons of McHugh J at [58], [60].

203 Reasons of Gummow and Callinan JJ at [175], [187].

204 See also reasons of Hayne and Heydon JJ at [261]-[269].

205 See reasons of Gummow and Callinan JJ at [187], referring to *Phillips* (1936) 26 Cr App R 17; *R v LSS* [2000] 1 Qd R 546; *R v Lawrence* [2002] 2 Qd R 400.

reconcile with recent cases in Australia and elsewhere involving this exception. At least, it would be difficult unless those cases could be hived off and treated as explicable only as a special sub-category of cases involving sexual crimes or unless those cases were now disapproved[206]. To erect a special *ad hoc* class within the exception would be such an unprincipled subdivision of a general rule of evidence law that I would not willingly embrace that approach, unless it was sustained by particular legislation[207]. Nor am I convinced that the earlier decisions were wrong. Some of them have existed for a long time and have often been followed[208]. Those decisions respond to the consideration, recognised by Gummow and Callinan JJ, that a rigid application of the collateral evidence rule can sometimes lead to obvious injustice which the common law is usually astute and flexible enough to avoid.

207 *Failure to establish admissibility*: It is unnecessary to pursue this issue further because I agree with all other members of the Court that, where the "corruption exception" applies, it is necessary at common law to lay the ground properly for the admission of such evidence[209]. This requirement is reflected in the express requirement in the *Evidence Act* applicable to the exception for prior inconsistent statements. That exception is not exhaustive of the common law. It is rather illustrative of a common application of a general principle. The requirement to lay the ground derives from considerations of procedural fairness to the witness whose credit is impugned. It is also protective of the fairness and efficiency of the trial process[210]. The requirement was not observed in this case, although it was sufficiently drawn to attention.

208 I cannot regard the failure properly to lay the ground for such evidence properly as a mere slip or oversight or mistake that should not redound against the interests of the appellants. Quite possibly, Mr Davis was not questioned with specific reference to the precise occasions on which he had the alleged conversations with Mr Ross because counsel for the appellants were not sure at that time that Mr Ross would give evidence or come up to proof. Possibly, it was because they were unsure of what Mr Ross would eventually say. Possibly, he had previously given conflicting or differing versions. Possibly, counsel did not

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206 See reasons of Hayne and Heydon JJ at [287].

207 See Gans and Palmer, *Australian Principles of Evidence*, 2nd ed (2004) at 322-333 [14.6.3].

208 Such as *Phillips* (1936) 26 Cr App R 17.

209 Reasons of Gummow and Callinan JJ at [189]; reasons of Hayne and Heydon JJ at [271].

210 Reasons of Gummow and Callinan JJ at [189].

want to be too specific about Mr Ross and his conversations with Mr Davis in prison because they could not be sure that he would be called. Perhaps they were being prudent in respect of his evidence.

209 Whatever the explanation, counsel for the appellants were sufficiently directed to the issue. They did not repair the ultimate lack of identification of the particular occasions of the alleged conversation involving Mr Ross – or even the identity of the person with whom it was alleged to have taken place. The result was that Mr Davis was not given a fair opportunity to confront the true purport and source of his allegedly false evidence that was said to cast doubt on his credibility. He did not get a fair chance to place before the jury his response to Mr Ross's accusation. In the circumstances, which were never thereafter repaired, it would have been unjust to have allowed Mr Ross, in effect, to have a free kick against the evidence of Mr Davis.

210 *Conclusion: no material error*: In the event, at the trial, Mr Ross gave unresponsive testimony that in fact put his allegations against Mr Davis before the jury[211]. This makes much of the foregoing analysis a trifle surreal. However, as a matter of law, the ground for the "corruption exception" to the collateral evidence rule was not laid. On that footing, the trial judge was correct to reject the evidence of Mr Ross, tendered on this basis. The Court of Criminal Appeal did not err in upholding that ruling.

211 The consequence is that the appeal by Mr Nicholls must be dismissed.

The unrecorded admissions issue

212 *Purposive interpretation of the Code*: The appeal by Mr Coates, relying on the suggested breach of s 570D of the Code presents the second occasion in a year that this Court has had to address the consequences of a failure of police to record, or put on the record, a videotaped interview, conducted in accordance with statute, an alleged off-camera "admission" by an accused that is subsequently tendered against him at his trial. The other such case was *Kelly v The Queen*[212].

213 In the end, the Court was unanimous in *Kelly* in dismissing the prisoner's appeal. McHugh J and I did so in accordance with the "proviso" to the *Criminal*

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211 Reasons of Hayne and Heydon JJ at [256].

212 (2004) 78 ALJR 538; 205 ALR 274. That case was concerned with the application of the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8.

Code (Tas)[213]. While dismissing the appeal on other grounds, the other members of this Court analysed the application of the proviso in a manner similar to that of McHugh J and myself[214].

214 All members of the Court in *Kelly* made observations about the purposes and operation of the Tasmanian Act there in question. It is fair, I think, to say that McHugh J[215] and I[216] were greatly affected in *Kelly* by the legal history that had preceded the introduction of legislative requirements for electronic recordings of interviews of accused persons by police[217]; the "mischief" to which the legislation was directed; and the need for a purposive construction of contested provisions, so as to avoid an interpretation that would defeat the achievement of the clear statutory objects. The majority acknowledged these concerns. However, in that case, they reached their preferred construction by reference to what they took to be the requirements of the text of the Tasmanian statute[218].

215 Nothing said in *Kelly* decides the outcome of the present appeal. It concerns different legislation; different provisions for exceptions from the recording obligation; and quite different factual circumstances. All that is in common between the two cases is that the persons involved were suspects in police custody under suspicion of murder; that recording on videotape of an interview between police and suspect took place; that important statements were allegedly made to police (denied by the suspect) that were not recorded on videotape; that it was not suggested that the videotape equipment malfunctioned or was unavailable for any reason; and that the alleged admissions off-camera, that were later recounted by police witnesses at the trial, were not immediately put to the accused on camera so that the accused's response could be recorded contemporaneously and seen by the jury, although this course would have been practicable in the circumstances.

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213 s 402(2). See *Kelly* (2004) 78 ALJR 538 at 553 [75], 571 [172]; 205 ALR 274 at 293, 318.

214 *Kelly* (2004) 78 ALJR 538 at 552 [69]-[70]; 205 ALR 274 at 292.

215 *Kelly* (2004) 78 ALJR 538 at 558-561 [96]-[106]; 205 ALR 274 at 300-303.

216 *Kelly* (2004) 78 ALJR 538 at 565-569 [141]-[164]; 205 ALR 274 at 311-316.

217 Particularly the problem of so-called "police verbals", see *Kelly* (2004) 78 ALJR 538 at 547-548 [42], 557-558 [93]-[95], 564-565 [136]; 205 ALR 274 at 286, 298-299, 309.

218 *Kelly* (2004) 78 ALJR 538 at 548-549 [45]-[49]; 205 ALR 274 at 287-288.

216 For the reasons which McHugh J and I gave in *Kelly*, I remain of the view that this Court should give such legislation a purposive construction[219]. Various verbal or linguistic reasons can be mounted to sustain the construction urged by the respondent. The case would not be in this Court were it otherwise. However, it is not a necessary construction. It tends to defeat the achievement of the objects of the Western Australian Parliament to put an end, so far as possible, to contests of the present kind.

217 True, the Western Australian Parliament did not enact an absolute bar on the reception at trial of unrecorded admissions to police. Circumstances will arise where the provisions of the Code are inapplicable (eg admissions blurted out before the accused person is a suspect) or, although applicable, where the admission is warranted (eg because the prosecution proves that there is a "reasonable excuse"[220] for not recording or the court is satisfied of "exceptional circumstances" that justify the admission of the evidence "in the interests of justice"[221]).

218 *Absence of "reasonable excuse"*: For the reasons given by Gummow and Callinan JJ, the explanations advanced on the part of the police in their evidence at trial did not provide a "reasonable excuse" within the Code for their failure to record the off-camera conversations with Mr Coates. Despite the opinion of the trial judge that Mr Coates asked for a toilet break when the second interruption to the recorded interview occurred, the circumstances of that break are very troubling. So far as the recorded transcript is concerned, it was the police, not Mr Coates, who initiated the break. The police interviewer twice asked Mr Coates if he wanted to break for the toilet. The fact that the question had to be repeated suggests that Mr Coates did not at first respond to the suggestion because he was not expecting (still less indicating) the proposal of a break. His was an odd response if it was Mr Coates who was seeking the break. The use by Mr Coates of the answer to the question "sure", may tend to indicate that he was willing to go along with a police suggestion. In my experience, "sure" is an expression usually used in conversational English as an unenthusiastic word of concurrence, like "alright" – rather than an affirmation by someone who positively desires and initiates the course proposed. However, I acknowledge that much would turn upon the facial expression, body language and tone of the person saying the word.

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219 See also reasons of McHugh J at [101].

220 See the Code, s 570D(2)(b).

221 The Code, s 570D(2)(c).

219 The trial judge expressed a contrary impression and he saw the police video recording. However, his Honour acknowledged that it was a matter of dispute, not certainty. Ultimately it was for resolution by the jury[222]. He identified no bodily or non-verbal indications of the request. He left the conflict to the jury. In evidence, Mr Coates denied that he had requested the break. Much later the police reconstructed the alleged oral ("verbal") admissions by Mr Coates that allegedly followed. Objectively, the interruption was a very long one. The police notes that were allegedly prepared were then mysteriously lost. The alleged admissions were not put on the record immediately after the break in the recording. As a matter of law, they did not have to be, under the Code, in order to be admissible at trial. But could there have been a safer and fairer way to ensure transparency of the process that ensued and to demonstrate the integrity of the police conduct than to take that course?

220 The fact that, in some circumstances, the accused might be upset by the police immediately repeating an inculpating statement made off-camera as soon as possible thereafter (and certain risks associated with that course) is less significant than the desirability of laying to rest, as far as possible, disputes such as have now arisen in *Kelly* and in this case. The accused will be more than upset if the alleged conversation is raised years later at a trial, without contemporaneous notes and in circumstances (as here) of sharp contest. Parliament has now spoken on the matter. And the general purpose of Parliament in these provisions of the Code is to put an end to contested police "verbals"[223]. The construction preferred by McHugh J and Gummow and Callinan JJ has that effect. With respect, the construction preferred by Hayne and Heydon JJ[224] perpetuates the very mischief that the provisions of the Code were intended to prevent.

221 *Conclusion: material error*: Subject, then, to the decision on the "proviso" issue, the result is that Mr Coates is entitled to succeed in his appeal. He has shown material error on the part of the trial judge in admitting the police evidence of the alleged unrecorded "admissions" off-camera. He has demonstrated error in the failure of the Court of Criminal Appeal to correct the trial judge's error.

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222 See reasons of Hayne and Heydon JJ at [356]-[366], extracting part of the charge to the jury.

223 See reasons of McHugh J at [98]-[99].

224 With which Gleeson CJ agrees at [1], [3].

The judicial warning issue

222 *McKinney warnings continue*: I disagree with any suggestion[225] that the enactment of legislative provisions controlling the receipt of police evidence of admissions in interviews with suspects may have removed the necessity of the warning of the kind mandated by this Court in *McKinney*[226]. The recording legislation varies in its requirements in different parts of Australia. The rule of practice stated in *McKinney* was a rule of the common law. Hence it is a rule of universal application throughout Australia. To the extent that subsequent legislation leaves unrepaired the allegations of contested unconfirmed admissions to police whilst in police custody, the "mischief" addressed in *McKinney* remains. To that extent, the rule stated in that case continues to apply. So much is required by an analysis of *McKinney* which is functional and not purely verbal.

223 Indeed, upon one view, the need for *McKinney*-type warnings may be increased, not reduced, by the passage of legislation obliging videotaped recordings of police interviews. To the extent that police practices develop, to exploit the boundaries of the legislative language (such as alleged admissions after the termination of a recorded interview as in *Kelly* or alleged admissions during an interruption whose purpose and course is contested), the need for judicial warning to juries about the dangers identified in *McKinney* may actually be enlarged. Otherwise, courts will surely witness a rise in the occurrence of "verbals" in gaps found in the legislation. On the theory suggested by Hayne and Heydon JJ, the common law would then stand mute and powerless. The trial judge in *Kelly*, properly in my view, gave a clear *McKinney*-type warning to the jury[227]. He was prudent to do so. The fact that he had done so became a consideration in the application of the "proviso" in that case. I would resist any suggestion that the binding rule in *McKinney* is under a cloud arising from supervening enactments. Neither as a matter of legal authority, nor as a matter of legal principle or policy is this so.

224 The trial judge posed a question for the jury expressed in terms that could be understood as requiring them to consider whether the police or Mr Coates were guilty of "perjury"[228]. As this Court pointed out in *McKinney*[229] that is not,

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225 See reasons of Hayne and Heydon JJ at [373].

226 (1991) 171 CLR 468 at 475-476.

227 See *Kelly* (2004) 78 ALJR 538 at 565 [139]; 205 ALR 274 at 310.

228 See extracts from the charge of the trial judge: reasons of Hayne and Heydon JJ at [365].

229 (1991) 171 CLR 468 at 477.

and never has been, the issue presented in our legal system by a criminal trial. There the issue is relevantly whether the prosecution has proved beyond reasonable doubt the charge brought against the accused. To raise the question of whether police or the accused are guilty of perjury is to suggest that the case is a contest between those parties and that in some way the accused must prove a counter allegation of perjury against the police before he can be acquitted.

225 The Court of Criminal Appeal agreed that it would have been preferable if this direction, framed in this way, had not been given by the trial judge. However, it was not inclined to consider that the jury would have understood the passage in the summing up in the forbidden way. The other members of this Court are inclined to take this benign approach to the error. Clearly, it amounted to a slip.

226 *Significance of failure to warn*: Because I have already identified an error that is material and because, on its own, the reference to possible police perjury would not undermine the integrity of the trial, I am likewise willing to pass this error by. I have more reservations about the omission to give the *McKinney* direction, if it should be concluded that the Code did not apply to exclude the contested confession to the police off camera.

227 It is impossible for an appellate court to know what weight (if any) the jury gave to the alleged off-camera admissions ascribed by the police witnesses to Mr Coates. For all that appeal judges know, that evidence may have been critical for the jury as revealing a consciousness of guilt of the crime charged. Perhaps the "admissions" were the evidence, or the ultimate evidence, on which the jury acted in Mr Coates' case. That possibility cannot logically be excluded. The jury's process of reasoning is unknowable[230]. It is no less possible that the jury took the course suggested because the trial judge instructed the jury that they could not convict Mr Coates on the off-camera admissions alone. That instruction did not, in terms, caution about the use of the admissions in conjunction with other evidence or indeed at all.

228 People like Mr Coates, when accused by police of admissions that are not recorded or otherwise independently confirmed, are in an extremely vulnerable position. They are in police custody. They have no control over the circumstances or the presence of witnesses or other means of authentication. They have a criminal record. Attacking police credibility at the trial may come at the price of the disclosure to the jury of their own past criminal record. Yet accepting everything attributed to them by police may be seriously unfair to them in a particular case. That is why the law seeks to redress the dangers for justice inherent in the situation. It does so, in part, by the legislation now enacted to

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230 See *Domican v The Queen* (1992) 173 CLR 555 at 565-566.

require admissions in interviews between police and suspects to be recorded on video. And to the extent that this redress does not meet the potential problem, it does so by requiring a judicial warning of the kind mentioned in *McKinney* and the cases which preceded that case.

229 The words in *McKinney* are not cast in stone. They were the outcome of two decades of authority in this Court dealing with the problems that I have described[231]. What is required in the way of judicial instruction to the jury depends on the needs of the particular case. In my view it would have been prudent for the trial judge in the present case (as was done in *Kelly*) to have given a warning of the dangers of convicting Mr Coates using in any way[232] the unrecorded, unconfirmed, contested evidence of the alleged admissions to police made off camera and never put to Mr Coates on camera.

230 *Conclusion: unnecessary to decide*: In the way in which I would decide this appeal, it is ultimately unnecessary for me to resolve the complaint of Mr Coates on this ground of appeal. It is enough for me to say that I think that there is much more in the submission than the other members of this Court are prepared to allow.

The listening device issue

231 On the fourth issue, I am in agreement with the analysis of Hayne and Heydon JJ[233]. There is no merit in the additional or separate argument of Mr Coates based on the *Listening Devices Act*. However, this conclusion matters not because of my earlier stated opinion, alike with Gummow and Callinan JJ, that the "reasonable excuse" exception to the requirements of s 570D of the Code was not otherwise established by the evidence in this case.

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231 Including *Carr v The Queen* (1988) 165 CLR 314 and *Duke v The Queen* (1989) 180 CLR 508. For the purposes that lay behind *McKinney*, see Ligertwood, *Australian Evidence*, 4th ed (2004) at 213-215 [4.33]-[4.34]. See also Uniform Evidence Act, s 165(1). The function of the common law to supplement such statutory warning requirements is acknowledged by Ligertwood, at 214-215 [4.34].

232 This is different from telling the jury that they could not convict on such evidence standing *alone*. See reasons of Hayne and Heydon JJ at [370]. In this sense, I do not agree that the direction given was stronger than a *McKinney* direction. See reasons of Gummow and Callinan JJ at [194].

233 Reasons of Hayne and Heydon JJ at [361]-[362].

The proviso issue

232 *The proviso may be raised*: It follows that the appellant, Mr Coates, has established error on the part of the primary judge uncorrected by the Court of Criminal Appeal of Western Australia. This conclusion means that this Court is empowered to enter the judgment that the Court of Criminal Appeal should have entered in Mr Coates' case[234].

233 There is no merit in the objection on behalf of Mr Coates to the prosecution's reliance for the first time in this Court on the proviso issue under the Code[235]. By analogy, I would adopt what I said in *Kelly* when a similar objection was raised on behalf of the prisoner[236]. There is no relevant procedural unfairness in allowing the prosecution to rely on its contention. The prosecution placed all of the relevant evidence before this Court by filing supplementary appeal books. This Court can consider the arguments for both sides. Finality in the appeal process argues strongly in favour of taking that course.

234 Like Gummow and Callinan JJ[237] I acknowledge that, apart from the off-camera admissions introduced into the trial, there was a powerful prosecution case against Mr Coates. Most especially, there was the motive that was proved in his case, to kill the victim who was the only prosecution witness in a pending trial against him and his girlfriend; the established fact proved by contemporaneous telephone records that (contrary to his initial statement) he was in the vicinity of the motel where the victim was killed; his false alibi and his admissions recorded on that part of the police interview that was videotaped.

235 *Conclusion: proviso inapplicable*: That said, I am convinced by the five considerations to which Gummow and Callinan JJ refer[238]. Like their Honours, I would conclude that this Court could not dismiss the appeal on the basis of an affirmative decision that no substantial miscarriage of justice has actually occurred. This Court cannot tell what impact the evidence of the off-camera "admissions" by Mr Coates would have had upon the jury. Their potential alone, or when taken in conjunction with the other evidence, was devastating and clearly inculpating. On that footing, there should be a retrial of the count of

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

235 The Code, s 689(1).

236 *Kelly* (2004) 78 ALJR 538 at 563 [123]-[126]; 205 ALR 274 at 306-307.

237 Reasons of Gummow and Callinan JJ at [193]-[196].

238 Reasons of Gummow and Callinan JJ at [196].

murder against Mr Coates. A retrial order upholds the strong policy of Parliament in enacting the recording legislation in a way that the application of the proviso would not.

Order

236 I agree in the orders proposed by Gummow and Callinan JJ.

237 HAYNE AND HEYDON JJ. Martin Graeme Coates, Thomas Nicholls and Amanda Kayelene Hoy were charged with the wilful murder at Rivervale of Clare Garabedian ("the victim"). They were convicted after a trial in the Supreme Court of Western Australia before a jury presided over by Murray J between 1 August and 21 September 2000. Their appeals, argued over seven days, were dismissed by the Western Australian Court of Criminal Appeal on 22 October 2002. By special leave, Coates and Nicholls have appealed to this Court. The appeals raise three points. The first point, raised by both appellants, concerns the operation of the rule that a witness's answers to questions in cross-examination on collateral issues are final. The second and third points, raised only by Coates, concern the reception of admissions which were not videotaped, and the directions which should have been given about them.

Background

238 The jury verdicts must have rested on an acceptance of the prosecution case, which depended heavily on the evidence of Adam John Davis. Before the trial, Davis had pleaded guilty to murdering the victim, and had been sentenced to life imprisonment (with a minimum term of 15 years to be served before eligibility for release on parole could be considered).

239 Hoy shared a house in Bassendean with Nicholls, and Coates often stayed there. Hoy was Coates's girlfriend and was pregnant to him. On Friday 21 August 1998, Coates asked Davis, in return for $2,000, to approach the victim, who was a prostitute, pose as a client, and give her a heroin overdose (described as a "hot shot"). Coates told Davis that the reason for his request was that the victim was going to give evidence for the prosecution against Hoy and Coates in pending criminal proceedings. There were in fact pending proceedings in which Hoy and Coates were charged with depriving the victim of liberty and assaulting her, occasioning her grievous bodily harm. She was to be the sole Crown witness. Davis told Coates and Hoy that he agreed to this proposal. He did so because he owed $2,000 to a bikie gang, and feared that he might be killed if he did not repay the debt.

240 On the evening of Saturday 22 August 1998, Davis went to the Bassendean house, was given $200 by Hoy to pay for the victim's services, and was given a bag of heroin by Coates with which to kill the victim. He borrowed Hoy's car and mobile phone and left in order to pick the victim up in a park. Hoy and Coates drove ahead of him in order to assist him in identifying the victim. He picked the victim up and took her to the Great Eastern Motor Lodge. There she had a shot of heroin, and another approximately one and a half or two hours later.

241 Davis then left and telephoned Hoy, who said she would get another parcel of heroin to Davis. Davis later collected some heroin and a syringe from

underneath Hoy's car. He said that the victim gave herself a third shot of heroin. At about 4.30am, Davis admitted Coates and Nicholls to the motel room. Nicholls left and returned with a large syringe. The victim awoke, screamed and tried to escape. Coates pulled her to the ground, Nicholls held a pillow to her face, Davis held her arm, Coates tried several times to give her a heroin injection, Davis gave her a heroin injection and Coates stood on her throat. The victim died.

242 Nicholls gave evidence denying being present at or involved in the murder. In a record of interview, however, while maintaining an ignorance of any plan to murder the victim by injecting her with heroin, he had admitted being present with Coates in the motel room when the victim awoke just before she was attacked. He said he left in the middle of the fight.

243 Coates also gave evidence denying presence at or involvement in the murder. However, apart from various other admissions proved against him, Detective Sergeant Kays and Detective Senior Sergeant Byleveld gave evidence that he said, in an interview which was not videotaped, that he "wanted to do a deal and that he wanted to be charged with conspiracy to murder".

The collateral evidence rule

244 *The cross-examination of Davis in relation to Ross.* Davis gave evidence in chief for more than a day. The first cross-examiner was counsel for Hoy. He cross-examined Davis for over a day. During his cross-examination, he put to Davis, and Davis denied, that his "story about Coates going down the park to help identify [the victim]" was untrue. He then put to Davis, and Davis denied, that he had told others that the story was untrue. He was then asked:

> "Have you ever told anybody that the whole story – you've made up the whole story you've told us about the involvement of Coates and Nicholls is a lie?——No, I haven't.
>
> That you were told by police what to say?——No.
>
> And that you did it so that you would gain a benefit?——No.
>
> Never told anybody that?——No.
>
> Quite sure about that?——Very sure.
>
> Because it all is a lie, isn't it – the whole thing?——No, it's not."

245 After the cross-examination of counsel for Hoy finished, counsel for Coates cross-examined Davis for nearly two days. However, she did not repeat the suggestion made by counsel for Hoy in the passage just quoted.

246 Counsel for Nicholls's cross-examination of Davis lasted nearly two days. Soon after it began he asked the following question:

> "[D]id you at any time further down the track have any conversations and tell anybody that the story that you had given to the police about Marty Coates and Thomas Nicholls being present in the room in which Clare Garabedian was killed was, to use your word, bullshit?——No."

Counsel for the Crown then objected on the ground that the place and the person to whom Davis allegedly spoke should be identified. The trial judge left the matter to the discretion of counsel for Nicholls. Counsel for Nicholls continued:

> "Did you at any time – do you recall a conversation that went along the lines of this: that you had told somebody the story you had given to the police about Marty Coates and Thomas Nicholls being present in the room in which Clare Garabedian was killed was all bullshit?——No.
>
> Do you recall saying in a conversation that it was also bullshit that Marty Coates had gone to Northbridge to point Clare Garabedian out to you?——No, I never said that.
>
> Did you also say in a conversation you didn't know why Thomas Nicholls had been implicated at all?——I never said that.
>
> …
>
> Did you in a conversation say that the police had told you what to say in order to implicate others?——No.
>
> Did you say in a conversation that you had given Clare Garabedian two shots and that Marty Coates knew nothing about it?——No.
>
> Did you say in a conversation that the police had offered you a deal if you cooperated and implicated Marty Coates and others in the murder?——No.
>
> Did you in a conversation confirm that yourself and Clare Garabedian had been 'an item' for some time prior to her death?——No, never.
>
> So none of the things that I have put to you were ever said by you in any conversation to anybody?——No."

247 *The arguments of counsel at the trial for the reception of Ross's evidence.* Joseph Paul Ross was called as a witness by counsel for Nicholls on 11 September 2000, about four weeks after Davis had left the witness box.

Counsel for Nicholls sought a ruling on the admissibility of evidence he wished to elicit from Ross.

248 A debate between counsel and the trial judge then took place. It must be understood against the background of the traditional "collateral evidence" rule described by Phipson thus[239]:

> "A party may not, in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters …"

The general rule does not apply to evidence of prior inconsistent statements; previous convictions; evidence of reputation for untruthfulness; medical evidence affecting the reliability of a witness's evidence; evidence of bias, interest or corruption; and probably to evidence of some other matters. Some of these instances are on occasion treated as not being collateral, and hence as being outside the ban imposed by the general rule, but they are commonly analysed as exceptions to it.

249 A standard test for what is collateral is that of Pollock CB in *Attorney-General v Hitchcock*[240]:

> "[T]he test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence – if it have such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him."

The test is helpfully put by Wigmore[241]:

> *"Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?"*

250 It emerged that Ross was being called to give evidence of earlier statements by Davis to the effect that his story to the police, which he was to repeat at the trial, that Coates and Nicholls were involved in the murder was

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239 *Phipson on Evidence*, 15th ed (2000) at 261-262, par 11-37.

240 (1847) 1 Exch 91 at 99 [154 ER 38 at 42].

241 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 1010, par 1020 (italics in original).

false, and that he advanced that story because he had made or had been offered a deal with the police pursuant to which he hoped for leniency[242]. The argument for the view that Ross's evidence was on a collateral matter was as follows. When Davis said in answer to the questions in cross-examination that Coates and Nicholls were present during the murder, he could be contradicted (as he was) by the testimony of Coates and Nicholls. But when he denied telling anyone that the story he had given the police about Coates and Nicholls being present was untrue, he could not be contradicted unless an exception to the collateral evidence rule applied. Whether Coates and Nicholls were present at the murder was a fact in issue. Whether on some occasion before giving evidence Davis said they were not present was not a fact in issue. Counsel for Coates and Nicholls could not have called evidence in their own case about whether Davis had said on an earlier occasion that they were all not present. To use Wigmore's terms, so far as evidence showed that Coates and Nicholls were not present at the murder, the fact of their absence could be shown through that evidence independently of Davis's self-contradiction. That evidence would have been admissible to raise a reasonable doubt, whether Davis did or did not give evidence that they were present. But Ross's evidence that Davis had said his story that Coates and Nicholls were present was false, and was advanced to secure advantages from the police, could not have been admissible independently of Davis's evidence. It was only tendered to show Davis's self-contradiction and his weaknesses as a witness. It could only be received if it fell within an exception to the collateral evidence rule. Valid or not, that was the thinking underlying the Crown's opposition to Ross's evidence, the trial judge's rejection of it, and the Court of Criminal Appeal's concurrence in that ruling.

251 In the course of the argument before the trial judge, defence counsel spoke by reference to a proof of Ross's evidence which Crown counsel did not have and which is not before this Court. Counsel for Nicholls also intimated that recent discussions with Ross had revealed that he would go beyond his proof. Counsel stated that Ross would say that he had had a conversation with Davis at a specific unit in Casuarina Prison in which Davis said that Coates and Nicholls had not been involved in the murder, and that the police had told Davis to implicate them in order to ensure that Davis received a good discount on his sentence. Counsel

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242 In this Court the prosecution advanced an argument that Ross's evidence did not establish bias because the Ross–Davis conversation or conversations took place before the deal was made and before arrangements for Davis to give evidence had been made. Ross's position, as revealed in the cross-examination of Davis and the arguments advanced to the trial judge, creates room for the submission. But if Davis had any dealings with the police of the kind he supposedly told Ross about, he had them before he gave evidence, and they were capable of reflecting badly on the credibility of that evidence.

for Coates, who had not cross-examined Davis in relation to the proposed evidence, supported the admissibility of the evidence. In the final form of his submission, counsel for Nicholls submitted that the Ross–Davis conversation revealed that Davis "was going to come to court and tell lies … in order to secure the deal that was offered to him by the police to implicate Mr Coates and Mr Nicholls." The unsatisfactoriness of the instructions on which counsel for Nicholls was working is indicated by the fact that on occasion he said that Davis was to implicate falsely not only Coates and Nicholls, but also Hoy.

252 Between them, counsel contended before the trial judge that the evidence did not go to a collateral issue, but that if it did, it was admissible as a prior inconsistent statement and as going to demonstrate bias or corruption on the part of Davis.

253 *The trial judge's ruling on the proposed evidence of Ross.* The trial judge rejected the contention that the Ross evidence was admissible as relating directly to a fact in issue in establishing that neither Coates nor Nicholls was in the room where the victim died, or was otherwise implicated in her death. He did so because of the hearsay character of the evidence if tendered on that basis. The trial judge considered that the evidence went to a collateral issue in the sense defined by *Attorney-General v Hitchcock*[243].

254 The trial judge said that though the evidence established a prior inconsistent statement on the part of Davis, it was not admissible. (It is not now contended that the trial judge erred in this, because the appellants conceded that counsel had not complied with the *Evidence Act* 1906 (WA), s 21: counsel in cross-examining Davis had not referred to "the circumstances of the supposed statement … sufficiently to designate the particular occasion"[244].)

255 Finally, the trial judge said that though the evidence would be admissible if it demonstrated bias on the part of Davis, he considered that it did not: "There is nothing to suggest that [there existed any] relationship or … situation … as

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243 (1847) 1 Exch 91 [154 ER 38].

244 Section 21 provides:

> "Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it …"

between Davis and Coates and Nicholls which establishes the bias in the relevant sense."

256 Accordingly, though Ross gave evidence on one issue in chief, he did not deal with the Davis conversation at that time. In the course of his evidence in chief he said he was in a remand centre at the time of giving evidence, and had used drugs. In cross-examination he admitted to a very long and very bad record for possession of drugs, fraud, stealing, receiving stolen goods and forgery. In re-examination he said, non-responsively, that Davis had repeatedly told him all three accused were not present at the time of the murder.

257 *The Court of Criminal Appeal upholds the trial judge's ruling.* In the Court of Criminal Appeal, Miller J (Anderson J concurring) and Wheeler J agreed that the evidence was inadmissible to prove a prior inconsistent statement by Davis, because s 21 of the *Evidence Act* had not been complied with. There had not been any designation of the "particular occasion", despite Crown counsel having drawn attention to the need to do so. Miller J also held that the trial judge was correct in regarding the evidence as collateral. "At its highest, the evidence of Ross could only go to the question whether [Davis] had said [Coates and Nicholls] were or were not in the room, not whether as a fact they were." Miller J also said that the trial judge was right to reject the application of the bias exception to the collateral evidence rule for the reasons he gave. Miller J also rejected a contention, not put to the trial judge or pressed to this Court, that Davis's statements to be proved through Ross fell within a "penal interest" exception to the hearsay rule.

258 *Submissions of the appellants on the collateral evidence rule.* In this Court, counsel for each of Coates and Nicholls submitted, first, that the "collateral evidence" rule did not apply; secondly, that if it did, the bias, interest or corruption exception applied; and, thirdly, that if the rule applied but the exception did not, the law should be changed and relaxed so as to place the evidence outside the rule. The submissions that the collateral evidence rule did not apply and that it should be changed tended to merge into each other. The submissions that it did not apply also tended to merge into whether the bias exception applied in this case, or the prior inconsistent statement exception applied in other cases.

259 Counsel for the appellants submitted that the collateral evidence rule, resting on a distinction between matters of credit and facts in issue, was a rule of convenience, not principle, and was not a strict rule of law, but a guide to discretionary judicial regulation of the litigation process. They submitted that the rule was relaxed where credibility was inextricably linked with the principal issue in the case, and that that was so here: for the inconsistency between what Davis said in court and Ross's evidence of what Davis said out of court went to the core question of whether Coates and Nicholls were in the room when the

murder was committed. Counsel also argued that if the collateral evidence rule would otherwise prevent the reception of Ross's evidence, it should be replaced by a rule prohibiting the admission of evidence relating solely to credit except where that evidence has substantial probative value. They also submitted that Ross's evidence was that Davis fabricated the very testimony which he had given in chief, and that it therefore fell outside the collateral evidence ban altogether.

260 It is convenient to deal first with the second of the three points the appellants raised – whether the exception or qualification relating to bias, interest or corruption applied. On this point their arguments had force, though they failed to acknowledge a key difficulty.

261 *Did the bias exception apply?* Potential bias on the part of witnesses is frequently pointed to in litigation, whether it is said to derive from a relationship of family or blood or business or employment or friendship, or from self-interest (as where a witness is a party or likely to be affected by the success or failure of a party). Often the source of potential bias is obvious or is revealed by the party calling the witness. Often, even though it is not obvious, it is conceded at once in answer to a single question in cross-examination, partly because it is honest to do so and partly because it is foolish not to. The present problem arises only where it is not obvious, not revealed by the party calling the witness, and not conceded by the witness in cross-examination.

262 Wigmore explained that the exception related to three different "*kinds of emotion* constituting untrustworthy partiality", that is, bias, interest, and corruption.[245] He drew a useful distinction between "bias", in the sense of "all varieties of hostility or prejudice against the opponent *personally* or of favor to the proponent personally"; "interest" in the sense of "the specific inclination which is apt to be produced by the relation between the witness and the *cause at issue* in the litigation"; and "corruption", in the sense of "the *conscious false intent* which is inferrible [sic] from giving or taking a bribe or from expressions of a general unscrupulousness for the case in hand"[246]. These three categories are related, and will often overlap. As Wigmore explained, in relation to evidence showing corruption, "the essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony"[247].

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245 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782, par 945 (emphasis in original).

246 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782, par 945 (emphasis in original).

247 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 803, par 956.

Below they will be described as "bias" unless the context makes another course desirable.

263 Ross's evidence revealed that Davis was prepared to lie on oath in order to ingratiate himself with the police, in the hope that they might influence his sentence. The trial judge and the Court of Criminal Appeal did not consider that that showed bias, because it showed no relationship (of hostility) between Davis on the one hand and Coates and Nicholls on the other. However, that was too narrow an approach to the exception[248].

264 The approach of the courts below perhaps reflects too limited a reading of some of the language used by Pollock CB in *Attorney-General v Hitchcock*[249]:

> "It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he has said."

265 The word "relation" certainly includes bias cases resting on the existence of a particular, continuing relationship – for example, where the witness under challenge was not only the servant but also the "kept mistress" of the party calling her[250]. The word "relation" also includes cases resting on a looser relationship between the challenged witness and one party and involving hostility, for example where the witness threatened revenge against the employer

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248 It is an approach which is not unique. Evidence that a witness offered to change her evidence in exchange for a bribe has been held not to constitute bias or corruption, only to show a previous inconsistent statement: *R v Aldridge* (1990) 20 NSWLR 737 at 745-746.

249 (1847) 1 Exch 91 at 100 [154 ER 38 at 42].

250 *Thomas v David* (1836) 7 Car & P 350 at 351 [173 ER 156 at 157]. That case incidentally illustrates controversy over definition of the collateral evidence rule, for Coleridge J at 351 [157] said that the evidence was "material to the issue", not "collateral to the issue", and in *Melhuish v Collier* (1850) 15 QB 878 at 884 [117 ER 690 at 692] he said the principle was whether "the fact was one which the defendant might have proved in chief": sed quaere.

by having him gaoled[251], or the witness desired to punish a party for having frustrated a marriage arranged for the witness's sister[252]. The word also extends to cases resting on a looser relationship of goodwill between the witness and one party.

266 But the exception is wider than that. It extends to all "matters which affect the motives, temper, and character of the witness … with reference to his feelings towards one party or the other"[253]. Thus, bias may be found in a wife's willingness falsely to accuse her husband of incest unless he gave her property[254]. Bias was found in a child complainant's motive to level a false charge against an accused, who was concerned about the influence of the complainant on his daughter[255]. Bias may be found in a reluctance to give evidence against an accused due to a fear of reprisals: "a statement to the effect that a person if required to give evidence will give false evidence out of a desire not to offend certain of the parties is a statement indicating partiality in relation to the parties or the cause, whether that partiality stems from friendship or fear"[256]. Bias was inferred from the attempt by a person claiming to be a victim of an abduction to procure a witness to give false evidence, because the brother of the supposed victim wanted to ensure that the accused was falsely convicted[257]. Bias may also be established where a witness has been coached by a person who is hostile to the party against whom the witness's evidence has been tendered[258].

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251 *Yewin's Case*, unreported, noted in *Harris v Tippett* (1811) 2 Camp 637 at 638-639 [170 ER 1277 at 1278]. See also *R v Shaw* (1888) 16 Cox CC 503 (witness seeking revenge due to quarrel); *Hall v Marchant* [1914] St R Qd 174 (witness wishing to "get even" with employer who had dismissed him without providing a reference); *Smith v The Queen* (1993) 9 WAR 99 (motive of ward to make false complaint against foster father because he expelled her from his house for taking drugs).

252 *Bakopoulos v General Motors Holden's Ltd* [1972] VR 732; affirmed *Bakopoulos v General Motors Holdens Pty Ltd* [1973] VR 190.

253 *Attorney-General v Hitchcock* (1847) 1 Exch 91 at 100 [154 ER 38 at 42] per Pollock CB.

254 *R v Umanski* [1961] VR 242 at 244.

255 *R v Harrington* [1998] 3 VR 531 at 539.

256 *R v De Angelis* (1979) 20 SASR 288 at 295 per King CJ, Jacobs and Legoe JJ agreeing.

257 *Hudd v The Queen* (1987) 75 ALR 143 at 146 and 149-150.

258 *R v LSS* [2000] 1 Qd R 546 at 554 [30].

267 Moreover, the exception is not limited to the relation between a challenged witness and persons who are, strictly speaking, parties. It can extend to cases where one witness offers a bribe to other witnesses. Thus, in *Trial of William Viscount Stafford ("Lord Stafford's Case")*[259] the accused was charged with treason. A witness, Dugdale, gave evidence that the accused was present at a meeting where it was resolved to kill Charles II[260]. The accused indicated a desire to call one William Robinson to prove that Dugdale "hath endeavoured to persuade people to swear against me falsely, and offered them money for it"[261]. When Robinson was called, he said that Dugdale "told me he could furnish me with money, and put me in a way to get money, if I would come in as an evidence against my lord Stafford"[262]. *Lord Stafford's Case* was approved in *Attorney-General v Hitchcock*. Pollock CB said[263]:

> "In that case the evidence was to shew that the witness had offered a bribe in the particular case, and the object was to shew that he was so affected towards the party accused as to be willing to adopt any corrupt course in order to carry out his purpose."

Alderson B said[264]:

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259 (1680) 7 How St Tr 1293.

260 (1680) 7 How St Tr 1293 at 1342.

261 (1680) 7 How St Tr 1293 at 1400.

262 (1680) 7 How St Tr 1293 at 1401. To the same effect see *Trial of Sir Miles Stapleton* (1681) 8 How St Tr 501 at 518-519; *Trial of Maha Rajah Nundocomar* (1775) 20 How St Tr 923 at 1035-1036.

263 *Attorney-General v Hitchcock* (1847) 1 Exch 91 at 101 [154 ER 38 at 43].

264 *Attorney-General v Hitchcock* (1847) 1 Exch 91 at 103 [154 ER 38 at 43]. In *Harris v Tippett* (1811) 2 Camp 637 [170 ER 1277] Lawrence J, at nisi prius, refused to permit evidence to be called contradicting a denial by a witness called by the defendant of having attempted to dissuade a witness called by the plaintiff from attending the trial. *Harris v Tippett* was not cited in *Attorney-General v Hitchcock*, and *Lord Stafford's Case* was not cited in *Harris v Tippett*. It is difficult to say whether the cases are inconsistent, since it is not clear in *Harris v Tippett* exactly what the defendant's witness said to the plaintiff's witness. Wigmore said that *Harris v Tippett* "has been universally treated as erroneous" (*Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 969, par 1005, n 4) apparently because it confused character and bias (at 1018, par 1023 n 2). *Harris v Tippett* may be inconsistent with *Melhuish v Collier* (1850) 15 QB 878 at 881 [117 ER 690 at 691],

(Footnote continues on next page)

> "[W]here the witness endeavoured to bribe another person to give evidence against Lord Stafford, that evidence was receivable, as having a tendency to shew that the man who came himself to give evidence against Lord Stafford, was embittered against him, and had endeavoured to persuade other people to give false evidence on the same side."

268 Further relevant examples of the scope of the bias exception include *Attorney-General v Hitchcock*, in which the court considered that if the bribe allegedly offered by officers of the Crown in that case had been accepted, the exception would have applied[265]. The exception may operate where a witness is willing to withdraw allegations against persons being prosecuted if disciplinary proceedings against him are dropped[266]. A threat to make a false complaint against a person one dislikes is admissible[267]. Evidence of a witness's having solicited a bribe is admissible[268]. An offer by a witness for the prosecution to give favourable testimony for the defendant if the defendant's friends arrange for the dropping of a charge is admissible[269]. Where the defendant is sued for slanderously saying that the plaintiff had knowingly received stolen cattle from a witness for the defendant, who was convicted of stealing the cattle, an offer by that witness to swear that the plaintiff "was in with him in stealing the cattle" in order to obtain a pardon is admissible[270]. These last three instances, in particular, are very close to the present circumstances.

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where a witness called by the plaintiff was allowed to state in cross-examination that two other persons to be called as witnesses for the plaintiff "had endeavoured to tamper with her evidence" by offering her money to give particular evidence. It may also be inconsistent with United States authority, eg *People v Alcalde* 148 P 2d 627 at 630 (SC Cal in banc, 1944) where the Court said: "A witness who has testified to material matters may be cross-examined as to his attempt to bribe other witnesses and it may be shown by other witnesses that he offered bribes to obtain false testimony."

265 (1847) 1 Exch 91 at 106 [154 ER 38 at 44-45] per Rolfe B.

266 *R v Denley* (1970) *Criminal Law Review* 583.

267 *R v Lawrence* [2002] 2 Qd R 400 at 408-413 [22]-[39] per Thomas JA.

268 *Jackson v Thomason* (1861) 8 Jur NS 134; *Alward v Oaks* 65 NW 270 (SC Minn in banc, 1895).

269 *Roberts v Commonwealth* 20 SW 267 at 268 (CA Ky, 1892).

270 *Barkly v Copeland* 15 P 307 at 309 (SC Cal in banc, 1887).

269 Here, the appellants wanted to call from Ross evidence of matters which could affect the motives, temper and character of Davis with respect to his feelings towards one party – the Crown. It led to an inference that Davis was eager to do the will of the Crown (as expressed to him by the police) even if it meant committing perjury, to the detriment of the appellants. Technically, then, Davis was not influenced by what Wigmore called "bias" (in the sense of hostility or prejudice against one party personally or of favour to the other personally[271]). Nor was it "interest" (the specific inclination apt to be produced by the relation between the witness and the cause at issue in the litigation[272]). Rather, it was what Wigmore described as "corruption" (the conscious false intent which is to be inferred from giving or taking a bribe or from expressions of a general unscrupulousness in relation to the case[273]).

270 According to Ross's account of what Davis said, the police were not offering a bribe in the form of money, but something even more valuable – a measure of liberty. That offer could have been seen by the jury as a means of stimulating in Davis a willingness to obstruct the discovery of the truth by manufacturing false testimony[274]. It was therefore sufficient to bring Ross's evidence within the corruption exception to the collateral evidence rule.

271 However, it does not follow that the tender of Ross's evidence should have been upheld. It failed to overcome a further barrier: no proper foundation for its tender had been laid by the appellants in their cross-examination of Davis.

272 *Laying the foundation.* So far as Ross's evidence proved a prior inconsistent statement on the part of Davis, the appellants conceded that the trial judge was correct to reject it for failure to comply with the requirements of s 21 of the *Evidence Act*. There was no identification of place, time, or speaker, nor was there any precise specification of what Davis allegedly said. This is scarcely surprising in view of the extreme difficulty counsel had in specifying these things to the trial judge in the course of the argument about the admissibility of Ross's evidence on 11 September 1998, four weeks after Davis had left the witness box, and in view of counsel's reliance on the combination of a statement from Ross together with recent instructions derived from Ross.

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271 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782, par 945.

272 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782, par 945.

273 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 782, par 945.

274 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 803, par 956.

273 However, the appellants argued that since they were not relying on the prior inconsistent statement exception to the rule that Davis's answers to questions on collateral matters were final, but on the bias exception, their failure to be more specific in cross-examination was immaterial. They said that they only had to comply with the rule in *Browne v Dunn*[275], and that they had done this by the questions put to Davis during cross-examination. It is in fact questionable whether they had, but let it be assumed that they had.

274 One of the questions proposed by the House of Lords and considered by the judges of the King's Bench in *The Queen's Case*[276] was whether:

> "[W]hen a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution; it would be competent to the party accused, to examine witnesses in his defence, to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts?"

275 Abbott CJ gave the unanimous answers of the judges as follows[277]:

> "The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the courts below, and a practice, to which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared, that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declaration imputed to him, the adverse party has an opportunity, afterwards, of contending, that the matter of the speech or declaration is such, that he is not to be bound by the answer of the witness, but may contradict and

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275 (1893) 6 R 67.

276 (1820) 2 Brod & B 284 at 311-312 [129 ER 976 at 987].

277 (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

> falsify it; and, if it be found to be such, his proof in contradiction will be received at the proper season."

He went on to highlight the danger that the witness might not be available to be recalled during the trial and the general need to prevent surprise. After drawing attention to the fact that the question related not only to alleged "declarations" but also to "acts", he then said[278]:

> "Now, such acts of corruption are ordinarily accomplished by words and speeches: an offer of money or other benefit derives its entire character from the purpose for which it is made, and this purpose is notified and explained by words; so that an enquiry into the act of corruption will usually be, both in form and effect, an enquiry as to the words spoken by the supposed corruptor; and words spoken for such a purpose do, in our opinion, fall within the same rule and principle, with regard to the course of proceeding in our courts, as words spoken for any other purpose; and we do not, therefore, perceive any solid distinction with regard to this point between the declarations and the acts mentioned in the questions proposed to us."

It should be noted that Abbott CJ's language extended to all prior inconsistent statements, not just those relating to corruption.

276 Though the terms of the question related to declarations made or acts done by the witness to encourage persons to give corrupt evidence on behalf of one party, there is no reason why the same principles would not apply to declarations and acts establishing that the witness was not the corrupting, but the corrupted, party. Nor is there any reason why they would not apply to declarations and acts demonstrating bias and interest as well as corruption.

277 At common law, similar rules apply to the proof of prior inconsistent statements in general. Thus, in *Angus v Smith*[279], Tindal CJ said:

> "before you can contradict a witness by shewing he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect

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278 (1820) 2 Brod & B 284 at 315 [129 ER 976 at 988].

279 (1829) M & M 473 at 474 [173 ER 1228 at 1228].

> and explain what he has formerly said. I think, as far as my memory serves, the rule was so laid down to this extent in *The Queen's* case."

In *Crowley v Page*[280], Parke B said of prior inconsistent statements that:

> "in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, … the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion."

278 In *Attorney-General v Hitchcock*[281] Alderson B said, in relation to questions both about prior inconsistent statements generally and about prior inconsistent statements showing bias, that though it was not "necessary" to question the witness about the matter in cross-examination, it was only "just and reasonable" to do so. However, in that case Pollock CB regarded prior questioning of the witness as not merely just and reasonable but necessary[282], and Parke B said the same during argument[283].

279 Similarly, in *Carpenter v Wall*[284] Patteson J said:

> "I like the broad rule, that, where you mean to give evidence of a witness's declarations *for any purpose*, you should ask him whether he ever used such expressions."

280 In the United Kingdom, the common law rule for admitting prior inconsistent statements was preserved by s 23 of the *Common Law Procedure Act* 1854 (UK) and its re-enactment as s 4 of the *Criminal Procedure Act* 1865 (UK). The only purpose of s 23 was to clarify whether a statement could be proved against a witness who neither admitted nor denied making it: it adopted Parke B's view that it could where the circumstances of the statement were put to the witness, and the witness was asked whether he or she had made the

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280 (1837) 7 C & P 789 at 791-792 [173 ER 344 at 345].

281 (1847) 1 Exch 91 at 102 [154 ER 38 at 43].

282 (1847) 1 Exch 91 at 100-101 [154 ER 38 at 42].

283 (1847) 1 Exch 91 at 94 [154 ER 38 at 40].

284 (1840) 11 Ad & El 803 at 804-805 [113 ER 619 at 620] (emphasis added).

statement[285]. The modern Western Australian equivalent of s 23 of the *Common Law Procedure Act* and s 4 of the *Criminal Procedure Act* is s 21 of the *Evidence Act*. There is Victorian authority that in that State the common law in relation to prior inconsistent statements survives the enactment of equivalent legislation[286]. The same must be true of Western Australia. There is no reason to suppose that in Western Australia the wider common law rule stated in *The Queen's Case*, requiring the laying of the right foundation in cross-examination of challenged witnesses before calling evidence in rebuttal of their denials of bias, interest or corruption, has not survived too. No case has reversed it and no statute has repealed it.

281 This wider common law rule has survived in the United States as well. Wigmore said the witness must be asked specifically whether he made a statement indicating bias[287]:

> "He must [be asked], as a matter of principle; for the same reasons of fairness that require a witness to be given an opportunity of denying or explaining away a supposed self-contradictory utterance … require him also to have a similar opportunity to deny or explain away a supposed utterance indicating bias."

There has since been a strong, though not unanimous, line of United States authority to the same effect[288]:

> "[I]t is necessary, before the impeaching evidence or the evidence by which it is attempted to show bias or prejudice can be introduced, that the

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285 See n 280 above. See United Kingdom, Common Law Commission, *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Supreme Courts of Common Law* (1853) at 18-19; Kerr, *The Common Law Procedure Act 1854 With Practical Notes* (1854) at lxvi and 19; Day, *The Common Law Procedure Acts*, 2nd ed (1863) at 205.

286 *R v Umanski* [1961] VR 242 at 244; cf *Narkle v The Queen* (2001) 23 WAR 468 at 477 [38] per Murray J, Kennedy and Pidgeon JJ concurring.

287 *Wigmore on Evidence*, Chadbourn rev (1970), vol 3A at 801, par 953.

288 *State v Harmon* 152 P 2d 314 at 318-319 (SC Wash in banc, 1944). See also *Wright v State* 201 SW 1107 at 1111 (SC Ark in banc, 1918); *Smith v United States* 283 F 2d 16 (CA 6th Cir, 1960); *State v Shaw* 378 P 2d 487 at 489 (SC Ariz in banc, 1963); *United States v Marzano* 537 F 2d 257 at 265 (CA 7th Circ, 1976); *United States v Harvey* 547 F 2d 720 at 722 (CA 2nd Cir, 1976); Annot, 87 ALR 2d 407; *McCormick on Evidence*, 4th ed (1992) at 134-135, par 39.

> attention of the witness be called to the contradictory statements, the time when and the place where they were made, and the circumstances surrounding the making."

It is obviously desirable that what is put to the impeached witness corresponds to what is elicited from the impeaching witness[289].

282 There are strong reasons of principle and practice underpinning this common law rule. First, it ensures fairness towards the challenged witness in giving that witness an opportunity to explain what is put by the cross-examiner. Secondly, it reduces surprise on the part of the counsel calling that witness and enables that counsel to prepare to deal with the rebutting evidence to be called by the other side. Thirdly, it may also save time: if the challenged witness accepts the detail of the conversations or acts constituting or demonstrating the bias, interest or corruption alleged, it becomes unnecessary (and depending on the circumstances inadmissible) for the party who made the challenge to call evidence supporting it. The more detail that is put by the cross-examiner to the challenged witness, the more likely it is that the memory of that witness will be stimulated, and the less likely will be the necessity of calling rebutting evidence. Finally, a denial by a witness of a very detailed allegation followed by rebutting proof of its correctness can be very damaging to the credibility of the witness.

283 The wider common law rule was not complied with in this case. The reasons are identical to the reasons why the appellants on their own concession failed to meet the requirements of s 21 of the *Evidence Act*. The cross-examinations of Davis set out above did not mention Ross. They did not mention the specific place where Davis allegedly spoke to him. They did not mention the specific time when Davis allegedly spoke to him. They were hazy about the content of what Davis allegedly said to Ross. They gave Davis no opportunity to give any "reason, explanation or exculpation of his conduct … as the particular circumstances [might] happen to furnish"[290]. It would have been erroneous to allow Ross to give evidence of the alleged conversation, when Davis had not been confronted with the evidence that Ross was going to give. Accordingly, the trial judge was correct not to apply the corruption exception.

284 *Hearsay?* Had counsel complied with the requirement to put the circumstances of corruption to Davis, an issue would have remained whether any hearsay difficulty attended the reception of Ross's evidence. That issue received no attention from the parties in the courts below. It is not necessary for the

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289 *People v Payton* 218 NE 2d 518 at 522 (App Ct Ill, 1966).

290 *The Queen's Case* (1820) 2 Brod & B 284 at 313 [129 ER 976 at 988].

decision of this appeal to consider it, and we do not think that it is desirable to do so in the circumstances of this case. It would require examination of five difficult questions. First, is the evidence within the hearsay ban? Secondly, if it is, should an exception be recognised? In particular, thirdly, should a new common law exception to the hearsay rule be recognised in circumstances falling outside the legislation derived from the Australian Law Reform Commission's Reports on Evidence, is the exception in question outside those circumstances and, if it is within them, is Ross's evidence within the legislation[291]? Fourthly, given that, by hypothesis, the issue is a collateral one, what consequences would flow from receiving hearsay evidence pursuant to that exception, and, in particular, how far can the party opposing tender call contrary evidence? Fifthly, where as here that party is the Crown, is the contrary evidence to be called in the Crown case in chief, or is the Crown to be permitted, exceptionally, to call it in reply? Not only are these questions difficult, but the last four are quite novel. The first two questions received only brief and belated attention in argument in this Court. The last three questions received no attention in argument at all.

285 *Was the evidence outside the collateral evidence rule?* The arguments of the appellants that Ross's evidence was admissible even if it did not fall within the bias exception must be rejected. When the matter was most recently considered by this Court, a majority reaffirmed the received law as to the finality of answers in cross-examination on collateral matters[292]. There are real difficulties in defining the outer limits of the ban on evidence in rebuttal on "collateral" and "credit" questions. Opinions differ about how far it is legitimate to approach the problem emphasising the importance of flexibility against rigidity, convenience against principle, and case management rather than rigid rules, though the prosecution in this case was prepared to accept the legitimacy of such an approach up to a point.

286 But whatever the difficulties of definition and approach, the law as it stands does not permit any relaxation of the traditional rules merely on the ground that the particular witness's credibility is inextricably linked with the principal issue in the case. If that is illustrated by nothing else, it is illustrated by the analysis in the cases involving evidence rebutting a challenged witness's denials of matters suggesting bias, interest or corruption. That analysis accepts that the key question is whether the witness's state of mind is such as to cause the witness to lie about the principal factual issues.

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291 This third group of questions is suggested in the reasons of Kirby J at [204], although the reasons at [205]-[206] do not answer them.

292 *Goldsmith v Sandilands* (2002) 190 ALR 370 at 372 [3] per Gleeson CJ, 379-381 [37]-[41] per McHugh J, 393-394 [82]-[83] per Hayne J, 397 [96] per Callinan J.

287 The appellants relied on statements to the effect that "where the disputed issue is a sexual one between two persons in private the difference between questions going to credit and questions going to the issue is reduced to vanishing point"[293]. The appellants sought to widen those statements beyond cases involving sexual offences in private to all cases of strongly disputed credibility. But that line of reasoning has been criticised even in sexual offence cases. It has been accepted in cases where the only significant issue is consent, but not where the issue is whether the acts took place; it has been argued that if it were to apply where the issue is whether the acts took place, it would apply to any offence of which there is no extrinsic evidence and no disinterested witness[294]. It has also been said that to use it "as a basis for departing from the general rule of finality would leave too wide a gap in that important rule"[295]. Wherever the merits lie in this debate, here the disputed offence was not a sexual one; neither consent nor the actus reus was in issue; the case concerned the behaviour of not two, but five, persons; that behaviour did not take place on a single occasion in private, but had a background in various places going back more than a day; there was extrinsic evidence, particularly independent scientific evidence; and there was confessional evidence. There is no analogy between particular problems raised which may be raised by sexual crimes in private and the problems raised by the present circumstances.

288 The other authorities on which the appellants relied were either cases in which the controverted statements clearly went to the issue[296] or cases falling within an exception to the finality rule[297].

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293 *R v Funderburk* [1990] 1 WLR 587 at 597; [1990] 2 All ER 482 at 491 (unlawful sexual intercourse without witnesses). See also *Chandu Nagrecha* [1997] 2 Cr App R 401 at 406 (indecent assault without witnesses); *R v Lawrence* [2002] 2 Qd R 400 at 405 [13] per McPherson JA, 415-416 [48]-[51] per White J (rape with no witnesses).

294 *Bannister v The Queen* (1993) 10 WAR 484 at 494.

295 *R v LSS* [2000] 1 Qd R 546 at 555 [31] per Thomas JA. See also *Narkle v The Queen* (2001) 23 WAR 468 at 480-481 [49] per Murray J; Kennedy and Pidgeon JJ agreeing. *Chandu Nagrecha* [1997] 2 Cr App R 401 was criticised by McHugh J in *Goldsmith v Sandilands* (2002) 190 ALR 370 at 381 [41] n 43.

296 *Watson v Little* (1860) 5 H & N 472 [157 ER 1266] (in which the issue was whether the plaintiff was legitimate, the evidence of the witness which was challenged was that he was, and the contradictory evidence was an affiliation order); *Miller v White* (1889) 16 SCR 445 at 453-454 (in which the issue was

(Footnote continues on next page)

289 *Should the collateral evidence rule be changed?* This is not a case that presents a suitable opportunity to change the received law, let alone any reason to do so. In particular, it has not been shown that the applicable law created any injustice in this case. Assuming that the evidence of Ross – who had an extensive criminal record, and had failed to give clear and consistent information about what he would say to counsel acting for the appellants – might have helped the appellants, there were available to them two perfectly serviceable avenues of admissibility for Ross's evidence, namely the avenue afforded by s 21 of the *Evidence Act* and the avenue afforded by the exception relating to bias, interest or corruption. Those avenues are governed by clear rules that are easy to comply with. They could have been employed in this case if a proper foundation for them had been laid in the cross-examination of Davis. The appellants argued for the establishment of a much vaguer avenue of admissibility based on the discretionary reception of evidence with substantial probative value. While there are discretionary powers in the law of Western Australia to exclude otherwise admissible evidence the probative value of which is outweighed by its prejudicial effect, there has been no demonstration of the desirability of recognising a discretionary power to receive otherwise inadmissible evidence, or to admit evidence after balancing its weight against the risk of time being wasted by the pursuit of marginally relevant issues. Here the appellants invoked such a power against the prosecution, but if it existed it could be exercised in favour of the prosecution as well as against it. Nothing in the circumstances of, or arguments in, the present case suggests that it does or should exist.

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which firm a witness was an agent for and his denials in cross-examination that he acted as agent for one could be contradicted by business records of the second).

297 For example, *Natta v Canham* (1991) 32 FCR 282 (a proposal by the plaintiff to the rebutting witness to stage a motor accident and divide the damages received as a result of it: this was evidence of corruption). See also cases relating to the illegitimate coaching of witnesses such as *R v R (D)* [1996] 2 SCR 291 at 312-313; *R v LSS* [2000] 1 Qd R 546 at 554-555 [30]-[32]. The appellants also placed considerable reliance on *R v Phillips* (1936) 26 Cr App R 17, wherein are recorded some ex tempore pronouncements of Hewart LCJ, Talbot and Singleton JJ. All that the court *held* was that the proviso could not be applied; its other pronouncements have no authority, because the Crown did not present argument, save on the proviso, to the contrary of that accepted by the Court of Criminal Appeal in upholding the appeal.

Unrecorded admissions

290 *The factual background.* On 7 October 1998, about six weeks after the victim's death, the police interviewed Davis in Brisbane, and soon thereafter arrested and began interviewing Nicholls, Coates and Hoy in Perth. Information obtained from Davis was passed to the officers conducting interviews in Perth. The questioning of Coates, who was then aged 35, and no stranger to police interrogation, commenced at 3.24pm. The interrogation was videotaped. The interviewing officers were Detective Senior Constable Hawley and Detective Hutchinson. The questioning of Coates concluded at 8.46pm, but there were three breaks. One break was from 3.58-4.02pm, during which non-videotaped questioning took place. The second break was from 5.06-5.51pm and again, non-videotaped questioning took place. The third break was from 6.19-7.38pm: during it, unlike the first two, no questioning took place, since the police officers used the time to liaise with colleagues who had been questioning Davis, Nicholls and Hoy, or who were otherwise engaged in investigating the victim's murder, to see whether further questioning of Coates should take place. In the course of the second break, according to the evidence of police officers, Coates made two sets of admissions, which were tendered at the trial. One set of admissions was allegedly made to Hawley and Hutchinson. Another set of admissions was allegedly made to two more senior officers, Detective Sergeant Kays and Detective Senior Sergeant Byleveld. Coates denied making the admissions.

291 None of the police officers took notes of the conversations during the second break. Hawley said that notes were made the next morning when he and Hutchinson discussed what had been said the night before. But he and Hutchinson said the notes were later lost or mislaid. Hawley and Hutchinson prepared their witness statements for trial together without the benefit of notes. Kays and Byleveld made no notes at any time. Kays based his witness statement, made 21 months later, solely on his recollection. Byleveld prepared his statement around the same time, after speaking with Kays.

292 The trial judge was asked to rule twice on what was said during the second break. On 2 August 2000, before the taking of evidence at the trial began, he upheld the admissibility of evidence from Hawley and Hutchinson about the first set of alleged admissions made during the second break. On 21 August 2000, during the trial, he upheld the admissibility of testimony from Kays and Byleveld about the second set of admissions made during the same break.

293 *The legislation.* Section 570D of the *Criminal Code* (WA) provided:

"(1) In this section –

'**admission**' means an admission made by a suspect to a member of the Police Force, whether the admission is by spoken words or by acts or otherwise;

'**serious offence**' means an indictable offence of such a nature that, if a person over the age of 18 years is charged with it, it can not be dealt with summarily 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 admission by the accused person shall not be admissible unless –

(a) the evidence is a videotape on which is a recording of the admission; or

(b) the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for there not being a recording on videotape of the admission; or

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

(3) Subsection (2) does not apply to an admission by an accused person made before there were reasonable grounds to suspect that he or she had committed the offence.

(4) For the purposes of subsection (2), '**reasonable excuse**' includes the following -

(a) The 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."

294 It was common ground that the "reasonable excuses" referred to in s 570D(4)(a), (b) and (d) did not apply: it was practicable to videotape what was said in the second break, the equipment was not merely obtainable but actually there, and it had not malfunctioned.

295 *The first ruling.* Before the trial began, counsel for Coates objected to the evidence of Hawley and Hutchinson about what was said during the non-videotaped second break. The argument took place on 2 August 2000 – not on a voir dire, but pursuant to s 611A of the *Criminal Code*.

296 Among the materials available to the trial judge before making his first ruling were: a document which was called a "deposition" but in truth was a signed witness statement, dated 18 November 1998 (about six weeks after the interview with Coates), made by Hawley from the notes which were later lost; an equivalent document from Hutchinson in similar terms; and a typed version of what had been recorded on the videotaping equipment. The videotape itself had not at that stage been played to the trial judge.

297 Before the first break at 3.58pm, Coates made no admissions. He was asked whether Hoy had dealt in drugs, and said she had at one stage.

298 Shortly after saying that, at 3.58pm, Coates requested that the interview be "paused" while he went to the toilet. He was asked to repeat his request, and then the questioning and videotaping ceased. But Coates did not go to the toilet. According to the statements of Hawley and Hutchinson, and in due course their oral evidence, which Coates did not challenge, Coates said he did not want to go to the toilet; he wanted to talk "off tape". He asked if the tapes were off. Hawley said "What do you want?" Coates said he did not want to talk while videotaping was taking place about Hoy's criminal activities relating to drugs unconnected with the murder. Hawley indicated that he was not obliged to talk about those activities on video, but that the police officers were not supposed to have breaks of the kind taking place, and that if that was all he wanted to say, the videotaping should recommence. This it did at 4.02pm. No objection was taken to the police officers' evidence of the conversations during that first break between 3.58 and 4.02pm.

299 Just before 5.06pm, the following is recorded on the transcript of the videotape:

> "Q. Do you want to go to the toilet?
>
> Q. Do you want to go to the toilet again, do you?
>
> A. Sure.
>
> Q. All right, I will suspend the interview again. It's 6 minutes past 5 and I will just turn the tapes off."

Again, Coates did not go to the toilet. Videotaping did not recommence until 5.51pm.

300 The trial judge said that, according to the police evidence, the conversation that followed was initiated by Coates and not by them. He stated that "a break in the process of recording the interview was contrived" – though he did not say by whom – and that "the statements [ie the relevant admissions] were initiated and made by the accused at that time".

301 According to the police officers, in the course of the second non-videotaped discussion between Coates, Hawley and Hutchinson, Coates asked what his options were. He was told that he could cooperate and tell the truth, or stick to his current story and take his chances. He was warned that the matter was serious as it involved the death of a Crown witness. He asked: "What can I do?" He then asked: "How much will I get?" He expressed a fear of a lengthy gaol term and said he would do himself harm. He asked: "[H]ow can I get myself out of this situation?" He said: "I know exactly what happened and it's not how you think. It's nowhere near it. It's 100 miles away from it." He then referred to Nicholls and Davis. On being asked whether he would tell the police "what really happened", he said: "What's in it for me?" Hawley said that if Coates was talking about deals, he was not "the boss", but could get "the boss". Coates asked him to do so Hawley and Hutchinson then left the room to get Kays and Byleveld, who were more senior officers.

302 The trial judge found that, while the circumstances were not exceptional within the meaning of s 570D(2)(c), there was a reasonable excuse for there not being a recording on videotape of what Coates said in the second break in the presence of Hawley and Hutchinson. He did not consider that the circumstances fell within s 570D(4)(c), because there was no "direct reference to non-consent to these statements being made whilst the videotape was running". But he saw the circumstances as "allied" to those in s 570D(4)(c), and held that, "[b]y analogy", they constituted a reasonable excuse.

303 *The second ruling*. By the time the trial judge made the second ruling on 21 August 2000, relating to the evidence of Kays and Byleveld, he had seen the whole of the videotaped part of the discussions between Coates, Hawley and Hutchinson, and had heard the whole of the oral evidence in the trial to that point, including the evidence of Hawley and Hutchinson on 18 August 2000. He had, of course, not yet heard Coates's subsequent denials in evidence before the jury of the admissions attributed to him by the police; but those denials did not go to the issue of admissibility of the officers' evidence under s 570D, and Coates did not seek to give any evidence relevant to admissibility under that section on a voir dire.

304 According to Kays and Byleveld, Coates said that he did not want to go to gaol, that he would harm himself there, that he would do a deal to be charged with conspiracy to murder, and that he would give evidence against Davis and Nicholls in exchange for that deal. Byleveld told Coates that the police "don't do

deals" and that if he wished to discuss the matter further he could do so with Hawley and Hutchinson with the videotaping equipment on.

305 In his second ruling, the trial judge said:

> "Of course he did consent to the interview being videotaped and there was a videotaped interview, but I think it is clearly open, when one views that process, to conclude that the break which occurred in the interview was at the request of Mr Coates, and that was a toilet break. For myself, and I suppose it is my view which is of some importance in this context when I am ruling about whether the material should be excluded from evidence, there is no reasonable proposition that it was a break which was effectively manufactured by the interviewing police officers."

306 Later he said:

> "[I]t is clear that the process was commenced by Mr Coates in my opinion and that he was seeking to speak off the camera, if that phrase is appropriate, to the police officers and to discuss with them, and the short discussion which follows, is of this content, what options he had to deal with the interview process when as is clear or anticipated it was resumed in an official way on the camera and was recorded."

In short, the trial judge found that Coates had withdrawn his consent to the videotaping of the discussion.

307 The trial judge held that there was no point at which it would have been appropriate for Hawley and Hutchinson to tell Coates that it was impossible to talk to him further without videotaping the conversation: "he was having the exchange with the police officers which he wished to have and which he initiated." The trial judge pointed out that when Kays and Byleveld entered the room and Coates broached the question of doing a deal, they said no deals could be done, and that if he wished to talk further he should do so on video. He concluded by saying that the requirements of s 570D had been satisfied. His reasoning differed from that of his first ruling in that, in his first ruling, he did not find that s 570D(4)(c) had been satisfied but that the circumstances were "allied" or analogical. In his second ruling, he treated the discussion between 5.06 and 5.51pm as a "separate interview process", and found that Coates had not consented to the videotaping of it.

308 *What videotaping did Coates consent to?* The primary avenue of admissibility for the officers' evidence is s 570D(4)(c), which concentrates attention on whether Coates "did not consent to the interview being videotaped". If, at 5.06pm, Coates had been prepared to go on being subjected to videotaped questioning, and if the break then was triggered by the police as a means of

adopting more aggressive tactics without being videotaped in doing so, it would not be possible to conclude that s 570D(4)(c) had been satisfied, and very difficult to conclude that there was, in any sense, a "reasonable excuse" for the lack of videotaping.

309 In dealing with this issue, it is necessary to examine in more detail some aspects of the course of events until the end of the second break.

310 At 3.24pm, when the interview began, Coates was told that he was in one of the video interview rooms at the premises, and he acknowledged that. He agreed that the police officers had "brought [him] back here for questioning". He was asked if he was "happy" about that and he agreed he was. He was told that the police wished to ask him questions and record the answers on a camera behind a screen and microphones on a table in the room. After being warned that he was not obliged to say anything unless he wished to, he was told that what he did say would be recorded by the camera and the microphones and could later be used in evidence in court. He said he understood that. Although the police officers did not specifically ask for Coates's consent to their discussions being videotaped, in substance he gave consent to that course by answering the questions without protest. No contention to the contrary was advanced in this Court.

311 At 3.58pm, Coates withdrew his consent to the discussion being videotaped, and the police officers complied. But from 4.02pm, he indicated consent to Hawley's decision to resume the videotaping of the discussion by not protesting at it.

312 At 5.06pm, the videotaping ceased again. Its resumption at 5.51pm was consented to by Coates. That is to be inferred from the fact that when Hawley then told him that the video interview had recommenced, cautioned him, and said that whatever he said was being recorded and could be given in evidence, Coates did not protest and proceeded to answer the questions asked.

313 The crucial issue is whether Coates withdrew his consent to videotaping at 5.06pm or whether the police officers of their own volition decided to cease videotaping, and, to use the trial judge's language, "effectively manufactured" the break.

314 The trial judge's second ruling, unlike the first, was made after the videotape had been played. This second ruling was therefore demeanour-based in the sense that the trial judge detected nothing in the demeanour or conduct of Coates, Hawley or Hutchinson which suggested that Hawley and Hutchinson had "effectively manufactured" the break. This Court was not asked to play the videotape with a view to assessing the demeanour of the participants for itself. In these circumstances great weight must attach to the trial judge's assessment.

However, that assessment is supported by five other matters. The trial judge did not explicitly refer to all of them, but he must have been conscious of them.

315 The first relates to the approach taken by counsel for Coates. In the course of argument before the second ruling, counsel for Coates adopted a somewhat different position on how the question of Coates going to the toilet arose at 5.06pm from that which she had adopted before the first ruling on 2 August 2000. On 2 August 2000 she said:

> "[I]t was not Mr Coates's request to go to the toilet; it was the police suggesting to him that he might want to go to the toilet. … 'Do you want to go to the toilet?' and then he's asked again, 'Do you want to go to the toilet again, do you?' 'Sure', he says."

The trial judge then said:

> "You people have no doubt viewed the video. I haven't but I would have thought that question was put in response to some motion or sign of discomfort."

Counsel said: "No, not that I saw on the video, your Honour."

316 But on 21 August 2000, counsel for Coates said:

> "There has been no evidence that the fact of the interview being off camera was at Coates' instigation. What we have got is him said to be requesting to go to the toilet, although it's still unclear to me – and the transcript has the police making the request, not Mr Coates and it was unclear on watching the video exactly who said something about going to the toilet, but that doesn't and can't equate to, 'I want to have a conversation off camera with you'."

317 It can be seen that on 21 August 2000, counsel was less dogmatic about whether the police initiated the question. That may be because on 18 August, Hawley had given evidence in chief that Coates had asked to go to the toilet. In the course of cross-examination, counsel for Coates said:

> "Now, you say that – how do you say the conversation with Mr Coates commenced during that second break? —— He asked to go to the toilet again.
>
> Now, on viewing that video to me it was unclear who was doing the asking. Mr Coates seems to have his [head] turned to one side at the time. Are you certain that it was he who asked to go to the toilet or did somebody ask him if he wanted to go to the toilet? —— No, he certainly asked me.

Okay. All right. So if I —— all right."

Counsel did not challenge Hawley further or return to the subject. While in this Court counsel for Coates (who had not appeared at the trial) relied on the transcript of interview, the impressions of counsel for Coates at the trial, which qualify the reliability of the transcript in the light of the videotape, must be given considerable weight. So must the fact that Hawley was not shaken on the point, and the fact that Hutchinson was not questioned on it at all.

318 The submission of counsel for Coates on 21 August 2000 quoted above suggests a new position – that even if Coates initiated the break, that in no way equated to the expression of a desire to have a non-videotaped discussion. Taken in isolation, that point might have force, but it has none when considered with the rest of the circumstances.

319 The second matter which supports the trial judge's assessment is that the line of questioning which the police officers adopted between 4.02 and 5.06pm must have been extremely disturbing for Coates. They put forward a great deal of unpalatable information, he made various admissions in response, and his manner of answering questions as recorded in the transcript revealed increasing alarm about the course of events. This was in sharp contrast with what had happened before 3.58pm. Before 3.58pm, the police had done nothing more than establish various non-incriminating background facts, or facts that, though potentially incriminating (for example, Coates's knowledge of the victim and the fact that Coates had been charged with offences against her), were facts that could easily have been proved without Coates's cooperation. Coates did not admit anything which might have suggested that he knew something about the victim's death or that he had any association with the building where she died. The only aspect of the questioning which apparently disturbed him was questioning about whether Hoy had been selling drugs, and it was that which led him to request a break from videotaping.

320 But from 4.02pm onwards, matters worsened for Coates. In that period he initially propounded an alibi for the night of the victim's murder: he said he had been with Hoy, had returned to their residence at Bassendean, become very drunk, and had stayed there until lunchtime the following day. He denied any involvement in the death of the victim. The questioning then took the following course.

321 First, the police officers elicited an admission that a tattoo on his arm had been done by "Adam Flick", whom Coates knew through Hoy. The police asked Coates if he knew "Flick" as Adam John Davis, but he said that name did not ring a bell. Coates did admit to knowledge that "Flick" was supposed to owe the Jokers (a bikie gang) a lot of money, and that he had gone to Queensland. Coates

also accepted that "Flick" knew that Coates and Hoy had been charged with crimes against the victim before her death.

322 The police then informed Coates that Davis had made a statement to police in Queensland indicating knowledge of the victim's death; Coates's shocked responses revealed, contrary to what he had just told the police, that he knew that "Flick" and Davis were the same man and he subsequently confirmed this. The police also informed him that Nicholls and Hoy were in the building at that moment being interviewed about the victim's death.

323 The police then took Coates through various telephone calls made on his mobile telephone on the night of 22-23 August 1998. Some were made to Nicholls from Rivervale (where Coates could not have been if he had been at home drinking in Bassendean, as he had earlier told the police). Some were made to Hoy. The police drew to Coates's attention the fact that the Great Eastern Motor Lodge, where the victim's body was found, was in Rivervale. Coates agreed that the phone records made it look as though he had been in Rivervale making phone calls to Nicholls and Hoy at times from 9.44pm to 5.20am – a period when he was supposedly drinking at home in Bassendean. He could offer no likely explanation for this, and agreed that logic suggested that he was in Rivervale.

324 The police officers then informed Coates that they had been told that at about 4.00am he and Nicholls had been let into a room at the Lodge and that the night watchman had seen Nicholls's vehicle drive past the Lodge quite slowly a couple of times, once with its lights off, with two males inside. The men had observed the night watchman watching them and had then driven off before returning later after the watchman had left. The watchman, however, recorded the registration number. The police officers also said that two men were seen getting out of Nicholls's car, one holding a little box.

325 Coates denied killing the victim, or arranging at the Bassendean house for her killing, or arranging with Hoy for Davis to pick the victim up and take her to the motel room to receive a lethal injection of drugs, or giving Davis drugs, or leaving a syringe with heroin in it near the rear wheel of a vehicle in the Lodge car park, or being at the Lodge[298]. It was at that point that the topic of Coates going to the toilet again came up.

326 Coates had previous experience of police investigations. He had been in gaol in relation to earlier convictions. He had been in gaol in relation to the

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298 In his testimony, he admitted that that at least was untrue, and that he had driven to the Lodge with Nicholls.

charges against him and Hoy of deprivation of the victim's liberty and occasioning her actual bodily harm, and was on bail. The inference was strongly available that it was Coates who wanted the videotaping to cease while he endeavoured to extricate himself from the difficulties which the police questioning revealed he was in. Indeed, it seems improbable that the police officers would have wished to interrupt the questioning in view of the pressure it was placing on Coates and the videotaped admissions he had earlier made.

327 The third matter supporting the trial judge's assessment is that Coates had already employed the excuse of wanting to go to the toilet at 3.58pm, when he unquestionably expressed that wish but did not act on it. His real reason for withdrawing consent to videotaping at 3.58pm was that he did not want the police to ask further questions about Hoy's drug dealing. An inference was therefore clearly open that the real reason why the videotaping was suspended at 5.06pm was that Coates had withdrawn his consent to its continuing for another reason – that its increasingly damaging character made it desirable to negotiate a deal without being videotaped.

328 There is a fourth matter, to which the trial judge did explicitly refer, which supports his conclusions. That is what Coates said in the period from 5.06-5.51pm. He said he wanted to speak about the options he might have if he implicated others, and that is what he then proceeded to do when the interview resumed.

329 There is a fifth matter. Coates's state of mind at 5.06pm may be inferred from the fact that after 5.51pm, his attempt to do a deal with the police officers having failed, he began making even more damaging admissions. He had earlier asserted that he knew nothing about the victim's death, and that he was drunk or asleep on the night of Saturday, 22 August 1998. When the police officers told him that Davis made a statement that day to the police in Queensland, his answer was: "What? That he knows about it? … How could he know anything about her death?" Contrary to that posture, he now said that the victim's death had been spoken about by Nicholls and "Flick"/Davis before he went to bed. He said for the first time that "Flick"/Davis was at the Bassendean house that night. He said that "Flick"/Davis, who was "pretty well sober", explained how easy it would be for him to "get" the victim, whom he described as "a street walker", and kill her with a drug overdose, and that Nicholls said it would be better if "she went away".

330 The implication of others by Coates at this point, in circumstances where he had denied all knowledge of the murder up until 5.06pm, makes it more credible that he spoke to the police officers between 5.06 and 5.51pm of doing a deal by implicating others, and more credible that it was he who initiated the discussion and withdrew his consent to the videotaping.

331 *Comparable legislation.* In *Kelly v The Queen*[299], the majority described the background to the enactment of provisions like s 570D, and highlighted the variety in the responses of Australian legislatures to the problem of non-recorded admissions by accused persons in the respect relevant to that case. Similar variety exists in relation to the present problem: the legislatures have introduced different exceptions to the general condition precedent to admissibility that there be audiotaping or videotaping or both. While several legislatures have adopted the test of "reasonable excuse" (or its equivalent) to permit the admission of non-videotaped admissions, only three have adopted an equivalent to s 570D(4)(c), which specifies the accused's non-consent to videotaping as a "reasonable excuse" for failure to videotape.

332 Section 570D was introduced in 1992[300]. In 1995, identical language was employed in s 8(3)(c) of the *Criminal Law (Detention and Interrogation) Act* 1995 (Tas). That provision now appears as s 85A(2)(c) of the *Evidence Act* 2001 (Tas) which provides that a "reasonable explanation" includes instances where: "the defendant did not consent to an audio visual record being made of the interview"[301].

333 In New South Wales, a "reasonable excuse" in s 281(4) of the *Criminal Procedure Act* 1986 (NSW) includes (in par (b)) "the refusal of a person being questioned to have the questioning electronically recorded". Section 281 was introduced in 1995[302].

334 In South Australia, the problem has been more specifically dealt with. An investigating officer in certain circumstances must make a videotaping of an "interview" with a "suspect" if it is "reasonably practicable" to do so, pursuant to s 74D(1)(a) of the *Summary Offences Act* 1953 (SA), which was also introduced in 1995[303]. In deciding whether it is reasonably practicable, one of the matters which must be considered is "a refusal of the interviewee to allow the interview to be recorded on videotape …": s 74D(3)(c). Section 74E(1)(a) provides that in

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299 (2004) 78 ALJR 538 at 545-546 [31]-[36]; 205 ALR 274 at 282-283.

300 By the *Acts Amendment (Jurisdiction and Criminal Procedure) Act* 1992 (WA), s 5.

301 As amended by the *Justice (Miscellaneous Amendments) Act* 2003 (Tas), s 3 and Sch 1.

302 By the *Evidence (Consequential and Other Provisions) Act* 1995 (NSW), Sch 1 [3] into the *Crimes Act* 1900 (NSW) as s 424A.

303 By the *Statutes Amendment (Recording of Interviews) Act* 1995 (SA), s 5.

proceedings for an indictable offence, evidence of an interview between an investigating officer and the defendant is inadmissible unless the investigating officer complied with the relevant Part of the *Summary Offences Act*. Section 74C provides:

> "In this Part –
>
> '**interview**' includes –
>
> (a) a conversation; or
>
> (b) part of a conversation; or
>
> (c) a series of conversations …".

335 An examination of the legislation in other jurisdictions shows only that nowhere has any legislature adopted an absolute stand against the reception of non-videotaped admissions, and that different legislatures have made different selections of language and, to some extent, different policy choices. None of the comparable legislation in other jurisdictions throws any particular light on the correct construction of s 570D as it applies to the present problem.

336 *The application of s 570D: outline.* In the present case, there was a "reasonable excuse" for there not being a recording on videotape of the admissions made in the period 5.06-5.51pm on one of three bases. First, s 570D(4)(c) was satisfied in that the discussion in that period comprised a separate interview, and Coates did not consent to that interview being videotaped. Secondly, and in the alternative, s 570D(4)(c) was nevertheless satisfied on the basis that there was a single interview from 3.24-6.19pm, and while Coates consented to parts of that interview being videotaped, he did not consent to it – that is, the whole of it – being videotaped. Thirdly, if s 570D(4)(c) did not apply, the circumstances fall within the inclusive aspect of the definition of "reasonable excuse" in s 570D(4).

337 *More than one "interview".* The expression "interview" was not usefully defined in the *Criminal Code*[304]. But on any view, the discussion between the police officers and Coates between 7.38 and 8.46pm was a separate interview. Just before 6.19pm, the police indicated that they had no further questions and concluded their dealings with Coates at that time by asking him whether he had any complaints, and whether inducements had been held out or threats made, by saying how he could get a copy of the interview, by telling him he would be

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304 Section 570(1) provided only that "interview" meant "interview with a suspect by a member of the Police Force".

charged, and by taking two oral swabs. Over an hour then passed in which there was no questioning. When it commenced again, at 7.38pm, the officer stated that he wanted to ask Coates "a few more questions" to "clear up things that were said during your first interview"; Coates agreed to this, and was cautioned again before the questioning began.

338 What of the period between 3.24 and 6.19pm? In that time the police conducted either more than one interview, or only one interview. If they conducted more than one interview, the relevant number must have been six – first, a videotaped interview with Hawley and Hutchinson from 3.24-3.58pm; secondly, a non-videotaped interview from 3.58-4.02pm; thirdly, a videotaped interview from 4.02-5.06pm; fourthly, one non-videotaped interview beginning at 5.06pm; fifthly, another with Kays and Byleveld ending at 5.51pm; and, sixthly, a videotaped interview with Hawley and Hutchinson from 5.51-6.19pm. Each of the six stretches of questioning had a different character. The first and last opened with warnings about the right to silence, about the fact that videotaping was in progress, and about the fact that the videotaped answers could be given in evidence. The third, fourth and fifth did not open in that way, but it would not have been inappropriate if the police had decided that they should[305]. The second and fifth closed with statements by the police about how questioning, if it was to take place, had to be videotaped. Coates consented to the first, third and last interviews being videotaped, but not, on the trial judge's findings, the second, fourth and fifth. For these reasons, there were sufficient divisions between the six periods to conclude that there was more than one interview, and that there were in fact six. On that view, the questioning which took place between 5.06 and 5.51pm, comprised two successive interviews in which admissions were made. There was a reasonable excuse for there not being a recording on videotape of the admissions made during each of those two interviews because Coates did not consent to them being videotaped.

339 *No consent to whole interviews being recorded.* Alternatively, it may be that there was only one interview running from 3.24 until 6.19pm. That conclusion would derive some support from the way the police spoke at the time. They spoke just before 6.19pm as if one interview "conducted today" or "this afternoon" was coming to an end, and spoke at 7.38pm of one interview having finished an hour earlier and another beginning at that time. A difficulty in this conclusion is that the substitution of two new questioners suggests that a separate interview took place at least in the latter part of the 5.06-5.51pm period.

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305 Indeed, counsel for Coates contended that the lack of a caution at 5.06pm was a ground for rejection of the non-videotaped admissions, considered as part of "a separate interview process", in the judge's discretion: the trial judge disagreed, and no challenge has been made to that exercise of discretion.

340 If there was only one interview between 3.24 and 6.19pm, there was a reasonable excuse for there not being a recording on videotape of those parts of it which contained the admissions. That excuse was that Coates did not consent to the second, fourth or fifth periods of questioning (during which they were made) being videotaped. He consented to the bulk of the interview being videotaped, but not to three particular parts of it. He cannot be said to have consented to "the interview" being videotaped when he did not consent to the whole of it being videotaped.

341 *Circumstances fell within inclusive element of definition.* If the questioning between 3.24 and 6.19pm is not to be regarded as falling within s 570D(4)(c) in either of the ways just discussed, the circumstances nonetheless fall within the inclusive element of the definition of "reasonable excuse" in s 570D(4). On the trial judge's findings, the police officers deferred to Coates's wishes on two occasions. First, at 3.58pm, Coates withdrew his consent to videotaping in order to prevent questions about Hoy's drug dealing; the police officers said they would not pursue that issue, and they did not pursue it after Coates gave his consent to videotaping resuming. Secondly, at 5.06pm, he withdrew his consent to videotaping in order to seek to secure a favourable deal; the police officers acceded to his withdrawal of consent to videotaping and, at least for a time, listened to him as he sought to secure a deal.

342 The legislation does contemplate that non-videotaped admissions by suspects can be admissible in subsequent proceedings – not only in the "exceptional circumstances" referred to in s 570D(2)(c) but also in the circumstances described in pars (a)-(d) of s 570D(4). Since the definition of "reasonable excuse" in s 570D(4) is not exhaustive, commencing as it does with the word "includes", there must be other circumstances in which admissions made in non-videotaped interviews can be tendered in evidence because there is a reasonable excuse for the failure to videotape them.

343 In this case, a reasonable excuse can be found in the fact that Coates did not want the relevant part of the discussion to be videotaped. The legislation does not confront the police with a choice between conducting videotaped sessions of the questioning of suspects and conducting no questioning at all if the suspect does not consent to videotaping. It recognises that there may be questioning to which the suspect consents, so long as there is no videotaping.

344 It would be anomalous if s 570D were to be construed as permitting reception of an admission from an accused person who, although refusing absolutely any videotaping, was prepared to engage in extensive discussions with the police, while forbidding the reception of an admission from an accused person who consented to extensive videotaping of discussions with the police, but refused to permit a short part of them, in which admissions were made, to be

videotaped. The period between 5.06 and 5.51pm was not a short period, but it was considerably less than half of the period during which the discussion proceeded. If Coates had refused his consent to videotaping at the outset but indicated a willingness to answer questions, there would have been nothing unlawful in the police proving the answers to those questions, notwithstanding the absence of videotaping.

345 *Coates's factual arguments.* Two groups of arguments were advanced by Coates against the correctness of the trial judge's rulings: factual and constructional. So far as the former are concerned, counsel for Coates pointed out to this Court that Hawley admitted that, with Coates's permission, it would have been perfectly possible to leave the videotaping equipment on; that the police officers had not said in evidence that Coates refused permission for the discussion between 5.06 and 5.51pm to be videotaped; that Hawley said in evidence that he "encouraged" Coates to "speak off video" and "deliberately chose to continue [the] interview off camera"; that this was "'deliberately intended' to avoid videotaping requirements"; and that Hawley admitted that he had not followed "proper or careful practice" by encouraging Coates to speak while the discussion was not being videotaped. Counsel for Coates also criticised the Court of Criminal Appeal for saying "[a]ccording to the evidence of the officers [Coates] was anxious to speak off tape about the options that he might have if he was to implicate others" and for saying that it was "the initiation by Coates himself of the off-video interview which is a critical factor".[306] Counsel also submitted that no police officer gave evidence that he believed Coates was anxious to speak off tape, and that "neither Kays nor Byleveld gave any suggestion whatever that there was any basis on which they could have possibly believed that Coates would not go on videotape".

346 Before dealing with the detail of these factual arguments, it must be remembered that before the second ruling was made, the trial judge heard the evidence of the police officers Hawley and Hutchinson, had not heard any contrary evidence from Coates, and accepted the evidence of the officers. No application was made to set aside either the first or the second ruling after Coates did give evidence. No basis was put forward for impugning the testimonial honesty of the police officers involved in this case, and no attempt was made to essay the difficult task of demonstrating error in the trial judge's acceptance of their evidence. In that state of affairs, the trial judge's finding that the break was requested by Coates and not manufactured by Hawley and Hutchinson must be accepted.

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306 *Hoy v The Queen* [2002] WASCA 275 at [146] per Miller J.

347 To some degree, the factual submissions of Coates are unsupported by the evidence. Thus, what Hawley actually said in cross-examination was:

> "In fact you actually encouraged him to speak off video by saying, 'Come on then, tell us your side of the story' didn't you? —— Yes, I suppose you could say that."
>
> So you deliberately chose to continue this interview off camera for a short time, didn't you? —— Yes.
>
> And you would agree with me that that is not proper or careful practice? —— In hindsight, yes.
>
> That what you should have been doing is really as soon as the conversation started was, 'Come on, we really should be having this on video.' Right? —— Yes."

It is particularly to be noted that Hawley did not say any words to the effect that the conduct of the police was "'deliberately intended' to avoid videotaping requirements".

348 Further, it was correct of the Court of Criminal Appeal to say that Coates initiated the off-video discussion because the trial judge found that the break "was at the request of Mr Coates". It was also correct of the Court of Criminal Appeal to say that the officers' evidence demonstrated Coates's anxiety to speak. The officers proved indeed that as soon as the videotaping ceased the questioned suddenly became the questioner; that his opening words were: "What are my options?", "What am I looking at?", "What can I do?" and "How much will I get?"; that he followed them up with references to how he would not survive gaol, and by the statement "How can I get myself out of this situation?" Only then did Hawley say "Come on then, tell us your side of the story". The officers also proved that Coates said "What's in it for me?", and asked to see Kays and Byleveld with a view to striking a deal.

349 Some of the factual arguments are beside the point; they do not demonstrate error in the trial judge's conclusion that Coates initiated the decision to cease videotaping at 5.06pm and did not assent to its resumption until 5.51pm. It therefore does not matter that the police officers did not say that Coates refused his consent to videotaping, nor does it matter that the police officers did not specifically ask him about his consent. Contrary to what Coates suggested, there was evidence that the police officers believed Coates was anxious to speak off tape and there was evidence that they believed that Coates was not consenting. So far as the evidence of Hawley and Hutchinson is concerned, Coates's submission is irreconcilable with the trial judge's finding based on their evidence that the break was requested by Coates and was not manufactured by Hawley and Hutchinson. So far as the evidence of Kays and Byleveld is concerned, the

submission is irreconcilable with the fact that Byleveld told Coates that no further discussion could take place unless it was videotaped; with the fact that when Kays left the video room he told Hawley and Hutchinson to "get back in there and put him back on video if he wanted to"; and with the fact that Byleveld believed that "Mr Coates had ceased the video". These items of evidence imply a belief in Kays and Byleveld that it was the wish of Coates that the discussion at that time not be videotaped.

350 Nor is the admissibility of Coates's admissions affected by whether Hawley allowed the discussion to continue off-camera for a short time without pressing Coates for a resumption of videotaping, or whether Hawley had not conformed to proper or careful practice.

351 Counsel for Coates argued that the first ruling could not be defended because the trial judge made it in reliance only on the unsworn witness statements of Hawley and Hutchinson, and they were incapable of constituting sufficient proof of "a reasonable excuse" on the balance of probabilities. That was not a point taken by counsel for Coates before the trial judge when he was considering the arguments before he made his first ruling. Counsel for Coates at that stage acquiesced in the procedure, and did not require a voir dire in which sworn evidence might be taken. The parties appear to have assumed that the evidence the officers would eventually give would conform to what their statements said. Certainly there was no prejudice to Coates, because it turned out to be the case that the officers' evidence, when it came to be given, corresponded with their witness statements. And the second ruling, which confirmed the first ruling, though by somewhat different reasoning, was given with the benefit of the sworn evidence of Hawley and Hutchinson.

352 *Coates's legal arguments.* Coates rightly argued that s 570D and similar enactments recognise that miscarriages of justice may occur where the prosecution relies on a confession or admission that has not been mechanically recorded. To that may be added the desire of legislatures to minimise time-wasting in forensic combats between accused persons and police officers over whether or not a confession had been made.

353 However, these general appeals to the purposes of the legislation do not point decisively, as a matter of construction, to what particular technique is revealed in the language of the statute as having been chosen by the Western Australian legislature.

354 Counsel for Coates submitted that it would frustrate the purposes of s 570D if a "reasonable excuse" could be found in the mere circumstance that police officers gave evidence that they "did not initiate" a non-videotaped discussion, but believed that the accused was "anxious" to speak out and had initiated the discussion, chose to continue the interview, and then, when

videotaping resumed, chose not to have any admissions confirmed. Coates submitted that s 570D should not be construed so as to permit easy evasion by allowing dishonest police officers to get off-camera admissions into evidence by giving perjured testimony that they had thought the suspect no longer wanted the interview recorded.

355 The risk of police officers lying in order to bring s 570D(4)(c) into operation is a risk which could only be overcome by a complete ban on the reception of non-videotaped admissions. Despite s 570D, it would be possible for police officers to tender admissions by mendaciously testifying that the accused was not "a suspect", or that it was "not practicable" to videotape the admissions, or that the equipment could not be obtained in time, or that it malfunctioned. Parliament struck a compromise in enacting the section: it relied on a belief that police officers would in general try to carry out their investigative and testimonial duties honestly. On that assumption, compliance with s 570D would result in a good many admissions being reliably recorded even though difficulties may arise in some marginal cases, and even though there might remain a possible risk of perjury. It is not possible to seek to overcome the possible risk of perjury by construing s 570D to mean what the words do not say.

356 Counsel for Coates advanced a more modest argument: that the beneficial purpose of s 570D could be frustrated by police officers simply giving evidence that they believed a suspect did not want admissions recorded and therefore ceasing to videotape the interview. That is not so, for a mere belief of that kind is insufficient to prove that the suspect did not consent.

357 It does not matter that the police officers did not ask Coates to repeat on-camera the things he had said off-camera. It might have been thought aggressive and even deceitful of them to have done so in those particular circumstances, in view of the fact that he had made it plain that he did not want to talk about certain matters on-camera. It would nullify the regime which permits a suspect to consent or not to consent, if police officers were required to accede to a suspect's wish to speak off-camera, but then to repeat on-camera everything that had been said. Further, though most legislatures have made it a condition of admissibility of non-videotaped admissions that their making be confirmed in a recorded form[307], that course has not been adopted in Western Australia. Some of the statutes adopting the former course pre-date the introduction of s 570D in

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307 *Crimes Act* 1914 (Cth), s 23V(1)(b); *Criminal Procedure Act* 1986 (NSW), s 281(2)(a); *Crimes Act* 1958 (Vic), s 464H(1)(c) and (e); *Summary Offences Act* 1953 (SA), s 74D(1)(c); *Evidence Act* 2001 (Tas), s 85A(1)(b); *Crimes Act* 1900 (ACT), s 187(3) (applying the Commonwealth legislation in the ACT); *Police Administration Act* (NT), s 142(1)(a).

1992[308]. That suggests that the Western Australian legislature deliberately chose not to adopt the course adopted elsewhere. And it militates against Coates's submission that, on the true construction of s 570D, a failure to get the admissions made off-camera repeated on-camera means that there is no "reasonable excuse".

358 Counsel for Coates suggested that nothing in the Second Reading Speech about the Bill containing what became s 570D casts light on its construction. It is true that there is nothing specific about the construction of s 570D(4). But the Attorney-General, after describing the success of a trial scheme for videotaping the interviews of suspects and the advantages of installing appropriate equipment, referred to *McKinney v The Queen*[309]. He then said[310]:

> "The Bill will ensure that in serious cases an accused's confession will be inadmissible unless it has been videotaped. Exceptions to this rule will be permitted, subject to the court's discretion, to receive evidence of admissions which have not been videotaped, if this is in the interests of justice."

The exceptions are s 570D(2)(b) read with sub-s (4), and s 570D(2)(c). The only reference to the "interests of justice" appears in s 570D(2)(c). Yet the Attorney-General's language indicated that he regarded the "reasonable excuse" exception in s 570D(2)(b) as advancing the interests of justice also. A construction of s 570D(4) that would exclude the admissions made between 5.06 and 5.51pm would not serve the interests of justice.

359 Counsel for Coates appeared to submit that the "reasonable excuse" in s 570D(2)(b) both had to exist and had to be the reason why there was no videotaping. In effect, it was submitted that even if Coates did not consent to the videotaping, the real reason why the police questioned him without continuing the videotaping was to serve their own ends, not to conform to his wish to speak "off-camera". That submission is irreconcilable with the trial judge's finding that the break was requested by Coates and not manufactured by Hawley and Hutchinson, and with the evidence discussed above demonstrating the belief of the police officers that Coates would not go on videotape.

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308 The Victorian legislation dates from 1988 and the Commonwealth legislation from 1991.

309 (1991) 171 CLR 468.

310 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 June 1992 at 3356.

360 Counsel for Coates also submitted that s 570D(2)(b) required proof of a "reasonable excuse for there not being a recording on videotape of the *admission*" and s 570D(4)(c) required proof of a lack of consent by the suspect to "the *interview* being videotaped" – not the part of the interview containing the admission. In short, he submitted that the prosecution had to prove a lack of consent to any interview at all. The contrast between "admission" in s 570D(2)(b) and s 570D(4)(a), and "interview" in s 570D(4)(b)-(d) is curious. However, if sound, this submission would have absurd results. It would mean that if the suspect refused consent to any part of the discussion being videotaped, but proceeded with it and made ten admissions, they could be proved against him, but if he agreed to the discussion being videotaped, save for isolated moments during which he made the same ten admissions, they could not be proved against him.

361 Counsel for Coates also submitted that the *Listening Devices Act* 1978 (WA)[311] applied to the questioning of Coates, and that this meant that the police could not have had a reasonable excuse for failing to videotape any part of the questioning. Section 4(1) of the Act prohibits the use of any "listening device" to record a "private conversation" by a person who is not a party to that conversation; it also prohibits a person (whether a party to the conversation or not) from communicating or publishing "the substance or meaning" of a private conversation that has been recorded in that way[312]. However, s 4(2) provides that "it is not an offence" for a party to a private conversation to record and publish it if the publication is "no more than is reasonably necessary in the public interest or in the course of his duty or for the protection of his lawful interests". Counsel argued that either the questioning of Coates was not a "private conversation", or that, if it was, s 4(2) applied. Either way, it would have been lawful to videotape the admissions, and the existence of the *Listening Devices Act* did not create a reasonable excuse for not doing so, since Coates's consent was not required.

362 Even if the questioning of Coates during the relevant period was not a "private conversation", or, if it was, even if the exception in s 4(2) could be held

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311 The *Listening Devices Act* 1978 (WA) was repealed and replaced by the *Surveillance Devices Act* 1998 (WA), which came into force on 22 November 1999.

312 Section 3 relevantly provided:

> "'private conversation' means any conversation carried on in such circumstances as may reasonably indicate that the parties to the conversation desire it to be confined to those parties, but does not include a conversation made in any circumstances in which the parties to the conversation ought reasonably to expect that the conversation may be overheard."

to apply, that would simply mean that any recording of the non-videotaped admissions by the officers, or the subsequent publication of that recording, would not constitute an offence. The *Listening Devices Act* imposes no obligation to record conversations. There is no explicit link between it and s 570D of the *Criminal Code*. Whether or not the *Listening Devices Act* did not render it unlawful to videotape the admissions, it casts no light on the correct construction of s 570D.

363 For all these reasons, no error has been demonstrated in the reception by the trial judge of the admissions made by Coates that were not videotaped.

McKinney direction

364 Coates submitted that the trial judge should have given the jury a direction of the kind described in *McKinney v The Queen*[313]:

> "[T]he jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and, accordingly, it is necessary that they be instructed … that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated. Within the context of this warning it will ordinarily be necessary to emphasize the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth. And, of course, the trial judge's duty to ensure that the defence case is fairly and accurately put will require that, within the same context, attention be drawn to those matters which bring the reliability of the confessional evidence into question."

365 The trial judge directed the jury as follows on the non-videotaped admissions. He reminded the jury that the relevant discussion had lasted three quarters of an hour. He said that that was a period of time which counsel for Coates:

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313 (1991) 171 CLR 468 at 476 per Mason CJ, Deane, Gaudron and McHugh JJ.

> "particularly invites your attention to as saying it's far too long a break to be accommodated by the sort of discussion which police officers say occurred and the events which police officers say happened during that period."

He directed the jurors that they would want to give that "some consideration". He then said:

> "You will make your own judgment who asks for [the break]. It's asked for apparently as a toilet break and then it occurs."

He then summarised the evidence of the four police officers and the evidence of Coates, and said that the competing versions had to be measured carefully against each other. He pointed out that the police officers had not kept any notes made at the time and had testified without any aid to recollection. He then said, in a passage to which counsel for Coates directed specific criticism:

> "A question that might arise is whether you think that [Coates's] evidence may be right and the officers might be mistaken about what occurred, but you might find that a very difficult proposition and the question might well be, the simple question, who is telling the truth and who is committing perjury in this court in relation to what occurred at that time?"

366 He then said that the real question was whether they accepted the evidence of the police officers, that it was not necessary for them to believe Coates, and that it sufficed if they thought his evidence "may be true". He said that on the evidence of the police officers, the jury might think that Coates had made "implied admissions of guilt", including conscious dishonesty on his part. He continued:

> "[I]t's perfectly clear that if you took that to be a lying process, if I can describe it in that way, to sum up the nature of the process, alone on that basis you could not convict Coates of any offence.
>
> Its real significance would be the extent to which his behaviour in that way is so revealing of a consciousness of guilt as to provide support for the truth and accuracy of Davis's evidence when he implicates Coates. It remains the case, I think, that you keep coming back to Davis and the need to rely upon him if you are to establish guilt and make decisions about guilt in this context as well as in relation to other accused persons."

367 Two criticisms were advanced by Coates. The first was that what he called a "*McKinney* direction" should have been given and was not given. The second was that the passage in which the trial judge referred to perjury was sufficiently flawed to justify the allowing of the appeal.

368 The first criticism fails. According to the majority in *McKinney v The Queen*, the direction called for should be given where two conditions are satisfied. One is that the confession is "the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt"[314]. The second is that the making of the confession is not reliably corroborated. If the passage quoted above from *McKinney v The Queen* were to be treated as a statute, or even as a canonical statement of the common law, and construed with precision, it would not apply here, because the evidence of Hawley about the admissions he heard was corroborated by Hutchinson, and vice versa; and the evidence of Kays as to the admissions he heard was corroborated by Byleveld, and vice versa. However, it is not desirable to construe the passage as if it were a statute. Other passages in the reasons for judgment of the majority reveal that the Court was troubled about the risk of collaboration by police officers[315]. In these circumstances, the word "corroborated" should perhaps not necessarily be given its normal meaning. But the other condition, that the confession be "the only (or substantially the only) basis" for finding guilt cannot be explained away or read down. Counsel for Coates submitted that it was only "an example given in that case". That is incorrect.

369 The condition was not satisfied here. In the case of Coates, the evidence against him included that of Davis – a witness whose background, behaviour and position left him open to be disbelieved, certainly, but whose evidence was available to be accepted. The evidence against Coates also included admissions made by him in the videotaped parts of the questioning, not only in the form of lies but also in the form of knowledge of the expressed desire of Coates and Nicholls to kill the victim. Coates had a motive to kill the victim – to silence the only eye witness against him and Hoy in pending criminal proceedings. He expressed anger at the victim, and feared that her evidence could lead to him having to serve three or four years' imprisonment. He had an opportunity, demonstrated by telephone records and by admissions, to kill the victim: he was near the scene of the murder at the time it took place. Davis's evidence about what happened was confirmed by medical and forensic evidence, even though it did not directly implicate Coates. While explanations were advanced in the course of the trial in order to nullify the effect of these categories of evidence, they were capable of being accepted by the jury, which meant that neither the non-videotaped admissions nor the evidence of Davis stood alone.

370 Further, the trial judge twice pointed out that, in isolation, the non-videotaped admissions did not form a basis on which Coates could be convicted.

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314 (1991) 171 CLR 468 at 476.

315 (1991) 171 CLR 468 at 476-477.

That was stronger than the type of direction described in *McKinney v The Queen*. That type of direction, while centring on the "dangers involved in convicting", assumes that once the dangers have been properly considered it is *open* to the jury to convict on the admissions. But the direction that the trial judge here gave was that the jury *could not* convict on the admissions alone.

371 To hold that the kind of direction now called for by Coates was mandatory would involve a very substantial change in the law. Nothing in the reasoning in *McKinney v The Queen* or in the arguments advanced by Coates suggests that that change should be made.

372 The fundamental obligations of a judge instructing a jury are well known. The trial judge must decide what are the real issues in the case, and then tell the jury, in the light of the law, what those issues are[316].

373 There may now be a question whether the warning described in *McKinney v The Queen* is now appropriate at all. At the time it was decided, only one Australian legislature had attempted to deal with the problems to which the Court in *McKinney v The Queen* was directing its attention. Now that all Australian legislatures have devised solutions in their own differing ways, it is not clear that the direction described in *McKinney v The Queen*, in its precise terms, continues to have the same work to do. A competing consideration is that while the dangers that troubled the majority in *McKinney v The Queen* have generally been reduced by legislation, so far as they remain in particular cases, a warning is still called for. However, the question need not be decided in this case, for the reasons already given.

374 Where there is a real issue about whether evidence of non-videotaped admissions should be accepted, the trial judge may find it appropriate to draw attention to the particular difficulties that may affect acceptance of police evidence about non-videotaped admissions, even if it is not substantially the only evidence against the accused and even if it is corroborated. Whatever duty there was to warn in this case was amply carried out by the trial judge. He pointed to the key problems in accepting the testimony of the police officers – the lack of notes (as counsel for Coates had requested) and the time difficulty. He reminded the jury of counsel's criticisms along those lines. He also spoke of the need for care. He directed them as to the burden and standard of proof on the issue in a

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316 *Alford v Magee* (1952) 85 CLR 437 at 466; *Melbourne v The Queen* (1999) 198 CLR 1 at 52-53 [143]; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]-[42]; *Zoneff v The Queen* (2000) 200 CLR 234 at 256-257 [55]-[56]; *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [49]; *KRM v The Queen* (2001) 206 CLR 221 at 259 [114]; *Doggett v The Queen* (2001) 208 CLR 343 at 373 [115].

manner which was not complained about. And he directed them that it would not be possible to convict on the non-videotaped evidence alone. These directions reflected the issues that had arisen in the case and gave the jury sufficient guidance about their resolution.

375 The other criticism made concerned the trial judge's references to perjury. Reliance was placed on a statement in *McKinney v The Queen*[317] that a jury should never be directed in terms which suggest that it is necessary to decide whether police officers have conspired to permit perjury. But the trial judge did not suggest that it was necessary to decide that in this case. He said that it "might well be" a question, not that it was. One reason why he chose that language may be that counsel for Coates did not cross-examine the police officers to suggest that they had been engaged in a conspiracy to commit perjury, and had endeavoured to prevent that possibility arising as an issue.

376 There is a further reason for rejecting both criticisms of the trial judge's directions in relation to the non-videotaped admissions. Before the summing up, counsel were asked if they wished to propose any particular directions. Counsel for Coates did not propose any directions on this subject beyond two suggestions, both of which the trial judge took up – one about the police officers' want of notes, and another about summarising the competing bodies of evidence. After the summing up, counsel spent a considerable time asking for further directions. None were sought on this topic. There is no requirement in Western Australia that leave must be obtained to take a point on appeal which was not taken at trial. However, the things that happened before, and the things that did not happen after the summing up, suggest that counsel for Coates was of the view that the summing up had not unfairly disadvantaged Coates. Because of her familiarity with the context and atmosphere of the trial, she was much better placed than anyone else (and in particular much better placed than her successors or this Court) to judge that question. The fact that no redirection was sought correcting the initial directions suggests that the initial directions were not in need of correction. It may also suggest that counsel elected not to seek a more favourable direction because to do so might have had the disadvantage of highlighting and reminding the jury of the admissions made. The failure to complain is particularly significant in relation to the second of Coates's criticisms, because another way of putting that criticism, if it were sound, is that it reversed the burden of proof. The fact that counsel did not complain about what, if the criticism were sound, would be a very fundamental matter, suggests that it is not sound.

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317 (1991) 171 CLR 468 at 477.

Hayne J
Heydon J

Orders

377 Both appeals should be dismissed.