HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

KHALID BAKER APPELLANT

AND

THE QUEEN RESPONDENT

Baker v The Queen
[2012] HCA 27
15 August 2012
M154/2011

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

M J Croucher SC with L C Carter for the appellant (instructed by Doogue & O'Brien)

G J C Silbert SC with B L Sonnet for the respondent (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

Baker v The Queen

Criminal law – Evidence – Common law – Hearsay – Admissions – Appellant and co-accused jointly tried for murder – Appellant convicted; co-accused acquitted – Co-accused made certain admissions in police interview and to witnesses ("out-of-court confessional statements") – Consideration of *Bannon v The Queen* (1995) 185 CLR 1 – Whether out-of-court confessional statements were admissible in exculpation of appellant as exception to hearsay rule.

Words and phrases – "admissions", "against penal interest", "hearsay rule", "out-of-court confessional statements".

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. On 26 March 2008, the appellant and a juvenile, LM, were arraigned in the Supreme Court of Victoria (Whelan J) on a presentment charging them jointly with the murder of a young man named Albert Snowball. On Sunday 27 November 2005, the deceased was at a party on the first floor of a converted warehouse in Brunswick. At around 3am, an altercation took place on the landing of the stairwell just outside the party. In the course of the altercation, the deceased crashed through a window and fell 5.4 metres to the ground. He died two days later as the result of the injuries he sustained in the fall.

2 It was the Crown case that at the time of his fall the deceased was being attacked by the appellant and LM. The precise circumstances of the fall were not known. A push or punch might have projected him through the window, or the window may have shattered as he backed away from the fury of the attack. On either view, the act or acts of the appellant and LM in attacking the deceased were capable of being the legal cause of his death[1]. It was not alleged that the appellant or LM intended that the deceased should go through the window. On the Crown case, each was liable for his murder because they were acting in concert with the intention of inflicting really serious injury or because one was aiding and abetting the other knowing the other was assaulting the deceased with that intention.

3 A number of witnesses described the events on the landing leading up to the deceased's fall. There were two inconsistent versions. On the first version, the appellant was the principal assailant. On the second version, the appellant was restrained throughout the fight by a bystander and LM was the sole assailant.

4 The appellant made no admissions as to any involvement in the incident. Neither he nor LM gave or called evidence at the trial.

5 LM participated in an interview with the police in which he made admissions which included that he had pushed the deceased. LM also made statements to witnesses in the immediate aftermath of the incident which were capable of being viewed as an admission of responsibility for the deceased's fall.

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1 *Royall v The Queen* (1991) 172 CLR 378 at 389-390 per Mason CJ, 398 per Brennan J, 410-411 per Deane and Dawson JJ, 423 per Toohey and Gaudron JJ, 441 per McHugh J; [1991] HCA 27.

The course of the trial and the procedural history

6 At the date of the trial, the common law governed the admissibility of LM's statements in the appellant's case[2]. Subject to recognised exceptions, the rule against hearsay precludes the admission of out-of-court statements as evidence of the fact asserted in the statement[3]. In *Bannon v The Queen*, it was acknowledged that the common law of Australia has not to date recognised an exception for the out-of-court confessional statements of a co-accused or a third party from the operation of the rule[4].

7 At the conclusion of the evidence, the trial judge raised with counsel the content of the directions to be given to the jury in the trial of the appellant with respect to LM's statements. His Honour observed that the circumstances of the joint trial were "very closely analogous" to those considered in *Bannon*. Counsel for the appellant submitted that there was a clear distinction between the two cases and that fairness required that the jury be permitted to take into account LM's admissions in considering whether the Crown had established his client's guilt.

8 Whelan J ruled that LM's out-of-court statements were not admissible in the appellant's trial, observing that "there is at present no exception to the hearsay rule which would render [LM's] admissions admissible in [the appellant's] trial."

9 Notwithstanding the ruling, and it would seem without objection, the appellant's counsel told the jury that he was precluded from addressing them on LM's admission to the police that "I pushed him".

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2 The trial commenced on 26 March 2008. The verdict on the appellant's trial was returned on 26 May 2008. The relevant provisions of the *Evidence Act* 2008 (Vic) commenced on 1 January 2010. It is modelled on the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW), which were largely the product of the draft Evidence Bill proposed by the Australian Law Reform Commission in its report, *Evidence*, Report No 38, (1987). See also Australian Law Reform Commission, *Evidence*, Report No 26, Interim, (1985).

3 *Cross on Evidence*, 8th Aust ed (2010) at 1072 [31010].

4 *Bannon v The Queen* (1995) 185 CLR 1 at 22 per Dawson, Toohey and Gummow JJ; [1995] HCA 27.

10 Whelan J directed the jury in conventional terms that:

> "The evidence concerning admissions by [LM] is only evidence in his case, it is not evidence in [the appellant's] case. So when you separately consider [the appellant's] case, you ignore the admissions allegedly made by [LM], they are not evidence in [the appellant's] case."

11 The jury returned verdicts acquitting LM outright and convicting the appellant of the murder of the deceased.

12 The appellant applied for leave to appeal against his conviction to the Court of Appeal of the Supreme Court of Victoria (Maxwell P, Buchanan and Bongiorno JJA). The grounds of appeal included a contention that LM's out-of-court statements had been wrongly excluded. On the hearing of the application in the Court of Appeal, that ground was not pressed. The application was argued on the sole ground that the verdict was unreasonable and could not be supported having regard to the evidence[5]. The Court of Appeal considered there was no substance to this ground and the application for leave to appeal was refused[6].

13 The appellant applied for special leave to appeal on the ground not pressed in the Court of Appeal: that LM's out-of-court statements had been wrongly excluded. The appellant submitted that his failure to preserve the point below should not preclude the grant of special leave in circumstances in which the Court of Appeal was bound to uphold Whelan J's ruling. He submitted that LM's admissions met the requirements of reliability and prejudice that the joint reasons in *Bannon* suggest are a prerequisite to the consideration of any extension of the exceptions to the hearsay rule. In the circumstances, special leave to appeal was granted. Nonetheless, the proper course was for the appellant to have maintained his ground of challenge in the Court of Appeal. This Court would have had the benefit of that Court's analysis of the issues that are said to be presented. Contrary to the appellant's submissions, LM's statements when assessed in the context of the Crown case do not present issues materially different from those considered in *Bannon*. The exclusion of LM's out-of-court statements in the appellant's trial did not occasion a miscarriage of justice. For the reasons to be given, the appeal should be dismissed.

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5 *Baker v The Queen* [2010] VSCA 226 at [2].

6 *Baker v The Queen* [2010] VSCA 226 at [51], [55]-[57].

14 It is convenient at this juncture to refer to the evidence given at the joint trial and the contents of LM's statements in some detail.

The evidence

15 On the evening of Saturday 26 November 2005, around 100 to 200 people attended the warehouse party. A band was to perform at the party. LM attended the party with a view to "free-styling" with the band. LM travelled to the party in a car with several other persons. The group included the appellant, Ali Faulkner and Lado Morgan.

16 The atmosphere at the party was described as being good until around 3am. At that time, two persons, who it was open to find were the appellant and Faulkner, commenced an apparently random and unprovoked assault on the party-goers. On the Crown case, LM joined in the violence.

17 Neither the appellant nor LM put in issue his presence at the party at the time the violence commenced or on the landing in the period before the deceased's fall. There were a number of people on the landing at that time. Common to the accounts of all of the witnesses was that a fight was taking place on the landing at the time the window shattered. As may be expected, the accounts of the witnesses of this violent and fast-moving incident varied considerably.

18 The appellant, LM and Morgan are all of African origin. The deceased was Caucasian. A number of witnesses described the appellant by reference to his wide, or big, eyes, muscly body, and headband described as a "do-rag". Several said he was bare chested at the time of the fight on the landing. Morgan is tall. His hair was styled in "corn rows". Faulkner does not appear to be of African origin. He was described as being of Arabic or Lebanese appearance.

19 The following account of the evidence is taken from the judgment of the Court of Appeal supplemented by reference to the summary of evidence, which forms part of the appeal papers.

20 The appellant, Faulkner and, on the Crown case, LM exhibited a high degree of aggression over several minutes inside the room in which the party was held. Party-goers, including women, were punched and struck with bottles. The appellant, Faulkner and LM then left the party through a doorway which opened onto a landing on the stairwell.

21 On the first version of events, given by Asher Doig, Peter Arcaro, Earl Stuart and Patricia Brady, it was open to find that the appellant was the principal assailant. On the second version, given by Nassir Asfer, Eric Masonga and, to some extent, Morgan, it was open to find that LM was the sole assailant.

22 Doig was on the landing. He saw five or six black men come out onto it from the party. They were behaving "very aggressively". They started pushing the deceased. At least two instigated the assault on him. The appellant was the main instigator. The other assailant was tall and had corn rows. At one point, the deceased was pushed against a railing and the appellant ran up and kneed him in the chest or ribs. The group then walked down to the lower landing. As they did, the deceased said something like "you bastards". The appellant ran back up the stairs and began punching the deceased and behaving "in a very psychotic manner". Another black man was also punching the deceased. This was not the man whose hair was styled in corn rows. The appellant picked up a chair to hit the deceased, but Doig and another man each took hold of the chair's legs and pulled it down. The fight was "fairly brutal"; like a form of kick boxing. Towards the end, the appellant threw the deceased against the wall and "king-hit" him. He then went to hit him again, but the blow missed. A further punch connected. After this, either as the result of a punch or a push, Doig saw the deceased "literally flying through the window".

23 Arcaro was also on the landing. He saw a group of three or four men walking down the stairs, a few of them were dark skinned. The appellant looked at the deceased and ran back up the stairs to fight with him. It was a one-on-one fight. The appellant was punching and pushing the deceased, who was not really fighting back. A few people, including Doig, tried to restrain the appellant. The appellant was "incredibly aggressive … every movement … was kind of aggressive and wild". At one stage, the appellant picked up a chair but it was taken from him. During the fight, the appellant and the deceased "worked their way" to the left of the window. The appellant either punched or pushed the deceased through the window.

24 Stuart said that the appellant and two other African men had been ushered out onto the landing by a number of people. The appellant was "very angry, very animated" and he was "passionately … resisting". The three African men were ushered down the stairs and then they came back up in a "fighting manner". The appellant was fighting and one of the others was trying to stop the fight. The deceased was struck by more than one person and he was "bumped back" by "the velocity of the activity". The appellant was involved in a "quite severe fight" and his actions were "scary". There had been "a frenzy of blows … with hands and

feet" but, according to Stuart, the deceased was not the target of the attack. The deceased went through the window as the result of being pushed back "by the force of what was occurring".

25 Stuart's evidence departed from an earlier statement that he had made to the police and the Crown Prosecutor was given leave to put leading questions to him. Stuart then confirmed that the appellant was yelling in an aggressive and threatening manner and that his eyes were fixed on the deceased when he came onto the landing. He was kicking him. The appellant carried out a sustained attack on the deceased. Another African man was also punching the deceased, but not at the same rate as the appellant. The ferocity of the attack caused the deceased to be "kicked or pushed" through the window. Under cross-examination by the appellant's counsel, Stuart said that the white male being attacked by the appellant was not the person who went out the window. This was a direct contradiction of the evidence that Stuart had given in response to the Crown Prosecutor's leading questions.

26 Brady was on the landing when the door opened and a group of mostly black persons came out. They were fighting: "just a huge ball of fight literally coming out and moving down the stairs." One of them came charging back up the stairs. He was looking at someone behind Brady. He "whacked" this person. Brady's description of the aggressor was consistent with him being the appellant. This man picked up a chair as if to throw it, but someone grabbed it off him. He was throwing lots of punches at the white man. She could not recall if the white man fought back. The fight continued for a minute or two and then she heard the window smash, she turned around and the white man was gone.

27 Two witnesses, Benjamin Dudding and John Corrin, appear to have seen the incident on the landing through a frosted glass door. Dudding saw a fight between a dark skinned man and a Caucasian. He said there may have been more than two involved in the fight. Corrin saw two black skinned individuals attacking one person. He could see that punches were being thrown.

28 An alternative version of events was given by Asfer and Masonga, who were both on the landing with Morgan. Asfer had travelled to the party with the appellant, LM, Faulkner and Morgan. He did not see any fighting inside the party. He said that the appellant and Faulkner had come outside looking upset and walked downstairs. They said that they had been involved in a fight inside. The deceased came from the party onto the landing and asked the appellant and Faulkner, "Why did you hit me?" The appellant and Faulkner ran back up the stairs, at which time LM came out onto the landing. Morgan grabbed Faulkner

and restrained him and Asfer restrained the appellant. LM began fighting with the deceased. The appellant was not fighting with anyone. He could not have made contact with anyone in the fight because Asfer had hold of him. At some point, the appellant picked up a chair and was holding it over his head but was forced to drop it because Asfer was still holding him. LM continued to fight with the deceased. The two were punching each other. LM was facing the window and the deceased was facing the stairs. Asfer heard the window break. He did not see it break because he was struggling with the appellant.

29 Asfer was in the car with the appellant, LM, Faulkner and Morgan after the incident. He said that LM had challenged Faulkner, saying "look what you made me do".

30 Masonga saw the appellant, LM and Faulkner come out of the party and go down the stairs to the middle landing. After a pause, the appellant and LM came back up the stairs. The appellant approached a white male on the landing near the railing and a fight broke out between them. LM approached the deceased and they started fighting. The appellant did not fight with the deceased.

31 In evidence in chief, Masonga said that he had not seen anyone go through the window. In cross-examination, he said that the deceased had lost his balance in fighting LM, stepped backwards to recover his footing and fallen through the window. Masonga was clear that LM was the last person to have physical contact with the deceased before the deceased fell. In his initial account to the police, Masonga said that he had not seen any fighting on the landing. He acknowledged under cross-examination that his first statement contained a number of "inventions". He had signed the false statement because he had not wanted to get involved.

32 Morgan was on the landing when the appellant and Faulkner came out. He thought they had rushed down the stairs. A person came out of the party and the appellant focussed on that person. The appellant came back up the stairs. Faulkner ran after him. Morgan stopped Faulkner because Faulkner had been behaving aggressively all night. At this point, LM came onto the landing. There was a fight, but Morgan was focussed on Faulkner and did not really know what was going on. He recalled that LM was hit in the face and that he hit someone back. He did not know who LM hit or who hit first. He thought that the appellant may have been physically involved but he was not sure. He thought he saw the appellant pick up a chair and put it down again. The appellant was fighting. This went on for less than five minutes. There was yelling and people came out onto the landing and the situation got out of control. He heard the

sound of smashing glass and looked up. He heard that someone had fallen out of a window.

33 After this, everyone on the landing went down the stairs and Morgan saw the man on the ground. The appellant, LM, Morgan, Faulkner and Asfer ran off. They all got in a car. The appellant was driving. LM was angry with Faulkner and they exchanged words. Morgan remembered LM saying "see what you've done" and "see what you put us through". In cross-examination, Morgan agreed that in his statement to the police he had said that LM said, "see what you've done, look what you've made me do".

LM's out-of-court statements

34 LM's interview with the police took place on the evening of the incident. LM spoke with a solicitor prior to its commencement. His father was present throughout the interview. At the beginning of the interview, LM was cautioned and advised that the investigation related to serious assaults in which a male had received life threatening injuries.

35 LM was reluctant to name his associates or to identify the person who had invited him to attend the function. He had been "pretty drunk".

36 LM's initial narrative description of events on the landing is set out below:

> "There was a dispute with my – one of my friends against some people there which we never met before. And then they sort of went out to the stairs – the stairway and al–, I was just tryin' to break it up 'cos that was my night that I performed there. So I didn't want a bad name for my first career name. So, I was breaking – I was breakin' – bas–, basically, breakin' the fights that they were fightin'. I said, 'I'm performin', what are youse doin', boys?' In the end, they sort of went outside to the stairs and were pushing my mates down the stairs and this guy came out, just through the door, started yelling at my friend. And my friend just went to hit him. And I – like, I – I – I was pushing – I broke it up and said, 'Keep walkin', mate,' to my friend. And the other guy from the side hit me here. I go, 'What are you doin'?' an' I pushed him away. I turned away and ke–, went down the stairs. And then, when I got downstairs, the guy was outside on the pavement. And was shocked, so … disappear."

37 The essentials of this account were repeated on a number of occasions in the course of the interview:

"Q. 180 Okay. Did your friend that was with you walking down punch the other white guy near the landing?

A. No. Th–, the – they couldn't 'cos I was in the middle.

Q. 181 You were in the middle between the white guy – – – ?

A. Mm. Yeah.

Q. 182 And your friend?

A. Yep.

Q. 183 And you've pushed him downstairs?

A. My friend.

Q. 184 Yep.

A. Keep walkin', pushed him down the stairs. He – and then he – he – he was swearing at him but he kept walkin'. And as I was walkin' down, the guy hit me from the back.

Q. 185 The guy who was following you?

A. Yeah.

Q. 186 How – what fist did he use to punch you?

A. I don't know 'cos – but, that's what I mean. Like, I was – I was pushing my friend. That's what I mean, so by the time I turned around, I copped a punch here. I don't know if it was a left or a right.

…

Q. 190 And where were you? Were you at the top of the landing or halfway down the stairs?

A. On the top.

…

A. And the guy was standing here. And my friend was here. I was in the middle. You know, so I – I – I'm – I'm – I'm tryin' sort them 2 to stop fighting. Pushing my friend down the stairs, the guy from the side hits me.

...

A. Then I turn around and I push him. I go, 'Piss off, mate,' and kept walkin'. And then when I went downstairs, the guy is on the – on the pavement.

Q. 200 Did you see him go out the window?

A. No.

…

A. I pushed him and I turned and walked out.

Q. 204 Did you hear anything?

A. No. W–, when I went downstairs, when I seen the guy, I'm like, 'Oh my God.' I – I took off. I was – I was – I was shocked.

...

Q. 209 And none of your other friends were involved?

A. They're li–, when we went downstairs, like, we were lookin' at this guy and – and then all my friends came down. You know what I mean? I see 'em, I go, 'Let's get out of here. I don't know what – let's get out of here, done somethin' bad.' We t–, we left.

Q. 210 You said, 'Let's get out of here, we've done something bad?'

A. Yeah.

Q. 211 Why do you say you've done something bad?

A. 'Cos, like, this guy fell from the stairs – the window. I–, like I – I thought, like, well, I dunno if it was me still but that was the guy that I

pushed, so he was – he was facin' on the ground and looked like unconscious. That was not – like, I was – I can't explain it.

Q. 212 But you said you've done somethin' bad, but if you've only pushed him when he was punching you, do you think that's bad?

A. Yeah, I – that's what I mean, like, either I did it or someone. But I know it was the guy that I pushed, 'cos I seen his face. Because they were – my friends, they were to still fight. I seen his face. I know what he looked like and – – –".

38 LM was asked why he did not remain at the scene to tell police what had happened. He responded:

"A. 'Cos it was somethin' terrible I did.

Q. 275 Okay. We–, once again, I – I'm just a bit confused by this. You tell me you've done something terrible but then you say all you did was push a guy away who punched you.

A. Well, I'm assuming that I did something terrible because at – at – as – I was the only person to have any contact with him at last, from – from – from what I've seen, so I'm only assuming that this guy is badly injured from me pushing him. And from what you – the information I've been told by you."

39 LM estimated that the man was about a metre and a half in front of the window when he pushed him. He had not thought the man would go through the window.

40 LM's references to his friend in his account of events on the landing and in the stairwell were not references to the appellant. On LM's account, he did not see the appellant on the landing or in the stairwell.

41 Before turning to the appellant's submissions, there should be some reference to this Court's decision in *Bannon v The Queen*[7].

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7 (1995) 185 CLR 1.

Bannon v The Queen

42 Bannon and his co-accused, Calder, were jointly charged with the stabbing murders of a man and his de facto wife. Shortly after the killing, Calder made statements to associates that were capable of being understood as admissions that she had stabbed the victims. Bannon sought to rely on those statements in support of his case that Calder had acted alone. He was granted special leave to appeal on the ground that the trial judge erred by refusing to allow the jury to take Calder's statements into account in exculpation of him. Bannon argued that the exception to the hearsay rule respecting statements against pecuniary or proprietary interest should be extended to include, at the instance of the accused, third party statements against penal interest made by a person who is unavailable to give evidence. Alternatively, he argued that the hearsay rule should be relaxed in the case of confessional statements adjudged as meeting a test of reliability. Calder's statements would not have been admissible on either basis. The assertion on which Bannon sought to rely, that Calder acted alone, was not an asserted fact against Calder's penal interest[8]. The admissions went no further than the implied assertion that she had wielded the knife, an assertion that was not inconsistent with the Crown case that the two had acted in concert. The further implication, that she acted alone, was a "dubious inference" lacking the degree of reliability on which Bannon's submission depended[9].

43 Deane J was in general agreement with the joint reasons for dismissing Bannon's appeal[10]. His Honour considered that there were no grounds for apprehending that Bannon's trial had miscarried as the result of the exclusion of Calder's statements. Her statements did not provide unambiguous support for his case[11]. His Honour considered circumstances in which the exclusion of the confession of one accused at a joint trial may be productive of unfairness[12]. He

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8 *Bannon v The Queen* (1995) 185 CLR 1 at 10 per Brennan CJ, 27-28 per Dawson, Toohey and Gummow JJ.

9 *Bannon v The Queen* (1995) 185 CLR 1 at 26-27 per Dawson, Toohey and Gummow JJ.

10 *Bannon v The Queen* (1995) 185 CLR 1 at 12-13.

11 *Bannon v The Queen* (1995) 185 CLR 1 at 16.

12 *Bannon v The Queen* (1995) 185 CLR 1 at 13-14.

gave two examples of circumstances of this kind. The first was the joint trial of A and B for murder at which each asserts the other to be solely responsible and in which the prosecution tenders against B an unambiguous confession that he alone killed the deceased. The second, a variant of the first, posited the prosecution's acceptance that only one of the two committed the offence. In the context of these examples his Honour said[13]:

> "[I]t appears to me to be strongly arguable that the basic requirement of fairness dictates that, in circumstances where the Crown has seen fit to bring a person (the first accused) to a joint trial with another accused and to place before the jury material which is tendered only against that other accused but which is supportive of the innocence of the first accused, the trial judge have a discretion to direct that that material, even though otherwise inadmissible in the trial of the first accused, be evidence in that trial at the instance of the first accused if, in all the circumstances of the case, the trial judge considers that fairness to the first accused and the interests of the administration of justice support the conclusion that such a direction be given."

44 As will appear, the appellant's principal argument is constructed on this passage in his Honour's reasons.

The grounds of challenge

45 The appellant's first ground of appeal asserts error in the trial judge's failure to direct the jury that LM's admissions could be used in exculpation of the appellant. The second ground is dependent upon success on the first. It asserts that it was an error for the Court of Appeal to hold that the evidence was capable of supporting the verdict without taking LM's admissions into account. The determination of the first ground makes it unnecessary to say more about the second. The appellant's argument acknowledged that under the present state of the law Whelan J's ruling was correct. Success on the appeal is dependent upon making good one of two contentions respecting the modification of the law of evidence governing hearsay.

46 The appellant's principal contention was that a limited exception to the rule against hearsay confined to the conduct of joint trials should be allowed. A

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13 *Bannon v The Queen* (1995) 185 CLR 1 at 15.

further, broad contention was that an exception for third party confessions should be allowed in order to bring the common law into line with the uniform Evidence Act provisions governing the reception of first hand hearsay when a witness is unavailable.

The principal contention

47 The appellant framed his principal contention this way: at a joint trial in which the prosecution relies on admissions by an accused, A, in proof of A's guilt, and those admissions also tend to exculpate the co-accused, B, the trial judge should be required (or have the discretion) to direct that A's admissions are evidence in B's trial to be considered in exculpation of B.

48 It was submitted that an exception to the hearsay rule of the limited kind proposed would not be attended by the dangers of third party confessions generally[14]. Unlike the potential mischief of gaol-house confessions[15], a confession tendered by the Crown against the maker at a joint trial is assumed to pass a threshold of reliability. The rationale for the exception to the rule respecting admissions (what a party himself admits to be true may reasonably be presumed to be so[16]) was suggested to apply with equal force to "LM's admission that he pushed the deceased and caused him to fall". It is to be observed that LM did not assert that his push caused the deceased's fall. His admission was to pushing the deceased when he was about one metre and a half from the window. In the context of the issues at the trial, the appellant's intended reliance on the assertions made by LM in his interview was not on the admission of the push but on the inference that the push was the cause of the fall because LM was the only person engaged in hostile physical contact with the deceased at the time of his fall.

49 The appellant's submissions were apt to treat the assertions contained in LM's interview as an undifferentiated whole, possessed of reliability because they were made against LM's penal interest. Whether a previous representation

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14 See *R v Blastland* [1986] AC 41 at 52-53 per Lord Bridge of Harwich.

15 *Bannon v The Queen* (1995) 185 CLR 1 at 9 per Brennan CJ.

16 *Slatterie v Pooley* (1840) 6 M & W 664 at 669 [151 ER 579 at 581] per Parke B cited in *Nicholls v The Queen* (2005) 219 CLR 196 at 266 [184] per Gummow and Callinan JJ; [2005] HCA 1.

is against the penal interest of the maker requires consideration of the fact that the maker intended to assert. LM's statement "I pushed him" was an admission against penal interest. It was an assertion that was consistent with both versions of events: that the appellant was the principal aggressor or that LM was the sole aggressor. Other assertions, including those which directly or indirectly conveyed that the appellant was not involved in any assault on the deceased before his fall, were not evidently against LM's penal interest. As explained in *Bannon*, the question to be asked is whether LM apprehended that it was to his prejudice to have made admissions implicating himself alone as opposed to having acted in concert with or having been assisted by the appellant[17]. There is no reason to suppose that he did.

50 The appellant submitted that LM's acquittal was eloquent of the rejection of the prosecution case that he and LM were acting in concert. On this analysis, the issue was whether the appellant or LM was the aggressor. While the jury were not satisfied of LM's guilt, it was submitted that his admissions supported acceptance of the accounts given by Masonga, Asfer and Stuart and to this extent might have raised a doubt in the appellant's favour. The submission wrongly reasoned backwards from the verdicts. The Crown case was that the appellant and LM were acting in concert (or one was aiding and abetting the other) in assaulting the deceased. LM's admission to pushing the deceased was consistent with the Crown case and, if received in the appellant's trial, amounted to proof of an element in the case against him.

51 One very important reason for the hearsay rule is the unfairness of depriving the party against whom the hearsay is tendered of the opportunity of cross-examining the maker[18]. In *Bannon*, Deane J contemplated circumstances in which the failure to admit the untested assertions of B at the instance of A might operate unfairly in the trial of A[19]. The examples that his Honour gave each concerned an unambiguous confession of sole guilt. The unfairness that his Honour identified was the conduct of A's trial "without regard to material which

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17 *Bannon v The Queen* (1995) 185 CLR 1 at 27 per Dawson, Toohey and Gummow JJ citing *Wigmore on Evidence*, Chadbourn rev (1974), vol 5, §1462; see also at 38 per McHugh J.

18 *Lee v The Queen* (1998) 195 CLR 594 at 602 [32]; [1998] HCA 60; *Cross on Evidence*, 8th Aust ed (2010) at 1074 [31015].

19 See above at [43].

was, if reliable, inconsistent with ... guilt"[20]. The risk of unfairness of this description may be thought more evident in the second of the two examples, in which not only has B made an unambiguous confession of sole guilt, but it is apparent that only one of A and B committed the offence. Perhaps it should also be hypothesised that B's confession contains esoteric knowledge of the offence? Whether such a case could not be dealt with satisfactorily by an order for separate trials is not a question that need be addressed in this appeal.

52 The concept of unfairness is concerned with A's right to a fair trial[21]. While the discretion to exclude admissible evidence if its reception would operate unfairly to the accused may be engaged for reasons other than unreliability[22], the suggested discretion to admit otherwise inadmissible material is posited on the basis of the reliability of the confession of sole guilt[23]. The tender of a confession of sole guilt against the maker as probative of his or her guilt does not vouch for the reliability of all the assertions made in it. Among other considerations, B may have reasons for choosing not to implicate his confederate in his confession of guilt. In a case in which the Crown is in possession of credible evidence tending to establish the complicity of A in the commission of the offence for which B has admitted sole guilt there will ordinarily be no unfairness in the prosecution of A and B at a joint trial, nor in the tender of B's confession against B alone.

53 The Crown did not rely upon the contents of LM's interview as reliable in its case against LM, save as to show that LM "had a hand in [the deceased] going through the window." The assertions in LM's interview did not provide

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20 *Bannon v The Queen* (1995) 185 CLR 1 at 14.

21 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666 per Wilson, Dawson and Toohey JJ; 82 ALR 10 at 26; [1988] HCA 56; *R v Swaffield* (1998) 192 CLR 159 at 174 [18] per Brennan CJ, 189 [53]-[54] per Toohey, Gaudron and Gummow JJ; [1998] HCA 1.

22 *R v Swaffield* (1998) 192 CLR 159 at 197 [78] per Toohey, Gaudron and Gummow JJ.

23 *Bannon v The Queen* (1995) 185 CLR 1 at 14-15 per Deane J.

unambiguous support for the appellant's case[24]. There was no unfairness in the exclusion of those statements in the appellant's trial.

The broad contention

54 The appellant's broad contention was that developments since the decision in *Bannon* make it appropriate to now recognise an exception to the hearsay rule in the case of third party confessions. Three developments were relied upon. First, Tasmania and Victoria have now enacted legislation modelled on the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW)[25]. The appellant submitted that LM's statements would be admissible under s 65(2)(b), (c) or (d) and s 65(8) of the *Evidence Act* 2008 (Vic)[26]. Secondly, third party confessions

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24 *Bannon v The Queen* (1995) 185 CLR 1 at 16 per Deane J.

25 *Evidence Act* 2001 (Tas), *Evidence Act* 2008 (Vic).

26 Section 65 of the *Evidence Act* 2008 (Vic) relevantly provides:

> "(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation –
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> ...
>
> (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
>
> (c) was made in circumstances that make it highly probable that the representation is reliable; or
>
> (d) was –
>
> (i) against the interests of the person who made it at the time it was made; and
>
> (ii) made in circumstances that make it likely that the representation is reliable.
>
> …

(Footnote continues on next page)

in homicide cases are admitted in Queensland following the decision of the Court of Appeal of Queensland in *R v Zullo*[27]. On this analysis, there is now a clear majority of Australian jurisdictions in which third party confessions are admissible at the instance of the defence. Thirdly, in England, following the decision of the House of Lords in *R v Myers*[28], legislative provision has been made for the admission of the confessional statements of co-accused[29].

55 In *Bannon*, McHugh J commented on the enactment of the *Evidence Act* 1995 (Cth) and comparable legislation in New South Wales, then the only jurisdictions to have adopted uniform Evidence Acts[30]. In circumstances in which other States might adopt some or all of the provisions of the Commonwealth Act, his Honour proposed that this Court adopt a cautious approach to the development of new exceptions to the hearsay rule[31]. While the uniform Evidence Acts preserve the rule against hearsay, the treatment of the rule and the exceptions to it differs in material respects from the common law.

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(8) The hearsay rule does not apply to –

(a) evidence of a previous representation adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document tendered as evidence by an accused so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation."

27 [1993] 2 Qd R 572.

28 [1998] AC 124.

29 Section 76A(1) of the *Police and Criminal Evidence Act* 1984 (UK) provides that "[i]n any proceedings a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a co-accused) in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section."

30 See fn 2 above.

31 *Bannon v The Queen* (1995) 185 CLR 1 at 41.

Whether LM's previous representations would meet the conditions of s 65(2)(b), (c) or (d) of the *Evidence Act* 2008 (Vic) need not be addressed. Section 65(8) provides a broad exception to the hearsay rule with respect to first hand hearsay adduced by a defendant in criminal proceedings. The only condition for the admission of evidence of a previous representation given by a person who saw, heard or otherwise perceived it being made when adduced by an accused is for the provision of reasonable notice[32]. If the appellant's broad contention were upheld, it would have no consequence for any new trial at which the admission of LM's statements (if he were unavailable to give evidence) would be governed by the *Evidence Act* 2008 (Vic).

56 The consequence of upholding the broad contention would be to effect a significant alteration to the common law of evidence in those States which to date have chosen not to adopt the uniform Evidence Act or to modify the hearsay rule along the lines of the English legislation or otherwise. In circumstances in which the application of the hearsay rule in the appellant's trial did not occasion a miscarriage of justice, the invitation to effect that change should be rejected.

57 Something should be said about the appellant's submissions respecting the Queensland line of authority. *Zullo* was decided before *Bannon*. At Zullo's trial for murder, evidence was admitted of a confession to the killing made by a man named Beard. The evidence of the confession was given by a police officer. Beard was not charged with any offence arising out of his confession[33]. He gave evidence at the trial and, when questioned about the confession, claimed privilege on the ground of self-incrimination[34]. Zullo appealed against his conviction for manslaughter to the Court of Appeal of Queensland on grounds including a suggested error in the trial judge's directions concerning the use that might be made of the confession. In dealing with this ground, the Court commented that there was "authority of some strength" in favour of the view that the evidence of Beard's confession was not admissible[35]. Nonetheless, the Court

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32 *Evidence Act* 2008 (Vic), s 67.

33 *K; Ex parte Attorney-General (Qld)* (2002) 132 A Crim R 108 at 114 [17] per McPherson JA.

34 *R v Zullo* [1993] 2 Qd R 572 at 573.

35 *R v Zullo* [1993] 2 Qd R 572 at 574 citing *R v Blastland* [1986] AC 41 at 52-53, *Re Van Beelen* (1974) 9 SASR 163 and *Donnelly v United States* 228 US 243 (1913).

said that the confession was to be considered by the jury "for what they thought it was worth"[36].

58 Although not necessary for the decision, there was discussion of *Zullo* in *K; Ex parte Attorney-General (Qld)*[37]. McPherson JA, who gave the leading judgment of the Queensland Court of Appeal in the latter, commented that *Zullo* was contrary to decisions in overseas jurisdictions and that the New South Wales Court of Criminal Appeal had declined to follow it. However, his Honour observed that *Zullo* was binding in Queensland until overruled.

59 In *R v Martin*, the Court of Appeal of Queensland considered *Zullo* in the context of a submission that an accused's confession to a killing should be received in the trial of a co-accused[38]. McPherson JA noted that *Bannon* had not been drawn to the Court's attention in *K; Ex parte Attorney-General (Qld)*. However, for reasons that were not explained, his Honour said that he was not persuaded that statements in *Bannon* were necessarily inconsistent with the line of authority in Queensland relating to the admission of hearsay confessions to a killing[39]. The success of the appeal of the accused Klinge in *Martin* did not turn on the admissibility of the confessional statements of the co-accused. There was no discussion of how the statements in *Zullo* might be reconciled with the law as it was subsequently stated in *Bannon*.

60 The common law of evidence governs the admission of hearsay confessions in Queensland. To the extent that the appellant's submissions identified Queensland as an Australian jurisdiction in which hearsay confessions are admissible, the submission was misconceived.

61 For these reasons, the appeal should be dismissed.

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36 *R v Zullo* [1993] 2 Qd R 572 at 574.

37 (2002) 132 A Crim R 108 at 113-114 [17].

38 (2002) 134 A Crim R 568.

39 (2002) 134 A Crim R 568 at 575 [21].

62 HEYDON J. In the *Sussex Peerage Case*, Lord Brougham stated[40]:

> "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."

The proposition to which Lord Brougham applied this soft impeachment was far less extreme than the proposition advocated by the appellant in this appeal. The appellant submitted that an out-of-court statement incriminating its declarant is admissible in an accused person's favour even when the declarant is alive, available, and sitting in the courtroom in which the out-of-court statement is tendered, but has simply chosen not to testify. Hitherto Australian courts, apart from the Supreme Court of Queensland, have held that that submission is not the law[41]. That position was challenged in *Bannon v The Queen*[42], but this Court did not overturn it. The appellant now challenges *Bannon v The Queen* itself.

63 The issues in this case arose out of an extensive fight which broke out during a large "warehouse party" at 3.00am. During that fight, a young man fell through a glass window. He died from the effects of the fall. The prosecution alleged that the appellant and a minor tried jointly with him, LM, caused the deceased's fall. The prosecution case was that the appellant and LM intended to cause the deceased really serious injury and that one or other or both of the accused pushed the deceased, causing his fall.

64 The question in this appeal is whether hearsay statements made by LM which allegedly exculpated the appellant were admissible in his favour.

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40 (1844) 11 Cl & F 85 at 111-112 [8 ER 1034 at 1045].

41 See *Re van Beelen* (1974) 9 SASR 163 at 203-232; *R v Martin* (1983) 32 SASR 419 at 439; *Wade v Gilroy* (1986) 83 FLR 14 at 18-19 and 29; *R v Greatorex* (1994) 74 A Crim R 496 at 498 and 507-508; *Robinson v The Queen* (1996) 15 WAR 191 at 194-196; *Question of Law Reserved (No 3 of 1997)* (1998) 70 SASR 555 at 561-562, 568 and 573-574; *Willis v The Queen* (2001) 25 WAR 217 at 238 [122]; *Button v The Queen* (2002) 25 WAR 382 at 445-457 [203]-[239]; *Etherton v Western Australia* (2005) 30 WAR 65 at 92 [138]; *Manufekai v The Queen* (2006) 196 FLR 460 at 465-466 [24]; *Brown v Western Australia* (2011) 207 A Crim R 533.

42 (1995) 185 CLR 1; [1995] HCA 27.

Bannon v The Queen: summary

65 *Bannon v The Queen* was heard by six Justices. Four judgments were delivered: one by Brennan CJ, one by Deane J, one by Dawson, Toohey and Gummow JJ, and one by McHugh J. Apart from some dicta of Deane J which are examined below[43], their Honours did not support abandoning the common law position that the rule against hearsay prohibits receiving statements of one co-accused favourable to another co-accused and statements of third parties favourable to an accused.

66 The appellant states the key question in this case as being whether the Court should now "recognize an exception to the rule against hearsay of the kind considered, but not decided, in *Bannon v The Queen*". That formulation compels reconsideration of the arguments which did not prevail in that case.

67 The appellant in *Bannon v The Queen* advanced three arguments for the Court's consideration[44]. One was that the rule against hearsay should be applied flexibly. The second argument was that there was an exception to the rule against hearsay when an out-of-court statement by a person other than the accused was against that person's penal interest and that person is not available to testify. The third argument was that an out-of-court statement of that kind which was reliable should be admitted where its admission was reasonably necessary to prove a fact in issue. Each of the six Justices who heard *Bannon v The Queen* either denied that the law should be changed in this way or held that even if the common law could be appropriately modified, that modification would not assist the appellant in the circumstances of the case.

68 It is convenient to deal in turn with each of these arguments, with a difficulty that emerged in the course of judgment in *Bannon v The Queen*, and with the dicta of Deane J. Finally, the arguments of the present appellant not raised in *Bannon v The Queen* will be examined. However, it is desirable first to deal with two preliminary points of a factual character.

69 The appellant submitted that LM's out-of-court statements exculpated him. The appellant also submitted that those statements were reliable. Neither submission is correct.

Did LM's statements exculpate the appellant?

70 The appellant repeatedly submitted that the admissions of LM which the prosecution relied on tended to implicate LM and exculpate the appellant. Those

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43 See below at [98]-[107].

44 *Bannon v The Queen* (1995) 185 CLR 1 at 6-7 and 31.

admissions fell into two groups. It is not correct to say that either group exculpated the appellant.

71 The first group of statements allegedly exculpating the appellant comprised statements by LM to police officers during a formal interview. Those statements were to the effect that he had pushed the deceased. The problem for the appellant is that LM did not admit pushing the deceased out of the window. He said only that he assumed that that was the case. And he specifically denied two leading questions by a police officer suggesting that he had pushed the deceased out of the window. LM told the police officers that the deceased was one or two metres, or one and a half metres, from the window when he pushed him. LM claimed that he did not see the deceased go out of the window. LM's statements that he had pushed the deceased do not amount to evidence that he pushed the deceased out of the window. And they do not amount to evidence that the appellant did not push the deceased out of the window. In the police interview, LM said that he and the appellant had come to the party in LM's car. The appellant had driven. LM said that they left the party by the same means. They left together. The appellant and LM were dancing at the party when the fighting broke out. LM persistently refused to name his friends or describe their conduct. The trial judge treated LM's denials of recollection and refusal to name his friends with great scepticism.

72 The second group of statements allegedly exculpating the appellant comprised statements by LM in the car in which he left the party. The appellant, LM and three others left in the car immediately after the deceased had fallen. Mr Asfer testified that LM had said to Mr Faulkner: "Look what you made me do". Mr Morgan testified that LM had said: "See what you've done" and "see what you've put us through". In cross-examination, Mr Morgan accepted that he had told the police that LM had said: "See what you've done, look what you've made me do." These rather vague statements may inculpate LM and Mr Faulkner. However, again, they do not exculpate the appellant.

73 LM's statements were thus affected by the same weakness as that of the co-accused whose statement was considered in *Bannon v The Queen*. Professor C R Williams has analysed the appellant's position in that case as follows[45]:

> "The argument of the defence involved using the statement of the co-accused as implied hearsay. From the admission 'I killed the deceased' without reference to the accused, it was sought to infer that the co-accused was in substance saying 'I alone killed the deceased', which if the statement had been made, would have been direct hearsay. If a general

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45 Williams, "Implied Assertions in Criminal Cases", (2006) 32 *Monash University Law Review* 47 at 62-63.

> rule against the admission of hearsay evidence is accepted, then the statement of the co-accused was correctly regarded as not admissible for the purpose of drawing such an inference. No issues of faulty perception or erroneous memory on the part of the co-accused arose. Possible issues of insincerity and ambiguity were however both present and significant. There are any number of reasons why a person who has committed a killing may choose not to implicate another participant in the offence. When considered for the purpose for which it was sought to be used, the statement was highly ambiguous; a statement 'I committed a killing' by no means necessarily means 'I alone committed a killing'."

That reasoning is particularly apposite here. LM's statements that he pushed the deceased, taken in isolation, are not the same as LM saying: "I, and I alone, pushed the deceased." The contexts in which LM made those statements could of course suggest otherwise. But here those contexts, particularly the police interview, do not suggest otherwise. They are neutral or point in the opposite direction.

74 In the police interview, LM was extremely keen to minimise the involvement of his friends in general and the appellant in particular. Yet he never explicitly said that the appellant had no involvement. In view of his manifest desire to protect the appellant, that is significant. It is not possible to infer from LM's statements that the appellant did not push the deceased.

75 The statements by LM in the car were made in the presence of the appellant and three other people. At the time they were made, the appellant was driving the car. It is perhaps unlikely that LM would have intended to accuse the appellant in front of the others, especially while the appellant had control of the vehicle in which he was a passenger. In any event, nothing about the circumstances in which this group of statements were made suggests that LM was taking responsibility for the deceased's death to the exclusion of the appellant.

76 The hearsay statements by LM do not exculpate the appellant. The factual substratum necessary for debate about creating a new hearsay exception for third party confessions favourable to the accused does not exist in this case. That conclusion alone is sufficient ground for dismissing the appeal. However, the appeal should also be dismissed on other grounds set out below. It is relevant to those grounds to consider a second preliminary point of a factual character – whether LM's statements were reliable.

Were LM's statements reliable?

77 The appellant submitted that LM's statements were reliable for four reasons. First, the prosecution relied on them as inculpatory of LM. This was significant because the burden on the prosecution to prove guilt beyond a

reasonable doubt "tends to ensure a relatively high degree of reliability". Secondly, LM did not object to the admissibility of his own admissions. Thirdly, the first group of admissions were made to the police. Fourthly, the evidence of Messrs Asfer and Masonga that the blows were struck by LM corroborated that group of admissions. It is convenient to deal with these four reasons in turn.

78 As to the first, it is true that the prosecution relied on the admissions. But it relied on them as inculpatory of LM only. The appellant's submission suggests that the burden of proof resting on the prosecution causes it always to call weighty evidence. It suggests that every piece of evidence that the prosecution relies on is valuable. It suggests that the prosecution vouches for or warrants the truth of each piece of evidence. These suggestions overlook the prosecution duty to call all available evidence. In *R v Apostilides*[46], Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ said:

> "A refusal to call [a] witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare. The unreliability of the evidence will only suffice where there are identifiable circumstances which clearly establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence."

It was for the jury to assess what caused the deceased's death, taking into account the hearsay evidence of LM as well as many other accounts of the evening. The conflicts between the testimony of prosecution witnesses did not mean that the prosecution was warranting one version or another as reliable.

79 The second reason advanced for thinking that the hearsay evidence was reliable was that LM did not object to the admissibility of his own admissions. How could he? Police officers recorded the first group of admissions. They were made in circumstances not raising any possibility of objection on grounds of involuntariness. The circumstances did not raise any possibility of discretionary exclusion either. LM had consulted his solicitor. The interview took place in his father's presence. He received all necessary warnings about his rights. The second group of admissions were made in circumstances not raising any possibility of objection by LM. In any event, the fact that LM did not object does not of itself make his admissions reliable. The events he had participated in were confused and fast-moving. They had the capacity to affect the accuracy of perception.

80 The third supposed reason why LM's evidence was reliable was that the admissions in the first group were made to police officers. It is true that the statements were made in a formal setting under police caution. That

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46 (1984) 154 CLR 563 at 576; [1984] HCA 38.

circumstance supports the conclusion that the admissions were made. It does not render reliable LM's powers of perception of the events he narrated, his recollection of those events or his expression of that recollection. It is a novel proposition that where the police are investigating a death, there is some special solemnity attaching to police interviews of witnesses.

81 The fourth reason the appellant assigned for the reliability of LM's statements was that the testimony of Messrs Asfer and Masonga corroborated them. That takes no account of the fact that they were contradicted by the evidence of Mr Doig, Mr Arcaro and, to some extent, Mr Stuart. In any event, so far as reliability is relevant to the reception of LM's statements, it must be assessed independently of what other witnesses said.

82 For all of those reasons, LM's statements were not reliable.

Flexible application of the hearsay rule?

83 It is now necessary to turn to the three arguments put in *Bannon v The Queen* on which the appellant relied. The first is that the hearsay rule should be relaxed in the case of highly or sufficiently reliable evidence[47]. In *Bannon v The Queen*, Brennan CJ attacked and rejected the proposed relaxation. Dawson, Toohey and Gummow JJ (and Deane J, who agreed with their Honours) did not address it. McHugh J did not find it necessary to deal with it. His Honour held that the evidence was not sufficiently reliable to satisfy the exception if it existed[48]. The grounds which Brennan CJ assigned for his Honour's conclusion are, with respect, convincing[49]. One of his Honour's points concerned the parties' inability to cross-examine the makers of out-of-court statements who do not give evidence. Another concerned the fact that neither the judge nor the jury would have seen the out-of-court statement being made or seen the declarant giving evidence. To these points may be added the following considerations.

84 Suppose a witness, Mr W, testifies to a relevant event which he has himself observed. In those circumstances, the jury is invited to accept that Mr W did perceive the event, that he has remembered correctly what he perceived, that there is no ambiguity in his narration of the event to the court, and that he is sincere in his testimony. Sincerity may be promoted by the making of an oath or affirmation. Mr W's fear of criticism for false evidence, inside the court or outside it, and the prospect of prosecution for perjury may also promote truthfulness. But the principal guarantee and test of the witness's honesty and the

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47 (1995) 185 CLR 1 at 7.

48 (1995) 185 CLR 1 at 33.

49 (1995) 185 CLR 1 at 7-8: see below at [94].

accuracy of his perception, memory and narration lie in his capacity to be cross-examined. At the end of the day, the jury must be satisfied both that the witness believes that the event took place, and that his belief is justified.

85 It is obvious that any danger that the jury wrongly reaches, or fails to reach, that state of satisfaction is accentuated when what is offered to the court is not Mr W's account of what he saw, but his account of what another person, who does not testify – Mr Jones – saw. In that instance, the jury must be satisfied that Mr W believed he heard Mr Jones say that the event happened. It must be satisfied that Mr W's belief is justified. It must be satisfied that Mr Jones believed that the event happened. And it must be satisfied that Mr Jones's belief was justified. The jury must decide whether it is so satisfied without the safeguards which the ordinary conditions of testimony would have provided in relation to Mr Jones had he been called as a witness. It must decide without testing of Mr Jones's account in cross-examination. And it must decide despite the diminished value of these safeguards so far as Mr W is concerned. There is no direct link between Mr W's testimony and the conclusion that the jury is invited to reach as a result of it. The direct witness, who asserts that the event occurred, can be cross-examined much more fruitfully about his perception and memory of that event than the hearsay witness can be cross-examined. The direct witness claims personal experience of the event and can be cross-examined on that experience. The hearsay witness, who merely testifies that he heard the direct witness say "the event took place", can only be cross-examined about what he claims he heard the direct witness say. The direct witness is giving the "best" evidence[50]. The hearsay witness is not.

86 There is a further danger in the introduction of a relaxed or flexible rule based on "reliability". In *Pollitt v The Queen* certain Justices in this Court employed the kind of thinking that the appellant advocated in this appeal to create a limited exception permitting parties to telephone conversations to be identified. The differences of opinion that emerged between those Justices illustrate that danger[51].

87 Whatever the merits of a flexible application of the hearsay rule based on reliability, it would not be correct to indulge in that process here. LM did not directly exculpate the appellant. And the evidence concerning what LM said is not a very reliable guide to what he saw.

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50 *Teper v The Queen* [1952] AC 480 at 486.

51 See *Pollitt v The Queen* (1992) 174 CLR 558 at 566-567, 595-596, 610-611 and 621-622; cf at 582-583 and 605; [1992] HCA 35.

Statement against penal interest?

88 The second argument advanced in *Bannon v The Queen* that the appellant relied on was that this Court should recognise an exception to the rule against hearsay for out-of-court statements by persons other than the accused where those statements are against the maker's penal interest and the maker is unavailable to testify. In *Bannon v The Queen*[52], Brennan CJ pointed out that Holmes J (dissenting in *Donnelly v United States*[53]) and Wigmore[54] had attacked the narrowness of the exception to the hearsay rule based on declarations against interest. That exception applied to proprietary and pecuniary interest only. Extending that exception to include declarations against penal interest would depend at least on the declarant's death, as the exception concerning declarations against proprietary or pecuniary interest does. An extension to that extent only would not assist in the present case: LM was not dead at the time of the appellant's trial. Brennan CJ observed that in Canada a hearsay exception developed as a result of these criticisms. It depends on satisfaction of at least two conditions. The first is that the declarant "should have apprehended a vulnerability to penal consequences as a result" of making the statement, which vulnerability was "not remote". The second is that the declarant be unavailable through death, insanity, grave illness or absence in a jurisdiction to which the processes of the court do not extend[55]. The first condition corresponds with an equivalent condition that applies to declarations against proprietary and pecuniary interest. In *Ward v H S Pitt & Co* Hamilton LJ, speaking for himself, Sir Herbert Cozens-Hardy MR and Buckley LJ, said[56]:

> "It is essential that the deceased should have known the fact [declared in his out-of-court statement] to be against his interest when he made [the statement], because it is on the guarantee of truth based on a man's conscious statement of a fact, 'even though it be to his own hindrance', that the whole theory of admissibility depends."

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52 (1995) 185 CLR 1 at 8.

53 228 US 243 at 278 (1913).

54 *Wigmore on Evidence*, Chadbourn rev (1974), vol 5, §§1476-1477.

55 *Bannon v The Queen* (1995) 185 CLR 1 at 9, quoting *R v O'Brien* [1978] 1 SCR 591 at 599.

56 [1913] 2 KB 130 at 137-138, citing *Sturla v Freccia* (1880) 5 App Cas 623 at 633 and *Tucker v Oldbury Urban Council* [1912] 2 KB 317 at 321.

89 Even if the powerful objections that Brennan CJ stated to extending the law in this way were put aside[57], it would be futile to create the exception in this case. LM did not meet any of the conditions of unavailability. And, at least in respect of the second group of statements, the "apprehended vulnerability to non-remote penal consequences" condition was not met either. Hence adopting this proposed exception would not benefit the appellant.

90 In *Bannon v The Queen*, Dawson, Toohey and Gummow JJ (Deane J concurring) did not decide on the correctness of the second postulated exception. Their Honours did not need to decide because they held that the declarant in that case did not appreciate that what she narrated was to her prejudice[58]. McHugh J took the same course[59]. In this appeal, the appellant submitted that the Canadian requirements for the reception of third party or co-accused confessions, such as "reliability" and "corroboration", were satisfied here. For the reasons given above[60], that is not so.

Necessity and reliability?

91 The third argument from *Bannon v The Queen* that the appellant advocated was that there exists a hearsay exception for statements exculpatory of an accused where those statements are both reliable and reasonably necessary to prove a fact in issue. Brennan CJ rejected this submission in *Bannon v The Queen*[61]. His Honour did so on the ground that this third proposed exception is fundamentally inconsistent with Australian authority.

92 Dawson, Toohey and Gummow JJ (Deane J concurring) did not deal specifically with this third proposed exception. McHugh J criticised it, but held that it was unnecessary to decide whether it should be adopted in Australia. That was because the evidence did not satisfy the reliability threshold[62].

93 Even if the exception existed, which it is unnecessary to decide, LM's statements would not satisfy its terms. They do not exculpate the appellant. Even if they did, they are not reliable. And they were not necessary to prove that

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57 *Bannon v The Queen* (1995) 185 CLR 1 at 9-10.

58 (1995) 185 CLR 1 at 27-28.

59 (1995) 185 CLR 1 at 38.

60 See above at [77]-[82].

61 (1995) 185 CLR 1 at 10-12.

62 (1995) 185 CLR 1 at 40-41.

fact in issue. The relevant fact, that LM alone pushed the deceased, could have been proved by the appellant deciding to enter the witness box and testifying to that effect.

The inculpation of the accused

94 In the concluding paragraph of his reasons for judgment in *Bannon v The Queen*, Brennan CJ observed that "counsel for the appellant did not submit that any exception to the hearsay rule should admit evidence inculpatory of an accused person."[63] It is plain that Brennan CJ thought that any new hearsay exception admitting evidence inculpatory of an accused person was undesirable. That is because, in rejecting the "flexible application" exception, his Honour had said[64]:

> "To admit hearsay evidence whenever the judge forms the opinion that the evidence is sufficiently reliable would be to transform the nature of a criminal trial. If the judge's opinion be based on no specific criteria but only on an appreciation of the circumstances generally, the judge would have to exercise a lively discretion to exclude evidence that the judge thought to be reliable in order to prevent undue prejudice to the accused who could not cross-examine the maker of the out-of-court statement."

McHugh J noted that non-inculpation of the accused was a requirement in Canadian law[65].

95 In the concluding paragraph of his reasons for judgment in *Bannon v The Queen*, Brennan CJ also said the out-of-court statements of the co-accused, Kerry Calder, "in so far as they inculpated herself were likely to be understood by the jury as inculpatory of the appellant as an aider and abettor."[66] On Brennan CJ's approach, that made them inadmissible. Hence, said Brennan CJ[67]:

> "It follows that, on any view of the scope of an exception to the hearsay rule as contended for, the appellant cannot succeed. If Calder's statements were understood to be exculpatory of the appellant in the sense that the

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63 (1995) 185 CLR 1 at 12.

64 (1995) 185 CLR 1 at 7.

65 (1995) 185 CLR 1 at 35.

66 (1995) 185 CLR 1 at 12.

67 (1995) 185 CLR 1 at 12.

> appellant was not a party to Calder's offence, Calder's statements can hardly be taken to be reliable as to that fact. That fact is not asserted and the circumstances in which the statements were made give no assurance that Calder was adverting to the appellant's involvement in the murders."

96 These passages are germane in this appeal too. Here, too, counsel for the appellant did not submit that any new exception to the hearsay rule should admit evidence inculpatory of an accused person. Here, too, LM's statements to the police officers were likely to be understood as inculpatory of the appellant as an aider and abettor. That is so because the prosecution case at the joint trial of the appellant and LM was put on an alternative basis: either they acted in concert, or each aided and abetted the other. If LM's statements were admitted not only against LM, but in favour of the appellant, it was open to the jury to infer, given LM's statement that the appellant was present, that LM's reluctance to speak fully about the appellant's role[68] was attributable to the fact that they had acted in concert or aided and abetted each other. Finally, like Kerry Calder's statements in *Bannon v The Queen*, if LM's statements were understood to be exculpatory of the appellant, they were not reliable in that respect.

97 If out-of-court confessions of crime are admissible in favour of the accused, why are they not admissible against the accused? The difficulties which their admissibility against the accused would present suggest that they should not be admitted either against or in favour of accused persons.

Deane J's dicta in *Bannon v The Queen*

98 The appellant relied on several passages in Deane J's reasons in *Bannon v The Queen*. The appellant stressed three in particular. The first appears after his Honour set out certain examples not comparable to the present facts[69]:

> "The point of the examples is simply to demonstrate that, in circumstances where the Crown has seen fit to proceed against two accused persons jointly and to lead particular evidence on the joint trial against one only of them, a situation can arguably arise in which ordinary considerations of fairness would be affronted and the administration of criminal justice mocked if the other accused were precluded from relying upon that evidence if it supported his or her innocence or raised a doubt about his or her guilt."

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68 See above at [71].

69 (1995) 185 CLR 1 at 14.

By "doubt" his Honour meant "reasonable doubt". That characterisation is supported by a later passage in Deane J's reasons on which the appellant also relied[70]:

> "The central prescript of our criminal law is that no person should be convicted of a crime unless his or her guilt is established beyond reasonable doubt after a fair trial according to law. The specific content of the requirement of a fair trial may vary with changing circumstances, including contemporary standards and perceptions. When it appears that judge-made rules of evidence or procedure conflict, or are liable to conflict, with the basic requirements of fairness, it is a function of a final appellate court … to address the question whether those rules should be altered or adjusted to avoid such conflict." (footnote omitted)

99 The third passage on which the appellant relied was[71]:

> "it appears to me to be strongly arguable that the basic requirement of fairness dictates that, in circumstances where the Crown has seen fit to bring a person (the first accused) to a joint trial with another accused and to place before the jury material which is tendered only against that other accused but which is supportive of the innocence of the first accused, the trial judge have a discretion to direct that that material, even though otherwise inadmissible in the trial of the first accused, be evidence in that trial at the instance of the first accused if, in all the circumstances of the case, the trial judge considers that fairness to the first accused and the interests of the administration of justice support the conclusion that such a direction be given."

100 Deane J made it plain that he was not asserting these views as concluded statements of the law, but as suggestions only. The appellant's submissions about them are expressed subject to that caveat. The appellant submitted that "Deane J's suggested exception" was sound in principle. But what is the suggested exception? If it corresponds with the final passage quoted, LM's statements do not support the appellant's innocence or raise a reasonable doubt about his guilt.

101 The appellant referred to Parke B's aphorism: "what a party himself admits to be true, may reasonably be presumed to be so."[72] Parke B's aphorism justifies the reception of admissions which the maker was aware were against

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70 (1995) 185 CLR 1 at 15.

71 (1995) 185 CLR 1 at 15.

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

interest. But it cannot justify the reception of all admissions. The reception of admissions, unlike the reception of declarations against proprietary or pecuniary interest, does not depend on the maker's awareness that they are against interest at the time they are made. Some admissions are received even though their makers thought them to be in their interests at the time they were made. E M Morgan has advanced a sounder justification for the reception of admissions[73]:

> "The exclusionary rules of evidence and the procedure for enforcing them are not designed to be automatic eliminators of untrustworthy testimony; in the main they rather provide a privilege of protection against such testimony to the party against whom it is offered. A litigant can scarcely complain if the court refuses to take seriously his allegation that his extra-judicial statements are so little worthy of credence that the trier of fact should not even consider them. He can hardly be heard to object that he was not under oath or that he had no opportunity to cross-examine himself."

102 However that may be, on the strength of Parke B's aphorism, the appellant then made a submission assuming that a confession by B implicating himself and exculpating A was necessarily a reliable confession. The submission also assumed that LM's admissions implicated him and exculpated the appellant. The submission was:

> "The same rationale dictates that LM's admission that he pushed the deceased and caused him to fall, in circumstances where there are competing versions as to which of the two accused pushed the deceased, and the appellant disputes that he did so, may reasonably be presumed to be (or possibly be) a true statement that the appellant did not push the deceased."

It may be accepted that LM's admission that he pushed the deceased could reasonably be presumed to be true. But LM did not say that the appellant did not push the deceased[74]. Deane J's statements in *Bannon v The Queen* depend on a consideration stated fairly early in his reasons for judgment. That consideration is that the hearsay statement be one in which the maker "unambiguously admits that, alone and without assistance", he or she committed the crime[75]. That is not true of LM's statements.

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73 "The Rationale of Vicarious Admissions", (1929) 42 *Harvard Law Review* 461 at 461.

74 See above at [71]-[72].

75 (1995) 185 CLR 1 at 14.

103 What if it were true of LM's statements? It is convenient to examine what force the argument has. There is a conceptual difficulty in it. On the strength of an approach similar to Parke B's, many confessions and admissions have weight because it is assumed that their makers would not invent their involvement in criminal conduct. But it does not follow from that reasonable assumption that those makers would not lie about the involvement of persons other than themselves. On the one hand, it is a commonplace that one accomplice may falsely exaggerate the guilty role of others[76]. On the other hand, it is possible that an accused person may falsely diminish the guilty role of others – whether out of affection for those others, or out of fear of future retribution. It does not follow from the putative reliability of self-inculpation that the exculpation of others is reliable. Indeed, the view that exculpations of others in these circumstances are reliable is not supported by experience.

104 Another conceptual difficulty in Deane J's appeal to fairness is this. If an admission is made, the tendering party must accept that what is to be received in evidence comprises not only the parts adverse to the opposing party, but also "everything … which is fairly connected with that admission"[77]. That is so even if that which is fairly connected is adverse to the tendering party. That is, the party against whom the evidence is tendered must suffer the adverse consequences of the admission, but may take advantage of everything fairly connected with it that is favourable to that party. The appellant's submission seeks to apply this advantage not only to the party against whom the admission is tendered but to a party against whom the admission is not tendered. The prosecution tendered LM's statements against LM. They were not tendered against the appellant and were not admissible against the appellant. In the result, the proposed extension based on "fairness" is anything but fair. "Fairness" applies to all parties to litigation. It must involve parity and reciprocity. It cannot be limited to the defence. At common law, instances in which the rules of evidence differ as between prosecution and defence are rare, apart from the burden and standard of proof. Suppose B makes an inculpatory statement exculpating A. If the prosecution's tender of the confession against B is said, because of its reliability, to make it "fair" to receive the exculpatory evidence in favour of A, why is the reverse not "fair"?

105 That is, why is it not "fair" for the prosecution to rely, against A, on a reliable confession by B inculpating A? For the reasons given above, it is unfair

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76 *R v Farler* (1837) 8 C & P 106 at 108 [173 ER 418 at 419].

77 *Lyell v Kennedy* (1884) 27 Ch D 1 at 15 per Cotton LJ.

to take the latter course[78]. And if that is unfair, it must be equally unfair to use B's confession to exculpate A.

106 Deane J's suggested exception creates a further unfairness. That unfairness is perhaps only transitory, but it has real effects. The police officers who conducted the interview of LM probably thought that the answers LM gave would be admissible evidence against him, but no-one else. They probed LM about what *he* did. They did not probe LM about what *others* did. Making a retrospective change to the common law rule, as the appellant suggests this Court should do, would operate unfairly to the prosecution. It would permit LM's evidence to suggest the appellant's innocence in circumstances where the police officers investigating the deceased's death did not, and the prosecution at the trial could not, examine that possibility by questioning.

107 There may be cases where unfairness arises because the prosecution tenders an out-of-court statement by one co-accused that points to the innocence of another. But in those cases the solution may not lie in the rules of evidence. It might be more appropriate to grant a separate trial or to turn to doctrines of abuse of process to cure the unfairness.

The risk of perjury

108 It is common now to downplay the risk of manufactured evidence as a reason for not widening admissibility. But it is a real danger in cases such as the present case. In *Re van Beelen*, Walters, Wells and Jacobs JJ used the following words, plainly written by Wells J, to describe it[79]:

> "The mere knowledge that an extra-judicial confession of crime could, in favourable circumstances, be received to exculpate an alleged offender, would, however, be likely, in our opinion, to tempt the less scrupulous members of our community to undertake clandestine operations of self-help. All that would be required by a guilty accused person would be the services of two or three accomplices and a person, known to all, who had died after the date of the alleged offence and who, theoretically, could have committed it. The accomplices, when called as witnesses, could then simply attribute a 'confession' to the deceased man, and the confession could be given artistic verisimilitude by inserting in it evidence of esoteric knowledge that had, in fact, come from the best of all sources – the offender. If there were not at hand a deceased person into whose mouth the confession could conveniently be put, the unavailability of a living person could, no doubt, be arranged by any one of a number of

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78 See above at [103]-[104].

79 (1974) 9 SASR 163 at 205.

> irregular methods – direct or indirect. Where serious crime was alleged, the motive for making such arrangements would be strong.
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> If answer be made that the foregoing observations are, *mutatis mutandis*, equally applicable to the alibi, evidence of which is not excluded, the reply may be offered that the alibi is at least closely and naturally associated with the accused himself and his connection with the case against and for him; it is usually susceptible of being tested and assessed with the aid of, and against, the case as a whole. The extra-judicial confession of a stranger who does not appear in the witness box, however, has the merit, from a guilty accused's point of view, that the circumstances of its making would, more often than not, be largely beyond the natural purview of the principal case on which issue had been joined, and would be likely to raise questions that, except for the connection of the text of the confession with the *corpus delicti*, related to facts and events not likely to be canvassed by the main body of evidence. Perjurious or lying defences would thus become dangerously easy to fabricate, and correspondingly difficult to expose."

Simpson J described that danger as "obvious" in *R v Greatorex*[80]. In *Bannon v The Queen*, Brennan CJ said that if the common law were changed, "false confessions untested by cross-examination would bedevil criminal trials" and "[g]aol-house confessions allegedly made by prisoners who would decline to admit guilt testimonially would be a commonplace."[81] The circumstances those remarks contemplate differ from those in this appeal. But the appellant did not attempt to deal with the risk of fabricated confessions that an exception to the hearsay rule might create. He tried to construct a rule limited to the particular circumstances of this appeal. However, any evidentiary rule which would benefit the appellant in this appeal would have to be structured so as to operate more widely as well.

Australian authority

109 The appellant acknowledged that most intermediate appellate courts in this country had not gone beyond the principles elucidated in *Bannon v The Queen*. But he submitted that the opposite was true in Queensland. Like the mother watching her son in the parade, the appellant submitted that Queensland was the only one in step, and that the common law in the other jurisdictions should be made to conform with Queensland.

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80 (1994) 74 A Crim R 496 at 508.

81 (1995) 185 CLR 1 at 9.

110 The first of the Queensland cases is *R v Zullo*. It preceded *Bannon v The Queen*. The case concerned a hearsay statement by a person not charged with a killing that he was the killer. That person gave a different version when interviewed by police officers. He said that it was the accused and not he who was responsible. At the trial, he successfully claimed the privilege against self-incrimination in relation to his incriminating statement. The prosecution tendered the hearsay statement[82]. The judge directed the jury[83]:

> "Before an out of Court confession by some other person would result in an acquittal of an accused, you would have to be satisfied that it had such substance, after scrutinising all the evidence relevant to it carefully, that you had a reasonable doubt as to the accused's guilt. If after scrutinising all the evidence relevant to that confession you reached the conclusion that there is no substance in it, or that it was not truthful, then you may conclude that nothing relating to that evidence causes you to have a reasonable doubt as to the accused's guilt."

On appeal, the accused claimed that this was a misdirection. The Court of Appeal noted that there was "authority of some strength" against the admissibility of the evidence[84]. But it treated the evidence as admissible. No reasons were given beyond reliance on Holmes J's dissenting judgment in *Donnelly v United States*[85]. The Court of Appeal said[86]:

> "The confession … was … to be considered by the jury for what they thought it was worth, and may very well have inclined the jury towards a 'not guilty' verdict, even if they were by no means convinced that it was truthful."

Their Honours also agreed that there had been a misdirection[87]:

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82 See *R v K; Ex parte Attorney-General (Qld)*, where it was observed that the maker of the third party confession did not give evidence in either of Zullo's trials: (2002) 132 A Crim R 108 at 114 [17].

83 [1993] 2 Qd R 572 at 573-574.

84 [1993] 2 Qd R 572 at 574.

85 228 US 243 at 278 (1913).

86 [1993] 2 Qd R 572 at 574.

87 [1993] 2 Qd R 572 at 574.

> "If the jury were inclined to suspect that the … confession was spurious, that would not necessarily have been a justification for ignoring it when coming to their final conclusion."

But how can an out-of-court confession raise a reasonable doubt if the jury does not believe its truth? The Court of Appeal's assumption that the third party confession was admissible was obiter only. It was inconsistent with the Australian common law as received from England[88]. Leaving aside short-run disagreements, there is but one Australian common law[89]. Whether or not the common law rule in question – the hearsay rule – was of a kind which an intermediate appellate court ought to have departed from is a controversy which can be put to one side[90].

111 In *R v K; Ex parte Attorney-General (Qld)*, the Court of Appeal followed *R v Zullo* as a case which "remains binding in Queensland."[91] Whether it was right to do this, or whether it should not have been followed because it was only an obiter assumption inconsistent with the leading common law cases, is another controversy which may be put to one side. In *R v K*, the Court of Appeal's attention was not drawn to *Bannon v The Queen*, notwithstanding that it had been decided more than six years earlier.

112 However, when *R v Martin* was decided a few months later, *Bannon v The Queen* was drawn to the Queensland Court of Appeal's attention. The Court of Appeal held that the "Queensland line of authority" remained binding in Queensland until this Court overruled it. In its view, what this Court said in *Bannon v The Queen* was not necessarily inconsistent with the Queensland cases[92]. The Court of Appeal did not explain this alleged congruity. In truth, *Bannon v The Queen* is inconsistent with the Queensland cases. Though no majority of this Court decided unequivocally against any future departure from the traditional law, their Honours made it plain that the law as it then stood contained no exception to the hearsay rule in favour of accused persons for

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88 *Sussex Peerage Case* (1844) 11 Cl & F 85 at 111-114 [8 ER 1034 at 1044-1046].

89 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563; [1997] HCA 25.

90 Cf *Myers v Director of Public Prosecutions* [1965] AC 1001 at 1021-1022.

91 (2002) 132 A Crim R 108 at 114 [17].

92 *R v Martin* (2002) 134 A Crim R 568 at 575 [21].

confessions made by a co-accused or a third party[93]. The Queensland cases reveal no basis on which they should be preferred. They should be overruled.

Impact of legislative developments

113 The appellant submitted that legislation largely corresponding with the *Evidence Act* 1995 (Cth) ("the Evidence Act") now existed in New South Wales, Tasmania and Victoria, and that the Northern Territory was preparing to follow suit. The Australian Capital Territory, formerly governed in large part by the Evidence Act, now also has its own legislation in very similar form. The appellant submitted that there is now a "consistent pattern of legislative policy to which the common law of Australia can adapt itself." The appellant took the quoted words from *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[94]. They appear in the discussion by Gleeson CJ, Gaudron and Gummow JJ of the questions whether and how the courts should use legislative developments as a guide for changing the common law. Those are large and significant questions.

114 Gleeson CJ, Gaudron and Gummow JJ[95] quoted a passage from Lord Diplock's judgment in *Warnink v J Townend & Sons (Hull) Ltd*[96]:

> "Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course."

Their Honours then pointed out that Lord Diplock was speaking in the context of a nation which at the time had only one Parliament. Australia is a federation with nine Parliaments. It can be difficult to detect a "steady trend" or a "consistent pattern" in the conduct of State and Territory legislatures. Often they seek to maintain, so far as ss 109 and 122 of the Constitution will let them, a sturdy independence. Queensland, South Australia and Western Australia have not adopted the Evidence Act. Those polities are very large in area. More importantly, they are quite large in population. Their legislatures are entitled to arrange their court processes along lines which they perceive to be desirable. In *Bannon v The Queen*, McHugh J observed that to change the Australian common

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93 For example, *Bannon v The Queen* (1995) 185 CLR 1 at 22.

94 (1999) 201 CLR 49 at 62 [23]; [1999] HCA 67.

95 (1999) 201 CLR 49 at 62 [24].

96 [1979] AC 731 at 743.

law by changing the common law of Victoria was not a course which should lightly be taken. Writing in 1995, just after the enactment of the Evidence Act, he said[97]:

> "The recent legislative activity in this field provides a sound reason for this Court proceeding cautiously when invited to alter the settled rule against hearsay evidence. If any change is to come about as the result of judicial law-making, it should only occur after the Court has had the benefit of full argument from counsel representing the States and the Commonwealth."

This Court heard no argument in this appeal from any counsel within this category except counsel for the respondent.

115 The appellant's submission that the common law should adapt itself to the Evidence Act raises the question – which part of it? The appellant mentioned s 65(1), (2)(b), (c) or (d) and (8)[98].

116 Those provisions permit the reception of "representations". The appellant submits that LM made a "representation" exculpating the appellant. That submission is factually incorrect[99]. And so far as the provisions of s 65(2)(b)-(d) require non-fabrication or reliability, the requirements are not satisfied[100]. Another difficulty is that the Evidence Act is, if not a completely integrated and exhaustive code, at least based on a carefully thought out scheme. Its parts are interdependent to some degree. Any adaptation of the common law to conform to the Evidence Act must be workable. To ensure this, it may be necessary to recognise many more provisions as forming part of the common law than those to which the appellant referred – for example, many definitions in the legislation, and the s 67(1) procedural duties to give notice. It would not be easy to decide how far this recognition should go.

117 A further difficulty is that minds may well differ on the desirability of importing the Evidence Act into the common law. Tests for admissibility that turn on questions of "fabrication" and "reliability" are alien to common law approaches. In *Vocisano v Vocisano*[101], Barwick CJ said that "statements made

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97 (1995) 185 CLR 1 at 41.

98 See above at [54].

99 See above at [70]-[76].

100 See above at [77]-[82].

101 (1974) 130 CLR 267 at 273; [1974] HCA 14.

on an occasion when they are unlikely to be concocted are [not] for that reason admissible." In *Pollitt v The Queen*, Brennan J said[102]:

> "[I]t is not desirable to subsume the res gestae principle under a general principle which would admit hearsay evidence when a trial judge believes that concoction was extremely unlikely".

And in *Bannon v The Queen*, Brennan CJ said the following position would apply if like requirements were imported into the common law[103]:

> "Admissibility would reflect no more than the judge's opinion of the fairness of exposing the accused to the risk of conviction on the hearsay evidence. That is not an appropriate power to vest in a trial judge who has not heard the declarant making the statement and ordinarily would not have seen the declarant. It is one thing for a trial judge to rule on the fairness of admitting an accused's confession when the accused was, ex hypothesi, the actor in the relevant events and is able to contest, by cross-examination and by testimony, the case advanced against him that is based on the confession; it is another thing to rule on the fairness of admitting the statement of another declarant when the accused was not involved in the making of the statement and is unable effectively to contest the case based on the statement." (footnote omitted)

The provisions of s 65(2)(b)-(d) are characterised by more safeguards than the regime Brennan CJ attacked. Nonetheless, those regimes share significant common ground. Sections 135 and 137 of the Evidence Act deal with the exclusion of evidence where its probative value is outweighed by the risk of prejudice to the accused.

118 Further, s 65(8) of the Evidence Act undercuts the safeguards in s 65(2). And the applicability of s 65(8) to the present circumstances is unclear. It applies where the defence tenders evidence. Here the prosecution tendered it.

119 The processes by which the common law might "adapt itself" to the Evidence Act are thus neither manifestly desirable nor simple. The judgments the Act makes and the techniques it adopts cannot be incorporated into the common law without a violent act of legislation, this time judicial.

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102 (1992) 174 CLR 558 at 582.

103 (1995) 185 CLR 1 at 7-8.

English developments

120 Finally, the appellant relied on the fact that in England a confession by one co-accused is admissible in favour of another co-accused. This was the result of legislative change[104]. The difficulties of adapting the common law of Australia to meet a foreign legislative change are even greater than adapting it to meet an Australian legislative change.

121 The English legislation was enacted after the decision in *R v Myers*[105]. In general, that case favours the appellant's position. Evidently, the legislature thought the decision to be unsatisfactory. *R v Myers* was an appeal by the accused against the reception of her own out-of-court statements. Those statements were tendered by her co-accused. *R v Myers* thus did not raise the issue in the present case. Indeed, in numerous respects it is factually distinguishable from the present case. And as Lord Hope of Craighead pointed out, the certified question did "not … sufficiently analyse the issues"[106]. The appellant made only two passing references to *R v Myers*. He took the Court to no part of what their Lordships said. The appellant did not demonstrate, or seek to demonstrate, its suitability as a precedent to be followed in Australia.

Conclusion

122 The present common law in relation to hearsay exceptions should not be changed in the respects the appellant advocated. LM's evidence was not admissible in the appellant's favour. The trial judge's direction was correct. The appeal should be dismissed.

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104 *Police and Criminal Evidence Act* 1984 (UK), s 76A(1).

105 [1998] AC 124.

106 *R v Myers* [1998] AC 124 at 146.