HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HEYDON AND CRENNAN JJ

MICHAEL JOHN CARR APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Carr v The State of Western Australia [2007] HCA 47
23 October 2007
P34/2006

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

N J Mullany with L M Timpano for the appellant (instructed by D G Price & Co)

S Vandongen with T B L Scutt for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Carr v The State of Western Australia

Criminal law – Evidence – Admissibility of videotape evidence of admissions recorded without suspect's consent – Police videotaped conversation with appellant in the lockup section of the police station – Appellant was unaware lockup conversation was being videotaped – Appellant made certain admissions – Whether lockup conversation was an "interview" within the meaning of s 570(1) of the *Criminal Code* (WA) ("the Code") – Relevance of formality of the lockup conversation – Whether s 570D(4) of the Code excluded, by implication, admissibility of videotape evidence of admissions recorded without suspect's consent – Relevance of assumption in s 570D(4)(c) of the Code that consent required – Difference between implication and assumption – Whether an "admission" within the meaning of s 570D of the Code included only those admissions capable of being videotaped.

Statutes – Interpretation – Purposive interpretation – Where the statutory provision reflects compromise between competing interests – Relevance of purpose or object of statute.

Words and phrases – "admissibility", "assumption", "consent", "exceptional circumstances", "formality", "implication", "interview", "right to silence".

Criminal Code (WA), Ch LXA, ss 570(1), 570D.
Interpretation Act 1984 (WA), s 18.

1 GLEESON CJ. I agree with Gummow, Heydon and Crennan JJ that the appeal should be dismissed. As to what their Honours describe as the second branch of the appellant's submissions, concerning the absence of consent to videotaping, I shall state my own reasons for not accepting those submissions of the appellant. Subject to that, I agree with the joint reasons.

2 One preliminary matter should be noted. It is not a rule of the common law, and it was not suggested in argument, that the trial judge was bound to exclude the evidence in question because the police did not caution the appellant at the commencement of, or during, the events that occurred in the lockup. It is not a principle of the common law that evidence of an admission, or a confession, to a police officer is inadmissible unless a caution is first administered. If that were the common law, then the Judges' Rules of 1912 would have been based upon a misconception[1]. The true position is that failure to administer a caution may enliven a judicial discretion as to whether to receive or reject the evidence. Thus, in the reasons of Dixon CJ, Webb and Kitto JJ in *Stapleton v The Queen*[2], the following appears:

> "It was said that the learned judge should have excluded the evidence given by Sergeant Mannion of what the appellant said in answer to his question[s] when the appellant was brought to the police station after his arrest. As has already been said, although the accused was under arrest on a charge of murder, no warning was given before the questions were put. The answers were not, however, inadmissible at common law as involuntary. True it is that Sergeant Mannion was a person in authority within the meaning of that rule. But there was no pressure or insistence, no fear of prejudice raised or hope of advantage held out, no inducement raising a presumption against the voluntariness of the prisoner's statements. Counsel for the appellant did not contend to the contrary. What he maintained was that in the exercise of the judge's discretion he ought to have excluded the evidence."

3 In this case, two of the grounds of appeal to the Western Australian Court of Appeal complained that the evidence in question should have been rejected, on discretionary grounds, because of the absence of a caution in the lockup. Those grounds of appeal were considered and rejected, and are not before this Court. If there were a common law rule of mandatory exclusion because of the failure to administer a caution, arguments about the construction of s 570D of the *Criminal Code* (WA) ("the Criminal Code") would be otiose. It was (for good reason) not argued that there was a common law principle that obliged the trial judge to

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1 See *Cross on Evidence*, 7th Aust ed (2004) at [33690].

2 (1952) 86 CLR 358 at 375-376.

exclude the evidence. The Court of Appeal ruled that considerations of fairness and public policy did not mean that the trial judge's decision to admit the evidence involved error. It is unnecessary to refer to the reasons of the Court of Appeal on that point, but the fact that discretionary arguments were raised and rejected should not be overlooked.

4 The appeal to this Court turns entirely upon questions of statutory construction. To the extent that s 570D is to be understood and applied in the context of common law principles, one of the relevant common law principles is that there are discretionary grounds, related to considerations of fairness and public policy, upon which a trial judge may reject evidence of admissions made by a person suspected of crime[3]. Section 570D did not displace that principle, but provided an additional, statutory, ground of mandatory exclusion in specified circumstances. If the facts of a given case do not fall within the specified circumstances, the common law grounds of exclusion, including discretionary grounds relating to fairness and public policy, remain.

5 Another general consideration relevant to statutory construction is one to which I referred in *Nicholls v The Queen*[4]. It was also discussed, in relation to a similar legislative scheme, in *Kelly v The Queen*[5]. It concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the *Acts Interpretation Act* 1901 (Cth) ("the Acts Interpretation Act"). It is also required by corresponding State legislation, including, so far as presently relevant, s 18 of the *Interpretation Act* 1984 (WA). That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.

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3 See, for example, *R v Swaffield* (1998) 192 CLR 159.

4 (2005) 219 CLR 196 at 207 [8].

5 (2004) 218 CLR 216 at 225-232 [22]-[40].

6 To take an example removed from the present case, it may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

7 As explained in *Kelly* and *Nicholls*, the general purpose of legislation of the kind here in issue is reasonably clear; but it reflects a political compromise. The competing interests and forces at work in achieving that compromise are well known. The question then is not: what was the purpose or object underlying the legislation? The question is: how far does the legislation go in pursuit of that purpose or object?

8 Section 570D, which took its place in the context of Ch LXA dealing with "Videotaped interviews", provided, in sub-s (2), that, on the trial of an accused person for a serious offence, evidence of any admission by the accused person should not be admissible unless either the evidence took a certain form (a videotape recording of the admission), or the prosecution proved that there was a reasonable excuse for there not being such a videotape recording, or there were exceptional circumstances which, in the interests of justice, justified the admission of the evidence. The section established a mandatory rule of exclusion of evidence of an admission unless the evidence was in the form of a videotape; but the rule was subject to two qualifications. That was the method chosen by the legislature to pursue the general purpose described in *Kelly* and in *Nicholls*. Subject to two qualifications, the section excluded evidence of an admission unless the admission was in a certain form. Other provisions of Ch LXA regulated certain aspects of dealing with videotapes and related matters, but we are concerned only with the statutory rule of exclusion of evidence. If the evidence of the admission was in the form referred to, that is to say, if the evidence was a videotape on which was a recording of the admission, then the statutory rule of exclusion did not apply. The qualifications to the rule did not arise for consideration. As noted earlier, there were and are potentially relevant common law rules that could result in the exclusion of the evidence, but they are not of present concern.

9 Once the appellant's first argument concerning the meaning of "interview" is rejected (as it should be for the reasons given by Gummow, Heydon and Crennan JJ) then it follows that the evidence of the admission by the appellant was in the form of a videotape on which there was a recording of the admissions.

According to the express terms of s 570D(2), the statutory rule of exclusion does not apply, and it is therefore unnecessary to consider the statutory qualifications to the rule.

10 The argument that, because the appellant did not consent to the interview in the lockup being videotaped, s 570D (as distinct from some other statutory provision or rule of common law) required exclusion of the videotape depends upon reading s 570D as containing some rule of exclusion wider than that stated in s 570D(2). The express words of s 570D(2) did not require exclusion of the videotape. If, by implication, the exclusion effected by s 570D was wider than appears from its express terms, then it is necessary for the appellant to identify the terms of the implication, and to explain why it should be made, bearing in mind that what is involved is an exercise in construction, not legislation[6].

11 The appellant put an argument based on what was said in my reasons in *Nicholls*[7], not about an implication, but about an assumption. I pointed out that s 570D(4)(c) assumed that the consent of a suspected person was necessary if the police were to videotape an interview. That appeared to me to be so because, in elaborating one of the qualifications to the statutory rule of exclusion, the legislation provided that it was, by definition (ie in all circumstances), a reasonable excuse for there not being a recording of an admission on a videotape that the accused person did not consent to the interview being videotaped. Why it would always (rather than sometimes) be a reasonable excuse for not videotaping an interview that the interviewee did not consent to the videotaping is hard to explain unless it is assumed that consent is necessary. I went on immediately to point out that the assumption was not challenged in argument. It should be added, however, that the basis of the assumption was questioned from the Bench. The transcript of argument in *Nicholls*[8] records that counsel for the respondent, having accepted that videotaping required the consent of an interviewee, was asked to explain why that was so. He was asked whether it was because of some other legislation. He said he could not point to any other legislation. Section 570D did not say, and no other provision in Ch LXA said, that videotaping could not occur without consent. By making absence of consent always a reasonable excuse for there being no videotape, the legislation appeared to assume that consent was necessary, but there is a difference between an assumption and an implication.

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6 See *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106 per Lord Diplock; *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586; [2000] 2 All ER 109; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423; *R v Young* (1999) 46 NSWLR 681 at 686-687 [5]-[12].

7 (2005) 219 CLR 196 at 207-208 [9].

8 [2004] HCATrans 124 at 84, 90.

12 The difference between an implication and an unexpressed assumption was described as critical by Mason CJ, in a constitutional context, in *Australian Capital Television Pty Ltd v The Commonwealth*[9]. He said:

> "It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.
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> It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument."

13 The task for the appellant is to show the existence of an implied rule of exclusion of evidence, that is to say, to show that the express statement of the rule of exclusion in s 570D(2) was incomplete, and that, by implication, the section also mandated the exclusion from evidence of a videotape to the making of which the interviewee had not consented.

14 It is unnecessary to pursue the question of what is involved in the expression "did not consent to the interview being videotaped" in s 570D(4)(c). Whether it applied only to a case of refusal, or whether it covered any case of absence of consent, is a problem that does not arise. Here, there was a videotape, and therefore no need to show a reasonable excuse existed. In any event, I am prepared to accept that the appellant did not consent to the videotaping, whatever exactly that means.

15 There may be cases in which one provision in an enactment throws light upon the meaning of another provision by indicating a legislative assumption about that meaning. An example is *Meyer Heine Pty Ltd v China Navigation Co Ltd*[10], where the general words of a statutory prohibition of conduct were silent on the territorial reach of the prohibition (a common circumstance in criminal legislation). There arose a question of construction as to whether the general words of prohibition applied to conduct outside Australia or applied only to

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9 (1992) 177 CLR 106 at 135 (reference omitted).

10 (1966) 115 CLR 10.

conduct within Australia; that is, whether the prohibition operated extra-territorially. In deciding that the prohibition did not apply to conduct outside Australia, this Court relied strongly upon another provision of the statute, concerning aiding and abetting, which reflected an assumption that conduct which took place outside Australia could not amount to a contravention of the Act. That assumption was consistent with a view about the legislative competence of the Australian Parliament which was widely held at the time of the enactment. General words of prohibition were therefore construed so as to be given a limited territorial operation. That construction was assisted by a manifestation, elsewhere in the Act, of a legislative understanding that the prohibition's reach was limited territorially. Reading down general words in order to give them a limited effect territorially is a commonplace exercise in statutory construction. In this case, however, no such exercise is proposed. There are no words in s 570D whose meaning is said to be made clear by noting the assumption in s 570D(4)(c). What is involved in the appellant's argument is an attempt to elevate the assumption directly into an implied widening of, or addition to, the rule of exclusion stated in s 570D(2), but no process of construction by which that can occur has been shown.

16 The assumption might be explained in a number of ways. It might reflect a view of the law. (This is what was questioned in the course of argument in *Nicholls*.) It might be the result of an oversight. It may be that the framers of Ch LXA did not advert to circumstances of the kind that arose in the present case. That would not be surprising. Whatever be the true explanation, it is beside the point unless, by some legitimate process of construction, s 570D could be given the meaning that, in addition to the rule of exclusion stated in s 570D(2), a videotape was to be excluded if the interviewee did not consent to the making of the videotape.

17 It cannot be said that the implication for which the appellant contends resolves, consistently with the advancement of the underlying purpose or object of the legislation, some ambiguity in the language of s 570D(2). That is not an end of the matter. Statutory construction is not confined to the resolution of ambiguities in language[11]. Since the object of the appellant's argument is to add, by implication, a ground of mandatory exclusion of evidence to that stated expressly in s 570D(2), the appellant must show (to adopt the modern test) that to confine the grounds of exclusion to that stated in s 570D(2) would defeat the purpose of the statute[12], or (to adopt a test formulated in earlier times) that to read s 570D(2) according to its terms produces a result contrary to the necessary

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11 *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592 per Lord Nicholls of Birkenhead; [2000] 2 All ER 109 at 115.

12 *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106.

intendment of the language of the statute[13]. In the circumstances of the present case, I see no material difference between these two tests.

18 The essential problem for the appellant is that of which I spoke earlier. Section 570D established a qualified, but otherwise specific, rule of exclusion of evidence of admissions. That, on any view of the matter, was only a limited step in pursuit of the object of protecting citizens against unfair police conduct, and protecting the integrity of the administration of criminal justice. To read s 570D as containing another ground of exclusion of evidence would only be to take a further limited step in pursuit of the same object. The legislation plainly did not attempt to deal with all possible problems of police misconduct or accusations of such misconduct. It cannot be said that the underlying purpose of the statutory provision would be defeated unless there were two limited rules of exclusion rather than one. The ground of exclusion stated in s 570D(2) was complete in itself. No additional ground of exclusion was implied.

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13 *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 at 32.

19 GUMMOW, HEYDON AND CRENNAN JJ. On 25 November 2004, at a trial in the Supreme Court of Western Australia before Jenkins J and a jury, the appellant was convicted of aggravated armed robbery contrary to s 392 of the *Criminal Code* (WA) ("the Criminal Code"). He was sentenced by Jenkins J on 20 January 2005 to six years' imprisonment without parole. His conviction was in respect of an armed robbery committed at the South Perth branch of the Commonwealth Bank on 8 April 2003.

20 An application for an extension of time to apply for leave to appeal against conviction and sentence was dismissed on 28 June 2006 by the Court of Appeal (Steytler P, McLure and Buss JJA)[14].

21 The evidence against the appellant comprised substantially his admissions to police. Those admissions were recorded on videotape, and the issue on the appeal to this Court is whether that videotape was properly received in evidence. The resolution of that question turns on the construction of Ch LXA of the Criminal Code (ss 570-570H) which is headed "Videotaped interviews".

22 The appellant was aged 26 at the time of his sentencing. He was arrested on 30 July 2003 and after a search of the house where he lived with his mother he was taken to the Kensington police station. There he was questioned by police officers. That questioning occurred in an interview room between 6:57 pm and 7:26 pm, and was recorded by videotape. During that questioning, the appellant was told that the interview was being recorded and that its contents could be used in court as evidence against him. He did not make any substantial admissions during the course of that questioning. There were three occasions on which he expressed a desire to have a lawyer present. The first was soon after the interview began, but he consented to answer questions. Later he expressed a desire to speak to his lawyer before providing an alibi. And at the end of the meeting, on being told "If you wish to hold off and talk to your lawyer, please do", he said he did.

23 After the questioning in the interview room, and after an unrecorded cigarette break with the police officers, the appellant was taken to the lockup section of the police station. There the officers undertook various administrative tasks regarding the appellant, such as making entries into police databases, returning the appellant's property, photographing him and taking DNA samples. These activities were routine, and were not contrived. They were undertaken because the appellant was to be returned to prison by reason of his violation of

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14 (2006) 166 A Crim R 1.

the terms of his parole relating to a previous conviction. The appellant had not then been charged in relation to the Commonwealth Bank robbery.

24 In the course of undertaking these tasks in the lockup, the discussion between the appellant and the police began in a question-and-answer format in order to elicit the information that was being entered into the police records. It was not idle banter or chit-chat. Shortly into that discussion, the appellant initiated a wider conversation with the police officers, during which he made suggestions indicating his involvement in the bank robbery. The police officers responded to these suggestions by asking questions intended to elicit more information and admissions about the robbery. The conversation resulted in a sequence of substantial admissions by the appellant about the conduct of the robbery which strongly indicated his guilt. The appellant had been cautioned both during the search of his place of residence and during the preceding interrogation in the interview room. No further caution was given by the police officers during the conversation in the lockup.

25 At the time the appellant made his admissions, the officers knew that the lockup was being recorded for security and other purposes by fixed surveillance cameras and microphones. There was thus an accurate video recording of the appellant's admissions, and an edited version of that video was admitted as Ex 17 and shown to the jury at the trial. The camera and microphones were permanently fixed in the lockup. They were not concealed, although there was some doubt as to how readily apparent they were to observers. In any event, the appellant was unaware of their presence.

26 The appellant gave evidence at his trial. Although he did not deny making the admissions, he claimed that they were untrue and that he made them solely to "frustrate", "tease" or "piss off" the police, as he bore the police significant animosity.

27 The appellant contends in this Court that s 570D(2) of the Criminal Code barred the receipt of Ex 17 into evidence and that his conviction should be quashed and an acquittal entered.

Chapter LXA of the Criminal Code

28 Chapter LXA commences with a sequence of definitions in s 570(1). These include the following:

> '"interview' means an interview with a suspect by ... a member of the Police Force; ...
>
> 'suspect' means a person suspected of having committed an offence;

'videotape' means any videotape on which is recorded an interview, whether or not it is the videotape on which the interview was originally recorded."

29 The Chapter contains detailed provisions regarding the possession, broadcast, retention, distribution and use of videotapes of interviews (ss 570A-570H). The determinative provision for this appeal, s 570D, lies in the midst of these. It is headed "[a]ccused's admissions in serious cases inadmissible unless videotaped" and relevantly provides:

"(1) In this section –

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

'serious offence' means an indictable offence of such a nature that ... it can not be dealt with summarily ...

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

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

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

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

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

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

(a) The admission was made when it was not practicable to videotape it.

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

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

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

30 A number of preliminary points about this legislation should be made. First, Ch LXA of the Criminal Code has been replaced by Pt 11 of the *Criminal Investigation Act* 2006 (WA) ("the 2006 Act"). While the entry into force of the 2006 Act may resolve some of the difficulties in Ch LXA revealed in the present case, other matters including the definition of "interview" may be of continuing relevance.

31 Secondly, Ch LXA relies upon an interlocking series of definitions. Thus, the criteria for admissibility in sub-s (2) of s 570D turn upon the definition of "videotape" given in s 570(1), and hence upon the meaning of "interview" in that sub-section. This may be contrasted with s 118 of the 2006 Act, which requires an "audiovisual recording" of an "admission", rather than a "videotape" of an "interview".

32 Thirdly, the criteria in s 570D are phrased in the negative. The legislation provides that evidence "shall *not* be admissible *unless*" the criteria are fulfilled, rather than providing that evidence "shall" be admissible "if" the criteria are fulfilled. It is accepted that evidence the admissibility of which is not barred by s 570D, nevertheless may be rejected by common law exclusionary principles, and that, conversely, admissions to which no common law objections might properly be taken nevertheless might be barred from receipt into evidence by reason of non-compliance with s 570D.

The preliminary ruling

33 In advance of the trial, Wheeler J had dismissed an application by the appellant for a ruling that the videotape of the conversation in the lockup was inadmissible. The appellant had contended that "interview" as defined in s 570(1) of the Criminal Code required a degree of formality lacking in the conversation in the lockup. Wheeler J rejected this submission, saying that s 570D was:

> "directed to the very real problem of the disputed admissions and of the vulnerability of persons in police custody to what was seen as potential misrepresentations or, indeed, even fabrications of what had been said by them to police officers, so that the mischief at which [the section] was aimed was … any conversation between police officers and a suspect

which could result in an admission, and I for my part would read the reference to an interview with that beneficial purpose in mind."

Her Honour also rejected submissions that the evidence nevertheless be excluded in the interests of justice. In particular, she stressed that it was not suggested that the admissions were not made voluntarily or that force, trickery or other improper conduct had been present.

The Court of Appeal

34 The leading judgment was given by Buss JA, with whom Steytler P and McLure JA agreed. His Honour set out the relevant legislation and, after referring to the decisions of this Court in *Kelly v The Queen*[15] and *Nicholls v The Queen*[16], concluded as follows[17]:

> "The legislative purpose in enacting s 570D was to prohibit, subject to the exceptions in paras (a), (b) and (c) of s 570D(2), the reception at trial of unrecorded admissions by an accused to the police. It is necessary, in order to promote this purpose, that 'interview' be construed broadly. An 'interview' is not confined to a formal interrogation. In my opinion, 'interview', within the definition of 'videotape' and in the context of para (b) of s 570D(2), means any conversation between a member of the Police Force and an accused person in relation to an alleged offence. It includes an informal conversation initiated by the accused person.
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> In *Nicholls*, Gleeson CJ said[18]:
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> 'Section 570D(4)(c) assumes that the consent of a suspected person is necessary if the police are to videotape an interview. That assumption was not challenged in argument in this Court.'
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> If, with great respect, s 570D(4)(c) makes that assumption (an issue which is not referred to in the other judgments in *Nicholls* and which does not require resolution in this appeal), s 570D does not prohibit the reception at trial of admissions by an accused person which are recorded on videotape

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15 (2004) 218 CLR 216.

16 (2005) 219 CLR 196.

17 (2006) 166 A Crim R 1 at 17.

18 (2005) 219 CLR 196 at 207 [9].

> in circumstances where the accused did not know that the admissions were being recorded, and therefore was not given the opportunity to consent or refuse to consent to the interview being videotaped. Section 570D does not, however, restrict or otherwise affect the general discretion of a trial Judge to exclude evidence of admissions obtained in those circumstances on the ground of unfairness or public policy."

Buss JA rejected the appellant's submission that the evidence of the conversation was inadmissible by reason of its not constituting an "interview".

The common law and Ch LXA

35 Before turning to the argument in this Court regarding Ch LXA of the Criminal Code, it is important to note that in this Court the appellant did not challenge the rejection both by Wheeler J and by the Court of Appeal of his submissions respecting the application of the common law exclusionary rules as to involuntariness, unfairness and public policy. There is accordingly no significance from these points of view in the failure of the police officers to repeat, during the conversation in the lockup, the cautions earlier administered (which did not, in any event, refer to any right to a lawyer, and did not have to), or in their failure to supply him with a lawyer during the conversation in the lockup.

36 Nor would a firm basis for construction of any legislative regime be provided by invocation from the common law of "the right to silence". The reason appears from what was said by Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen*[19]:

> "That expression is a useful shorthand description of a number of different rules that apply in the criminal law[20]. But referring, without more, to the 'right to silence' is not always a safe basis for reasoning to a conclusion in a particular case; the use of the expression 'right to silence' may obscure the particular rule or principle that is being applied."

In the passage from the speech of Lord Mustill in *R v Director of Serious Fraud Office; Ex parte Smith*[21] to which reference was made in *RPS*, Lord Mustill said

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19 (2000) 199 CLR 620 at 630 [22].

20 *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30-31 per Lord Mustill.

21 [1993] AC 1 at 30-31.

of the expression "the right of silence" that it "arouses strong but unfocused feelings" and went on to list six immunities to each of which the expression had been attributed. None of these would have fitted the facts in the present appeal.

37 Something more should be said here respecting the absence from the common law of some general "right to" or "privilege of" silence which is wider than or different from a right or privilege not to answer questions asked by persons in authority[22]. In particular, the following points should be made.

38 First, there is no principle of the common law that persons suspected by police officers of having committed a crime must be given a caution before interrogation in which they are warned of their right to silence, or that in default of such warning, evidence of any confession is automatically inadmissible. The only relevant common law principle is that a failure of police officers to warn in these circumstances may result in the trial judge exercising a power to exclude the evidence. If there were a common law principle of a type earlier described, it would not have been necessary to promulgate the Judges' Rules 1912, or their many equivalents in Australia. It would not have been necessary to enact legislation providing that evidence obtained after a failure to warn is presumed to have been obtained improperly, and liable to exclusion unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in that way[23]. And it would not have been necessary to enact legislation mandating warnings about the right to silence, as have some jurisdictions[24].

39 Secondly, there is no principle of the common law that persons suspected by police officers of having committed a crime must be advised that they are entitled to communicate with a legal practitioner before being interrogated, or that in default evidence of any confession is automatically inadmissible. If there

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22 See the remarks of Brennan CJ in *R v Swaffield* (1998) 192 CLR 159 at 184-185 [33].

23 See, for example, *Evidence Act* 1995 (Cth), ss 138 and 139.

24 See, for example, *Crimes Act* 1914 (Cth), s 23F; *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), s 122(1); *Crimes Act* 1958 (Vic), s 464A(3); *Police Powers and Responsibilities Act* 2000 (Q), s 431 and Police Powers and Responsibilities Regulation 2000, Sched 10, s 37; *Criminal Investigation Act* 2006 (WA), s 138(2)(b) and (3); *Police Administration Act* (NT), s 140.

were such a principle, it would not have been necessary for those jurisdictions which have done so to have enacted legislation imposing a duty so to advise[25].

40 It is with that in mind that attention falls upon the regime established by Ch LXA of the Criminal Code. Counsel for the State was correct to characterise Ch LXA in general, and s 570D in particular, as a preliminary threshold or gateway, and not as an exhaustive criterion of admissibility. As remedial legislation Ch LXA should be given a beneficial interpretation but it should not be read as doing more work than that disclosed by its subject, scope and purpose.

The submissions in this Court

41 The appellant made three principal submissions regarding Ch LXA. First, he submitted that the videotape of his admissions was inadmissible as it did not record an "interview". In order to constitute an "interview", the conversation between the appellant and the police officers was said to require a "degree or element of formality", and this in turn was said to require an appreciation on behalf of the appellant that (a) the conversation in the police lockup was being recorded, and (b) what he said could be used in evidence in court against him. Since the conversation in which the appellant made his admissions did not meet this definition of "formality" and thus did not constitute an "interview", the evidence of his admissions was said to be inadmissible.

42 Secondly, the appellant submitted that a videotape of an admission is not admissible unless the suspect consents to the interview being videotaped. The requirement of consent was said to be a "statutory assumption", or more correctly an implication, derived from the wording of par (c) of s 570D(4). Since the appellant did not consent to the videotape of his admissions being made, the videotape was said to be inadmissible on that account as well. This argument had not been put to the Court of Appeal.

43 Thirdly, the appellant submitted that there was no "reasonable excuse" for the absence of a videotape complying with the statutory requirements, and that there were no "exceptional circumstances" justifying the admission of the evidence despite that non-compliance.

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25 See, for example, *Crimes Act* 1914 (Cth), s 23G; *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), s 123; *Crimes Act* 1958 (Vic), s 464C; *Summary Offences Act* 1953 (SA), s 79A; *Police Powers and Responsibilities Act* 2000 (Q), s 431 and Police Powers and Responsibilities Regulation 2000, Sched 10, s 34; *Criminal Investigation Act* 2006 (WA), s 138(2)(c) and (3); *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 6.

44 In response, the State submitted, first, that the appellant's construction of the term "interview" was erroneous and that the Court of Appeal had correctly decided that "interview" encompassed an informal conversation, including the one initiated by the appellant. Even if "formality" were required, the State submitted that the appropriate degree of formality was present on the facts.

45 Secondly, the State submitted that there was no implied requirement of consent before a videotape could be admitted into evidence.

46 Finally, the State supported the outcome in the Court of Appeal by a ground now advanced on a notice of contention. The ground is that even if the appellant's submissions as to the meaning of "videotape" and "interview" were correct, the appellant's admissions were properly admitted into evidence as there were "exceptional circumstances" within the meaning of par (c) of s 570D(2) justifying their admission. Those "exceptional circumstances" centred on the existence of an accurate videotape of the appellant's voluntary admissions regarding a serious offence.

The meaning of "interview" in Ch LXA

47 Beyond the clarification that "interview" means an "interview with a suspect by … a member of the Police Force", the Criminal Code does not otherwise define the word "interview". The Court was taken to a number of dictionary definitions, none of which provided a clear resolution to the present case[26]. The appellant contended that "interview" connoted a "formal, unhurried interrogation procedure directed to the investigation of crime", as opposed to a chat, informal banter, or talk carried out in an atmosphere of informality. In part, this proffered definition was derived from dicta in the judgment of Wright J in *R v McKenzie*[27]. In that case certain admissions were ruled inadmissible because they were not recorded by videotape, not for the absence of an "interview".

48 The appellant submitted that a mere conversation would not suffice to constitute an "interview". To this end, the appellant pointed to the absence of

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26 Namely, those to be found in the *Oxford English Dictionary*, 2nd ed (1989), vol 8 at 3, and the *Macquarie Dictionary*, 4th ed (2005) at 743. Nor do those to be found in other dictionaries. One meaning of "interview" involves formality, but that meaning is not the only meaning.

27 [1999] TASSC 36 at [14].

any definition such as that found in s 74C of the *Summary Offences Act* 1953 (SA), in which "interview" is defined to include:

> "(a) a conversation; or
>
> (b) part of a conversation; or
>
> (c) a series of conversations".

This comparison of the South Australian and Western Australian provisions is of doubtful utility. The South Australian provisions were inserted in 1995 by s 5 of the *Statutes Amendment (Recording of Interviews) Act* 1995 (SA), well after the enactment in 1992 of the relevant Western Australian provisions. The most that could be said is that the South Australian provision might tend to highlight an ambiguity in the Western Australian one, but it does nothing to resolve that ambiguity one way or the other. The inclusion of conversations in the South Australian definition says nothing about whether they are to be excluded from the Western Australian provision, which is silent on the matter.

49 The appellant also contended that the "formality" of an interview required a "meeting of minds" about the nature, context and purpose of the discussion. However, that phrase is more likely to mislead than assist. The absence of a "meeting of minds" might indicate that the appellant's admissions were involuntary, or that they were elicited by unfair deception. Such cases can and should be dealt with under the common law exclusionary rules. They are not matters which touch upon the definition of "interview".

50 Even if it be accepted that the term "interview" connotes a degree of formality, it is not apparent where that line is to be drawn. The conversation between the appellant and the police officers in the present case was no mere informal chit-chat: the police officers fell in with the appellant's style of speech, but they structured the relevant part of the conversation as a patient and deliberate sequence of questions and answers designed to elicit admissions. However, there is much force in the observation of Ormiston J in *R v Raso* that[28]:

> "it would be difficult to identify that form of questioning which constitutes an 'interview' and that which constitutes some less formal kind of questioning in circumstances where the questions are being administered by the police".

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28 (1993) 115 FLR 319 at 348.

Raso concerned the meaning of s 23V(1) of the *Crimes Act* 1914 (Cth) which at that time included the phrase "interviewed as a suspect"[29]. That legislation concerned the tape recording of such interviews, and Ormiston J considered it[30]:

> "artificial, and possibly conducive to the abuses which the legislation is trying to avert, to draw distinctions between questioning which takes place on a relatively casual basis and questioning which results from some formal or organised interview".

51 The same is true of the present case. Contrary to the appellant's submissions, neither logic nor the text of Ch LXA justifies the conclusion that "formality" requires that the suspect appreciate that the conversation was being recorded and that its contents could be used as evidence against him. Rather, in an appropriate case these matters may attract the common law exclusionary rules relating to involuntariness, unfairness or public policy.

52 In the absence of textual indicia, the appellant turned to argument based on what was said to be the purpose of Ch LXA. This was said to be "to facilitate formality and propriety throughout the interview ... process" and hence to "serve" the "protection and preservation of the integrity of the interview process generally". The appellant submitted that the "evident policy of the statutory regime" was that evidence of the appellant's admissions be inadmissible, as part of the "broader imperative" of the statute, namely to ensure the "formality" of the interview process and hence its "integrity". The appellant did not otherwise indicate, however, what this formality would require, nor did he indicate how it was to be manifested beyond the suggested requirements that a suspect be cautioned and consent before any interview is videotaped.

53 It is difficult to see how any such policy of "formality" is evident either in the statute itself or in the extrinsic legislative materials. The term "interview" is largely undefined and on its face Ch LXA is unconcerned with the conduct of interviews beyond the requirement that they be videotaped if admissions made during them are to be admissible. Contrary to the appellant's contentions, nothing in the text or structure of the Chapter evinces any broader purpose of regulating the conduct of interviews. The textual indicia of Ch LXA all relate to

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29 The sub-section has since been amended to read "questioned as a suspect": *Measures to Combat Serious and Organised Crime Act* 2001 (Cth), Sched 4, Item 54.

30 (1993) 115 FLR 319 at 348.

the regulation of *videotapes* – their use, distribution and so forth – but not the regulation of interviews.

54 Moreover, a consideration of the relevant extrinsic materials confirms this textual conclusion. In his second reading speech, the Attorney General stated that the Bill that inserted Ch LXA[31]:

> "makes provision with respect to the increasing use of video recordings of police interviews for indictable offences ... [and] will ensure that in serious cases an accused's confession will be inadmissible unless it has been videotaped. Exceptions to this rule will be permitted, subject to the court's discretion, to receive evidence of admissions which have not been videotaped, if this is in the interests of justice."

55 Further, the appellant did not point to any passage in any of the reports[32] which led to the enactment of legislation similar to s 570D supportive of his submission that their goal was to ensure the "formality" and "integrity" of the interview process.

56 Even if the appellant were correct about the policy underlying Ch LXA of the Criminal Code, his construction of the term "interview" is inconsistent with his submission as to that underlying statutory purpose. If indeed Ch LXA is aimed at preserving the integrity of police procedure more generally, it seems odd that the requirement of videotaping should apply only to a vaguely defined subset of interactions between police and suspects, namely "formal" interviews. To the contrary, the text of the statute and its legislative history point towards its purpose as being the encouragement of video recording, and the expansion – and not restriction – of the circumstances in which video recording was appropriate.

57 The public benefit in accurate video recordings is not limited to the recording of admissions by suspects. Legislation of the kind contained within Ch LXA of the Criminal Code exists in all Australian States. The broad purpose of such legislation was discussed by Gleeson CJ, Hayne and Heydon JJ in *Kelly v The Queen*[33]. In the absence of an accurate record of what occurred during police

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31 Acts Amendment (Jurisdiction and Criminal Procedure) Bill 1992 (WA). Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 4 June 1992 at 3356.

32 Those reports are listed or referred to in *Kelly v The Queen* (2004) 218 CLR 216 at 227-228 [28] notes 32 and 33.

33 (2004) 218 CLR 216.

interviews, disputes could readily occur about the authenticity of any admissions said to have been made during such interviews, and about the propriety of the conduct of the police officers in question. Their Honours said[34]:

> "The disputes could turn on questions not only of fabrication, but also of misunderstanding, misrecollection, coercion, or oppression in a broad sense. Considerable amounts of court time were taken up, generally in the absence of the jury, in resolving disputes about confessions. Considerable amounts of police time, too, were taken up in interviews slowly recorded by officers operating typewriters or writing in notebooks. Grave allegations were commonly made suggesting police perjury, brutality and pressure. Unfounded though many of these allegations may have been, they were damaging to public confidence in the criminal justice system. Over time the courts, law reform agencies and legislatures began to respond to this state of affairs. In particular, as audio recording became more common in commercial and social life, and as the necessary equipment became more efficient, easier to operate, and cheaper, it was increasingly suggested that, either as a matter of sensible practice or as a precondition to admissibility, police interviews in criminal investigations should be electronically recorded."

58 Gleeson CJ, Hayne and Heydon JJ noted that the utility and desirability of an accurate video recording was not limited to ensuring the accuracy and voluntariness of any admission that was made, adding[35]:

> "[I]t came to be viewed as a commonplace, not only in circles favourable to defence interests but also in police circles, that, despite its financial cost, the electronic recording of police interviews, particularly video-recording, would generate real advantages. It would be useful in providing a means of establishing exactly what was said; in proving that requirements for cautioning and other formalities had been complied with; in narrowing the time within which it could be alleged that threats had been made; in helping to estimate the fairness and propriety of the questioning; and in helping to evaluate, by assessment of the demeanour and manner of the interviewee in responding, the reliability of what was said."

59 One textual indicium in Ch LXA of this policy is the very choice of the word "interview", rather than merely "admission", in the definition of

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34 (2004) 218 CLR 216 at 225-226 [25].

35 (2004) 218 CLR 216 at 228 [29].

"videotape". The statutory definition would not be satisfied, for example, by a videotape that recorded only a string of admissions without the surrounding context of the interview during which they were made. In the present case, however, the jury was presented by the playing of Ex 17 with the near entirety of the appellant's interactions with police.

60 The consequence of acceptance of the appellant's submissions on the meaning of "interview" would not be that *no* evidence of an admission is admissible unless it be on "videotape". Rather, the consequence would be that the admission might be proved by evidence inferior to and less accurate than a videotape, as long as the prosecution can satisfy the court of the existence of a "reasonable excuse". This result would be to turn the "best evidence rule" on its head[36].

61 The vice to which the appellant's construction leads is that police officers could attempt to evade the statute by informal off-camera discussions with suspects during which unrecorded admissions were made, in the belief that the requirement of videotaping did not apply to "informal" discussions and that the circumstances would provide a "reasonable excuse" within the meaning of par (b) of s 570D(2).

62 The appellant's challenge based on the definition of "interview" fails. The Court of Appeal was correct in determining that the meaning of "interview" encompassed any conversation between a member of the Police Force and a suspect, and included an informal conversation initiated by the suspect[37].

The requirement of consent

63 The second branch of the appellant's submissions concerned the requirement of consent by the suspect when being videotaped. The appellant had consented to be videotaped during his interrogation in the interview room at the police station but he did not consent to the subsequent videotaping in the lockup. At that stage he did not realise he was being filmed at all. The appellant submits that this lack of affirmative consent is another reason leading to the inadmissibility of his admissions.

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36 cf *Golden Eagle International Trading Pty Ltd v Zhang* (2007) 81 ALJR 919 at 921 [4]; 234 ALR 131 at 132-133.

37 (2006) 166 A Crim R 1 at 17.

64 However, before turning to the substance of that submission, two preliminary points must be made. First, the requirement of "consent" spoken of here relates to the *videotaping* of the interview, and not to the separate question of whether the interview was itself consensual. The appellant submitted that in the absence of a requirement that suspects consent before they can be videotaped, police duplicity and deception may induce suspects to speak when they do not wish to do so. The answer to that submission is that if a suspect makes admissions during an *interview* to which the suspect does not otherwise consent, real questions may arise whether the police conduct was sufficiently improper to merit exclusion of the evidence, whether the circumstances made it unfair to receive the evidence, and perhaps, though more rarely, whether the admissions were voluntary. However, that would be a matter for the application of common law exclusionary rules.

65 Secondly, the problem of non-consensual videotaping and other forms of recording or surveillance is the subject of legislation in each Australian State and Territory[38]. In Western Australia, surveillance of this kind is regulated by the *Surveillance Devices Act* 1998 (WA) ("the Surveillance Devices Act"). The cameras and microphones in the lockup were "optical surveillance devices" and "listening devices" within the meaning of s 3 of the Act. The Surveillance Devices Act contains prohibitions on the use of listening devices to record a "private conversation" (s 5) and on the use of optical surveillance devices to record "private activity" (s 6). Activities falling within the scope of those prohibitions require a warrant or other lawful justification such as consent: ss 5(2) and (3), 6(2) and (3).

66 Independently of any operation of Ch LXA of the Criminal Code, was the use of the surveillance cameras and microphones in the police lockup lawful in the absence of a warrant or the appellant's consent? In part, the answer to that question depends on the definitions of "private activity" and "private conversation" in s 3 of the Surveillance Devices Act, as these definitions mark out the extent of the prohibitions in ss 5 and 6 of that Act:

> "'private activity' means any activity carried on in circumstances that may reasonably be taken to indicate that any of the parties to the activity *desires it to be observed only by themselves*, but does not include an

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38 *Listening Devices Act* 1984 (NSW); *Surveillance Devices Act* 1999 (Vic); *Listening and Surveillance Devices Act* 1972 (SA); *Invasion of Privacy Act* 1971 (Q); *Surveillance Devices Act* 1998 (WA); *Listening Devices Act* 1991 (Tas); *Surveillance Devices Act* 2000 (NT); *Listening Devices Act* 1992 (ACT).

activity carried on in any circumstances in which the parties to the activity *ought reasonably to expect that the activity may be observed*;

'private conversation' means any conversation carried on in circumstances that may reasonably be taken to indicate that any of the parties to the conversation *desires it to be listened to only by themselves*, but does not include a conversation carried on in any circumstances in which the parties to the conversation *ought reasonably to expect that the conversation may be overheard*". (emphasis added)

67 Given the generally public nature of the police lockup, through which police officers (and others) were free to come and go, and given the administrative nature of the tasks with which the appellant and the officers were engaged, it seems highly doubtful that the appellant was engaged in an activity or conversation that he desired to be observed only by himself, or in which he had any reasonable expectation of privacy. Even if the videotape did record "private activity" or a "private conversation", it is likely that ss 5(3)(a) and 6(3)(b) justified the recording as being "carried out in the course of that person's duty as a law enforcement officer" or as being "reasonably necessary for the protection of the lawful interests of that principal party". The precise scope of these provisions was not pressed by either party in this Court. However, as Hayne and Heydon JJ observed in *Nicholls*, whatever the proper construction of legislation such as the Surveillance Devices Act, it "casts no light on the correct construction of s 570D" of the Criminal Code[39].

68 What, then, is the proper construction of s 570D as regards consent? Paragraph (c) of s 570D(4) stipulates as one ground for a "reasonable excuse" for the absence of a videotape, that the accused person "did not consent to the interview being videotaped". The appellant submitted that there was a "statutory assumption" – or perhaps more accurately a statutory implication – not simply that lack of consent was a reasonable excuse for the non-existence of a videotape, but rather that consent was an affirmative prerequisite for admissibility even if a videotape did exist. This submission should be rejected. Nothing in the definitions of "interview", "videotape" or "admission" requires that a suspect consent to being videotaped as a prerequisite for admissibility, nor, more broadly, does anything else in the text and structure of Ch LXA.

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39 (2005) 219 CLR 196 at 318 [362]. The Act under consideration in that case was the *Listening Devices Act* 1978 (WA), which was repealed and replaced with the present statute.

69 On a sequential reading of Ch LXA, the need to consider the absence of consent arises only if par (a) of s 570D(2) is unfulfilled; that is, when there is no "videotape on which is a recording of the admission". Only in such a state of affairs is it necessary to consider lack of consent as a reasonable excuse within the meaning of par (b) of s 570D(2). Paragraph (b) lifts the ban upon admission of the untaped admission if the prosecution proves, on the balance of probabilities, that there is a "reasonable excuse" for the absence of the videotape. Paragraph (c) also lifts that ban where there are the "exceptional circumstances" of which it speaks.

70 The effect of s 570D(2)(b) and (4)(c) is that oral evidence can be given on an admission made in an interview where the accused person did not consent to the interview being videotaped. But it does not follow that an interview which has been videotaped is inadmissible unless the accused person consented to that videotaping.

71 The facts in the present case may be contrasted with those in *Western Australia v Yerkovich*[40], on which the appellant relied for support. That reliance was, however, misplaced. In *Yerkovich*, the accused allegedly made unrecorded off-camera admissions, having refused to answer any questions during a videotaped interview. The State argued that the off-camera statements were admissible as there was a "reasonable excuse" for the non-existence of a videotape, namely that the accused "did not consent" to a videotaped interview. However, Roberts-Smith J ruled that the evidence was inadmissible: the exception in par (b) of s 570D(2) did not apply because the accused was never asked whether he did or did not consent to the interview being videotaped[41]. In this Court, counsel for the State accepted that "did not consent" in s 570D(4)(c) means that an accused "positively did not agree" to being videotaped.

72 This Court does not need to address the correctness of the ruling in *Yerkovich* or the response to it in this Court by counsel for the State: the essential point is that *Yerkovich* illustrates, contrary to the appellant's submissions, that par (b) of s 570D(2) and the question of consent within the meaning of par (c) of s 570D(4) come into play only in the *absence* of a videotape. So much was also demonstrated by the decision of this Court in *Nicholls*[42]. However, as explained above, in the present case there was, in Ex 17,

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40 [2004] WASC 62.

41 [2004] WASC 62 at [118]-[120].

42 (2005) 219 CLR 196 at 258 [155]-[156].

an admissible "videotape" of an "interview" in which the appellant made an "admission". Thus, par (a) of s 570D(2) was fulfilled and there was no need to turn to the dispensations provided by par (b) ("reasonable excuse") or par (c) ("exceptional circumstances"). Accordingly, there is no occasion to address the submissions on the notice of contention respecting par (c) or on the related issues raised by the third aspect of the appeal.

73 The appellant's lack of consent to the videotaping of his admissions was no bar to their admissibility. The second aspect of the appeal thus also fails.

The scope of Ch LXA

74 Section 570D was applicable to the admissions made by the appellant and, common law exclusionary rules not being infringed, the result is that the appellant's admissions were properly admitted. Despite this, the scope of s 570D is not as wide as the parties may have assumed. Although it is not necessary to do so to decide the present appeal, it is appropriate to say something about the limits of the section.

75 In their submissions, both parties to this appeal initially appeared to endorse the proposition that s 570D regulated any and all admissions made by suspects to police officers. The strength of that endorsement was weakened during the course of oral argument. Plainly, what became Ch LXA of the Criminal Code was drawn with attention to the recording of oral confessions of guilt by suspects to police officers. So much is clear, for example, from the use of the phrase "videotaped *confessions*" in the Attorney General's second reading speech, or from the inclusion of the concept of "interview" within the definition of "videotape"[43]. However, a confession of guilt is only one type of admission: the genus encompasses many species, not all of which involve oral statements, not all of which are admissions of guilt, and not all of which are capable of being videotaped.

76 As a general proposition, the law of evidence proceeds on the basis put by Parke B that "what a party himself admits to be true, may reasonably be presumed to be so", but there is no limitation as to the manner or form in which such an admission may be made[44]. For example, a suspect might make admissions to police in a letter, or in a telephone conversation unsolicited by the

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43 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 4 June 1992 at 3356 (emphasis added).

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

police. In *ASP v The Queen*, for example, the applicant made a confession in a letter enclosed with a Christmas card he sent to police[45]. In *R v Doherty*, an admission contained in a letter to police was probative of the accused's consciousness of guilt despite not being a direct confession[46]. Other examples can be given[47]. They include *R v Noffke*[48], a conspiracy case.

77 In oral argument, the appellant submitted that the contents of such a written admission to police would be inadmissible in Western Australia as it would not be contained in a "videotape", but that a videotaped oral recitation of the contents of that document would be admissible. Even assuming that the appellant's premise is correct, namely that the written admission is itself inadmissible, it seems odd that the contents of an inadmissible document can be admitted into evidence simply by reciting its contents orally[49], and it is even odder that Ch LXA should be construed so as to require this peculiar and contorted practice.

78 The proper resolution to this apparent difficulty lies in the realisation that the definition of "admission" in s 570D(1) must be read in light of its statutory context, namely its location in a Chapter of the Criminal Code concerning *videotaped* interviews. The heading to Ch LXA is, by reason of s 32 of the *Interpretation Act* 1984 (WA), "part of the written law", ie part of the Criminal Code. As with Pt V of the *Trade Practices Act* 1974 (Cth) considered in *Concrete Constructions (NSW) Pty Ltd v Nelson*[50], the heading to Ch LXA of the Criminal Code is "part of the context within which the substantive provisions of [the Chapter] must be construed and should be taken into consideration in determining the meaning of those provisions in case of ambiguity"[51]. However,

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45 [2007] NSWSC 339 at [69].

46 (2003) 6 VR 393 at 413-414.

47 In *R v Freer and Weekes* [2004] QCA 97, the accused addressed his letter of confession to the court and not to the police.

48 [1999] QCA 340 at [10].

49 cf *Dent v Moore* (1919) 26 CLR 316.

50 (1990) 169 CLR 594. See also the remarks of Stephen J in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 225.

51 (1990) 169 CLR 594 at 601.

unlike the heading of Pt V considered in *Concrete Constructions*, the heading of Ch LXA is an accurate reflection of, and not an artificial restriction upon, the substantive provisions of that Chapter. It is true that s 570D(1) defines "admission" in a very broad manner, including admissions "by spoken words or by acts or otherwise". But when viewed in context the definition of "admission" is concerned with those admissions capable of being videotaped. It is for this reason, and not by way of "reasonable excuse", that written admissions or the like would be admissible albeit not embodied in a "videotape". In such cases, the admission would be one that fell outside the scope of Ch LXA.

Conclusion

79 The appeal should be dismissed.

80 KIRBY J. This appeal comes by special leave from the Court of Appeal of the Supreme Court of Western Australia[52]. It is one of several recent appeals that concern laws enacted to provide for the recording of admissions made to police by suspects under police interrogation[53].

81 At the material time the applicable law in Western Australia was found in Ch LXA of *The Criminal Code* of that State ("the Code")[54]. Those provisions were inserted in the Code by an amendment enacted in 1992[55]. They came into effect in 1996. Laws for like purposes, but differently expressed, were enacted in other Australian jurisdictions in the 1980s and 1990s[56].

82 The laws so enacted followed a long series of decisions of this Court[57], reports of law reform agencies[58] and comment by scholars[59] addressed to problems that had arisen, for the administration of criminal justice, out of earlier police practices. Such problems included so-called police "verbals"[60]. To

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52 *Carr v Western Australia* (2006) 166 A Crim R 1.

53 cf *Em v The Queen* [2007] HCA 46. Earlier cases include *Kelly v The Queen* (2004) 218 CLR 216; *Nicholls v The Queen* (2005) 219 CLR 196.

54 Notably, the Code, s 570D.

55 *Acts Amendment (Jurisdiction and Criminal Procedure) Act* 1992 (WA), s 5.

56 See eg *Crimes Act* 1900 (NSW), s 424A introduced by the *Evidence (Consequential and Other Provisions) Act* 1995 (NSW), Sched 1, Item 1.5[3]. This provision was later transferred to the *Criminal Procedure Act* 1986 (NSW), s 108. In 2001 that section was renumbered as s 281. See also *Crimes Act* 1958 (Vic), s 464H introduced by the *Crimes (Custody and Investigation) Act* 1988 (Vic); *Summary Offences Act* 1953 (SA), s 74D; *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 8(2)(a) (now repealed); cf *Kelly* (2004) 218 CLR 216 at 228-229 [30]-[35].

57 *Cleland v The Queen* (1982) 151 CLR 1; *Carr v The Queen* (1988) 165 CLR 314; *Duke v The Queen* (1989) 180 CLR 508; *McKinney v The Queen* (1991) 171 CLR 468.

58 Australian Law Reform Commission, *Criminal Investigation*, Report No 2 (Interim), (1975) at 70-72 [154]-[156]; South Australia, Criminal Law and Penal Methods Reform Committee, *Criminal Investigation*, Second Report, (1974) at 194.

59 eg Campbell and Whitmore, *Freedom in Australia*, 2nd ed (1973) at 82-83.

60 *Kelly* (2004) 218 CLR 216 at 262-263 [138]-[139].

eradicate the problems, changes occurred both in the statutory and common law, designed to address, at once, the *integrity* and *reliability* of the record of admissions and the *acceptability* of the means by which those admissions were procured[61].

83 The interpretation of the contested legislation examined in this appeal, adopted by the Court of Appeal[62] (and now by the majority in this Court[63]), addresses the concern about the *integrity* of the record. However, it does not give effect to the other purpose of the legislation to guarantee the *acceptability* of the way in which such admissions are obtained. In the Code this was not left to the residual discretion to exclude evidence under the rules governing involuntariness, unfairness or public policy[64]. It was part and parcel of the scheme of the legislation applicable to the present case.

84 A correct legal analysis of the Code requires that the appeal be upheld. Because the prosecution did not suggest that the conviction below could be sustained without the evidence of admissions, secured in contravention of the statutory provisions applicable to the case, the appellant is entitled to an acquittal. This Court should so order.

The facts

85 *The background facts*: The background facts are stated in the reasons of Gummow, Heydon and Crennan JJ ("the joint reasons")[65]. Those facts reveal that Mr Michael Carr ("the appellant") was suspected of involvement in an armed robbery of a bank in a Perth suburb. His residence was searched and he was taken to the Kensington Police Station for interview by police officers. The offence of which he was suspected, namely robbery with aggravated

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61 See generally Dixon, *Interrogating Images: Audio-visually Recorded Police Questioning of Suspects*, (2007) at 1-25.

62 (2006) 166 A Crim R 1 at 15-19 [31]-[47].

63 Reasons of Gleeson CJ at [1] and reasons of Gummow, Heydon and Crennan JJ ("the joint reasons") at [56].

64 Joint reasons at [64].

65 Joint reasons at [19]-[26].

circumstances[66], was a "serious offence"[67]. It therefore attracted the operation of s 570D of the Code, the meaning of which section is in contest in this appeal.

86 As was correctly recognised by Buss JA, who gave the principal reasons in the Court of Appeal[68], it is essential to set out more facts than appear in the joint reasons concerning the initial interview of the appellant at the police station and the subsequent conversation in the lockup section of that station ("the lockup"). This may be tedious. However, without such additional facts, the appellant's argument cannot be fully understood.

87 *Interview in the interview room*: In apparent intended conformity with s 570D of the Code, when the appellant arrived at the police station, he was taken to a place described as "the interview room". He was interviewed there by Detective Senior Constables Richards and Shillingford of the Kensington Detectives Office. As s 570D of the Code provides, the interview was recorded on videotape. Detective Senior Constable Richards noted aloud the commencement time as being 7 pm and its conclusion as 7.29 pm. The interview room was "fitted with videotape recording equipment including microphones"[69]. As was explained to the appellant, the interview was the subject both of sound and visual recording. It followed a predictable, familiar and proper course. This included the following questions and answers (emphasis added):

> "Okay. Michael, as I've, um, advised you this interview is going to be recorded on video. There's a camera through the window there, okay, and these two dots are microphones. They'll pick up what we're going to say so when you speak I ask that you just speak up fairly – not loud but nice clear voice for us and don't tap the table. The time by my watch is, um, 7 pm, Wednesday, the 30th of July, 2003. [Detective Senior Constable Richards introduced himself and Detective Senior Constable Shillingford and obtained the name, date of birth and address of the appellant.]
>
> Q: Okay. Michael, we're here to interview you in regards to what you know about a bank robbery. Before I go into anything like that

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66 The Code, s 392 as it stood at the time of the subject robbery. The provision was later amended by the *Criminal Law Amendment (Simple Offences) Act* 2004 (WA), s 36(3) but without any material effect.

67 Relevantly, the Code, s 570D(1) defines "serious offence" to mean "an indictable offence of such a nature that … it can not be dealt with summarily". Robbery with aggravation is such an offence.

68 (2006) 166 A Crim R 1 at 6-8 [18]-[20].

69 (2006) 166 A Crim R 1 at 5 [15].

there's just a little bit of background that I want to learn from you first of all, okay. First of all, your level of education.

A: Year 11.

Q: Yep. Um – and how long ago was that? How long since you've been to school?

A: Um – 95, 94.

Q: Okay. … And who do you live … with?

A: Um, I reside … with my mother and my sister.

Q: Okay. Um – like I said, I need to – I need to ask you some questions in regards to a – to a bank robbery that we're investigating. Before I ask you any questions in regards to that I'm going to give you a caution and it's important that you understand it, okay, so at the end of it I'm going to ask you to repeat it back to me. In fact, I've already given you the caution before – um – but we'll just go over it once more, okay –

A: Mm hm.

Q: – for the purpose of the video and that is you're not obliged to say anything unless you wish to do so. Anything you do say will be recorded on the video and may be used as evidence in court. Can you please explain to me what you think this means?

A: Um – that without my lawyer present – um – it, um – anything that I do say or could say could jeopardize my future – well being. Um – I don't wish to say anything about any bank robbery because I do not do anything like that … I don't wish to say anything without my lawyer present anyway pretty much.

Q: No dramas. I was wondering if you'd just persist with me for a minute.

A: Yep.

Q: Um – it sounds like you've basically got the gist of what I'm – what I'm talking about.

A: Yep.

Q: If I ask you a question do you have to answer it?

A: No.

Q: Okay. If you want to answer it can you answer it?

A: Um, if I want to I can, yes.

Q: Okay. It's your choice, isn't it?

A: Yep.

Q: And if you answer it it's going to be recorded on the video. You understand that?

A: Yep.

Q: If you're charged *this video may be played in court*. Do you understand that?

A: Yep.

Q: And what – what's that called?

A: [No audible response].

Q: The tape being played?

A: Um – what's it called?

Q: Evidence?

A: Evidence, yeah.

Q: It's going to be evidence used against you.

A: Yep.

Q: Okay. So you understand that?

A: Yep. …

Q: Okay. What I'm trying to get at is are you on – are you with us at the moment? You can understand what we're talking about?

A: Yeah. Quite clearly.

Q: Okay. And you're quite happy just to continue on with this until I sort of explain to you what it's all about and, um –

A: Yep.

Q: – put a few things to you? Like – like I said, it's up to you whether you want to answer those questions –

A: Yep. Not a problem.

Q: – okay, but I'm going to – going to say a few things to you and it's up to you how you want to respond. Are you happy with that?

A: All right, mate. Yep.

Q: Okay."

88 Questions ensued, directed to the search conducted at the appellant's residence, pursuant to a search warrant, immediately before he was brought to the police station. Those questions were followed by further questions relating to the appellant's knowledge about the bank robbery. He denied any such knowledge. The appellant was then questioned concerning his mother and his girlfriend. He was asked if he had an alibi for the time of the robbery. He responded:

"A: Um – I don't know. I'd have to speak to my lawyer about it. Um – this is getting pretty heavy now. Um – just leave these kinds of questions as I don't have any – I don't have an alibi at this time because I haven't thought about it or, um, anything like that. I'd have to speak to my lawyer as to any relevancies if I was to be put in place of someone that was supposed to be involved in this kind of stuff. Um –"

89 There followed further questions about the appellant's girlfriend, to which he objected, and about his mother. He was shown photographs taken from video security footage of the bank at the time of the robbery. He again denied any involvement. The interview concluded (emphasis added):

"Q: Well, at the moment we're on video. I'm giving you the opportunity to speak. *Once again, I'll tell you you're under caution. You don't have to talk –*

A: Yeah, I know.

Q: – but I'm still going to go through with these questions.

A: Yeah, that's fair enough.

Q: *If you wish to hold off and talk to your lawyer, please do.*

A: Yeah, I do.

…

Q: Okay. Thanks, Michael, for your time in answering your questions.

A: All right, thank you.

…

Q: … Is there anything you wish to add while you've got the chance *while the tape's running* that we've gone over or, um, we haven't gone over that you wish to talk about now while you have the opportunity?

A: No.

Q: Okay. All right. Well, if that's the case, um, *we're going to finish the video*. We've obviously got inquiries that still need to be completed.

A: Yes.

Q: Um – if any charges happen further on down the track –

A: Mm hm.

Q: – a copy of this tape and the tape that was – the interview that was done at the scene at the search warrant will be made available to you or your solicitor. Contact your solicitor, they'll need to contact us and we can provide one for you.

A: All right then. No worries.

Q: Okay. If that's all we've got to talk about *we'll stop the video now*. It's, by my watch, 7.29 pm …"

90 *Features of the interview*: Ten features of the foregoing interview can be noted. First, there was precision as to time, indicating a recognition by the participating police officers of the importance of recording the beginning of the recorded interview. Secondly, care was observed, at the outset, to check the appellant's levels of education and understanding of the caution that was then administered to him. Thirdly, the caution given to the appellant bore a dual aspect, namely advice about the absence of any obligation to say "anything" except voluntarily and a warning that what was said would be recorded and might be used later. Fourthly, the appellant was told that the record would include anything said in the ensuing interview. It would be recorded "on the video"; by implication this was the "video" recorded in the interview room as specifically pointed out and explained to the appellant. This, and this alone, was the recording identified as that which "may be played in court".

91 Fifthly, the appellant expressed the desire not to say anything "much" without his lawyer present and the interrogating detective expressed his understanding that this was the appellant's intention ("No dramas"). Sixthly, the appellant repeatedly referred to holding off and talking to his lawyer, a privilege the interviewer had offered. Seventhly, the interviewing detective ultimately indicated his intention to "finish the video". Eighthly, in confirmation of this, the detective promised to provide copy of the videotape (including one earlier taken at the search of the appellant's residence) to the appellant or his solicitor. Ninthly, the termination of the interview was noted, again with exactness, not as 7.30 pm, for example, but as 7.29 pm. To the untutored, or even tutored, understanding, this was equivalent to telling the appellant that his "interview" by the police was finished. Tenthly, this conclusion was confirmed by the physical removal of the appellant from the interview room with its indicated cameras and microphones.

92 *Videotaped conversation in the lockup*: The appellant was then taken to the lockup. Unknown to him, that place was under the surveillance of video cameras and subject to sound recording. It is not quite correct to say that there was no "idle banter or chit-chat"[70]. Whilst, as soon became obvious, the appellant was unaware of the presence of video and sound recording, the police officers were not only aware of these facilities but quickly realised that the appellant had not appreciated their existence. The detectives immediately resolved to take advantage of that fact.

93 The recording of what ensued included the police reactions to the appellant's statements. The two detectives are seen at the outset to speak in whispered, hushed tones. Whilst it is difficult to understand exactly what is said by them, at one point Detective Senior Constable Richards proceeds into the interview room and looks directly at the camera and a voice is heard saying: "He does not know." Although this was not said at the very outset of the appellant's volunteered statements in the lockup, it preceded inculpating questions asked by the detectives of the appellant, such as whether he had done "jobs" on other banks.

94 It may be true that, in the lockup, the detectives had administrative duties to perform in processing the appellant. However, observation of the surveillance film, and a reading of the transcript taken from it, make it plain that the police officers were using well-known techniques of interrogation, in the hope of procuring more information from the appellant than they had secured in the immediately preceding interview. In the resulting transcript of record, the letter "R" refers to Detective Senior Constable Richards, the letter "S" refers to

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70 Joint reasons at [24].

Detective Senior Constable Shillingford and the letter "C" is a reference to the appellant.

95 The record begins with small talk, by inference intended to put the appellant at ease and loosen his tongue now that (as he thought) his interview with the police was over. Detective Senior Constable Shillingford guessed at the appellant's star sign:

"*Small talk and obtain personal details*

(S) Gemini?

(C) Gemini. How old are you?

(S) I got ten years on you.

(C) Your partner's younger. 32, 33, 33.

(S) I'm 68, you're 78.

(C) Oh yeah. Excellent, year of the horse.

(S) Is it?

(C) Mine is.

(S) I wouldn't have a fucken clue.

(C) And how old are you?

(R) 30 at the moment.

(C) 30.

Tape briefly skips forward

(C) You don't look that old.

(S) Thanks.

(C) What did the bank staff reckon when they conducted the interview with them? It was like he was the floor manager, he conducted the interview well. I wasn't very aggressive, was I? Very assertive actually. They would have said a professional, down pat, didn't lose … didn't break stride or a sweat. Hey?

(R) That's right mate.

(C) Na, dead set or what. What about the cunt I turned around and caught hitting the buzzer?

(S) Did you catch someone?

(C) Caught him mate.

(S) Caught him.

(C) Yeah. He was on the ground going like this (demonstrates trying to activate the alarm by hitting under the lock-up bench). He was on his knees (demonstrates pointing a gun) I said 'what are you doin'?'

(S) Did ya swear at them at all?

(C) Na, be real, I just said this, this is all I said. It was like this. Hurry up I'm in a fucken hurry, I'm in a bit of a hurry, hurry up!"

96 I will not set out the rest of the conversation. Before long the police officers were engaging in a style of expression identical to the appellant, complete with slang and expletives. The exchange bears quite a contrast to the style, content and expression of the interview recorded earlier in the interview room. In the earlier exchange, the appellant disclosed that he had been a heroin addict in 1996-7 and was on the methadone programme. Having engaged the appellant in informal conversation in this way, the detectives, especially Detective Senior Constable Shillingford, addressed questions not only to the conduct of the subject bank robbery but to the use of stolen cars, "shooters" and the appellant's involvement in "other jobs".

97 Because of the surveillance equipment in the lockup, the integrity and reliability of the boastful, inculpating statements made by the appellant in his lockup conversation appear to be established. The statements were made with the bravado and boastfulness of a person who did not believe that he was under surveillance or that his remarks were being recorded.

98 *Admission of evidence, verdict and appeal*: In a preliminary ruling in the Supreme Court of Western Australia, before the appellant's trial, Wheeler J overruled the appellant's application that the lockup evidence be ruled inadmissible, because contrary to s 570D of the Code. The trial then proceeded upon that basis before Jenkins J and a jury. Evidence was given and submissions were made in an attempt to explain the lockup admissions. However, the jury were evidently unconvinced that the appellant had only "wanted to tease [the

police] or to piss them off in circumstances where he believed that what he said would not be recorded and therefore could not be used against him"[71].

99 The jury's guilty verdict and the appellant's conviction followed. Various grounds of appeal were argued in the Court of Appeal. However, the only ground remaining relates to whether the evidence in the videotape of the lockup conversation was inadmissible on the basis that it did not conform to the requirements of the Code.

The legislation and common ground

100 *Two basic postulates*: The outcome of this appeal will not be decided by whether the appellant was guilty in fact of the offence of robbery with aggravated circumstances, as charged. If that were the question before this Court, there could be little doubt as to what the outcome should be. As Wheeler J remarked, in her preliminary ruling, the conversation in the lockup was "very detailed and one which tallies at very many points with the statements … of a number of witnesses to the offence so that reliability appears to be assured when one looks at the content and compares it with the subject of other depositions"[72].

101 If a person who has committed a serious crime makes admissions consistent with his involvement in that crime, and those admissions are accurately recorded, why should the law be concerned to reconsider his conviction? Above all, why should it contemplate an order acquitting such a person of a crime when his guilt is seemingly established reliably, by his own words?

102 The answer to these questions lies in features that are central to the criminal trial process observed in Australia. Specifically, it derives from the requirements established by the Parliament of Western Australia for the conduct of trials of serious offences in that State, where the conviction of an accused person rests on evidence of that person's admissions to police. As is often said, the rule of law is relatively easy to accord to popular people who are, or may be, innocent of a crime. It is tested when its principle is invoked by a prisoner who claims to have been convicted on inadmissible evidence which, it is said, should not have been placed before the jury. In such a case, upholding the law, and the procedures that the law mandates, may be more important for the interests of the community than obtaining, or affirming, the conviction of a person such as the appellant.

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71 Directions to the jury by Jenkins J explaining the appellant's case at trial. See *Carr* (2006) 166 A Crim R 1 at 12 [28].

72 Ruling by Wheeler J cited in *Carr* (2006) 166 A Crim R 1 at 10 [25].

103 There is a second feature of the Australian criminal justice system that should be mentioned. Trials of serious crimes, such as the present, are accusatorial in character[73]. Valid legislation apart, it is usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence. Ordinarily (as here) the accused does not need to prove his or her innocence[74].

104 This second feature of the criminal justice system is not always understood. Yet it is deeply embedded in the procedures of criminal justice in Australia, inherited from England. It may even be implied in the assumption about fair trial in the federal Constitution. It serves as a check on the powers of the state and as an important defence for individual liberty. It is a reason why countries that observe the accusatorial system tend to have a higher quality of liberty than countries that observe different traditions.

105 Sometimes it falls to this Court to defend these basic features of the legal system, invoked by unattractive parties, including prisoners who appear to be, and may indeed be, guilty of the offence charged. In such cases, the observance of legality is even more important than keeping an individual such as the appellant behind bars. To the extent that this Court upholds the rule of law, it offers the protection of the law that is precious for everyone in the Commonwealth.

106 *The provisions of s 570D*: The provisions of s 570D of the Code are set out in the joint reasons[75]. I will not repeat the legislation. I incorporate it by reference. The section must be read with certain definitions contained in s 570 of the Code in mind. Relevantly, these provisions state:

> "(1) In this Part, unless the contrary intention appears –
>
> …
>
> 'interview' means an interview with a suspect by –
>
> (a) a member of the Police Force; or

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73 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64-65 [34].

74 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 532.

75 Joint reasons at [28]-[29].

(b) …

'suspect' means a person suspected of having committed an offence;

'videotape' means any videotape on which is recorded an interview, whether or not it is the videotape on which the interview was originally recorded.

(2) In this Part, a reference to part of a videotape includes a reference to the visible part and to the audible part of the recording on the videotape."

107 This Court considered the requirements of s 570D of the Code[76] in *Nicholls v The Queen*[77]. The view that prevailed in that case laid emphasis on the fact that s 570D was directed to providing a solution to the problem of admissions made to police and the special difficulty presented by police "verbals"[78]. In this appeal, neither party questioned, or sought qualification of, the holding of the Court in *Nicholls*.

108 However, the appellant submitted that this appeal presented a new and different question for the elucidation of the application of s 570D. It was not, as such, concerned with the ambit of the concept of "interview", at issue in cases such as *Nicholls* and *Kelly v The Queen*[79] in respect of unrecorded alleged "admissions" made by accused persons to police whilst in their custody. Here, there was no question but that the appellant's admissions were recorded on a videotape. Accordingly, the issue decided in *Nicholls* does not provide the answer to the issues argued in this appeal. More elucidation is needed.

109 *The 2006 amending Act*: The Court was told that, since the appellant's arrest in July 2003, the statutory requirements for the conduct of interviews by police in Western Australia have been altered once again. The *Criminal Investigation Act* 2006 (WA) ("the 2006 Act") has been enacted. It commenced on 1 July 2007. One feature of the 2006 Act is the replacement of references to

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76 As it stood prior to the enactment of the *Criminal Code Amendment Act* 1999 (WA).

77 (2005) 219 CLR 196.

78 *Nicholls* (2005) 219 CLR 196 at 208 [10] per Gleeson CJ, 237-238 [98]-[100] per McHugh J, 257 [150]-[151] per Gummow and Callinan JJ, and at 275-277 [214]-[217] of my own reasons; cf at 309-310 [332]-[335] per Hayne and Heydon JJ.

79 (2004) 218 CLR 216, where the relevant provision referred to "official questioning".

"videotape" (as appearing in s 570D) with "audiovisual recording of an interview"[80]. Inferentially this change was adopted because of changes in the technology by which recordings are now captured on media other than videotape. The 2006 Act does not apply to the appellant's case. The appeal must be decided within the four walls of s 570D of the Code, as earlier applicable. Nevertheless, some issues presented by the appeal will be of relevance to the interpretation and application of the new legislation.

The issues

110 *Common ground*: A number of features of the case can be put to one side because of matters either agreed between the parties or shown to be immaterial to the outcome of the appeal.

111 It was common ground that, at the time of the lockup conversation between the appellant and police (as of the earlier interview), there were reasonable grounds to suspect the appellant of the "serious offence" of robbery. It was also common ground that the appellant was ignorant of the fact that the lockup conversation was being recorded. Moreover, at no time before or during that second conversation was the appellant re-cautioned. Nor was he immediately or thereafter taken to the interview room to be confronted with the admissions that he had made in the lockup.

112 The parties accepted that legislation, such as s 570D of the Code, was to be construed having regard to its own peculiarities. In each Australian jurisdiction where such legislation had been adopted, it represents something of a compromise between competing interests in society. In *Kelly*[81], this Court emphasised the importance, in each case, of giving effect to the actual language of the legislation, accepting that this varies as between different jurisdictions. In this respect, the Code, applicable in Western Australia, does not lay down specific requirements of police procedure or discipline[82]. Instead, it is concerned with the admissibility of evidence derived from police investigations. Of necessity, the rules for such admissibility impinge on police conduct. They do so

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80 See eg ss 117, 119, 123. Note that the parties agreed that, in fact, despite changing technology, the surveillance in the lockup was captured on "videotape", not on some non-tape recording device: [2007] HCATrans 143 at 75, 2040 and 2150.

81 (2004) 218 CLR 216 at 236 [51].

82 Contrast, in the United Kingdom, *Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*: see Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, made pursuant to s 66(1) of the *Police and Criminal Evidence Act* 1984 (UK).

both because a provision, such as s 570D, expresses the applicable law of the State and because it sanctions non-complying police conduct in a way inimical to the achievement of police outcomes.

113 Unsurprisingly, the appellant accepted that there were admissions contained in the lockup conversation that could be regarded as probative of his guilt of the offence charged. His counsel apparently accepted that, if the case came down to the residual common law discretion to exclude evidence obtained in a manner that was involuntary, unfair or contrary to public policy, it would not succeed. In advance of the trial, such an argument had been specifically considered and rejected by Wheeler J[83]. That decision was affirmed by the Court of Appeal[84]. The argument was not revived in this Court.

114 In this Court, the State advanced a new argument, based on a notice of contention to which reference will be made. However, if the specific legal points were determined against it, the State did not suggest that the appellant's conviction should be maintained on the basis of the "proviso"[85]. That is, the State would not argue that no substantial injustice had occurred. In this way, the issues to be decided in the appeal were narrowed substantially.

115 *The issues for decision*: The issues for decision in this appeal are:

(1) *The "interview" issue*: Was the conversation between the appellant and the two police officers, which took place in the lockup, an "interview", as required by s 570D of the Code? Does s 570D contemplate that, to be admissible, the "interview" of a "suspect" by a member of the Police Force in a videotape must possess the type of formality and mutuality that characterised the original interview in the interview room? Or can the informal type of questioning, such as took place in the lockup, amount to an "interview", so as to comply with the requirements of the section?

(2) *The "consent" issue*: Assuming that the informal conversation in the lockup otherwise amounts to an "interview" within the Code, is it a presupposition (or implication) of s 570D of the Code that, however informal the "interview" might be, it must still be carried out with the consent of the suspect? If so, having regard to the absence of a caution (or re-caution) and the other features that marked the shift between the initial

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83 (2006) 166 A Crim R 1 at 10 [25].

84 (2006) 166 A Crim R 1 at 22 [56].

85 See *Criminal Appeals Act* 2004 (WA), s 30(4), formerly the Code, s 689(1); cf *Nicholls* (2005) 219 CLR 196 at 281-282 [235].

interview and the lockup conversation, did the appellant give the requisite consent?

(3) *The "exceptional circumstances" issue*: In the event that the foregoing issues are decided in favour of the appellant, the State, by its notice of contention, submitted that this Court should affirm the reception of the evidence of the admissions of the appellant in the lockup conversation. It should do so on the ground that it is satisfied that there were "exceptional circumstances", in accordance with s 570D(2)(c), in the interests of justice, to "justify the admission of the evidence". On the assumption that the appellant is entitled to succeed on either of the first two issues, were there such "exceptional circumstances" for the reception of the evidence that would not conflict with the basic purpose and policy of s 570D?

116 Initially, the appellant sought an order for a retrial. On the return of the appeal, his counsel asked this Court to direct a judgment of acquittal, in the event that the foregoing issues were decided in his favour.

The lockup conversation was not an "interview"

117 *Textual meaning of interview*: In an elliptical way, s 570D of the Code makes it a precondition to the reception into evidence of an "admission", made by a suspect to a member of the Police Force, that it should be made during a recorded "interview".

118 This is necessary because s 570D(2) renders such admissions "not … admissible" unless, primarily, "the evidence is a videotape on which is a recording of the admission"[86]. "Videotape" is defined[87] to mean "any videotape on which is recorded an interview". Undoubtedly, the questions and answers between Detective Senior Constable Richards and the appellant, in the interview room, recorded on videotape, amounted to such an "interview". But was the conversation in the lockup properly so described?

119 Obviously, the mere fact that a conversation is recorded on video film cannot alone render it an "interview" for the purpose of the provisions of the Code. An "interview" is a particular type of conversation. The mode of recording, if any, is external to the character of the communication. Many "interviews" are not recorded in such a way. The search is, therefore, for the essential character of an "interview" of the kind that meets the requirements of s 570D. It is not, as such, for the medium in which it is recorded.

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86 The Code, s 570D(2)(a).

87 The Code, s 570(1).

120 In ordinary speech, the word "interview" connotes an exchange between persons that observes some degree of formality or structure and mutuality. The primary definition in the *Macquarie Dictionary*[88] is: "a meeting of persons face to face, especially for formal conference in business, etc, or for radio and television entertainment, etc". Formality is likewise included in the primary definition given in the *Oxford English Dictionary*[89]. The *Chambers English Dictionary*[90] describes an "interview" as "a formal meeting". Thus, normally, the word connotes a face to face meeting having features of a formal interchange between participants. A "conversation" need not have these features. But an "interview" does.

121 This Court can, as it pleases, dismiss the argument that "interview" when used in the Code involves an element of formality and structure with mutuality between the participants in the communication in question. However, it must realise that it does so in the face of the unanimous opinion of the great dictionaries of the English language.

122 The word "interview" was used in the equivalent Tasmanian legislation[91]. Explaining what is involved in that notion, Wright J in *R v McKenzie*[92] observed:

> "[T]he use of the word 'interview' throughout s 8 is such as to confirm the use of the word in its ordinarily understood sense. It is interesting to note that 'interview' seems to be used in contradistinction to the words 'official questioning' which appear as part of the definition of 'confession or admission' used in s 8(1). … The very requirement that the 'interview' must be videotaped tends to confirm that it is a formal, unhurried

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88 4th ed (2005) at 743.

89 *The Oxford English Dictionary*, 2nd ed (1989), vol 8 at 3 gives the primary meaning as: "A meeting of persons face to face, esp one sought or arranged for the purpose of formal conference on some point."

90 (1988) at 748. See also *The Random House Dictionary of the English Language*, 2nd ed (1987) at 999 which states as the first definition "a formal meeting in which one or more persons question, consult, or evaluate another person", and *Webster's Third New International Dictionary*, (1976) at 1183-1184 which gives "a formal meeting for consultation".

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

92 [1999] TASSC 36 at [14].

interrogation procedure, conducted in circumstances in which electronic recording aids are likely to be available, which is the real target of s 8."

123 The meaning of the word "interview" in the context of s 570D of the Code is conveniently illustrated by the formal manner in which the interview preceding the lockup conversation took place. That interchange was specifically recognised by the participants to be an "interview" for the purposes of the Code. It was structured accordingly. Hence its description, as such, in the opening words of the police interviewer explaining its purpose to the appellant. Hence also the precise conclusion at the stated hour and the promise that the "interview", conducted then, and earlier at the scene of the residential search, would be provided on video to the appellant or his solicitor.

124 The "interview" by members of the Police Force observed the ordinary expectations of a measure of formality and mutuality appropriate to a procedure so described. These were not, however, features of the conversation in the lockup. Apart from everything else, the banter, exchange of immaterial personal details and repeated use of the words "fucken", "shit" etc by police officers implied a conversation outside the ambit of the statutory "interview" for which s 570D provides. Certainly, that was the appellant's understanding of it. His belief was entirely understandable and deliberately encouraged.

125 *Contextual reinforcement*: There are various contextual reinforcements for this view of the type of "interview" that s 570D contemplates.

126 First, there is the fact that the word "interview" in the Western Australian provisions is unelaborated. It therefore attracts its meaning in ordinary speech. The definition provided by s 570(1) of the Code is unhelpful in this respect. By way of contrast, the *Summary Offences Act* 1953 (SA) recognised that a problem might arise from the ordinary features of the word "interview". Thus, that Act expressly states[93] that for the purposes of the Part containing the obligation to record interviews with suspects[94] and controlling the admissibility of interviews with a suspect[95], the word "interview" is to include: "(a) a conversation; or (b) part of a conversation; or (c) a series of conversations".

127 Whilst the South Australian definition was introduced after the enactment of s 570D of the Code, the latter was not brought into force until after the South Australian law had commenced. In any case, the Western Australian drafters were faced with precisely the same problem as those who drafted the South

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93 *Summary Offences Act* 1953 (SA), s 74C.

94 *Summary Offences Act* 1953 (SA), s 74D.

95 *Summary Offences Act* 1953 (SA), s 74E.

Australian law. Moreover, the 2006 Act continues to use the unelaborated word "interview"[96]. That word did not have to be used by the Parliament of Western Australia. However, when it was used it had to be given effect. This Court should ascribe to the word "interview" in the Code its ordinary, everyday meaning connoting formality and mutuality in the communication. Had some different, wider or looser meaning been intended, in the context of s 570D, this could have been made clear.

128 Secondly, the generally formal character of the police "interview", as envisaged by the Code, secures additional reinforcement from the fact that s 570D appears in an added chapter of the Code (Ch LXA) titled "Videotaped interviews". This introduces a section of the Code addressed to a particular and formal variety of communications between accused persons and officers of police. The special provisions enacted govern not only admissibility of evidence of admissions (s 570D) but also the broadcast of "interviews" (s 570C); their availability to the jury (s 570E); retention of videotapes by police and the Anti-Corruption Commission (ss 570G, 570GA); and the use of videotapes for teaching purposes (s 570H). These provisions reinforce the conclusion that the reference to "interview" in the definition of "videotape" in s 570(1) is a reference to a formal communication between police and suspects having the features of the interview with the appellant that took place in the police interview room. Conversations more generally, such as happen to be videotaped unbeknownst to the accused, do not fit naturally within the language, structure and provisions of Ch LXA of the Code.

129 Thirdly, it is now quite common in Australian legislation, federal and State, to provide for recording of "interviews". *Butterworths Australian Legal Dictionary* describes a "Record of interview" as: "A written transcript of a formal interrogation of a suspect by police generally created at the time of the interview."[97] Once again, the feature of formality is emphasised[98]. It is true that there might sometimes be a contest about the sufficiency of compliance with this requirement of a degree of formality in the exchange. There could be borderline cases. This was not one of them.

130 *Confirmatory purposive construction*: In addition to emphasising the importance of deriving meaning for statutory words and phrases from the

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96 The 2006 Act, ss 115, 116, 117, 119, 120, 121, 122, 123 and 124.

97 Nygh and Butt (eds), *Butterworths Australian Legal Dictionary*, (1997) at 991.

98 See also the provisions for an "interview friend" under the *Crimes Act* 1914 (Cth), ss 23H, 23K in the case of interviews of an Aboriginal or Torres Strait Islander suspect or of a suspect under the age of 18.

surrounding provisions of the statute, this Court has also repeatedly stressed the need to give effect to the purpose of the legislation. What was the purpose of s 570D?

131 Obviously, a purpose was to attempt to end "verballing" by police, attributing unconfirmed admissions to suspects at a disadvantage in denying them. The availability of a reliable recording of the conversation in the lockup adequately meets this objective. However, there was another and different purpose. The object of requiring interviews to be videotaped extended to the purpose described by Lamer J in the Supreme Court of Canada in *Rothman v The Queen*[99]. His Lordship explained it as including "*the protection of the system* itself by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society".

132 Section 570D of the Code contributed to the control of "abuse of power" by police[100]. Such abuse of power includes the false attribution to suspects of admissions they have not made. But it also extends to other wrongs. These include taking advantage of suspects in ways contrary to the basic objectives of the criminal justice system.

133 In *Pollard v The Queen*[101], McHugh J elaborated the purposes of the Victorian law reserving to an accused person the opportunity to communicate with a friend, relative or legal practitioner before interrogation[102]. His Honour explained[103]:

> "In pursuance of its objective, the section seeks to neutralize the psychological disadvantage which could otherwise be suffered by a person who is questioned while detained in police custody and isolated from contact with the outside world. It also seeks to ensure that that person will have the opportunity of obtaining legal advice before answering questions, making statements or assisting the police in their investigations."

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99 [1981] 1 SCR 640 at 689 (emphasis in original).

100 See *Kelly* (2004) 218 CLR 216 at 265 [147]-[148].

101 (1992) 176 CLR 177.

102 *Crimes Act* 1958 (Vic), s 464C.

103 (1992) 176 CLR 177 at 235.

134 The potential for abuse of power, inherent in the psychological disadvantage of a suspect undergoing questioning by the police[104], suggests the range of possible disadvantages against which requirements for the videotaping of interviews protect. It is not *only* the false attribution to suspects of admissions they have not made.

135 *Construction and the right to silence*: I have determined the meaning of "interview" in s 570D on the basis of textual and contextual considerations, and by reference to the purposes of the statute. However, the meaning that I favour is one that is consonant with the right to silence that is afforded to a suspect at common law against the background of which the Code provisions were written.

136 The right to silence has been described[105] by four Justices of this Court as "a fundamental rule of the common law" in Australia. There is no doctrine of the common law that explains precisely what the observance of the right to silence entails in the context of the questioning of a suspect by police officers. However, this Court has indicated that the observance of the right might require more from police officers in circumstances where a suspect is uneducated or otherwise disadvantaged, than is necessary where a suspect is intelligent or educated. As Dixon J said in *R v Lee*[106]:

> "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. … 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 (if we are to assume that the requirement of voluntariness is not enough to ensure justice) a justification for the existence of an ultimate discretion as to the admission of confessional evidence."

137 The question of whether or not the observance of the common law right itself gives rise to a requirement that the police administer a caution to the suspect, alerting the suspect to his or her rights, does not arise for determination in this appeal. I adhere to what I said in *R v Swaffield*[107]: "[A]s the Australian

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104 See also *R v Lee* (1950) 82 CLR 133 at 159-160; Dixon, "Regulating police interrogation", in Williamson (ed), *Investigative Interviewing*, (2006) 318 at 323-324.

105 *Petty v The Queen* (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ.

106 (1950) 82 CLR 133 at 159.

107 (1998) 192 CLR 159 at 202 [95].

authorities stand, the absence of a caution triggers the exercise of a discretion to exclude what was said but does not require exclusion." The appellant declined to agitate any argument based on the judicial discretion. That being so, it is not necessary to determine the exact content of the common law right. It is enough to note that, by providing for such an "interview", with the formality and mutuality that the word entails, Parliament afforded protection to rich and poor, guilty and innocent, educated and uneducated. I cannot share a view of the right to silence that effectively confines its availability to educated and wealthy suspects who know of their rights or who can afford experienced lawyers to advise them[108]. That is an elitist view of the protections of the common law that is alien to my understanding. It affords a further reason for adopting the construction of the Code that I favour.

138 *Conclusion: the "interview" required by s 570D*: When the Parliament of Western Australia provided, as it did in s 570D of the Code, restrictions upon the reception of evidence of admissions made by suspects to police officers except (in the normal case) during a videotaped "interview", all of the indications of that section (and in the surrounding provisions) affirm that the Code had in mind an "interview" observing a degree of formality and mutuality – precisely of the type conducted with the appellant in the police interview room[109].

139 That was truly an "interview" where the appellant received the caution that was observed by the parties during the interview. The appellant knew that the interview was subject to recording and that the recording was liable to be used against him in any later prosecution. The caution alerted the appellant to his right to silence and to have access to a lawyer before embarking on potentially damaging admissions that would help prove the State's case against him from his own words.

140 Arguably, the provision of a caution was particularly important in the appellant's case. He had a background in heroin use and, at the time the admissions were made, was known by the police to be on a methadone programme. Following the administration of the caution, he limited his answers and requested access to a lawyer. It was a request which the interrogator accepted and ultimately observed. However, when, shortly after the explicit conclusion of the "interview", and following disarming personal banter, the appellant began to make admissions, he was not re-cautioned. The police interrogators acknowledged their awareness that he did not know that his statements were being recorded. Despite that awareness, and despite their awareness of the appellant's earlier demand for prior access to a lawyer, the

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108 Joint reasons at [37]-[39]; cf *Em* [2007] HCA 46 at [227]-[231].

109 cf reasons of Gleeson CJ at [5], [17]-[18].

detectives proceeded with questions designed to elicit damaging admissions from him before he had obtained legal advice. In my view, these were not admissions secured during an "interview" of the type for which s 570D provides.

141 *Proper application of the Code*: This conclusion can be tested thus. If the practice observed in the appellant's case were to become standard, the actual "interview", with cautions and limits observed in accordance with the common law, would become a charade. The accused, having his acknowledged rights respected and being informed that the interview was concluded, could be led into a different area. There, in a completely new and informal setting, admissions might be secured and recorded in circumstances obviously different from the "interview" envisaged by s 570D. If Parliament had intended this to be permissible, it would at least have avoided use of the word "interview" (as other statutes do). Or it might have adopted a special meaning for the word (as the South Australian statute does[110]).

142 It follows that the better interpretation of "interview" in s 570D is that it requires a degree of formality and mutuality. Not only would this ensure the integrity of the resulting record. It would also serve the purpose of neutralising the psychological disadvantages for the interviewee. With respect, the Court of Appeal and the majority reasons in this Court overlook the dual features that lie behind the requirement for a statutory "interview". They give effect to one only of the purposes for requiring the videotaping of interviews with police.

143 *Answering the criticisms*: There is no tension between the foregoing conclusion and the insistence, upheld in *Nicholls*[111], that the word "interview" should be given a broad interpretation so that off-camera oral communication is caught by the statutory requirements of videotaping[112]. The present appeal is concerned not with the *when* question (about the duration of an "interview") but with the "what" and "how" questions. *What* form of oral interchange fulfils the statutory requirement reflected in s 570D of the Code in Western Australia? *How* may admissions be procured during an "interview" that answers to the description of that form of communication in this context?

144 In s 570D, the Code makes it plain that evidence of admissions by a suspect shall not later be received in the trial of that person for a "serious offence" unless it is recorded on videotape and is in the form of an "interview".

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110 See above these reasons at [126]-[127].

111 See eg (2005) 219 CLR 196 at 276 [215]-[216].

112 cf *R v Raso* (1993) 115 FLR 319 at 345-348. See joint reasons at [50].

Subject to exceptional provisions in the section[113], an informal blurting out of alleged admissions or questioning in a non-formal interview setting does not fulfil the preconditions laid down by the section. In such cases, the duty of the police officers, where such events occur, is, as quickly as reasonably practicable, to resume the statutory "interview", so as to put the alleged admissions to the accused and to record on videotape any response[114].

145 There is no inconsistency between this approach and that adopted by the majority in *Nicholls*. Each interpretation is designed to fulfil the purposes of s 570D of the Code. Relevantly, that purpose is, as I have demonstrated, not confined to the integrity of the record but extends to the features of the questioning and specifically the expectation that the dual caution will be provided to the suspect and that his or her entitlement of access to a lawyer will be protected before potentially damaging admissions are recorded.

146 *Conclusion: conversation not an "interview"*: It follows that the informal questioning of the appellant, conducted in the lockup, outside the interview room and after the formal interview was stated to have concluded, was not an "interview" conforming with s 570D of the Code. As such, the videotape, retrieved from surveillance devices in the lockup, does not comply with the definition of a "videotape" for the purposes of s 570D(2)(a) of the Code because that definition requires that any admissions must be made in an "interview".

147 Subject to what follows, evidence of the appellant's admissions made during his conversation with police officers in the lockup was not therefore admissible at his trial. It was inadmissible under s 570D(2), whether given in the form of the record of surveillance videotapes or by oral evidence of the officers concerned. The point was argued in the Court of Appeal. It is available to the appellant in this Court. In my view it succeeds.

The appellant did not consent to the "interview"

148 *Is consent required?*: Subject to the State's notice of contention, the foregoing is sufficient to require that the appeal be allowed. However, I will deal briefly with another aspect of the appellant's submissions for I consider that, on a correct construction of s 570D of the Code, it too should be determined in his favour.

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113 The Code, s 570D(2)(b) and (c) and s 570D(3).

114 *Nicholls* (2005) 219 CLR 196 at 277-278 [220]. See also *Western Australia v Yerkovich* [2004] WASC 62 at [121].

149 Section 570D of the Code is written against the long-standing practice that a person, suspected by police officers of having committed a crime, is to be given a caution before interrogation and, if the suspect so decides, must be accorded the privilege of silence and of communication with a lawyer before answering further questions. It is a practice that observes and gives effect to the common law right of silence[115]. That was the practice which police respected in Western Australia. It was duly observed in the interview first conducted with the appellant. However, it was not observed in the questioning in the lockup that followed.

150 On the face of things, being obviously unaware of the existence of surveillance cameras and microphones in the lockup (a fact fully appreciated by the police and recorded by them at the time), the appellant did not consent to the continuance of the questioning there. He was not re-cautioned. His attitude to any questioning that would be recorded and might be used against him in a prosecution had been made perfectly clear less than an hour earlier during the formal "interview". He had declined to answer questions when they became "heavy". He asked repeatedly for the opportunity to first have the advice of his lawyer. His right to that advice was ultimately acknowledged and respected by the police.

151 It follows that, just as the police officers were alert to the fact that the appellant was unaware that their questions and his answers were being recorded in the lockup (and that he believed, as he had been told, that the police interview had been concluded), they would have been aware that he would *not* consent to such questioning before having access to his lawyer. They nevertheless proceeded in the lockup with their questioning. In the intervening time, nothing was suggested as indicating a change of mind on the part of the appellant. Overwhelmingly, the evidence suggests that he had not.

152 *Requirement of consent is implied*: But is consent necessary in law to the admissibility of evidence of admissions by an accused person during police questioning? It is not expressly so stated in s 570D. However, the appellant submitted that consent was implied by the language, context and purpose of the section. It should be noted that this presents a question with distinct statutory significance. As such, it is not precisely the same question as is raised by the common law requirement of voluntariness.

153 In *Nicholls*[116], Gleeson CJ expressed the opinion that s 570D(4)(c) assumed that the consent of a suspected person is necessary if the police are to

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115 See above these reasons at [136]-[137]; cf joint reasons at [37]-[39].

116 (2005) 219 CLR 196 at 207-208 [9].

videotape an interview. His Honour recorded that this assumption had not been challenged in argument before the Court. He pointed out that, consistently with s 570D, a court might receive evidence of an admission, eg where there is a reasonable excuse for there not being a recording on videotape of the admission. This, he observed, was "the effect of the express language of the statute"[117].

154 I agree with Gleeson CJ's analysis in *Nicholls* in this respect. The specific reference in s 570D(4)(c) to the "reasonable excuse" for there not being a recording on videotape of the admission as including that "[t]he accused person did not consent to the interview being videotaped"[118] is conclusive of the assumption (or implication) that consent of the accused person for videotaping such an interview is ordinarily required. If it were not, why, one asks rhetorically, would Parliament provide amongst the "reasonable excuse[s]" the absence of consent? That provision implies that, ordinarily, consent by the accused must be given to the conduct of the "interview"[119]. And, by definition, evidence of an admission during an interview is not admissible unless it is videotaped[120]. The hypothesis of consent, as stated by Gleeson CJ in *Nicholls*, was correct.

155 This conclusion, derived from the language of s 570D, is reinforced by the context and purpose of the provision. The context is an interview which, by the common law, the appellant (like any other suspect) could decline to participate in. The context also includes the conduct of an "interview" which, by definition, implies mutuality between interviewer and interviewee. As well, the introduction of "recording of the admission" suggests a requirement of consent. This is a standard requirement for invasions of privacy, as by videotaping a person's conversation. It is especially important where the potential consequences are significant, as they are for suspects[121].

156 Whilst it is true that the "consent" referred to in s 570D(4)(c) of the Code is addressed to the interview being "videotaped", the existence of a "videotape on

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117 (2005) 219 CLR 196 at 208 [9].

118 The Code, s 570D(4)(c) read with s 570D(2)(b).

119 cf reasons of Gleeson CJ at [15], [18].

120 The Code, s 570D(2)(a) read with s 570(1) definition of "interview" and "videotape".

121 cf Organisation for Economic Co-operation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, adopted 23 September 1980, Principle 2; *Privacy Act* 1988 (Cth), Sched 3, "National Privacy Principles".

which is a recording of the admission" is the primary requirement for the reception at the trial of evidence of any admission made by the accused person[122]. Subsidiary issues may arise for the exercise of a residual discretion to admit or reject admissions obtained involuntarily, unfairly or in a way that is contrary to public policy[123]. However, the existence of that discretion cannot circumvent the logically anterior questions of whether the recording that is procured is an "interview" and whether consent to obtaining it from an interviewee is implicit in the requirements of the section. Because, in my view, those questions arise first, and must be resolved against the submissions of the State, any subsequent application of the exclusionary rule need not be addressed. Moreover, the appellant did not rely on any exclusionary rule.

157 *Conclusion: no consent*: Having regard to the terms of the original interview, and the repeated requests by the appellant to have access to a lawyer before answering further police questions about his involvement in the alleged offence, it is clear that he did not consent to the subsequent questioning in the lockup. In the informal, expletive-filled, apparently unofficial conversation that took place there, the only available inference was the one the police officers themselves drew. That is, the appellant believed that his police "interview" was concluded. He did not believe that the subsequent questions and answers were being recorded. Still less did he believe that his answers might be used in evidence against him at a trial for the serious offence of which he was suspected.

158 Because consent was required for an "interview" under s 570D, and was absent from the lockup conversation, this affords a further reason why, although videotaped, the conversation was not an "interview" within the section. It did not meet the dual requirements for such an "interview". Specifically, it did not conform to the implied requirement of the section that such "interviews" would be videotaped only with the consent of the suspect and under circumstances where he or she received the dual caution before such an "interview" was undertaken. On this basis too, the appellant is entitled to succeed in his appeal.

"Exceptional circumstances" not shown for admission

159 *The State's contention*: By a notice of contention, filed at the hearing before this Court, the State argued that it was nonetheless entitled to uphold the appellant's conviction on the basis set out in s 570D(2)(c) of the Code. That paragraph makes admissible, at the trial of a person accused of a serious offence, evidence of an admission made by the accused person where:

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122 cf joint reasons at [64].

123 Joint reasons at [64].

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

160 In the present case, the "court", being the court of trial, did not reach, or express, any such satisfaction. However, I will assume that this Court, stepping into the shoes of the trial judge, may do so if the circumstances would otherwise support such a conclusion.

161 The State argued that the "exceptional circumstances" included the fact that the appellant himself had initiated the lockup conversation and had there provided compelling evidence of his guilt of the serious offence of which he was suspected and of which he was later charged and convicted. The State said that these circumstances were "exceptional" and justified the admission of the evidence in the "interests of justice".

162 *Absence of exceptional circumstances*: The phrase "exceptional circumstances" should be given a meaning appropriate to the context in which it appears. That context is a *prima facie* requirement of the Code that interviews with persons, suspected of having committed serious offences, should be videotaped with the consent of the suspect and that evidence of admissions made during such interviews should not be received at the trial of the suspect unless recorded on videotape.

163 The requirements, imposed by s 570D, entered the law of Western Australia after decades of demonstrated problems for accused persons, police, courts and the community arising from unreliable evidence of alleged admissions to police and allegations of abuse of power in securing such admissions. Provisions such as s 570D therefore reflect a high public purpose addressed both to the integrity and acceptability of the administration of police interrogation. Circumstances are not "exceptional" within s 570D(2)(c) unless they explain and justify a departure from normal requirements, laid down by the section, to submit accused persons to "interview" and to do so under circumstances where their consent to videotaping of the interview has been obtained.

164 In the present case, the posited "exceptional circumstances" did not lead to the departures from the requirement of the section. Thus, they do not help to overcome the fact that what occurred was not an "interview" as contemplated by Parliament; nor was it recorded on videotape with the consent of the appellant. On the contrary, the police officers had obviously concluded their statutory "interview". Yet they quickly realised that the appellant was unaware of the fact that their informal questioning was being recorded. They pressed on, regardless of his earlier demand to have access to legal advice before answering questions and making any admissions.

165 The State's contention can be measured against the possibility that what happened on this occasion might become a common practice. In that event,

police officers, frustrated by the irksome insistence of the suspect on the legal right to silence and the request for access to a lawyer, would simply lead him or her from the formal interview, conducted in the interview room, into the lockup or a tea room or some other facility monitored by surveillance devices, perhaps a bar or a public park[124], and there engage in banter, informal conversation and apparently innocent questioning. The psychological dynamic of the "interview", where, by the strictures of law, the power relationship between interviewer and interviewee is to some degree equalised, would be completely changed. The offence to basic principle would not be cured by the mere fact that the conversation was recorded reliably. This is not a discretionary determination. It is concerned with the fundamental character and requirements of the statutory "interview" for which s 570D of the Code provides.

166 *Conclusion: contention rejected*: The result is that the circumstances are only "exceptional" in that they amounted to a conscious breach by public officials of the expressly stated, or implied, requirements laid down by Parliament in s 570D. The State has failed to enliven s 570D(2)(c) of the Code. Its contention should be rejected.

Conclusion: order for acquittal

167 The result is that the appellant is entitled to succeed in this appeal. The revised order, sought on his behalf, was that a judgment of acquittal be entered. It is not appropriate to order a retrial. The error below was not made in the directions to the jury of the trial judge. It lay in the reception into evidence of admissions made in a case where the police had not complied with s 570D of the Code and where there were no "exceptional circumstances" to justify the admission of that evidence. Those admissions would not be available at a retrial. Without them, as was accepted, there would be insufficient evidence to prove the guilt of the appellant beyond reasonable doubt.

168 It is an undeniably uncongenial outcome to discharge a prisoner, evidence of whose guilt is seemingly established by his own words. Such an order is not made with enthusiasm. I can understand the tendency of human minds to resist such an outcome. However, the order is not made only for the appellant but as an assurance of the adherence of our institutions to the rule of law[125]; to steadfast observance of the requirements of the accusatorial system of criminal justice hitherto followed in Australia; and to the neutral judicial application of the requirements laid down by Parliament in s 570D of the Code.

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124 *Em* [2007] HCA 46 at [146].

125 cf *Blackburn v Alabama* 361 US 199 at 207 (1960); *R v Oickle* [2000] 2 SCR 3 at 42-44 [68]-[70].

169 Section 570D is a strict and unusual provision. It was enacted to deal with a large and endemic problem. We do the law no service by failing to observe the requirements that appear in the provisions of s 570D of the Code because the appellant, who claims their benefit, becomes their uncongenial beneficiary.

170 This was not a case where a suspect, suddenly apprehended by police, blurted out incriminating evidence. In such a case different considerations would arise[126]. Instead, this was a case of a suspect in police custody who was properly cautioned, formally interviewed and who then insisted on his right to silence and to consult a lawyer before answering questions. Knowing of that insistence, police proceeded to override his rights and privileges. He was a smart alec for whom it is hard to feel much sympathy. But the police were public officials bound to comply with the law. We should uphold the appellant's rights because doing so is an obligation that is precious for everyone. It is cases like this that test this Court. It is no real test to afford the protection of the law to the clearly innocent, the powerful and the acclaimed[127].

171 The "right to silence" may indeed sometimes evoke "strong but unfocused feelings". It is, without doubt, a "shorthand description" of different rules that apply in the criminal law[128]. But it has not been, at least until now, meaningless and impotent in Australian law. In default of clear and valid legislation authorising a contrary course, this Court should uphold the right to silence in a case such as the present for it is important to the individual's true choice to remain silent in the face of authority and to the proper control of the conduct of the agents of the state.

Orders

172 The appeal should be allowed. The judgment of the Court of Appeal of the Supreme Court of Western Australia should be set aside. In place of that judgment, it should be ordered that the appeal to the Court of Appeal against conviction be allowed; the conviction of the appellant be quashed; and, in place of that conviction, a judgment of acquittal should be entered.

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126 *Em* [2007] HCA 46 at [224].

127 cf *Em* [2007] HCA 46 at [230]-[231].

128 Joint reasons at [36].