# HIGH COURT OF AUSTRALIA

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

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**Matter No M144/2006**

LEMALUOFUIFATU ALIPAPA TOFILAU — APPELLANT

AND

THE QUEEN — RESPONDENT

**Matter No M145/2006**

MATTHEW JOSEPH MARKS — APPELLANT

AND

THE QUEEN — RESPONDENT

**Matter No M146/2006**

SHANE JOHN HILL — APPELLANT

AND

THE QUEEN — RESPONDENT

**Matter No M147/2006**

MALCOLM JOSEPH THOMAS CLARKE — APPELLANT

AND

THE QUEEN — RESPONDENT

*Tofilau v The Queen*
*Marks v The Queen*
*Hill v The Queen*
*Clarke v the Queen*
[2007] HCA 39
*30 August 2007*
M144/2006, M145/2006, M146/2006 & M147/2006

**ORDER**

*Each appeal is dismissed.*

On appeal from the Supreme Court of Victoria

**Representation**

O P Holdenson QC with L C Carter for the appellants in M144/2006 & M146/2006 (instructed by Victoria Legal Aid)

P F Tehan QC with C B Boyce for the appellant in S147/2006 (instructed by Ronald V Tait)

G J Lyon SC with M J Croucher for the appellant in S145/2006 (instructed by Victoria Legal Aid)

P A Coghlan QC with J D McArdle QC and S B McNicol for the respondents (instructed by Solicitor for Public Prosecutions (Vic))

## CATCHWORDS

### Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v The Queen

Criminal law – Evidence – Confessions and admissions – Scenario evidence – Undercover police officers posing as a criminal gang used scenarios involving staged criminal conduct to gain the trust of persons suspected of committing a serious crime – On condition that the person tell the gang boss the truth about his prior criminal activity, the gang boss offered that person membership of the gang with concomitant material benefits and the prospect of illegally avoiding prosecution for prior crimes – Whether the resulting confessions were admissible.

Criminal law – Evidence – Confessions and admissions – "Inducement rule" – History of the "inducement" requirement – Whether the promises made to the confessionalists were "inducements" – History of the "person in authority" requirement – Whether undercover police officers posing as gang members were "persons in authority" – Whether a person who represented himself as having the capacity to influence illegally a criminal prosecution was a "person in authority" – Whether a person must be known by the suspect to have actual lawful authority to influence the course of the prosecution to be a "person in authority".

Criminal law – Evidence – Confessions and admissions – "Basal voluntariness" – History of the "basal voluntariness" rule – Meaning of "voluntariness" – Whether the use of deception by the police obviated "voluntariness" – Whether inducements obviated "voluntariness" – Whether in the circumstances the confessionalists' wills were overborne – Relevance of analogy to "duress".

Criminal law – Evidence – Confessions and admissions – Discretionary grounds for exclusion – "Public policy" discretion – Whether the use of deception by the police was improper.

Criminal law – Evidence – Confessions and admissions – Discretionary grounds for exclusion – Unfairness discretion – Whether in all the circumstances it was unfair to the confessionalist to use against him a confession obtained by police deception.

Criminal law – Evidence – Confessions and admissions – Discretionary grounds for exclusion – Prejudice discretion – Whether the prejudicial impact of the circumstances in which the confession was obtained was greater than the probative value of the confession.

Criminal law – Evidence – Confessions and admissions – Discretionary grounds for exclusion – Reliability discretion – Whether the circumstances in which the confession was made rendered the confession inherently unreliable.

Words and phrases – "basal voluntariness", "duress", "free choice", "inducement", "oppression", "overborne", "person in authority", "right to silence", "scenario evidence", "scenario techniques", "unfairness", "voluntary".

*Evidence Act* 1958 (Vic), s 149.

1 GLEESON CJ. The appellants were suspected of having committed serious and violent crimes (murder). They were tricked by undercover police officers, posing as criminals, into confessing. They were tried and convicted. Their confessions were received in evidence. The technique of deception used by the police, and the details of the confessions, appear from the reasons of other members of the Court. The confessions, which were made in circumstances that supported rather than cast doubt upon their reliability, were obviously found by the trial juries to have been true. The issue in these appeals is whether the evidence of the confessions should have been excluded.

2 All four appellants rely upon the rule of the common law that evidence of a confession (the rule covers all admissions, but we are concerned here with admissions that amounted, or for practical purposes amounted, to confessions) may not be received against an accused person unless it is shown to be voluntary. In this context, as in other legal contexts, the word "voluntary" may create uncertainty. There is, however, an aspect of the rule with a more specific focus. A confessional statement will be excluded from evidence as involuntary if it has been obtained from an accused either by fear of prejudice or hope of advantage, exercised or held out by a person in authority[1]. That particular and well-established form of involuntariness was described by Dixon J as "the classical ground for the rejection of confessions and [that which] looms largest in a consideration of the subject."[2] Even so, it does not cover the field.

3 In addition to the rule that requires a trial judge to exclude evidence of a confession that is not voluntary, there are discretionary principles according to which a trial judge may exclude evidence of a voluntary confession. Those principles have been stated in a number of decisions of this Court, and were summarised in *R v Swaffield*[3], by Toohey, Gaudron and Gummow JJ, as covering three classes of case. The first is a case where it would be unfair to the accused to admit the statement. The relevant form of unfairness is related to the law's protection of the rights and privileges of the accused person. The second is a case where considerations of public policy, such as considerations that might be enlivened by improper police conduct, make it unacceptable to admit the statement. The third concerns the general power of a trial court to reject evidence on the ground that its prejudicial effect (that is to say, the danger of its misuse, not its inculpatory force) outweighs its probative value.

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**1** *Ibrahim v The King* [1914] AC 599 at 609.

**2** *McDermott v The King* (1948) 76 CLR 501 at 511-512.

**3** (1998) 192 CLR 159 at 189 [51]-[52].

4 The first two of those discretions were of potential relevance to these cases. They were invoked by the appellants at trial in the Supreme Court of Victoria, and in the Victorian Court of Appeal. The ability to invoke considerations of unfairness, and public policy, in support of an argument for exclusion of confessional evidence in the exercise of a judicial discretion limits the need to go beyond established principle in seeking to characterise the conduct of a confessionalist as involuntary. If what is really meant is that, the confession having been induced by some form of deception, it would be unfair to the accused (in the sense stated above) to receive it in evidence, or contrary to public policy to allow the deception to bear fruit, then existing principle brings discretion into play. There is no occasion to seek to extend the concept of voluntariness beyond its accepted limits in order to accommodate considerations of fairness and public policy. On the other hand, it is understandable that an accused would seek to invoke a rule of mandatory exclusion rather than to rely only upon discretionary judgment. Furthermore, the approach taken by appellate courts to the review of discretionary decisions may make it more difficult for a convicted person to challenge an unfavourable ruling[4]. This consideration will be even more compelling in a second appellate court, where an intermediate appellate court has reviewed, and affirmed, a trial judge's exercise of discretion. These forensic considerations were reflected in the course taken in argument in these appeals. Initially, all four appellants confined their arguments in this Court to the issue of voluntariness: both the narrower, more specific, aspect earlier identified, and the wider, less clearly defined aspect (referred to in argument, adapting an expression used by Dixon J in *McDermott v The King*[5], as "basal voluntariness"). Under pressure of argument, one appellant relied as well on the discretionary principles. Concentrating on the mandatory rule of exclusion avoided the difficulty of overcoming discretionary judgments which had already been affirmed after appellate review. Tactically, it may have suited the appellants not to become too closely involved in the extent to which their complaints could be dealt with on discretionary grounds. In this connection, it is interesting to note the course of argument and decision in the two matters decided in *Swaffield*. Those cases involved confessions obtained by subterfuge and deception. They were dealt with according to principles of discretionary exclusion. If some of the arguments advanced in the present appeals were correct, then *Swaffield* and its related appeal would seem to have been dealt with according to the wrong principle. On the approach of at least three of the present appellants, they should have been dealt with under the rubric of mandatory exclusion of involuntary confessions.

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**4** *House v The King* (1936) 55 CLR 499 at 505.

**5** (1948) 76 CLR 501 at 512.

Two further preliminary matters should be mentioned. First, the common law rules with which we are presently concerned apply, not only to confessions of guilt, but to all admissions sought to be used in evidence against an accused person at trial. Sometimes, an admission may be made in the course of an assertion of innocence. It may be an admission of a fact which is not seriously in dispute, which of itself is not inconsistent with innocence, but which the prosecution could not otherwise prove. The admission may have been made to any manner of person, and in any kind of circumstance. It may have been made in response to a mistake, a misrepresentation (either deliberate or innocent), to the pressure of events or circumstances, or to mere inadvertence. It may have been made in circumstances where issues of legal rights or consequences, or considerations of choice either to speak or remain silent, never entered the mind of the maker. It would be clearly wrong to suggest that the only kinds of admission used in evidence at criminal trials are those made to police officers in a context of a conscious decision not to exercise a "right to silence". Admissions, which may turn out to be very damaging, are often made in circumstances where the maker of the admission is unconcerned with legalities, and may not even realise the significance that later will be attached to what is said. Secondly, the use by the police of deception in the hope of eliciting admissions is not new. The particular technique of deception adopted in the present cases seems to have been imported into Australia from Canada. Since these trials, it has been reported in the media. Presumably, unless Australians suspected of serious crime are unaware of what is contained in the newspapers, it has a limited life expectancy. It would, however, be erroneous to characterise these appeals as raising a completely novel problem demanding reconsideration of established legal principle. The use of undercover police operatives always involves deception. Such operatives are undercover precisely because they are trying to deceive somebody about something. The technique of deception used in *Deokinanan v The Queen*[6], where the police put an accused person's friend in a prison cell with the accused in the hope of obtaining a confession, is common. These days, the friend would probably be equipped with a secret recording device. The Privy Council held that the confession was voluntary and admissible. All forms of covert surveillance, many of them authorised (subject to safeguards, such as a requirement for judicial approval) by statute, involve a kind of deception. Interception and recording of telephone conversations often produces evidence of admissions tendered at a criminal trial, as well as circumstantial or direct evidence of criminal activity. The parties to those conversations speak in the erroneous belief that they are not being overheard. They have no opportunity to consult a lawyer, or to take advice on what they should or should not say. They are not given any warning that what they say may be used against them. They do not waive any right to silence. Yet, if a suspect, in an intercepted and secretly

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**6** [1969] 1 AC 20.

recorded conversation, makes an admission, that admission is ordinarily and rightly regarded as voluntary. At least, it is not regarded as involuntary simply because the person making the admission is the victim of a form of deception.

6 The concept of voluntariness, which is significant in many legal contexts, is protean. This was explained by Windeyer J in *Ryan v The Queen*[7] to be "partly because of ambiguities in the word 'voluntary' and its supposed synonyms, partly because of imprecise, but inveterate, distinctions which have long dominated men's ideas concerning the working of the human mind". Even the use of terms such as "mind" and "will", or "freedom of choice", may provoke scientific or philosophical protest. Generally speaking, however, the law, as a normative science which must evaluate human conduct for practical purposes, accepts certain working hypotheses, one of which is the existence of free will. It judges the conduct of people upon assumptions of personal autonomy that may be rejected by a psychiatrist or a philosopher[8]. Conscious of this problem, judges, when they speak of confessions as voluntary, or involuntary, often seek to explain what they mean. In *Cornelius v The King*[9], Dixon, Evatt and McTiernan JJ gave as an example of an involuntary statement one that is given in consequence of a threat made, or a promise of advantage given, by a person in authority. In the preceding sentence, however, they stated a wider proposition: "If [a statement] is made as a result of violence, intimidation, or of fear, it is not voluntary." Similarly, some years later, in his judgment in *McDermott*, Dixon J referred both to the "definite rule" excluding statements resulting from threats or inducements by persons in authority, and also to a wider concept. He said that to say that a statement has been voluntarily made means "that it has been made in the exercise of [a person's] free choice". He amplified this: "If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary."[10]

7 An example of the dangers involved in giving a broad and colloquial meaning to the concept of voluntariness is provided by cases dealing with the admissibility of statements made by people under a legal obligation to answer questions. The courts have rejected arguments that such statements, not being made in the exercise of a free choice to speak or remain silent, were involuntary.

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**7** (1967) 121 CLR 205 at 244.

**8** cf *Azar* (1991) 56 A Crim R 414 at 418-419.

**9** (1936) 55 CLR 235 at 245.

**10** (1948) 76 CLR 501 at 511.

One such case was *R v Kempley*[11], where the Court of Criminal Appeal of New South Wales held that admissions made under compulsory interrogation pursuant to certain regulations could be received in evidence in a later prosecution, and were not involuntary. The case went to this Court, where special leave to appeal was refused. Latham CJ said[12]:

> "The reasons for excluding statements obtained from accused persons by inducements consisting in a threat or promise by a person in authority were that it was probable that statements so induced might be false, and further that it was improper for such persons to use their authority to bring about confessions by accused persons. But it could not be held by a court of law that compliance with a law requiring true answers and designed to elicit true answers should be assumed to be likely to produce false answers ... Thus it could not be said that the calling of the attention of a person to a duty imposed upon him by law to answer truly was a threat or was improper in any sense."[13]

8 That reasoning is directed to the narrower, "definite" rule, rather than the wider concept of voluntariness, but the outcome of the case is instructive. Latham CJ's identification of considerations of reliability as the primary, but not the sole, rationale for the exclusion of involuntary statements is consistent with history and authority. The addition of the reference to impropriety in the form of abuse of authority to extract confessions is interesting in the light of later High Court authority, such as *Bunning v Cross*[14] and *Swaffield*, concerning discretionary exclusion.

9 Statements often are made under weaker, but nevertheless real, forms of legal compulsion. Membership of a professional association, for example, might oblige a person to answer questions posed by a governing professional body. Again, a person may be under a contractual obligation to furnish information to another. A recent example in the New South Wales Court of Criminal Appeal is *R v Frangulis*[15], where the owner of a building destroyed by fire was advised by his solicitor that he was required by an insurance policy to provide information to the insurance company about the circumstances of the fire. The information

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**11** (1944) 44 SR (NSW) 416.

**12** *Kempley v The King* (1944) 18 ALJ 118 at 122.

**13** See also *R v Travers* (1957) 58 SR (NSW) 85; *R v Zion* [1986] VR 609.

**14** (1978) 141 CLR 54.

**15** [2006] NSWCCA 363.

provided did not involve a confession of guilt, but it contained admissions which were later used in evidence against the insured, who was convicted of arson. It could hardly be denied that such admissions were voluntary, but there was, no doubt, a sense in which the insured's freedom to speak or to remain silent was, or was at least perceived by the insured to be, impaired.

The "definite" rule

10 Reference has been made above to the passage in his judgment in *McDermott* in which Dixon J referred to the general requirement of voluntariness for the admissibility of confessional statements and then added that it was "also a definite rule" that a statement cannot be voluntary if it is preceded by an inducement held out by a person in authority. The context reveals that Dixon J used the word "definite", not for emphasis, but as meaning precise or specific, in contrast to the general and less specific principle to which he had earlier referred.

11 The first argument of each of the appellants in the present case was based upon this definite rule. The confessions made by the appellants were procured by inducements held out to them. The question is whether the people who held out the inducements, police officers posing as criminals, were persons in authority. This question was considered recently by the Supreme Court of Canada, in a case indistinguishable from the present, *R v Grandinetti*[16], and answered in the negative. The decision was unanimous. The reasons of the Court were delivered by Abella J. This Court, of course, is bound to form its own opinion on the matter, but the reasons of Abella J are persuasive.

12 A similar question had been considered previously by the Supreme Court of Canada. In *R v Hodgson*[17], seven members of that Court gave the same rationale for the rule of exclusion as had been given in this Court by Latham CJ in *Kemplay*; concerns about unreliability (false confessions) and the need to guard against improper state coercion. Citing *Hodgson*, Abella J said in *Grandinetti*[18]:

> "The underlying rationale of the 'person in authority' analysis is to avoid the unfairness and unreliability of admitting statements made when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state."

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**16** [2005] 1 SCR 27.

**17** [1998] 2 SCR 449.

**18** [2005] 1 SCR 27 at 38 [35].

13 It was conceded in *Grandinetti* that undercover police officers are usually not persons in authority within the rule, because the critical element is the perception of the person making the statement. That concession also represents the law in Australia. The unusual feature of *Grandinetti*, and of the present cases, is that the undercover police officers, although posing as persons who were not persons in authority, represented that they had influence with other persons who could influence the investigation and prosecution of the relevant offence. The representations expressly or by implication indicated that those whom the undercover officers could influence were themselves corrupt. The belief of the maker of the confessional statement was that he was being offered inducements, not by police officers, but by criminals who were in a position to influence certain corrupt police officers. The Supreme Court of Canada held, and I respectfully agree, that in such circumstances "the state's coercive power is not engaged."[19] The appellants did not believe the makers of the inducements to be persons in authority, or to be acting as agents of persons in authority. Their supposed capacity to exercise corrupt influence over others who were persons in authority does not alter their character as understood by the appellants. A representation (true or false) as to a capacity to influence corrupt officials could be made by anybody, but it would not constitute the maker of the representation a person in authority. The definite rule does not avail the appellants.

The wider principle

14 In view of the obvious possibility that this Court would reach the same conclusion as the Supreme Court of Canada in *Grandinetti*, the appellants next supported mandatory exclusion of their confessional statements by reference to the wider principle, which they called "basal voluntariness". This was a reference to a fundamental principle concerning voluntariness, of which the "definite rule" considered above is a particular, although the most common, application.

15 It may be that the definite rule ought to be regarded as a response of the law of evidence to some extent analogous to the response of the law of contract to problems of defining voluntariness when dealing with questions of duress. In *Barton v Armstrong*[20], Lord Wilberforce and Lord Simon of Glaisdale said:

> "The action is one to set aside an apparently complete and valid agreement on the ground of duress. The basis of the plaintiff's claim is,

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**19** [2005] 1 SCR 27 at 42 [44].

**20** [1976] AC 104 at 121 (references omitted).

> thus, that though there was apparent consent there was no true consent to the agreement: that the agreement was not voluntary.
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> This involves consideration of what the law regards as voluntary, or its opposite; for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained – advice, persuasion, influence, inducement, representation, commercial pressure – the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress – threat to life and limb – and it has arrived at the modern generalisation expressed by Holmes J – 'subjected to an improper motive for action'".

16 The common law of evidence in Australia has treated the definite rule as a specification of a particular form of conduct, involving the application of a certain kind of coercive force external to a confessionalist, which it will not accept as a reason for voluntary action. At the same time, it has declined to limit itself by treating that as the only form of conduct that will destroy or overwhelm the freedom of choice which it considers necessary to make conduct voluntary. (Some Australian jurisdictions have enacted legislation which deals somewhat differently with the matter of admissions, but such legislation is not of present concern.)

17 The law treats as voluntary a great deal of conduct about which a person, speaking colloquially, may say that he or she had no choice. Since the original rationale for the principle of exclusion of involuntary statements was concern about the unreliability of statements made under coercion, that will sometimes be a useful guide in making a judgment about what kind of conduct will be taken to render a statement involuntary. It is, however, of no assistance to the appellants in this case, because the deception practised upon them was not such as was likely to elicit a false confession.

18 To the extent that abuse of the state's coercive authority is another part of the rationale for the exclusionary rule, there are two difficulties for the appellants. The first has already been mentioned in dealing with the definite rule: the appellants thought they were talking to criminals, not police officers. The second is that deception is a very common method of seeking to obtain confessions from people suspected of crime. For most of the twentieth century, the *Crimes Act* 1900 (NSW), in s 410, excluded evidence of confessions induced

by untrue (meaning deliberately false[21]) representations made by persons in authority. That legislation was unusual, and went beyond the common law. Thus, in Adams, *Criminal Law and Practice in New Zealand*[22], the following appeared:

> "The mere fact that a confession, otherwise voluntary, has been obtained by artifice, misrepresentation, breach of faith, or other underhand means, will not render it inadmissible. In New South Wales, under s 410 of the Crimes Act 1900, a confession is inadmissible if induced by any untrue representation made by the prosecutor or a person in authority. But no trace of any such rule is to be found in England or New Zealand."

19 Since possible forms of deception are bounded only by human imagination, and human gullibility, it would be dangerous to assert that no form of deception could deprive conduct of its voluntary character. Most deception used in the hope of eliciting admissions, however, including the form used in the present case, is calculated to induce a person to choose to reveal information that otherwise would be concealed. The appellants were subjected to powerful psychological pressure, but it is not unusual for people to reveal old secrets under pressures that are no less compelling. The law attempts to distinguish between external pressures and pressures personal to the confessionalist[23]. That itself may be a distinction based on pragmatic rather than scientific considerations. The effect of external forces and circumstances on an individual is likely to depend on characteristics personal to the individual. That which a person of one disposition may regard as unbearable pressure may be a matter of indifference to another. The physical or emotional characteristics of a person, or that person's background or circumstances, will always be material to the effect of externally imposed pressure. The burden of guilt may weigh heavily on one person but may be borne lightly by another.

20 References were made in argument to the appellants' "right to silence", and to the effect on that right of the techniques adopted by the undercover police. As Lord Mustill pointed out in *R v Director of Serious Fraud Office, Ex parte Smith*[24], that expression "refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute." It is not a single principle.

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**21** *R v Connors* (1990) 20 NSWLR 438.

**22** 2nd ed (1971) at 988.

**23** *Collins v The Queen* (1980) 31 ALR 257 at 307 per Brennan J.

**24** [1993] AC 1 at 30.

It is a convenient shorthand reference to a collection of principles and rules, some substantive and some procedural. If it is said that there has been an infringement of a person's right to silence, then it is usually necessary to identify the particular legal rule involved and to explain the nature of the infringement by reference to that rule. The tendency in argument in the present case was to use the shorthand description to create an aura of inviolability around the appellants' guilty secrets, and then to take the further step of characterising the tricking of the appellants into deciding to reveal those secrets as an overbearing of the will.

21 In answer to this line of reasoning it must again be observed that many forms of undercover police activity, and of covert surveillance, involve attempts to gain information from people who, if they were aware of what was going on, would remain inactive or silent. There is a sense in which it can be said that intercepting a telephone conversation, or secretly recording an interview, always deprives a person of the opportunity to remain silent in circumstances where, if the person had realised that he or she was under observation, the person would have remained silent. That does not mean that there has been an infringement of one of the legal rules which together make up the right to silence. Nor does it mean that what is being said in the conversation is involuntary. The argument seems to equate the right to silence with a right of privacy, and to treat as involuntary any statement that is made without a fully-informed appreciation of the possible consequences. Neither step is consistent with legal principle.

22 In *Basto v The Queen*[25], Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ described s 410 of the *Crimes Act* 1900 (NSW) as a "statutory extension of ... common law doctrine". Yet if the argument for the appellants in the present case were correct it was not an extension at all; fraudulent misrepresentations would vitiate consent and result in involuntariness. The argument for the appellants proves too much. If the deception practised upon the appellants rendered their statements involuntary, then many other forms of deception to which people suspected of crime are subjected will have the same consequence. The wills of the appellants were not overborne. Their statements were, in a legal sense, voluntary.

23 There remain, however, the discretionary grounds relied upon by one appellant. There, questions of unfairness, including unfair derogation from legal rights, and matters of public policy, including an evaluation of police conduct, are important.

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**25** (1954) 91 CLR 628 at 640.

Discretion

24 The discretionary arguments were strongly relied on by all appellants at trial and in the Court of Appeal. However, appellate review of judicial discretion, in accordance with the principles stated in *House v The King*[26], is not at large. I agree with what is said on the subject in the reasons of Callinan, Heydon and Crennan JJ and have nothing to add.

Conclusion

25 The appeals should be dismissed.

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**26** (1936) 55 CLR 499.

26 GUMMOW AND HAYNE JJ. Undercover police, posing as criminals, tell a murder suspect that, to join their gang and profit from their activities, he must tell their boss the truth about his involvement in the murder. They tell him that, if he does that, the boss can and will make any problems "go away". The undercover police play out various scenarios designed to show the suspect how successful and powerful they are as criminals. Any initial protestations of innocence by the suspect are met with insistence upon the need to tell the truth because charging and conviction are inevitable if the gang's help is rejected. Is the suspect's subsequent confession to those who play the roles of boss and gang members a voluntary confession?

27 This is the central issue that arises in each of these appeals. Although the facts of each case differ in their detail, they raise the same legal issue, and it is to be resolved in the same way. In each case the appellant's confession was rightly held in the courts below[27] to have been made voluntarily.

28 There are three separate, but overlapping, inquiries that may have to be made in deciding whether evidence of an out-of-court confessional statement is admissible[28]. First, there is the question, commonly described as a question of "voluntariness", presented when the confession in issue was made to someone identified as a "person in authority". Second, there may be the consideration of exclusion of evidence of the confession based upon notions of "basal voluntariness"[29]. Finally, there is the discretion to exclude evidence of the confession for reasons of fairness, reliability, probative value or public policy[30].

29 The first question, the question of "voluntariness", requires examination of whether the statement in issue was made to a person known or believed by the speaker to be a person in authority. In the present cases, because each appellant neither knew nor believed that those to whom he was speaking were police (or other persons having lawful authority to affect the course of the investigation of

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**27** *R v Tofilau* (2003) 13 VR 1; *R v Tofilau (No 2)* (2006) 13 VR 28; *R v Hill* [2004] VSC 293; *R v Hill* [2006] VSCA 41; *R v Clarke* [2004] VSC 541; *R v Clarke* [2006] VSCA 43; *R v Marks* (2004) 150 A Crim R 212; *R v Marks* [2006] VSCA 42.

**28** *R v Swaffield* (1998) 192 CLR 159 at 188-189 [50]-[52] per Toohey, Gaudron and Gummow JJ.

**29** *McDermott v The King* (1948) 76 CLR 501 at 511-512 per Dixon J.

**30** *Swaffield* (1998) 192 CLR 159 at 188-189 [50]-[52], 197 [78] per Toohey, Gaudron and Gummow JJ.

or prosecution for the offence to which the confession related) the particular rules about confessional statements to persons in authority were not engaged.

30 The central inquiry in each of the present cases concerns the second question – the question described as "basal voluntariness". In none of the present cases was there compulsion of the kind that would deny "basal voluntariness". In each case, the appellant could and did choose not only whether to say anything about the murder, but also what he said about that subject. That he spoke at all because he thought that he would profit from doing so does not mean that he was not free to choose whether he spoke or remained silent about the murder. His statements were made voluntarily.

31 In only one of the present cases (the matter of *Clarke*) was it submitted that it was necessary to consider the third issue which may arise in connection with confessions – the discretion to exclude evidence of the out-of-court statement alleged to constitute or contain a confession. It was said, in *Clarke*, that the confession to undercover police should have been excluded because it was unfairly or inappropriately obtained by or on behalf of investigating authorities. This contention should be rejected.

32 It is convenient to turn at once to a consideration of the origin and content of the applicable principles. Once that is done, so much of the facts of the individual cases can be set out as is necessary to permit consideration of the application of those principles.

Some important matters of history

33 Proper understanding of the principles governing "voluntariness" and "basal voluntariness" requires some understanding of the history of the development of the common law rules about the admissibility of evidence of out-of-court confessional statements.

34 The common law rule excluding evidence of certain out-of-court confessional statements was originally founded only in considerations of the reliability of the evidence. The rule was predicated upon the presumption that only a voluntary confession is reliable. The essential premise was that a person does not act against self-interest. In the 18th century, reliability was understood to be the only rationale for the rule. So much was made clear in *R v Warickshall*[31] where it was said that:

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**31** (1783) 1 Leach 263 at 263-264 [168 ER 234 at 234-235].

> "It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. *Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit.* A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." (emphasis added)

The 18th century focus upon reliability is confirmed when it is noticed that, in *Warickshall*, the principle that was stated was expressly confined to the exclusion of evidence of what had been said by the accused. The Court in *Warickshall* went on to say[32] that:

> "This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; *for a fact, if it exist at all, must exist invariably in the same manner*, whether the confession from which it is derived be in other respects true or false." (emphasis added)

35 Subsequent development of the common law regulating the exclusion of evidence of out-of-court confessions was, at least for a time, informed wholly by considerations of reliability. Much of that development of the common law was directed to articulating the circumstances in which evidence of statements made to persons in authority were to be excluded. But it is important to recognise that "voluntariness" was used at this time as the means of determining whether the evidence was not so unreliable that it should be excluded from consideration by the jury. That is, a class of cases was identified in which evidence of what had been said out of court was to be rejected because, as a class, those cases were thought likely to have produced an unreliable confession. Voluntariness, for its own sake, had no significance.

36 These early developments of the law relating to confessions had little if anything to do with the privilege against self-incrimination. The development of

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**32** (1783) 1 Leach 263 at 264 [168 ER 234 at 235].

the law relating to that privilege had separate roots and developed independently[33].

37 The law, as understood in the middle of the 19th century, was stated in the first edition of Best on Evidence, published in 1849, as being[34] that:

> "Self-disserving evidence is not always receivable in criminal cases, as it is in civil. There is this condition precedent to its *admissibility*, that the party against whom it is adduced must be shown to have supplied it *voluntarily*, or at least *freely*. ... [T]he law on the subject as it stands at present is merely that every confession or criminative statement of any kind, which either has been extracted by any species of physical torture, coercion, or duress of imprisonment; or been made in consequence of inducements held out to the accused, by any person in whose custody he is, or who has any lawful authority, judicial or otherwise, over his person or the charge against him, ought to be rejected."

38 This statement of the law was not inconsistent with what Parke B was to say, a few years later, in *R v Baldry*[35]:

> "By the law of England, in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession."

39 The way in which the requirement of an inducement by a person in authority had been understood before the decision in *Baldry* was not then without controversy. Not least was that so because cautions against saying anything in response to official questioning had been held[36] to be a form of inducement. In *Baldry*, Parke B said[37] that the rule about inducements had "been extended quite too far, and that justice and common sense have, too frequently, been sacrificed

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**33** Morgan, "The Privilege Against Self-Incrimination", (1949) 34 *Minnesota Law Review* 1.

**34** Best, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law*, (1849) at 418-419.

**35** (1852) 2 Den 430 at 444-445 [169 ER 568 at 574].

**36** *R v Drew* (1837) 8 Car & P 140 [173 ER 433]; *R v Morton* (1843) 2 M & Rob 514 [174 ER 367].

**37** (1852) 2 Den 430 at 445 [169 ER 568 at 574].

at the shrine of mercy". But leaving aside these controversies about the particular content that was then given to the rules governing the admissibility of evidence of out-of-court confessional statements made to persons in authority, the rules remained rooted in considerations of reliability. Indeed the burden of the criticism made by Parke B in *Baldry* of earlier decisions about what was an inducement by a person in authority was that the consequence of the earlier decisions was to exclude evidence that was not likely to be unreliable.

40 The way in which Parke B stated the rule in *Baldry* was consistent with the need to make a distinct inquiry about "basal voluntariness". And that understanding of the rule stated by Parke B would have been consistent with what had earlier been written on the subject in the first edition of Best on Evidence. But subsequent developments in the law relating to confessions suggest strongly that the rules stated by Parke B were later understood as a single rule concerned only with statements to persons in authority. Indeed it is the statement of Parke B in *Baldry* that has subsequently been identified[38] as the point at which the requirement of an inducement by a person in authority became an essential part of the test. And, as will later appear, it was not until this Court's decision in *McDermott v The King*[39] that the overarching principle of voluntariness was again identified as encompassing the consideration of not only inducements offered by persons in authority but also "basal voluntariness". Yet it is to be observed that the formulation in successive editions of Best on Evidence of the relevant principles remained substantially unchanged through the latter half of the 19th century and into editions published as late as 1922[40].

41 The rule about confessional statements to persons in authority remains. A confession made following a promise or threat by a person in authority is inadmissible. As was said in the advice of the Privy Council in *Ibrahim v The King*[41], a case sometimes treated[42] as the origin of much of the modern Australian law relating to the admissibility of confessions[43]:

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**38** See, for example, *Cross and Tapper on Evidence*, 8th ed (1995) at 665.

**39** (1948) 76 CLR 501.

**40** Phipson (ed), *The Principles of the Law of Evidence*, 12th ed (1922) at 472.

**41** [1914] AC 599.

**42** See, for example, *McDermott* (1948) 76 CLR 501 at 503-504.

**43** [1914] AC 599 at 609.

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

Whether, as that opinion suggests[44], the principle "is as old as Lord Hale" need not be considered.

42 In the first part of the 20th century, the rationale for the common law rules excluding evidence of certain out-of-court confessional statements was still understood to be reliability. Wigmore, writing in the second edition of his work on Evidence[45], published in 1923, treated reliability as not simply the central, but the only, rationale for the common law rules relating to confessions. That author said[46]:

> "The principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony. ... This theory, while developing different and inconsistent practical tests at the hands of various Courts, seems to have been generally accepted as the underlying and fundamental principle since the first introduction of any doctrine about the inadmissibility of confessions."

Wigmore denied[47] that the exclusionary rules could rightly be founded in any considerations other than considerations of reliability. He expressly rejected the notions that the rules were to be understood as related to breach of confidence or of good faith, or were to be engaged because of illegality in the method of obtaining the confession, or in the speaker's situation at the time of making it, or because of any connection with the privilege against self-incrimination.

43 Yet it is clear that during the 20th century there was a major conceptual shift in the rationale for the law in this area. First, there was introduced a

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**44** [1914] AC 599 at 609-610.

**45** *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2nd ed (1923), vol 2 at 139-142.

**46** *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2nd ed (1923), vol 2 at 139-140.

**47** *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2nd ed (1923), vol 2 at 142-144.

concern for self-determination as encapsulated by the maxim *nemo debet prodere se ipsum* (no one can be required to be his own betrayer or, in what Lord Diplock said[48] was "its popular English mistranslation 'the right to silence'"). It has been argued that this was a conflation, perhaps based on confusion, of the traditional requirement for voluntariness to determine reliability and the privilege against self-incrimination[49]. Second, there emerged a concern to regulate police conduct by excluding evidence obtained by inappropriate police action. There would seem little doubt that the latter concern was linked to the growth of a professional police force in the latter half of the 19th century and was both reflected in and grew out of the introduction of the Judges Rules in England in 1912[50]. However this may be, by the end of the 20th century, three rationales had been propounded[51] to support the rule excluding evidence of an out-of-court confession made in response to some threat or inducement made or offered by a person in authority: reliability, self-determination and regulation of police conduct.

44 It may be that the way in which the law has developed in other jurisdictions, notably Canada[52] and England[53], before statutory intervention[54], may best be understood as the rearticulation of applicable principles in ways intended to accommodate application of these other rationales to the exclusion of certain kinds of confessional evidence. In particular, the treatment in those jurisdictions of the idea of "inducement" (and, perhaps, "person in authority") may owe much to accommodating principles of self-determination and police

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**48** See, for example, *R v Sang* [1980] AC 402 at 436.

**49** Godsey, "Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination", (2005) 93 *California Law Review* 465 at 477-478; *Bram v United States* 168 US 532 (1897).

**50** Framed or approved by the judges in England, for the guidance of the police in their inquiries: *R v Voisin* [1918] 1 KB 531 at 539; Archbold, *Pleading, Evidence & Practice in Criminal Cases*, 28th ed (1931) at 406.

**51** See, for example, *DPP v Ping Lin* [1976] AC 574 at 595 per Lord Morris of Borth-y-Gest, 607 per Lord Salmon; *Lam Chi-Ming v The Queen* [1991] 2 AC 212 at 217-219.

**52** *R v Hodgson* [1998] 2 SCR 449; *R v Oickle* [2000] 2 SCR 3; *R v Grandinetti* [2005] 1 SCR 27.

**53** *DPP v Ping Lin* [1976] AC 574 at 595 per Lord Morris of Borth-y-Gest, 607 per Lord Salmon; *Lam Chi-Ming v The Queen* [1991] 2 AC 212 at 217-219.

**54** *Police and Criminal Evidence Act* 1984 (UK).

regulation in a single test originally informed only by considerations of reliability. Whether that is so need not be decided.

45 For present purposes, it is important to notice that the common law in Australia has developed in and since *McDermott* by identifying the three overlapping rules mentioned earlier in these reasons. Those rules deal with confessional statements made to persons in authority, but also engage the considerations described as "basal voluntariness" and the application of the discretionary principles earlier mentioned. Because the common law in Australia has developed in this way it is neither necessary nor appropriate to extend the concept of "person in authority" beyond those persons known or believed by the confessionalist to have lawful authority to affect the course of the investigation of or prosecution for the offence in question[55].

46 In the present matters, the focus falls upon "basal voluntariness".

Basal voluntariness

47 It is a definite rule of the common law of Australia that a confession made in response to a threat or inducement by a person in authority is inadmissible. But it is also a definite rule that a confession must be made voluntarily before evidence may be given of it. This latter rule, described as "basal voluntariness", derives directly from the common law principles in *Warickshall* where voluntariness was used as the touchstone of reliability. But that is not to be understood as suggesting that the common law has not been further developed.

48 In his dissenting speech concerning the existence of a defence of duress to a charge of murder, the subject with which the House of Lords was concerned in *Director of Public Prosecutions for Northern Ireland v Lynch*[56], Lord Simon of Glaisdale pointed to the "chaotic terminology" in the classification of conduct as voluntary or involuntary for purposes of the criminal law. His Lordship said[57]:

> "Will, volition, motive, purpose, object, view, intention, intent, specific intent or intention, wish, desire; necessity, coercion, compulsion, duress – such terms, which do indeed overlap in certain contexts, seem frequently to be used interchangeably, without definition, and regardless that in some cases the legal usage is a term of art differing from the popular usage. As

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**55** cf *Grandinetti* [2005] 1 SCR 27 at 39-42 [38]-[44].

**56** [1975] AC 653. *Lynch* was subsequently overruled in *R v Howe* [1987] AC 417.

**57** [1975] AC 653 at 688.

> if this were not enough, Latin expressions which are themselves ambiguous, and often overlap more than one of the English terms, have been freely used – especially animus and (most question-begging of all) mens rea."

49 What can be said for the purposes of the present appeal is that in legal discourse the terms "voluntary", "voluntariness" and cognate terms take their colour from the particular context and purpose in which they are used. Several contrasting examples may be given from the civil and criminal law.

50 In *Ryan v The Queen*[58], Windeyer J, when considering the proposition that the only acts punishable were voluntary acts of the accused, remarked:

> "The word 'involuntary' is sometimes used as meaning an act done seemingly without the conscious exercise of the will, an 'unwilled' act: sometimes as meaning an act done 'unwillingly', that is by the conscious exercise of the will, but reluctantly or under duress so that it was not a 'wilful' act."

51 The plea of non est factum which puts in issue the execution of an instrument by the defendant, who alleges the absence of a consenting mind, is kept within narrow limits to allow for the significance attached by third parties to the presence of a signature upon a document[59]. On the other hand, where an alienation of property is set aside on the ground of undue influence, the law responds to "an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter". The words are those of Dixon J in *Johnson v Buttress*[60]. When Dixon J thereafter in *McDermott*[61] came to deal with "basal voluntariness" in the context of the law of evidence he used, as these reasons will show, different terms.

52 What emerges are two general propositions, supported by what was said by Lord Wilberforce in *Lynch*[62] with reference to *Barton v Armstrong*[63]. The first

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**58** (1967) 121 CLR 205 at 244.

**59** *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 182-183 [48]-[49].

**60** (1936) 56 CLR 113 at 134.

**61** (1948) 76 CLR 501 at 515.

**62** [1975] AC 653 at 680.

is that only some of the means by which consent to act or speak may be obtained are classified unacceptable for the attribution of legal consequences. The second is that what the law accepts in one field of legal discourse it may regard as unsatisfactory in another.

53 When one turns to the common law respecting the inadmissibility of some confessional statements, it must first be said that the common law tests of voluntariness have never required a subjective inquiry into the mind of the confessionalist to determine why it was that he or she made the statement of which evidence is to be given. Rather, subject to what later is said about the discretion to reject confessional evidence, the common law rules have sought to operate by excluding evidence from consideration of the tribunal of fact that is deemed so unreliable as a class that it should not be available for consideration. The exclusionary effect of the rules is important. Although it is for the prosecution to demonstrate[64] that a confession was made voluntarily before it becomes admissible, the rules are essentially exclusionary in character. The rules deal only with the *admissibility* of evidence of out-of-court confessional statements. If the evidence is admitted, it remains open for the confessionalist to argue, and for the tribunal of fact to accept, that, even if the statement was made, it is not reliable.

54 To the extent to which questions of fairness are distinct from reliability, and to the extent to which questions of controlling police conduct and methods are relevant, they are best dealt with under the discretion. Questions of basal voluntariness are to be understood as informed only by considerations of reliability of the evidence concerned. Do the circumstances in which the evidence was obtained fall into the category of cases which the law classifies as so likely to produce unreliable evidence that the evidence should be excluded from consideration by the tribunal of fact? In order to make good the propositions just stated, it is necessary to consider what was said in *McDermott*.

*McDermott v The King*

55 The reasons of Dixon J in *McDermott*[65] have rightly been taken to be the authoritative statement of the common law of Australia on the admissibility of confessions. In *McDermott*, the Court decided[66] that, apart from special statutory

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**63** [1976] AC 104 at 125.

**64** *R v Lee* (1950) 82 CLR 133 at 144.

**65** (1948) 76 CLR 501.

**66** (1948) 76 CLR 501 at 515.

provisions like what is now s 149 of the *Evidence Act* 1958 (Vic), a judge may exclude evidence of a confessional statement if "improperly procured by officers of police" even if "the strict rules of law, common law and statutory," do not require rejection of the evidence. The Court rejected the argument that evidence of a confession had to be rejected if the confession had been obtained in breach of the Judges Rules. But it is in the reasons of Dixon J that there is found reference to the notion of "basal voluntariness" and it is only by close analysis of those reasons that the content of that concept emerges.

56 The overarching common law rule was described[67] by Dixon J as being that "a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made". The rule was amplified[68] in the immediately following sentences:

> "This means substantially that it has been made in the exercise of his *free choice*. If he speaks because he is *overborne*, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of *duress, intimidation, persistent importunity, or sustained or undue insistence or pressure*, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an *inducement held out by a person in authority* and the inducement has not been removed before the statement is made ... An inducement may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority (*Ibrahim v The King*[69]; *R v Voisin*[70])." (emphasis added)

The similarities between this statement of the applicable rules, and the passage quoted earlier from the first edition of Best on Evidence, are evident.

57 The content given by Dixon J, in *McDermott*, to the word "voluntarily" is important. As pointed out above, the overarching principle is that a confession cannot be admitted into evidence unless it is shown to have been made "voluntarily". Both the rules governing the exclusion of evidence of certain confessions made to persons in authority and the principle of "basal

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**67** (1948) 76 CLR 501 at 511.

**68** (1948) 76 CLR 501 at 511.

**69** [1914] AC 599 at 609-610.

**70** [1918] 1 KB 531 at 537-538.

voluntariness" take their place as aspects of this one principle. Both also identify criteria that found a legal conclusion: that the confession was not made "voluntarily".

58 That this is the way in which the rules operate is most obviously apparent in the rule concerning statements made to persons in authority. The particular content that is given to both the concept of "inducement" and the concept of a "person in authority" constitute the criteria that yield the relevant legal conclusion: that the confession was not made voluntarily. But as the reasons of Dixon J in *McDermott* show, application of the rule about "basal voluntariness" also depends upon identifying the criteria that are to found the legal conclusion that a confession was not made "voluntarily". The relevant conclusion is described as the will being "overborne". The circumstances that yield that conclusion, and provide the criteria which govern the availability of the legal conclusion, are described as "the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure". All are species of compulsion.

59 Further refining the content of the criteria that are engaged under the head of "basal voluntariness" must take account of the way in which the tests will fall for consideration. "Basal voluntariness" may be seen as a principle underpinning the whole of the law relating to confessions. But it is a principle that in practice will fall for consideration, if at all, only in cases not concerning a person in authority. The test excluding statements preceded by an inducement in the form of fear of prejudice or hope of advantage held out by a person in authority necessarily excludes confessions in which a person in authority has so acted as to engage the principle of basal voluntariness. For, of course, if a person in authority subjects a suspect to coercion, whether by threats of violence or other intimidatory acts, the rule excluding a confession made to a person in authority in response to an inducement is readily applied. Further questions may then be engaged where the person in authority is an agent of the state. Thus, the conduct of state agents will either be dealt with directly under the rules about statements to persons in authority or, if those rules do not require exclusion of the evidence, circumstances that are said to bear upon reception of the confessional evidence that state agents have obtained can be examined in connection with the exercise of the discretion.

60 Confessions made to someone not known or believed to be a person in authority will thus fall to be considered under the test of "basal voluntariness". Basal voluntariness is concerned with confessions made under compulsion. The key inquiry is about the quality of the compulsion that is said to have overborne the free choice of whether to speak or to remain silent. In this context,

"overborne" should be understood in the sense described[71] by Dixon J as "the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure". It is necessary to focus upon the sufficiency of the compulsion.

61 In *McDermott*, Dixon J treated overbearing of the will separately from the fear of prejudice or hope of advantage. Fear of prejudice and hope of advantage were treated as the two species of the genus of inducements. But, by contrast, overbearing of the will was confined to circumstances like duress. Considerations of a fear of prejudice or the hope of advantage were seen as not only different from an overbearing of the will but also as relevant only to statements made to a person in authority.

62 Rarely, if ever, would the test of "basal voluntariness" exclude confessions where some hope of advantage (as distinct from fear of prejudice) was held out to the person who made the confession. The "basal principle" of which Dixon J spoke[72] is "a principle the application of which is flexible and is not limited by any category of inducements that may *prevail over a man's will*" (emphasis added). But there are few circumstances when an inducement in the form of a promise of advantage will compel a person to speak. Promises of advantage that are not made by a person whom the confessionalist knows or believes to be a person in authority would rarely, if ever, be such as could found the conclusion that the speaker did not have a free choice to speak or remain silent. That is not to say that the promising of an advantage may not bear upon the exercise of the discretion. It may do so.

63 Two further points should be made. The first is negative and identifies what does not suffice to show that the will has been overborne. The conclusion that a confessionalist had no choice to speak or stay silent is not required (and without more being established, would not be open) if it is observed that the confessionalist acted under some misapprehension or mistake, even if that misapprehension or mistake was induced by the person to whom the confession is made. Nor is that conclusion required (and without more being shown the conclusion would not be open) if it is observed that there was some imbalance of power between the confessionalist and the person to whom the confession was made.

64 The second point to make is that the conclusion that a confessionalist had no choice to speak or stay silent is not readily reached where the confession was

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**71** (1948) 76 CLR 501 at 511.

**72** (1948) 76 CLR 501 at 512.

not made to a person whom the speaker knew or believed to be a person in authority. In such a case, absent duress of person or intimidation, it will be necessary to articulate *why* there was no choice. Was the importunity, insistence or pressure so sustained or persistent that there was *no* choice? Why? By hypothesis, the confessionalist did not know or believe that the weight of the state or its agencies bore upon him or her. What, then, is said to have deprived that person of choice? For the basal voluntariness rule to apply it must be possible to identify what it was that is said to have deprived that person of choice.

The discretion

65 In only one of the present cases, the case of *Clarke*, did the appellant submit that the discretion to exclude the confession should have been exercised in favour of its exclusion from evidence. It was submitted that the confession had been inappropriately or unfairly obtained by investigating authorities. This being the particular basis of the appellant's complaint, it is neither necessary nor appropriate to attempt to chart the metes and bounds of the discretion. Only those aspects of the discretion that are relevant to the facts in *Clarke* require application. It is nonetheless important to begin consideration of the application of the discretion by reference to three decisions of this Court – *R v Lee*[73], *Cleland v The Queen*[74], and *R v Swaffield*[75].

66 In *Lee*, the Court decided some questions about the operation of what is now s 149 of the *Evidence Act* 1958 (Vic). Those issues may be put to one side. But the decision in *Lee* is also important for what it decided about the circumstances in which a voluntary confession may be excluded in the exercise of the discretion. The Court discountenanced asking[76], as separate questions, whether a police officer had acted "improperly" and then whether it would be unfair to *reject* the accused's statement. Rather, it was said[77] to be "better to ask whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use his own statement against the accused". And emphasis was given[78] to it being in the interests of the community that all crimes

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**73** (1950) 82 CLR 133.

**74** (1982) 151 CLR 1.

**75** (1998) 192 CLR 159.

**76** (1950) 82 CLR 133 at 154.

**77** (1950) 82 CLR 133 at 154.

**78** (1950) 82 CLR 133 at 155. See also *R v Jeffries* (1946) 47 SR (NSW) 284 at 313.

"should be fully investigated with the object of bringing malefactors to justice, and such investigations [not being] unduly hampered".

67 In *Cleland*[79], a majority of the Court again emphasised the purpose of the rules as to confessions (and in particular the residual discretion) as being to ensure that the accused has a fair trial not, as Gibbs CJ put it[80], "to insist that those who enforce the law themselves respect it". In that regard, Gibbs CJ expressly agreed[81] with what Brennan J had said in *Collins v The Queen*[82] that:

> "it is difficult to conceive of a case ... where a voluntary confession which might fairly be admitted against an accused person would be rejected in the public interest because of unlawful conduct leading to the making of the confession."

68 It is in the setting provided by these earlier decisions of the Court that the decision in *Swaffield* is to be understood. There, in the joint reasons of Toohey, Gaudron and Gummow JJ, it was pointed out[83] that it is not always possible to treat voluntariness, reliability, unfairness to the accused, and public policy considerations as discrete issues. It followed[84] that:

> "The wider the operation given to the principle that, to be admissible, a confession must be voluntary, the less scope there is, in practice, for the exercise of the unfairness discretion. Particularly is that so in relation to improprieties calculated to cause the making of an untrue admission. It may be expected that improprieties calculated to have that effect will often impact on the exercise of a free choice to speak if that notion is given its full effect. However, it will not necessarily be so in every case."

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**79** (1982) 151 CLR 1.

**80** (1982) 151 CLR 1 at 8, quoting from *Bunning v Cross* (1978) 141 CLR 54 at 75 per Stephen and Aickin JJ.

**81** (1982) 151 CLR 1 at 9; see also at 17 per Wilson J, 34-35 per Dawson J.

**82** (1980) 31 ALR 257 at 317.

**83** (1998) 192 CLR 159 at 196 [74].

**84** (1998) 192 CLR 159 at 197 [76].

But as was also pointed out[85], unreliability, although an important aspect of the unfairness discretion, is not the only consideration that may be engaged. Other forms of disadvantage may arise. The circumstances considered by this Court in *Foster v The Queen*[86] and in the Supreme Court of Victoria by Smith J in *R v Amad*[87] are notable instances of such other forms of disadvantage. But the chief focus for the discretionary questions that arise remains upon the fairness of using the accused person's out-of-court statement, rather than upon any purpose of disciplining police or controlling investigative methods.

69 In the further consideration of the questions raised, in *Clarke*, about the refusal of the trial judge to exclude evidence of confessional statements the appellant had made, it will be necessary to examine not only the particular facts of the case that are said to have required the discretionary exclusion of the evidence, but also the principles that are to be applied in the appellate review of that decision. The second of those questions is better left for consideration in conjunction with the application of the principles that have been stated in these reasons to the particular facts of that case.

Tofilau

70 On 29 June 1999, Belinda Romeo was found dead in her unit. She had been dead for some days. She had died by ligature strangulation.

71 On the day after Ms Romeo's body was found, the appellant made a statement to police in which he described having met Ms Romeo about half way through March 1999. They had commenced a sexual relationship and the appellant had moved into Ms Romeo's unit soon after they had met. He said that he had stayed there for two weeks until he left and returned to live with relatives in Carlton. He said that the last time he had seen Ms Romeo was at a club, in the early hours of the morning of Sunday, 20 June 1999. He had subsequently tried to telephone her but with no result.

72 One month later, on 29 July 1999, the appellant was arrested and he took part in a videotape recorded interview at the offices of the homicide squad of the Victoria Police. He denied any involvement in Ms Romeo's death and was released without being charged.

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**85** (1998) 192 CLR 159 at 197 [78].

**86** (1993) 67 ALJR 550 at 554-555; 113 ALR 1 at 7-8.

**87** [1962] VR 545.

73 Little progress was made in the investigation of Ms Romeo's death during the next two years but in November 2001, the investigation took a new turn. Between November 2001 and March 2002, police constructed a series of 16 scenarios in which undercover police operatives, posing as members of an organised criminal gang, interacted with the appellant. The officer in charge of the police team subsequently gave evidence at the appellant's trial that he had been provided with only basic information about the circumstances surrounding the death of Ms Romeo and that very little information was given to the covert operatives. He said that this was done so that leading questions would not be asked by operatives that might affect the reliability of any admissions they obtained and to ensure that they did not inadvertently disclose to the appellant that they knew anything about the matter.

74 It is not necessary to describe the techniques used by the undercover police officers. Considerable emphasis was given to instilling in the appellant a sense of confidence that association with what he was led to believe was a criminal gang would bring not only financial and personal reward but also protection against police investigation. The appellant participated in or observed what appeared to be serious criminal activity by gang members. In fact, the "criminal" activity was staged. From time to time reference was made in conversation between the appellant and members of the gang to the appellant's connection with the death of Ms Romeo. Over time it was made plain to the appellant that it was important that the appellant tell the gang the whole truth about his background. If he did, the problem could be handled.

75 The covert operations culminated in March 2002. Police served a notice on the appellant foreshadowing an application to the Magistrates Court for permission to take a sample from him for DNA analysis. (He had refused to give such a sample when he was interviewed in 1999.) One of the gang members, on being told that the notice had been served, exhorted the appellant to tell the truth. He told the appellant that he did not believe what the appellant had earlier said and that he believed that the appellant had killed Ms Romeo. The appellant then admitted to killing Ms Romeo by strangling her with something she had round her neck. As the trial judge put it[88], the appellant was "effectively persuaded" by one of the covert operatives to give a full and frank account of the killing to the gang's boss.

76 The appellant was then taken to a meeting, in a hotel room, with the man whom he understood to be the "boss". What happened in that room was videotape recorded. The "boss" told the appellant that he did not have to say

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**88** (2003) 13 VR 1 at 6 [15].

anything, that he could "get up and walk out now" but that the "boss" could not help him if he did. The boss went on to say[89]:

> "But we can help you, we can make this go away but you'll have to tell me everything that happened so that I make sure that we cover all the bases."

The appellant then described to the "boss" how he had killed Ms Romeo. He said that he had disposed of the scarf he had used to strangle her by leaving it in a car behind the units where Ms Romeo lived.

77 On the day following this conversation the appellant was arrested, taken to the offices of the homicide squad, and there he participated in a tape recorded interview. He denied that he had been to the hotel but, when the recording was played, he accepted that the voices on the recording that had been made of the conversation at the hotel were his, and that of the "boss". The appellant denied strangling Ms Romeo and said that he had decided to pretend that he had committed a murder so that he could work in the gang.

78 In the course of the interview, the appellant was shown a scarf found in a car behind Ms Romeo's unit. He denied ever having seen it before. It was put to the appellant that he had told the "boss" about throwing the scarf with which he had strangled Ms Romeo into a car at the back of the block of units. He was asked how he could explain how he knew where the scarf had been found if his story about participating in the murder was all an invention. He declined to offer any comment.

79 The trial judge[90] and the Court of Appeal[91] held that what the appellant had said to gang members and the boss were not statements made to a person in authority. These conclusions were correct. During the recorded interview with officers of the homicide squad the appellant said, "I don't know if he's [the boss is] a cop or not."[92] Because the appellant neither knew nor believed that those to whom he spoke had lawful authority to affect the course of the investigation of or prosecution for the murder of Ms Romeo, the rules about confessional statements to persons in authority were not engaged.

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**89** (2003) 13 VR 1 at 6 [15].

**90** (2003) 13 VR 1 at 11 [32].

**91** (2006) 13 VR 28 at 67 [170].

**92** (2006) 13 VR 28 at 47 [84].

80 The trial judge[93] further held that evidence of what the appellant had said in the conversations was not to be excluded as not being made voluntarily. (The better view may be that no distinct point about basal voluntariness was argued in the Court of Appeal, though it is plain that reference was made to the subject.) However this may be, the trial judge's conclusion on that subject was correct.

81 The statements the appellant made to undercover police officers were not made under compulsion. Nothing that was said to or done with the appellant constituted compulsion of a kind that would meet the criteria leading to the conclusion that what was said was not said voluntarily. There was no duress or intimidation. The police operation was elaborate and took place over an extended period. The appellant thought that he would benefit from saying what he did. More than once the appellant was told how important it was that he be frank about his past and about the circumstances of Ms Romeo's death in particular. He was repeatedly told that if he had a problem the boss would make it "go away". But no coercion was applied to the appellant by those to whom he made his confession. There was no importunity, insistence or pressure of a kind exerted by those to whom the confession was made that would found the conclusion that the appellant had no free choice whether to speak or stay silent. Observing that the appellant may have felt under pressure requires no different conclusion. What is important is the absence of coercion by those to whom he spoke. That he may have felt under the pressure that he himself generated by his desire to join the gang and thus gain not only the financial benefits said to follow from that membership but also resolution of what otherwise appeared to be his inevitable prosecution for murder is not to the point.

82 The appeal to this Court should be dismissed.

Marks

83 This appellant was charged with the murder of his great-aunt, Margaret Mary O'Toole. She was found dead in her home on 17 April 2002. She had been beaten to death. In April 2002, the appellant owed more than $28,500 on credit card accounts. His accounts were overdrawn. One creditor had obtained judgment against him. The previous year, in April, the deceased, accompanied by the applicant, had borrowed $28,000, secured by mortgages over certain real estate, for use in a "business investment". There was evidence, and there were admissions made by the appellant, from which it would have been open to the jury to conclude that the appellant had received the money which his great-aunt borrowed. There was evidence of the appellant borrowing other money from her. There was also evidence from which it would have been open to the jury to

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**93** (2003) 13 VR 1 at 16 [51].

conclude that the deceased either had called for repayment of the money lent or proposed to do so.

84 In May 2002, police arrested the appellant, cautioned him, searched his premises, and conducted a videotape recorded interview. He was not then charged with the deceased's murder.

85 Between 25 September 2002 and 27 November 2002 the Victoria Police Undercover Unit conducted an operation of the same kind as has been considered in the matter of *Tofilau*. Again, the operation culminated in an interview with the "boss" of the criminal gang conducted in a hotel room. Again, the "boss" said that he did not care whether the appellant was responsible or not for the death of the deceased but that he needed to know what had happened so that the situation could be "handled". The appellant described to the "boss" how he had killed the deceased and what he had done after doing so.

86 At his trial the appellant submitted that evidence of these statements should be excluded. On the voir dire he adduced evidence from a consulting clinical and forensic psychologist that, in his opinion, the appellant was suffering from a borderline personality disorder as well as a dependent personality disorder and an adjustment disorder, in addition possibly to an anti-social personality disorder. Presumably this evidence was directed to showing what had moved the appellant to say what he did. For the reasons given earlier, the application of the rule about basal voluntariness neither required nor permitted that kind of inquiry. The relevant inquiry was about whether those who had secured the confession had coerced the appellant; it was not about the appellant's state of mind.

87 The trial judge concluded[94] that there was no evidence that the will of the accused was overborne and that the prosecution had discharged the onus of demonstrating basal voluntariness. He concluded[95] that the rule about confessions to persons in authority was not engaged because the person to whom the statements were made was not known or believed to be a person in authority.

88 The appellant's appeal to the Court of Appeal against his conviction on grounds including that the trial judge erred in failing to exclude evidence of the out-of-court confessions to the "boss" was dismissed. For the reasons given in respect of the matter of *Tofilau*, the appeal to this Court should also be dismissed. The statements in issue were not made to a person in authority. They were not

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**94** *Marks* (2004) 150 A Crim R 212 at 224 [70].

**95** (2004) 150 A Crim R 212 at 225 [75].

made under compulsion. No challenge was made in this Court to the failure to exclude them in exercise of the discretion.

Hill

89 On the evening of 17 February 2002 a taxi driver picked up this appellant and his girlfriend, Nicole Green, and drove them to the house in Carrum where the appellant, Ms Green, and the appellant's stepbrother, Craig Anthony Reynolds, lived together. After they had arrived at the house, and the appellant had gone in to fetch money to pay the taxi fare, the appellant summoned the taxi driver into the house. Mr Reynolds lay seriously wounded on the floor. Subsequent examination revealed that he had sustained a fracture to the base of the skull consistent with being struck by a blunt object. Mr Reynolds died a few days later.

90 When first interviewed by police, the appellant described coming upon Mr Reynolds, lying injured. He spoke about what he observed and heard, but said nothing that implicated him in Mr Reynolds suffering the injuries he did. Subsequent investigations by police suggested that the appellant was responsible for Mr Reynolds' death but yielded insufficient evidence to warrant charging the appellant.

91 Investigating officers asked the Victoria Police Undercover Unit for assistance. Between the middle of June 2002 and 6 August 2002 that unit enacted a series of 19 scenarios in which undercover operatives, posing as members of an organised criminal gang, interacted with the appellant. As in the matters of *Tofilau* and *Marks*, emphasis was given to a supposed code of truth, honesty and loyalty between all gang members and the necessity for full disclosure of any past crimes which the police might still be investigating. Again, as in *Tofilau* and *Marks*, the culmination of this aspect of the investigation was a meeting between the appellant and a policeman, posing as the "boss" of the gang. The boss spoke to and secured admissions from the appellant about the death of Mr Reynolds.

92 Again, it is not necessary to describe the scenarios.

93 At his trial, the appellant formally admitted that he had inflicted the injuries on Mr Reynolds which caused his death. In those circumstances, the central issues at the appellant's trial were whether the prosecution established that the appellant had acted with murderous intent, and whether the prosecution excluded provocation.

94 The appellant contended that evidence of the admissions he had made to the undercover policeman who had acted the part of the gang's boss should be excluded. He said that these statements were not made voluntarily. Rather, he

said, they were made because that was what those with whom he was dealing had wanted to hear, and because, by making up the story he did about his involvement in the death of Mr Reynolds, he would be able to participate in proceeds of crime promised to him by members of the gang.

95 The trial judge concluded that the appellant was "not in any sense overborne or having his will affected by that which members of the gang said to him or did in his presence". Rather, the trial judge concluded that "at all times the conversation between [the appellant] and either or all of the police undercover operatives was voluntary and made by him in a free exercise of his will to speak or not to speak". He concluded that neither the "boss" nor any of the other undercover police was a person in authority.

96 On appeal to the Court of Appeal against conviction the appellant's challenges to these conclusions were rejected[96]. The Court of Appeal was correct.

97 The rules about statements to persons in authority were not engaged. The person to whom the appellant made the admissions was not a person whom he knew or believed could lawfully affect the outcome of the investigation of or any subsequent prosecution for the murder of Mr Reynolds.

98 The statements which the appellant made were not made under compulsion. Nothing that was said to or done with him constituted compulsion of a kind that would meet the criteria leading to the conclusion that what was said was not said voluntarily. There was no duress or intimidation. There was no importunity, insistence or pressure of a kind exerted by the person to whom the confession was made that would found the conclusion that the appellant had no free choice whether to speak or stay silent. The evidence of what he had said was rightly admitted at his trial.

99 The appeal to this Court should be dismissed.

Clarke

100 Bonnie Melissa Clarke was aged six years when she died. On the night of 20 December 1982, Bonnie's mother, Marion Wishart, put Bonnie to bed at about 8.30 pm. Next morning she discovered Bonnie, dead in her bed with a stab wound through her chest. She had suffered wounds consistent with her killer attempting to asphyxiate her. She had been sexually assaulted.

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**96** *R v Hill* [2006] VSCA 41 at [98]-[125].

101 The appellant had boarded with Mrs Wishart between January and September 1982. The appellant shared the victim's surname but was not related to her.

102 In March 2002, almost 20 years after the murder, the Victoria Police Undercover Unit began an operation of the same general kind as the operations considered in the matters of *Tofilau*, *Marks* and *Hill*. During the period when undercover police operatives were engaged in playing out various scenarios designed to demonstrate to the appellant their membership of a successful and powerful gang of criminals, an article was published in a newspaper reporting that DNA testing was being used to solve old murders. The article said that police had recommenced their investigation into the case of Bonnie Clarke. The article said that police believed that the killer may have boarded with the child's family before she was killed, and that they planned to interview at least 14 persons who had rented rooms in the house during the three years before the murder. On the following day, an officer of the homicide squad of the Victoria Police went to the appellant's home, spoke to the appellant's partner, and left his business card indicating that he wanted the appellant to contact him.

103 Against this background, the appellant spoke to an undercover police operative whom he believed was a member of the criminal gang, and said that he did not know who killed the child but that he had lived at the house for about nine months as a boarder and knew mother and daughter. The police operative told the appellant that the "boss" could "fix" anything and that he had to be provided with the absolute truth. The appellant then denied, and for some time thereafter continued to deny, any involvement in the death of Bonnie Clarke.

104 In June 2002, the appellant was taken by a gang member to a hotel room to meet the man whom he believed to be the "boss" of the gang. The "boss" emphasised that he had to be able to trust the appellant entirely and explained that the appellant "could not have more police 'heat' on him if he tried". The "boss" produced what appeared to be a three page confidential police report on investigations into the murder of Bonnie Clarke. This was a fabricated document, prepared for the occasion. The document recorded that the appellant was "the only suspect identified by investigators for this crime". It described certain inquiries that were still to be made and said that on completion of those inquiries, approval would be sought from the Director of Public Prosecutions to charge the appellant with the murder.

105 The appellant's first reaction to the document was to say that "it was an accident that she [Bonnie] died". The "boss" assured the appellant that "I can fix it". The appellant then gave a full description of how it was that he had killed Bonnie Clarke. He described what he did after the killing, and in response to further questions put by the "boss", further elaborated on the manner and circumstances of Bonnie's death.

106 The conversation in the hotel room finished at about 6.12 pm. By about 7.15 pm the appellant had been arrested and taken to the offices of the Homicide Squad. At 7.45 pm a videotape recorded interview was conducted. In the course of that interview the appellant acknowledged that he had assaulted Bonnie, smothered her, and had probably stabbed her.

107 At his trial, the appellant submitted that the admissions obtained by the covert police officers should be excluded from evidence, first because the statements had been induced by persons in authority, second because the appellant's will had been overborne, and third because they should be excluded in the exercise of discretion. The trial judge concluded[97] that the covert operative to whom the confession was made was not a person in authority. He further concluded[98] that the appellant had had a choice as to whether he spoke up or did not. (Indeed, the trial judge noted that on the voir dire, the appellant acknowledged that he had had such a choice[99].) In relation to the discretion to exclude the evidence, the trial judge concluded[100] that "on balance ... the means adopted by the covert operatives to elicit the admissions were [not] disproportionate to the purpose, particularly when one considers the seriousness of the crime under investigation". The trial judge further concluded[101] that any forensic disadvantage to the appellant otherwise occasioned by admitting the evidence could be overcome. More generally, the trial judge concluded[102] that "despite some concerns, the conduct of the covert operatives did not cross the line of acceptable conduct and that the admissions made to [one of the covert operatives] on 6 June 2002 should be admitted into evidence so as to enable the jury to assess their probative value". One factor which weighed in the trial judge's conclusions in this last regard was that he considered that the appellant had joined in the criminal activity fabricated by the undercover operatives of his own free will and "with some enthusiasm"[103].

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**97** [2004] VSC 11 at [40].

**98** [2004] VSC 11 at [49].

**99** [2004] VSC 11 at [50].

**100** [2004] VSC 11 at [91].

**101** [2004] VSC 11 at [96].

**102** [2004] VSC 11 at [101].

**103** [2004] VSC 11 at [98].

108 On the issues of "person in authority" and "basal voluntariness", what has been said in relation to the previous matters applies equally to this matter. The statements in issue were not made to a person in authority. The statements were not coerced; they were made voluntarily.

109 In the Court of Appeal, the discretionary questions considered at trial were agitated by reference to three propositions: first, that the statements were made in circumstances that rendered them inherently unreliable and calculated to elicit an untrue admission of guilt. Secondly, it was submitted that the circumstances in which the statements were made must inevitably have caused the appellant to suffer forensic disadvantage because they involved the implication that he had "serious criminal propensities". Thirdly, the admission of the evidence was said to be "both unfair and contrary to public policy". Each of these propositions was rejected by the Court of Appeal.

110 In this Court, the appellant's argument on the discretionary questions emphasised what he identified as the "pressure" placed on him by the covert operative playing the role of the "boss" to confess to the crime. In addition, it was said that the scenario evidence inevitably revealed that the appellant was willing to participate in criminal activity and that revealing that willingness to the jury placed him at a serious forensic disadvantage.

111 The respondent asserted, and the appellant denied, that the appeal against the trial judge's decision not to exercise the discretion to exclude the evidence was to be decided according to the familiar principles stated in *House v The King*[104]. Once it is noticed that the discretion which is to be exercised is, as was said in *McDermott*[105], to be exercised even if "the strict rules of law, common law and statutory," do not require rejection of the evidence, it follows that the respondent's submission should be accepted. The trial judge is to exercise a discretion. That discretion is to be exercised according to principle. The question on appeal is whether the exercise of the discretion miscarried because the judge "acts upon a wrong principle, ... allows extraneous or irrelevant matters to guide or affect him, ... mistakes the facts, [or] does not take into account some material consideration"[106]. (Because the decision will ordinarily be supported by reasons, it is to be assumed that the residual category of cases identified in *House*, where it does not appear how the primary judge reached the result embodied in the order but the result embodied is, upon the facts, unreasonable or plainly unjust, would rarely fall for consideration.)

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**104** (1936) 55 CLR 499 at 505.

**105** (1948) 76 CLR 501 at 515.

**106** *House v The King* (1936) 55 CLR 499 at 505.

112 A number of matters may affect the exercise of the discretion to exclude evidence of a confession which otherwise is admissible. So much is evident from what is said in *Swaffield*. But as noted earlier in these reasons, by reference to the decisions in *Lee*[107] and *Cleland*[108], the chief focus of the discretionary questions that arise remains upon the fairness of using the accused person's out-of-court statement, rather than upon the method of obtaining it. To the extent to which questions of disciplining police or controlling investigative methods are said to be relevant, proper weight must be given to the seriousness of the crime being investigated. Such considerations are relevant to the exercise of the discretion to exclude illegally obtained evidence[109]. The relevance of the seriousness of the crime being investigated can be no less when considering the exercise of a discretion to exclude evidence that has not been unlawfully obtained.

113 In the present matter, the appellant sought to describe the methods employed by investigating police as "improper". That description was given colour and, perhaps, some content, by reference to the playing out of what appeared to be serious criminal activity. But in fact, no crime was committed in the course of the various scenarios conducted by the covert police operatives. The "impropriety" to which the appellant pointed was, in the end, said to lie in the "pressure" that had been applied to him. That "pressure" was constituted by creating in his mind the belief that the only way he could avoid being charged with and convicted of the murder of Bonnie Clarke was to tell the "boss" that he had done it.

114 In the present case there was no reason to doubt the reliability of what the appellant told the "boss". He repeated essentially the same account of events surrounding the death of Bonnie Clarke when he was interviewed formally by the Homicide Squad officers very soon after he had said what he did to the "boss". But leaving this consideration to one side, and confining attention wholly to what was said to the covert police operatives, it was open to the trial judge to conclude, as he did, that the circumstances were not such as to warrant excluding the confession from consideration by the jury. The trial judge considered the significance to be attached to the appellant's participation in the various criminal scenarios that were played out. He concluded that the evidence of those activities

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**107** (1950) 82 CLR 133.

**108** (1982) 151 CLR 1.

**109** *Bunning v Cross* (1978) 141 CLR 54; *Cleland* (1982) 151 CLR 1 at 20 per Deane J; *Pollard v The Queen* (1992) 176 CLR 177 at 202-203; *Ridgeway v The Queen* (1995) 184 CLR 19 at 31; *Nicholas v The Queen* (1998) 193 CLR 173.

did not present forensic difficulties of a kind that required exclusion of the evidence. That conclusion was open.

115 It was not shown that the trial judge acted upon any wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts or failed to take into account some material consideration. It was not shown that the exercise of the discretion miscarried.

116 The appeal should be dismissed.

117 KIRBY J. Four appeals are before this Court. Each challenges the conviction of the appellant of murder. In each trial, the judge admitted prosecution evidence given by undercover police officers. In each case, those police officers gave evidence, over the accused's objection, of confessional statements made to them by the accused in the course of dealings with the officers who were acting out "scenarios". Such "scenarios" were carefully pre-planned and followed a technique known as the "Canadian model"[110]. During an early stage in the proceedings in Victoria in one of the four matters, the Chief Commissioner of Police (Vic) sought to suppress the publication of details of the "scenario technique". This Court, like Canadian courts before it[111], declined to provide the suppression order sought[112].

118 The "scenario" technique used in the cases varied from one instance to the other. The following description accurately captures the main ingredients[113]:

> "Typically, the covert technique begins with an apparently chance encounter between the suspect and an undercover operative posing as some sort of criminal. A relationship is developed between the suspect and the initial contact person, and through that relationship the suspect is gradually drawn into the activities of the criminal gang to which the initial contact supposedly belongs. As the suspect is drawn into the gang, the activities in which they are involved escalate in seriousness, going from collecting money from brothels as part of an apparent protection racket, to acting as a lookout for robberies, to involvement in a violent 'run through' of a supposed drug dealer's home. All of this conduct is staged, all of the participants – apart from the suspect – are undercover police officers and none of the activity is in fact criminal; but the suspect is led to believe that it is."

119 The initial inducement for the involvement of the accused in the "criminal gang" is the prospect of material gain. However, the scenario unfolds so as to

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**110** The methodology was borrowed from Canadian police practice exemplified in *R v Unger* (1993) 83 CCC (3d) 228. See *R v Tofilau* (2003) 13 VR 1 at 11 [34].

**111** *R v Mentuck* [2001] 3 SCR 442; *R v ONE* [2001] 3 SCR 478.

**112** *In the Matter of an Application by the Chief Commissioner of Police (Vic)* (2005) 79 ALJR 881; 214 ALR 422 affirming *Re Applications by Chief Commissioner of Police (Vic*) (2004) 9 VR 275.

**113** Palmer, "Applying *Swaffield* Part II: Fake gangs and induced confessions", (2005) 29 *Criminal Law Journal* 111 at 112 (footnotes omitted).

play on the suspect's *fear* about past criminality and his *hope* that the gang (or its "boss") will be able to "fix up" the reason for that fear[114]:

> "At this point, the suspect will be made to believe that the formal police investigation has been re-activated: for example, the police will write to the suspect seeking a DNA sample. The suspect will then be confronted by his contacts and warned that his past crimes could bring 'heat' onto the gang; but he will also be told that the gang can make the investigation go away. All that the suspect has to do, he will be told, is to tell the truth; indeed, he may be harangued into doing so, or even interrogated. The suspect may initially deny involvement, but as the pressure mounts to 'tell the truth', a confession may be made, partial at first and then in full. At this point, the suspect will be charged, whereupon he may repeat his confession, or may revert to his previous silence, denials or version of events. In either case, the prospects for success of any prosecution are likely to rest very heavily on the question of whether the accused's confession to the undercover operatives is admissible."

120 By these appeals, the four appellants contest the admissibility of the evidence procured by variations on the foregoing "scenario techniques". Each of their cases arose in Victoria. Although it has been suggested that Victoria should adopt the reformed *Uniform Evidence Act*[115], the common law (with its different approach to the issues argued in this appeal[116]) continues to be applicable.[117] However, in one relevant respect, the common law is modified by a provision of the *Evidence Act* 1958 (Vic)[118] ("the Evidence Act") upon which the prosecution relied.

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**114** (2005) 29 *Criminal Law Journal* 111 at 112 (footnotes omitted).

**115** See Victorian Law Reform Commission, *Implementing the Uniform Evidence Act* (2006) at 11 (Recommendation 1).

**116** See reasons of Callinan, Heydon and Crennan JJ ("joint reasons") at [322] describing the different approach taken to the issues by the *Evidence Act* 1995 (Cth) and derivative legislation. The *Uniform Evidence Acts* are in force in New South Wales, Tasmania, the Australian Capital Territory and Norfolk Island. The common law approach has also been abandoned in the United Kingdom: *Police and Criminal Evidence Act* 1984 (UK), ss 76, 78.

**117** The common law principle of voluntariness is expressly preserved in Victoria by the *Crimes Act* 1958 (Vic), s 464J(b).

**118** s 149. See below at [211]-[214].

121 It follows that, whilst in many jurisdictions the law governing the type of issues presented by these appeals has moved towards detailed statutory regulation, these appeals require a belated exploration of common law rules. As this Court pointed out in *R v Swaffield*[119], the common law with respect to the admissibility of confessional evidence has followed a meandering history. It is one that has responded to the changing organisation and functions of police services; changing practices and technologies affecting the investigation and prosecution of crime; changing provisions for criminal appeals designed to prevent miscarriages of justice[120]; and changing "social attitudes" and "social realities" observed by the courts[121].

122 In an attempt to impose a measure of conceptual order on the many earlier developments of the common law, this Court, in *Swaffield*, derived from past decisions a series of tests to be applied before disputed confessional evidence is admitted. Over time, the tests have been formulated in different terms, and it is clear that they overlap and reinforce one another to a significant extent. The first of the tests, voluntariness, arises from "the fundamental requirement of the common law that a confessional statement must be voluntary, that is, 'made in the exercise of a free choice to speak or be silent'"[122]. Another test, sometimes subsumed in voluntariness, requires that the evidence should be judged reliable[123]. A third test (policy exclusion) concerns unfairness to the accused[124] and other grounds for the rejection of confessional evidence (even where given voluntarily and reliable) in the exercise of judicial discretion[125].

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**119** (1998) 192 CLR 159.

**120** A point made by Dixon J in *McDermott v The King* (1948) 76 CLR 501 at 512-513; and by Dawson J in *Cleland v The Queen* (1982) 151 CLR 1 at 30; cf *Swaffield v The Queen* (1998) 192 CLR 159 at 171 [14], 174 [17] per Brennan CJ.

**121** Law Reform Commission of Canada quoted in Australian Law Reform Commission, *Evidence*, Report No 26, (1985) vol 1 at 534 cited *Swaffield* (1998) 192 CLR 159 at 194 [68].

**122** *Swaffield* (1998) 192 CLR 159 at 188 [50] quoting *R v Lee* (1950) 82 CLR 133 at 149 and citing *MacPherson v The Queen* (1981) 147 CLR 512 at 519; *Cleland* (1982) 151 CLR 1 at 5; *Collins v The Queen* (1980) 31 ALR 257 at 307. See also *Swaffield* (1998) 192 CLR 159 at 208 [121].

**123** *Swaffield* (1998) 192 CLR 159 at 209-210 [124]-[126]; see also at 167-171 [10]-[13].

**124** *Swaffield* (1998) 192 CLR 159 at 171-172 [14], 189 [53], 211 [129].

**125** *Swaffield* (1998) 192 CLR 159 at 167 [8], 189 [51]-[52], 211-212 [132].

123 In the present appeals, all of the appellants invoked the rule of voluntariness. All of them did so by reference to the particular aspect of the voluntariness rule requiring the exclusion of evidence of confessional statements made to "persons in authority" as a result of an "inducement", being a threat or promise of favour or advantage ("the inducement rule"). That this is an established sub-category of the common law voluntariness rule in Australia was not contested during the argument.

124 Additionally, all of the appellants relied more generally on so-called "basal involuntariness"[126]. I dislike the adjective "basal" for it adds nothing to the critical concept of "voluntariness"[127]. However, it tends to be used to refer to those elements of the voluntariness rule concerned with the exercise of the free will of a person who is suspected of a criminal offence, either to remain silent or to make confessional statements to police, prosecutors or other persons.

125 In *Swaffield*, the arguments before this Court were not presented by reference to the voluntariness rule in any of its forms. This was so notwithstanding the fact that "voluntariness is a flexible principle" and that some *dicta* existed suggesting that "involuntariness might extend to 'false representations or other trickery'". Such considerations were arguably relevant to the circumstances both of Mr Swaffield's case and the conjoined appeal of Mr Steven Pavic[128]. By way of contrast, in the present appeals, the voluntariness and "basal voluntariness" of the confessional statements constituted the centrepiece of each appellant's contentions[129].

126 None of the appellants sought to contest the admissibility of the statements made by them on the basis of the reliability test. Most did not rely on the discretionary ground for exclusion of the confessional evidence. Only one (Mr Malcolm Clarke) invoked the judicial discretion, appealing in his case to considerations of alleged unfairness and public policy to support the exclusion of the contested statements.

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**126** cf *Swaffield* (1998) 152 CLR 159 at 196-197 [75], 209 [123] referring to *McDermott* (1948) 76 CLR 501 at 512 per Dixon J; *Cleland* (1982) 151 CLR 1 at 13 per Murphy J.

**127** It derives from the reference by Dixon J in *McDermott* (1948) 76 CLR 501 at 512 to "the basal principle that to be admissible a confession must be voluntary".

**128** *Swaffield* (1998) 192 CLR 159 at 209 [123].

**129** If the applicants were to succeed on the issue of involuntariness, this would attract the *Evidence Act* 1958 (Vic), s 149. See below at [213].

Approach to the appeals

127 *A new problem*: It follows from the foregoing introduction that these appeals present a new problem for this Court's resolution. Because voluntariness was not argued in *Swaffield*, the outcome of each appeal is not supplied simply by applying what was held in that case and in *Pavic*. This is so despite the fact that there are some factual features that all of the cases have in common (undercover police officers recording confessional evidence obtained by interrogation and elicitation following official conduct deliberately designed to mislead the accused).

128 Only in Mr Clarke's appeal, in so far as it invokes the policy discretion as a fall-back if the voluntariness test is unavailing, are the reasons in *Swaffield* of direct application. Nevertheless, because under the discretionary grounds of exclusion, Messrs Swaffield and Pavic argued objections to the admissibility of evidence procured by elicitation, questioning, deception and trickery, some of the observations of the Court in *Swaffield* may, by analogy, be relevant to evaluating the appellants' submissions concerning "basal voluntariness".

129 The history of the common law, and the development of its responses to the perceived dangers of confessional evidence, is traced in the reasons of Callinan, Heydon and Crennan JJ ("the joint reasons")[130]. Those reasons demonstrate the manner in which, over time, the common law principles have expanded, contracted, refocused and changed in response to the perception of new problems arising within changing institutional settings and to reflect different social and judicial attitudes[131].

130 When a new problem such as "scenario evidence" arises for evaluation under the common law it is a serious mistake to assume that the answers are to be given by simply plucking out of the casebooks passages from judicial reasoning addressed to different problems considered long ago, before "scenario techniques" were dreamed of.

131 I agree with the joint reasons that the attempt by the appellants, when advancing their arguments concerning the ambit of those who are in "lawful authority" (for the purpose of the inducement sub-category of the voluntariness rule) to treat remarks of Wood J in *R v Dixon*[132] as if they were legally definitive in their appeals, is erroneous. As the joint reasons remark, the problem raised by

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**130** Joint reasons at [268]-[293], [326]-[327].

**131** *Swaffield* (1998) 192 CLR 159 at 171-172 [14], 194 [68].

**132** (1992) 28 NSWLR 215 at 229. See joint reasons at [294].

the facts addressed by Wood J in that case was "completely different" from the problem now presented by these appeals[133]. However, I would go further and in the same vein. Most of the judicial remarks addressed to the inducement rule, collected in the joint reasons[134] (save perhaps for those contained in recent Canadian authority specifically addressed to "scenario evidence"[135]), have to be read with considerable care and used with discernment. Otherwise, the risk is run that later judges select words written by earlier judges to address significantly different problems, in order to extract from those words a congenial rule that offers a resolution of new issues presented by relevantly different circumstances.

132 Taken literally, the words used by Wood J in *Dixon* are broad enough to include, as "persons in authority", the undercover police officers who dealt with the appellants in these "scenarios". If this were so, without more, Wood J's test would attract the inducement rule in each of the present appeals and support the appellants' common argument that their confessional statements should be excluded from the record.

133 However, just as Wood J's words cannot be treated as though expressed in a statute of universal application, so the observations of Wood B and his judicial colleagues in *R v Row*[136] nearly two hundred years earlier have, in my view, only marginal relevance to the novel problem now presented. The law's treatment of an admonition of a neighbour to tell the truth in the setting of England at the time when *Row* was decided will cast no more than the remotest light upon the contemporary problem which this Court now faces.

134 Given the nature of the common law, it is essential to provide responses to the appellants' submissions in a manner that proceeds by analogical reasoning from judicial opinions expressed in past decisions. However, such reasoning is more likely to be useful and convincing if it draws on cases bearing some approximate factual similarity to the present ones. As "scenario evidence" constitutes a new development in policing, it requires that courts examine closely any decisions concerned with the new technique. It obliges them to confine the use of earlier cases, addressing quite different facts, to determining the purpose and objective which courts have there held to be reflected in basic common law doctrine. Any attempt at a more specific use of earlier judicial *dicta* runs the risk

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**133** Joint reasons at [295].

**134** Joint reasons at [268]-[293].

**135** Such as *R v Grandinetti* (2003) 178 CCC (3d) 449 (Alberta Court of Appeal); [2005] 1 SCR 27 (Supreme Court).

**136** (1809) Russ and Ry 153 [168 ER 733]. See joint reasons at [283].

identified by the joint reasons in their criticism of the appellants' invocation of *R v Dixon*. That is the risk of deploying judicial language, written in earlier times for different purposes, to the significantly different circumstances of the present case. This Court should be more discerning in eliciting the applicable legal principle.

135 *A cautious response to confessions*: One thread of basic common law doctrine runs through the authorities back to the 18th century and before. It demands a serious approach of caution to "confessions under threats or promises"[137]. That phrase, in all of its generality, is the one that Lord Mansfield CJ used when addressing himself to the danger of reliance on words "forced from the mind by the flattery of hope, or by the torture of fear"[138].

136 The general language used by Lord Mansfield CJ was not cut back by reference to the status, ostensible authority or lawful power of those who procured, and later repeated, the confessional statements. The apprehended danger arose from the operation of *hope* and *fear* on the mind of the suspect[139]. This is where the inducement rule began. It is as well to keep the attitudinal caution of the common law in mind when attempts are made to restrict the operation of the inducement rule, so that it applies in limited circumstances or to limited relationships.

137 The danger of false, misleading, blustering, hypothetical or mistaken confessional evidence is no less present today than it was when Blackstone described that form of testimony as "the weakest and most suspicious of all"[140]. Any analogical development of common law principles to apply to new factual circumstances will remain true to the approach that lies at the core of the common law rule. Parliament may alter that rule in fundamental respects as it chooses. Judges, applying analogical reasoning, may not do so.

138 Not long ago, in *Mallard v The Queen*[141], this Court corrected an earlier refusal of special leave to appeal[142] to a long-term prisoner convicted of murder.

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**137** *R v Rudd* (1775) 1 Leach 115 at 118 [168 ER 160 at 161]. See joint reasons at [269].

**138** *R v Warickshall* (1783) 1 Leach 263 at 263-264 per Eyre B and Nares J [168 ER 234 at 235].

**139** *Warickshall* (1783) 1 Leach 263 at 263-264 [168 ER 234 at 235]. See reasons of Gummow and Hayne JJ at [34].

**140** Blackstone, *Commentaries on the Laws of England* (1813), vol 4 at 324-325; cf joint reasons at [270].

**141** (2005) 224 CLR 125.

It set aside an accused's conviction which had been based, substantially, on confessional evidence. Later and more detailed scrutiny by the Court showed that the confession, which had convinced a jury and many earlier appellate judges, was insubstantial, misleading and factually impossible to reconcile with other objective evidence. *Mallard* (along with many other cases before it, and doubtless others yet to come) reinforces the wisdom of the common law's insistence on taking great care to ensure that confessional evidence is voluntary and reliable, and was not collected in circumstances justifying exclusion on discretionary grounds. These may be old rules. But they have lost none of their modern relevance and applicability.

139 In considering the rule of voluntariness, and specifically the sub-rule governing the inducement of confessional evidence by persons in authority in the context of "scenario evidence", this Court should maintain the longstanding caution of the common law about confessional evidence. It should express the governing legal rule with this caution in mind.

140 To the extent that the law demands that the recipient of a confession must not only *in fact* be a "person in authority" (such as a police officer or prosecutor), but must be *known* to be such by the suspect and must have, and be known to have, *lawful* power to influence the course of criminal proceedings, the ambit of the protection of the inducement rule is obviously diminished. Its capacity to restrain the use of confessional evidence that is "involuntary", in the sense of being affected by a relevant hope or fear, is reduced. Very good reasons would be needed to confine the inducement rule in such a way.

Considerations of legal principle and policy

141 *Reasons of principle and policy*: As in other cases where there is no precisely applicable provision of the Constitution nor legislation governing the point in controversy, and where no holding of this Court affords a clear and binding rule that can be applied to resolve the differences in argument, the solution to the contentions of the parties in the present appeals must be found in the usual sources. What is required is a close examination of relevant legal authority, principle and policy[143].

142 The parties argued for the outcomes which they respectively favoured substantially by reference to judicial *dicta* in earlier decisions of this and other courts concerned with voluntariness, the inducement rule and the judicial discretion to exclude confessional evidence. I will address shortly the arguments

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**142** Noted (1997) 191 CLR 646.

**143** *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

on the legal authorities. However, first it is useful to identify some important considerations of legal principle and policy. Such considerations provide a relevant background so as to ensure that evaluation of the authorities proceeds in a manner apposite to the novel problems that "scenario evidence" raises. Correctly, in my view, these considerations, or some of them, were adverted to below, both at trial[144] and on appeal[145].

143 Reference to these background considerations is not intended to merge concerns of public policy into the resolution of the voluntariness issue. Such concerns are more properly to be taken into account in the context of the third, discretionary, ground for the exclusion of confessional evidence. As noted above, that ground is here relevant only to the appeal of Mr Clarke. Nevertheless, reference to the background considerations is appropriate at this stage to provide a transparent foundation for the resolution of the parties' arguments concerning voluntariness in the present factual context.

144 As noted above, the various common law bases for the exclusion of confessional evidence overlap with one another. Thus, a common explanation of the law's general hostility to involuntary confessions in earlier times was the proneness of such confessions to be unreliable. Yet this is not now generally seen as the sole justification for the voluntariness rule in either of its manifestations[146]. Other considerations (including respect for the basic rights of an accused and discouragement of undesirable conduct by police and other public officials) supplement explanations of voluntariness focusing on reliability.

145 Likewise, considerations that inform decisions about "basal voluntariness" may overlap those relevant to the exercise of the judicial discretion to exclude even confessional evidence considered to have been given voluntarily and to be reliable. When facing a new evidentiary problem, such as the present, it is more likely that the correct ambit of the applicable categories, and their accurate application to the circumstances of the case, will follow from a candid acknowledgment of the most important factors of legal principle and policy that will be in the mind of a court when deciding such questions.

146 *Considerations favouring admissibility*: The following considerations of legal principle or policy tend to favour the admissibility of the confessional

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**144** eg *R v Tofilau* (2003) 13 VR 1 at 22-27 [76]-[89] per Osborn J.

**145** *R v Tofilau [No 2]* (2006) 13 VR 28 at 70-71 [181]-[182] per Vincent JA.

**146** cf reasons of Gummow and Hayne JJ at [42]-[43]; joint reasons at [285]-[293]. See also Schrager, "Recent Developments in the Law Relating to Confessions: England, Canada and Australia", (1981) 26 *McGill Law Journal* 435 at 446.

evidence gathered by the "scenario techniques" to which the appellants object in these appeals:

(1) The crimes alleged against the appellants were all very serious, being in each case homicide. The killings involved were unresolved. It is to be expected that modern police forces will seek to clear up such crimes. Inevitably, such crimes are of great concern to the community and to the family and friends of the victim. Clearly, it is in society's interest that wherever possible, such crimes should be resolved in a public trial based on substantial evidence[147];

(2) In so far as the use of "scenarios" and like trickery and deception by police officers is criticised as objectionable, a principle of proportionality may apply. The "scenario techniques", for reasons of their complexity and sheer expense, have (so far) been confined to cases of homicide such as those here under consideration. They have not been deployed to clear up less serious crimes. Where homicide is concerned, society has the strongest interest in bringing offenders to justice because of the particular value accorded by our community to safeguarding human life;

(3) The confessional evidence of the appellants, secured in the course of "scenarios", was apparently reliable, in the sense that it was accurately recorded. Its technical reliability was not contested. If part of the common law's caution over the admission of confessional statements stemmed from an anxiety about their content reliability, that concern can safely be put aside in these appeals;

(4) In so far as it may be suggested that the confessional evidence was unreliable in a different sense, as for example that it was the result of bravado, boasting, giving the interrogator what he or she wished to hear, or otherwise affected by extraneous motives, such considerations could be left to be argued before the jury which would be aware of such dangers;

(5) Australian police services need not only to use the most modern technology but also new techniques of investigation found to be successful in comparable police forces overseas. Just as some criminals have become more sophisticated, so policing techniques must also advance to ensure that those who are suspected of crimes are rendered accountable for them before the independent courts[148];

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**147** cf *Swaffield* (1998) 192 CLR 159 at 217 [147].

**148** cf *Swaffield* (1998) 192 CLR 159 at 217 [147].

(6) A distinction needs to be drawn between cases where police officers and other public officials themselves become involved in criminal acts and instances where (as in the present appeals) there was no actual criminal conduct on the part of police, simply "scenarios" giving a false appearance of criminality[149]. Different considerations might arise had there been any involvement of police in criminal acts. Those considerations can be disregarded in the present appeals;

(7) Apart from homicide, other offences, difficult to detect yet important to prevent, may demand the use of trickery and deception in undercover police operations, for society's protection. Anti-terrorist policing, for example, may necessitate infiltration of illegal or anti-social organisations for the purposes of preventing very serious offences or, where they have occurred, bringing offenders to justice. In these and other cases, it should not be expected that police, any more than the suspects, will conduct their activities according to the rules of a gentlemanly sporting club; and

(8) Acknowledging that social values, like police techniques, change over time, a question may ultimately be presented as to whether the "informed community", giving effect to "prevailing community standards", would expect that a reliable confession to a previously unsolved case of homicide would be excluded from the trial of persons such as the appellants. In *Tofilau*, asking the question whether what was done to extract confessional evidence from the appellant would be viewed as "a dirty trick, one that shocks the community"[150], the trial judge (Osborn J) concluded that the overall discretion to reject such evidence should not be exercised against reception of the evidence[151]. Is a similar conclusion to be expressed in judging whether the confessional statements are to be classified as "voluntary" or "involuntary"?

147 It remains to decide whether, notwithstanding the foregoing considerations favouring reception of the confessional statements, the voluntariness test in Australia (which is wider than that applied in other countries[152]) demands a different outcome.

148 *Considerations favouring inadmissibility*: The following arguments of legal principle and policy tend to favour the exclusion of such evidence:

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**149** cf *Ridgeway v The Queen* (1995) 184 CLR 19 at 30.

**150** *R v Collins* [1987] 1 SCR 265 at 287.

**151** (2003) 13 VR 1 at 26-27 [89]-[90] applying *R v Unger* (1993) 83 CCC (3d) 228.

**152** *Tofilau [No 2]* (2006) 13 VR 28 at 68 [174].

(1) The use of such evidence, consciously collected by sworn officers of police, tends to undermine both the principle of the common law protective of a suspect's "right to silence"[153] and also a basic principle of the international law of human rights to which Australia has subscribed[154]. Such international principles can properly inform the expression of the common law of Australia[155], and add a new dimension, not considered in past cases, for the elaboration of the common law;

(2) The "scenario technique", by its psychological impact, has an inherent tendency to overbear the will of the target. It deprives the target of a warning about the fact that statements made may be recorded and later used against him or her, notwithstanding that he or she is in fact being interrogated by police. It also tends to deprive the target of access to a lawyer before providing incriminating confessional evidence that may prove critical at trial;

(3) The techniques used, including deception and trickery, and the bypassing of ordinary police obligations to warn a suspect before interrogation, sit uncomfortably with the accusatorial character of criminal proceedings in Australia[156]. In several recent decisions, this Court has insisted upon the observance of the requirements of the accusatorial trial. One of the most important of such requirements is the need to uphold both the accused's "right to silence" during official investigation and his or her right to be warned about the potential consequences of self-incrimination during interrogation. The use of "scenario techniques" in effect allows undercover police officers to circumvent these requirements. Yet they are requirements that those officers would be expected to observe if wearing their uniforms. In this sense, the techniques tend to undermine special features of the administration of criminal justice that comprise an important check on the power of the state and on its intrusion into the lives of all persons;

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**153** *R v Sang* [1980] AC 402 at 436 per Lord Diplock. See joint reasons at [291].

**154** *International Covenant on Civil and Political Rights*, Art 14.3(g): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality … Not to be compelled to testify against himself or to confess guilt."

**155** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

**156** See *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; cf *Rogers v Richmond* 365 US 534 at 540-541 (1961).

(4) The use of "scenario techniques" also has an inherent tendency to select vulnerable persons, playing on the very "hope" and "fear" that has traditionally been the source of the common law's insistence upon "great chastity"[157] in the reception into evidence of testimony that has been influenced by threats or promises made by persons in authority. Where the question is whether the will of an individual has been overborne, the vulnerability of the individual concerned, whether on grounds of "age, background [or] psychological condition"[158] has conventionally been treated as significant. As Brennan J repeatedly said[159]:

> "Voluntariness is not an issue to be determined by reference to some hypothetical standard; it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused."

(5) A particular problem with "scenarios" is that they involve the suspect in conduct which shows him or her to be willing to become implicated in illegal acts, even if no real illegality actually eventuates. This of itself puts the suspect into a disadvantageous position. It does so by a type of entrapment, organised by police. It reveals the suspect in a bad light before the trial judge and jury. It makes it next to impossible for the suspect, "whose liberty is at stake and who stands to be condemned on the undercover officer's evidence if his credibility is unchallenged", to make proper checks on the background of the police officers concerned and to challenge them, given that such officers "have necessarily led a Jekyll-and-Hyde life and … in their undercover work have had to lie convincingly and dissimulate"[160];

(6) Especially significant in this respect is the fact that the deception and trickery is performed by agents of the state who deliberately set about pretending to perform illegal and improper acts. Displacing the usual assumption that the state and its officials will always act with honesty, integrity and lawfulness, the conduct of "scenarios" comprises an arguable

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**157** *R v Thompson* (1783) 1 Leach 291 at 293 per Hotham B [168 ER 248 at 249], cited in joint reasons at [275].

**158** *Collins* (1980) 31 ALR 257 at 307 per Brennan J.

**159** *Swaffield* (1998) 192 CLR 159 at 170 [11] quoting *Collins* (1980) 31 ALR 257 at 307.

**160** *R v Hughes* [1986] 2 NZLR 129 at 148. See also *R v Hines* [1997] 3 NZLR 529 and Lusty, "Proposed Witness Anonymity Laws Violate the Right to a Fair Trial and Arguably Infringe Ch III of the Constitution", (2004) 28 *Criminal Law Journal* 110 at 112.

misuse of state power by persons who are expected to behave in an impeccable manner[161]. It involves agents of the state taking advantage of their own apparent criminality and wrong-doing;

(7) Pessimists might view official involvement in deception, trickery and apparent criminality as a further instance of the attainment of state objectives, and in particular criminal confessions, through undesirable practices (such as torture, prolonged isolation, sleep deprivation, humiliation and psychological manipulation of suspects[162]; and international rendition[163]). As a matter of general principle, the extension of such practices is not to be encouraged[164]. Ultimately, the only institutions that are likely to curb them are the courts[165];

(8) Where legislation expressly authorises the employment of novel investigative techniques, individual rules will generally be stated in ways that take into account the need to restrain state officials from descending to unacceptable conduct for the purpose of securing evidence in a particular case. The fact that no such legislation has been enacted in relation to "scenario techniques" should not be permitted to found an assumption that the use of such techniques is subject to no legal restraint. It is possible for the cost of obtaining relevant evidence to be too high[166]; and

(9) The grave nature of the crime of homicide and the affront that unsolved crimes (or those that must remain unsolved because of the exclusion of inadmissible confessional evidence) occasion do not license disregard for

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**161** *R v Looseley* [2001] 1 WLR 2060 at 2068; [2001] 4 All ER 897 at 904; Bronitt, "Taking Privacy Rights Seriously: Engaging with Undercover Law Reform", (2003) 27 *Criminal Law Journal* 113 at 116.

**162** See eg Greenberg and Dratel (eds), *The Torture Papers: The Road to Abu Ghraib*, (2005); Miles, "Medical Ethics and the Interrogation of Guantanamo 063", (2007) 7(4) *American Journal of Bioethics* 5.

**163** See eg Skinnider, "The Art of Confessions", (2005) at 32-33.

**164** cf *A v Home Secretary (No 2)* [2006] 2 AC 221 at 287 [113] citing Holdsworth, *A History of English Law*, [3rd ed] (1945), vol 5 at 194.

**165** *Wong Kam-Ming v The Queen* [1980] AC 247 at 261. See joint reasons at [292].

**166** *Bunning v Cross* (1978) 141 CLR 54 at 72 citing *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28-29 [63 ER 950 at 957]. The passage was cited in the Court of Appeal in *Tofilau [No 2]* (2006) 13 VR 28 at 61 [149] per Vincent JA.

> the basic principles of our law. In the gathering of evidence, the end rarely, if ever, justifies the deployment of any means[167]. Were it otherwise, routine torture in the cause of gathering evidence to solve the most serious crimes might be justified, despite the affront that such conduct occasions to human dignity, as well as the danger it presents for the reliability of the resulting testimony and for the integrity of those state officials involved.

149 Some evidence, even if arguably relevant and reliable, is excluded by the operation of legal rules because of the basic principles observed in our system of criminal justice. Those principles pervade the administration of criminal law in Australia. The securing of convictions, even in cases of unsolved homicide, must comply with the law, which reflects fundamental notions of justice and fairness. The state is a great teacher in society. If it sets debased standards for itself, there is a risk that such standards will proliferate and result in a lowering of confidence in the state and its officials and of respect for the rule of law.

Some additional facts

150 *Understanding the appeals*: Having now described the background of policy and principle against which the particular requirements of the common law in the present context are to be elicited, it is necessary to add some detail to the skeletal description of the facts of each appeal contained in the reasons of Gummow and Hayne JJ[168], and in the joint reasons[169]. Only if some additional facts are mentioned will the force of the appellants' several submissions in relation to the voluntariness rule be fully understood.

151 *The appeal of Tofilau*: So far as Mr Tofilau's appeal is concerned, the confessional statements in question were considered in a voir dire in which three undercover police officers, as well as their "controller" gave sworn evidence. The "controller" testified that he coordinated, supervised and planned the operation, the purpose of which was to make the suspect "feel comfortable about talking about his involvement in the crime".

152 Mr Tofilau was told that "Mark Butcher" and "Tui Brown" were able to "organise things" with "Corey", identified as a corrupt member of the Drug

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**167** Bronitt, "Taking Privacy Rights Seriously: Engaging with Undercover Law Reform", (2003) 27 *Criminal Law Journal* 113 at 114, 118. See also *R v Mack* (1988) 44 CCC (3d) 513 at 541 cited in *Ridgeway* (1995) 184 CLR 19 at 36.

**168** Reasons of Gummow and Hayne JJ at [70]-[80], [83]-[87], [89]-[95], [100]-[107].

**169** Joint reasons at [220]-[241].

Squad who provided assistance to the "gang". He was led to believe that the police investigation of him, in respect of his involvement in the death of Belinda Romeo, would be made to conclude, being halted by the corrupt officer pursuant to a request by "Butcher" to that effect. Mr Tofilau would then be neither subject to further police attention or investigation in relation to the death of Ms Romeo, nor charged with any offence in respect of that death. He would also be given access to $10,000 from a safe deposit box. He would be admitted into the "gang" as one of its members.

153 The trial judge accepted that Mr Tofilau was "completely deceived" by the operation, and that he believed that the superiors in the gang had the capacity to "fix things with the police"[170]; and also that he was "exhorted" and "harangued" to make a confession[171]. The statements made to Mr Tofilau contained implied threats as to the potential dangers of further attention from the police and other distinct disadvantages if he did not tell the "truth" to the boss of the gang[172]. The trial judge accepted that the confessional statements were elicited from Mr Tofilau in what was the "functional equivalent" of a police interrogation[173] and that he was "manipulated" by the undercover agents to bring about a mental state in which he was likely to confess to a crime[174]. Nevertheless, the trial judge rejected the submission that the statements were involuntary. He admitted them into evidence.[175] His ruling was upheld by the Court of Appeal.

154 *The appeal of Marks*: Mr Matthew Marks was tried before Coldrey J and a jury where similar evidence was adduced on a voir dire. At the conclusion of the hearing his Honour ruled that the prosecution could lead the confessional statements in evidence at the trial[176].

155 The general background to Mr Marks's case is set out in other reasons[177]. However, those reasons do not explain the way in which it was represented to

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**170** *Tofilau* (2003) 13 VR 1 at 6 [15], 15 [48].

**171** *Tofilau* (2003) 13 VR 1 at 5 [12], 19-20 [66].

**172** *Tofilau* (2003) 13 VR 1 at 15 [48]-[50].

**173** *Tofilau* (2003) 13 VR 1 at 19 [66].

**174** *Tofilau* (2003) 13 VR 1 at 20 [70].

**175** *Tofilau* (2003) 13 VR 1 at 27 [91].

**176** *R v Marks* (2004) 150 A Crim R 212.

**177** Reasons of Gummow and Hayne JJ at [83]-[87]; joint reasons at [227]-[231].

Mr Marks, by the undercover police officer with whom he principally dealt ("Rick Baxter"), that the head of the gang ("Gary Butcher") had influence over a corrupt police officer ("Royce") who could "fix up" any "drama" with the police. Such influence extended to the matter in which Mr Marks was being investigated by the homicide squad. "Baxter" represented to Mr Marks that "Butcher" could make things of concern to him (including evidence) "disappear".

156 Mr Marks was later told by "Butcher" that word had come from police that he was a suspect in a murder investigation, and that "Butcher" wanted to know what the problem was so that an alibi witness could be found or evidence made to disappear.

157 The trial judge, in his ruling, concluded that Mr Marks was subjected to "a massive and elaborate subterfuge" and "a degree of manipulation and exploitation"[178]. He also found that Mr Marks's confession was "the result of various inducements" made to him by members of the gang who were, in fact, police officers.[179] He nevertheless admitted the evidence in the trial[180]. His ruling was upheld on appeal by the Court of Appeal.

158 *The appeal of Hill*: Mr Hill was arraigned before Bongiorno J and a jury. A ruling was made upholding the admissibility of the confessional evidence in his case. That ruling was upheld by the Court of Appeal[181]. The background facts are stated in other reasons[182]. However, those reasons do not explain the inducements that were held out to Mr Hill.

159 On 19 separate occasions Mr Hill met an undercover police officer whom he knew as "Pat Austinn". He was led to believe, and did believe, that "Austinn" was a member of a criminal gang. "Austinn" introduced Mr Hill to "Mark Butcher", identified as the head of the gang who had contacts with and influence over a corrupt police officer. Mr Hill was informed that the matter in which he was being investigated by police (a murder) was something the gang "could take care of if he passed the checks". He was told that "good … money" was paid by the gang to police to ensure that they could "fix" any problem. The undercover operation culminated in a meeting between Mr Hill and "Butcher" in which the former admitted to attacking the deceased with a house brick, but at first denied

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**178** *Marks* (2004) 150 A Crim R 212 at 229 [99].

**179** *Marks* (2004) 150 A Crim R 212 at 229 [99].

**180** *Marks* (2004) 150 A Crim R 212 at 231 [116].

**181** *R v Hill* [2006] VSCA 41.

**182** Reasons of Gummow and Hayne JJ at [89]-[95]; joint reasons at [232]-[236].

being responsible for leaving him in the condition in which he was later found. This denial led to an indication that there could be a "problem" because "Butcher" did not believe Mr Hill, whereupon Mr Hill revised his account somewhat. "Butcher" continued to press Mr Hill as to certain details, but the latter averred that his revised account was "the … honest truth". "Butcher" accepted this and represented that he wanted to "sort it out".

160 The trial judge found that the undercover police had made it clear to Mr Hill that untruthful denials might jeopardise the criminal activities of the "gang". However, he found that the representations made to Mr Hill were not an "inducement" nor were "Austinn" or "Butcher" to be treated as "persons in authority". For this latter ruling, he relied on the approach adopted by Osborn J in *Tofilau*. The confessional evidence was admitted. The Court of Appeal accepted that it had been made "as a result of persistent questioning by [the] undercover operatives"[183]. However, the trial judge's ruling on the evidence was upheld.

161 *The appeal of Clarke*: The same pattern of events was disclosed in the trial of Mr Clarke before Kellam J and a jury. A voir dire was conducted. This showed that, during a conversation between Mr Clarke and two undercover police officers ("Terry Batchelor" and "Mark Cassidy") posing as members of a criminal gang, one produced a fictitious document (described as a "prop") apparently emanating from Victoria Police. It purported to disclose that Mr Clarke was the only suspect in the crime of murder of the deceased. It also stated that a circumstantial case against Mr Clarke had been developed. On further inquiries being made, approval was to be sought from the Director of Public Prosecutions to charge Mr Clarke with murder. The "prop" lent an air of authenticity to the claim of "Batchelor" and "Cassidy" to speak with authority concerning the favourable internal consideration of Mr Clarke's case within Victoria Police. It gave the appearance that gang members had the power to influence police or prosecution decisions affecting Mr Clarke.

162 Evidence was given by the "controller" of the covert operation. He agreed that the intention was to lead Mr Clarke to believe that "Cassidy" was the "boss" of a powerful and violent criminal organisation and had the ability to control corrupt police, who did favours for the criminal gang. Mr Clarke was led to believe that problems could be fixed if he were to confess to the killing of the deceased. At one stage Mr Clarke was told by "Cassidy", "now if you say to me I didn't do this I can't fix it".

163 Despite these pressures Mr Clarke continued for some time to deny involvement in the death of the deceased. "Cassidy" told him that he did not

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**183** [2006] VSCA 41 at [3] per Callaway JA.

believe him and that it was Mr Clarke's "one and only chance". The message could not have been more blunt. That was the point at which the "prop" was produced, with "Cassidy" saying to Mr Clarke: "What do you want to do about it? Because I'm telling ya this is not going to go away. You can deny it 'til the cows come home. I can't have you hanging around with us." Evidence suggested that, at this time in his life, Mr Clarke was specially vulnerable because he was hoping to get married.

164 The trial judge admitted the confessional statements procured following the foregoing exchange as voluntary[184]. The Court of Appeal upheld that decision[185].

165 *Common features of the appeals*: The common features of the evidence in the four appeals, relevant to the issues of voluntariness are:

(1) Each appellant was subjected to sustained, prolonged, intense pressure to admit his involvement in a murder which, at first, he denied;

(2) Each persisted in denial of guilt for a period of time but ultimately made a confessional statement;

(3) The confessional statements were made to persons who were *in fact* police officers, acting covertly;

(4) The police officers concerned used techniques that played on each appellant's *fear* of being prosecuted for murder and on his *hope* of joining a criminal gang, thereby securing financial advantages, and more importantly, gaining access to corrupt police who could "fix up" the otherwise looming problem of criminal prosecution;

(5) Each appellant did not know that the persons with whom he was dealing were police officers[186]; but each of those persons represented that they had the power, through police officers whom they effectively controlled, to influence and alter the course of future criminal proceedings to the appellant's advantage;

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**184** *R v Clarke* [2004] VSC 11.

**185** *R v Clarke* [2006] VSCA 43.

**186** *Crimes Act* 1958 (Vic), s 464J [right to remain silent].

(6) The confessional evidence was, in each case, procured through what was effectively an interrogation and not a neutral investigation that allowed the appellant to tell his own story in his own way;

(7) Although none of the appellants was in physical custody at the time the confessional statements were made, each was suspected by police of homicide in circumstances where police believed that there was insufficient evidence to sustain a successful prosecution. The purpose of the "scenarios" was to repair the evidentiary gap in the prosecution case;[187] and

(8) By reason of the course adopted, each of the appellants was deprived of a warning which the police officers, acting as such, would ordinarily have given concerning the appellant's "right to silence"; the recording of the evidence; its possible later use in a trial of the appellant; and the availability of access to a lawyer before giving inculpating confessional testimony to the police.

166 *The issues*: The principal issue presented by the foregoing features of the evidence in these appeals thus becomes whether the appellants, or any of them, are entitled to complain of breach of the requirement that, to be admissible, confessional statements must be voluntary. Specifically:

- *The confessional inducement issue*: Did the confessional statements, or any of them, breach the inducement rule, being confessional statements impermissibly induced from the appellant by persons in authority?

- *The basal voluntariness issue*: Were the confessional statements otherwise inadmissible as procured in breach of the requirement of "basal voluntariness"?

- *The s 149 Evidence Act issue*: If the confessional statements were obtained in breach of the inducement rule or otherwise subject to exclusion, are they nonetheless admissible by reason of s 149 of the Evidence Act?

- *The discretionary exclusion issue*: In the case of Mr Clarke, if neither of the foregoing grounds of exclusion is established or if s 149 authorises reception of the evidence, were his confessional statements inadmissible under the general judicial discretion to exclude confessions obtained unfairly, unlawfully or otherwise in ways contrary to public policy?

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**187** cf joint reasons at [219].

167 In successive decisions, the Court of Appeal determined the above questions adversely to each of the appellants. By special leave, they are now before this Court challenging those determinations.

Voluntariness: inducement by persons in authority

168 *Persons in authority*: Although, in *Hill*, Bongiorno J concluded that the various statements made by the undercover police agents did not amount to "inducements"[188], I would not accept that conclusion, given the purposes of the inducement rule.

169 The inducement rule is addressed to statements and conduct of "persons in authority" that are designed to operate on the mind and will of a person suspected of criminal wrong-doing. The question which the rule raises is whether such statements or conduct caused a suspect to make a confession or admission against his or her own interest. In the relevant sense, it is apparent that the repeated, insistent statements made by the undercover agents to each of the appellants comprised "inducements". The substantial issue in these appeals is whether, for the purposes of the inducement rule, the undercover police were "persons in authority", as that term is used in the present context.

170 I am indebted to the joint reasons for their helpful survey of the history of the inducement rule[189], and specifically of the "person in authority" requirement[190]. Those reasons have identified various bases that have been advanced, long before the present problem presented, for the existence of both the rule and the requirement.

171 In numerous cases it has been held that "persons in authority" include police officers, prosecutors and other like officials. Indeed, wider categories of such persons have been recognised. However, it is not necessary in these appeals to consider that feature of the rule. The undercover agents who procured the confessions relied on by the prosecution from each of the appellants were indisputably police officers. To that extent, they were *in fact* "persons in

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**188** An "inducement" for the purposes of the rule is any statement or representation that suggests that the outcome of making confessional statements will be a beneficial result for the accused, including a result that no prosecution will be conducted. See *Cornelius v The King* (1936) 55 CLR 235 at 245; *Stapleton v The Queen* (1952) 86 CLR 358 at 375-376; *DPP v Ping Lin* [1976] AC 574 at 594-595; Heydon, *Cross on Evidence*, 7th Aust ed (2004) at 1126 [33640].

**189** Joint reasons at [268]-[292].

**190** Joint reasons at [283]-[284].

authority". The question for decision is whether the law requires an accused, later complaining of inducement, to have *known* that the persons making the inducement were *themselves* such persons. Specifically:

- Is it sufficient that the persons who make the inducement are *in fact* persons in authority, although that fact is unknown to the suspect and only subsequently revealed?

- Is it sufficient that the suspect knows or believes that the persons making the inducement have effective control over persons in authority who can influence the course of a criminal prosecution against the suspect?

- Is it essential that the "persons in authority" have, and are known or believed to have, *lawful* power to control or influence the course of a criminal prosecution of the suspect[191]?

172 None of these issues has hitherto been decided by this Court. Overseas judicial authority is of limited persuasive power because of the broader view that has been taken in Australia of "basal voluntariness". It is against this background that I approach the foregoing questions. I agree with the joint reasons that they are not to be answered by treating the words of selected earlier judicial reasons as if they presented a statutory formulation yielding the solution[192]. Much safer is the derivation of the ambit of the inducement rule by reference to its basic purpose as a species of the cautious response of the common law to confessional evidence in general, and in particular where that evidence is the product of statements and representations by a public official playing on the suspect's hopes and fears.

173 *Functional analysis of the rule*: I accept, as the joint reasons have demonstrated, that judicial authority may be found to support the arguments advanced in these appeals both for the appellants and for the prosecution. Because the joint reasons outline this authority most thoroughly, I will not deal with it in these reasons.

174 This Court must choose an expression of the rule, applicable to these cases, that not only best represents a proper extension by analogy of the common law that has previously existed in Australia, but also most effectively upholds the *purpose* for which the limitation on the admissibility of confessional statements made to "persons in authority" exists. That purpose takes this Court back to the

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**191** cf reasons of Gummow and Hayne JJ at [29]; joint reasons at [266]-[267].

**192** cf the joint reasons at [295] referring to the appellants' argument based on *R v Dixon* (1992) 28 NSWLR 215 at 229.

context of the rule (upholding the voluntariness of confessional statements generally) and the object of the particular sub-category of the rule (addressing the capacity of people with access to the levers of power and decision-making over criminal proceedings to influence "by promises of favour"[193] both the decision to make a confessional statement and its contents).

175 These two considerations (context and purpose) lend force to the appellants' submission that the requirement that the "inducement" be made by a "person in authority" is satisfied in cases such as the present. Specifically, it is satisfied if the persons making the inducement were in fact (as all of the undercover police officers were here) "persons in authority", and if those persons represented themselves to be (and were believed by the suspect to be) persons with authority and power to influence the course of a criminal prosecution against the suspect. The coincidence of these factual elements tends to overbear the will of the suspect and his or her interest and entitlement to be silent, and to induce him or her to make damaging, inculpating statements against interest. It is this feature of the "inducement" that attracts the inducement rule.

176 To limit the class of "persons in authority" to those whom an accused *knows* or *believes* to have lawful authority makes no sense if the reason for the rule is to discourage officials from exploiting hope or fear to procure confessional statements from suspects against their own interest. There is no point to requiring that the person in authority must act, and be believed to act, in a *lawful* way. By definition, any public official, with relevant power, who represents to a suspect that power over a criminal prosecution will be used in a manner favourable to that suspect is, regardless of the strict legal merit of the representation, acting unlawfully. No public official – police officer, prosecutor or otherwise – may utilise such powers in any way alien to the purposes for which those powers are afforded to them by law.

177 It is therefore of the essential nature of statements and representations of the kind addressed by the inducement rule that, normally, they will have been made for *unlawful* purposes, alien to the reasons for which the power was granted to the public official concerned. To impose a requirement that the suspect must be *aware* that the person making the inducement is, himself or herself, a person in authority (as distinct from one able to pull the levers of authority) restricts the operation of the rule in an unnecessarily artificial way. Even more clearly, to limit the rule to cases where the person in authority operates, or is believed to operate, *lawfully* is quite unrealistic. Indeed, it is counterproductive when the very nature of the power that engenders the hope or fear is such that it will be deployed unlawfully and corruptly.

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**193** *Warickshall* (1783) 1 Leach 263 at 264 [168 ER 234 at 235].

178 Whilst the ambit of the rule is not to be found, statute-like, in the formulation which Wood J used in *Dixon*[194], that formulation ("seen by the accused by virtue of his position, as capable of influencing the course of the prosecution, or the manner in which he is treated in respect of it") was obviously carefully chosen by that experienced judge. Its terms lend support to the appellants' submissions concerning the applicable legal principle.

179 The same can be said of the comment (for that is all it was) of Davies JA in *R v Kassulke*[195]. The inducement rule was explained in that case by reference to deterring improper pressure by persons who are *in fact* officers of the state in order to avoid unreliable confessional statements motivated by hope or fear procured by such officers.[196] With respect to those of the contrary view, I find the analysis of Davies JA, and his preference for a "rational" over an "historical" operation of the inducement rule, most persuasive.

180 Of course, some judges consider that finding binding legal authority demands of a court such as this an exercise in historicism, if not archaeology[197]. But when this Court faces a novel legal problem, such as that presented by "scenario" induced confessions, the answer should be found in a functional analysis. In that analysis, history has a part to play, but not to the exclusion of a rational ascertainment of the object that the inducement rule is intended to serve in contemporary circumstances.

181 *Canadian analysis in Grandinetti*: The most substantial argument in favour of the respondent's interpretation of "person in authority" is that it derives support from the unanimous reasons of the Supreme Court of Canada in *R v Grandinetti*[198]. In that case, Abella J, giving the opinion of the Court, said[199]:

> "The underlying rationale of the 'person in authority' analysis is to avoid the unfairness and unreliability of admitting statements made when the

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**194** (1992) 28 NSWLR 215 at 229.

**195** [2004] QCA 175 at [19]. See joint reasons at [299]-[304].

**196** [2004] QCA 175 at [21].

**197** See *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234 at 266-267 [108]-[113]; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1530 [96]; 229 ALR 1 at 26.

**198** [2005] 1 SCR 27.

**199** [2005] 1 SCR 27 at 38 [35] (emphasis added), quoting *R v Hodgson* [1998] 2 SCR 449 at 468 [25].

accused believes himself or herself to be under pressure *from the uniquely coercive power of the state*. In *Hodgson*, although explicitly invited to do so, the Court refused to eliminate the requirement for a 'person in authority' threshold determination. As Cory J stated, were it not for this requisite inquiry,

> 'all statements to undercover police officers would become subject to the confessions rule, even though the accused was completely unaware of their status and, at the time he made the statement, would never have considered the undercover officers to be persons in authority.'"

182 Because of the respect owed to the Canadian Court, because of the similarity of the applicable common law and because the "scenario techniques" here in issue originated in Canada, it is proper to pay considerable attention to that Court's holding on this subject. Undoubtedly, it supports the decisions of the courts below. If correct, it is fatal to the appellants' submissions on the inducement rule.

183 For a number of reasons, however, I am unpersuaded by the Supreme Court's exposition. First, as already stated, the Australian common law on voluntariness (of which the inducement rule is a sub-category), has developed differently to, and more broadly than, its overseas counterparts. Especially because of the gradual acceptance of the *Uniform Evidence Acts* in Australia, any elaboration of the common law on this topic should not depart from the previous approach in this country. It should maintain the comparative strictness of the remaining categories of cases to which the common law continues to apply.

184 Secondly, some of the passages in the reasons of the Supreme Court of Canada in *Grandinetti*, immediately before and after the paragraph just cited, indicate peculiarities of the Canadian law that make a literal borrowing of the stated rationale for defining "person in authority" somewhat unsafe. Just prior to the paragraph excerpted above, Abella J cites an additional passage from Cory J's reasons in *Hodgson* explaining that the "person in authority" requirement is "appropriate since most criminal investigations are undertaken by the state, and it is then that an accused is most vulnerable to state coercion[200]". However, "state coercion" and the "uniquely coercive power of the state" can be brought to bear on the will of a suspect not only by those who are *known* to be public officials but also by those who appear to *control* the levers of state power, although apparently holding no state office themselves. Moreover, immediately following the cited passage, Abella J goes on to refer to the "filter" available in Canada under the *Canadian Charter of Rights and Freedoms*. The *Charter* operates to

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**200** *Hodgson* [1998] 2 SCR 449 at 467 [24].

prevent the admission of statements that "undermine the integrity of the judicial process"[201]. This "filter" has no precise equivalent in Australia. Any Australian common law rule must be fashioned without the benefit of access to such a "filter".

185 *Preferred analysis of Grandinetti*: For the purpose of deriving the Australian common law rule, the reasoning in the Alberta Court of Appeal of Conrad JA, in dissent, when *Grandinetti* was in that Court[202], is in my opinion both correct and compelling. In her reasons, Conrad JA concluded that the trial judge in that case had interpreted the meaning of "person in authority" too narrowly. She said[203]:

> "The trial judge should have determined whether the accused believed that the recipient could influence the prosecution and whether that belief was reasonable. This test does not require that the maker of a statement believe that any prosecutorial inducement be for the good of the state. A maker of a statement must merely have a subjective belief, reasonably held, that the person to whom he is talking has a sufficient connection with the prosecution to affect the prosecution. The law does not require that an accused also make a qualitative analysis of whether any promise or inducement furthers the objects of the state."

186 In explaining her broader view, Conrad JA approached the problem in the way that I too would favour[204]:

> "I find support for this conclusion in the very policy behind the voluntariness rule, namely, that of ensuring fairness in the criminal process. The confessions rule serves to discourage police officers from engaging in undesirable investigative techniques. A police officer cannot promise a prosecutorial favour in return for a statement. To allow an undercover operation to rely on its relationship with the police to obtain a

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**201** [2005] 1 SCR 27 at 38 [36].

**202** (2003) 178 CCC (3d) 449.

**203** (2003) 178 CCC (3d) 449 at 485 [113].

**204** (2003) 178 CCC 3(d) 449 at 487 [117]-[118]. The Supreme Court's decision in this respect has been criticised. See Skinnider, "The Art of Confessions", (2005) at 17: "The conclusion that only a person who has visible power over the proceedings against an accused has the power to coerce a confession is flawed. This view seems to lack the foresight to acknowledge the scenario involving private citizens holding knives to throats or police officers posing as criminals advising suspects to confess or risk the fate of other would be informants".

> statement would be to allow the police to do indirectly that which it cannot do directly.
>
> I accept that in the normal case police officers operating undercover are not considered persons in authority. But the reason for this is that the accused must believe there is a connection between the recipient of his statements and the prosecution. An accused who speaks to an undercover officer believes he is talking to a civilian. But where an undercover operation includes, as part of its ruse, an association with the police, and the suggested ability to influence the investigation and prosecution of the offence, it loses its protection from the confessions rule. Put another way, if undercover officers pretend to associate themselves with the police in such a way as to make it reasonable for an accused to believe that they can influence the prosecution, and an accused actually believes them, the officers can be persons in authority."

187 The foregoing explanation provides what I regard as a functional, as distinct from a purely historical or verbal, approach to the inducement rule. The function of the rule is to prevent people who are in fact public officials, and are believed by the suspect to have power over the bringing of a criminal prosecution, using their power to instil the type of fear or hope which for centuries has been the source of the common law's caution about the reception of confessional statements by suspects.

188 *Conclusion: breach of inducement rule:* Applying that approach, as I would, to the present appeals, the undercover officers involved were *in fact* unquestionably persons with authority. Moreover, they were believed by each of the appellants to be such because of the representations which they repeatedly made about their special capacity to control the initiation or termination of criminal investigations and prosecutions against the appellants. Any other approach to the resolution of the "persons in authority" issue in these cases would be formulaic. It would be concerned with the form rather than the substance of the common law rule. Such an approach would fail to carry forward the purpose of the rule as a sub-category of the common law's insistence on the voluntariness of confessions made to persons in authority, so defined.

189 All of the confessional statements in issue in these appeals were profoundly influenced by the repeated inducements offered to each of the appellants so as to oblige them to make confessions in order to join the criminal "gangs" and have things "fixed up" by police officers who were under their effective control. These were classic instances of "hope" and "fear" inducing the appellants' several confessions. The circumstances were thus within the inducement rule.

190 Subject to what follows, each of the confessional statements was therefore liable to exclusion from evidence on this ground. The trial judges and the Court of Appeal erred in law in concluding otherwise. No question of discretionary

leeway arises. The legal error common to the decisions was an overly narrow conception of the "person in authority" requirement of the inducement rule in the Australian common law of evidence.

The voluntariness rule: basal voluntariness

191 *An additional pathway*: Because the foregoing conclusion is sufficient to entitle each of the appellants to succeed in his argument about the suggested involuntariness of his confessional statements, it is unnecessary for me to state at length an alternative pathway that leads to the same conclusion by way of the application of "basal voluntariness". However, for a number of reasons it is appropriate to address that argument.

192 At common law, the prosecution bears the burden of proving, on the balance of probabilities, that confessional statements upon which it seeks to rely have been made voluntarily[205]. This common law requirement is preserved by statute in Victoria[206]. As an alternative to reliance on the inducement rule, each of the appellants invoked "basal involuntariness". They did so on the footing that the confessional statements tendered by the prosecution were, in each case, induced by trickery, deception, sustained pressure and repeated interrogation which they characterised as sophisticated, elaborate, extreme, persistent and destructive of their independent will.

193 The appellants argued that the inducements held out by the undercover police officers were so substantial that they effectively deprived them of the free choice, otherwise enjoyed in law, whether to make or withhold confessional statements to persons who were police officers.

194 In this respect, each of the appellants challenged the conclusion of the trial judges, confirmed by the Court of Appeal, to the effect that their confessional statements were the result of their own volition. Even if the undercover police were not "persons in authority" (and thus subject to the inducement rule), the appellants submitted that their will had been overwhelmed by the conduct of persons who were in fact agents of the state and who set out to subject them to a barrage of psychological pressure, lies, manipulation, exploitation and inducements.

195 The appellants invoked the fundamental or "basal" requirement for the admissibility of confessional evidence at common law in Australia, namely that

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**205** *Lee* (1950) 82 CLR 133 at 144; *Wendo v The Queen* (1963) 109 CLR 559 at 562, 572-573; *MacPherson* (1981) 147 CLR 512 at 522, 532; *Cleland* (1982) 151 CLR 1 at 12, 19.

**206** *Crimes Act* 1958 (Vic), s 464J(b).

"a confessional statement made out of court by an accused person may not be admitted in evidence against him upon his trial for the crime to which it relates unless it is shown to have been voluntarily made"[207]. As the relevant authorities concerning this aspect of voluntariness are set out in the reasons of Gummow and Hayne JJ[208], I will not repeat them. It is sufficient for me to incorporate them by reference.

196 Can it be said that each of the appellants, by a voluntary exercise of his own free will, chose to respond (where he did not have to do so) to the insistent importuning of the undercover operatives, whom they believed to be their friends, to "tell the truth"? For the purpose of the principles of "basal voluntariness", were the conversations between the respective appellants and "the bosses" of the criminal "gangs" that they wished to join nothing more than free dialogues, in which self-incriminating admissions were all the more plausible because made in circumstances lacking any perceived official pressure?

197 I find that view of the conversations a serious mischaracterisation of the exchanges that actually took place. As described earlier in these reasons, in every instance, the confessions were motivated by a combination of purposes. However, in accordance with the build-up of *fear*, which the "scenarios" were designed to produce, and in the *hope* of securing the promised assistance of pretended corrupt police officers, the appellants, and each of them, cannot in my view be said to have freely chosen to make the confessional statements that they did. Least of all did they freely do so for the purpose of enabling the later use of those confessional statements in their respective trials for murder as damaging (even possibly decisive) testimony against themselves.

198 *The relevance of Swaffield*: Although *Swaffield* was not a case in which the parties argued questions of voluntariness, some of the remarks made in this Court in that case are apt to an understanding of the purposes of "basal voluntariness", as it exists in the context of the administration of criminal justice as practised in this country.

199 In the joint reasons in *Swaffield*[209], reference was made by Toohey, Gaudron and Gummow JJ to an earlier decision of the Supreme Court of Canada

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**207** *McDermott* (1948) 76 CLR 501 at 511. See also *Ibrahim v The King* [1914] AC 599 at 609.

**208** Reasons of Gummow and Hayne JJ at [55]-[56]. See also "Developments in the Law – Confessions", (1966) 79 *Harvard Law Review* 935 at 954.

**209** (1998) 192 CLR 159 at 199-200 [84]-[86].

in *R v Hebert*[210]. Whilst cautioning about the use of Canadian authority, given the intervention of the *Charter*, the joint reasons in *Swaffield* cite the majority's observations in *Hebert* in relation to the "right to silence", which is the time-honoured antonym to the making of self-incriminating confessional statements[211]. As the joint reasons in *Swaffield* point out, McLachlin J drew a distinction between "observing a suspect and actively eliciting information in violation of the suspect's choice to remain silent"[212]. They quote the following passage[213]:

> "When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police."

200 This explanation of the impermissibility of elicitation by police officers was given effect in the decision in *Swaffield*. The conduct of a police constable, operating undercover and actively interrogating Mr Swaffield in a hotel concerning his criminal involvements, was held to have exceeded what was legally permissible. Although the resulting exclusion of the evidence was premised on the judicial discretion, the joint reasons make a point that is directly relevant to the issue of basal voluntariness under present consideration[214]:

> "However, there is [a] broader question of whether what [the police constable] did was in violation of Swaffield's right to choose whether or not to speak to the police. There is the added question whether there has been a breach of [the Judge's Rules] and, if so, the consequence for the admissibility of the conversation …
>
> What if a test is applied by reference to Swaffield's right to choose whether or not to speak to the police? The application of such a test turns, at least so far as the Canadian authorities are concerned, on the extent to which any admission was elicited. It is clear from *Hebert* that the

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**210** [1990] 2 SCR 151.

**211** [1990] 2 SCR 151 at 181.

**212** (1998) 192 CLR 159 at 200 [86].

**213** [1990] 2 SCR 151 at 185.

**214** (1998) 192 CLR 159 at 202-203 [94], [97], [98].

> Canadian Supreme Court regards the use of a subterfuge to obtain a statement as likely to be in violation of the choice whether or not to speak but even then would treat a quite unelicited admission as not calling for the exercise of the discretion to exclude.
>
> In the circumstances of this case, the admissions were elicited by an undercover police officer, in clear breach of Swaffield's right to choose whether or not to speak. The Court of Appeal was right in its conclusion [that is, in excluding the confessional statements] and this appeal should be dismissed."

201 In my own reasons in *Swaffield* I too embraced a test of elicitation. I also cited *Hebert*[215]. I noted the endorsement by the Canadian judges of United States authority[216]:

> "[T]he defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."

202 When this test was applied in *Swaffield*, it led to the conclusion that the "state agent" had "actively [sought] out information such that the exchange could be characterised as akin to an interrogation"[217]. I observed[218]:

> "Subterfuge, ruses and tricks may be lawfully employed by police, acting in the public interest[219]. There is nothing improper in these tactics where they are lawfully deployed in the endeavour to investigate crime so as to bring the guilty to justice. Nor is there anything wrong in the use of technology, such as telephonic interception and listening devices although this will commonly require statutory authority[220]. Such facilities must be employed by any modern police service. The critical question is not whether the accused has been tricked and secretly recorded. It is not even whether the trick has resulted in self-incrimination, electronically

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**215** (1998) 192 CLR 159 at 219 [153].

**216** *Kuhlmann v Wilson* 477 US 436 at 459 (1986).

**217** (1998) 192 CLR 159 at 220 [154] citing *R v Broyles* [1991] 3 SCR 595.

**218** (1998) 192 CLR 159 at 220-221 [155].

**219** *Ridgeway v The Queen* (1995) 184 CLR 19 at 37; *R v Christou* [1992] QB 979 at 989; cf *Rothman v The Queen* [1981] 1 SCR 640 at 697.

**220** cf *Ousley v The Queen* (1997) 192 CLR 69 at 134-135.

> preserved to do great damage to the accused at the trial. It is whether the trick may be thought to involve such unfairness to the accused or otherwise to be so contrary to public policy that a court should exercise its discretion to exclude the evidence notwithstanding its high probative value. In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police … in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent."

203 These remarks in *Swaffield* apply equally, in principle, to exclusion under the "basal voluntariness" rule. Either the courts are serious about upholding the accusatorial form of criminal trial in Australia or they are not. Either they will defend suspects from conduct of police officers who set out to extract confessional statements by undercover interrogation where earlier, regular interviews have failed to afford the necessary evidence, or they will not. Either they are willing to protect an accused's entitlement to remain silent in the presence of police or other official interrogators or they are not. A case such as the present puts our courts to the test. It puts this Court to a test as to its adherence to basal principles of the common law.

204 *Conclusion: statements inadmissible*: In my view, the confessional evidence secured from each of the appellants by "scenario techniques" offended the common law principle of basal involuntariness. In each case, the will of the suspect (in respect of the choice whether to speak or to withhold incriminating statements, in a context where police officers were present, and the statements were being recorded for future use in evidence) was overborne by the tactics used to extract the confessional statements. That will was overborne because tricks and deception were targeted directly at the suspect's fundamental legal right under our criminal justice system, namely to remain silent in the presence of police investigators. As to the suggestion that the tricks used by the undercover police officers were tolerable because the officers did not threaten violence, engage in unlawful conduct or use intimidation or duress to obtain the confessions,[221] it is necessary to remember that violence, intimidation and duress can be deployed in different manifestations. For frightened, vulnerable people of low intellect, a physical bashing may be much less effective than trickery and manipulation. As Professor Ashworth has remarked[222]:

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**221** cf reasons of Gummow and Hayne JJ at [81], [88], [98], [108]; joint reasons at [375].

**222** Ashworth, "Should the Police be Allowed to Use Deceptive Practices?", (1998) 114 *Law Quarterly Review* 108 at 112.

> "The conduct of a person who has been deceived is in an important sense not voluntary: the behaviour is, to the extent it is governed by the deception, not under the control or the choice of the actor."

205 A State Parliament, by enactment, might override such basic features of the Australian criminal justice system (and the rights of suspects within it). That Parliament then accepts democratic accountability before the electors for any departures from fundamental rights hitherto observed[223]. Courts of law should not change such basic rules. Their task is to adhere to long-established principles and to apply them neutrally. When asked to extend old rules, courts of law should only do so by analogical reasoning. They should ensure that such extensions adhere scrupulously to basic principles. Courts in this country are bound to do this, however unattractive they may sometimes regard the task.

206 *Necessity of parliamentary change*: I can well understand an inclination of the mind adverse to the appellants and their arguments in these appeals. I can appreciate an intuitive objection to excluding from consideration by a jury apparently reliable confessional statements that may help to clear up unresolved cases of homicide. I am sympathetic to the need, in contemporary circumstances, for innovations in police techniques and the use of technology. I accept the *bona fides* of the undercover police officers, and their "controllers", engaged in these cases. I understand the force of the rhetoric of Osborn J in his ruling in *Tofilau*[224]:

> "[P]revailing community standards would not support the exclusion of the confessional statements in the circumstances of the present case."

However, under our Constitution, courts exist to protect the legal rights of the probably guilty as well as of the possibly innocent. They exist to defend the unpopular as well as the acclaimed. We say this in the law many times in our ceremonies. But it only really matters when we are put to the test as judges to apply our rhetoric in a live case affecting real prisoners facing long sentences. If the community does not understand the importance of the rule of law and of defending the accusatorial trial and time-honoured rights against self-incrimination, it is the duty of judges and lawyers to explain how these principles transcend even unpopular outcomes in particular cases. When such values are lost, all established rights are imperilled.

207 In *Swaffield*, I observed[225]:

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**223** *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

**224** (2003) 13 VR 1 at 27 [90].

**225** (1998) 192 CLR 159 at 225 [167].

> "Legislation might permit police conduct of the kind disclosed in each of these appeals. None has been enacted. If it were, it would presumably introduce pre-conditions of prior independent authorisation. It would lay down checks and limits to defend the kinds of values which have long been protected by the common law. If it derogated from those values it would do so by the authority of Parliament."

208 Subject to the Constitution[226], it was open to the Victorian Parliament to legislate in respect of the police practices the subject of these appeals. Following this Court's decision in *Ridgeway*[227], amendments were enacted to federal law to regulate controlled operations by police and customs agents. The Federal Parliament passed the *Measures to Combat Serious and Organised Crime Act* 2001 (Cth)[228]. Where such legislation is enacted, it ordinarily includes independent checks against misuse of official power; defined limits on derogations from the normal rights of suspects; assurances to facilitate scrutiny of the means adopted by officials; and protections for innocent persons caught up in an operation. No such legislation was enacted by the Victorian Parliament to authorise and regulate state police covert operations utilising "scenario techniques" such as were deployed in each of the present cases.

209 This Court should not authorise such operations as within the common law where they derogate so seriously from basic individual common law rights which it is normally the province of courts to defend and uphold. Recent Australian experience suggests that, if police can demonstrate a need for enhanced legislative powers, parliaments have not been slow in enacting them. This is the way to preserve the rule of law. It is not by bending basic principles of voluntariness to allow the reception of confessional statements containing damning self-incrimination induced by trickery and deception on the part of public officials. Least of all should departures from permissible police conduct which override and ignore a suspect's "right to silence" be justified *ex post facto*

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**226** *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-486, 501-503; cf at 466, 475; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 99, 104, 115, 139. But see *Nicholas v The Queen* (1998) 193 CLR 173; cf Wheeler, "The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia", (1997) 23 *Monash University Law Review* 248; Lusty, "Proposed Witness Anonymity Laws Violate the Right to a Fair Trial and Arguably Infringe Ch III of the Constitution", (2004) 28 *Criminal Law Journal* 110 at 114.

**227** (1995) 184 CLR 19.

**228** See *Crimes Act* 1914 (Cth), s 15HB; Bronitt, "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe", (2004) 33 *Common Law World Review* 35 at 43.

on the ground that "prevailing community standards would not support the exclusion of the confessional statements"[229].

210 Doubtless, "community standards" may inform the content of the common law as expressed by the judges. However, in matters such as the present, it would be a mistake to enlist supposed "community standards" to condone departure by police officers from the basic rights of those suspected of crimes. Often it is the judges alone who will safeguard those basic rights. Elected officials, journalists and community groups sometimes prove to be no more than fair weather friends to basic legal principles and the rule of law. But it is in defending them that courts like this are put to the test.

Remaining issues

211 A number of issues remain to be dealt with. First, in each appeal, the respondent relied on s 149 of the Evidence Act. Relevantly, that section provides:

> "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made … ."

212 Because the trial judges and the Court of Appeal determined that the undercover police operatives were not "persons in authority", they held that s 149 had no application to the case[230].

213 Once it is concluded (as in my opinion it should be) that the undercover police were "persons in authority" for the purposes of the inducement rule, it is necessary, in cases arising in Victoria, to give effect to s 149. The provision would not appear to apply more broadly to the exclusion of evidence on the ground of "basal involuntariness".[231] However, given the way the proceedings developed, that question has never been determined in any of the present cases.

214 The appellants each resisted the application of s 149. They did so on the footing that the confessional statements were not "confessions" of the kind to which s 149 is addressed. They also argued that the inducements were calculated

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**229** *Tofilau* (2003) 13 VR 1 at 27 [90] applying dicta expressed in Canada in *R v Unger* (1993) 83 CCC (3d) 228 at 248-249 [68]-[72].

**230** See eg *Tofilau* (2003) 13 VR 1 at 16 [54].

**231** cf joint reasons at [390].

to cause them falsely to confess their guilt. These too are not issues that have been considered below in any of the cases.

Conclusion: remit to Court of Appeal

215 Any determination of such issues by this Court would proceed without the benefit of the opinion of an intermediate court. A disappointed party would thus lose a right to seek appellate review of the decision, itself an important privilege generally recognised in Australia, as under international law[232]. Consideration of the foregoing issues, if they be still relevant, should therefore be remitted to the Court of Appeal.

216 So should any further consideration of the application by Mr Clarke for the exclusion of the confessional statements on the additional basis of the exercise of the judicial discretion. A favourable determination of the issue of voluntariness, on either or both of the grounds propounded, entitles the suspect, as a matter of law, to the removal of the affected statements from the record. In such circumstances, no judicial discretion falls to be exercised. However, Mr Clarke's issue too should be remitted to the Court of Appeal in case conclusions adverse to the appellants are reached on the application of s 149 of the Evidence Act.

217 The prosecution did not rely on the "proviso"[233] to sustain the appellants' convictions on the basis of other evidence if the confessional statements were excluded. As the joint reasons point out[234], two of the appellants (Tofilau and Clarke) sought orders of acquittal and the other two (Hill and Marks) sought orders for a retrial. The proper order is therefore that each of the appeals should be returned to the Court of Appeal so that all remaining issues might be dealt with, so far as is necessary, and orders made appropriate to each case.

Orders

218 In each appeal, the following orders should be made:

(1) Appeal allowed;

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**232** *International Covenant on Civil and Political Rights*, Art 14.5. See *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 276-280.

**233** *Crimes Act* 1958 (Vic), s 568(1).

**234** Joint reasons at [244].

(2) Set aside the orders of the Court of Appeal and of the Supreme Court of Victoria; and

(3) Remit the proceedings to the Court of Appeal for decision conformable with these reasons.

219 CALLINAN, HEYDON AND CRENNAN JJ. These four appeals raise for consideration the admissibility of "scenario evidence". In outline, scenario evidence is confessional evidence obtained in the following way. Undercover police officers pose as members of a gang. They solicit the cooperation of a person whom they think has committed a serious crime, although they do not believe that they are yet able to prove it. They encourage that person to take part in "scenarios" involving what the person wrongly thinks is criminal conduct. Provided that the person informs the head of the gang of anything which might attract the adverse attention of the police, they offer the person two advantages. One is the opportunity of material gain by joining the gang. The other is the certainty that the head of the gang can influence supposedly corrupt police officers to procure immunity from prosecution for the serious crime. This technique was developed in Canada and evidence obtained pursuant to it there has been held admissible by the Supreme Court of Canada[235].

The background in *Tofilau v The Queen*

220 *The trial.* After a trial before the Supreme Court of Victoria (Osborn J and a jury), on 16 October 2003 Lemaluofuifatu Alipapa Tofilau ("Tofilau") was convicted of murdering Belinda Loree Romeo on 20 June 1999. She had been strangled. She had had a sexual relationship with him for the previous three months.

221 *Preliminary investigation.* Tofilau gave a statement to police on 14 July 1999. He was interviewed by detectives on 29 July 1999. He made no admissions of involvement in the killing.

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**235** Evidence obtained by a similar technique was admitted in *R v Todd* (1901) 13 Man LR 364. The Manitoba Court of Appeal admitted scenario evidence in *R v Unger* (1993) 83 CCC (3d) 228. In *R v Hodgson* [1998] 2 SCR 449 at 475 [36] a test was stated which, if correct, rendered the evidence admissible (see below at [300]). The Supreme Court of Canada reaffirmed the test specifically in relation to scenario evidence after the trials in the present appeals had taken place, and held that type of evidence admissible: *R v Grandinetti* [2005] 1 SCR 27. There are rulings of trial judges other than those under challenge in these appeals permitting the reception of scenario evidence, but they did not turn on the question of whether there was a person in authority: *Director of Public Prosecutions (Vic) v Ghiller* (2003) 151 A Crim R 148; *R v Favata* [2004] VSC 7 (an appeal against conviction being subsequently allowed on other grounds in *R v Favata* [2006] VSCA 44); *State of Western Australia v Lauchlan* [2005] WASC 266.

222 *Use of scenarios.* From December 2001 the police carried out an undercover operation in which particular officers posed as members of a criminal gang. At a meeting on 17 March 2002 an undercover officer told Tofilau that he did not believe what he had earlier said about the death of Belinda Romeo and that he believed that Tofilau had killed her. That officer exhorted Tofilau to confess, and Tofilau proceeded to admit the strangling. This meeting was audio taped.

223 The undercover officer then took Tofilau to the purported head of the gang. The purported head told Tofilau he needed to know all relevant details if he were to fix things with the police, and he interrogated Tofilau about them. Tofilau made extensive admissions which were videotaped.

224 On 18 March 2002 Tofilau made admissions in a record of interview conducted by persons known to him to be police officers. He confirmed that he had made statements to the undercover officers about strangling the deceased. Initially he said they were true, but he then claimed that he had fabricated what he had told them so that he could join the criminal gang.

225 *The trial judge's ruling.* The trial judge ruled that Tofilau's admissions were admissible. He held that they were not to be excluded as involuntary on the ground of having been induced by threats or promises from a person in authority, because the undercover officers were not perceived by Tofilau to be persons in authority. He held that it was not necessary to consider whether s 149 of the *Evidence Act* 1958 (Vic)[236] ("the Evidence Act") applied; in any event Tofilau's admissions were not "confessions" (that is, complete admissions of guilt) within the meaning of that expression in s 149. He also held that there were no circumstances of "basal involuntariness" because Tofilau's will was not overborne. He declined to exclude the admissions as unreliable, or to exercise the discretion, discussed in *R v Swaffield*[237], to exclude them[238].

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**236** It provides:

> "No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made; nor shall any confession which is tendered in evidence be rejected on the ground that it was made or purports to have been made on oath."

**237** (1998) 192 CLR 159.

**238** *R v Tofilau* (2003) 13 VR 1.

226 The trial proceeded and Tofilau was convicted.

The background in *Marks v The Queen*

227 *The trial*. After a trial before the Supreme Court of Victoria (Coldrey J and a jury), on 15 October 2004 Matthew Joseph Marks ("Marks") was convicted of murdering Margaret O'Toole, his great aunt, on 7 April 2002. She died as a result of many hammer blows being inflicted on her head and throat. Marks owed her approximately $60,000 and believed that he would derive considerable financial benefit under her will.

228 *Preliminary investigation.* Marks was interviewed by the Homicide Squad. Although he was released without charge, they decided to elicit scenario evidence.

229 *Use of scenarios.* In similar fashion to what happened in relation to Tofilau, undercover operatives gained Marks's confidence and involved him in 16 scenarios enacted between 22 October and 27 November 2002. On 27 November 2002 he admitted to an undercover officer, whom he wrongly believed to be the head of the gang he wished to join, that he had killed the deceased by bashing her head and neck with a hammer.

230 *The trial judge's ruling.* The trial judge overruled all the objections to reception of the admission – a "person in authority" objection, a "basal involuntariness" objection, a reliability objection and contentions that the evidence should be excluded in the court's discretion. He held also that, if the first objection had been upheld, s 149 would have applied[239].

231 The trial proceeded and Marks was convicted.

The background in *Hill v The Queen*

232 *The trial.* After a trial before the Supreme Court of Victoria (Bongiorno J and a jury), on 6 August 2004 Shane John Hill was convicted of murdering Craig Anthony Reynolds, who died on 22 February 2002. The victim, who was Hill's stepbrother, had been struck repeatedly with a house brick on 17 February 2002 and there were signs of attempts to strangle him. He had habitually supplied Hill with heroin, and relations between them had become tense.

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**239** *R v Marks* (2004) 150 A Crim R 212 at 220-231 [57]-[115].

233 *Preliminary investigation.* Late in the evening of 17 February 2002, and on 14 March 2002, Hill provided exculpatory statements to the police. In the days after the crime, on the other hand, he made incriminating remarks to his own brother and the victim's brother.

234 *Use of scenarios.* From 18 June to 6 August 2002, undercover police officers participated with Hill in 19 "scenarios" involving various types of apparent illegality and impropriety in order to gain his confidence. These tactics culminated on 6 August 2002 with Hill making admissions, which were recorded, about his stepbrother's death. On 9 August 2002 Hill was arrested and interviewed by a non-covert police officer. He made admissions during this interview.

235 *The trial judge's ruling.* The trial judge found that the admissions were not induced by persons in authority; that if they had been, s 149 of the Evidence Act would have applied; that there was no "basal involuntariness"; and that the evidence should not be excluded as a matter of discretion.

236 The trial proceeded and Hill was convicted.

The background in *Clarke v The Queen*

237 *The trial.* After a trial before the Supreme Court of Victoria (Kellam J and a jury), on 15 June 2004 Malcolm Joseph Thomas Clarke ("Clarke") was convicted of murdering Bonnie Melissa Clarke on 21 December 1982. She was six years old, and had been sexually assaulted, asphyxiated and stabbed. Clarke had been a lodger in her mother's house, and had later lived next door.

238 *Preliminary investigation.* Although the police spoke to Clarke on several occasions in the ensuing months, he was not formally interviewed. The initial investigation was unsuccessful, but in February 2001 the police resumed work on the case.

239 *Use of scenarios.* From March 2002 undercover police officers staged a series of scenarios with Clarke which were broadly similar to those employed with Tofilau, Marks and Hill. On 6 June 2002 Clarke made filmed admissions to an undercover officer, whom he believed to be the boss of the gang he was seeking to join. He then made admissions in a video-recorded interview with non-undercover officers.

240 *The trial judge's ruling.* The trial judge admitted evidence of admissions made to undercover operatives. He rejected an objection based on the "person in authority" rule, and hence held that s 149 of the Evidence Act did not need to be

considered. He also rejected objections based on "basal involuntariness", on reliability and on discretionary exclusion.

241 The trial proceeded and Clarke was convicted.

The Court of Appeal

242 The Court of Appeal of Victoria (Callaway, Buchanan and Vincent JJA) heard separate applications for leave to appeal against conviction by each of Tofilau, Marks, Hill and Clarke ("the appellants"). However, in each appeal the appellant had the same counsel as the others, the prosecution had the same counsel, the applications were argued together, and the decisions were handed down on the same day. In those applications each appellant maintained his arguments relating to "person in authority", "basal involuntariness" and discretionary exclusion. Each application was dismissed[240].

The appeal to this Court

243 In their appeals to this Court, all appellants contend that the courts below erred in relation to the issues of "person in authority" and "basal involuntariness". In addition, Clarke applied to amend his notice of appeal in order to contend that the Court of Appeal erred in failing to find error in the trial judge's failure to exclude the evidence on discretionary grounds.

244 Tofilau contends that apart from the scenario evidence, and the admissions in the record of interview made under their influence, there is insufficient evidence on which a jury could convict him at a second trial. Thus he seeks an acquittal. Marks, too, seeks an acquittal. Hill and Clarke each seek only an order for a new trial.

The legal context of the appellants' submissions

245 In order to appreciate the significance of the appellants' arguments, it is desirable to place them in the context of the law relating to the admissibility of confessions as a whole. An admission by an accused person "must be voluntary in order to be admissible"[241]. It is common to divide involuntary statements into

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**240** *R v Tofilau (No 2)* (2006) 13 VR 28; *R v Hill* [2006] VSCA 41; *R v Clarke* [2006] VSCA 43; *R v Marks* [2006] VSCA 42.

**241** *R v Lee* (1950) 82 CLR 133 at 144 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.

two categories. One concerns the "inducement rule": an admission by an accused person "is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed"[242]. The other category concerns those caught by the "basal involuntariness" rule, to be discussed below[243]. But even if an admission is voluntary, it may be excluded on "discretionary" grounds. In *R v Swaffield*[244] Toohey, Gaudron and Gummow JJ grouped these "discretionary" grounds under three heads.

246 The first in time to emerge was that which was stated in the cases summarised by Lord Sumner delivering the advice of their Lordships in *Ibrahim v The King*[245] about impropriety in police questioning. The correctness of excluding evidence on this ground in Victoria was left open in *Cornelius v The King*[246], but was approved for New South Wales by Dixon J in *McDermott v The King*[247]. Dixon J said of it:

> "there has arisen almost in our own time a practice in England of excluding confessional statements made to officers of police if it is considered upon a review of all the circumstances that they have been obtained in an improper manner".

In *R v Lee*[248] Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ declined to interfere with the Victorian Full Court's recognition of the discretion in that State. The application of this head was given fresh life from 1982, for in *Cleland v The Queen*[249] the discretion to exclude illegally or improperly obtained real evidence

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**242** *R v Lee* (1950) 82 CLR 133 at 144 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.

**243** Below at [325]-[340].

**244** (1998) 192 CLR 159 at 189 [52].

**245** [1914] AC 599 at 611-614.

**246** (1936) 55 CLR 235 at 247-248 per Dixon, Evatt and McTiernan JJ.

**247** (1948) 76 CLR 501 at 513.

**248** (1950) 82 CLR 133 at 149-151.

**249** (1982) 151 CLR 1.

enunciated in *Bunning v Cross*[250] was applied to confessions. It has since been common to refer to this as a "policy" discretion.

247 The second "discretionary" head to emerge arose where it could be said of a voluntary confession that "in all the circumstances it would be unfair to use it in evidence against" the accused. The words are those of Latham CJ in *McDermott v The King*[251] summarising *R v Jeffries*[252], but they were approved by Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ in *R v Lee*[253]. This is commonly called a "fairness" discretion.

248 The third "discretionary" head to emerge was the application to confessions of the "discretion" to exclude evidence the prejudicial impact of which is greater than its probative value, which had begun to be recognised in *R v Christie*[254] and continued to develop in various fields of the law of evidence throughout the 20th century. The application of that principle to confessions, but not its description as a "discretion", was accepted as legitimate by Toohey, Gaudron and Gummow JJ in *R v Swaffield*[255].

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**250** (1978) 141 CLR 54 at 75.

**251** (1948) 76 CLR 501 at 506-507.

**252** (1946) 47 SR (NSW) 284.

**253** (1950) 82 CLR 133 at 151.

**254** [1914] AC 545 at 560 per Lord Moulton, 564-565 per Lord Reading (Lord Dunedin concurring).

**255** (1998) 192 CLR 159 at 191-193 [61]-[65]. In that case at 194 [69] it was further suggested that, subject to a qualification, admissibility at common law turns "first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which [takes] account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards". Whether or not this is so was not crucial to the outcome in *R v Swaffield*, was not argued in the present appeals, and is not crucial to their outcome. The correctness of the suggestion thus need not be decided in these appeals (cf reasons of Kirby J at [127]). Subject to that, it is desirable to say the following about the fact that Tofilau appeared to submit to Osborn J that confessions can be excluded merely because they are unreliable, as did Marks and Clarke. The submissions were rejected on the facts (*R v Tofilau* (2003) 13 VR 1 at 17 [57]-[58]; *R v Marks* [2004] VSC 476 at [83]-[92]; *R v Clarke* [2004] VSC 11 at [54]-[65]), but in any event

(Footnote continues on next page)

Were the undercover operatives "persons in authority"?

249 *The legal issues.* The question whether the admissions were excluded by the "inducement rule" depends on whether the undercover operatives were "persons in authority". That question is discussed here in relation to the appellants as a class. That is because from this point of view there is no material difference between them. Indeed the submissions presented were substantially similar, with significant reciprocal adoption by cross-reference. In contrast, it is necessary to consider the application of the "basal involuntariness" rule separately in relation to each appellant because the outcome will be governed by the particular circumstances of each appellant.

250 *The approach of the trial judges.* In the case of Tofilau, Osborn J held that the inducement rule did not apply where the suspect "neither knew or believed that the person holding out the inducement was a 'person in authority'"[256]. He also held that "the holding out contemplated must be one which cloaks the inducement with authority"[257]. He said that in the present case "the inducements did not come from persons supposed by the accused to have some capacity by reason of authority to carry them into effect"[258]. He concluded[259]:

> "In the present case, this requirement can only be regarded as being met if the role of an undercover police officer who was represented to be a corrupt drug squad detective at the initial meeting ... can be regarded as cloaking the subsequent inducements with authority. In my opinion it cannot. The purported corrupt police officer was part of the scenario at the time of the initial introduction to the purported gang. What was said about him both at the [initial meeting] and subsequently in reiteration and reinforcement of the scenario was, however, clearly said by persons who purported to be criminals. There were no inducements offered by persons

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their correctness in law is highly questionable: a fear of unreliability may underpin the "inducement rule", and unreliability may be a factual circumstance relevant to basal involuntariness and to discretionary exclusion, but the fact that a judge thinks that a confession is unreliable is not in itself a ground of automatic exclusion.

**256** *R v Tofilau* (2003) 13 VR 1 at 9 [26].

**257** *R v Tofilau* (2003) 13 VR 1 at 9 [27].

**258** *R v Tofilau* (2003) 13 VR 1 at 10 [29].

**259** *R v Tofilau* (2003) 13 VR 1 at 14 [42].

> in authority in the relevant sense prior to the confessional statements. Indeed, the essence of the inducements that were offered was that they were not offered by persons in authority but were offered by criminals purporting to have connections with, but in fact to be outside, authority."

251 In the case of Hill, Bongiorno J followed Osborn J's reasoning in *R v Tofilau* and said that, while the accused believed in the power of the gangster boss to fix things, power was not authority, and the accused did not believe in the boss's authority.

252 In the case of Marks, Coldrey J applied Osborn J's reasoning and held that the inducements offered were not "held out by a person cloaked with authority legitimately linked to the investigative or prosecutorial process", but "were held out by a crime boss outside the authority of the law and envisaged the ... perversion of the course of justice through the utilisation of [a] corrupt police officer"[260].

253 And in the case of Clarke, Kellam J also followed Osborn J's reasoning. He held that Clarke did not see the gangster boss as a person with authority or control over the prosecution, but as "a criminal who might be able to interfere in a criminal way with the investigation of the case against" him[261].

254 *The approach of the Court of Appeal.* In *R v Tofilau* the Court of Appeal rejected a challenge to Osborn J's reasoning in relation to a "person in authority". It approved Osborn J's approach. It distinguished between a suspect's perception that an individual had the capacity to influence the prosecution, and a suspect's perception that the individual had the authority to do so. It required that the suspect perceive that the offeror of the inducement possess, "by reason of some lawfully held or conferred status or relationship with" the suspect, the capacity to influence "the course of the prosecution, or the manner in which [the suspect] is treated in respect of it"[262]. The Court of Appeal rejected the corresponding ground of challenge in the other applications[263].

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**260** *R v Marks* (2004) 150 A Crim R 212 at 225 [74]-[75].

**261** *R v Clarke* [2004] VSC 11 at [40].

**262** *R v Tofilau (No 2)* (2006) 13 VR 28 at 67 [170] per Vincent JA (Callaway and Buchanan JJA concurring). The latter quotation is from *R v Dixon* (1992) 28 NSWLR 215 at 229 per Wood J.

**263** *R v Hill* [2006] VSCA 41 at [104]-[105]; *R v Clarke* [2006] VSCA 43 at [122]; *R v Marks* [2006] VSCA 42 at [183].

255 *The appellants' arguments.* All appellants contended that their admissions to undercover operatives were not voluntary, on the ground that they had been preceded by threats or promises held out by persons in authority. They did not in terms contend that the "person in authority" requirement did not or should not exist. But the appellants did submit that the operatives in the present cases were persons in authority. There was no issue that the admissions of each appellant had been preceded by promises of advantage if they were made (specifically, profitable membership of the gang and the conferral of de facto immunity by supposedly corrupt police officers friendly with the gangsters) and threats of corresponding disadvantage if they were not made.

256 The arguments which the appellants advanced on the "person in authority" issue, like their other arguments, were advanced in some detail. The consequences for the appellants if their arguments fail, and the legal significance of those arguments, make it necessary both to set them out and to analyse them in some detail.

257 The appellants submitted that the trial judges and the Court of Appeal erred in holding that a police officer could not be a person in authority unless the person who confesses or makes admissions believes that officer to have lawful authority, and in concluding that the operatives were not persons in authority because the appellants believed that they were gangsters with access to corrupt police officers capable of perverting the course of justice as distinct from honest officers dedicated to enforcing the law[264].

258 Dixon J, writing in a context remote from scenario evidence, defined the expression "person in authority" as including "officers of police and the like, the prosecutor, and others concerned in preferring the charge"[265]. The primary

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**264** For example, *R v Tofilau (No 2)* (2006) 13 VR 28 at 67 [170] per Vincent JA (Callaway and Buchanan JJA concurring).

**265** *McDermott v The King* (1948) 76 CLR 501 at 511. In *R v Kassulke* [2004] QCA 175 at [18] Davies JA said that Dixon J "intended to limit [the] expression ['person in authority'] to those persons exercising or purporting to exercise the authority of the State in the investigation or prosecution of a charge of a criminal offence". (See also *R v Burt* [2000] 1 Qd R 28 at 32-33 [7] per Thomas JA.) This leaves out another type of "prosecutor" – the victim of the crime who, where private prosecutions are possible, could prosecute the crime, and who, where they are not, or where they are not being undertaken, is normally the trigger for the police force to investigate the crime and for the prosecuting authorities to institute a prosecution. It is not necessary in this case to consider whether this suggestion, which would involve a radical departure from the many cases which have included

(Footnote continues on next page)

submission of the appellants involved a significant expansion of that formulation. The submission was:

> "[A]ny person genuinely and reasonably believed by an accused to have the ability or capacity to influence the conduct of an investigating police officer in such a manner as to bring to an end a police investigation or to prevent a prosecution from being commenced falls within the definition of a 'person in authority'."

The appellants submitted that it was not necessary for the suspect to believe that the person holding out the inducement had lawful authority to do so. They advanced the following reasons for the conclusion they urged.

259 First, the appellants contended that "person in authority" was correctly defined by Wood J in *R v Dixon*[266]:

> "[A] person in authority includes any person concerned in the arrest, detention or examination of the accused, or who has an interest in respect of the offence, or who otherwise is seen by the accused by virtue of his position, as capable of influencing the course of the prosecution, or the manner in which he is treated in respect of it."

260 Secondly, the appellants submitted that the approach they advocated was supported by Davies JA in *R v Kassulke*[267].

261 Thirdly, the appellants submitted that it had never been a bar to characterising a statement as an inducement made by a person in authority, thereby rendering a confession inadmissible, that the inducement was a threat or promise to commit an unlawful act – to commit a contempt of court[268], to attempt to pervert the course of justice by procuring the grant of bail[269], to obstruct the course of justice by not charging a relative of the suspect[270], to commit the tort of

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> "the prosecutor" in the sense described within the category "person in authority" for nearly two centuries, is justified.

**266** (1992) 28 NSWLR 215 at 229 (Hunt CJ at CL and Sharpe J concurring).

**267** [2004] QCA 175 at [20].

**268** *R v Scofield* (1988) 37 A Crim R 197.

**269** *R v Bosman* (1988) 50 SASR 365.

**270** *R v Hurst* [1958] VR 396.

false imprisonment by keeping a mother in custody and putting her children in care unless she confessed[271], or to commit a battery if the suspect was threatened with a beating unless there was a confession, for example. The appellants in effect submitted that there was no difference between that type of conduct and the conduct of persons thought to be gangsters offering to interfere with the course of justice through the medium of a supposedly corrupt police officer.

262 Fourthly, the appellants submitted that on the test they proposed many past cases would still be decided as they had in fact been decided.

263 Fifthly, the appellants confronted *R v Grandinetti*. That unanimous decision of the Supreme Court of Canada upheld a test for defining "person in authority" inconsistent with that which the appellants proposed, namely whether the accused reasonably believed that the person hearing the admission was acting on behalf of the police or prosecuting authorities[272]. The appellants attacked the underlying reasoning.

264 Finally, the appellants submitted that the undercover officers were exercising the authority of the state in dealing with the appellants, or acting under the orders of officers who were not acting undercover but who were also exercising the authority of the state. They submitted that had the undercover officers been wearing police uniforms and badges while speaking to the appellants before they made admissions, they would have been persons in authority. The appellants submitted that the fact that they were not wearing uniforms and badges was not a material circumstance; in particular, their belief that the "gangsters" would make a request of a police officer corruptly to terminate the investigation was not mistaken in that they believed that officer to be an officer, and he was.

265 *The prosecution's position.* On the other hand, the Director of Public Prosecutions submitted that two conditions had to be satisfied before a person was a person in authority. The first was that that person actually did possess the authority – that is, the lawful authority – of the state. The second was that that person was perceived reasonably by the person confessing to have possessed that lawful authority. A question may arise whether, even if it is otherwise correct, the prosecution's definition is too narrow because it excludes what Dixon J called

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**271** *R v Middleton* [1975] QB 191.

**272** [2005] 1 SCR 27 at 40-41 [43], approving *R v Hodgson* [1998] 2 SCR 449 at 475 [36].

"the prosecutor". That is not, however, a question which needs to be decided in this appeal[273].

266 *The critical difference between the parties.* One difference between the appellants and the Director is that the appellants do not require the putative person in authority to in fact be a person exercising the legal authority of the state, whereas the Director does. Even if the appellants' test is erroneous in this respect, it would not affect the outcome, because the undercover police officers in these appeals do satisfy the requirement stipulated by the Director's test. It is accordingly not necessary to decide whether the Director is correct in insisting on the first limb[274].

267 The other difference between the test advocated by the appellants and that advocated by the Director is critical. It concerns what the reasonable perception of the person confessing is of the relationship between the alleged person in authority and the conduct of the prosecution. For the appellants, the reasonable perception of the relationship need only be that the alleged person in authority has a practical ability to influence the conduct of the prosecution, whether lawfully or not. For the Director, the reasonable perception of the relationship must be that the alleged person in authority has an ability to influence the conduct of the prosecution deriving from lawful authority. The difference is critical because the appellants did not have any reasonable basis on which to believe that the undercover police officers were acting pursuant to lawful authority.

History of the inducement rule

268 Before considering the appellants' arguments, it is desirable to bear in mind the history of the inducement rule with particular reference to the "person in authority" requirement.

269 There is no doubt that by 1783 admissions were excluded in criminal cases on the ground that they were unreliable when "forced from the mind by the

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**273** See note [265] above.

**274** There are authorities against it: *R v Hodgson* [1998] 2 SCR 449 at 471-475 [32]-[36]; *R v Burt* [2000] 1 Qd R 28 at 32-33 [7] per Thomas JA, 41-42 [39] and [45] per White J, but they were criticised in *R v Kassulke* [2004] QCA 175 at [21] per Davies JA (Williams and Jerrard JJA concurring): see below at [299]-[304].

flattery of hope, or by the torture of fear"[275]. In 1775 Lord Mansfield CJ had remarked[276]:

> "The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial."

Professor Langbein has concluded that the relevant development began after 1722. First, confessions induced by threats or promises were seen as lacking weight in 1738. Then, in 1740, they were seen as inadmissible. That view, for example, was expressed in 1741 by the future Foster J[277], the celebrated author of *Crown Law*. By 1761 the latter view came to prevail, and a string of cases ensued in which prisoners against whom there was no evidence except induced confessions were acquitted[278].

270 Foster, writing in 1762, said[279]:

> "[H]asty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often mis-reported, whether through ignorance,

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**275** *R v Warickshall* (1783) 1 Leach 263 at 263-264 per Eyre B and Nares J [168 ER 234 at 235].

**276** *R v Rudd* (1775) 1 Leach 115 at 118 [168 ER 160 at 161]. Mirfield, *Confessions*, (1985) at 47, questioned whether Lord Mansfield was referring to "a practice of prosecutors, or to a practice of judges, or to a rule binding judges". Kaufman, *The Admissibility of Confessions in Criminal Matters*, 3rd ed (1979) at 1, said it was "a statement of fact, a hint, perhaps, that a rule of practice existed".

**277** *R v White* (1741) 17 Howell State Trials 1079 at 1085.

**278** Langbein, *The Origins of Adversary Criminal Trial*, (2005) at 220-222. The inconclusiveness of the position before the early 18th century is discussed in Mirfield, *Confessions*, at 42-47. For arguments that, as Lord Sumner said in *Ibrahim v The King* [1914] AC 599 at 610, the "principle is as old as Lord Hale", see Wolchover and Heaton-Armstrong, *Confession Evidence*, (1996) at pars 4-002-4-015.

**279** *A Report of Some Proceedings on the Commission of Oyer and Terminer and Gaol Delivery for the Trial of the Rebels in the Year 1746 in the County of Surry; and of Other Crown Cases*, (1762) at 243.

> inattention, or malice, it mattereth not the defendant, he is equally affected in either case; and they are extremely liable to mis-construction. And withall, this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted."

Blackstone, writing in the later 1760s, said that confessions[280]:

> "are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence".

271 The reasons for these developments have been said to lie in a distrust of evidence given by persons implicated in crimes who had been promised immunity and rewards if they would give evidence for the prosecution against their accomplices, in the "ever growing aversion to capital punishment for relatively minor crimes of theft", and in the risk of abuse by masters of their servants[281]. Thus Langbein said[282]:

> "[T]he confession rule was not generated in rural venues populated by 'half-stupid' peasants fawning before squires,[283] but in metropolitan London, then the largest urban center in the world. The typical confessant was a young and vulnerable domestic servant (often female), or an apprentice, hireling, or lodger, often far from the support of home and family, charged with taking food, clothes, housewares, tools, or stock of the trade. Cases in which a suspect was overawed into confessing a crime of which he or she was completely ignorant were no doubt rare, but it was plausible for contemporaries to have been concerned that a frightened and bewildered servant, mistakenly accused of a crime by the master upon whom the servant depended for daily bread, might confess to something the servant had not done, if that is what the master insisted, especially when the master promised impunity or forgiveness (the 'hope of favor'

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**280** *Commentaries on the Laws of England*, (1813), vol 4 at 324-325.

**281** Langbein, *The Origins of Adversary Criminal Trial*, (2005) at 230-232.

**282** Langbein, *The Origins of Adversary Criminal Trial*, (2005) at 230-231 (footnotes omitted).

**283** This is an allusion to Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 3, par 865 at 353.

> branch of the rule). Moreover, there were a few occasions in which alleged crimes arising out of domestic or workplace settings were ambiguous, in the sense that the servant had a tenable claim of entitlement to the allegedly stolen goods as part of an understanding about the terms of service. Such cases were not smash-and-grab break-ins, but workplace disputes. The danger was that the master might determine to win the dispute with a three-step minuet: first instigating or threatening criminal prosecution, then promising impunity if the servant confessed stealing what the servant had taken without criminal intent, and then reneging on the promise not to prosecute the servant on the confession."

272 On that view, the development of the "person in authority" element of the inducement rule was integrally connected with the power of private persons over prosecutions. There are today proportionately many fewer private prosecutions than in the 18th century, even in jurisdictions which permit private prosecutions at all; a symptom and cause of this is the rudimentary nature of 18th century police forces. "The law enforcement officers formed no disciplined police force and were not subject to effective control by the central government, watch committees or an inspectorate."[284]

273 Further explanations for the development of the inducement rule have been advanced. Appellate review was limited until the Court for Crown Cases Reserved was set up in 1848, and even that was a cumbrous and infrequently used procedure[285]. There was no legal aid. In felony cases, until the *Trial for Felony Act* 1836 (UK), defence barristers could only argue points of law and advise the accused what questions to ask witnesses; defence barristers could not address the jury or examine witnesses themselves. Neither the accused nor the accused's spouse was generally considered a competent witness until the late 19th century, and they were therefore unable to explain any admissions made – although many contemporary lawyers favoured that state of affairs as conferring advantages on the accused, so that it may not have been causative in the development of the inducement rule[286].

274 However that may be, many aspects of contemporary conditions appear to have engendered a spirit of hostility to induced confessions.

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**284** *Director of Public Prosecutions v Ping Lin* [1976] AC 574 at 600 per Lord Hailsham of St Marylebone.

**285** Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 308-313.

**286** See *Cornwell v The Queen* (2007) 81 ALJR 840 at 849-853 [38]-[53] per Gleeson CJ, Gummow, Heydon and Crennan JJ; 234 ALR 51 at 64-69.

275 The ground initially given for rejecting induced confessions in *R v Warickshall* was unreliability. But the inquiry did not turn on whether in the particular circumstances of a given case a confession was unreliable. Once an inducement was made out – and the decisions on that question were lenient to the accused – the confession was automatically excluded without further inquiry into the likelihood of its being untrue[287]. Thus in 1783 Hotham B said: "It is almost impossible to be too careful ... Too great a chastity cannot be preserved on this subject."[288]

276 In the ensuing years the authorities revealed the following tendencies.

277 First, the courts inquired into whether there was a threat or promise; they did not inquire into whether it was likely to have produced an untrue confession[289].

278 Secondly, very vague observations were held to amount to a threat or promise. Thus confessions were excluded after such statements as: "[Y]ou may as well tell me all about it."[290]

279 Thirdly, some truthful and even helpful observations were held to amount to a threat or promise. In *R v Drew*[291] Coleridge J excluded a confession made after the accused was told not to say anything to prejudice himself, as what he said would be taken down, and would be used for or against him at his trial. He ruled in similar fashion in *R v Morton*[292], as did Maule J in *R v Furley*[293] and *R v Harris*[294].

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**287** *R v Thompson* (1783) 1 Leach 291 [168 ER 248]; *R v Cass* (1784) 1 Leach 293n [168 ER 248 at 249].

**288** *R v Thompson* (1783) 1 Leach 291 at 293 [168 ER 248 at 249].

**289** For example, *R v Enoch* (1833) 5 C & P 539 at 540 [172 ER 1089], where Parke J saw it as sufficient to exclude a confession that it "was made after an inducement".

**290** *R v Croydon* (1846) 2 Cox CC 67.

**291** (1837) 8 C & P 140 [173 ER 433].

**292** (1843) 2 Moo & Rob 514 [174 ER 367].

**293** (1844) 1 Cox CC 76.

**294** (1844) 1 Cox CC 106.

280 In *R v Baldry*[295], in 1852, Lord Campbell CJ, Parke B and Erle J made trenchant criticisms of the case law on that point, and this may have checked the tendency described in the penultimate paragraph. However, only the four cases mentioned in the previous paragraph were said or suggested to be wrong. And *R v Baldry* did not disturb the principle that once a threat or promise was found, no inquiry was conducted into whether it was likely to produce an untrue confession[296]. This was reaffirmed in *R v Moore*[297], which was argued on the same day as *R v Baldry*. In *R v Moore*, Parke B, speaking for eight judges of the Court for Crown Cases Reserved, said[298]:

> "It is admitted that confessions ought to be excluded unless voluntary, and the Judge, not the jury, ought to determine whether they are so.
>
> One element in the consideration of this question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the Judge was to decide whether the confession was voluntary), that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat.
>
> But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement, and the prosecutor, magistrate, or constable, is such a person, and so the master or mistress may be.
>
> If not held out by one in authority, they are clearly admissible."

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**295** (1852) 2 Den 430 [169 ER 568].

**296** (1852) 2 Den 430 at 446 and 445 per Lord Campbell CJ and Parke B respectively [169 ER 568 at 575 and 574]. This no doubt led to the enactment in Victoria shortly after 1852 of the precursor to s 149 of the Evidence Act (see note [236] above), namely s 19 of the *Law of Evidence Consolidation Act* 1857 (21 Vic No 8).

**297** (1852) 2 Den 522.

**298** (1852) 2 Den 522 at 526-527 [169 ER 608 at 610].

281 Thus in 1881 Lord Coleridge CJ, sitting in the Court for Crown Cases Reserved, said[299]:

> "[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

In so doing he was quoting from Russell, who a little later said[300]:

> "A confession can never be received in evidence, where the prisoner has been influenced by *any* threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration, if *any* degree of influence has been exerted."

In 1893 the Court for Crown Cases Reserved in *R v Thompson*[301] repeated Lord Coleridge CJ's statement. That remained the position in England until, shortly before the statutory abolition of the inducement rule in 1984[302], the House of Lords in *Director of Public Prosecutions v Ping Lin*[303] favoured an examination of whether, in the particular case, the inducement had actually caused the confession.

282 In Australia, perhaps some courts resisted the English extremes[304], but the operation of the rule was not fundamentally different, save that in Australia the prosecution had only to establish voluntariness on the balance of probabilities, whereas in England the standard of proof was beyond reasonable doubt[305].

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**299** *R v Fennell* (1881) 7 QBD 147 at 151.

**300** *A Treatise on Crimes and Misdemeanors*, 5th ed (1877), vol 3 at 442 (emphasis in original).

**301** [1893] 2 QB 12 at 17 per Cave J, speaking as well for Lord Coleridge CJ, Hawkins, Day and Wills JJ.

**302** *Police and Criminal Evidence Act* 1984 (UK).

**303** [1976] AC 574: see [289] below.

**304** For example, *R v Bodsworth* [1968] 2 NSWR 132 at 139.

**305** *Wendo v The Queen* (1963) 109 CLR 559 at 562 per Dixon CJ, 572 per Taylor and Owen JJ.

History of the "person in authority" requirement

283 The person in authority requirement appears first to have emerged explicitly in 1809 in *R v Row*[306]. Lord Ellenborough CJ, Mansfield CJ of CB, Macdonald CB, Heath, Grose, Lawrence, Le Blanc, Chambre JJ and Wood B held admissible a confession made after some of the accused's "neighbours, who had nothing to do with the apprehension, prosecution or examination of the prisoner, officiously interfered, and admonished the prisoner to tell the truth, and consider his family, which was a large one". They did so on the ground that "the advice to confess was not given or sanctioned by any person who had any concern in the business". While the rule stated in *R v Row* was often followed[307], there were a few later cases decided in a four year period, between 1830 and 1834, which held or assumed that an inducement could lead to the exclusion of a confession even though it did not proceed from or in the presence of a person in authority[308]. In 1837, Parke B recorded that there was disagreement among the judges on the point[309]. However, in 1839 the judges agreed that the person in authority requirement existed[310]. Its existence was put beyond doubt in 1852 by *R v Moore*[311] and in 1853 by *R v Sleeman*[312]. In *R v Cleary*[313] and *R v Wilson*[314]

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**306** (1809) Russ & Ry 153 [168 ER 733].

**307** For example, *R v Gibbons* (1823) 1 C & P 97 [171 ER 1117].

**308** *R v Kingston* (1830) 4 C & P 387 [172 ER 752]; *R v Dunn* (1831) 4 C & P 543 [172 ER 817]; *R v Slaughter* (1831) 4 C & P 544n [172 ER 818]; *R v Walkley* (1833) 6 C & P 175 [172 ER 1196]; *R v Thomas* (1834) 6 C & P 353 [172 ER 1273].

**309** *R v Spencer* (1837) 7 C & P 776 [173 ER 338].

**310** *R v Taylor* (1839) 8 C & P 733 [173 ER 694]. See generally Joy, *On the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland*, (1842) at 23-33.

**311** (1852) 2 Den 522 [169 ER 608]. In *R v Baldry* (1852) 2 Den 430 at 445 [169 ER 568 at 574], the person in authority requirement is mentioned by Parke B, but in *R v Moore* the recognition and limitation of the person in authority rule was crucial to the decision that the wife of a person in whose house had been committed an offence in no way concerning that person or his wife was not a person in authority.

**312** (1853) 6 Cox CC 245.

**313** (1963) 48 Cr App R 116.

the rule was applied by the English Court of Criminal Appeal. In 1967 the House of Lords refused to accept a requirement sometimes thought to be related to the person in authority rule, namely that the inducement, in addition to proceeding from a person in authority, must relate to the prosecution[315]. In 1968 the Privy Council rejected a submission that the person in authority requirement be abolished[316].

284 The person in authority requirement has never been challenged in Australia, and many Australian authorities have accepted that it exists[317], although there has been debate about its extent[318].

The purpose of the inducement rule

285 What have the authorities suggested as being the purposes served by the rule that an admission proceeding from an inducement by a person in authority is inadmissible? It is desirable to pose the inquiry because the answer may assist in assessing the cogency and desirability of the test advocated by the appellants. It is not, however, proposed to discuss the question whether the various purposes do satisfactorily explain the inducement rule in its entirety, for no submission that it be abandoned has been made. Nor is it proposed to discuss suggestions not made in the authorities. Further, it is not denied either that other classifications are possible or that the categories may overlap to some extent.

286 *Reliability.* The oldest justification for the rule is that given by Eyre B and Nares J in *R v Warickshall*. In that case a person accused of having received property knowing it to have been stolen made a full confession of her guilt. In consequence the property was found in her bed. The court rejected the

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**314** [1967] 2 QB 406.

**315** *Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 760 at 818-821 per Lord Reid (Lords Morris of Borth-y-Gest, Hodson, Pearce and Wilberforce concurring).

**316** *Deokinanan v The Queen* [1969] 1 AC 20.

**317** For example, Dixon J did so in *McDermott v The King* (1948) 76 CLR 501 at 511.

**318** For example, the conclusion that the mother of (*R v Scofield* (1988) 37 A Crim R 197) or a person in loco parentis to (*Jonkers v Police* (1996) 67 SASR 401) a child complaining of sexual offences was a person in authority was criticised in *R v Burt* [2000] 1 Qd R 28 at 32-33 [7]-[8] by Thomas JA and *R v Tofilau (No 2)* (2006) 13 VR 28 at 66 [166] by Vincent JA (Callaway and Buchanan JJ concurring).

confession on the ground that it had been "obtained by promises of favour". Her counsel contended[319]:

> "[A]s the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected; for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction".

Eyre B and Nares J said[320]:

> "It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law."

That is, the law does not reject a confession merely because it is made on the faith of a particular assumption and a pledge of that faith has been violated by reason of that assumption being incorrect. Eyre B and Nares J continued[321]:

> "Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."

The same approach can be illustrated by three other old cases. In *R v Court*, Littledale J said[322]:

> "The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner

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**319** (1783) 1 Leach 263 at 263 [168 ER 234 at 234].

**320** (1783) 1 Leach 263 at 263 [168 ER 234 at 234].

**321** (1783) 1 Leach 263 at 263-264 [168 ER 234 at 234-235].

**322** (1836) 7 C & P 486 at 487 [173 ER 216].

> being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed."

In *R v Baldry*, Parke B approved the reasons given by Lord Campbell CJ at trial; he said, in admitting the confession, that the inducement "could have no tendency to induce him to say anything untrue"[323]. In *R v Scott*[324], Lord Campbell CJ said that if there were threats or promises, "the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon". There are modern authorities to the same effect. Thus Lord Reid said that one line of thought underlying the rejection of confessions was "that a statement made in response to a threat or promise may be untrue or at least untrustworthy"[325].

287 This type of thinking might suggest that an inquiry into the accused's mental processes is called for, in order to examine whether the inducement did stimulate the flattery of hope or the torture of fear, and whether it was the flattery or the torture, as distinct from some other cause, which forced the confession from the accused's mind. The traditional English approach, until *Director of Public Prosecutions v Ping Lin*[326], was against conducting any inquiry of this kind. This had the result that very small inducements were fatal, even after *R v Baldry*. A small selection from a huge field of examples would include: "It will be the right thing ... to make a clean breast of it"[327]; "I think it might be better if you made a statement and told me exactly what happened"[328]; "Put your cards on the table. Tell them the lot"[329]; "You had better tell the truth"[330].

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**323** (1852) 2 Den 430 at 444 [169 ER 568 at 574].

**324** (1856) Dears & Bell 47 at 58 [169 ER 909 at 914].

**325** *Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 760 at 820.

**326** [1976] AC 574.

**327** *R v Thompson* [1893] 2 QB 12 at 13.

**328** *R v Richards* [1967] 1 WLR 653; [1967] 1 All ER 829.

**329** *R v Cleary* (1963) 48 Cr App R 116.

**330** *R v Jarvis* (1867) LR 1 CCR 96.

288 This traditional approach can be defended in two ways. In *Commissioners of Customs and Excise v Harz and Power* Lord Reid defended it thus[331]:

> "It is true that many of the so-called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men and women; they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side."

An alternative approach is that while an inquiry on the voir dire into what happened between an accused person and a person in authority is manageable, a wider inquiry into the actual contents of the accused's mind is not likely to generate any benefits, or at least any benefits outweighing the increased costs of that inquiry in time and money. This appears to underlie the view expressed in Russell and referred to earlier[332].

289 In the years just before the statutory abolition of the inducement rule in England in 1984[333], the English courts began to react against the strictness of the inducement rule. In *R v Isequilla*[334] Lord Widgery CJ said: "[T]he courts have perhaps been over-generous in accepting as an inducement for present purposes something which would be unlikely to induce the average man." The House of Lords in *Director of Public Prosecutions v Ping Lin*[335] made it plain that the test was whether the inducement, on the facts of the particular case, caused the confession. Whether or not that tendency, if adopted in Australia, would cause the inducement rule to reflect a reliability rationale more closely is not entirely clear. The curiosity would remain that confessions made without any inducement can be false – whether because of a spontaneous desire to confess, or because of shock or shame on arrest, for example – but no "reliability" principle applies there. At all events, there has been a persistent line of authority disagreeing with the "reliability" principle. Thus in *R v Baldry*, Pollock CB said of an induced statement[336]: "There is no presumption of law that it is false or that

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**331** [1967] 1 AC 760 at 820.

**332** See above at [281].

**333** *Police and Criminal Evidence Act* 1984 (UK), s 76.

**334** [1975] 1 WLR 716 at 721; [1975] 1 All ER 77 at 82.

**335** [1976] AC 574 at 594, 600-602, 604 and 606-607.

**336** (1852) 2 Den 430 at 442 [169 ER 568 at 573].

the law considers such statement cannot be relied upon." And in *Basto v The Queen* this Court said[337]:

> "A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth. That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise of advantage being held out by a person in authority. A statement induced by such a promise is involuntary within the doctrine of the common law but it is plain enough that the inducement is not of such a kind as often will be really likely to result in a prisoner's making an untrue confessional statement."

However, the reliability principle has been asserted on several more recent occasions in this Court[338].

290 *Jury danger.* A second principle on which the inducement rule has been said to rest was put thus by Pollock CB, as a matter quite distinct from, and indeed contradictory of, the reliability principle[339]:

> "The ground for not receiving such evidence is, that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false or that the law considers such statement cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury."

The theory is evidently that although admissions are received because "what a party himself admits to be true, may reasonably be presumed to be so"[340], a jury

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**337** (1954) 91 CLR 628 at 640 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ.

**338** For example, *Cleland v The Queen* (1982) 151 CLR 1 at 18 per Deane J; *R v Swaffield* (1998) 192 CLR 159 at 167-170 [11] per Brennan CJ.

**339** *R v Baldry* (1852) 2 Den 430 at 441-442 [169 ER 568 at 573] per Pollock CB. This justification is sometimes treated as part of the first. Thus the English Criminal Law Revision Committee *Eleventh Report Evidence (General)*, (1972), Cmnd 4991 at 35 [55] said: "Persons who are subjected to threats, inducements or oppression may 'confess' falsely; juries are peculiarly apt to attach weight to such a confession, even though the evidence of the threat, inducement or oppression is before them; consequently, they must be prevented from knowing of the confession." But that is not how Pollock CB put it in *R v Baldry*.

may give excessive weight to admissions compared with other evidence. Lord Sumner appears to have adopted this view[341]:

> "It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice ... ."

Dixon J quoted those words with approval in *Sinclair v The King*[342].

291 *Nemo tenetur se ipsum prodere.* Thirdly, if an accused is convicted solely or largely on the basis of a confession, in some minds a question arises whether it can be said that the duty of the prosecution to prove guilt has been discharged. In Frankfurter J's words[343]: "Ours is an accusatorial system, a system in which the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." In that sentence much depends on what is meant by "coercion". In *R v Sang*, Lord Diplock said[344]:

> "The underlying rationale of this branch of the criminal law, though it may originally have been based upon ensuring the reliability of confessions is, in my view, now to be found in the maxim nemo debet prodere se ipsum, no one can be required to be his own betrayer or in its popular English mistranslation 'the right to silence'."

Lord Reid considered that the exclusion of induced confessions rested on the idea "that nemo tenetur seipsum prodere"[345]. Under this principle "it is regarded as inappropriate that a person should incriminate himself as the result of the conduct of another"[346]. Deane J said that the basis of the law rested on "a combination of

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

**341** *Ibrahim v The King* [1914] AC 599 at 611, citing *R v Baldry* (1852) 2 Den 430 at 445 [169 ER 568 at 574], which appears to be a slip: the correct reference is in note [339] above.

**342** (1946) 73 CLR 316 at 335.

**343** *Rogers v Richmond* 365 US 534 at 540-541 (1961).

**344** [1980] AC 402 at 436.

**345** *Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 760 at 820.

**346** *R v Dixon* (1992) 28 NSWLR 215 at 221 per Wood J.

the potential unreliability of a confessional statement that does not satisfy the requirement of voluntariness and the common law privilege against self-incrimination"[347]. Appeal is also made to a supposed disconformity between the right of the accused not to testify at the trial, and the tender of admissions made before trial. Thus Channell J said[348]: "[T]he moment you have decided to charge him and practically get him into custody, then, inasmuch as a judge even can't ask a question or a magistrate, it is ridiculous to suppose that a policeman can." That was a view with some support just before the turn of the 20th century[349]; obviously now police officers can ask questions of suspects both before and after they are charged, on certain conditions. But some have a lingering distaste about the reception of the answers.

292 *Disciplining the police.* A further principle was stated in *Wong Kam-Ming v The Queen*. Lord Hailsham of St Marylebone said[350]:

> "[A]ny civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

Again, much depends on what is meant by "improper methods", "ill treatment" and "improper pressure". Threats or promises of unlawful conduct, depending on what it is, may well be "improper" and indeed may be themselves unlawful conduct; but not all inducements involve threats or promises of unlawful conduct. The House of Lords held in *Director of Public Prosecutions v Ping*

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**347** *Cleland v The Queen* (1982) 151 CLR 1 at 18 per Deane J.

**348** *R v Booth* (1910) 5 Cr App R 177 at 179, differently reported in *R v Knight and Thayre* (1905) 20 Cox CC 711 at 713.

**349** *R v Gavin* (1885) 15 Cox CC 656; *R v Histed* (1898) 19 Cox CC 16.

**350** [1980] AC 247 at 261. In Australia this was recognised in *R v Dixon* (1992) 28 NSWLR 215 at 221.

*Lin*[351] that establishing an inducement did not require proof of any impropriety. On this approach, the exclusion of confessions has two effects: it protects the accused who made the confession by excluding it, and it deters police officers on future occasions from repeating their conduct with other accused persons.

293 *Impact on free choice.* Another principle relates to the impact of an inducement on the free choice of the accused to confess. In *R v Baldry*[352], Lord Campbell CJ said that the reason for excluding confessions made after an inducement "is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury". The "bias" is generated by the power of the inducement made by the person in authority. A similar idea appears in Canada: the purpose of the rule is "to avoid the unfairness ... of admitting statements made when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state"[353]. This has particular force in relation to confessions in police stations, where the accused may have no family or lawyer at hand.

Examination of the appellants' arguments

294 *The argument based on R v Dixon.* In relying on the definition given by Wood J in *R v Dixon*[354] the appellants noted that he used the word "capable" without qualification by any reference to lawful authority. That definition does not, however, assist the appellants.

295 First, that case had nothing to do with scenario evidence. It concluded that a Community Aboriginal Liaison Officer speaking to a young Aboriginal, "held in police cells and charged with serious crime", was a person in authority because, in the eyes of the suspect, the officer "was likely to be seen as a person of some standing and influence with the police ... to be associated with them in his office, and to be in a position both to offer advice as to what he should do and also to secure some help for him in relation to the charges he was facing"[355].

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**351** [1976] AC 574 at 593 per Lord Wilberforce, 594 per Lord Morris of Borth-y-Gest, 602 per Lord Hailsham of St Marylebone.

**352** (1852) 2 Den 430 at 446 [169 ER 568 at 575].

**353** *R v Grandinetti* [2005] 1 SCR 27 at 38 [35].

**354** (1992) 28 NSWLR 215 at 229: quoted above at [259].

**355** (1992) 28 NSWLR 215 at 229-230.

That is, the suspect believed that the officer could influence the course of the prosecution, but lawfully. The position here is the converse: the appellants believed that the gangsters with whom they thought they were dealing could influence the course of the prosecutions, but only unlawfully. What Wood J said about the circumstances before him contains nothing favourable to the appellants about the resolution of the problem raised by the completely different circumstances of these appeals.

296 Secondly, the proposition that Wood J's definition does not apply to scenario evidence is supported by his favourable citation of an early scenario evidence case from Manitoba. In *R v Todd* two detectives represented to the accused that they were members of an organised gang of criminals and that to join that gang he had to satisfy them that he had committed a crime of a serious nature. They were held not to be persons in authority. Wood J quoted the following statement of Bain J[356], which has been approved by the Privy Council[357]:

> "A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favor on the one hand and on the other to inspire him with awe."

The expression "the authority that the accused knows such persons to possess" cannot be applied to the supposed gangsters in these cases, because each appellant knew that the "gangsters" possessed no authority – lawful power – at all, whatever unlawful power he believed they had.

297 Thirdly, when Wood J spoke of the person in authority being seen in a certain light by virtue of his "position", the context suggests that he had in mind the person's official position, carrying rights and functions authorised by law, as distinct from the person's de facto power.

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**356** *R v Todd* (1901) 13 Man LR 364 at 376.

**357** *Deokinanan v The Queen* [1969] 1 AC 20 at 32-33 per Viscount Dilhorne, Lords Hodson and Upjohn.

298 For those reasons, when Wood J's definition is read in context, it can be seen not to support, and to differ from, that which the appellants propound. Under Wood J's definition mere "ability" or mere "capacity" is not enough: it must be lawful capacity.

299 *The argument based on R v Kassulke.* The appellants cited *R v Kassulke*[358] in support of the test they propounded. Davies JA, after referring to Dixon J's statement that the expression '"person in authority' includes officers of police and the like, the prosecutor, and others concerned in preferring the charge", said:

> "There is also authoritative support for the view that the above definition should be expanded, by the notion of the reasonable perception of the accused, to include any person whom the accused reasonably believed was a person who had some power to control or influence the proceedings against him. On this view it would not matter whether the person in question was, objectively, a person in authority within Sir Owen's definition. There may be many persons whom an accused might reasonably perceive were persons who had some power to influence proceedings, in the sense that such proceedings might only commence if that person complains; but who were not persons who in fact had the power to exercise the authority of the State in the investigation or prosecution of the accused." (footnote omitted)

In *R v Kassulke*, the Queensland Court of Appeal decided that a doctor and a medical student who testified about a confession were not persons in authority. Davies JA's statement was thus directed to a very different factual context from the present. Further, although the passage referred to three authorities that Davies JA cited as affording "authoritative support" for the test proffered by the appellants, they do not do so.

300 The first of the three was *R v Hodgson*[359]. But the majority of the Supreme Court of Canada there did not include as a person in authority "any person whom the accused reasonably believed was a person who had some power to control or influence the proceedings against him". Their test was "whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities". That test is

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**358** [2004] QCA 175 at [20] per Davies JA (Williams and Jerrard JJA concurring).

**359** [1998] 2 SCR 449 at 471-475 [32]-[36] per Lamer CJ, Gonthier, Cory, McLachlin, Iacobucci, Major and Binnie JJ.

inconsistent with that advocated by the appellants here. The present appellants did not believe the "gang boss" was acting on behalf of the police; they only believed that he had access to a corrupt police officer.

301 The second authority was *R v Dixon*. There Wood J said that a "person in authority" included any person who "is seen by the accused by virtue of his position, as capable of influencing the course of the prosecution, or the manner in which he is treated in respect of it"[360]. But to be seen as having a particular "position" is different from being seen as having "some power to control or influence the proceedings": the former test is much narrower than the latter.

302 The third authority was *R v Burt*, and in particular some statements of Thomas JA and White J[361]. They do not support the test proffered by the appellants. Thomas JA's observations centre on whether "the accused would see the person asking the questions as a person in authority". And White J's also centre on "authority" rather than "some power to control or influence the proceedings".

303 The fact that the three cases do not support the test proffered by the appellants is further revealed by the fact that each of them cites *R v Todd*[362]; yet that case is cited by Davies JA as authority for a narrower test than that proffered by the appellants, namely a test depending on whether the accused reasonably perceives the questioner to be a person in authority[363].

304 In fact the passage on which the appellants rely in Davies JA's judgment in *R v Kassulke* as supporting their test cannot be regarded as having the authority of the Queensland Court of Appeal. Far from adhering to it, as the appellants submitted, Davies JA rejected the test described in that passage. He did so in the immediately succeeding passage[364]:

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**360** (1992) 28 NSWLR 215 at 229.

**361** [2000] 1 Qd R 28 at 32-33 [7] per Thomas JA, 41 [39] and 43 [48] per White J.

**362** (1901) 13 Man LR 364 at 376, quoted above at [296]; see *R v Dixon* (1992) 28 NSWLR 215 at 229; *R v Hodgson* [1998] 2 SCR 449 at 471-472 [32]; *R v Burt* [2000] 1 Qd R 28 at 41 [39].

**363** *R v Kassulke* [2004] QCA 175 at [19].

**364** *R v Kassulke* [2004] QCA 175 at [21].

> "If the dual rationales for the [inducement rule] ... are, as I think they are, the deterrence of [that] conduct ... by officers of the State and the risk that such conduct will induce unreliability in a confession then, in my opinion, the view expressed in the preceding paragraph does not serve either rationale. It plainly does not serve the first."

That is because, on that view, it is not necessary for the person in question in fact to be a police officer, a prosecutor, or another person concerned in preferring the charge. Davies JA continued[365]:

> "And in my opinion it does not serve the second because police officers and those in similar positions, but not all of those persons who may be included in this view, may be presumed to animate hopes of favour and to inspire awe because they hold those positions, thereby risking the reliability of confessions which they obtain by such conduct. This view would include within the meaning of 'person in authority' many who could not be presumed to have those effects. The likely explanation for this view, in my opinion, is historical rather than rational; that there was a time when complainants were persons of authority, in the sense in which Sir Owen used that term, because they would have had the power to initiate, stultify or prevent a prosecution."[366]

305 *The argument based on threats to do unlawful acts.* A person known to be a police officer who threatens to do an unlawful act unless a confession is made is a person in authority. But it does not follow that promises by persons whom a suspect does not know to be police officers to procure a corrupt police officer to obtain practical immunity are promises made by persons in authority. A suspect could well know that a police officer investigating an offence who threatened to beat that suspect unless the latter confessed was not making a lawful threat, but the police officer is still a person in authority because the suspect would be likely to believe, with reason, that the police officer had lawful authority to carry out investigations of and initiate prosecutions for the offence. The appellants' submission was that where a police officer offered a suspect bail[367] or offered not to prosecute a suspect's relative[368], if the suspect confessed, an inducement had been offered by a person in authority by threatening an unlawful act. It was

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**365** [2004] QCA 175 at [21].

**366** He referred to *R v Wilson* [1967] 2 QB 406 at 415.

**367** *R v Bosman* (1988) 50 SASR 365.

**368** *R v Hurst* [1958] VR 396.

submitted that the offer of bail was a representation that the police officer would "attempt to pervert the course of justice" by representing that he or she "is close to the judge and that the judge will accede to [the] request". The appellants submitted that by offering not to prosecute a relative of the suspect, the police officer was contemplating a "thwarting [of] the interests of the State [in ensuring that] offenders get prosecuted, and indeed partly sabotaging or steering the investigation away from an ... offender". These are very far-fetched statements. These can be promises which police officers know they can make good lawfully: they promise bail to people they know will get bail; they promise not to charge relatives whom they do not intend to charge. However, even where police officers threaten illegalities, it is possible for someone being questioned reasonably to believe that they have lawful authority to investigate and initiate prosecutions for an offence, even though they are threatening or carrying out unlawful acts in the course of investigating the offence. There is a distinction between threatening or committing unlawful acts in the course of exercising lawful powers of investigation, on the one hand, and, on the other hand, doing so while lacking any lawful authority to conduct an investigation at all. The fact that persons in the former category are persons in authority is not a ground for inferring that persons in the latter category are as well.

306 *The argument that the appellants' test is consistent with the outcomes in earlier cases.* The appellants' submission that on their test many past cases would still be decided as they were in fact decided does not support that test. Since no existing Anglo-Australian case before Osborn J's decision had to determine the precise issue in these appeals, it is not surprising that the results in past cases are compatible with the appellants' test.

307 *The appellants' attack on R v Grandinetti*. The appellants submitted that what was said in *R v Grandinetti* is inconsistent with Wood J's test in *R v Dixon*. That is not so. The submission that there is inconsistency depends on reading the word "capable" in Wood J's test as meaning that any capacity, lawful or not, to influence the course of the prosecution will suffice. For reasons given above[369] that reading is unsustainable.

308 The appellants also submitted that the focus of the "person in authority" rule is different in Canada from that of the equivalent rule in Australia. It was said that in Canada the focus is on the "coercive power of the state". It is true that the Court's conclusion was[370]:

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**369** At [294]-[298].

**370** *R v Grandinetti* [2005] 1 SCR 27 at 42 [44].

> "When ... the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state's coercive power is not engaged."

That is, the state's coercive power was not, to the accused's perception, engaged, and hence the accused was not exposed to the pressures generated when the state's coercive power is engaged. As noted above[371], the Court said[372]:

> "The underlying rationale of the 'person in authority' analysis is to avoid the unfairness and unreliability of admitting statements made when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state."

However, contrary to the appellants' submission, that is among the functions which the inducement rule was seen as performing in English law before the abandonment of the inducement rule in 1984, and which it is seen as performing in Australia in those jurisdictions which have not adopted legislation on the model of the *Evidence Act* 1995 (Cth).

309 The appellants submitted that *R v Grandinetti* misconstrued the "disciplinary principle" underlying the inducement rule, and was inconsistent with two other principles underlying it, the reliability principle and the protective principle. They submitted that it paid no regard to the need to protect persons from the coercive conduct of agents of the persons who were actually agents of the state even though they were not believed to be. They adopted the criticism of Conrad J, dissenting in the Alberta Court of Appeal in *R v Grandinetti*, that the Canadian position wrongly required "the maker of a statement [to] believe that any prosecutorial inducement be for the good of the state"[373]. Conrad J also said that to permit reception of the evidence would be to allow the police to do indirectly what they could not do directly[374]. She further said that the undercover officers were making "use of the implied power and authority of the state to assist them in inducing the appellant to confess"[375]. She concluded[376]:

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**371** At [293].

**372** *R v Grandinetti* [2005] 1 SCR 27 at 38 [35].

**373** *R v Grandinetti* (2003) 178 CCC (3d) 449 at 485 [113].

**374** *R v Grandinetti* (2003) 178 CCC (3d) 449 at 487 [117].

**375** *R v Grandinetti* (2003) 178 CCC (3d) 449 at 487 [120].

**376** *R v Grandinetti* (2003) 178 CCC (3d) 449 at 487-488 [120].

> "The object of the confessions rule is to ensure that statements extracted by the police are reliable and that they have not been coerced by inappropriate state conduct. It makes sense, therefore, that the rule should apply to the police officers in this case."

310 These criticisms advanced by Conrad J cannot be transposed to the reasoning of the Victorian Court of Appeal. Its approach did not require the appellants to believe that what was said to them was for the good of the state. It required only that they believe, on some reasonable basis, that the "gangsters" had the authority of the state. The appellants did not believe this. If there is unfairness in the eliciting of scenario evidence, that is a matter to be dealt with by inquiring whether there should be discretionary exclusion on grounds of unfairness, not as part of the inducement rule. To say that the police officers did indirectly what they could not have done directly is questionable: there was insufficient evidence for the appellants to be suspects, they were not in custody, and there was no duty to warn them about their right to silence. To describe the conduct of the police officers posing as gangsters as making "use of the implied power and authority of the state" is incorrect; they were reasonably to be perceived by the appellants as making use of their functions as gangsters and making use of a confederate, a supposedly corrupt police officer, who could not be described as embodying the "power and authority of the state" when he was nullifying its attempts to detect crime. The appellants in the present appeals did not demonstrate how the admissions were at risk of being unreliable, or why the conduct was "inappropriate". That is, the appellants did not demonstrate how the reception of the evidence was inconsistent with the reliability principle and the protective principle.

311 *The argument based on uniforms and badges*. If the police officers who induced the appellants' admissions had not been undercover operatives disguised as gangsters, but had been acting as uniformed officers (or as plain clothes detectives with identification), no doubt they would have been persons in authority, because it may have been reasonable for the appellants to believe that they were. To postulate this variation is not helpful. It brings about a radical change in the circumstances. It introduces discordance and unreality: for a representation by a person believed to be a gangster that he can procure immunity for the suspect from a corrupt police officer is likely to be different in its effect from a representation by a police officer that he can procure immunity for the suspect from a police officer, corrupt or otherwise. It was not reasonable for the appellants to perceive the "gangsters" as being capable lawfully of influencing the course of the investigation; it would be more reasonable to perceive police officers as being capable of doing so.

312 One question which the appellants posed by varying the facts of the present cases, which may arise in other cases, but which does not arise in the

present circumstances, is whether the supposed "corrupt police officer" who was to ensure immunity for each appellant could be a person in authority. The "corrupt police officer" in these appeals could not be a person in authority, because he offered no inducement personally and he offered no inducement through the undercover officers with whom the appellants had dealings. It might be a question, in another case in which a person in that position did offer inducements, whether that person was a person in authority. The answer to that question would depend on whether it was reasonable for the accused to perceive the person to have the lawful authority of the state to act as he did.

313 *Consequences of the appellants' test.* The appellants did not shrink from the extreme consequences of their arguments. Their argument that persons were persons in authority if they had a practical ability to influence the conduct of the prosecution, whether lawfully or not, if sound, entails the result that a criminal who was not an undercover police officer and who offered to assassinate the crucial witness to the accused's crime would be a person in authority if there were reasonable grounds for believing in his capacity to do this. The Court of Appeal rightly rejected that consequence as absurd, and its absurdity reveals the invalidity of the argument which leads to it[377].

The relationship between the purposes of the inducement rule and the "person in authority" requirement

314 The rules excluding confessions induced by a person in authority are old and, for the most part, well-settled. Ordinarily what needs to be considered are the terms of the rules rather than their underlying principles. However, the present appeals are presented by the appellants as raising what is in this country a novel problem about their application. The appellants seek to solve that problem by altering the rules. Consideration of whether that should be done may be assisted by examining the relationship between the purposes of the inducement rule and the "person in authority" requirement.

315 *Reliability.* If confessions are excluded because an inducement carries a risk of unreliability, it is true that some inducements from persons not in authority could be weighty, and likely to affect reliability. The Privy Council accepted this in *Deokinanan v The Queen* when it said[378]:

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**377** *R v Tofilau (No 2)* (2006) 13 VR 28 at 66 [165].

**378** [1969] 1 AC 20 at 33.

> "The fact that an inducement is made by a person in authority may make it more likely to operate on the accused's mind and lead him to confess. If the ground on which confessions induced by promises held out by persons in authority are held to be inadmissible is that they may not be true, then it may be that there is a similar risk that in some circumstances the confession may not be true if induced by a promise held out by a person not in authority, for instance if such a person offers a bribe in return for a confession."

But the fact is that persons in authority in the sense of police officers, prosecutors and employers are more likely in standard instances to affect reliability because of the force of what they say than persons who are not persons in authority. Police officers in particular have power in relation to questions like the grant of police bail, the formulation of charges, the length of interrogations and the conditions under which they are conducted. It is they who conduct most investigations of crime and most interrogations about it. It is they who conduct those interrogations largely in the unamiable environment of police stations (and indeed modern legislation requiring tape recording tends to compel this). In standard instances, persons who are believed to be police officers are more likely to be in a coercive position vis-à-vis suspects, because they are arms of the state, than persons who are not in authority. To the extent that inducements can cause suspects to confess to crimes which they did not commit, inducements are more likely to have that outcome when they proceed from persons in authority as traditionally understood than other inducements are.

316 *Jury danger*. The view that confessions are excluded because of their disproportionate effect on the jury, if treated as a separate justification for the inducement rule independently of the reliability principle, would lead to the exclusion of all confessions, not just those generated by inducements and not just those generated by inducements proceeding from persons in authority. Hence that principle is unrelated to the "person in authority" requirement and does not cast any light on the definition of "person in authority".

317 *Nemo tenetur se ipsum prodere.* If confessions generated by inducements are excluded on the ground that they are the result of the accused having been influenced by the state to engage in self-betrayal or self-accusation and they unsatisfactorily relieve the state of its duty to prove its allegations, then there is no case for including in the definition of "person in authority" persons who were not perceived to be officers of the state. To take the present facts as an example, the appellants thought they were obtaining private and personal advantages from gangsters. It is true that a conduit to one of those advantages was thought to be the connection between the gang and a corrupt police officer, but the appellants can hardly reasonably have thought that that officer was acting in the state's interests.

318 *Disciplining the police.* If confessions are excluded because of a desire to prevent police officers using threats or promises on the ground that it is improper for them to do so, then the inducement rule has no operation in relation to non-police officers. Accepting the appellants' contention that what matters is the perception of the person confessing, the function of ensuring appropriate police behaviour is not advanced by controlling the conduct of people who appear to be gangsters. The appellants leave out of their test that which the Director puts in his, namely a requirement that the person offering the inducement actually be a person in authority. If that is not a necessary element of the test, as the appellants would have it, controlling the behaviour of persons in relation to whom it does not matter whether they are police officers is immaterial.

319 *Impact on free choice.* If the purpose of the inducement rule is to preserve the autonomy of the accused's will in the face of pressure from the uniquely coercive power of the state, there is no justification for extending the definition of "person in authority" to cover persons who are not perceived to be officers of the state, but only gangsters.

320 *Summary.* Whether the basis of the inducement rule be reliability, preventing improper state coercion, disciplining the police, or avoiding unfair reductions in the choice of suspects to speak, a perception by the suspect that the coercive power of the state is being used is central: "most criminal investigations are undertaken by the state, and it is then that an accused is most vulnerable to state coercion"[379]. Where that perception does not exist, the basis of the inducement rule is not present. It is true that the coercive power of bodies or persons other than the state can be as coercive in particular cases as that of the state, but to select that fact as a reason for devising a new inducement rule would be to create a rule wider than that which the appellants are seeking. It would be to abandon the "person in authority" requirement. It would be to compel the prosecution to establish the voluntariness of every statement against interest made by an accused to any person. To require that is to impose "an overwhelming burden"[380].

The appellants' test should not be adopted

321 The appellants did not submit in terms that the "person in authority" requirement should be completely abandoned. However, in substance the test which the appellants advocate is not a test which simply reflects a minor

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**379** *R v Hodgson* [1998] 2 SCR 449 at 467 [24].

**380** *R v Hodgson* [1998] 2 SCR 449 at 467 [25].

modification in the received test to cope with supposedly novel circumstances: rather it goes very close to abandoning any "person in authority" requirement. That is because in modern conditions the role of police officers in preparing matters for prosecution is so crucial that to include in the ambit of "person in authority" all persons reasonably believed to have the practical capacity (whether lawfully nor not) to influence police conduct is to blur or go close to annihilating the distinction between inducements offered by persons in authority as traditionally understood and inducements offered by anyone at all. The inevitable consequence of adopting the test which the appellants advocate would be that the Court would tend to look only to the degree of coerciveness or attractiveness in the inducement.

322 In summary, the change in the law which the appellants invite the Court to make should not be made for the following reasons.

(a) To widen the "person in authority" requirement is to change a rule of law which has existed since 1809. According to the conclusions of distinguished modern scholarship[381], the requirement has its roots two or three generations earlier, and it grew up then on rational grounds. The rule has had its modern critics[382]. But the only judicial doubts about it were expressed over a very brief period a long time ago.

(b) To alter the "person in authority" requirement is to take a step which the Privy Council refused to take in *Deokinanan v The Queen*, and to take a step which was thought to call for legislation to effectuate it in the United Kingdom, Australian federal courts, the Australian Capital Territory, Tasmania and Norfolk Island[383].

(c) In each case that legislation came after very lengthy and careful consideration by law reform bodies[384]. They conducted "a wide survey of the whole field" and resisted a "policy of make do and mend"[385].

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**381** Above at [271]-[272].

**382** For example, Mirfield, "Confessions – the 'Person in Authority' Requirement", (1981) *Criminal Law Review* 92.

**383** *Police and Criminal Evidence Act* 1984 (UK); *Evidence Act* 1995 (Cth); *Evidence Act* 1995 (NSW); *Evidence Act* 2001 (Tas); *Evidence Act* 2004 (Norfolk Island).

**384** English Criminal Law Revision Committee *Eleventh Report Evidence (General)*, (1972), Cmnd 4991 at 39 [58] and 41-44 [61]-[66]; Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985) vol 1 at 69 [141], 432-440

(Footnote continues on next page)

(d) But even in those jurisdictions the step of abandoning the "person in authority" requirement was not a step taken in isolation and for its own sake. The "person in authority" requirement went, but only as a small part of a radical process of jettisoning the common law on confessions and substituting a wholly restructured system. The model which Australian legislators have followed is that of the *Evidence Act* 1995 (Cth). Section 84 provides for the exclusion of admissions the making of which were influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or a threat of conduct of that kind. Section 85 provides that evidence of certain admissions is inadmissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected. The circumstances in which that applies relate to admissions made by a defendant in criminal proceedings in the course of official questioning, or as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued. In addition, s 138 provides for the exclusion of evidence obtained improperly or illegally, unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way in which the evidence was obtained. Section 90 provides that in a criminal proceeding the court may refuse to admit evidence of an admission if it would be unfair to a defendant to use it. Section 135 gives the court power to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial, be misleading or confusing, or cause or result in undue waste of time. And s 137 obliges a court in criminal proceedings to refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. In England the equivalent to ss 84 and 85 is s 76 of the *Police and Criminal Evidence Act* 1984. Confessions may be excluded if obtained by oppression (ie torture, inhuman or degrading treatment, and the use or threat of violence, whether or not amounting to torture): s 76(2)(a) and (8). Confessions may also be excluded if obtained in consequence of anything said or done which was likely to render unreliable any confession: s 76(2)(b). To modify the inducement rule as the appellants wish would be to take a step favourable to the interests of defendants generally. But that was not the way the legislatures, accepting

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[759]-[770]; vol 2, App C at 196-198 [131]; Australian Law Reform Commission, *Evidence*, Report No 38, (1987) Ch 12.

**385** *Myers v Director of Public Prosecutions* [1965] AC 1001 at 1022 per Lord Reid.

the advice of expert law reform bodies, chose to act. They got rid of the "person in authority" requirement, but also made changes hostile to the interests of defendants generally by emphatically reversing the trend which *R v Baldry* had criticised, checked, but not reversed. No doubt, as Marks submitted, it can be appropriate for the common law to be modified so as to adopt, or accommodate itself to, statutory changes, though this is not an easy course in a federation like Australia that has a single common law, where legislation has altered that single common law in some jurisdictions but not others. To refine or abolish the "person in authority" requirement in the light of statutory refinement or abolition would not necessarily be outlandish. But complete abandonment of the received inducement rules and the substitution for them of entirely new statutory regimes might be thought a different matter, particularly since the new regimes at present only apply to a minority of jurisdictions and a minority of litigants; and the step is indeed not one which the appellants invite the Court to take. Nor is there any injustice to the present appellants in not taking this step: it is highly unlikely that the appellants' confessions would have been excluded under ss 84 or 85 if those provisions had been in force in Victoria, since the conduct of the operatives was not violent, oppressive, inhuman or degrading within the meaning of s 84, and since, on the findings of the trial judges, it was unlikely that the truth of the admissions was affected by that conduct within the meaning of s 85.

(e) It has not been shown that the purposes of the common law rules underlying induced confessions can only be fulfilled if the proposed change is made.

(f) The proposed revision or abandonment of the "person in authority" requirement might have had some force in the 19th century. But two changes have taken place in the law in the 20th century which undercut the need for any change. One is that the courts have now detected, or perhaps created, the doctrine of "basal involuntariness", and have done so more markedly in Australia than in England[386]. The other is the development, since the late 19th century[387], of doctrines permitting the exclusion of evidence on "discretionary" grounds of various kinds[388]. To

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**386** See [326] below.

**387** See *R v Miller* (1895) 18 Cox CC 54 at 55; *R v Knight and Thayre* (1905) 20 Cox CC 711 at 713; *Ibrahim v The King* [1914] AC 599 at 614; *R v Christie* [1914] AC 545.

**388** See the summary at [245]-[248] above.

the extent that the common law inducement rule is thought to bear harshly on accused persons – a highly controversial proposition – the harshness is ameliorated by the possibility of these doctrines being applicable in particular cases.

Conclusion on inducement

323 The Director is correct in submitting that a person to whom an accused has made admissions cannot be a person in authority at least unless that person is perceived by the accused, on reasonable grounds, to have the lawful authority of the state to investigate the circumstances. On that test, the undercover officers were not persons in authority, because each appellant lacked reasonable grounds for thinking that the undercover officers had lawful authority to investigate the offence of which that appellant, it was thought, was guilty. The only reasonable belief which the appellants could have had about those persons was that they were gangsters, not authorised police officers, and that, as the Director submitted, "[t]hey do not call upon the power of the State. They call upon the power of evil." Accordingly, the admissions of the appellants were not the result of inducements rendering them inadmissible.

Section 149 of the Evidence Act

324 The appellants contended that if the admissions were involuntary on the basis of being induced by threats or promises from a person in authority, s 149 of the Evidence Act did not make them admissible. Since it has been held that the admissions were not involuntary on this ground, no occasion arises to consider the application of s 149.

Basal involuntariness: general

325 The second aspect of the appellants' arguments rested on "basal involuntariness". This is a doctrine which had the advantage for the appellants that no "person in authority" requirement need be satisfied.

326 *The origins of "basal involuntariness".* The origins of the doctrine of "basal involuntariness" are much later than those of the "inducement rule". In Australia they lie in the joint judgment of Dixon, Evatt and McTiernan JJ in *Cornelius v The King*. They said[389]:

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**389** (1936) 55 CLR 235 at 246.

> "[A] promise of advantage and a threat of harm are not the only matters which may deprive a statement of its voluntary character. For instance, a confession which is extracted by violence or force, or some other form of actual coercion is clearly involuntary, and, therefore, cannot be received in evidence."

They then approved[390] a statement of Brandeis J[391]: "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion". They also spoke approvingly of cases excluding confessions[392]:

> "where the compulsion alleged takes the form of prolonged and sustained pressure by police officers upon a prisoner in their hands, until, through mental and physical exhaustion, to which want of sleep and food sometimes contributes, he consents, in order to obtain relief, to make a confession of the crime. If it is alleged that the confession is the outcome of pressure, the question whether by persistent interrogation, or by other means, a prisoner has been constrained to confess so that his statement cannot be regarded as voluntary must sometimes be decided as a matter of degree."

And they concluded by saying[393]:

> "no doubt can be felt that interrogation may be made the means or occasion of imposing upon a suspected person such a mental and physical strain for so long a time that any statement he is thus caused to make should be attributed not to his own will, but to his inability further to endure the ordeal and his readiness to do anything to terminate it."

However, they also said that the "difficulty of defining a standard in such a matter is necessarily almost insuperable"[394].

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**390** (1936) 55 CLR 235 at 246.

**391** *Wan v United States* 266 US 1 at 14 (1924).

**392** *Cornelius v The King* (1936) 55 CLR 235 at 246-247.

**393** *Cornelius v The King* (1936) 55 CLR 235 at 252.

**394** *Cornelius v The King* (1936) 55 CLR 235 at 252.

327 In *R v Lee* Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ said, adopting the words of Dixon J in *McDermott v The King*[395], that an admission by an accused person is not admissible[396]:

> "unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure".

And in *McDermott v The King* Dixon J also said[397]:

> "It is perhaps doubtful whether, particularly in this country, a sufficiently wide operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will."

328 It was upon the latter part of that proposition in particular that the appellants fastened. They said that the voluntariness test posed an inquiry into whether each appellant "truly had a freedom to speak or remain silent" – a "free choice" – that is, "a choice unconstrained by any pressure, hope of advantage or benefit or force or coercion or compulsion, a true free choice". They also stressed the opening words of the proposition, and they noted that Dixon J said of the discretion to exclude confessions[398]:

> "In part perhaps it may be a consequence of a failure to perceive how far the settled rule of the common law goes in excluding statements that are not the outcome of an accused person's free choice to speak."

329 *"Oppression" under English common law.* The approach of the appellants would give a very wide scope to "basal involuntariness". A similar approach may have applied at common law in England: there appears to have been no doctrine of "basal involuntariness", but, even if there were no inducement by a person in authority, confessions were inadmissible where "oppression" was

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**395** (1948) 76 CLR 501 at 511.

**396** (1950) 82 CLR 133 at 144.

**397** (1948) 76 CLR 501 at 512.

**398** *McDermott v The King* (1948) 76 CLR 501 at 512.

present. The doctrine of oppression was asserted in 1963 when Lord Parker CJ said that answers and statements were inadmissible if "obtained in an oppressive manner by force or against the wishes of an accused person"[399]. The *Judges' Rules* 1964 then stated that the Rules did not affect the principle[400]:

> "[t]hat it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

In *R v Prager* the Court of Appeal adopted two "definitions or descriptions" of oppression[401]. The first was that of Sachs J in *R v Priestley*[402]:

> "[S]omething which tends to sap, and has sapped, that free will which must exist before a confession is voluntary."

He added that relevant facts included:

> "such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

The second definition or description was taken from an address by Lord MacDermott. He said oppressive questioning was[403]:

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**399** *Callis v Gunn* [1964] 1 QB 495 at 501.

**400** *Practice Note (Judges' Rules)* [1964] 1 WLR 152 at 153.

**401** [1972] 1 WLR 260 at 266 per Edmund Davies and Stephenson LJJ and Thompson J.

**402** (1965) 51 Cr App R 1.

**403** "The Interrogation of Suspects in Custody", (1968) 21 *Current Legal Problems* 1 at 10.

> "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent."

Yet the first definition or description could operate very differently from the second. Unless full force is given to the phrase "his will crumbles", the words "he speaks when otherwise he would have stayed silent" are capable of applying so as to render many confessions inadmissible, because spontaneous confessions are much rarer than those which follow on from questioning, and the most innocuous conduct can cause suspects to speak in the sense that but for the conduct they would otherwise have remained silent. A related danger exists with the appellants' submissions on basal involuntariness.

330 *Dixon J's statement analysed.* Dixon J in *McDermott v The King* drew a distinction between confessions made in the exercise of free choice and those made by persons whose will was overborne. The examples he gave of an overbearing of the will – "duress, intimidation, persistent importunity, or sustained or undue insistence or pressure"[404] – are instructive, for they are restricted. In 1948, when *McDermott v The King* was decided, duress was the use or threat of either violence to the person or imprisonment. At that time duress of goods was not seen as sufficient to render a contract void[405], although money paid in order to obtain possession of goods wrongfully detained, or to avoid their unlawful detention, was recoverable in an action for money had and received[406]. Nor was economic duress then recognised as a ground rendering a contract void. In any event both duress of goods and economic duress are factually remote from involuntary confessions. Intimidation is the threat of violence or some other illegal act. The expression "sustained or undue insistence or pressure" implies that insistence or pressure which is less than sustained or undue does not produce involuntariness.

331 Even though these examples selected by Dixon J are not exhaustive, his use of them points to a relatively narrow ambit for "basal involuntariness" and suggests that the appellants are wrong in construing other parts of Dixon J's language in *McDermott v The King* as indicating any breadth in the doctrine.

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**404** *McDermott v The King* (1948) 76 CLR 501 at 511.

**405** *Skeate v Beale* (1841) 11 Ad & E 983 at 990 [113 ER 688 at 690]; *The Unitas* [1948] P 205; aff'd sub nom *Lever Bros and Unilever NV v HM Procurator General* [1950] AC 536 (on other grounds).

**406** For example, *Maskell v Horner* [1915] 3 KB 106.

332 *The limits of Dixon CJ's conception of "basal involuntariness"*. Dixon CJ was either the sole or a primary author of the "basal involuntariness" doctrine. That he, at least, had a more limited view of voluntariness than that suggested by the appellants is indicated not only by the precision of the language quoted above[407] from *Cornelius v The King*, and the language just analysed in *McDermott v The King*, but also by other decisions in which he participated.

333 In *Wendo v The Queen*[408] he said:

> "[O]nce it was established that *a prisoner understood what he was doing* in making a statement which, if true, would amount to a confession, it is admissible in evidence quite independently of its probative value." (emphasis added)

334 Another case in which the limits of Dixon J's approach can be seen is *Sinclair v The King*, in relation to his treatment of confessions by persons of unbalanced mind. If a confession is inadmissible where the choice of the maker is not free, an impaired mental capacity to choose would appear relevant. And it is true that a confession is inadmissible as involuntary where the mind of the accused is so unbalanced as to render it wholly unsafe to act on the confession. But Dixon J limited this avenue of exclusion to extreme cases. He said[409]:

> "It may be conceded that a confession may in fact be made by a person whose unsoundness of mind is such that no account ought to be taken of his self-incriminating statements for any evidentiary purpose as proof of the criminal acts alleged against him. In such a case it might properly be rejected."

But he went on[410]:

> "A confession is not necessarily inadmissible as evidence upon a criminal trial because it appears that the prisoner making it was at the time of unsound mind and, by reason of his mental condition, exposed to the liability of confusing the products of his disordered imagination or fancy with fact."

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**407** At [326]-[327].

**408** (1963) 109 CLR 559 at 562.

**409** *Sinclair v The King* (1946) 73 CLR 316 at 338.

**410** *Sinclair v The King* (1946) 73 CLR 316 at 338.

Dixon J rejected analogies with inquiries into the competence of witnesses said to be insane and inquiries into whether accused persons were fit to plead. He also declined to accept an analogy with the inducement rule, drawn in an argument summarised thus[411]:

> "The argument is that to be admissible evidence of a confession must be an expression of the independent will of the confessionalist and, moreover, must derive from the circumstances in which it is made that assurance of trustworthiness which the law finds in the improbability of a false admission being made of incriminating facts. If the mind is unsound and its infirmity disables the person confessing from distinguishing between reality and unreality, how, it is asked, can these conditions be fulfilled?"

He rejected this argument, first, because he said it "appears to me to press too far the supposed logical basis of the exclusion of 'involuntary' confessions"[412]. He said[413] that that rule was, in the words of Lord Sumner, "a rule of policy", the policy being "not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice"[414]. He said, evidently with approval, that the view of Holmes CJ was that the inducement rule "had been carried very far"[415]. Indeed, he quoted Holmes CJ as saying that the inducement rule had gone "to the verge of good sense, at least"[416].

335 Secondly, he reasoned that a strict, perhaps over-strict, rule relating to induced confessions should not be extended to non-induced confessions. He said[417]:

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**411** *Sinclair v The King* (1946) 73 CLR 316 at 334-335.

**412** *Sinclair v The King* (1946) 73 CLR 316 at 335.

**413** *Sinclair v The King* (1946) 73 CLR 316 at 335.

**414** *Ibrahim v The King* [1914] AC 599 at 610-611, attributing this to *R v Baldry* (1852) 2 Den 430 at 445 [169 ER 568 at 574]: the correct reference is to Pollock CB at 442; 573.

**415** *Sinclair v The King* (1946) 73 CLR 316 at 335.

**416** *Commonwealth v Chance* 54 NE 551 at 553 (Mass, 1899) as quoted in *Sinclair v The King* (1946) 73 CLR 316 at 336.

**417** *Sinclair v The King* (1946) 73 CLR 316 at 337.

> "The tendency in more recent times has been against the exclusion of relevant evidence for reasons founded on the supposition that the medium of proof is untrustworthy, in the case of a witness, because of his situation and, in the case of evidentiary material, because of its source. The days are gone when witnesses were incompetent to testify because they were parties or married to a party, because of interest, because of their religious beliefs or want of them or because of crime or infamy. We now call the evidence and treat the factors which formerly excluded it as matters for comment to the tribunal of fact, whose duty it is to weigh the evidence. It must be remembered that the rules relating to the presumptive involuntariness of confessions were developed at a time when the incompetency of witnesses on such grounds was a matter of daily inquiry and, moreover, when the prisoner could not testify. These are all considerations against extending the principle upon which confessions resulting from intimidation or from a threat made or promise given in reference to the charge by a person in authority are excluded as involuntary to cases of insanity where the will may be affected or there may be a liability to confuse the data of experience with those of imagination, so that such factors without more would be enough to exclude a confession."

336 He then dealt with the position of the appellant in *Sinclair v The King* thus[418]:

> "Boyd Sinclair's mental state did not disable him from observing, appreciating, recollecting and recounting real occurrences, events or experiences. The fact that his mind, in its schizophrenic state, may have been stored with imaginary episodes and with the memory of unreal dramatic situations would, of course, make it impossible to place reliance upon his confessional statements as intrinsically likely to be true. The tendency of his mental disorder to dramatic and histrionic assertion formed another difficulty in attaching an inherent value to what he said. But it is to be noticed that his condition did no more than make it possible that the source of any confessional statement made, lay in these tendencies. His was not a case in which it could be said that the higher probability was in favour of his confession of such a crime being the product of imagination. Reason suggests that in such circumstances it is for the tribunal of fact to ascertain or verify the factual basis of the statements of a man in such a mental condition by comparing their contents with the independent proofs of the circumstances and

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**418** *Sinclair v The King* (1946) 73 CLR 316 at 337-338.

> occurrences to which they relate. It happens that external facts independently proved do supply many reasons for supposing that the confessional statements made by Boyd Sinclair were substantially correct. Though this consideration is not relevant to the question of the legal admissibility of such statements, it provides an example of the inconvenience or undesirability of a rule of rigid exclusion."

337 The limits of Dixon J's approach is also indicated by the fact that in *Sinclair v The King* he referred with approval to United States authority holding that a confession by an intoxicated person is not inadmissible "unless the degree of intoxication is so great as to deprive him of understanding what he was confessing"[419]. In similar fashion Sholl J considered that evidence could be excluded as involuntary only if an accused person lacked "sufficient intellectual capacity ... to determine whether he would or would not exercise his right to refuse to answer"[420]. A mere reduction in that capacity did not suffice.

338 The aspect of the basal involuntariness doctrine under discussion has only occasionally led to exclusion. A confession late at night by an accused person who had fainted twice, had difficulty in moving and was "in a dopey condition" was excluded on the ground that the prosecution had not established that it was voluntary[421]. The same result applied to a confession by a person who, after stabbing another person, had "blacked out" and attempted suicide by taking poison and by jumping into Auckland Harbour; he was found in wet clothing, cold, shivering, frothing at the mouth and in a distressed state; he had repeatedly vomited; and he had been rushed to hospital where his stomach had been forcibly pumped out before the confession was elicited[422]. But instances of this kind, where there has been automatic exclusion on grounds of involuntariness, as distinct from discretionary exclusion, are rare.

339 The point of these citations is to demonstrate that Dixon J, and other judges, have considered the "basal involuntariness" rule in its application to mentally disordered persons to be quite circumscribed. The appellants do not now claim the benefit of any doctrine relating to mental disorder, although Marks

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**419** *Commonwealth v Zelenski* 191 NE 355 at 357 (Mass, 1934), citing *Commonwealth v Howe* 9 Gray 110 at 114 (Mass, 1857). (The correct page is in fact 112.)

**420** *R v Buchanan* [1966] VR 9 at 15.

**421** *R v Burnett* [1944] VLR 115 at 116-117 per O'Bryan J.

**422** *The Queen v Williams* [1959] NZLR 502.

at one stage appeared to[423], but the limits of the "basal involuntariness" rule in that respect suggests that it is not extensive in other respects, and that the width of the inducement rule is not a pointer towards any width in the "basal involuntariness" rule.

340 To the very narrow extent to which a category of basal involuntariness has been found or contemplated as a possibility in relation to persons suffering from mental disorder, or a head wound, or extreme fatigue, that category operates as an exception to a general proposition – it cannot be called a rule of law – that "what will render a confessional statement involuntary must be some factor external to the accused"[424]. The factors listed by Dixon J in *McDermott v The King* were all factors external to the accused – factors causing the will of the accused to be "overborne"[425].

The appellants' first submission: denial of appellants' rights

341 The appellants submitted that "the vice is here that these were police officers who deliberately set about the scenario tactic to secure from the suspect a detailed confession which, had they gone about it by interview process, they could not have done without giving proper warnings and securing and advising that they could have the benefit of a solicitor". It was the essence of scenario evidence that "the appellants in each case had to be denied their fundamental rights". In particular, counsel for Clarke submitted: "Naturally [Clarke] was not afforded any protective rights; they were and indeed, had to be, deliberately circumvented in order to achieve the sole purpose of extraction of the confession."

342 This submission faces difficulties of a magnitude which permit it to be rejected at this stage. It may be true that had the police officers not been operating undercover, but had asked each appellant to answer questions, the appellants would not have answered, or would not have made admissions. But whether the police officers would have had a duty to warn the appellants about a right to communicate with a solicitor depends on the terms of ss 464A(2) and 464C of the *Crimes Act* 1958 (Vic) ("the Crimes Act"). The sections protecting the rights of suspects under interrogation did not apply to the police officers for

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**423** Below at [380].

**424** *R v Azar* (1991) 56 A Crim R 414 at 419 per Gleeson CJ (Finlay and Smart JJ concurring).

**425** *Collins v The Queen* (1980) 31 ALR 257 at 307 per Brennan J.

several reasons. Since they were "engaged in covert investigations under the orders of a superior" they fell outside the definition of "investigating official" in s 464(2). Secondly, the appellants were not "in custody" within the meaning of s 464A(2) or s 464C. For the same reasons the duty created by s 464A(3) to warn the appellants that they did not have to do or say anything but that anything they did say or do might be given as evidence did not arise. Even if the first bar to the application of ss 464A and 464C was removed by postulating a case where police officers were not operating covertly, the second would remain as long as the appellants were not taken into custody.

343 Another difficulty is that when police officers, pursuant to judicial warrant, listen to telephone calls made by others, they may obtain evidence of admissions which they could not have obtained by the process of interviewing. Yet the surveillance evidence is admissible. So is confessional evidence obtained by eavesdropping.

344 An even more fundamental difficulty is that this submission does not correspond in any way with Dixon J's test in *McDermott v The King*. That test does not turn on a rejection of police tactics which seek to obtain evidence indirectly which could not have been obtained directly without certain safeguards being supplied to the accused. It turns simply on an overbearing of the will. The submission might be material to discretionary exclusion. It is not material to basal involuntariness.

The appellants' second submission: absence of choice

345 The appellants' second submission was, in essence, that their confessions were involuntary because they "had no choice but to make the confessions they did". Each had no choice, it was submitted, because each feared prosecution for murder, each was promised that in return for a confession the murder investigations would cease, and each believed that that promise would be fulfilled. The appellants submitted that the courts below had misapplied the "basal involuntariness" rule by relying excessively on the fact that the appellants had been told by the covert operatives that they could leave at any time.

The appellants' third submission: freedom to remain silent nullified by deception

346 The appellants' third submission was that even if the will of the appellants had not been overborne, "basal involuntariness" existed because the appellants' freedom to speak or remain silent had been so influenced by deception, trickery or manipulation that there had been no effective exercise of the freedom.

Deception and manipulation

347 *Is the conduct of a person who has been deceived not voluntary?* Underlying both the second and the third of the appellants' submissions was a contention, in the words of a learned article, that the "conduct of a person who has been deceived is in an important sense not voluntary: the behaviour is, to the extent it is governed by the deception, not under the control or the choice of the actor"[426]. That reasoning is unsound in relation to the "basal involuntariness" doctrine. There are innumerable examples of confessions being admitted despite the confession having been generated by deception. Sometimes the deception is contemplated by the grant of warrants by judges to police officers to record telephone conversations secretly, or to record face-to-face conversations secretly[427]. Often the decision to record conversations with a particular accused person secretly is made because no recording would be possible if that accused person knew of the recording. Secret recording thus commonly depends on trickery - creating or confirming a false assumption that no recording is being made. Sometimes the deception occurs without prior judicial authority, as where police officers deliberately arrange matters so that they can overhear what a suspect says: the suspect has been deceived into thinking that he can speak with impunity. To introduce a rule which could render "involuntary" all confessions made on the basis of a false assumption of fact created or encouraged by police officers would radically change the law.

348 In any event, the force of the contention advanced in the article quoted at the start of the preceding paragraph is lessened by the fact that in the same article the author said that while lying in court and deceiving suspects about their rights were wrong, "there are distinctly fewer moral objections to the use of disguises, informers or other agents at the investigative stage, so long as this does not involve prompting or questioning a suspect in relation to an incident in a way that undermines rights that should be protected"[428]. Whether, as Clarke submitted in relation to discretionary exclusion, rights were undermined in this case is considered below[429].

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**426** Ashworth, "Should the Police be Allowed to Use Deceptive Practices?", (1998) 114 *Law Quarterly Review* 108 at 112.

**427** As in *Em v The Queen* [2006] NSWCCA 336.

**428** Ashworth, "Should the Police be Allowed to Use Deceptive Practices?", (1998) 114 *Law Quarterly Review* 108 at 138.

**429** Below at [391]-[414].

349 *Deception and involuntariness: the cases.* The appellants referred to specific authority in support of their third submission. The appellants contended that Murphy J in *Cleland v The Queen*[430] had said that "involuntariness can arise where there is any suggestion of trickery or false representation".

350 Murphy J said[431]:

> "It may be a question of classification whether a confession induced by false representations or other trickery is voluntary. In older decisions these were regarded as negating voluntariness (see for example *R v Johnson*[432]; *Attorney-General (NSW) v Martin*[433]; see also various statutory provisions such as *Crimes Act* (NSW) 1900, s 410; *Evidence Act* 1928 (Vic), s 144 which treated inducement by false representations as requiring exclusion)."

Later, after quoting a lengthy passage from the judgment of Hayes J in *R v Johnston*[434], Murphy J said[435]:

> "The voluntariness of a confession is suspect if it is obtained by interrogation rather than being volunteered, or if, although volunteered, the procedure involved interrogation; if the confessor was in custody, lawful or otherwise; or if anything suggests inducement by threats, promises, false representations or other trickery."

The submission which the appellants advanced on the strength of these passages is too extreme.

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**430** (1982) 151 CLR 1 at 13-15.

**431** *Cleland v The Queen* (1982) 151 CLR 1 at 13. This passage was noted by Toohey, Gaudron and Gummow JJ in *R v Swaffield* (1998) 192 CLR 159 at 197 [75]. There is single judge authority that an admission made under material misapprehension of the facts is not voluntary: *R v Kwabena Poku* [1978] Crim LR 488; *R v Anderson* (1991) 105 FLR 25, and unreported cases referred to at 31.

**432** (1864) 15 ICLR 60.

**433** (1909) 9 CLR 713.

**434** (1864) 15 ICLR 60 at 83-84.

**435** *Cleland v The Queen* (1982) 151 CLR 1 at 15.

351 First, *Attorney-General (NSW) v Martin* was not a decision on the common law of voluntariness; it was a decision on s 410(1) of the *Crimes Act* 1900 (NSW) which provided:

> "No confession, admission, or statement shall be received in evidence against an accused person if it has been induced –
>
> (a) by any untrue representation made to him; or
>
> (b) by any threat or promise, held out to him by the prosecutor, or some person in authority."

Further, far from supporting Murphy J's contention, *Attorney-General (NSW) v Martin* contains the following dictum by Griffith CJ[436]:

> "I doubt whether this enactment as to admissions or statements made any difference in the law so far as regards admissions or statements induced by threats or promises, but it did alter the law so far as regards statements induced by untrue representations."

And in *Basto v The Queen*[437], Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ said that s 410(1)(a) made a "statutory extension of the common law doctrine ... to untrue representations". If the recognition by s 410(1)(a) of an untrue representation as an inducement leading to involuntariness could be said to "alter" the common law or effect a "statutory extension" of it, that points against the common law treating untrue representations by persons other than those in authority as inadmissible on grounds of basal involuntariness.

352 Secondly, there never was any s 144 of the *Evidence Act* 1928 (Vic). The section in that Act which corresponded to s 410 of the *Crimes Act* 1900 (NSW) was s 141, but, like its original ancestor[438] and its current successor[439], it did not render confessions inadmissible on the ground of having been induced by a false representation.

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**436** *Attorney-General (NSW) v Martin* (1909) 9 CLR 713 at 721. The same view was put more tentatively by Dixon J in *McDermott v The King* (1948) 76 CLR 501 at 512.

**437** (1954) 91 CLR 628 at 640.

**438** *Law of Evidence Consolidation Act* 1857 (21 Vict No 8), s 19.

**439** Section 149 of the Evidence Act, set out above at note [236].

353 Thirdly, *R v Johnston* was a decision of the Irish Court of Criminal Appeal, comprising 11 judges. The passage quoted by Murphy J from the judgment of Hayes J attracted the support of none of the other 10 judges. The passage collects together doctrines which under modern Australian law are divided up under the heads of involuntariness by reason of an inducement held out by a person in authority; basal involuntariness; and potential exclusion on various discretionary grounds[440]. Hayes J did say that the word "voluntary"[441]:

> "is to be understood in a wide sense, as requiring not only that the prisoner should have free will and power to speak, or refrain from speaking, as he may think right, but also that his will should not be warped by any unfair, dishonest, or fraudulent practices, to induce a confession."

It may be accepted that if the accused's will has been overborne in the sense in which that word is used in the Australian authorities, any resulting confession is involuntary. It does not follow that an accused's will is overborne merely by reason of misrepresentations. Hayes J's statement was an obiter dictum so far as he held the confession admissible because it was not "obtained by any threat, promise, or other undue or unfair means"[442]: that is, his conclusion did not turn on a finding of misrepresentation. That Hayes J's dictum needs to be handled with care is also suggested by his conclusion that, had the accused been in custody, the confession would have been inadmissible as not voluntary unless preceded by a caution. This view does not correspond with the modern law: a want of caution would only be a possible reason for exclusion on discretionary grounds.

354 Fourthly, Murphy J spoke tentatively ("It *may* be a question of classification"; "The voluntariness of a confession is *suspect*"). He did not link his remarks to the question of whether the person dealing with the accused was a person in authority. The case in which he spoke was dealing with an issue quite separate from basal involuntariness, namely whether there was a discretion to exclude illegally or improperly obtained confessional evidence. What Murphy J said on issues other than that issue was general and cautious. The circumstances he described were seen by him as flagging a dangerous area; but he was not purporting to delineate with precision the boundaries of that area. In particular, Murphy J did not specifically state any rule that at common law a confession is

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**440** See above at [350].

**441** *R v Johnston* (1864) 15 ICLR 60 at 83.

**442** *R v Johnston* (1864) 15 ICLR 60 at 86.

involuntary on the sole ground that it has been induced by a misrepresentation made by a person other than a person in authority.

355 *Canadian authority on deceit.* There is Canadian authority that deceit in the form of "a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretense that it was insulin" would render a confession inadmissible. This was so on the ground that the conduct "is so appalling as to shock the community" – but not because it undermined "voluntariness *per se*"[443]. In Australian law, of course, the abuse of what were assumed to be confidential relationships which a suspect might well expect would give the conversation immunity from use in litigation, even if no civil wrong were committed, would be an impropriety likely to attract exclusion on discretionary grounds, subject to other relevant factors; the same is true of the battery involved in the injection, which is not merely an impropriety but an actual illegality.

356 Among the deceptions employed by the undercover officers against Clarke was a suggestion that the police had stronger evidence against him than they actually had. In *R v Oickle* the Court treated this as an example of potential "oppression" – that is, the creation of "oppressive conditions" which are "inhumane". Iacobucci J said[444]:

> "A final possible source of oppressive conditions is the police use of non-existent evidence ... The use of false evidence is often crucial in convincing the suspect that protestations of innocence, even if true, are futile. I do not mean to suggest in any way that, standing alone, confronting the suspect with inadmissible or even fabricated evidence is necessarily grounds for excluding a statement. However, when combined with other factors, it is certainly a relevant consideration in determining on a *voir dire* whether a confession was voluntary."

357 These aspects of *R v Oickle* appear to reveal that the detail of Canadian law on this aspect of confessions is somewhat different from Australian law. However, Canadian authority, as far as it goes, does not support any submission

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**443** *R v Oickle* [2000] 2 SCR 3 at 42 [66]-[67] per Iacobucci J (speaking for himself, L'Heureux-Dubé, McLachlin, Major, Bastarache and Binnie JJ). Cf at 41 [65]: "the police use of trickery to obtain a confession ... is a distinct inquiry. While it is still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system."

**444** [2000] 2 SCR 3 at 39 [61].

that police trickery by itself renders a confession inadmissible on grounds of "basal involuntariness".

358 *Deception and involuntariness: conclusion.* Counsel for Tofilau and Hill submitted that deception could lead to a conclusion of basal involuntariness "whenever the justifications for the voluntariness rule are engaged". He submitted that the undercover officers had engaged in "the functional equivalent of an interrogation of a suspect". He submitted that by "improper means", namely "trickery or deceit", they had induced a state of mind in the appellants which was "completely, wholly, fundamentally mistaken as to the circumstances or context" in which they answered "questions and the consequences of answering questions". He submitted that at least two of the justifications for excluding confessions existed, namely the importance of protecting the right to silence and the need to prevent "improper practices of interrogation" by disciplining police officers. This submission conformed with another submission, namely that the Court "should confirm that the voluntariness requirement cannot be satisfied in circumstances where a person is unaware of their right to silence". Counsel cited *R v Li*[445], where Coldrey J said:

> "[T]he concept of voluntariness ... extends to and encompasses the situation where answers are given by an accused person who lacks understanding that such questions need not be answered, and, as a result, feels compelled to participate in the interview process."

359 These submissions should be rejected. The police officers committed no crimes or civil wrongs or other illegalities. They had the benefit of statutory exemption from various aspects of the regime protecting suspects under interrogation[446]. They were investigating four murders in relation to which more conventional methods had not yielded useful results. One of those murders had taken place 20 years earlier. In the circumstances, the means employed, while deceitful, cannot be described as "improper". Nor, unless police officers are to be forbidden from addressing questions to anyone whom they later charge, or at least from relying on the answers, can what happened be described as an impermissible interference with the right to silence. As for Coldrey J's statement, he was speaking in a case concerning a 17 year old male of East Timorese background who had not had previous contact with the police; who did not speak good English and lacked the capacity to understand or articulate abstract concepts; whom the police warned of his right to remain silent, his right to seek

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**445** [1993] 2 VR 80 at 87.

**446** See above at [342].

legal advice and his right to speak to a friend or relation; but who did not understand what was said. Coldrey J's remarks must be understood in that context, and not as applying generally. As Gleeson CJ said in *R v Azar*[447]:

> "There is no justification for the proposition that a statement is voluntary ... only if the maker of the statement was aware, at the time it was made, that the law offered a choice between speaking or remaining silent. Admissions are frequently made by accused persons, often to persons other than police officers, and sometimes to police officers, in circumstances where the maker of the statement is uninterested in, and unaware of, the legalities of the situation. Indeed if ... a statement may be voluntary even though made pursuant to a legal obligation, a fortiori a statement may be voluntary even though the maker is unaware of what the law requires.
>
> ... There are numerous statements in the law reports to the effect that a confessional statement to a police officer is not inadmissible merely because no caution has been administered. It is hardly likely that those statements were intended to apply only in the case of an accused person who knows of his right to silence even without a caution."

360 While it is possible to conclude that there has been basal involuntariness in circumstances which include the fact that the accused has been deceived, the mere fact of deception is insufficient in itself to justify a conclusion of basal involuntariness. Similarly, deception may be a ground on which a confession may be excluded in the court's discretion; but when that inquiry is undertaken, other factors must be weighed with the deception.

361 It is necessary to reject two further submissions advanced in relation to the law on voluntariness by counsel for Marks.

362 The first of these rested on a reference to Deane J's observation in *Cleland v The Queen*[448]:

> "If the making of [a confessional] statement has been procured or influenced by unlawful or improper conduct on the part of law enforcement officers, that circumstance will be of relevance on the question whether the confession was voluntary."

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**447** (1991) 56 A Crim R 414 at 419-420 (Finlay and Smart JJ concurring).

**448** (1982) 151 CLR 1 at 18.

Counsel submitted that the conduct of the police officers was "improper or undesirable". The impropriety of police conduct may be a ground for the exclusion of any resulting confession as a matter of discretion. But in principle that factor – while, with other factors, it may, as Deane J says, be "of relevance" – will not cause the confession to be subject to the "basal involuntariness" doctrine unless the accused's will has been overborne.

363 The second of these submissions rested on a reference to the following statement of Iacobucci J (speaking for himself, L'Heureux-Dubé, McLachlin, Major, Bastarache and Binnie JJ) in *R v Oickle*[449]:

> "There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness *per se*, is so appalling as to shock the community."

The Supreme Court of Canada saw that consideration as a matter going to voluntariness. On Australian authority, there is no distinct ground for treating confessions as automatically inadmissible on the basis of appalling police trickery unless the inducement rule is attracted or the conduct is such as to overbear the will of the accused: neither ground applies here. "Appalling police trickery" could trigger a discretion to exclude the evidence, but Marks did not rely on that discretion.

Duress analogy

364 For present purposes it may be accepted that the causes of basal involuntariness are not limited to the factors listed by Dixon J – "duress, intimidation, persistent importunity, or sustained or undue insistence or pressure"[450]. But the appellants pointed to only one factor legitimately going to basal involuntariness beyond those factors. They submitted that "basal involuntariness" could be found not only in the overbearing – or destruction – of the will, but also in its "deflection".

365 They accepted that no authority gave direct support to this approach. However, they relied on *Director of Public Prosecutions v Lynch*[451]. There the House of Lords held by a bare majority that the defence of duress (in the form of threats to kill or cause serious personal injury to the defendant) was available to a

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**449** [2000] 2 SCR 3 at 42 [67].

**450** *McDermott v The King* (1948) 76 CLR 501 at 511.

**451** [1975] AC 653.

person charged as an accessory to murder. All members of the House examined the question whether duress negated criminal intent, and said that it did not[452]. Rather they saw the question as being whether the presence of duress was sufficient to excuse the intentionally committed act which constituted the crime. A majority (Lords Morris of Borth-y-Gest, Wilberforce and Edmund-Davies) thought it was; Lords Simon of Glaisdale and Kilbrandon disagreed.

366 Reference was also made in argument to the dissenting judgment of Lords Wilberforce and Simon of Glaisdale in *Barton v Armstrong*[453]. In that case the Privy Council held that a deed was void because it was executed under duress in the form of threats to kill. The point on which the majority differed from the minority was that the majority thought it sufficient that the duress was a reason for executing the deed, even if it might have been executed although no threat had been made. That point of difference did not affect the following statement of Lords Wilberforce and Simon of Glaisdale[454]:

> "The action is one to set aside an apparently complete and valid agreement on the ground of duress. The basis of the plaintiff's claim is, thus, that though there was apparent consent there was no true consent to the agreement: that the agreement was not voluntary.
>
> This involves consideration of what the law regards as voluntary, or its opposite; for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained – advice, persuasion, influence, inducement, representation, commercial pressure – the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress – threat to life and limb –

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**452** [1975] AC 653 at 670 per Lord Morris of Borth-y-Gest, 680 per Lord Wilberforce, 690-695 per Lord Simon of Glaisdale, 703 per Lord Kilbrandon, 709-710 per Lord Edmund-Davies.

**453** [1976] AC 104.

**454** [1976] AC 104 at 121.

> and it has arrived at the modern generalisation expressed by Holmes J – 'subjected to an improper motive for action'."[455]

367 Reference was further made in argument to the fact that Professor Atiyah used what was said in *Director of Public Prosecutions v Lynch* as a reason for urging a reformulation of the emerging doctrine of economic duress. He said[456]:

> "Once it is appreciated that the victim of duress has chosen between evils, it becomes necessary to examine the nature and acceptability of the choice he was presented with. That clearly involves important questions of law, and cannot be treated as a pure question of fact. To treat the issue as one of fact diverts inquiry from the really vital issues in a case of economic duress, namely what sort of threats is it permissible to make, and when is it permissible for a victim of duress to reopen a question which has apparently been closed by his submission to the coercion."

He also said[457]:

> "Once it is understood that the law is not searching for overborne wills, but for improper and unacceptable threats, the very difficult question as to the permissible limits of coercion in our society has to be faced. Similarly, the extent to which society can legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards, raises very difficult questions of policy. In my view the overborne will theory was unsatisfactory not because it was more difficult to apply but because it simply evaded the really difficult questions."

368 The passages just referred to deal with "voluntariness" in the contexts of duress as a defence to murder, duress to the person in relation to contracts, and economic duress. The present context is different again: the admissibility of confessions. The appellants submitted that the primary judges had concentrated too much on whether the will of the appellants had been "overborne" and too little on whether, to use an expression of Lord Simon of Glaisdale, it had been "deflected not destroyed; so that the intention conflicts with the wish"[458].

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**455** *Fairbanks v Snow* 13 NE 596 at 598 (Mass, 1887).

**456** "Economic Duress and the 'Overborne Will'", (1982) 98 *Law Quarterly Review* 197 at 202.

**457** "Duress and the Overborne Will Again", (1983) 99 *Law Quarterly Review* 353 at 356.

**458** *Director of Public Prosecutions v Lynch* [1975] AC 653 at 695.

369 Even if this line of thinking were relevant to the admissibility of confessions, and even if it suggested some flaw in Dixon J's account of basal involuntariness, it would not assist the present appellants. There is no analogy between the present appellants and persons who commit crimes under duress. To use Lord Simon of Glaisdale's language, their intention to confess did not conflict with their wish not to do so. They intended to confess because they wished to. To use Professor Atiyah's language, the undercover police officers made no threats: they only offered the advantages of immunity from prosecution and a livelihood from the gang. The line of thinking advocated would have to suffer a transformation so as to accommodate the appellants' complaints about how they were deceived; but no attempt so to transform it was made. In view of the inapplicability of the submission even if it were soundly based in law, it is not necessary to consider whether it is soundly based in law.

370 That conclusion is reinforced by the following considerations. The "deflection of the will" submission rests on ideas which did not originate with the appellants. The submission was never put to any of the trial judges. That by itself is not necessarily a fatal objection to the submission. But what may be a fatal objection, depending on how the doctrine of will deflection were to be expressed, is that factual examinations might have been carried out on the voir dire which could possibly have defeated the appellants' argument. The submission was not put to the Court of Appeal. In the course of argument on the first day of these appeals, members of the Court referred the parties to Professor Atiyah and *Barton v Armstrong*[459]. By the second day of the hearing, two and a half months later, some of the appellants took up the suggestions. But there was no examination, in any detailed or organised or confident way, of the merits of the suggestion in law, the consequences of its acceptance for other parts of the law of confessions, or even of its application to the facts. These are circumstances which do not make the present occasion one on which it would be satisfactory to consider whether this important part of the law of evidence should undergo the radical reconstruction suggested.

371 It may be desirable, however, to note the following matters.

372 First, *Director of Public Prosecutions v Lynch* was overruled by a unanimous House of Lords 12 years later in *R v Howe*[460]: duress, based on a desire to protect one's own life or the lives of one's family, was held not to be a defence to a charge of murder, whether the accused was the actual killer or a

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**459** [1976] AC 104.

**460** [1987] AC 417.

principal in the second degree. This is not an event to which the appellants referred. The House of Lords in *R v Howe* did not criticise *Director of Public Prosecutions v Lynch* in relation to the "overbearing of the will" issue: rather it adopted the view of the minority in *Director of Public Prosecutions v Lynch*. But the changed result reveals how criticism of the "overbearing of the will" approach as a matter of principle does not lead inexorably to any precise conclusion as to what the rules of substantive law are in any particular field.

373 Secondly, there are general differences between the issues raised in the cases relied on and the present circumstances. Where duress as a defence to murder is in question, the law is seeking to balance an accused person's understandable instinct for self-preservation against the importance of showing fortitude against pressure to commit the wrongful act of killing another. Where duress to the person as a vitiating factor in contractual validity is in question, the law is seeking to balance the plaintiff's instinct for preservation of bodily health against the undesirability of reopening concluded transactions. But where confessions are in question, the form taken by the rules relating to voluntariness rests, among other things, on the need to balance the desirability or undesirability of the conduct which led to the confession, the risk of an unjust conviction, and the public interest in investigating and prosecuting crime by obtaining evidence of it from persons who can give the best evidence about it. It is far from clear that light is cast on the underlying considerations applicable to the present category by examining those applicable to other categories.

"Basal involuntariness": general factual aspects

374 It is now necessary to apply Dixon J's test to the facts in order to assess the submissions that each appellant had no choice but to confess. First some general aspects of the facts will be noted. Then the circumstances peculiar to each appellant will be considered.

375 Here the undercover police officers did not use violence on any appellant, and they did not threaten it. They did not threaten any illegal act directed against any appellant and they did not threaten any illegal act against any third party whose position might cause an appellant to speak who otherwise might have remained silent. They did promise to procure a corrupt police officer to terminate the police investigations, but they never in fact intended to do any such thing. They did tell Clarke that the police had DNA evidence linking him with the crime: that was untrue, but it was not intrinsically unlawful. They thus did nothing unlawful. There was no duress or intimidation. To ask whether they did anything "illegitimate" begs the question: if what they did fell outside Dixon J's test, it was not; if it fell within it, it was.

376 The police officers were at times importunate. They were insistent that each appellant confess his guilt. By their questioning they applied pressure. The question whether each appellant confessed involuntarily thus turns on whether the importunacy was so persistent, and whether the insistence and the pressure were so sustained or undue, as to overbear his will. That depends on the particular circumstances applying to each appellant.

"Basal involuntariness": the circumstances of Tofilau

377 Osborn J's conclusions were as follows[461]:

> "In the present case the accused was given a clear choice whether to speak or not as to his past. He was encouraged to speak the truth but the ultimate choice was his as to whether he spoke at all concerning the killing.
>
> It can of course be said that the accused was misled as to the circumstances in which he spoke. He was misled as to the true identity of those with whom he was speaking and he was misled as to a number of related collateral circumstances. In my view, however, this did not render his statements involuntary in the necessary sense. Moreover, I do not accept that he was intimidated, importuned or overborne into speaking as he did. He was offered an increasingly attractive choice and he made it."

The Court of Appeal, while accepting that "the careful targeting of ... [the] psychological and situational vulnerabilities" of suspects could cause those suspects to regard themselves "as having no realistic choice not to speak"[462], did not find that that possibility existed in the present case, and declined to interfere with Osborn J's findings.

378 Counsel for the appellant submitted that the conduct of the undercover officers involved "trickery, deception, sustained pressure and interrogation". It was "sophisticated, elaborate, extreme, protracted, extensive and persistent". Even if these descriptions are apt, their aptness, whether taken separately or in combination, does not of itself necessarily give rise to basal involuntariness, and does not contradict Osborn J's findings. In this Court no error was demonstrated in Osborn J's reasoning so far as it was factual. It was submitted, however, that

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**461** *R v Tofilau* (2003) 13 VR 1 at 15 [46]-[47].

**462** *R v Tofilau (No 2)* (2006) 13 VR 28 at 62-63 [155] per Vincent JA (Callaway and Buchanan JJ concurring).

Osborn J erred in making[463], and the Court of Appeal erred in accepting[464], the following statement:

> "There is no sense in which the confessional statements can be regarded as 'manufactured'. The substance of them was clearly the result of the accused's volition."

Counsel submitted that that was not the correct test. That submission is erroneous: the test stated in the second sentence in substance corresponds with that of Dixon J. This aspect of Tofilau's appeal thus fails.

"Basal involuntariness": the circumstances of Marks

379 Counsel for Marks complained that his client was the victim of pressure built up by a pincer movement between persons known to his client as police officers, who appeared hostile, and the "gangsters", who appeared to offer a way out. Coldrey J found that before Marks confessed he "fervently desired to be a member of the crew", he wished to obtain large sums of money as a result, he wanted to retain his friendship with one member of the gang, he was anxious for police investigation of him to cease, he believed the gang boss could arrange this, and he believed that if he lied to the gang boss he would forfeit any right to gang membership[465]. Coldrey J found that the gang boss told him three times that he did not have to speak about the homicide, that he could walk away, and that he had to be truthful and honest[466]. Coldrey J also found[467]:

> "The videotaped interview reveals a person who, if initially nervous, settled down quickly and, thereafter, confidently and relatively fluently, gave a detailed account of the events of 7 April 2002, and their aftermath.
>
> At no time was the accused harangued ... Nor was he interrogated ... in the accepted sense of that term, or subjected to duress, sustained pressure, intimidation, or persistent importunity. True it is that the

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**463** *R v Tofilau* (2003) 13 VR 1 at 16 [52].

**464** *R v Tofilau (No 2)* (2006) 13 VR 28 at 63 [155]-[156].

**465** *R v Marks* (2004) 150 A Crim R 212 at 220 [55], 223 [65].

**466** *R v Marks* (2004) 150 A Crim R 212 at 223 [63].

**467** *R v Marks* (2004) 150 A Crim R 212 at 223 [64]-[66] (footnotes omitted).

> accused was told he was the prime suspect for murder ... and, unless something was done about it, he would 'go down for it'. But the accused's own belief expressed later in the conversation ... was that he knew that the police knew they had the right man. Indeed as early as the 6 May interview investigating police had not only put the allegation to him that he was the killer but had made it clear that they would be conducting further inquiries.
>
> At all times during the videotaped episode the accused appears in control of himself even to the extent of querying the crime boss ... as to whether their conversation was being tape recorded."

380 Counsel for Marks submitted that the conduct of the people known to Marks to be police officers simply reinforced the likelihood of him responding to the inducement. Counsel did not explain how that militated against a finding of voluntariness. For the sake of argument, Coldrey J was prepared to assume the correctness of expert evidence that Marks suffered from a borderline personality disorder, a dependent personality disorder and an adjustment disorder. But he decided, after hearing the various recorded conversations between the appellant and the police officers, that Marks "had considerable self-possession and was well able to cope with situations of stress"[468]. Counsel submitted that his client was known to the police as "a person of weak character who was dependent on attention and affection". But counsel did not explain how these findings of Coldrey J could be overturned. Coldrey J concluded[469]:

> "In short there is no evidence that the will of the accused was overborne and I am satisfied, on the totality of the evidence, that the Crown have discharged the onus of demonstrating this basal aspect of voluntariness. As the accused subsequently remarked to [a covert operative], when essentially repeating his description of the killing, he felt better for having got it off his chest."

On the first day of the appeal, counsel for Marks said he did not intend to attack the conclusion just stated. He was then asked: "If you do not do that, how can you possibly have this Court hold that the confession was not voluntary?" He answered: "Through the first aspect, your Honour. Through inducements made to a person in authority." After an adjournment for two and a half months occasioned by Clarke's application to amend his notice of appeal, counsel for Marks said: "Now, just to ensure that there is no misunderstanding about the

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**468** *R v Marks* (2004) 150 A Crim R 212 at 224 [69].

**469** *R v Marks* (2004) 150 A Crim R 212 at 224 [70].

position on behalf of those representing Marks, it should not be thought that I was in fact giving away our submissions as to basal voluntariness." He then referred to parts of his written submissions which were rejected above[470].

381 Since no other basis was advanced on which to criticise Coldrey J's reasoning or the Court of Appeal's acceptance of it[471], this aspect of the Marks appeal fails.

"Basal involuntariness": the circumstances of Hill

382 Although counsel for Hill at the trial did not contend that Hill's confession should be excluded on the ground of basal involuntariness[472], Bongiorno J dealt with that issue. He held that the accused was not overborne, and his will was not affected by what the gang members said. He said that Hill's admissions were made "in a free exercise of his will to speak or not to speak. He could at any stage have left. The only 'inducement' for him to remain and to continue talking to the police was a hope of gain or reward which they offered out to him." The trial judge thus did not consider that Hill was influenced by any assistance which the gangsters might be able to give in terminating the investigation of his stepbrother's murder. The Court of Appeal held that that conclusion was open: Hill had expressed confidence to one "gangster" that the police had no evidence linking him with the stepbrother's murder[473].

383 Apart from relying on some factual submissions advanced by each of the other appellants which are irrelevant to Hill's circumstances, counsel's principal point was that the questioning by the gangsters was so persistent as to cause the confession to be "dragged out of him", and to be made, as Hill later claimed in his record of interview with non-undercover police officers, "under compulsion". It is true that Callaway JA described the questioning as "persistent"[474], but counsel referred to no evidence which supported the broader submission, and the questioning could not be described as "duress, intimidation, persistent importunity, or sustained or undue insistence or pressure". This aspect of Hill's appeal fails.

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**470** Above at [379]-[380].

**471** *R v Marks* [2006] VSCA 42 at [186].

**472** *R v Hill* [2006] VSCA 41 at [106]-[107].

**473** *R v Hill* [2006] VSCA 41 at [102].

**474** *R v Hill* [2006] VSCA 41 at [3].

"Basal involuntariness": the circumstances of Clarke

384 Kellam J had the benefit of observing "the demeanour and the manner in which the [appellant Clarke] commenced to make the admissions"[475] which had been recorded. He also observed Clarke being cross-examined on the voir dire. The trial judge found that, while the undercover officers misled him about their identity, and while they overstated the progress of the police investigation, Clarke had a free choice whether to speak or not[476]. He was told to tell the truth; he was offered a choice whether or not to speak about the death of Bonnie Clarke; he was given the opportunity to leave without saying anything; and the trial judge specifically rejected Clarke's evidence that if he had left he would have received a beating. The trial judge concluded[477]:

> "But in the end result, and in all the circumstances, the accused had a choice as to whether he spoke up or did not. He was offered the choice of not proceeding with his endeavours to join the criminal organisation or of doing so and telling ... the truth. He chose the latter course."

And the trial judge pointed to many admissions by Clarke during the voir dire that he was weighing up his options[478]. He also pointed to a statement by Clarke that it was his choice to stay because of "the pure fact of greed for money"[479].

385 The factual finding, accepted by the Court of Appeal[480], that Clarke had a free choice whether to speak or not was challenged in this Court. It was submitted that:

> "The trial judge concentrated on the objective circumstance of [the gangsters] saying that he could leave at any time without bringing into the mix the reality that if he did leave it was inevitable that he would be

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**475** *R v Clarke* [2004] VSC 11 at [49].

**476** *R v Clarke* [2004] VSC 11 at [46]-[49].

**477** *R v Clarke* [2004] VSC 11 at [49].

**478** *R v Clarke* [2004] VSC 11 at [50]-[52].

**479** *R v Clarke* [2004] VSC 11 at [51].

**480** *R v Clarke* [2006] VSCA 43 at [125] per Vincent JA (Callaway and Buchanan JJA concurring).

> charged with murder. It is unrealistic to find that the Appellant exercised an effective choice to speak or remain silent."

It was conceded that nothing said by the undercover police officers to the appellant "expressly forced" him to speak. Nevertheless, the supposed gang leader's "statements to the Appellant that he could leave at any time were, in reality, quite hollow. The same was true if he continued in his denials of murder". Why the statements were hollow was not explained.

386 It was also submitted:

> "The situation was tantamount to the Appellant having a loaded gun held at his head and [the 'gang leader'] saying to him 'if you deny it the trigger will be pulled, but you are free to deny it.' This is *not* freedom to speak or remain silent." (emphasis in original)

The example would fit Dixon J's test, but the facts are far removed from the example.

387 Counsel for Clarke read out numerous selected passages from the conversations with the "gangsters" which led to the confession. While some of those passages revealed the appellant to be under increasing stress, the primary purpose of counsel's selections was to establish that Clarke believed that unless he confessed it was inevitable that he would be charged with murder and convicted; and hence that he believed he had no choice but to confess. Indeed counsel went so far as to submit that "it was not open to the judge to find other than that the appellant was in fear of the murder charge and confessed as a result of this fear". Counsel submitted that this negated any suggestion that the appellant was free to leave at any time.

388 The primary flaw in these arguments is that, while the appellant was told that the police would not give up their investigation and was also told that they had some information adverse to him, the evidence did not establish that the appellant believed that unless he confessed he would be charged with murder and convicted, or that any such belief caused him to confess. Contrary to the appellant's submissions, the trial judge was entitled to rely on the appellant's admissions on the voir dire that he saw himself as having a choice, and that he chose to stay because of greed, and to prefer those admissions over the rather more speculative inferences about the appellant's beliefs which counsel sought to draw from the tape recorded interviews with the undercover officers.

389 Even if Clarke were deceived into speaking by the false representations of the police officers as to who they were and as to the extent of the police

investigation, which they "overstated"[481], it does not follow that he did not exercise a free choice to speak. Counsel for Clarke submitted:

> "These inducements followed upon months of calculated manipulations of his personal situation and condition. They included the actual commission of crime."

It was submitted that the purpose "of the process was corruption of the legal system". That criticism is false. No crimes were committed. No corruption of the legal system took place. Counsel for Clarke also submitted that the function of the basal involuntariness rule was to operate as a disincentive against undesirable practices of the kind which the police officers had engaged in. The proposition that the police practices were undesirable is questionable. They were in no way unlawful. Whether they were improper in such a manner as to justify discretionary exclusion is a matter for consideration below[482].

Section 149 of the Evidence Act

390 It may be controversial whether s 149 is capable of applying to evidence which does not offend the inducement rule but is affected by basal involuntariness. Even if s 149 is capable of applying, since it has been contended that basal involuntariness does not arise here, no occasion arises to consider whether in fact s 149 would assist the appellants.

Discretionary exclusion

391 Clarke applied towards the end of the first day of hearing to amend his notice of appeal. The new ground contended that the Court of Appeal had "erred in failing to determine that the trial judge had erred in not excluding, in the exercise of his discretion", the admissions made by Clarke to the gang leader.

392 *Events at trial.* At trial counsel for Clarke (who was not the counsel appearing in the Court of Appeal or this Court) put three arguments to Kellam J: that Clarke was denied the opportunity to exercise his rights; that the manner in which the admissions were obtained placed Clarke at "a massive forensic disadvantage"; and that the nature of the covert operation was such as to require exclusion of the admissions on public policy grounds.

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**481** *R v Clarke* [2004] VSC 11 at [79] per Kellam J.

**482** Below at [391]-[414].

393 *Clarke's first argument at trial.* The first argument was that the covert operatives denied Clarke any of his rights under the provisions of Pt III Div 1 Subdiv 30A of the Crimes Act. Counsel submitted that the gang boss was dominant in his relationship with Clarke; that in consequence he discouraged Clarke from responding to a police request for a DNA sample; that the "prop" – a supposed progress report into the state of the police investigation – which he supplied Clarke with contained material falsehoods; that he indulged in hectoring, bullying and overbearing behaviour in circumstances where Clarke had not been given the opportunity to be questioned by non-undercover officers; and that he had thus not been able to exercise any of the rights given by those provisions of the Crimes Act.

394 Kellam J accepted that, although in the videotape of his discussions with the boss Clarke revealed no distress and gave no sign of being under threat or coercion, he was hectored and harangued to a significant degree, in a manner which would be unacceptable in a formal police interview. He also accepted that the prop was fabricated and that while no piece of information in it was untrue, it contained several exaggerations. Indeed the available admissible circumstantial evidence fell a long way short of being sufficient to charge Clarke. Thus he was not in custody or something akin to custody and was not subject to the compulsion of the state. He was not under any compulsion by threat of violence. He thus had no vulnerability flowing from custody or compulsion of that kind. He had no rights under the relevant provisions of the Crimes Act because he was neither in custody nor a suspect, and because the police officers were engaged in covert investigations[483]. The means employed against Clarke were deceptive, but they did not circumvent any express exercise by Clarke of his right not to talk to police officers. Kellam J found that although the relationship between Clarke and the boss was unequal, it did not compare with the inequality between a person in custody and police officers. Nor did the boss unfairly exploit the inequality. Clarke wanted to impress the boss in order to join the gang and avoid the consequences of the police investigation. Kellam J concluded that the means employed by the covert operatives were not disproportionate to their purpose of investigating the serious crime of murdering a six year old girl.

395 *Clarke's second argument at trial.* The second argument advanced by counsel for Clarke at the trial was that reception of the admissions would create the forensic disadvantage of revealing Clarke to be a person with a criminal past who was prepared to engage in criminal acts in the future and to encourage the criminal acts involved in interfering with the police investigation.

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**483** See *Crimes Act*, s 464(2) (definition of "investigating official"), ss 464A and 464C, discussed above at [342].

396 Kellam J accepted that while this difficulty could be lessened by editing parts of the confessional statements, it could not be wholly cured, for some prejudicial material would remain. However, he thought that the forensic disadvantage could be overcome by careful jury directions, and he indicated that the issue might have to be reconsidered as the trial proceeded.

397 *Clarke's third argument at trial.* The third argument advanced at trial by counsel for Clarke was that employment of the particular covert operation was too high a price to pay: it involved the deliberate depraving of an apparently reformed offender, and it was a technique with obvious dangers if used by corrupt police officers. Although Kellam J found force in the submission, he said[484]:

> "[T]he fact is that the accused exercised his own free will in this regard. Indeed, he joined in the exercise with some enthusiasm. Significantly, and contrary to the then belief of the accused, no actual criminal act occurred. The police conduct, although dramatic, was not unlawful. Police officers acting as covert operatives did not commit any crimes. In particular the purported criminal activity was not designed to introduce the accused man into such activity in order to arrest and charge him for it but, rather, used as an investigative tool to solve an extremely serious crime."

Kellam J concluded that the task was to balance the individual and public interest in protecting the rights of the accused against the public interest in the effective investigation and prosecution of serious crime, and that the conduct of the undercover operatives was not sufficiently unacceptable to cause the evidence to be excluded[485].

398 *The Court of Appeal.* The Court of Appeal found no appellable error in Kellam J's approach[486].

399 *Counsel's submissions in this Court.* Counsel for Clarke in this Court submitted that while it was conventional to analyse discretionary exclusion of confessions as involving two "discretions" – to reject a confession the reception of which would be unfair[487], and to reject a confession that was illegally or

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**484** *R v Clarke* [2004] VSC 11 at [98].

**485** *R v Clarke* [2004] VSC 11 at [66]-[102].

**486** *R v Clarke* [2006] VSCA 43 at [129]-[134].

**487** *R v Lee* (1950) 82 CLR 133.

improperly obtained on public policy grounds[488] – in truth there was but a single "discretion"[489]. It is not necessary to resolve this question, since the outcome of the appeal will be the same whatever the answer. He also submitted that in any event what was involved was not a "discretion" but a rule of law, and relied on an analogy with the rule excluding evidence the prejudicial effect of which exceeded its probative value. It is not necessary to resolve that question either, for the same reason, although the appellant's submission is open to question, and quite out of line with past linguistic usage in this field.

400 Counsel for Clarke submitted that Kellam J's reasoning contained four errors.

401 The first alleged error was his conclusion that Clarke was not in a vulnerable position. The error lay in a failure to appreciate that Clarke believed that if he left the operatives he would inevitably be charged with murder. It also lay in a failure to appreciate fully, or weigh, the fact that the boss held himself out as a person with significant power over the progress of the police investigation.

402 The second alleged error related to the forensic disadvantage which reception of the admissions created for Clarke in revealing a criminal propensity. Counsel submitted that Kellam J was wrong to conclude that the forensic disadvantage of having this evidence of bad disposition admitted could be overcome by judicial warnings.

403 Thirdly, it was alleged that there was another forensic disadvantage. This argument, which is not recorded by Kellam J as having been put to him, related to the nature of the questioning engaged in by the boss. Counsel submitted:

> "[T]he judge erred by placing no weight upon the impact of the nature of the questioning ... and the effect that such questioning would have upon the [appellant's] decision whether or not to give evidence at his trial. Here the questioning was protracted. It included continual statements of disbelief with regard to the [appellant's] denials. It was in the nature of oppressive haranguing and exhortation."

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**488** *Cleland v The Queen* (1982) 151 CLR 1.

**489** He cited *R v Swaffield* (1998) 192 CLR 159 at 202 [91] per Toohey, Gaudron and Gummow JJ.

Counsel relied on *R v Amad*[490] and *R v Pritchard*[491].

404 The fourth error alleged by counsel for Clarke was that the boss, and other covert officers, exploited the vulnerability of Clarke by a process of psychological duress. "Minimum standards of the conduct of law enforcement officers whether covert or otherwise would never permit subjecting a suspect to this form of duress in an attempt to obtain confessional evidence." It was said that Kellam J erred in placing too much weight on the enthusiasm with which Clarke joined in the scenarios and on the fact that the police officers did not commit any crimes.

405 *Consideration of the appellant's arguments.* The first submission and, in part, the fourth, rest on the proposition that Clarke was in a vulnerable position. That proposition, and the contentions underlying it, were rejected above for reasons which need not be repeated[492].

406 As to the forensic disadvantages of the scenario evidence in revealing Clarke's criminal propensity, it misrepresents Kellam J's reasoning to suggest that he relied only on the effect of jury directions to cure the problem. He relied also on the effect of editing, and left open the possibility of the problem being revisited later if necessary. The Court was taken to no passage indicating that counsel for Clarke at the trial took up this invitation. In any event the prejudicial effect of the criminal propensity revealed was insignificant compared to the prejudicial effect of what he admitted about the murder of Bonnie Clarke.

407 So far as the forensic disadvantages of hectoring questioning are concerned, there is no close analogy between the authorities on which Clarke relied and the present case. *R v Amad*[493] concerned questioning by non-covert police officers of an accused person held in custody who had not been cautioned. The questioning was in breach of the Police Commissioner's Standing Orders, and there were other improprieties. Here Clarke was not in custody, the police officers lacked the material to place him in custody, there was no breach of either the Crimes Act or the modern equivalent of the Police Commissioner's Standing Orders, and there were no improprieties. In addition, the reasoning of Smith J towards his conclusion that the discretion should be exercised against reception

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**490** [1962] VR 545.

**491** [1991] 1 VR 84.

**492** See above at [384]-[389].

**493** [1962] VR 545.

reflects a distaste for the employment at trials of lies by persons being interrogated. Whether evidence should be excluded on the grounds under consideration is a question depending very much on the specific facts of the particular case, and Smith J's approach to the employment of lies is not necessarily determinative in other cases.

408 In *R v Pritchard*, which was again, unlike the present case, a case involving interrogation in custody in breach of the Chief Commissioner's Standing Orders[494], the outcome turned on the unfairness of depriving the accused of his right to make an unsworn statement by reason of receiving evidence of police interrogation in which the interrogator repeatedly and derisively revealed disbelief in the accused's denials. The particular aspect of the right to make an unsworn statement which was stressed was the right to give a version of events without being subjected to cross-examination. That kind of thinking has no application in Victoria now in view of the fact that the right to make an unsworn statement has been abolished. But again, since the decision to exclude the evidence depends closely on the facts of each case, the reasoning in *R v Pritchard* is not determinative in the circumstances of this case, which will now be considered below[495].

409 The submission that Kellam J erred in failing to conclude that the way Clarke was treated fell below acceptable standards of police conduct must be rejected for the following reasons.

410 Counsel for Clarke correctly accepted that so far as his arguments turned on exclusion because of illegal or improper means, the factors listed by Stephen and Aickin JJ in *Bunning v Cross*[496] were relevant. Two of these in particular are adverse to Clarke's submissions. One is the nature of the offence charged – here not only a murder, but a particularly vicious and horrifying murder. This was a factor which on occasion counsel, in his emphasis of the need for compliance with particular standards, submitted was irrelevant: but to accept that submission would be radically to change the law, as counsel admitted, and for the worse. The other is whether the police conduct affected the cogency of the evidence[497].

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**494** [1991] 1 VR 84 at 91.

**495** Below at [413].

**496** (1978) 141 CLR 54 at 78-80. See also *R v Swaffield* (1998) 192 CLR 159 at 212-213 [135] per Kirby J.

**497** If the matter is viewed as resting on unfairness rather than public policy, the likelihood or unlikelihood of the interrogation producing an untrue admission is

(Footnote continues on next page)

That Clarke said what the prosecution alleged he said is clear beyond doubt, for what he said was recorded, and he did not deny saying it. There is no reason to disagree with Kellam J's conclusion, after he had closely compared what Clarke said with the objective evidence, that the admissions were "not inherently unreliable" and that "it would be open in all the circumstances for a jury to consider that the manner in which the admissions are shown to have been made on the video-tapes is such that they are reliable"[498]. The Court of Appeal agreed with that conclusion[499], and no attack was made on it in this Court, beyond a throwaway assertion that the conduct "may well have" affected the cogency of the evidence. That assertion must be rejected.

411 Three other relevant *Bunning v Cross* factors are whether any illegality was the result of an innocent mistake or a deliberate disregard of the law, whether it was easy to comply with the law, and what the specific intention of the legislation infringed was. These do not arise in terms because there was no illegality, as counsel for Clarke twice conceded, then denied, but then, correctly, twice conceded again. Counsel for Clarke however submitted that the conduct was improper. He submitted – correctly – that it was plainly deliberate. He also submitted that it would have been easy for the police to have behaved properly, by questioning Clarke in a conventional fashion. It is true that that would have been easy, but it is also true that conventional questioning had failed in the past.

412 Counsel for Clarke said that three further factors were relevant[500]. One was that the conduct was encouraged or tolerated by those in higher authority: plainly it was. Another was that the conduct was inconsistent with a right of Clarke's which was fundamental, namely the "right to silence". That submission must be rejected in view of the conclusions reached above that the admissions were voluntary and that Clarke saw himself as having a choice which he exercised for his own purposes[501]. That is, he had a right to silence but he chose not to exercise it. The final factor was whether the conduct would involve the court itself in giving, or appearing to give, effect to impropriety in a way that

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equally relevant: *R v Lee* (1950) 82 CLR 133 at 153 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.

**498** *R v Clarke* [2004] VSC 11 at [64].

**499** *R v Clarke* [2006] VSCA 43 at [128].

**500** Relying on factors (v) to (vii) as stated by Kirby J in *R v Swaffield* (1998) 192 CLR 159 at 213 [135].

**501** Above at [384]-[389].

would be incompatible with the functions of a court, or which might damage the repute and integrity of the judicial process. Counsel for Clarke submitted that for police officers to promise to secure immunity from prosecution when in fact they intended to prosecute was an act of bad faith and corruption, which if permitted by this Court, would cause "the very authority of the State ... itself [to] be placed in jeopardy". It was improper for the state to put moral or psychological pressure on individuals in a process of actively eliciting confessions – as improper as it is for the state to put physical pressure on them for that purpose.

413 The correctness of that submission must be evaluated against the following circumstances. The police had failed – and their failure was not said to be culpable – to collect sufficient evidence against Clarke to charge him. The crime being investigated was very serious[502]. It had remained unsolved for 20 years. The scenario technique was one which had been in use for a long time in Canada, and had been approved by the Canadian courts. It was not embarked on as an unthinking frolic by junior officers. It had been deliberately selected by the superiors of those involved in the light of Canadian experience. No alternative was available if the investigation was to continue. It was reasonable for the police to seek to employ this technique, new in Australia, in carrying out their important duty to investigate an old crime. The technique was employed in a discriminating way, with considerable care being taken to avoid illegality. No doubt psychological pressure was built up, but conventional police interrogation of the most proper kind naturally involves pressure. Counsel submitted that the process was "designed to circumvent the [appellant's] right to silence". Clarke was in fact an experienced criminal who understood that he did not have to answer anyone's questions. He had not claimed any right to silence when interviewed by non-undercover officers soon after the murder. He actively cooperated in the questioning by the undercover officers. The questioning took place in the course of a relationship which he entered freely, and did not exploit some pre-existing or collateral relationship. The interrogation elements in the conversations were patent, and consistent with the roles which he believed the undercover officers were occupying. He had not been charged, and there was no proper basis to charge him. There was no illegality and no breach of Police Standing Orders. Part III Div 1 Subdiv 30A of the Crimes Act did not apply. The failure of other investigative methods which made it necessary to conduct the undercover operation also made it necessary for a process of active "elicitation" to take place. The admissions eventually obtained formed a significant part of the prosecution case. The operatives stressed the need to tell the truth. The undercover officers did not prey upon any special characteristics

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**502** See, in relation to the seriousness of the crime, *Cleland v The Queen* (1982) 151 CLR 1 at 17 per Murphy J.

of Clarke related to his gender, race, age, education or health. The means of elicitation were not so disproportionate to the problem confronting the police as to be inherently unfair or contrary to public policy.

414 If Kellam J's decision is to be viewed as discretionary, it cannot be said that he made any error of fact or law, took anything irrelevant into account or failed to take anything relevant into account; nor that the result was so unjust as to suggest some error not apparent on the face of his reasoning. If his discretion is not to be viewed as discretionary, it was correct for the reasons set out above. In either event the Court of Appeal was right not to interfere with it.

415 In view of the importance of the issue raised by the application for leave to amend, it is appropriate to grant that leave, but to reject the new ground of appeal.

A cautionary note

416 Nothing said above should be taken as a warrant for any undiscriminating reception of evidence gathered by police officers operating covertly. Plainly, as these appeals show, it is desirable that covert operations be undertaken from time to time, and they can be undertaken without damaging the integrity of the police force, or indeed of the system of criminal justice itself. Covert operations can however be risky. Sometimes the covert officers will, as a matter of necessity, be remote from close supervision and the discipline that it entails. Seduction of officers by criminals is not unknown. Covert officers can be placed in danger. Their response to that danger may cause them, however understandably, to act in a way that might otherwise be thought irregular. But none of those factors were present in the circumstances out of which these appeals arose. The trial judges in these cases were in all respects careful and discriminating in considering and admitting the relevant evidence.

Orders

417 Each appeal is dismissed.