HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

SOPHEAR EM APPELLANT

AND

THE QUEEN RESPONDENT

Em v The Queen [2007] HCA 46
4 October 2007
S59/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

S J Odgers SC with A Francis for the appellant (instructed by Legal Aid Commission of New South Wales)

D C Frearson SC with J A Girdham for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Em v The Queen

Criminal law – Evidence – Confessions and admissions – Discretionary grounds for exclusion – Unfairness discretion – Police covertly recorded a conversation with the appellant in a park – Appellant made certain admissions – Appellant not aware that he was being recorded – Appellant under mistaken belief that admissions to police could only be used against him in criminal proceedings if recorded electronically – Police deliberately omitted the second part of the standard caution, namely that anything said or done by the appellant could be recorded and used as evidence in court – Interpretation of s 90 of the *Evidence Act* 1995 (NSW) – Whether admitting evidence of admissions in these circumstances was unfair – Reliability of the admissions – Whether right to silence impugned – Whether jury should have been warned by the trial judge that an admission made in these circumstances may be unreliable.

Words and phrases – "unfair".

Evidence Act 1995 (NSW), ss 84, 85, 90, 137, 138.

1 GLEESON CJ AND HEYDON J. After a trial in the Supreme Court of New South Wales before James J and a jury, Sophear Em ("the appellant") was convicted of murdering Joseph Logozzo; assaulting Joseph Logozzo with intent to rob him while armed with a dangerous weapon; and firing a firearm with disregard for the safety of Marianne Logozzo. He was sentenced to 25 years imprisonment for the first offence, 10 years imprisonment for the second offence and two years imprisonment for the third offence. At that trial the appellant was also charged with five other offences, namely that, being armed with a dangerous weapon, the appellant had robbed Michael Kress, his wife Beverly Kress, his daughter Alyson Kress, his son Jonathon Kress, and Ramzi Tamer, who was a friend of his daughter. In the course of the trial the appellant pleaded guilty to those charges. He received five concurrent sentences of imprisonment for 12 years in relation to them.

2 The appellant's appeal to the Court of Criminal Appeal (Giles JA, Grove and Hidden JJ) against conviction and sentence was dismissed[1]. By special leave, the appellant appeals to this Court against the Court of Criminal Appeal's order dismissing his appeal to it against conviction. The Notice of Appeal makes two complaints. One is that the primary judge erred in overruling an objection to part of a confession recorded by police officers in a suburban park on 15 May 2002. The other complaint is in the alternative; that the jury should have been given a warning about the unreliability of the confession. If the first complaint is made out, the appellant contended that there should be no order for a new trial, but that he should be acquitted of the Logozzo offences. For the reasons given below, the appeal should be dismissed.

The crimes

3 *The Logozzo home invasion.* The three counts to which the appeal relates concern a "home invasion" on 7 January 2002. The home invaded was that of the Logozzo family in Cecil Hills, a suburb of Sydney. Mr and Mrs Logozzo arrived at their residence shortly after midnight. They were confronted by two men wearing dark clothes, balaclavas and large ski goggles. One was armed with a rifle and the other with a pistol. The men forced the Logozzos into their house. Other occupants of the house were threatened with the weapons, forced to leave the upstairs bedrooms in which they had been sleeping, and made to lie on the downstairs lounge room floor. The man with the rifle pointed it at Mr Logozzo and forced him upstairs so that property to be stolen could be identified. In the course of a struggle on the stairs and in the lounge room Mr Logozzo was shot in the chest by the man with the pistol. Mrs Logozzo ran to her husband's aid and

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1 *Em v The Queen* [2006] NSWCCA 336.

was shot in the hand by the man with the pistol. The intruders then fled. Mr Logozzo was taken to hospital but was pronounced dead.

4 *The Kress home invasion.* On 17 January 2002 another home invasion took place nearby, at the residence of the Kress family in West Hoxton. Late in the evening Mr Michael Kress, his wife Beverly, their son Jonathon (aged 16), their daughter Alyson (aged 17) and her boyfriend, Ramzi Tamer, were at the Kress residence. At about 11.30pm Mr Kress opened his garage and stood at the open door smoking a cigarette. A car which had been stolen the previous day stopped opposite his driveway. Three men alighted from the car dressed in dark clothing and balaclavas. Two were wearing ski goggles. One carried a pistol, one a rifle and one a knife. The man carrying the pistol ran up the driveway and said: "Get in quick, don't shout, if you shout, I'll shoot you." The men forced all the occupants of the house to lie on the floor of the downstairs bar area, tied their hands and placed masking tape over their mouths. Numerous items of property were stolen. The man with the pistol told them to keep their heads on the ground for another ten minutes and not to call the police on pain of death. The appellant, who was 19 at the time of the offences, admitted being one of the three men, but gave evidence seeking to exculpate himself, which James J did not accept.

The police investigation before the 24 April 2002 conversation

5 The police received information leading them to believe that two persons who committed the Logozzo home invasion might have been parties to the Kress home invasion, and that on each occasion an AK47 assault rifle and a .32 handgun were used. On 16 February 2002 police officers executing a search warrant at premises in Canley Vale in connection with an unrelated matter found a fishing licence in the name of Mr Kress and a watch owned by Alyson Kress which had been stolen during the Kress home invasion, black electrical cable ties similar to those used to restrain the Kress family, and a balaclava. At that time the appellant and a friend of his, Mao Vann, were living on the premises. The watch was found in Vann's room. During the search, the appellant was asked: "Who is Michael Kress?" He replied: "Might be a friend of ours."

6 On 22 February 2002 the appellant was interviewed by police officers in relation to the killing of a person on 9 February 2002. After being cautioned, he answered over 270 questions.

7 The police then discovered that SIM cards registered in the name of two persons having an address of 1/119 Chester Hill Road, Bass Hill had been used in a mobile phone stolen during the Kress home invasion. This caused police officers to execute a search warrant on 24 April 2002 at 1/119 Chester Hill Road, Bass Hill, which were premises then occupied by the appellant. Until then the appellant had not been the subject of police interest in relation to either the Logozzo or the Kress home invasions. The appellant was made to wait in the

lounge room for an hour while the house was searched. He was then taken to his bedroom while it was searched. In the appellant's bedroom the police found a carry bag containing, inter alia, black clothing, a balaclava, ski goggles, cable ties, two pairs of gloves, a roll of grey duct tape, and a sheath knife. He admitted that he owned those items, apart from the cable ties, but he said under questioning later that they had been used for fishing. Another occupant of the premises, Arno Do, was arrested in relation to a firearm found in the search. Liane Tran, who also occupied the premises, was taken to the police station for questioning about the use of her SIM card in a mobile phone stolen during the Kress home invasion.

The 24 April 2002 conversation

8 On 24 April 2002, following the search of the premises, the appellant was arrested. He was taken to Bankstown Police Station. He was questioned in an interview room about both the Logozzo and the Kress home invasions by Detective Senior Constable Bradley Abdy and Detective Senior Constable Michael McLean. Detective Abdy told the appellant he was to be asked about the Kress home invasion and administered the following caution: "I want you to know that you don't have to say or do anything unless you wish as anything you say or do may be recorded and later given in evidence at court." He was given a document to the same effect and a written summary of Pt 10A of the *Crimes Act* 1900 (NSW)[2]. He was also told that the interview would be recorded on a "video and audio machine". The following conversation then took place. The appellant said: "I'm not going to say anything to you if you turn that on. I don't want to look like a dickhead." Detective Abdy said: "I can turn the audio tapes on and leave the video off if you want?" The appellant said: "No, nothing." Detective Abdy said: "Well how about I turn the tapes on and you state that objection on them?" The appellant said: "I won't say a word if you turn it on." Detective Abdy said: "What about we write down what you say?" The appellant said: "No." Detective Abdy said: "Mick and I are going to ask you some questions anyway and it is up to you what you say."

9 The detectives then put a number of damaging circumstantial matters to the appellant in relation to the Kress home invasion. After a few minutes the appellant twice said that he did not want anything recorded on the tapes. After the second refusal he said: "But what do you want to know, like where is the gun and stuff?" The detectives then left the room. On their return the following conversation took place. Detective Abdy said: "Well Sophear what is it going to be are you going to talk to us or not?" The appellant said: "Not if it's on the

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2 This was in compliance with the following provisions of Pt 10A (now repealed) of the *Crimes Act*: ss 355(2), 356C(1) and 356M(1). See n 12 below.

tapes." Detective McLean said: "There I've turned it off, even our phones are off." As he said this he turned the machine off. The appellant said: "What about a wire, like in the movies?" Detective Abdy said: "I'm not going to sit here naked with you mate, you'll just have to trust us. We have been up front with you from this morning and we haven't tried to trick you."

10 The detectives then questioned the appellant for some time about the Kress home invasion and elicited admissions, including his possession of a silver pistol used in that home invasion. In answer to a question from Detective McLean: "Why did you pick that house anyway?", the appellant said: "They just looked rich, nice house, they had a Commodore in the driveway." The appellant declined to name the co-offenders. The detectives then left the room.

11 On their return, before questioning him about the Logozzo home invasion, the following conversation took place. Detective Abdy said: "Sophear, there is one other thing that [we] want to speak to you about, so just listen to what we have to say. You don't have to say or do anything unless you want to. But whatever you say or do may be recorded and later given in evidence at court." The appellant said: "I don't want anything recorded." Detective Abdy said: "It is the same as before. Nothing in this room is turned on."

12 The detectives then questioned the appellant about the Logozzo home invasion. Detective Abdy proposed turning the machine on, but the appellant began to cry. He asked to speak to a solicitor, and he was given an opportunity to do so. After the appellant returned to the interview room, the following conversation took place. Detective Abdy said: "What is it going to be mate? How about I just put the tapes in and you tell us whatever you want?" The appellant said: "No." Detective Abdy said: "What are you afraid of?" The appellant said: "I don't want to look like a dickhead." Detective Abdy said: "I told you before, I can leave the video out if you want." The appellant said: "No tapes." Detective McLean said: "We can record the conversation in our notebook and get you to sign it if you are happy with what has been written." The appellant said: "No I don't want to sign anything or have anything written down." Detective Abdy said: "Sophear we can't sit here all day. We are giving you a chance to tell us your side of the story. If you don't all we have is the statements from the other people in the house. If it was an accident, tell us, if you didn't shoot him tell us that." The appellant said: "I just don't want to talk about it just now, I have too much going on in my head, I want to say what happened in court." Soon afterwards the appellant was released from custody.

13 The detectives then prepared a record of what had been said based only on their recollections, not on notes. It was set out as a word-for-word record, but Detective Abdy agreed it was unlikely that word-for-word accuracy had been achieved. However, in this Court counsel for the appellant conceded that there was no significant challenge at trial to the essential accuracy of the record, save

in one relatively minor respect. At the trial, pursuant to s 281 of the *Criminal Procedure Act* 1986 (NSW)[3], the primary judge excluded evidence of what had been said on the ground that it had not been tape recorded.

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3 Section 281 provides:

"(1) This section applies to an admission:

(a) that was made by an accused person who, at the time when the admission was made, was or could reasonably have been suspected by an investigating official of having committed an offence, and

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

(c) that relates to an indictable offence, other than an indictable offence that can be dealt with summarily without the consent of the accused person.

(2) Evidence of an admission to which this section applies is not admissible unless:

(a) there is available to the court:

(i) a tape recording made by an investigating official of the interview in the course of which the admission was made, or

(ii) if the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in subparagraph (i) could not be made, a tape recording of an interview with the person who made the admission, being an interview about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms, or

(b) the prosecution establishes that there was a reasonable excuse as to why a tape recording referred to in paragraph (a) could not be made.

...

(4) In this section:

...

(Footnote continues on next page)

The investigation after 24 April 2002

14 On 30 April 2002 police officers attended the appellant's residence and asked him whether, if they brought some photographs of different types of guns, he would be prepared to look at them and show them the type of .32 calibre pistol which, according to what he had said on 24 April 2002, he had been in possession of during the Kress home invasion but had later sold. He said he would have a look but that he might not point anything out. The police advised him to speak to a solicitor.

15 In early May 2002 warrants (ST 02/149(c)-(f)) were issued by O'Keefe J, a judge of the Supreme Court of New South Wales, under s 16 of the *Listening Devices Act* 1984 (NSW) authorising Detective Abdy and Detective McLean each to wear a covert listening device transmitter and recorder for the purpose of recording conversations with the appellant.

16 On 13 May 2002 the detectives attempted to speak to him at his residence but he was not there.

The events of 15 May 2002

17 At about 11.55am on 15 May 2002 Detective Abdy and Detective McLean picked the appellant up from his residence. Each had been fitted with a covert listening device transmitter and recorder. Detective Abdy said they wanted to show the appellant some photographs and talk to him for five or ten minutes, and that they were not going to the police station. He went into their car. Detective Abdy said:

> ***reasonable excuse*** includes:
>
> (a) a mechanical failure, or
>
> (b) the refusal of a person being questioned to have the questioning electronically recorded, or
>
> (c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.
>
> …"

There are equivalents in other jurisdictions: see *Kelly v The Queen* (2004) 218 CLR 216 at 228-230 [32]-[36].

> "Mate, we're just gunna go and have a talk to you, I think there's a park or something up here. We're not going to take you to the police station or anything. So you know you're not under arrest, ok? As I told you before, we're going to come back and talk to you. Remember we said we might come back and show you some photos of some guns?"

While driving to the park, Detective Abdy reminded the appellant of his visit to the police station on 24 April 2002. The conversation continued as follows. Detective Abdy said: "Remember they gave you a piece of paper that said you didn't have to say anything to the police?" The appellant said: "Yeah, I know that." Detective Abdy said: "You know that?" Detective McLean said: "And we told you that, you remember that?" Detective Abdy said: "And the same goes again. You don't have to say anything to the police if you don't want to, ok?" Very soon thereafter Detective McLean said: "You know. Mate, you don't have to talk to us if you don't want to." But the detectives did not then or at any other stage say that anything the appellant said might be recorded and given in evidence. In evidence and argument this omitted warning was described as "the second part of the caution".

18 A little later the appellant asked: "So what, what do you want to know?" Detective Abdy said: "We want to know, you said when you did the home invasion at Hoxton Park. Do you remember that? Mate, I'm struggling to remember, I'm struggling to remember what you said. You said you picked the, why did you pick that house out?" The appellant then said: "I don't want to talk about that any more."

19 The detectives then showed the appellant photographs of guns. In the course of the conversation the appellant said: "The one that was used at the shooting was an SK." He had earlier denied knowing anything about the Logozzo home invasion.

20 During the balance of the conversation, the detectives repeatedly assured the appellant that he was not being tricked[4]. Detective Abdy said: "Mate, we didn't even take you to a police station, it's not hard, I mean we spoke to you once before and you wanted to talk to us, we're not, we're not trying to trick you or anything." A little later the appellant said: "I know how you guys work ... you try to con us", to which Detective Abdy said: "I'm not trying to, mate, I'm not trying to con you, we told you before, we're investigating a home invasion and a murder." A little later still Detective Abdy said: "Sophear, we haven't

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4 At one point Detective Abdy is transcribed as saying: "We're not trying to trick you up" but the word "trick" appears to be an error for "trip".

tried to trick you once, have we? We've brought you to a God damn park. We're not, we haven't got you in the police station." Detective McLean said: "Mate, you know you're under arrest[5]. We told you that as soon as you got in the car. Right. We told you that you don't have to talk to us if you don't want to, you know that, all right. We want to try and clear up a few things here." A little further on Detective McLean said: "Like Brad [Abdy] said, we're not here about tricking anybody."

21 In the course of the conversation the appellant denied involvement in the Logozzo home invasion. But thereafter he behaved in such a fashion as arguably to make admissions in relation to that home invasion. Then at page 25 of the transcript of the conversation, Detective Abdy said: "Maybe you might feel better if you tell us. It's not as though we're going to slap the handcuffs on you and take you away otherwise we'd be at the police station if we were gunna do that, wouldn't we?" Below, this will be referred to as "Detective Abdy's p25 statement". It had great significance in the trial, because James J rejected the whole of the conversation taking place after it, in which the appellant gave a detailed account of his arrival at the Logozzo residence, the struggle, the shootings and the departure.

Procedural history

22 The trial of the appellant before James J was not the first trial he had faced on the charges relating to the Logozzo home invasion. There had been an earlier trial before Shaw J, which commenced on 1 September 2003, at which Shaw J made an order rejecting evidence of both parts of the conversation at the park on 15 May 2002. He did so on three grounds. He held that the evidence was inadmissible on the ground that it was obtained improperly within the meaning of s 138 of the *Evidence Act* 1995 (NSW) ("the Act")[6]. Secondly, he

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5 The context suggests and counsel for the appellant accepted that the word "not" is wrongly omitted before "under arrest".

6 Section 138 provides:

> "(1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law, or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law,
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

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(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and

(d) the gravity of the impropriety or contravention, and

(e) whether the impropriety or contravention was deliberate or reckless, and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*, and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law."

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held that the evidence should be excluded under s 90 of the Act[7]. Thirdly, he held that the evidence should be excluded under s 137 of the Act as unfairly

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Section 139(1) provides:

> "For the purposes of section 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:
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> (a) the person was under arrest for an offence at the time, and
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> (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person, and
>
> (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence."

Section 139(5) provides:

> "A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:
>
> (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning, or
>
> (b) the official would not allow the person to leave if the person wished to do so, or
>
> (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so."

7 Section 90 provides:

> "In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
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> (a) the evidence is adduced by the prosecution, and
>
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence."

prejudicial[8]. He rejected contentions that the evidence was inadmissible under s 84[9] and s 85[10] of the Act.

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8 Section 137 provides:

> "In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

9 Section 84 provides:

> "(1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
>
> (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or
>
> (b) a threat of conduct of that kind.
>
> (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced."

10 Section 85 provides:

> "(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
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> (a) in the course of official questioning, or
>
> (b) 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.
>
> (2) Evidence of the admission is not admissible 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.
>
> (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:
>
> (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any

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23 The Court of Criminal Appeal (Ipp JA, Hulme and Howie JJ)[11] disagreed with Shaw J's conclusions in relation to s 138. It did so because he failed to find sufficient facts to support the conclusion that the appellant was under arrest or that s 139 applied; he failed to give reasons on that point; he took into account irrelevant considerations; and in other respects the exercise of "discretion", as it was described, miscarried. The Court of Criminal Appeal rejected Shaw J's conclusions in relation to s 90 on the ground that he took into account irrelevant considerations. And the Court of Criminal Appeal rejected his conclusions in relation to s 137 on the ground that reception of the evidence could cause no prejudice to the appellant in the relevant sense.

24 In 2004 a second trial took place before James J. That trial led to the appellant's convictions.

25 At that second trial James J admitted the evidence of the conversation in the park up to Detective Abdy's p25 statement. He said the meaning of that statement was: "if the accused spoke to the police he would not be arrested and what he said could not be used against him." James J held that it would be unfair, pursuant to s 90 of the Act, to use against the appellant admissions made after Detective Abdy's p25 statement.

26 This appeal relates to the correctness of James J's decision not to reject the park conversation before Detective Abdy's p25 statement, and the Court of Criminal Appeal's concurrence in that course.

Evidentiary gates through which the evidence passed

27 Before assessing the applicability of s 90 to the first part of the 15 May 2002 interview, the other gates through which that interview passed may be listed. These were fully considered at a voir dire conducted before Shaw J at

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mental, intellectual or physical disability to which the person is or appears to be subject, and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put, and

(ii) the nature of any threat, promise or other inducement made to the person questioned."

11 *R v Em* [2003] NSWCCA 374.

which the detectives gave evidence but the appellant did not. The transcript of that voir dire was before James J.

28 *Section 84.* Before Shaw J the appellant argued that s 84 applied. Shaw J rejected that contention. He said:

> "I believe the police behaved properly in all of the circumstances. I accept the submission of the Crown Prosecutor that [the police in] honest belief, in pursuit of evidence relating to a serious and tragic crime, behaved in a way which was understandable."

The submission that s 84 applied has not been put since.

29 *Section 85.* Before Shaw J the appellant contended that s 85(2) applied. Shaw J rejected the contention. It was not repeated in the appeal to the Court of Criminal Appeal against Shaw J's order rejecting the evidence on other grounds. It was, however, advanced to James J. Reliance was placed on s 85(3)(b). Reference was made to what was said to have been persistent questioning; to the claims of the detectives that they were not trying to trick the appellant; to a representation by them that there was an important difference between an intentional shooting and an accidental one; and to Detective Abdy's p25 statement. Counsel for the appellant relied on the appellant having answered the questions by saying: "I don't know" or "I can't remember" or by asking a question. Counsel for the appellant submitted that some of the information which the appellant admitted in his answers had previously been conveyed by the detectives, and Detective Abdy did accept that on 24 April 2002 the appellant had been told that on 7 January 2002 one of the armed men had got into a struggle with Mr Logozzo on the stairs; that the other victims were tied up on the floor; and that the offenders used a red car. James J rejected these submissions. He said:

> "The questioning was not hostile or overbearing, or, in my opinion, unduly persistent or confusing or too leading. That the accused often claimed not to know or not to remember, and sometimes gave partial, indirect or equivocal answers or evaded answering questions, does not militate against a conclusion that the circumstances in which such admissions as were made were made, were such as to make it unlikely that the truth of those admissions was adversely affected."

He said that the appellant's admissions of what he had been told before "were all given in response to non-leading questions by the police and, as spoken by the accused, sounded to me as answers given by the accused of his own accord and not as answers in which the accused was repeating what he had previously been told by someone else." James J concluded that the circumstances in which the

admissions in the whole of the 15 May 2002 conversation were made were such as to make it unlikely that the truth of the admissions was adversely affected.

30 The appellant did not contend to the Court of Criminal Appeal that James J had erred in relation to s 85. In this Court counsel for the appellant accepted James J's conclusion; but despite doing so, and despite the jury's conclusion beyond reasonable doubt that the admissions were reliable, the appellant did not concede that they were in fact reliable. Counsel for the appellant also said that James J's finding did not mean that one could say the evidence "is likely to be reliable", and said that there could be "a real risk that it is unreliable, even though it is not excluded by reason of [s] 85." Whatever technical merit these distinctions have, it is not necessary to inquire into their practical merits because counsel for the appellant said that the appellant's case on s 90 did not rely on any unreliability argument. This was said to be because the basis for any such argument rested on the appellant's evidence late in the trial, and hence could not have been taken into account by James J when he overruled the s 85 objection at an earlier stage.

31 *Section 138.* Shaw J accepted the appellant's contention that the 15 May 2002 admissions should be excluded under s 138. The Court of Criminal Appeal reversed that decision. The appellant repeated the submission to James J. In particular, the appellant submitted that the evidence had been obtained improperly for one of three reasons.

(a) At the time of making the admissions, the appellant had been "under arrest" within the meaning of s 355(2) of the *Crimes Act* 1900 (NSW) and the provisions of Pt 10A of that Act had been contravened[12].

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12 Part 10A of the *Crimes Act* was repealed by the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), Sched 4.16[3], and replaced by Pt 9 of that Act. In Pt 10A, s 356C(1) provided that a person who is under arrest may be detained. Section 356M(1)(a) provided that a person who is detained must be cautioned, orally and in writing, that "the person does not have to say or do anything but that anything the person does say or do may be used in evidence". Section 355(2) provided:

> "A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigative procedure, if:
>
> (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or

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(b) At the time of making the admissions, the appellant had been "under arrest" within the meaning of s 139(5) of the Act; in consequence, s 139(1) of the Act applied, but the appellant had not been cautioned in accordance with s 139(1)(c) of the Act.

(c) Those conducting the questioning of the appellant had made a false statement within the meaning of s 138(2)(b) of the Act, and the other requirements of s 138(2)(b) were satisfied, so that evidence of the admissions was to be taken to have been obtained improperly.

32 Section 355(2)(a) and (c) of the *Crimes Act* corresponded in substance with s 139(5)(a) and (c) of the Act. The correctness of the first two contentions thus turned on the question of whether a full caution should have been given on the ground that the appellant was under arrest. It was submitted by the appellant to Shaw J that, while on 15 May 2002 Detectives Abdy and McLean did not believe there was sufficient evidence to establish that the appellant had committed the offences of 7 January 2002, they did believe that there was sufficient evidence to establish that the appellant had committed the offences of 17 January 2002. The latter submission was not put to James J. Instead reliance was placed on the evidence of another police officer. James J declined to act on that evidence, partly because that officer was not a person in whose company the appellant had been for the purpose of being questioned, and partly because he preferred another part of that officer's evidence.

33 The appellant also submitted that the detectives had given the appellant reasonable grounds for believing that he would not be allowed to leave if he wished. James J, after referring to the fact that the conversation took place in a park, that the detectives repeatedly told the appellant he was not under arrest, that the appellant had been under arrest on 16 February and 24 April 2002, that the detectives had not placed any physical restraint on the appellant, and that Detective Abdy at one point asked the appellant whether he wished to go back to the car, rejected the submission.

(b) the police officer would arrest the person if the person attempted to leave, or

(c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so."

34 Hence neither s 139(5)(a) nor s 139(5)(c) applied, and nor did the equivalent parts of s 355(2). It followed that the detectives were not in breach of any duty to caution the appellant, and the first two contentions were rejected.

35 As to the third contention, based on s 138(2)(b), James J found that Detective Abdy's p25 statement was a statement of fact about the present intention of the detectives, namely that if the appellant spoke to them about the murder, it was not their intention to arrest him and prosecute him. James J also found that the detectives knew that the statement was false, and knew or ought to have known that it was likely to cause the appellant to make admissions. Hence s 138(2)(b) and s 138(1) were satisfied. But after considering s 138(3) he declined to exclude the evidence. He said that, "because of the probative value of the evidence, the importance of the evidence and the nature of the offence, the desirability of admitting the evidence outweighs the undesirability of admitting evidence that was obtained in the way in which the evidence was obtained."

36 The appellant did not challenge this conclusion either in the Court of Criminal Appeal or in this Court. Even if the s 138 objection had succeeded, it would not have caused the exclusion of the first part of the 15 May 2002 conversation.

37 *Section 137.* The appellant submitted to Shaw J that the evidence should be rejected under s 137. Although the Court of Criminal Appeal did not find the matter clear, it thought that Shaw J had purported to apply s 137 in rejecting the 15 May 2002 conversation. The Court of Criminal Appeal disagreed with this outcome, on the ground that the arguments advanced to Shaw J did not justify applying s 137. One argument was that what the appellant said was not really an admission. The Court of Criminal Appeal rejected that argument on the ground that the question whether a statement by the appellant was an admission or not was a matter for the jury. Another was that the unfair prejudice caused by reception of the evidence was enormous. The Court of Criminal Appeal rejected that argument on the basis that there was no *unfair* prejudice arising from the probability of the jury using it for a purpose other than that for which it was tendered, or of the jury overreacting to it in an illogical or irrational manner. The only prejudice in the evidence was its capacity to prove that the appellant committed the offences, and that was not unfair.

38 The appellant did not rely on s 137 thereafter.

39 *Police Commissioner's Code of Practice.* The New South Wales Police Commissioner has published a Code of Practice for Custody, Rights, Investigation, Management and Evidence ("the Code"). It was in force at the material time. Amongst much else it establishes standards for questioning suspects. Before Shaw J the appellant contended, and Shaw J evidently agreed, that the Code had been contravened in that the appellant had been questioned so

much after making it clear that he did not want to answer questions that the questioning amounted to "undue pressure". The Court of Criminal Appeal did not find it entirely clear whether this contravention was said to support exclusion under s 138 or s 90, but it disagreed with Shaw J: it held that even if there was a breach of the Code it was not sufficient to justify exclusion of the evidence. Neither that submission about the Code, nor any other, has since been advanced by the appellant.

40 *Section 135.* The appellant did not contend before Shaw J, James J, either of the Courts of Criminal Appeal, or this Court that his confession should have been excluded under s 135[13] of the Act.

41 *The position of the appellant in summary.* In relation to the first part of the 15 May 2002 conversation, the appellant has thus run, failed in and later abandoned some allegations; failed to advance others; and, to some degree, made express concessions. The resulting position is as follows. There had been compliance with s 281 of the *Criminal Procedure Act*, the statutory provision directed to the question of the form in which the results of official questioning may be tendered in evidence. There had been no violent, oppressive, inhuman or degrading conduct employed or threatened towards anyone, and hence there had been compliance with s 84, the provision particularly directed to interrogation methods. The circumstances were such as to make it unlikely that the truth of the admission was adversely affected, and hence there had been compliance with s 85, the provision particularly directed to unreliable confessions. The police had not acted improperly or in contravention of any Australian law (cf s 138), and in particular they had not acted improperly in failing to caution the appellant because s 139(1)(c) did not apply; hence there had been compliance with s 138, the provision particularly directed to the rejection of illegally or improperly obtained evidence. The probative value of the evidence was not outweighed by the danger of unfair prejudice (cf s 137), and was not substantially outweighed by the danger that the evidence might be unfairly prejudicial, misleading or confusing, or cause or result in undue waste of time (cf s 135). There had been no breach of the Police Commissioner's Code.

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13 Section 135 provides:

> "The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party, or
>
> (b) be misleading or confusing, or
>
> (c) cause or result in undue waste of time."

42 Of course it is possible for accused persons to invoke s 90 successfully even if they fail to invoke, or successfully to invoke, any other ground of exclusion. The question is whether in the particular factual circumstances of this case the appellant has done so.

Uncontested factual findings

43 Before concluding that it was not unfair to admit the first part of the conversation in the park, James J made the following findings which are not challenged by the appellant:

> "[T]he accused knew on 15 May that the persons he was speaking to were police officers. On 15 May the accused was told several times by the police officers that he did not have to say anything to the police and he was reminded of the written summary under part 10A of the *Crimes Act* which he had been given on 24 April ... [T]he accused understood that he did not have to say anything to the police."

He further found:

> "[T]he accused would not have spoken to the police on 15 May if he had known the conversation was being recorded; ... the police knew on 15 May that the accused would not speak to police if he knew that the conversation was being recorded; ... the accused did not know that the conversation was being recorded and believed that the conversation was not being recorded; ... the police knew that the accused believed that the conversation was not being recorded; and the police did not tell the accused that the conversation was being recorded."

He found that the appellant believed on 24 April and still believed at the commencement of the conversation on 15 May that if a conversation he had with the police officers was not recorded, evidence of the conversation could not be used against him in criminal proceedings. James J found that this belief was one which the appellant had formed himself independently of anything said or done by the police officers. He found that up to the commencement of the conversation on 15 May 2002 the police officers had not set out to induce that belief in him. In these circumstances James J found that it was not unfair to use evidence of the first part of the conversation against the appellant.

44 The Court of Criminal Appeal was prepared to determine the appeal on the assumption that the detectives were aware of the appellant's belief. That assumption is supported by the fact that the detectives did not believe that the appellant would have talked to them if he had thought the conversation was being recorded. Detective Abdy also believed that if he gave "the second part of the

caution", warning that anything said might be recorded and used in evidence, the appellant might become aware that he was being recorded, and might refuse to talk.

45 There is one other relevant and unchallenged finding of fact made by the first Court of Criminal Appeal, namely that the appellant "showed throughout the investigations that he was well aware of his rights and would exercise them whenever he thought it was in his interests to do so."[14]

The reasoning in the courts below

46 It was common ground between the parties that what the appellant said in the first part of the 15 May 2002 interview included "representations", "previous representations" and "admissions" within the meaning of those expressions as defined in Pt 1 of the Dictionary to the Act; and that since the evidence was tendered by the prosecution, s 90(a) was satisfied. James J held that s 90(b) was not satisfied because nothing that happened before or during the conversation of 15 May 2002 up to Detective Abdy's p25 statement made it unfair to use evidence of what was said before then.

47 The Court of Criminal Appeal agreed. In particular the Court of Criminal Appeal treated the case as being one in which the detectives did no more than fail to correct a belief of the appellant's which they knew to be erroneous, namely that the evidence could not be used against him. The Court of Criminal Appeal specifically rejected a submission, which had not been put to James J, that "albeit unintentionally, prior to [Detective Abdy's p25 statement] the detectives had said and not said things which would have tended to confirm the appellant's pre-existing belief that evidence of the conversation could not be used against him in criminal proceedings."[15] The "things said and not said" on which the appellant relied before the Court of Criminal Appeal as confirmatory were four in number. The first three were[16]:

> "(i) In the police car Detective Abdy told the appellant that, as on 24 April 2002, he did not have to say anything to the police if he

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14 *R v Em* [2003] NSWCCA 374 at [69] per Howie J (Ipp JA and Hulme J concurring).

15 *Em v The Queen* [2006] NSWCCA 336 at [60] per Giles JA (Grove and Hidden JJ concurring).

16 *Em v The Queen* [2006] NSWCCA 336 at [61] per Giles JA (Grove and Hidden JJ concurring).

did not want to; the appellant submitted that he did not add, as had been said on 24 April 2002, that anything the appellant said may later be given in evidence in court.

(ii) At the park Detective McLean reminded the appellant that nothing had been recorded on 24 April 2002, repeated that the appellant did not have to talk to the police if he did not want to, and said that all the police wanted was 'just a little bit of cooperation here'; the appellant submitted that again the detectives did not say that anything the appellant did say may later be given in evidence in court.

(iii) When the conversation turned to getting lives back to normal and the detectives wanting 'to try and clear up a few things here', the appellant was again told that he did not have to talk to the detectives if he did not want to; the appellant submitted that the impression was given that the police were not investigating the appellant's involvement, but were just seeking to eliminate the involvement of others, and … again that the detectives did not say that anything the appellant said may later be given in evidence in court."

The fourth was[17]:

"The detectives told the appellant that they were not trying to con or trick him. The appellant submitted that the effect of what they said was to trick him, by confirming his pre-existing belief that evidence of what he said could not be used against him in criminal proceedings and giving him a false sense of security."

48 The Court of Criminal Appeal rejected these arguments[18]:

"[F]ailing to correct is very different from confirming. The fact that the detectives did not tell the appellant that anything he said may later be given in evidence in court was not confirmatory. The appellant already held the belief, it did not need confirmation, and the appellant gave no evidence in the voir dire enquiry that there was some kind of confirmation; confirmation was not in question. At least until [Detective

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17 *Em v The Queen* [2006] NSWCCA 336 at [62] per Giles JA (Grove and Hidden JJ concurring).

18 *Em v The Queen* [2006] NSWCCA 336 at [65] per Giles JA (Grove and Hidden JJ concurring).

> Abdy's p25 statement] there was no holding out that, if the appellant did speak to the detectives, what he said could not be used against him: at that point the judge considered that what Detective Abdy said strengthened the appellant's belief and encouraged him to speak to the police ... I do not think that occurred at any earlier time."

The appellant's arguments: the law

49 The appellant's first complaint is that the first part of the 15 May 2002 conversation should have been excluded on the ground that it was unfair, within the meaning of s 90, to receive it in evidence.

50 *Central arguments.* Counsel for the appellant said that the word "unfair" in s 90 was not defined in the Act, and could not be defined comprehensively and precisely. The "concept of unfairness" had "been expressed in the widest possible form" in s 90[19]. It was submitted that the court had to consider the whole of the circumstances in which the admission was made, and examine the effect of those circumstances on the fairness to the appellant of its use at the trial.

51 The origins of s 90 lie in the Australian Law Reform Commission's Report on *Evidence*[20]. In the Bill annexed to the Commission's Interim Report[21], there were clauses corresponding broadly to ss 84, 85 and 138. There was no clause corresponding to the common law discretion, discussed in *R v Lee*[22], to exclude otherwise admissible confessions on the ground that it would be unfair to use them in evidence against the accused. The Report said[23]:

> "Several commentators made the point that the *Lee* discretion has been used to deal with the situation where the accused has chosen to speak to the police but on the basis of assumptions that were incorrect, whether because of untrue representations or for other reasons. The [proposed equivalent to s 85] does not deal with that situation. It is concerned with

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19 *R v Swaffield* (1998) 192 CLR 159 at 193 [67] per Toohey, Gaudron and Gummow JJ.

20 Australian Law Reform Commission, *Evidence*, Report No 38, (1987).

21 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985).

22 (1950) 82 CLR 133 at 151-155 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.

23 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 90, par 160(b) (footnote omitted).

> circumstances affecting the truth of the admissions, not the choice whether or not to make the admission. The interim proposals included a discretion enabling the judge to exclude evidence obtained illegally or improperly. That discretion is capable of dealing with the matter but not in the way that the *Lee* discretion does. The *Lee* discretion focusses on the question whether it would be unfair to the accused to admit the evidence. The discretion to exclude illegally or improperly obtained evidence requires a balancing of public interests. It would, therefore, be less effective than the *Lee* discretion in the situation where the confession was obtained because the accused proceeded on a false assumption. There is a need for a discretion to enable the trial judge to exclude evidence of admissions that were obtained in such a way that it would be unfair to admit the evidence against the accused who made them. Such a discretion should be added to the proposal."

52 The draft Bill annexed to the Report contained a clause 79, which is similar but not identical to s 90. The Report said: "This clause enacts an exclusionary discretion similar to that known as ... 'the Lee discretion' in existing law."[24] The appellant did not contend that the common law and s 90 were identical, but said that they had considerable similarities, and that the common law was of some assistance in applying s 90. The appellant submitted that the primary focus of s 90 was on any incorrect assumptions made by accused persons and the reasons why they made them. The appellant submitted that the purpose of the corresponding common law discretion was "to protect the rights and privileges of the accused person."[25] Among those rights and privileges is an entitlement to remain silent (statute apart) when questioned by police officers, and hence "the accused's freedom to choose to speak to the police", and a relevant issue is "the extent to which that freedom has been impugned."[26]

53 *Arguments not calling for decision.* The appellant also submitted that the specificity of ss 84, 85 and 138 contrasted with the generality of s 90. The appellant submitted that as a result of ss 84, 85 and 138, violence and the like, unreliability and unlawful or improper obtaining are not the touchstones of "unfairness" under s 90, for otherwise s 90 would not have independent work to do. But the appellant also submitted that the factors identified in ss 84, 85 and

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24 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 234, Appendix A, par 199.

25 *R v Swaffield* (1998) 192 CLR 159 at 189 [52] per Toohey, Gaudron and Gummow JJ; see also at 197 [78].

26 *R v Swaffield* (1998) 192 CLR 159 at 202 [91] per Toohey, Gaudron and Gummow JJ.

138 were not irrelevant under s 90 – a submission which need not be dealt with, since the appellant did not submit that what the detectives did bore any resemblance to the conduct described in ss 84, 85 and 138.

54 On the other hand, the appellant submitted that the factors to be weighed under s 138(3) were irrelevant to the s 90 discretion. He submitted that s 90 derived from *R v Lee* and s 138 from *Bunning v Cross*[27], and that the factors relevant to the "public policy" discretion in the latter case were quite distinct from the fairness described in *R v Lee*. The argument is not without support in authority[28] but one difficulty is that in *R v Lee*[29] Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ said:

> "No question of discretion can arise unless the statement in question is a voluntary statement in the common law sense. If it is non-voluntary it is ... legally inadmissible. If it is voluntary, circumstances may be proved which call for an exercise of discretion. The only circumstance which has been suggested as calling for an exercise of the discretion is the use of 'improper' or 'unfair' methods by police officers in interrogating suspected persons or persons in custody. It was with such cases in mind that *Latham* CJ, in *McDermott v The King*[30], said that the trial judge had 'a discretion to reject a confession or other incriminating statement made by the accused if, though the statement could not be held to be inadmissible as evidence, in all the circumstances it would be unfair to use it in evidence against him.' In the same case *Dixon* J[31] said: 'In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.' In our opinion the rule is fully and adequately stated in those two passages. What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must

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27 (1978) 141 CLR 54.

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

29 (1950) 82 CLR 133 at 150-151.

30 (1948) 76 CLR 501 at 506-507.

31 (1948) 76 CLR 501 at 513.

> depend upon the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions."

Their Honours thus evidently thought that police impropriety was relevant to the exclusionary discretion on which s 90 is based. However, it is possible to decide the present appeal against the appellant without engaging in the process described in s 138(3), and hence the correctness of the appellant's submission that it is impermissible to take into account the propriety of the police conduct need not be dealt with.

55 The appellant submitted that s 90 did not create a discretion, and hence that the Court of Criminal Appeal erred in applying the standard of review described in *House v The King*[32] that is normally applied to discretionary decisions. It is unnecessary to resolve this argument, since whatever standard of review is applied, the conclusions of James J and the Court of Criminal Appeal are correct.

56 The language in s 90 is so general that it would not be possible in any particular case to mark out the full extent of its meaning. Whether or not the appellant was correct to submit that the primary focus of s 90 was on incorrect assumptions made by accused persons, there is no doubt that it is one focus of s 90, and it is one which is relevant to the way in which counsel submitted the appellant's incorrect assumption should be viewed. In any particular case, the application of s 90 is likely to be highly fact-specific. Certainly it is on the facts of this particular case that the result must turn.

The appellant's arguments: the facts

57 The way the appellant's argument was put in this Court was different from the way it was put to the first Court of Criminal Appeal. There it was[33]:

> "[A]s the police knew that the accused would not answer questions if he believed the conversation was being recorded, the police intentionally tricked him into believing that the ... conversation was not being recorded and, thereby, obtained admissions that they would not otherwise have obtained but for the trick."

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32 (1936) 55 CLR 499.

33 *R v Em* [2003] NSWCCA 374 at [101] per Howie J (Ipp JA and Hulme J concurring).

Now the vice is said to lie not in tricking the appellant into a belief that the conversation was not being recorded, but in exploiting the appellant's belief that it could not be used in evidence.

58 Further, there was a divergence between the appellant's written submissions to this Court and his oral submissions. The written submissions claimed to challenge James J's finding that up to the start of the conversation on 15 May 2002 the detectives had not set out to induce the mistaken assumption that if a conversation were not recorded, evidence of it could not be given against the appellant. In support of that challenge the appellant relied on his release without charge on 24 April 2002 despite having made full admissions about the Kress home invasion and his agreement to talk to the police provided that what he said was not recorded either electronically or by notes. However, that challenge was abandoned in oral argument. In oral argument the position taken up was that the detectives had not contributed to or caused the formation of the appellant's belief; they had merely acted in a way which contributed to its continued existence.

59 According to counsel for the appellant, the effect of the detectives' conduct could be seen in several ways. One was the contrast between the formality of events on 24 April 2002, involving cautions and with recording machines and notebooks available, and the effect on the appellant of the informality of the discussion in the park, during which he was repeatedly told that he was not under arrest, was not to be taken to the police station and was not being tricked. Another was the contrast between the full caution given to the appellant on 24 April 2002 and the shorter version given on 15 May 2002, omitting the part relating to the recording of what was said and its possible use in evidence. Another, taken in juxtaposition with assurances that the appellant was not under arrest and was not obliged to talk if he did not want to, was Detective Abdy's statement: "We want to try and eliminate who else was involved". It was said that this "would have conveyed the message to the appellant that, outside the confines of arrest at the police station, the detectives were unable to use the conversations against him and they were instead seeking information to assist their investigation". It was said that all these circumstances "conveyed the message to the appellant that recorded conversations at the police station could be used against him in contradistinction to informal 'chats' with the police outside the station which could only be used for 'information purposes' when conducting investigations regarding the involvement of others."

60 A somewhat different, perhaps inconsistent, submission was also advanced. It was that on 24 April 2002 the appellant had stipulated that he would only speak if the detectives agreed not to record electronically or write down what was said, to which the detectives agreed, and that they demonstrated continuing agreement to the terms of their dealings by releasing him without charge even though he had made a full confession to the Kress home invasion.

Hence if they wished to alter the terms of those dealings, rather than assuring him that he was free to leave, they should have made the alteration very clear on 15 May 2002. It was submitted that the prosecution should not be allowed to take advantage of a departure from those terms.

61 The appellant also relied on a claim that he had been "pressured to speak".

The appellant's arguments: analysis

62 *Pressure?* The last submission can be rejected at once. It is true that the detectives tried by various means to get the appellant to talk to them about the January crimes. But, as James J found without challenge at either level of appeal, the appellant was not under arrest, and the detectives had not given the appellant reasonable grounds for believing that he would not be allowed to leave if he had wished to. A reading of the whole of the recorded conversation up to Detective Abdy's p25 statement confirms the correctness of James J's finding that the questioning was not hostile, overbearing, unduly persistent, confusing or too leading. That finding was not challenged, and it is fatal to the submission that the detectives pressured the appellant to speak.

63 *The appellant's subjective mental state.* At common law[34], the onus of demonstrating that it would be unfair to accused persons to use the evidence lay on them. The onus lies in the same place under s 90[35].

64 The appellant's submissions depend to a considerable extent on whether the police conduct "conveyed" or "would have conveyed" any particular "message", on the effect on the appellant of any contrasts between the behaviour of the detectives on 24 April 2002 and their behaviour on 15 May 2002, and on the idea that the detectives "confirmed" the appellant's belief. In this respect the submissions face the difficulty that these are allegations going to the appellant's subjective mental state. All that can be concluded about that mental state depends on circumstantial inference. Here circumstantial inference falls well short of the best evidence, direct evidence from the appellant. The appellant's failure to give evidence on the voir dire thus increased his difficulties in discharging the onus of proof. An example is afforded by the appellant's argument that after leaving the police station on 24 April 2002 he believed the police would not be charging him because of an agreement he had made with

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34 *R v Lee* (1950) 82 CLR 133 at 152-153 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ.

35 Compare ss 84 and 85, where the burden of proving the facts necessary for admissibility rests on the prosecution.

them not to use what he had said to them. That that was his mental state is contradicted by an admission in his evidence in chief that after he returned home on 24 April 2002 he thought he "was going to be charged, arrested and taken away to gaol."

65 Contrary to the appellant's submissions, it cannot be concluded that the police reinforced or contributed to the continuation of the appellant's mistaken assumption that what he said could not be used against him. The reasons why that is so are that once it was clear that the appellant believed that what he said could not be used in criminal proceedings, there is no evidence that he turned his mind to the question again, or that he had any doubt about it which might cause him to question it, or that he had any desire to search for confirmation.

66 *The effect of the appellant's concessions.* It follows from concessions which the appellant necessarily and rightly made that the use against him of the first part of the 15 May conversation was not unfair.

67 The appellant accepted that the mere fact that a conversation was being secretly recorded was not sufficient to make it "unfair" to the defendant to admit the recording into evidence. Yet decisions to record conversations with a particular accused person secretly are made because no recording would be possible if that accused person knew of the recording. Thus secret recordings often could not be made without some kind of trickery – a positive representation or conduct suggesting, and leading to the false assumption, that there was no recording being made, a deliberate failure to correct that false assumption, or conduct confirming that false assumption.

68 The scheme of the *Listening Devices Act* 1984 (NSW), pursuant to which the detectives made their recordings, is that by reason of ss 5 and 10 it is a criminal offence to record a private conversation without consent of all parties unless an exception applies. The relevant exception is a warrant granted by an "eligible Judge" pursuant to the various safeguards set out in s 16. If no exception applies, evidence of the private conversation is inadmissible (s 13). This implies that if an exception applies, the evidence is admissible subject to the general law of evidence.

69 Hence the appellant's concession that if his mistaken assumption consisted only in a belief that the conversation was not being recorded its use in evidence would not be unfair was rightly made. To reach the opposite conclusion would be for the judiciary, by exercise of its capacity to reach a judgment characterising conduct as "unfair" under s 90, to create an automatic and universal rule of exclusion in place of a provision calling for case-by-case judgment. For the courts to adopt such a rule would be to substitute their view about the merits of the statutory scheme involving judicially sanctioned covert surveillance as an aid to the detection of crime for that which has been adopted by the legislature.

70 It is true that the appellant's mistaken assumption went beyond a belief that the conversation was not recorded to a belief that evidence of the conversation could not be given. And counsel for the appellant submitted that there was a "big difference" between speaking while falsely assuming that no recording was being made of what was said, and speaking while falsely assuming that what was said could not be used in criminal proceedings. The difference was said to be that in the former instance, accused persons would assume that, although the admission was unrecorded, police officers who heard it could give oral evidence of it. This would give accused persons the "limited benefit" of being able to advance an argument about the unreliability of the police evidence of what was said. In the second instance, ex hypothesi they could not: if accused persons falsely believed that what they said could not be used in evidence, "a very significant factor in exercising [their] right to silence is missing."

71 One difficulty with the submission is that it attributes improbably subtle reasoning to the appellant, which cannot be inferred from the circumstances and which is unsupported by testimony from the appellant. But the most fundamental difficulty with the submission is that the appellant's belief that evidence of the conversation could not be given was integrally connected with his belief that the conversation was not being recorded. That is because, as counsel for the appellant said: "[T]he appellant incorrectly assumed that the conversation was not being electronically recorded and, *as a result*, incorrectly assumed that anything he said could not be used in evidence." (emphasis added) To conclude that while it is not unfair to use an admission which its maker did not believe was being recorded, it is unfair to use an admission which its maker did not believe could be used, when the reason for the second false assumption is the existence of the first, is illogical.

72 *The reliability of the evidence.* At one point the appellant conceded that, as at common law, the reliability of evidence was a factor affecting the fairness of its use. Later the appellant withdrew that concession, and later still the appellant denied that the concession had ever been made. The appellant's final position appeared to be that it was irrelevant to the application of s 90 that the impugned evidence was reliable, although s 90 was capable of being triggered by conduct falling short of that described in s 85 but creating the risk of an unreliable confession.

73 The appellant's original concession was correct. It is supported by common law authority[36]. Indeed in *R v Swaffield*[37] Toohey, Gaudron and Gummow JJ said: "Unreliability is an important aspect of the unfairness discretion but it is not exclusive." Here the evidence was completely reliable in that there is no doubt about what the appellant said: the recording device worked efficiently. The appellant advanced only one reason why what he said was unreliable, and it was a contention put forward in the appellant's evidence at the trial. The contention was that the appellant falsely told the detectives of his involvement with the crimes in order to protect his friends. This does not reveal error in James J's decision to admit the evidence for two reasons. The first is that since the appellant did not give evidence on the voir dire, the contention was not before James J at the moment when the evidence was admitted. The second is that while ultimately the acceptability of the appellant's contention was for the jury, it lacked plausibility to a very significant degree. Not only is it the case, as James J found without any present challenge by the appellant, that the circumstances were such as to make it unlikely that the truth of the admissions was adversely affected, but even if the appellant's contention had been advanced in evidence on the voir dire, it could not have caused James J to regard the reliability of what the appellant said as suspect. It is highly implausible that anyone fearing prosecution for murder would admit to the murder in order to protect unnamed friends.

74 *Did the courts below misdirect themselves?* The appellant submitted that it was not necessary for a finding of unfairness under s 90 in circumstances similar to the present for police officers deliberately to induce a person being questioned to hold an erroneous belief. The appellant also submitted that James J and the Court of Criminal Appeal wrongly assumed that this was crucial. So far as James J is concerned, the submissions put to the Court of Criminal Appeal and the somewhat different submissions put to this Court were not put to him. The question he dealt with appears to have been that which the parties were content for him to deal with, and where a conception as amorphous as "unfairness" is under consideration, it was not an error to fail to depart from the course they charted. Further, as the Court of Criminal Appeal pointed out, James J considered the whole of the circumstances and did not limit his attention to the detectives' intention[38]. So far as the Court of Criminal Appeal is concerned, it

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36 *R v Lee* (1950) 82 CLR 133 at 153 per Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ; *R v Swaffield* (1998) 192 CLR 159 at 189 [54], 195 [71], 196 [74], 197 [77]-[78] per Toohey, Gaudron and Gummow JJ.

37 (1998) 192 CLR 159 at 197 [78].

38 *Em v The Queen* [2006] NSWCCA 336 at [58]-[59] per Giles JA (Grove and Hidden JJ concurring).

did not require that the appellant's mistaken assumption be caused by deliberate inducements by the detectives. It did not concentrate on the mental state of the detectives, but instead, after recording the appellant's submissions as set out above, rejected them. The Court of Criminal Appeal's references to the fact that whatever effect the conduct of the detectives had on the appellant's state of mind, it was unintentional, merely mirrored the appellant's submissions[39]. Its method, which conformed to the parameters set by those submissions, objectively analysed what the detectives did and whether that tended to confirm the appellant's mistaken assumption. It did not rest on the flaw which the appellant attributed to it.

75 *The significance of the park.* The mere fact that the recording of the conversations was made in a park and not a police station cannot make it unfair to admit it into evidence. Section 281 of the *Criminal Procedure Act* requires confessions to be recorded; it does not require them to be recorded in a particular place, and many admissible confessions are made in places other than police stations. No provision in the *Evidence Act* or in any other statute requires them to be recorded in a particular place. Nor does the Police Commissioner's Code. The conduct of the detectives cannot be seen as undermining the statutory regime in s 281 and its equivalents elsewhere requiring confessions to be recorded. That is so partly because the appellant eschewed any such point as relevant only to s 138, on which he was not relying; and partly because whatever other criticism could be made of the detectives, they cannot be criticised for failing to comply with s 281: they did comply with it.

76 *The analogy with mistake in equity.* The appellant's argument endeavoured to extend to s 90 a principle permitting a court of equity to rescind a contract where one party entered it under a mistake deliberately not corrected by the other[40]. That extension should not be made for the following reasons. Section 356M(1)(a) of the *Crimes Act* as it stood at the relevant time made it mandatory for police officers to warn persons being questioned that what they said could be used in evidence. Section 139(1) of the Act rendered a failure to give that warning a ground for excluding the evidence under s 138. The Police Commissioner's Code reflects the same requirements[41]. In the circumstances of this case there was no express obligation of any kind on the detectives to warn

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39 *Em v The Queen* [2006] NSWCCA 336 at [60] and [66] per Giles JA (Grove and Hidden JJ concurring).

40 *Taylor v Johnson* (1983) 151 CLR 422 at 432 per Mason ACJ, Murphy and Deane JJ.

41 At 48.

the appellant that anything he said could be used in evidence. The appellant has not established that an implied obligation to have done so should be created by recourse to the doctrine of "unfairness" in s 90. It would be unusual to do so where the legislature had chosen not to do so; to do so would be to make a choice that the legislature had specifically declined to make.

77 Counsel for the appellant submitted that it was unfair to permit the reception of evidence obtained from the appellant where the appellant was operating under a disability – a significant mistake of which the detectives were aware. The difficulty is that every day police officers take advantage of the ignorance or stupidity of persons whom they eventually prosecute, and a mistake of the kind the appellant was operating under was simply a species of ignorance or stupidity.

78 *Was the appellant's freedom to speak or not to speak impugned?* In one formulation, the appellant's submissions identified as the central question whether his freedom to speak or stay silent had been impugned in the first part of the 15 May 2002 conversation. When all the circumstances analysed above are considered, it is impossible to conclude that that freedom was impugned. The appellant knew he was speaking to police officers. He knew they were investigating two home invasions, one involving a murder. He knew, having been cautioned several times on 22 February and 24 April 2002, that he was not obliged to speak to the police officers. He spoke to those officers knowingly and willingly. He gave a version of events. In his evidence before the jury he claimed that he planned to give that version – according to him, a non-incriminating mixture of denials, admissions, lies, evasions, jokes and questions[42]. Apart from the admissions he made, that account of the version of events lacked credibility, but he certainly wanted his version of events to be accepted by the detectives. He had an awareness of his rights and a capacity to act on them. While s 281 compelled the detectives to record what was said if they wanted to tender it, the appellant possessed no right not to be recorded once the listening device warrants had been obtained from O'Keefe J. The appellant was free to leave. The questioning was not overbearing. As counsel for the appellant conceded, neither legislation nor the Police Commissioner's Code created any obligation on the detectives to caution him. The appellant did not know the conversation was being recorded, but he accepted that that did not make it unfair to receive the evidence. The appellant did not contend that he spoke because of any threat of violence, or any illegality, or any impropriety. He did not contend that the circumstances were likely to affect the truth of the admissions. He thought that the conversation could not be used against him in criminal proceedings, but that cannot of itself make it unfair for the conversation

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42 See below at [85].

to be received in evidence. The detectives kept secret from him the fact that the conversation was being recorded, and hence his freedom to speak was affected in the sense that a factor that was important to him was kept secret from him. But that is true of virtually all cases of lawfully authorised secret surveillance. Virtually all persons who are the subject of that type of surveillance have been deprived of the opportunity to make an informed choice about whether or not to exercise their right of silence. It is difficult to see the practical difference, for this appellant, between speaking where his freedom of choice to speak was impaired by ignorance about the fact that what he said was being recorded, and speaking where his freedom of choice to speak was impaired by ignorance about the fact that what he said could be used against him. He did not speak on 24 April 2002 until it was made clear that what he said would not be used against him since it was not being recorded; his decision to speak on 15 May 2002 where he thought what was being said was not being recorded was governed by a mental state in which the supposed lack of recording was inextricably linked with the supposed incapacity to use the material.

79 For these reasons use of the first part of the 15 May 2002 conversation was not unfair to the appellant.

The failure to give a warning

80 It is now necessary to turn to the appellant's second complaint.

81 At the trial the appellant attempted to explain away the admissions made on 15 May 2002 by saying that they were untruthful, and that the reason they were untruthful was that he wished to protect those of his friends who had been involved in the crimes, and those of his friends who were not involved. Counsel submitted that the appellant testified that since he believed what he said to the police could not be used against him, and since there was no other evidence of his involvement in the Logozzo home invasion, he expected never to be charged with the offences committed while it took place. The appellant's testimony on this point did not all emerge in chief, and at no point was it given clearly or convincingly. In final address counsel for the prosecution attacked its credibility.

82 The appellant contends that James J ought to have warned the jury that if a person making an admission believes that it cannot be used against him, the primary basis for the assumption that admissions are reliable, namely that people do not usually make statements against interest unless they are true, is significantly diluted, so that the admission may be unreliable, and the jury should be cautious in determining what weight to give to the evidence. The giving by James J of this warning was said to have been necessary to ensure a fair trial because without it there was a perceptible risk of a miscarriage of justice.

83 If this necessity and this risk existed, they were not seen by counsel for the appellant at the trial, experienced as she was and familiar as she was with the details and atmosphere of the trial[43], as justifying a request to James J to give the direction which it is now said ought to have been given. Her failure to do so suggests that it was not necessary and that there was no risk.

84 Further, there is great force in what Giles JA said in the Court of Criminal Appeal[44]:

> "There is some unreality in the proposition that belief that an admission about commission of a murder can not be used in criminal proceedings may prompt an untrue admission to the police. Even if the admission could not be used in criminal proceedings, it would be likely to excite police interest and provoke other police endeavours to prove, apart from the admission, commission of the murder. The admission is still against interest, with what that conveys for truth.
>
> In the present case, the conversation ... does not convey that what the appellant said to the detectives was affected by his belief that evidence of the conversation could not be used against him in criminal proceedings or by deflection of attention from his friends. He was not cooperative and was fencing with the detectives, and in my understanding of the conversation was well conscious that what he said to the detectives could be adverse to his interests even if it could not be used in evidence. Reliability through being against interest is not confined to use as an admission in criminal proceedings."

In the absence of further testimonial articulation by the appellant of his thinking, it is not credible that the appellant would have falsely confessed to a murder, and run the risk of a relentless pursuit by the authorities for many years, merely to protect some friends.

85 In any event, the appellant's tactics at the trial do not suggest an unequivocal acceptance of culpability in order to protect others. They seem to have been directed in part towards creating confusion through a series of equivocations and questions, while trying to avoid actually making any admissions. Thus at one point of his cross-examination he attempted to characterise what he said on 15 May 2002 thus:

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43 Counsel who represented the appellant at the trial before James J did not represent him in the appeals to the Court of Criminal Appeal and to this Court.

44 *Em v The Queen* [2006] NSWCCA 336 at [69]-[70] per Giles JA (Grove and Hidden JJ concurring).

"Q. You see you were telling the police in the course of this conversation that you were one of the participants at the Logozzo home invasion?

A. No.

Q. You were?

A. No.

Q. Well you told us that already you were telling these things to attract attention to you as one of the participants in the Logozzo home invasion so that the people who committed that crime could escape their liability?

A. I was implying to the police that I may have been involved but I never said that I was involved. I never said I drove there. I never said that I shot the person. I never said anything along those lines. The police are the ones that suggested this."

Similarly, after the appellant while testifying at his trial accepted that he told the detectives: "You guys know that I did it", the questioning proceeded thus:

"Q. And they said, 'We know what you did, what, you did the home invasion or you did the murder.' You said, 'That I did both'?

A. I am saying that I did both as a question.

Q. No, you weren't.

A. Yes, I was.

Q. Well, it doesn't sound like a question when we played the tape, does it?

A. I don't know how it sounded like, but that was my intent."

He was questioned about "Counter Strike", a popular computer game among teenagers. He accepted that he had suggested to the detectives that he had clothed himself in "Counter Strike" attire, that being similar to the clothing, weapons and equipment used by some of the criminals, and had run around in it. He accepted that that was not true. He attempted to explain away what he said to the detectives as "a joke". He said: "I didn't think that they would believe me." He accepted that he had said to the detectives that he had sold the pistol used in the Kress home invasion, but said that that was a lie. This behaviour revealed that the appellant did not think it was safe to make any admission he pleased with impunity. Much of what he said was capable of explanation – or at least he later attempted to explain it – as a joke or an equivocation or a question.

86 In his summing up James J went through the transcript of the 15 May 2002 conversation, indicating what parts the prosecution relied on and referring to the appellant's explanations. He directed the jury to consider three questions:

> "1. Are you satisfied that the accused said what the Crown says that he said?
>
> 2. If you are satisfied that the accused said what the Crown says that he said, are you satisfied that the accused was intending by what he said to make a truthful statement? …
>
> 3. If you are satisfied that the accused said what the Crown says that he said and that the accused was intending by what he said to make a truthful statement, does what the accused said amount to an admission and what weight should be given to it."

James J also gave the following direction:

> "I have referred to some answers and explanations given by the accused in his evidence about some particular parts of the conversation on 15 May sought to be relied upon by the Crown as being admissions.
>
> However, when he was giving evidence the accused gave some answers and some explanations which would apply to a number of the passages relied on by the Crown as being admissions.
>
> The accused said that he gave some of his answers on 15 May to protect his friends who he knew had committed the offences on 17 January, in order to deflect or divert police investigation away from them and to focus the police investigation on himself.
>
> He said in evidence-in-chief: 'I will use my position to help my friends get away with it.'
>
> He said in cross-examination: 'My plan was to make these two police officers think I was involved in order for my friends to get away with it.'
>
> In cross-examination he said: 'I was going to say to the police things that would implicate my involvement.' So that his friends could avoid criminal liability.
>
> The accused said that he was prepared to imply that he was involved in the offences in the Logozzo home: 'Because if I did not do this crime, how could I be charged for it.'

> He agreed with the Crown Prosecutor that he was confident in the belief that 'nothing could happen to you because you didn't do it.'
>
> Another explanation the accused gave for saying some of the things he said to the police, for example that he had sold a pistol to a man at Cabramatta, was that he wanted the police to stop searching people's houses. He also said in his evidence that on 15 May he had given a number of answers which he had intended to be non-committal, for example the answer, 'probably'."

87 In the absence of any request for a further direction, those directions adequately brought to the jurors' minds the issues they had to consider.

88 Giles JA gave the following reasons for finding the directions adequate[45]:

> "That the appellant believed that he was not at risk was not, on his evidence, founded on belief that what he said could not be used against him; it was because he was innocent. The Crown put to the jury that belief that what he said could not be used against him was a mark of reliability, not unreliability. The reliability of what he said was for the jury, and the matters bearing upon it as relied on by the Crown and the appellant were fully before the jury. That the appellant may have believed that what he said could not be used against him, not articulated by him in his evidence, could cut both ways as to reliability, but was something well open for the jury's appreciation and evaluation. In my opinion, a direction to the effect suggested was not necessary. Unreliability of any admissions in the conversation of 15 May 2002 was prominent in the appellant's case at the trial. The unreliability was in his evidence attributed to his strategy to protect his friends, but a feature of the strategy was that the appellant did not think himself at risk. That he was not at risk because he didn't do it, but also because the conversation was not being recorded and what he said could not be used against him, was a difficult conjunction, but it was exposed for the jury and it was well open to the jury to undertake the necessary assessment; I do not think there was a risk as described by Brennan J."

Counsel for the appellant criticised this on the ground that it distorted the appellant's evidence. But the appellant did say: "If I did not do this crime, how could I be charged for it?" and "Nothing could happen to [him] because [he] didn't do it", and his belief that the evidence could not be used against him was

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45 *Em v The Queen* [2006] NSWCCA 336 at [107]. The reference to "a risk as described by Brennan J" is a reference to *Carr v The Queen* (1988) 165 CLR 314 at 325.

not clearly articulated. A direction of the kind which counsel for the appellant now says should have been given might have had disadvantages for the appellant in casting aspersions on his reliability in certain respects: for if he was unreliable in those respects, why not also in the passages where he made distinct denials?

89 The second complaint in the Notice of Appeal should be rejected.

Orders

90 Neither the use of the first part of the 15 May 2002 conversation nor the absence of the specific warning now identified by the appellant was unfair to the appellant. The trial over which James J presided was impeccably fair. The appeal should be dismissed.

91 GUMMOW AND HAYNE JJ. The facts and circumstances giving rise to this appeal, and the text of the relevant statutory provisions, are set out in the reasons of other members of the Court. It is unnecessary to repeat any of that material.

92 The central issue in the appeal is whether the primary judge's decision admitting in evidence, at the appellant's trial for murder, sound recordings of admissions the appellant made to police officers should have been held, in the Court of Criminal Appeal, to be wrong. The only ground advanced in this Court is that s 90 of the *Evidence Act* 1995 (NSW) ("the Act") was engaged and the power conferred by s 90 should have been exercised so as to refuse to admit the evidence. Section 90 states:

> "In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
>
> (a) the evidence is adduced by the prosecution, and
>
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence."

93 Section 90 appears in Pt 3.4 of the Act (ss 81-90) which is headed "Admissions". Some of these provisions (including s 84) apply in civil and criminal proceedings. Others, including ss 85, 86 and 90, apply only in criminal proceedings. Sections 85 and 86 apply only to evidence of admissions by the defendant; s 84 is not so limited.

94 It should be observed that s 90 is cast in a form which differs from ss 84, 85 and 86. These set out rules whereby in stipulated circumstances evidence of certain admissions is not to be admitted. Section 90 empowers the court in a criminal proceeding to refuse to admit evidence adduced by the prosecution of an admission (not expressly limited to an admission by the defendant) where to use the evidence would be "unfair to a defendant".

95 Part 3.11 (ss 135-139) is headed "Discretions to exclude evidence". The heading is misleading. Section 137 obliges the court in a criminal proceeding to refuse to admit evidence adduced by the prosecution where the danger of "unfair prejudice to the defendant" outweighs its probative value. Sections 138 and 139 are accurately described as providing a discretion to exclude improperly or illegally obtained evidence.

96 In considering the case the appellant seeks to base upon s 90, it is necessary to read the Act as a whole, with particular reference to the operation of the provisions of ss 84, 85, 86, 137, 138 and 139.

97 The particular questions about the operation of s 90 of the Act that are presented in this matter are questions that arise on the premise that evidence of the appellant's out-of-court admissions to police officers was not to be excluded under other provisions of the Act. It is important to identify the content of that premise. Doing that will not only identify the bases upon which the application of s 90 must be considered in this case, it will direct attention to some more generally applicable observations about its operation. In particular, it will reveal how the Act deals with a number of matters that otherwise might have loomed large in the determination of whether the use of evidence of an admission would be "unfair" to the defendant.

98 The premise that evidence of the appellant's out-of-court admissions to police officers was not to be excluded under other provisions of the Act can be conveniently dealt with as six separate propositions.

99 First, evidence of the admissions the appellant made was not to be excluded as having been influenced by violence or other conduct of the kind described in s 84. There was no suggestion of any conduct of that kind.

100 Secondly, the evidence was not to be excluded under s 85, on the ground that the circumstances in which the admissions were made to police were likely to have adversely affected their truth. It was not suggested in this Court that this section was engaged.

101 Thirdly, the evidence was not to be excluded under s 86 as it would be had it been unrecorded and unacknowledged. What the appellant said to the police was recorded in a sound recording and s 86 was accordingly not engaged.

102 Fourthly, the evidence was not to be excluded under s 137. It was not submitted that the probative value of the evidence was "outweighed by the danger of unfair prejudice to the defendant". If that imbalance had been demonstrated, the trial judge would have been bound to exclude the evidence.

103 Fifthly, the evidence was not to be excluded under s 138. Either it was not obtained improperly or in contravention of an Australian law or, if it was, the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in that way. In particular, it was not submitted that either s 138(2) or s 139 applied to deem the evidence to have been obtained improperly.

104 Section 138(2) provided that evidence of an admission made during or in consequence of questioning is taken to have been obtained improperly if (among other things) the person conducting the questioning:

> "made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false

> and that making the false statement was likely to cause the person who was being questioned to make an admission".

It is to be assumed that this provision was not said to be engaged in the present matter because the interviewing police officers said nothing that was false. The appellant's complaint was that their silence, coupled with what they did say, conveyed a misrepresentation that their conversation with the appellant was not being recorded.

105 Section 139 provided that, in certain circumstances, evidence of a statement made during questioning by a police officer is taken to have been obtained improperly if the investigating official did not caution the person that the person does not have to say or do anything, but that anything the person does say or do may be used in evidence. It was accepted that the conditions specified in s 139 as the conditions in which a caution must be administered (lest evidence of what is said be deemed to have been obtained improperly) were not satisfied.

106 Sixthly, and finally, it was accepted that s 281 of the *Criminal Procedure Act* 1986 (NSW), requiring that evidence of admissions by suspects not be admissible unless tape recorded, was satisfied and that no aspect of the New South Wales Police Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME), regulating the interrogation of suspects, was breached. (The Code of Practice was published to provide "a succinct reference to the powers of police when investigating offences". It is a document that was intended to record rights and duties; it was not a source of those rights or duties.) Later in these reasons it will be necessary to return to the significance of the six propositions that have been stated.

107 As pointed out at the commencement of these reasons, the central issue is whether the evidence of admissions should not have been admitted because, having regard to the circumstances in which they were made, it would be unfair to the defendant to use the evidence. That question requires consideration of whether there was identified some aspect of the circumstances in which the admissions were made that revealed why the use of the evidence, at the trial of the person who made the admissions, "would be unfair". That is, the focus of s 90 falls upon the fairness of using the evidence at trial, not directly upon characterising the circumstances in which the admissions were made, including the means by which the admissions were elicited, as "fair" or "unfair".

108 Understanding s 90 in this way is consistent with the language of the section. It is also consistent with what was said in the Report of the Australian Law Reform Commission that recommended the enactment of what was to

become s 90. In that report[46] the proposal was to enact "an exclusionary discretion similar to that known as 'the *Lee* discretion[47]' in existing law". In *R v Lee*, this Court said[48] that the discretion required asking "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". In *Lee*, the argument focused upon what was said[49] to be the "'improper' or 'unfair' methods [used] by police officers in interrogating suspected persons or persons in custody". Yet, in that case, the Court emphasised[50] that it is in the interests of the community that all crimes "should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be unduly hampered". The content and application of this common law discretion have subsequently been examined by this Court on a number of occasions, including in *Cleland v The Queen*[51], *R v Swaffield*[52] and most recently *Tofilau v The Queen*[53].

109 When it is "unfair" to use evidence of an out-of-court admission at the trial of an accused person cannot be described exhaustively. "Unfairness", whether for the purposes of the common law discretion or for the purposes of s 90, may arise in different ways. But many cases in which the use of evidence of an out-of-court admission would be judged, in the exercise of the common law discretion, to be unfair to an accused are dealt with expressly by particular provisions of the Act other than s 90. Thus although the discretion given by s 90 is generally similar to the common law discretion considered in *Lee*, it is a discretion that will fall to be considered only after applying the other, more specific, provisions of the Act referred to at the start of these reasons. The questions with which those other sections deal (most notably questions of the reliability of what was said to police or other persons in authority, and what consequences follow from illegal or improper conduct by investigating

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46 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 234.

47 *R v Lee* (1950) 82 CLR 133.

48 (1950) 82 CLR 133 at 154.

49 (1950) 82 CLR 133 at 151.

50 (1950) 82 CLR 133 at 155. See also *R v Jeffries* (1946) 47 SR (NSW) 284 at 313.

51 (1982) 151 CLR 1 at 8-9, 17, 34-35.

52 (1998) 192 CLR 159.

53 [2007] HCA 39. See also *Collins v The Queen* (1980) 31 ALR 257 at 317.

authorities) are not to be dealt with under s 90. The consequence is that the discretion given by s 90 will be engaged only as a final or "safety net" provision.

110 That this is the way in which the Act, and s 90 in particular, operates is apparent when two circumstances that may be relevant to the exercise of the common law discretion (the reliability of the confession and the use of improper means to secure it) are considered.

111 At common law, questions of reliability play an important part in considering the exercise of the common law unfairness discretion. As pointed out in *Swaffield*[54], other considerations may be engaged. In particular, admitting evidence of a confession may, sometimes, disadvantage an accused in ways that are not readily remedied. Cases of the latter kind include cases where admitting evidence of the confession would put the accused at a particular forensic disadvantage. The circumstances considered by this Court in *Foster v The Queen*[55] and in the Supreme Court of Victoria by Smith J in *R v Amad*[56] are examples of such cases. Because the chief focus of the common law discretion falls upon the fairness of using the accused person's out-of-court statement, not upon any purpose of disciplining police or controlling investigative methods, the reliability of what was said out of court is important to the exercise of that discretion.

112 As noted earlier, s 90 of the Act expressly directs attention only to the fairness of using the evidence at the trial of the accused. Section 85 deals with evidence of an admission made by a defendant in the course of official questioning, and provides that the evidence is not admissible 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". It follows that consideration of the reliability of what was said in a statement made to police can have no part to play in the operation of s 90. (By contrast, questions of reliability may well have a role to play in the application of s 90 if the statement was not made 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"[57]. But that is not this case.)

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54 (1998) 192 CLR 159 at 197 [78].

55 (1993) 67 ALJR 550 at 554-555; 113 ALR 1 at 7-8.

56 [1962] VR 545.

57 s 85(1)(b).

113 Because s 85 was not engaged to exclude the disputed evidence in the present case, no question of the reliability of what this appellant said in the admissions now in question was relevant to the exercise of the discretion under s 90. The hypothesis upon which that discretion was to be exercised must be that the circumstances were not such as to make unreliable the admissions the appellant made.

114 The second consideration that is relevant to the present matter, and assists in demonstrating that s 90 is to be understood as a safety net which catches a residuary category of cases not expressly dealt with elsewhere in the Act, where use of the evidence at trial would be unfair, is the consideration of improper police methods. The appellant's central complaint in the present matter was that the police deceived him. He thought that what he said to the police was not being recorded, but it was. This complaint lay at the heart of his contention that s 90 should have been applied to exclude the evidence.

115 For present purposes, it may be accepted that what the police did and said (and most importantly what they did not say) caused or contributed to the appellant forming the belief that what he said was not recorded and would not be admissible in evidence. (We leave aside any question of whether the evidence led on the voir dire showed that the appellant in fact held this belief.) The question presented by s 90 was: why did these circumstances make the use at his trial of the evidence of what he had said unfair? But that question was to be asked and answered only after other questions presented by the Act had been considered.

116 The appellant's argument, shorn of expressions like "trick" and "trickery", amounted to the propositions that what the police did, by interviewing the appellant as they did, was to be condemned, and that he had been misled into saying something that could be used in evidence against him. Neither of these propositions, whether taken separately or together, established that use at his trial of the evidence of what he said to police would be unfair.

117 First, the proposition implicit in much of the appellant's argument, that what the police did is to be condemned, requires close attention to other provisions of the Act which regulate when evidence may be excluded. The operation of those other provisions denies the conclusion, implicit in so much of the appellant's argument, that what the police did in this case was not only to be condemned but was such as to require the exclusion of the evidence. Particular importance must be attached in this respect to the provisions of s 138 excluding evidence that is illegally or improperly obtained and to the particular amplifications of those general provisions by the deeming provisions of s 138(2) and s 139.

118 Counsel for the appellant accepted that s 138 was not engaged. It follows either that the circumstances in which the admissions were obtained from the appellant were not such as to warrant description as "illegal" or "improper", as those words are used in the Act, or if they were, that the desirability of admitting the evidence outweighed the undesirability of admitting evidence that was obtained in the way it was obtained. If either of the deeming provisions was engaged (and it was not submitted that either was) the desirability of admitting the evidence of the appellant's admission must be assumed to outweigh the undesirability of admitting evidence that was obtained as a result of misrepresentation (if there was one) or without benefit of caution (if one was required).

119 The very nature of the inquiries required under s 138 denies that the application of s 90 can be approached from a premise that attaches weight to an assertion that what was done by police was "improper". In particular, the discretion to exclude the evidence of what the appellant told police is not to be engaged by simply asserting that a full caution was required, or expected, or should have been administered to the appellant. If that assertion is well founded (and it was not demonstrated, in argument, why it was) it fell to be considered under s 138. It was not relevant to the exercise of a discretion under s 90.

120 Nor was the discretion to be engaged by asserting that the conduct of the police is worthy of condemnation for more general (if unspecified) reasons. First, it was not suggested that what the police did was unlawful. Indeed, argument proceeded on the footing that the police recorded their conversation with the appellant under warrants issued under the *Listening Devices Act* 1984 (NSW) that permitted them to do just that. Secondly, as to the other limb of s 138, concerning improperly obtained evidence, either what the police did was not improper, or if it is asserted that it was (and again it was not demonstrated in argument why that was so) the significance to be attached to the impropriety of the conduct was to be judged according to the balancing exercise that was called for by s 138. It was not a matter that bore upon the exercise of the discretion under s 90.

121 It also follows from the conclusions just expressed about the operation of s 138 that to begin examination of the operation of s 90 from a premise which attaches determinative significance to the fact that the appellant had the mistaken belief (caused or contributed to by the police) that what he said was not being recorded and would not be admissible in evidence would be erroneous. It would be erroneous because that would not take the operation of provisions like ss 85 and 138 into account. The relevant questions presented by the Act (in particular, by ss 85 and 138) are about the reliability of the admissions made to police, and the lawfulness and propriety of the methods used to obtain the admissions. Showing that the person making the admission acted under some misapprehension is not to the point.

122 It is a truism that an Act must be read as a whole. When the Act that now is under consideration is read in that way, it is evident that the discretion given by s 90 is not to be understood as unaffected by the more particular provisions of the Act. Yet that, in essence, is what the appellant sought to argue.

123 Evidence of only part of what the appellant said to police was admitted at his trial. The exclusion of the other part of that evidence is not in issue in this appeal. The conclusion reached in the courts below, that no error was shown in the trial judge refusing to exclude under s 90 the evidence of part of what the appellant said to police, was correct. The appellant's appeal on this ground fails.

124 On the second issue agitated in the appeal, about what directions should have been given to the jury about the evidence of the admissions he made to police, we agree with Gleeson CJ and Heydon J.

125 The appeal should be dismissed.

126 KIRBY J. The question in this appeal, which comes from a judgment of the Court of Criminal Appeal of New South Wales[58], is apparently simple. Being a question concerning statutory language of broad generality, it is one that involves judgment and evaluation of issues about which minds can differ, as indeed they have.

127 Doubtless, deep-lying values inform judicial responses to the question presented. Amongst such values are those concerned with the right to a fair trial conducted within a criminal justice system that adheres to the accusatorial principle. That principle dictates that it is for the prosecution to prove a criminal accusation against an accused[59]. In gathering evidence, police and prosecutors cannot ordinarily oblige a suspect to make admissions, and thus to furnish otherwise missing proof of guilt. Furthermore, even where a reliable admission is made, a court of trial may refuse to admit it if its use would, having regard to the circumstances in which it was made, be unfair to the accused.

128 Sophear Em ("the appellant") was charged with a number of offences. In the Supreme Court of New South Wales, Shaw J concluded, on a voir dire, that admissions made by him in the course of a secretly recorded conversation with two detectives of New South Wales Police on 15 May 2002 ("the May conversation") should be excluded from evidence because their use would be unfair. His Honour applied s 90 of the *Evidence Act* 1995 (NSW) ("the Act")[60].

129 On appeal by the prosecution, Shaw J's ruling was vacated by the Court of Criminal Appeal[61]. The second trial judge, B M James J, admitted most of the contested evidence down to a point (on p 25 of the transcript of the May conversation) after which evidence about the conversation (and the admissions made in the course of it) was excluded[62]. This ruling reflected a hint contained in the reasons of the Court of Criminal Appeal[63].

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58 *Em v The Queen* [2006] NSWCCA 336.

59 See eg *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

60 *R v Em* unreported, Supreme Court of New South Wales, 16 September 2003 ("Reasons of Shaw J").

61 *R v Em* [2003] NSWCCA 374.

62 *R v Em* unreported, Supreme Court of New South Wales, 27 October 2004 at [148] ("Reasons of James J").

63 [2003] NSWCCA 374 at [135]-[136].

130 Evidence of the May conversation up to the specified point was therefore adduced before the jury. The appellant was convicted of serious offences, including the murder of Joseph Logozzo ("the Logozzo offences"). His convictions were challenged. One ground of appeal related to the refusal of James J to exclude the May conversation in its entirety under s 90 of the Act.

131 A second Court of Criminal Appeal heard the appellant's appeal against his conviction. It decided a number of issues[64]. The only questions remaining, following the grant of special leave to appeal to this Court, are: (1) the correctness of the decision of James J as to the exercise of the s 90 "unfairness" discretion; and (2) the correctness of the refusal of James J to give a warning to the jury about the use of the admissions made by the appellant. On both points, the second Court of Criminal Appeal affirmed the approach of James J.

132 In my opinion, both James J and the second Court of Criminal Appeal erred in their approach to s 90 of the Act. The use of admissions that the appellant made during the May conversation was "unfair" within the terms of that provision. In the largely undisputed circumstances in which the admissions were elicited and recorded, the unfairness is clear.

133 The conduct of police had the effect of derogating from the appellant's entitlement, as a person suspected of murder and other serious offences, to remain silent in the face of police questioning. The detectives took conscious advantage of a mistaken belief on the part of the appellant as to his legal position. The admissions were procured following the administration of a caution since admitted to have been incomplete. The caution omitted reference to the fact that any statements that the appellant made might later be used in evidence against him.

134 In these circumstances, the initial ruling of Shaw J on the s 90 issue was correct, although for reasons different to those which his Honour advanced. It was unfair to the appellant to use any of the evidence of admissions made by him in the course of the secretly recorded conversation. That evidence should have been wholly excluded under s 90 of the Act. The convictions that followed its receipt into evidence must be quashed. The second Court of Criminal Appeal, which allowed those convictions to stand, fell into error. This Court should reverse that Court's orders. It should make orders of its own disposing of the appeal.

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64 *Em v The Queen* [2006] NSWCCA 336.

The facts

135 *The April conversation*: The background facts are stated in the reasons of Gleeson CJ and Heydon J[65]. However, to explain the different conclusion to which I have come, it is essential (as both Courts of Criminal Appeal recognised[66]) to set out extracts from the two extended conversations with police in which the appellant was involved. Only this course will allow the appellant's complaint about the unfairness of using the contested evidence against him at trial to be properly appreciated.

136 James J excluded from evidence the record of an earlier interview between Detectives Abdy and McLean and the appellant on 24 April 2002 ("the April conversation"). He did so on the basis that it was a reconstruction and not electronically recorded. However, what occurred at that interview, as the second Court of Criminal Appeal remarked, was material to the issue of whether or not the May conversation was admissible[67].

137 The April conversation was material in that, in contrast to the May conversation, it began with the provision of a full caution to the appellant. That caution reflected the requirements set out in the then current New South Wales Police Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME) ("the Police Code of Practice"). That document counselled police officers to alert a criminal suspect first, that "You do not have to say or do anything if you do not want to" and, secondly, that "We will record what you say or do. We can use this recording in court."

138 Following the administration of this caution, the following reconstructed exchange (which the appellant did not contest in this Court) took place between the appellant and Detective Abdy, the primary investigating detective assigned to the case[68]:

> "Abdy: The questions that I ask you I want to record on this video and audio machine and I'll give you a copy of the interview.
>
> Appellant: I'm not going to say anything to you, if you turn that on. I don't want to look like a dickhead.

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65 Reasons of Gleeson CJ and Heydon J at [3]-[21].

66 [2003] NSWCCA 374 at [24]-[45]; [2006] NSWCCA 336 at [22]-[43].

67 [2006] NSWCCA 336 at [21].

68 [2006] NSWCCA 336 at [22]-[23].

Abdy: I can turn the audio tapes on and leave the video off if you want?

Appellant: No, nothing.

Abdy: Well how about I turn the tapes on and you state the objection on them.

Appellant: I won't say a word if you turn it on.

Abdy: What about we write down what you say.

Appellant: No.

…

Abdy: If you won't be interviewed on the tape that's fine. We'll just speak to you. But we need the gun back so what do you think?

Appellant: If I talk to you, I don't want anything recorded on the tapes.

Abdy: It's better that we record what we say, it'll be just like a conversation, the same as the one we are having now.

Appellant: No tapes. But what do you want to know, like where is the gun and stuff?

Abdy: Yeah that would be a good start. We are going to leave the room and we'll be back in a couple of minutes."

139 After Detectives Abdy and McLean returned, according to their reconstruction, the April conversation continued[69]:

"Abdy: Well Sophear what is it going to be, are you going to talk to us or not?

Appellant: Not if it's on the tapes.

McLean: There I've turned them off (turned ERISP machine off), even our phones are off.

Appellant: What about a wire, like in the movies?

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69 [2006] NSWCCA 336 at [24].

> Abdy: I'm not going to sit here naked with you mate, you'll have to trust us. We have been up front with you this morning and we haven't tried to trick you.
>
> Appellant: No."

140 The appellant then told the detectives about his involvement in the Kress home invasion. He made substantial admissions in relation to it. In his trial, he adhered to those admissions, pleading guilty to the charges for the Kress offences. He was convicted in respect of those offences and sentenced to twelve years imprisonment[70]. He is serving that sentence and will continue to do so. It is not in contest in this appeal.

141 However, during the April conversation, the detectives also sought to question the appellant in relation to the Logozzo offences. The following exchange took place[71]:

> "Abdy: Sophear, there is one other thing that we want to speak to you about, so just listen to what we have to say. You don't have to say anything unless you want to. *But whatever you say or do may be recorded and later given in evidence at court*.
>
> Appellant: I don't want anything recorded.
>
> Abdy: It is the same as before. Nothing in this room is turned on. Mick [McLean] is actually from the Homicide Unit working at Green Valley with me and other police. We are investigating the murder of Joe Logozzo.
>
> Appellant: I know nothing." (emphasis added)

142 The detectives put the known facts of the Logozzo murder to the appellant. They confronted him with suggested similarities between the Kress home invasion and that at the Logozzo residence. After a failed attempt on the part of the appellant to secure the attendance of a solicitor, the April conversation continued[72]:

> "Abdy: What is it going to be mate. How about I just put these tapes in and you tell us whatever you want.

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70 *R v Em* [2005] NSWSC 212 at [85].

71 [2006] NSWCCA 336 at [26].

72 [2006] NSWCCA 336 at [28].

Appellant: No.

Abdy: What are you afraid of?

Appellant: I don't want to look like a dickhead.

Abdy: I told you before, I can leave the video out if you want.

Appellant: No tapes.

Abdy: We can record the conversation in our notebook and get you to sign it if you are happy with what has been written.

Appellant: No. I don't want to sign anything or have anything written down.

…

Abdy: Well tell us that on the tapes. We need to know.

Appellant: I will say at court what I did.

Abdy: Alright I'll take you back to the charge room while we make further enquiries then."

143 The April conversation then concluded. The appellant was released without charge. Detective Abdy later testified that he did not then think the admissions made by the appellant in respect of the Kress offences were sufficient to warrant charging him because they were not electronically recorded. He believed that "for that evidence to be admissible it had to be electronically recorded". Detective McLean gave similar evidence. Doubtless it was that belief, and the frustration caused by the April conversation, that led to a police application, early in May 2002, for warrants under the *Listening Devices Act* 1984 (NSW). The application was granted by O'Keefe J. Armed with the warrants, Detectives Abdy and McLean conducted the interview of 15 May 2002 that is the subject of contest in this appeal.

144 *The May conversation*: The May conversation resulted in a record of 40 pages. The entire transcript was annexed to the ruling of James J admitting the evidence (and admissions) up to p 25. His Honour noted that "[m]uch depends on the general tenor of the conversation and on the context in which a number of things were said"[73]. It is not essential to reproduce the entire record, although I have had regard to it and to the recording itself.

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73 Reasons of James J at [40].

145 The conversation commenced at the appellant's residence where the detectives arrived to request another talk with him:

"Appellant: Where at?

Abdy: No, we're not going to go to the police station or nothing, we've just got to show you some photos and talk to you for about five or ten minutes. We don't want to do it here, O.K."

146 The detectives then drove the appellant not to a police station or some other official place, but to a nearby public park. It had been raining and it was cold. The appellant was cautioned to bring a hat. The following conversation was recorded:

"Abdy: Mate, we're just gunna go and have a talk to you, I think there's a park or something up here. We're not going to take you to the police station or anything. So you know you're not under arrest, O.K.? As I told you before, we're going to come back and talk to you. Remember we said we might come back and show you some photos of some guns?

Appellant: No.

…

Abdy: Do you know the last time we, the last time when you got taken down the police station, Sophear?

Appellant: Yeah.

Abdy: Remember when we took you down there that time?

Appellant: You kept me there for nine hours … I was exhausted.

Abdy: Were you, fair dinkum. *Remember they gave you a piece of paper that said you didn't have to say anything to the police.*

Appellant: *Yeah, I know that.*

Abdy: You know that?

McLean: And we told you that, you remember that.

Abdy: *And the same goes again. You don't have to say anything to the police if you don't want to, O.K.*

Appellant: *Just making you guys happy.*

> Abdy: You're just making us happy. No, mate, we only want to know, we only want to know the truth. Don't say things just to make us happy.
>
> McLean: You understand that though, don't you?
>
> Appellant: Yeah.
>
> McLean: You know. Mate, you don't have to talk to us if you don't want to." (emphasis added)

147 At no stage during these preliminaries, or later in the May conversation, did the detectives warn the appellant (as they had before the April conversation) that anything he said *would* (or *might*) be recorded and later used in evidence against him. Instead, they repeatedly assured him that he was not being tricked by them. Instances of such assurances were:

> "McLean: Mate, you know yourself that day that nothing was recorded, you know that, so we're trying to remember to the best of our ability.
>
> Abdy: Mate, we didn't even take you to a police station, it's not hard, I mean we spoke to you once before and you wanted to talk to us, *we're not, we're not trying to trick you or anything.*
>
> McLean: We told you on the way down in the car, right, it's your right, if you don't want to talk to us you don't have to, you know that?
>
> Appellant: I'm talking to you.
>
> McLean: Yeah. Well, that's what we want, is just a little bit of cooperation here.
>
> Appellant: Yeah, I told you it, you guys know. I know you won't forget.
>
> …
>
> Abdy: *We're not trying to trick you up. …*
>
> Appellant: *I know how you guys work.*
>
> Abdy: *You know how we work? How's that?*
>
> Appellant: *You try to con us …*
>
> Abdy: *I'm not trying to, mate, I'm not trying to con you,* we told you before, we're investigating a home invasion and a murder." (emphasis added)

148 The appellant acknowledged that he was aware of the subject of the police investigation and that it was "pretty serious". Then Detective Abdy suggested to the appellant a reason for holding the conversation in the unusual location of a public park:

> "Abdy: Yeah, and you told us you did the home invasion. You remember you told us that? Hey? Mate, and you said you wanted to speak to us about a murder, you wanted to talk about the murder but you didn't want to talk to us, *you didn't want it recorded at the police station*. Do you remember talking to us about that?
>
> Appellant: (no audible reply)
>
> Abdy: Mate, you said you were going to tell your side of the story in court. You said all that to us, didn't you?
>
> McLean: I think you said, I'm not gunna deny it, but I don't want to talk to you about to [sic] right now, or something like that anyway, you know, you said, My head's spinning, or something like that.
>
> Appellant: I'm not going to deny it, I said, that I didn't do it or I'm not going to deny it.
>
> McLean: You know what you said.
>
> Appellant: Yeah, I know what I said.
>
> McLean: Well, what was it?
>
> Appellant: I'm not going to say that I did it and I am not gunna deny it." (emphasis added)

149 There were further exchanges along these lines before the appellant reminded the detectives that they had actually invited him to the conversation to show him some pictures of guns. Once again, the detectives tried to reassure the appellant about the nature and circumstances of their conversation:

> "Abdy: Sophear, *we haven't tried to trick you once, have we? We've brought you to a God damn park. We're not, we haven't got you in the police station.*
>
> McLean: Mate, you know you're [not] under arrest. We told you that as soon as you got in the car. Right. We told you that you don't have to talk to us if you don't want to, you know that, all right. We want to try and clear up a few things here.

Abdy: We want to try and eliminate who else was involved in it. All right. We'll give you some names and you tell us if they're involved in it." (emphasis added)

150 There then followed questions concerning the possible involvement of the appellant's friends in the Logozzo offences:

"Appellant: You can just say that I drove [to the Logozzo residence] …

McLean: Well, no, we're not saying you drove, we just want the truth as to who drove. Mate, you know that. Like Brad [Abdy] said, *we're not here about tricking anybody.*

Abdy: But we need, but we need to know who's involved … so people aren't gettin' spoken to by police every five minutes when they've got nothing to do with it really.

…

Appellant: You guys know that I am involved, right, you think that I am involved …

Abdy: What did you do?

Appellant: Nothing. I told you guys everything already." (emphasis added)

151 The detectives persisted:

"Abdy: And that's the same gun you took to the house where the bloke was shot?

Appellant: Is it?

Abdy: I don't know, is it? You tell me.

Appellant: I don't know.

Abdy: Well, is it? How many guns did you take to the house where the bloke got shot?

Appellant: Can't remember."

152 After more exchanges of this kind it became clear that the detectives were becoming impatient with the appellant's responses:

"McLean: No. Mate, what we're trying to work out is, right, who, who shot this bloke, all right, and, right, if it's the case that you shot him or if

> it's the case that Mao shot him, that's what we want to know, and we want to know, right, what, what your intention was, right. If you intended to kill somebody, well, or if it was an accident, that's what you need to tell us, all right, that's what I'm interested in and we're interested in. Do you understand that?
>
> Appellant: (no audible reply)
>
> McLean: Well, which one is it?
>
> Appellant: I don't want to talk about that.
>
> Abdy: Mate, when are you, when are you going to talk about it?
>
> Appellant: (no audible reply)
>
> Abdy: Who else can you talk [to] about it, apart from us?
>
> Appellant: I don't talk about it to no one.
>
> Abdy: How come?
>
> Appellant: Why would I want to talk to someone about it?
>
> Abdy: It's, it's obviously playing on your mind. Is that right?
>
> Appellant: Yeah. I'm the type of person, I keep things to myself."

153 It was at this point in the conversation that the exchange took place (recorded on p 25 of the transcript) that led to the exclusion from evidence of the record that followed:

> "Abdy: Maybe you might feel better if you tell us. *It's not as though we're going to slap the handcuffs on you and take you away otherwise we'd be at the police station if we were gunna do that, wouldn't we?* Mate, one of these days you're gunna have to want to talk about it, aren't you? You can't keep it in forever, imagine was [sic] it's going to be like. When you, you're sitting here nodding your head, so I'm assuming you're meaning yes.
>
> Appellant: Yeah, I mean, yes." (emphasis added)

154 James J concluded that the subsequent parts of the interview should be excluded by reason of s 85, s 90 or s 138 of the Act[74]. Those provisions deal

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74 [2006] NSWCCA 336 at [44].

with the court's discretion to exclude evidence rendered unreliable by the circumstances of official questioning (s 85); evidence which it would be unfair to the defendant to use (s 90); and evidence illegally or improperly obtained (s 138).

155 In the second Court of Criminal Appeal, as in this Court, the appellant, who was expertly represented, elected to confine his arguments to s 90 of the Act[75]. There is therefore no occasion to consider s 85 or s 138, or other provisions of the Act that were relied upon at earlier stages in the proceedings. The provisions in the Act governing the exclusion of evidence overlap, as the earlier common law exclusionary rules did. There might be reasons why, in a case such as the present, a court would be assisted by having available for consideration all of the possibly relevant provisions of the Act, so that the several provisions might be judged in relation to each other. However, the reliance of the appellant on s 90 alone to some extent simplifies and focuses the task before this Court.

The legislation

156 Section 90, which governs the outcome of this appeal, reads:

> "In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:
>
> (a) the evidence is adduced by the prosecution, and
>
> (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence."

157 The formal preconditions for the application of s 90 were established. The proceedings against the appellant were criminal in character. The contested evidence of the May conversation was tendered as evidence of admissions. It was adduced by the prosecution. It was admitted before the jury. They found the appellant guilty.

The findings on the s 90 issue

158 *Findings of Justice Shaw*: As noted above, Shaw J concluded that the contested evidence should be excluded under s 90 of the Act. His Honour's conclusion was quashed on the basis that it was contaminated by a reference to the potential for "unfair prejudice" to the appellant. The first Court of Criminal Appeal held, correctly, that Shaw J's use of that term disclosed a running together

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75 [2006] NSWCCA 336 at [44].

of the test for exclusion of evidence under s 90 of the Act and the test under s 137[76].

159 Shaw J nominated various considerations in support of his conclusion which remain relevant to a proper exercise of the s 90 discretion[77]:

> "Some of the relevant circumstances raised by the evidence on the voir dire that go to whether this evidence should be excluded are that:
>
> - Detective Abdy knew the accused would not speak with them if he knew he was being recorded;
> - the accused repeatedly insisted that he did not wish to speak about the home invasions (though this is denied by [the detectives] on the basis that the '*body language*' of the accused indicated that he would speak with them);
> - some of the questioning was leading, verging on impermissible cross examination eliciting specific answers rather than allowing the accused to 'speak';
> - the conversation involved some level of subterfuge in that the police encouraged the accused to talk about whether the shooting was an 'accident' in circumstances where, pursuant to the felony murder rule, such circumstance is irrelevant to the charge of murder;
> - Detective [McLean] expressed frustration and exasperation at the accused's request not to speak about the first home invasion".

160 *First Court of Criminal Appeal*: In the first Court of Criminal Appeal, Howie J, who gave the Court's reasons, said that he was prepared to accept that it was open to Shaw J to make the listed factual findings on the evidence before him. His Honour also acknowledged that those findings were "relevant to a consideration of whether the evidence of the [May] conversation should be excluded under s 90"[78]. However, the application of that section was then dealt with in the following brief passage:

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76 [2003] NSWCCA 374 at [112]. Section 137 of the Act provides: "In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

77 Reasons of Shaw J at [81] quoted [2003] NSWCCA 374 at [114].

78 [2003] NSWCCA 374 at [115].

> "I do have considerable doubts … about the last two dot points. But as I have come to the view that his Honour's discretion under that section miscarried by his having taken into account irrelevant considerations, it does not matter what view I take of these particular findings."

161 Having rejected the conclusion of Shaw J, the first Court of Criminal Appeal did not proceed to re-evaluate the evidence in light of a correct understanding and application of s 90. The conventional approach to appellate review of a decision of this nature, which has miscarried for consideration of irrelevant matters, is that the appellate court will decide for itself whether, absent such matters, the decision itself was correct, or remit the discretion (or power) to be re-exercised at first instance, absent the erroneous consideration. In the present case a re-exercise of the discretion by the first Court of Criminal Appeal was to be expected, because that Court had accepted that at least three of the considerations mentioned by Shaw J were open on the evidence and relevant to the s 90 decision. But this did not occur.

162 This Court is not, of course, considering an appeal from the orders and reasons of the first Court of Criminal Appeal. However, I have recounted the history of the proceedings before Shaw J and that Court in some detail for a reason.

163 Shaw J upheld the objection to the admission of the record of the May conversation under s 90 of the Act. He thus concluded, as I do, that to use the evidence would be unfair to the appellant. The decision required consideration of a number of features of the circumstances in which the admissions that the prosecution relied on were made. Shaw J nominated a number of factors that were incontestably relevant to his conclusion under s 90. His Honour's decision then miscarried, as the appellate court found, because of a slip, involving reference to immaterial considerations.

164 The appellate court then proceeded to consider whether evidence as to the May conversation should be excluded under s 137 of the Act. It was in that context that the Court hinted that the conversation as from p 25 of the transcript should be excluded[79]. It was left to inference that the earlier part of the transcript might be admitted. This was so notwithstanding the survival of some of the reasons nominated by Shaw J (and the existence of others to which reference might have been made) as to why it would be unfair to the appellant to use any of that evidence in the appellant's trial. The issue of unfairness was not determined by the first Court of Criminal Appeal.

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79 [2003] NSWCCA 374 at [135]-[136].

165 The appellant himself had not given evidence on the voir dire before Shaw J. At the stage that Shaw J and the first Court of Criminal Appeal made their rulings on s 90, the relevant evidence was as high as it was going to reach. The record of all the police conversations with the appellant was closed. Normal appellate practice should have led the appellate court to consider for itself whether, although for different and fuller reasons, Shaw J had been correct in his conclusion that s 90 required exclusion of the entire May conversation for reasons of unfairness. However, that course was not adopted. In effect, the ruling was left to the second trial judge.

166 *Findings of Justice James*: The appellant was then arraigned before James J. A second voir dire was held to determine whether evidence of the May conversation was admissible. To determine the s 90 issue, James J accepted as his criterion whether, in that conversation, the detectives had "impugned the accused's freedom to choose whether to speak to police"[80].

167 It was on the basis of that criterion that James J decided that what was said by the appellant after p 25 of the transcript should be excluded from evidence. His Honour concluded that "[i]t would be unfair to use against the accused evidence of admissions made by him after the words spoken by Detective Abdy" at that point and made a ruling to that effect[81].

168 In support of this ruling, James J made a number of findings. He considered that, on 15 May 2002, the appellant was aware that he was speaking with police officers and that he understood that he did not have to say anything to the police[82]. However, he also found that the appellant believed, both in April and in May, that "if a conversation he had with police officers was not recorded ('was off the record'), evidence of the conversation could not be used against him in criminal proceedings"[83].

169 James J also found (as the prosecution had conceded)[84]:

> "that the accused would not have spoken to the police on 15 May if he had known the conversation was being recorded; that the police knew on 15 May that the accused would not speak to police if he knew that the

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80 Reasons of James J at [141].

81 Reasons of James J at [141].

82 Reasons of James J at [125].

83 Reasons of James J at [130].

84 Reasons of James J at [127].

> conversation was being recorded; that the accused did not know that the conversation was being recorded and believed that the conversation was not being recorded; that the police knew that the accused believed that the conversation was not being recorded; and the police did not tell the accused that the conversation was being recorded".

170 As the transcript of the May conversation showed, and as Detective Abdy acknowledged, the appellant was not, on 15 May 2002, given the "second part of the caution". This could have alerted him to the fact that statements made by him to police would (or might) be recorded and later used in evidence against him. In his testimony, Detective Abdy said that he believed that "if I gave him the second part of the caution [he might have] become aware that he was being recorded". When Detective Abdy was then asked "And then he would refuse to talk to you?" his answer was "He may have done so, I don't know".

171 James J found that, until the point in the conversation corresponding to p 25 of the transcript, the detectives "had not set out to induce in the accused a belief that, if what he said to police officers was not recorded, evidence of what he said could not be used against him"[85]. The appellant did not challenge that finding in this Court. James J also found that the appellant's belief at the commencement of the conversation that unrecorded evidence could not be used against him in criminal proceedings was one that he "had formed himself, independently of anything said or done by the police"[86]. That conclusion was not impugned before the second Court of Criminal Appeal or in this Court. However, the appellant sought to press a submission that the detectives had contributed to (if not encouraged) the continued existence of the appellant's false belief.

172 This last-mentioned contention finds some support in the fact that the detectives themselves acknowledged in their evidence that they had the same belief that unrecorded evidence could not be used against the appellant in a trial. Whereas the second part of the caution had been given to the appellant in the April conversation, Detective Abdy indicated to the appellant that one reason for meeting in the park on 15 May 2002 was that a conversation there would not be recorded. He said to the appellant: "[Y]ou wanted to talk about the murder but you didn't want to talk to us, *you didn't want it recorded at the police station*" (emphasis added). The only conceivable purpose of making this statement was to contrast an interview at the station (like the April conversation) and a recording-free chat in the park. The park was thus portrayed as a place for a safe,

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85 Reasons of James J at [130]-[132].

86 Reasons of James J at [130].

informal, "off-the-record" conversation, with no risk of a recording that might later be used in court against the appellant.

173 *Second Court of Criminal Appeal*: The second Court of Criminal Appeal upheld James J's limited exclusion of the evidence of the May conversation under s 90. It concluded that there was no unfairness in the use of the balance of the evidence of that conversation, holding that, at most, the detectives had failed to correct an erroneous belief on the part of the appellant[87]. Until p 25 of the transcript they had not held out that what the appellant had said could not be used against him[88].

174 The reliability of what the appellant said was a matter for the jury[89]. The mere fact that trickery had been used was not, of itself, sufficient to render the admission of the evidence unfair to the appellant[90]. There was no affirmative holding out that what the appellant had said would *not* be used against him[91]. Thus, it was held to be within the "discretion" of James J to conclude that the evidence of the conversation down to p 25 of the transcript was not inadmissible for unfairness reasons, pursuant to s 90 of the Act[92].

175 The second Court of Criminal Appeal also rejected the complaint that the trial judge had failed to warn the jury that any admissions made by the appellant might not have been reliable due to his belief, at the time of the May conversation, that what he said was not being recorded and could therefore not be used against him[93]. This issue is the subject of the second substantive ground of appeal to this Court. That ground is only relevant if the complaint about the admission of evidence of the May conversation is rejected. Having regard to my conclusion on admissibility, the warning issue does not arise for separate decision by me.

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87 [2006] NSWCCA 336 at [65].

88 [2006] NSWCCA 336 at [65].

89 [2006] NSWCCA 336 at [68].

90 [2006] NSWCCA 336 at [73]-[74] citing *R v Swaffield* (1998) 192 CLR 159 at 202 [91], 220-221 [155]; cf *Tofilau v The Queen* [2007] HCA 39 at [146].

91 [2006] NSWCCA 336 at [77] contrasting *R v Noakes* (1986) 42 SASR 489.

92 [2006] NSWCCA 336 at [78].

93 [2006] NSWCCA 336 at [80]-[107].

The meaning of s 90 of the *Evidence Act*

176 *Textual considerations*: The word "unfair" in s 90 is not defined either in the Dictionary at the end of the Act or elsewhere. However, the word is one of common use in the law. It must take its meaning from the context and purpose of its use[94]. Depending on such context, the word connotes "not fair"; "biased or partial"; "not just or equitable"; "unjust"; or "marked by deceptive dishonest practices"[95].

177 Unfairness, for the purposes of s 90, cannot be defined comprehensively or precisely. A general law on evidence (such as the Act) must cover the admission (or rejection) of evidence adduced in a vast range of predictable and unpredictable circumstances. Moreover, what is "unfair" will vary over time in response to changing community attitudes and perceptions. The language of s 90 of the Act expresses the concept of unfairness "in the widest possible form"[96].

178 This fact, and the fact that the power afforded under s 90 is to be exercised at the moment that evidence is tendered for admission before a court, indicates that the judgment must be made on a case-by-case basis, normally on the run[97]. The section envisages individual decision-making by reference to all relevant facts, not *a priori* rules of universal application. What would be "unfair" in one set of circumstances might not be so if just a few of the integers were changed.

179 There are four textual features of s 90 that are relevant to the proper exercise of the power for which it provides.

- First, the section is limited in its application to evidence "adduced by the prosecution" in a "criminal proceeding". Thus, s 90 is confined in its operation to a particular type of trial which, in Australia, has distinctive features. Most importantly, criminal proceedings in this country normally observe an accusatorial principle by which it is for the prosecution to establish the criminal accusation. The defendant is not usually required by law to say or prove anything[98]. The specified context is thus that of

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94 Thus, "unfair contracts" (see eg *Blomley v Ryan* (1956) 99 CLR 362; *Stevenson v Barham* (1977) 136 CLR 190); "unfair competition" (see eg *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414); "unfair dismissal" (see eg *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539).

95 *The Macquarie Dictionary*, Federation edition (2001) at 2045.

96 *Swaffield* (1998) 192 CLR 159 at 193 [67].

97 cf *Dietrich v The Queen* (1992) 177 CLR 292 at 364.

98 cf *RPS* (2000) 199 CLR 620 at 633 [28].

admitting evidence of an admission which, by our law, normally a defendant is not required to make but which is contained in the evidence adduced by the prosecution and proffered against the defendant. Whether, in these circumstances, admission of the evidence would be "unfair" needs to be judged taking into account these peculiarities that lie deep in the Australian system of criminal justice[99];

- The "unfairness" that enlivens s 90 is not at large. It is not related to broader considerations such as unfairness to the community, unfairness to investigating police, unfairness to witnesses or to any other person or thing. The sole consideration is unfairness "to a defendant". This focuses the inquiry on the effect of the "circumstances in which the admission was made" on the defendant as such. The impact on a wider range of persons or values must be considered, if at all, under other exclusionary rules provided by the Act, not under s 90;

- The unfairness "to [the] defendant" is also not at large. It is not addressed to unfairness to the defendant outside the courtroom. It is only in the criminal proceedings where that person is "a defendant" and the relevant evidence is tendered for admission, that the admission may be excluded because it would be unfair to the defendant to use it in such proceedings; and

- The criterion for rejection of the evidence is not the way in which it might later be used by the tribunal of fact. That would involve a concern with unfair prejudice to which other sections of the Act are directed, such as s 135 (a general discretion to exclude evidence) or s 137 (a special discretion to exclude prejudicial evidence in criminal proceedings). As noted above, the several provisions for the exclusion of evidence necessarily overlap in some circumstances. They operate alternatively and cumulatively. An accused person is entitled to invoke any and all of the provisions that are alleged to be relevant to the proceedings in hand. In a statute of general application, the existence of differently expressed powers of exclusion that may, in a given case, have more particular application to the circumstances of a trial, is not a reason for reading down the alternative grounds for exclusion provided by the Act, including s 90[100].

180 *A power in the court*: The heading to s 90 is "Discretion to exclude admissions". Certainly, the decision of a court when s 90 is invoked is one

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99 cf *Azzopardi v The Queen* (2001) 205 CLR 50 at 65 [38].

100 cf reasons of Gummow and Hayne JJ at [122].

involving judgment and the evaluation of multiple considerations. Strictly speaking, it is a *power* conferred on a court to admit evidence of an admission or to refuse to admit the evidence to prove a particular fact[101]. It is not a *discretion* at large. The decision that s 90 requires is confined to the general or particular refusal to admit evidence envisaged by the opening words of the section.

181 Once a court, in circumstances to which s 90 applies, concludes that it "would be unfair to [the] defendant to use the evidence", the section does not provide the court with an uncontrolled option to allow the evidence or to reject it or limit its use. If relevant unfairness to a defendant in the use of the evidence is demonstrated, the only discretion provided to the court is to refuse to admit the evidence of an admission at all or to refuse to admit the evidence to prove a particular fact.

182 This construction, which follows from the character of the repository of the power selected by Parliament ("the court"), shifts the field of dispute, in a case such as the present, to the determination of whether or not "it would be unfair to a defendant to use the evidence". Some of the language of the second Court of Criminal Appeal proceeded on an assumption that a general "discretion" was conferred on the trial court to provide, or withhold, relief[102]. This constituted an error on that Court's part. It is an error relevant to the function of this Court in disposing of this appeal[103].

183 *History of the s 90 provision*: The legislative expression of the power to exclude evidence for unfairness was recommended by the Australian Law Reform Commission, whose reports[104] gave rise to the Act and to counterpart legislation now operating in several Australian jurisdictions[105]. The Act and its

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101 cf *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-225 per Earl Cairns LC; cf *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 143 [50]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 658 [310]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 154-155 [7].

102 [2006] NSWCCA 336 at [78]. Giles JA there referred to "*House v The King* principles".

103 cf *John Fairfax Publications Pty Ltd v Gacic* (2007) 235 ALR 402 at 411 [30].

104 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985); Australian Law Reform Commission, *Evidence*, Report No 38, (1987) ("ALRC 38").

105 *Evidence Act* 1995 (Cth); *Evidence Act* 2001 (Tas); *Evidence Act* 2004 (Norfolk Is). The enactment of a counterpart law has been recommended in Victoria: see

(Footnote continues on next page)

equivalents represent significant measures of reform. The provisions should not be read down because of the pre-existing law[106].

184 On the other hand, in its final report, upon which the Act was substantially based, the Commission retreated from an interim proposal to subsume the discretion to exclude evidence in criminal trials on unfairness grounds within other judicial powers conferred on trial courts[107]. It noted that several commentators on its interim proposals had objected to the suggested abolition of the unfairness discretion on the footing that that discretion, expressed in the decision of this Court in *R v Lee*[108], was particularly helpful in dealing "with the situation where the accused has chosen to speak to the police but on the basis of assumptions that were incorrect, whether because of untrue representations or for other reasons"[109].

185 The Commission acknowledged that its interim approach "[did] not deal with that situation" because it addressed only the truth (reliability) of an admission, and "not the choice whether or not to make [it]"[110]. It accepted that the interim proposal had been[111]:

> "capable of dealing with the matter but not in the way that the *Lee* discretion does. The *Lee* discretion focusses on the question whether it would be unfair to the accused to admit the evidence. The discretion to exclude illegally or improperly obtained evidence requires a balancing of public interests. It would, therefore, be less effective than the *Lee* discretion in the situation where the confession was obtained because the accused proceeded on a false assumption."

186 In supporting its decision to include amongst its final proposals a statutory expression of what it described as the "*Lee* discretion", the Commission noted a number of illustrations of cases which such a "discretion" would best address,

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

106 cf *Cornwell v The Queen* (2007) 81 ALJR 840 at 874 [154]; 234 ALR 51 at 98.

107 ALRC 38 at 90 [160].

108 (1950) 82 CLR 133.

109 ALRC 38 at 90 [160].

110 ALRC 38 at 90 [160].

111 ALRC 38 at 90 [160].

one of which was similar to the present case[112]. The Commission summarised its conclusion[113]:

> "There is a need for a discretion to enable the trial judge to exclude evidence of admissions that were obtained in such a way that it would be unfair to admit the evidence against the accused who made them. Such a discretion should be added to the proposal."

Substantially, the added proposal in the Commission's final report became what is now s 90 of the Act[114].

187 In *Lee*, a Full Court of this Court endorsed statements made by Latham CJ and by Dixon J in *McDermott v The King*[115]. The latter had described the exclusionary rule for unfairness as applicable where the court forms "a judgment upon the propriety of the means by which [a confessional] statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused".

188 This Court concluded in *Lee* that the unfairness rule was part of the Australian common law of evidence; that it was not excluded by the existence of a statutory provision permitting the rejection of involuntary confessions; and that it served a separate and justifiable purpose[116]. Specifically, the Court observed that the rule was to be understood in the context of a system of criminal justice in which police observed the obligation to caution suspects[117]. All of these postulates remain true today. They inform the way in which s 90 of the Act, designed to preserve the *Lee* discretion, was intended to operate in contemporary criminal trials.

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112 ALRC 38 at 90, fn 18: "A person was interviewed for thirty minutes and repeatedly stated he did not want to answer questions. Later a further attempt was made to get answers but he still refused to answer. A third attempt was made and he finally gave answers and allegedly made admissions. They were excluded under the unfairness discretion."

113 ALRC 38 at 90 [160].

114 See cl 79 of the Commission's draft Bill: ALRC 38 at 171.

115 (1950) 82 CLR 133 at 151 citing (1948) 76 CLR 501 at 506-507 per Latham CJ, 513 per Dixon J.

116 (1950) 82 CLR 133 at 150-151 discussing *Evidence Act* 1928 (Vic), s 141.

117 (1950) 82 CLR 133 at 159 referring to the English Judges' Rules and the Chief Commissioner's Standing Orders in Victoria.

189 *Elaboration of the exclusion*: The fact that the unfairness discretion (including now in s 90 of the Act) falls to be exercised in criminal proceedings as they are normally conducted in Australia warrants a reminder of the fundamental principle explained by four members of this Court in *Petty v The Queen*[118]. It is a principle, applicable to "criminal proceedings", that should not in my view be undermined, but preserved and protected[119]:

> "A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless."

190 As the Police Code of Practice applicable in this case recognised, the "right to silence" should be respected by police themselves. Of course, referring, without more, to that right will not suffice to establish that particular evidence must be excluded[120]. However, in appropriate circumstances, the unfairness discretion can be applied to uphold it and to deprive those who ignore or defy it of the fruits of their conduct.

191 In *R v Swaffield*, the joint reasons in this Court acknowledged that the term "unfairness" lacks precision and demands an evaluation of all of the relevant circumstances[121]. As noted in *Van der Meer v The Queen*[122], it is not concerned as such with unfair conduct on the part of police, but rather with whether it would be unfair to the accused to use his statement containing admissions against him[123]. Thus, unfairness is concerned with "the right of an accused to a fair

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118 (1991) 173 CLR 95.

119 (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ.

120 *RPS* (2000) 199 CLR 620 at 630 [22]; *Tofilau* [2007] HCA 39 at [20].

121 (1998) 192 CLR 159 at 189 [53] per Toohey, Gaudron and Gummow JJ.

122 (1988) 62 ALJR 656; 82 ALR 10.

123 *Swaffield* (1998) 192 CLR 159 at 189 [53] quoting *Van der Meer* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26.

trial", and whilst the unreliability of an admission might be "a touchstone of unfairness", it is "not to be the sole touchstone"[124]. It might be "that no confession might have been made at all, had the police investigation been properly conducted"[125]. In *Swaffield*, the Judges' Rules in Queensland (equivalent to the Police Code of Practice applicable in this case) were recognised to be "a yardstick against which issues of unfairness (and impropriety) [could] be measured"[126].

192 In my own reasons in *Swaffield*, I also referred to the principles stated in *Van der Meer*[127]. I made reference by way of comparison to s 90 of the Uniform Evidence Acts, even though it was not there applicable[128]. I acknowledged that s 90 "reflects the common law unfairness discretion" and permitted changing social circumstances to be considered[129]. In discussing such changing circumstances, I accepted that "[m]odern surveillance technology and covert police operations are potentially effective means for [bringing wrongdoers to justice]"[130].

193 After reviewing overseas authority, I remarked[131], in words to which I adhere (and which were cited in the second Court of Criminal Appeal in these proceedings[132]):

> "Subterfuge, ruses and tricks may be lawfully employed by police, acting in the public interest. There is nothing improper in these tactics where they are lawfully deployed in an endeavour to investigate crime so as to bring the guilty to justice. Nor is there anything wrong in the use of

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124 *Swaffield* (1998) 192 CLR 159 at 189 [54].

125 (1998) 192 CLR 159 at 189 [54] citing *Van der Meer* (1988) 62 ALJR 656 at 662; 82 ALR 10 at 20; *Duke v The Queen* (1989) 180 CLR 508 at 513.

126 (1998) 192 CLR 159 at 190 [55] citing *Van der Meer* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26.

127 (1998) 192 CLR 159 at 211 [129].

128 (1998) 192 CLR 159 at 211 [130].

129 (1998) 192 CLR 159 at 211 [131].

130 (1998) 192 CLR 159 at 217 [147].

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

132 [2006] NSWCCA 336 at [74].

> technology, such as telephonic interception and listening devices although this will commonly require statutory authority. 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 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 … 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." (footnotes omitted)

194 *Swaffield*, like this case, involved the secret recording of a conversation by an undercover police officer who, in disregard of the relevant Judges' Rules in Queensland, did not administer any caution at all to the suspect. The entire Court in that appeal concluded that the accused's admissions had rightly been rejected by the intermediate court. The joint reasons decided that this was so because the police conduct had impugned the suspect's freedom to choose whether to speak to the police or not. My own reasons represented a variation of the same principle. Consistency with the Court's approach in *Swaffield* requires that principle also to be applied in this appeal.

195 *Conclusion: the meaning of s 90*: The unfairness provision in s 90 of the Act was clearly intended to confer a "power or discretion" on a court in criminal proceedings to reject prosecution evidence that was at least as broad as that provided by the previous common law. It may even be that s 90 casts a wider net[133]. For the purpose of deciding this appeal, it is unnecessary to resolve that question. Whilst the several provisions of the Act governing the exclusion of evidence may overlap in particular circumstances, each provision, when invoked, should be applied according to its own terms.

196 The history of s 90 demonstrates that the section was preserved, and intended to apply, so as to address a particular and well-identified problem. It would be a serious departure from the text, inimical to the purposes of s 90, to impose on its broad language restrictions imported from the language of other exclusionary provisions in the Act. Essentially, that was the mistake that undermined the validity of the decision of Shaw J on the s 90 issue. It is a mistake that this Court should itself avoid. It would be no more tolerable to gloss s 90 by deliberate implication than to do so by a verbal slip, which is all that appears to have occurred in the reasoning of Shaw J.

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133 cf *Swaffield* (1998) 192 CLR 159 at 193 [67], 211 [131].

197 There is nothing in the language, history or purpose of s 90 that would licence overlooking the statutory objective of protecting criminal suspects against unfairness in favour of other concerns (such as the need to clear up a serious murder where the accused has repeatedly insisted to police on his right to silence).

Application of s 90 in this appeal

198 *Standard of review*: The second Court of Criminal Appeal considered that, in reviewing the exclusionary ruling of James J, it was subject to the constraints that *House v The King*[134] imposes on appellate review of "discretionary" decisions[135]. As already indicated, that was an error. Whether the function of the court under s 90 is described as involving a "power" or a "discretion" does not matter. Clearly, the judgment required is an evaluative one. This suggests that the appellate court should not ignore the antecedent exercise of the "power or discretion" or any advantages that the earlier court(s) enjoyed in making the contested decision.

199 However, if, having reviewed all the circumstances, the appellate court comes to a firm conclusion that the admission of the challenged evidence "would be unfair to a defendant", it would be unthinkable that it would then deny relief and ignore the unfairness. The fundamental obligation of the Court of Criminal Appeal is to determine whether or not "there [has occurred] a miscarriage of justice"[136]. In a case such as the present, the appellate task is akin to that presented when a challenge is made to a judge's ruling that particular evidence is "relevant"[137]. The court acknowledges the function of the original decision-maker, and makes full allowance for the advantages he or she had in the circumstances. But, if it reaches a firm conclusion of its own, it is required to give effect to that conclusion. It is not subject to restraint on the basis that the decision is "discretionary" in the sense that, say, a decision to grant an adjournment, to award costs or to order security clearly is.

200 Even if this view of the "power or discretion" in s 90 were incorrect, and the decision under the section was to be classified without qualification as a "discretionary" one, a clear conclusion that to admit evidence would be "unfair" to the defendant would allow a finding of error of the innominate kind,

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134 (1936) 55 CLR 499.

135 [2006] NSWCCA 336 at [78].

136 *Criminal Appeal Act* 1912 (NSW), s 6(1).

137 cf *Smith v The Queen* (2001) 206 CLR 650.

occasioning a miscarriage of justice. It would authorise appellate intervention as, in my view, is required here.

201 *Uncontested considerations*: To explain why use of the contested evidence would be unfair to the appellant, it is not necessary to engage in sophisticated reasoning. Decisions of the kind presented by s 90 often have to be made quickly, even instantaneously, in the course of the running of a criminal trial by reference to all the facts and circumstances as then known.

202 I will not delay in this analysis to contest a number of the propositions endorsed in the reasons of other members of this Court, who reach a conclusion opposite to my own. I am prepared to concede that the mere fact that a conversation with a suspect is secretly recorded does not alone make later use of any admissions contained in the recording "unfair" to the suspect[138]. I also accept that the existence of warrants under the *Listening Devices Act* militates in favour of a secret recording of a private conversation comprising admissible evidence[139]. However, such a warrant does not absolve a court of the obligation to decide, in accordance with s 90, whether particular evidence adduced in criminal proceedings should be excluded as unfair to a defendant. In granting such a warrant, a judge has no means of anticipating later unfairness to a defendant arising out of attempted use of the recorded evidence and the way the questioning proceeds.

203 I accept that, for example, the administration of a defective caution to a suspect does not give rise to a "right" to the exclusion of subsequent recorded evidence[140]. The unfairness to which s 90 refers must be found taking into account all the circumstances relevant to the procurement of the impugned admissions.

204 I agree that it would be a mistake to attribute over-subtle reasoning to the appellant[141]. However, there is a clear and not particularly subtle distinction between a belief (often correct) that unrecorded evidence of admissions to police cannot be used in a subsequent criminal trial and a false assumption (encouraged by things said and done by police) that on a particular occasion police were not in fact recording a conversation.

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138 Reasons of Gleeson CJ and Heydon J at [67].

139 cf reasons of Gleeson CJ and Heydon J at [68].

140 cf reasons of Gummow and Hayne JJ at [119].

141 Reasons of Gleeson CJ and Heydon J at [71].

205 I will not consider postulated analogies to mistakes in equity[142]. Taking into account matters of that kind would gloss the statute and divert the court's attention from the judgment it must make as to "unfair[ness] to a defendant". I agree that such unfairness could arise because the circumstances in which an admission was made render it unreliable[143]. However, as noted above, it was recognised in *Lee*, and confirmed in other cases down to *Swaffield*, that reliability is "not … the sole touchstone" of unfairness[144]. In the present case, the fact of the sound recording would seem to preclude challenge to the reliability of the record of the May conversation. However, it is not the case that every electronically recorded admission, whenever and however made, is *ipso facto* admissible. Section 90 demands consideration of "the circumstances in which the admission was made". The fact that the admission is recorded is only one such "circumstance".

206 It remains for the court to evaluate the proposed "use [of] the evidence" in the context of "criminal proceedings". The answer is not supplied by a judgment as to the motives of the detectives in adopting the course of conduct that they did. It may be accepted (as all the judges below agreed) that Detectives Abdy and McLean were frustrated, and anxious to secure evidence to solve a most serious crime. However, the governing consideration is not whether the detectives *deliberately* intended to deprive the appellant of his right to a fair trial. It is whether their conduct had that *effect* in the proceedings in which the contested evidence was admitted.

207 I consider that the conduct did have that effect. To explain why, it is necessary for me to refer to five important considerations.

208 *Omission of a full caution*: The most important consideration favouring the conclusion that use of the contested evidence was unfair to the appellant was the detectives' intentional failure to administer to him the second part of the caution set out in the Police Code of Practice. That caution includes the following warning: "We will record what you say or do. We can use this recording in court. Do you understand that?"

209 There is nothing unusual in the second part of the caution. Giving such a caution is a regular feature of police practice in dealing with suspects, in Australia and in other common law countries. It is therefore a feature that will be normal in conduct anterior to "a criminal proceeding" to which s 90 of the Act

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142 cf reasons of Gleeson CJ and Heydon J at [76]-[77].

143 Reasons of Gleeson CJ and Heydon J at [73].

144 *Swaffield* (1998) 192 CLR 159 at 189 [54].

applies. It recognises a suspect's "right to silence" and the character of an accusatorial trial. The rights of suspects in this respect are not to be undermined by courts unless derogation is expressly authorised by Parliament.

210 The failure of the detectives to administer the second part of the caution to the appellant was incontestably a conscious one. It rested in the detectives' fear that, had the caution been given, the appellant would have said nothing, as was his legal right. For the purposes of s 90 of the Act, the vice of the incomplete caution did not lie in the detectives' deliberate transgression of the Police Code of Practice. Rather, it lay in their resulting failure to alert the appellant, whom they had under their control, to a vital consequence of continuing the conversation into which he had been drawn.

211 The importance of the second part of the caution has been explained in many cases. In *Miranda v Arizona*[145], the Supreme Court of the United States explained:

> "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make [a suspect] aware not only of the privilege, *but also of the consequences of forgoing it*. It is only through an awareness of these consequences that there can be any assurance of real understanding and *intelligent exercise of the privilege*. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest."

212 Although these remarks were made in the context of the requirements of the Fifth Amendment to the United States Constitution, they usefully explain the purpose of the caution obliged, in Australia, by both Judges' Rules and Police Instructions or Codes of Practice. In New South Wales, the caution might not be required under binding legislation. However, it is incontestable that it represents an established feature of police practice. It is founded on what is by now a "fundamental rule of the common law"[146]. It reflects the recognition, as noted in the Police Code of Practice, that[147]:

> "If you fail to caution at the appropriate time, or if the suspect does not fully understand it, any subsequent conversation or admission might be

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145 384 US 436 at 469 (1966) (emphasis added).

146 *Petty* (1991) 173 CLR 95 at 99.

147 At 48.

ruled to be improperly obtained and inadmissible. Particular care should be taken in relation to vulnerable persons."

213 In the present case, the detectives were quite aware of their obligation to give the appellant a full formal caution. At the beginning of the May conversation, they reminded him of the "piece of paper" they had given him in April. Notwithstanding this, their oral caution was limited to an intimation that "the same [went] again" in that the appellant "didn't have to say anything to the police". The omission of the second part of the caution was significant. It was clearly intended to influence the appellant's thoughts and actions. It was knowing, apparently carefully planned and, in the result, effective.

214 If it was necessary on 15 May 2002 to repeat the *first* part of the caution, it was equally necessary to repeat the *second* part. Either this Court is serious about the right to silence and the need for police and like officials to caution suspects about the incidents of that right, or it is not. To condone the consequences that flowed after providing half a caution is, in effect, to accept that giving half the caution is adequate and the deletion of the other half results in no unfairness to a suspect.

215 Recognising that millions of cautions containing both parts of the specified warning must have been administered over many decades, in this country and elsewhere, I find it impossible to brush aside the intentional administration of an incomplete caution to the appellant on the part of Detectives Abdy and McLean, both sworn officers of police. I acknowledge their frustrations. I am willing to accept the sincerity of their objectives. But if their conduct on this occasion is vindicated by this Court, we must face the reality that what they did will be repeated. By condonation, it may well become a common or general practice. I will not willingly accept that development. It carries with it the seeds of the destruction of a suspect's right to silence and the undermining of the accusatorial character of criminal proceedings.

216 Before leaving this point, I would note that it would be incorrect to infer, if that is what is intended, that counsel for the appellant conceded that there was no obligation on the part of the detectives to caution the appellant[148]. To the contrary, it was a repeated theme of the appellant's submissions to this Court that a caution was required when the May conversation commenced and that it had to be the full caution, not just the first half.

217 In this Court, the obligation to caution was expressly argued for the appellant to be one "arising from the circumstances of this case"[149]. Moreover, as

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148 Reasons of Gleeson CJ and Heydon J at [78].

149 [2007] HCATrans 142 at 39.

was acknowledged from the Bench at the time this argument was put (encapsulating what was being submitted), "you either give it all or you give nothing. A misleading character, in a way, arises from giving half of it."[150]

218 *Trickery and informed choices*: The foregoing conclusion is reinforced by the fact that trickery was used by the detectives to overcome the appellant's obvious initial unwillingness to speak about the Logozzo home invasion, and to deprive him of an "informed choice" as to whether to make admissions or not to speak until appearing in court with the benefit of legal advice.

219 The detectives arrived at the appellant's home and took him for what was presented as an informal chat in a public park on a specific and limited subject. They repeatedly emphasised that he was "not under arrest" and "not going to … the police station". They reassured him on a number of occasions that he was not being "tricked" or "conned". It was not, therefore, a neutral conversation with public officers in which he was allowed to say what he wished. It involved a course of conduct consciously designed to deceive the appellant into believing that he was engaged in an off-the-record conversation[151]. The detectives' reference to his earlier interview with them, following which he had not been arrested but released, renders still more apparent the unfairness of the trickery. It compounds the unfairness occasioned by the administration of only half of the official caution. Necessarily, the deception influenced everything that the appellant then proceeded to say and do in the course of the May conversation. It caused the attempted use of admissions contained in that conversation (including the first part thereof) to be unfair to the appellant. It violated the appellant's right in law to choose whether or not to make admissions that would later be used against him in his trial[152]. It engaged the application of s 90 of the Act.

220 *Selection of the park venue*: Of itself, the fact that the meeting with the detectives on 15 May 2002 took place in a suburban park might seem innocuous. However, given the context, the detectives' selection of that venue for their second extended conversation with the appellant was far from so. Indeed, it was part of the deliberate deception designed to emphasise in the appellant's mind the distinction between a formal interview at the police station and an off-the-record chat in the park.

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150 [2007] HCATrans 142 at 39.

151 cf *Cleland v The Queen* (1982) 151 CLR 1 at 13; *R v Oickle* [2000] 2 SCR 3 at 42-43 [68].

152 *Swaffield* (1998) 192 CLR 159 at 201 [89]; cf *Blackburn v Alabama* 361 US 199 at 207 (1960) quoted *Oickle* [2000] 2 SCR 3 at 43-44 [70].

221 The detectives' repeated statements throw this fact into sharp relief: "[Y]ou don't want to go to the cop shop and talk"; "[W]e didn't even take you to a police station … we're not trying to trick you or anything"; "We've brought you to a God damn park. We're not, we haven't got you in the police station."

222 Whilst trickery, deception and covert operations are an inevitable part of modern policing, the detectives' conduct on 15 May 2002 transgressed the threshold of acceptable police investigative behaviour in a material respect[153]. It rendered unfair the reception and use in criminal proceedings of the appellant's subsequent admissions. In effect, it deprived the appellant of his right to silence.

223 With all respect, it is impossible to reconcile the outcome favoured by the other members of this Court in this case with the unanimous conclusion reached in *Swaffield*. Even if what the detectives did here was not illegal as such, there remains "the broader question" of whether it "was in violation of" the appellant's "right to choose whether or not to speak to the police"[154]. In *Swaffield*, no caution at all was administered. Here, the caution administered was incomplete, and even its limited effectiveness was undermined through trickery and deception, including that arising from the non-official venue chosen for the conversation.

224 It is true, as Gleeson CJ and Heydon J point out, that many admissions are made by suspects at venues other than police stations[155]. However, this was not a case in which an admission was spontaneously volunteered or accidentally blurted out in an unexpected place. It is obvious that the detectives selected the park as a venue with a view to deceiving the appellant. It assisted them to deprive him of a free choice to speak to the police about the Logozzo offences. It denied him the right that he asserted in the April conversation to withhold his version until he was on trial in a court. As in *Swaffield*, the resulting admissions ought to have been excluded to avoid unfairness to him. This Court should so order so as to vindicate the appellant's right to silence, out of which he was tricked.

225 *Rejecting an unconvincing discrimen*: My conclusion is further reinforced by what was the unconvincing *discrimen* that led to James J's exclusion of part only of the May conversation as from p 25 of the record. It was at that page that Detective Abdy reassured the appellant:

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153 cf *Tofilau* [2007] HCA 39 at [188].

154 *Swaffield* (1998) 192 CLR 159 at 202 [94]. See also at 224-225 [165].

155 Reasons of Gleeson CJ and Heydon J at [75].

> "It's not as though we're going to slap the handcuffs on you and take you away otherwise we'd be at the police station if we were gunna do that, wouldn't we?"

226 Understood in its context, this was but one in a long series of reassurances by the police designed to distinguish an inferentially recorded conversation at the police station from a purportedly unrecorded off-the-record chat in the park. Statements to the appellant to the effect that "you might feel better if you tell us" and "one of these days you're gunna have to want to talk about it" were not significantly different from the pseudo-ingratiation with which the earlier 25 pages of the conversation were replete. If the "circumstances in which the admission was made" were such as to make it unfair to the appellant to use the evidence following p 25, the unfairness was, in my view, established long before the exchange recorded on that page. It was erroneous and artificial to choose the passage on p 25 as the point after which the record became inadmissible when that record was the product of a tactic that was unified, well planned and designed to procure the precise admissions that it did.

227 *Ignorance and stupidity*: Finally, there is a statement in the reasons of Gleeson CJ and Heydon J with which I disagree.

228 Gleeson CJ and Heydon J state that "every day police officers take advantage of the ignorance or stupidity of persons whom they eventually prosecute"[156]. Their Honours suggest that the appellant's incorrect belief about the availability of any admissions in the May conversation at a trial was simply a species of such "ignorance or stupidity". This approach implies that the educated and the clever enjoy a special position under the law which the ignorant and stupid do not. I could never agree with such a view.

229 It is true that a well-advised, clever accused would probably not have gone to a park with detectives expecting to engage in an off-the-record conversation in such a place. Indeed, in all likelihood, no attempt would have been made to deceive and trick such a person, or to administer to him or her only half of the official police caution.

230 However, the law, including the Act, exists to protect all defendants in criminal proceedings against relevant unfairness, not just the educated and the clever. The law is not silent for vulnerable people who are "ignorant" about their rights and who are regarded as "stupid". This point was made by this Court in 1950 in a powerful passage in *Lee*[157]:

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156 Reasons of Gleeson CJ and Heydon J at [77].

157 (1950) 82 CLR 133 at 159.

> "It is, of course, of the most vital importance that detectives should be scrupulously careful and fair. The uneducated – perhaps semi-illiterate – man who has a 'record' and is suspected of some offence may be practically helpless in the hands of an over-zealous police officer. The latter may be honest and sincere, but his position of superiority is so great and so over-powering that a 'statement' may be 'taken' which seems very damning but which is really very unreliable. The case against an accused person in such a case sometimes depends entirely on the 'statement' made to the police. In such a case it may well be that his statement, if admitted, would prejudice him very unfairly. Such persons stand often in grave need of that protection which only an extremely vigilant court can give them. They provide the real justification for the Judges' Rules in England and the Chief Commissioner's Standing Orders in Victoria, and they provide … a justification for the existence of an ultimate discretion as to the admission of confessional evidence."

As far as I am concerned, nothing has changed in this respect since 1950. The expansion of covert police operations and techniques only heightens the continuing force of what the Court then said[158].

231 To adapt the words of Tobriner J in *People v Dorado*[159], to limit the protection s 90 of the Act offers to defendants who are "stupid and ignorant" would be "to favor the defendant whose sophistication or status had fortuitously" made the need for protection unnecessary (or less necessary) in that defendant's circumstances. That could not be the purpose of s 90, and that provision should not be applied as though it were.

232 *Conclusion on application of s 90*: In the light of the reasoning in *Swaffield*, it cannot seriously be suggested that a failure to provide a caution, whether contemplated by the Judges' Rules or a Police Code of Practice, is irrelevant to the fairness to the defendant of the use of evidence gathered after that failure. This is so whether no caution at all was administered (as in *Swaffield*) or whether the caution was only half given and then undermined by deception, tricks and the venue chosen for the conversation (as was the case here). The result is the same. The consequent admissions are subject to exclusion as their use would be unfair to the defendant. This Court should be consistent in its approach to such defaults. It should visit them with similar consequences.

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158 *Tofilau* [2007] HCA 39 at [203].

159 398 P 2d 361 at 369-370 (1965) quoted *Miranda* 384 US 436 at 471 (1966).

Conclusions

233 *Exclusion of evidence and acquittal*: For the foregoing reasons the decision of James J to admit the first 25 pages of the May conversation was erroneous. Having regard to the circumstances in which the admissions recorded in those pages were made, it was unfair to the appellant to permit their use.

234 The appellant sought to have the evidence excluded pursuant to the power or discretion that s 90 of the Act confers. Shaw J was correct to conclude that the evidence should have been so excluded, although in his reasons he incorrectly included a reference to immaterial considerations. When the first Court of Criminal Appeal identified this error, it should have conducted its own analysis of the record, and concluded that s 90 of the Act applied nonetheless. When it failed to do so, James J should have so ordered. Because his conclusion gave rise to a miscarriage of justice affecting the appellant, the second Court of Criminal Appeal erred in failing to correct it. The suggested *discrimen* for permitting the evidence before, but rejecting it after, p 25 of the record was insubstantial and unconvincing.

235 In his notice of appeal to this Court, the appellant at first sought an order for a retrial. However, in the course of oral argument, counsel for the prosecution conceded that, absent the evidence of the admissions made by the appellant on 15 May 2002, the case against him in respect of the Logozzo offences was insufficient to justify a retrial[160]. Necessarily, that concession precluded any later application of the "proviso" in the matter[161]. That this is the case serves to emphasise the grave consequences of the unfairness to the appellant occasioned by the course that the detectives embarked upon on 15 May 2002.

236 The appellant remains convicted of the Kress offences, to which he pleaded guilty. He must serve the sentences imposed on him in respect of those offences. However, the convictions entered and sentences imposed in respect of the Logozzo offences cannot stand. In light of the prosecution's concession, a new trial should not be ordered.

237 *Adhering to established law*: Self-evidently, resolving a serious murder is a matter of very high public importance for any society. However, s 90 of the Act (as well as the antecedent common law) provides that such resolution may not be achieved by reliance on admissions procured in circumstances that render

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160 [2007] HCATrans 142 at 75.

161 *Criminal Appeal Act* 1912 (NSW), s 6(1).

their use unfair to the suspect[162]. In evaluating fairness courts must take into account a suspect's right to silence and the concomitant entitlement "to choose whether or not to speak to the police"[163]. As the Supreme Court of the United States has recognised[164]:

> "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."

238 Necessarily, by its decisions, this Court sets the standards for police interrogation of suspects in this country. We are either serious or not serious about upholding the basic principles of the accusatorial trial; the "fundamental rule" of the accused's right to silence; and the privilege to speak only after a full and proper police caution is administered. The inference is becoming inescapable that despite a long line of decisions including *McDermott*, *Lee*, *Petty*, and *Swaffield* this Court has shifted its direction[165]. It is not now resolved to preserve the previously stated values. Such an alteration to the law is not warranted by the language of s 90 of the Act. It is not justified by analogical reasoning from basic common law principles. In my view, such a change should not be made by the Court but only by Parliament, accepting the seriousness of the step that is then taken, and imposing its own alternative restrictions and protections for the rights of suspects.

Orders

239 The appeal should be allowed. The orders of the Court of Criminal Appeal of New South Wales dated 3 November 2006 should be set aside. In place of those orders, this Court should order that the appellant's appeal to that Court be allowed. The subject convictions should be quashed and in their place a judgment of acquittal should be entered in respect of the relevant counts of the indictment.

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162 cf *Tofilau* [2007] HCA 39 at [148].

163 *Swaffield* (1998) 192 CLR 159 at 202 [94].

164 *Miranda* 384 US 436 at 480 (1966) quoting Schaefer, "Federalism and State Criminal Procedure", (1956) 70 *Harvard Law Review* 1 at 26.

165 *Tofilau* [2007] HCA 39 at [203]-[209].