HIGH COURT OF AUSTRALIA

BRENNAN CJ,
TOOHEY, GAUDRON, GUMMOW AND KIRBY JJ

THE QUEEN APPELLANT

AND

JASON ROY SWAFFIELD RESPONDENT

R v Swaffield; Pavic v The Queen (B61-1996) [1998] HCA 1
20 January 1998

ORDER

Appeal dismissed.

On appeal from the Court of Appeal of the Supreme Court of Queensland

Representation:

M J Byrne QC with M C Chowdhury for the appellant (instructed by R N Miller QC, Solicitor for Public Prosecutions (Queensland))

A J Glynn SC with A J Rafter for the respondent (instructed by Director, Legal Aid Office (Queensland))

CATCHWORDS

R v Swaffield

Criminal law – Evidence – Confessions and admissions – Admissibility of – Discretion to exclude – Covert and surveillance operation squad – Secretly tape recorded statements made by the respondent to undercover police – Such evidence was the primary evidence implicating the respondent – Previous refusal to answer police questions – Statements voluntarily made – Reliability – Unfairness discretion – Public policy discretion – Unduly prejudicial evidence – Right to silence – Eliciting confessions – Judges' Rules – Duty to caution – Seriousness of the offence – Arson.

Evidence – Criminal trial – Exclusion of evidence – Reformulation of tests – Voluntariness test – Unfairness test – Public policy test – Unduly prejudicial test.

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BRENNAN CJ,
TOOHEY, GAUDRON, GUMMOW AND KIRBY JJ

STEVEN FRANCIS PAVIC APPELLANT

AND

THE QUEEN RESPONDENT

20 January 1998
M13/1997

ORDER

Appeal dismissed.

On appeal from the Court of Appeal of the Supreme Court of Victoria

Representation:

D Grace QC with O P Holdenson for the appellant (instructed by The Office of David Grace QC)

W H Morgan-Payler QC with D M Salek for the respondent (instructed by P Wood, Solicitor to the Director of Public Prosecutions (Victoria))

CATCHWORDS

Pavic v The Queen

Criminal law – Evidence – Confessions and admissions – Admissibility of – Discretion to exclude – Secretly tape recorded statements made by the appellant to friend as agent of police – Previous refusal to answer police questions – Statements voluntarily made – Reliability – Unfairness discretion – Public policy discretion – Unduly prejudicial evidence – Right to silence – Eliciting confessions – Duty to caution – Seriousness of the offence – Murder.

Evidence – Criminal trial – Exclusion of evidence – Reformulation of tests – Voluntariness test – Unfairness test – Public policy test – Unduly prejudicial test.

1 BRENNAN CJ. Should a confessional statement voluntarily made to a witness who, unbeknown to the confessionalist, is a police officer or is acting on behalf of the police, be admitted into evidence on the trial of the confessionalist for the offence to which the statement relates? And does it matter that the confessionalist has previously refused to answer questions or make a confessional statement when interviewed by the police? These were the issues raised for consideration by the facts of two cases in which appeals were heard together in this Court.

Swaffield's case

2 In December 1995, Swaffield was charged before the District Court at Rockhampton on an indictment containing three counts: breaking, entering and stealing, breaking and entering with intent to commit a crime and arson. The prosecution alleged that he had stolen cutting equipment from a workshop (count 1) and used the cutting equipment to enter the Leichhardt Rowing Club (count 2) to which he wilfully and unlawfully set fire (count 3). Two years earlier, he had been charged with the same offences but the police offered no evidence against him at the committal hearing and he was discharged. Then, in May 1994, Swaffield became one of the targets in a police undercover operation to detect drug suppliers. Posing as a purchaser of illegal drugs, Constable Jacob Marshall engaged Swaffield in conversation on 11 and 16 August 1994. During these conversations, Swaffield made admissions about his involvement in the arson of the Leichhardt Rowing Club. The conversations were recorded by Constable Marshall without Swaffield's knowledge. Fresh charges were laid against Swaffield.

3 At his trial, Constable Marshall's evidence of Swaffield's recorded admissions was tendered over objection by Swaffield's counsel that those admissions had been obtained unfairly and that the police had demonstrated a disregard of the relevant Judges' Rules. Nase DCJ disallowed the objection and the admissions went into evidence. Swaffield was convicted and sentenced on all three counts. He appealed to the Court of Appeal only against his conviction for arson (count 3).

4 The Court of Appeal allowed his appeal by majority (Fitzgerald P and Helman J, Pincus JA dissenting) holding that the trial judge erred in the exercise of his discretion by failing to give sufficient weight to the respondent's right to silence. The conviction for arson was quashed and a verdict of acquittal entered. By special leave the Crown has appealed to this Court against that order.

Pavic's Case

5 Police were investigating the murder of a man named Andrew John Astbury, whose body was found in the Yarra River handcuffed to an electric motor casing. The police interviewed Pavic on 3 January 1995 at the homicide squad office at St Kilda Road in Melbourne. At the beginning of the interview, Pavic was given the usual warning and he was advised that he had a right to communicate with his solicitor. He contacted a solicitor. When questioned by the police, acting on his solicitor's advice, he made no comment on the questions put to him. During the questioning, the police informed Pavic that he was believed to have committed the offence of murder. Nevertheless, at the end of the interview, Pavic was allowed to leave the office.

6 On 4 January, the police recovered from the Yarra River a garbage bag containing blood-stained towels and clothing. On 9 January they obtained a statement from Lewis James Clancy in which he identified some of the clothing as clothes which he had left in Pavic's vehicle some time before. Pavic had told Clancy that he had lost the clothes and insisted that he accept $50 for them. This satisfied the police that they had sufficient evidence to arrest Pavic and charge him with murder. After his interview with the police, Clancy agreed to being fitted with a microphone to record a conversation with Pavic. At Pavic's trial, Clancy gave evidence that he agreed to participate in the police investigation by being fitted with a microphone because he wanted to dispel what he perceived to be the police belief that he was implicated in the murder in some way. He conveyed that belief to Pavic, as the police contemplated that he would, although the fact was that at that time Clancy was not a suspect. In the conversation with Pavic which Clancy recorded, Clancy told Pavic that the police had recovered his clothing stained with blood. In the ensuing conversation, Pavic made a number of inculpatory statements.

7 Pavic, who had pleaded guilty to manslaughter, was convicted of murder. The Court of Appeal of Victoria dismissed his application for leave to appeal against his conviction. Special leave was granted to appeal to this Court against that dismissal.

The common question for determination

8 Both cases involve a consideration of what has been called the fairness discretion. In neither case was any objection taken on the ground that the confessional statements were made involuntarily or on the ground that the taking of the statements was illegal or so contrary to public policy that they ought to be excluded.

9 These cases thus raise for consideration the purpose and scope of the discretion to exclude for unfairness. To address that subject, it is necessary to refer to the reasons why confessional evidence may be rejected by a trial judge.

Involuntary confessions

10 In *Sinclair v The King*[1], Dixon J said:

> " Confessions, like other admissions out of Court, are received in evidence as narrative statements made trustworthy by the improbability of a party's falsely stating what tends to expose him to penal or civil liability."

If no probative force could or ought to be attributed to a confession, the warrant for its admission in evidence would be denied. For that reason, the courts have been cautious in admitting into evidence confessions obtained in circumstances which throw doubt on their reliability.

11 At a time when a prisoner was not able to testify in his own defence, the common law developed the rule which excluded confessions which were made involuntarily. As Dixon J pointed out in *Sinclair*[2]:

> "The argument is that to be admissible evidence of a confession must be an expression of the independent will of the confessionalist and, moreover, must derive from the circumstances in which it is made that assurance of trustworthiness which the law finds in the improbability of a false admission being made of incriminating facts."

His Honour quoted the speech of Lord Sumner in *Ibrahim v The King*[3]:

> "[T]he rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired, by a person in authority, is a rule of policy. 'A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it' (*R v Warickshall*[4]). It is not that the law presumes such

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1 (1946) 73 CLR 316 at 334.

2 (1946) 73 CLR 316 at 334-335.

3 [1914] AC 599 at 610-611.

4 (1783) 1 Leach 263 [168 ER 234].

> statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice: *R v Baldry*[5]."

Although unreliability has remained the raison d'être of this rule of exclusion, the nature and effect of the inducement became the touchstone of its application. In *McDermott v The King*[6] Dixon J spelt out the rules by which voluntariness was determined. These rules were adopted by a unanimous Court in *R v Lee*[7]:

> "These rules, stated in abbreviated form, are—(1) that such a statement may not be admitted in evidence unless it is shown to have been voluntarily made in the sense that it has been made in the exercise of free choice and not because the will of the accused has been overborne or his statement made as the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, and (2) that such a statement is not voluntary if it is preceded by an inducement, such as a threat or promise, held out by a person in authority, unless the inducement is shown to have been removed. These two "rules" ... seem to be not really two independent and co-ordinate rules. There seems to be really one rule, the rule that a statement must be voluntary in order to be admissible. Any one of a variety of elements, including a threat or promise by a person in authority, will suffice to deprive it of a voluntary character. It is implicit in the statement of the rule, and it is now well settled, that the Crown has the burden of satisfying the trial judge in every case as to the voluntary character of a statement before it becomes admissible."

Thereafter involuntariness was given a wider scope in this country than in England. In England, involuntariness was not given the scope which rule (1) in *Lee* gave the exclusion here. Dawson J pointed out the difference in *Cleland v The Queen*[8]:

> "The reason for the rule excluding from evidence confessional statements not shown to have been voluntarily made was, at least in its origins, because

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5 (1852) 2 Den 430 at 445 [169 ER 568 at 574].

6 (1948) 76 CLR 501 at 511-512.

7 (1950) 82 CLR 133 at 144.

8 (1982) 151 CLR 1 at 27-29.

such statements were unreliable as evidence. As was said by Williams J in *Reg v Mansfield*[9]:

> 'It is not because the law is afraid of having truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth.'[10]
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> ...
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> No such narrow view was taken in this country. In *Cornelius v The King*[11], Dixon, Evatt and McTiernan JJ said:
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> 'But a promise of advantage and a threat of harm are not the only matters which may deprive a statement of its voluntary character. For instance, a confession which is extracted by violence or force, or some other form of actual coercion is clearly involuntary, and, therefore, cannot be received in evidence. ... The position is well stated by Brandeis J in delivering the judgment of the Supreme Court of the United States in *Wan v United States*[12]: - 'The requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was in fact voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.'"

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9 (1881) 14 Cox CC 639 at 640.

10 See *R v Warickshall* (1783) 1 Leach 263 at 263-264 [168 ER 234 at 234-235]. See also *R v Scott* (1856) 1 Dears & Bell 47 at 58 [169 ER 909 at 913-914] per Lord Campbell CJ; *Wigmore on Evidence*, 3rd ed (1940), vol III par 822; cf Cowen and Carter, *Essays on the Law of Evidence*, (1956), ch 2.

11 (1936) 55 CLR 235 at 246.

12 266 US 1 at 14-15 (1924).

Unreliability and the overbearing of the confessionalist's will are twin justifications of the rule excluding confessions that are not voluntary. This was recognised by Deane J in *Cleland*[13]*:*

> " The rational basis of the principle that evidence can only be received of a confessional statement if it be shown to be voluntary should be seen as a combination of the potential unreliability of a confessional statement that does not satisfy the requirement of voluntariness and the common law privilege against self-incrimination".

If confessions made when the will of the confessionalist is overborne are to be excluded because they may be unreliable, the effect of conduct by those in authority upon the will of the confessionalist must be examined to determine whether his will was overborne. I venture to repeat what I said in *Collins v The Queen*[14]:

> " So the admissibility of the confessions as a matter of law (as distinct from discretion, later to be considered) is not determined by reference to the propriety or otherwise of the conduct of the police officers in the case, but by reference to the effect of their conduct in all the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focussing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard: it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused."

12 The curial concern about unreliability was subsumed by a concern about the nature of the inducement and its effect on the will of the confessionalist. The latter concern reflected the traditional objection to compulsory interrogation, the origin of which was stated by Windeyer J in *Rees v Kratzmann*[15]:

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13 (1982) 151 CLR 1 at 18.

14 (1980) 31 ALR 257 at 307.

15 (1965) 114 CLR 63 at 80; see also *Hammond v The Commonwealth* (1982) 152 CLR 188; *Sorby v The Commonwealth* (1982) 152 CLR 281.

> "There is in the common law a traditional objection to compulsory interrogations. *Blackstone* explained it: 'For at the common law, *nemo tenebatur prodere seipsum*: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men': *Comm* iv 296. The continuing regard for this element in the lawyer's notion of justice may be, as has been suggested, partly a consequence of a persistent memory in the common law of hatred of the Star Chamber and its works. It is linked with the cherished view of English lawyers that their methods are more just than are the inquisitional procedures of other countries."

Devlin J is reported to have directed a jury in these terms[16]:

> "So great is our horror at the idea that a man might be questioned, forced to speak and perhaps to condemn himself out of his own mouth ... that we afford to everyone suspected or accused of a crime, at every stage, and to the very end, the right to say: 'Ask me no questions, I shall answer none. Prove your case.'"

The common law rule which excluded confessions that were induced by a threat or promise by a person in authority (rule (2) in *Lee*) was confirmed by statute in Queensland[17]. In Victoria[18], that common law rule was confined by the proviso that a confession induced by a promise or threat should not be rejected unless the inducement was "really calculated to cause an untrue admission of guilt to be made"[19]. Neither of these statutory provisions excluded the wider common law rule adopted in this Court[20].

13 In determining objections to the admissibility of a confession that is said to have been made involuntarily, the court does not attempt to determine the actual

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16 *R v Adams* reported in Heydon, *Evidence: Cases and Materials*, 3rd ed (1991) at 158.

17 Section 10 of *The Criminal Law Amendment Act* 1894 (Q); and see *McDermott v The King* (1948) 76 CLR 501 at 512.

18 Now s 149 of the *Evidence Act* 1958 (Vic); previously s 141 of the *Evidence Act* 1928 (Vic) and s 19 of the *Law of Evidence Consolidation Act* 1857 (Vic).

19 See *Cornelius v The King* (1936) 55 CLR 235 at 238; *R v Lee* (1950) 82 CLR 133 at 148.

20 *Cornelius v The King* (1936) 55 CLR 235 at 246; *McDermott v The King* (1948) 76 CLR 501 at 511-512; *R v Lee* (1950) 82 CLR 133 at 144.

reliability of the confession. Rather, it assesses the nature and effect of any inducement to make the confession in order to determine whether the confession was made because the will of the confessionalist was overborne by the conduct of a person or persons in authority. That conduct may consist of a threat, promise or inducement made or held out by the person or persons in authority with the additional requirement in Victoria that the threat, promise or inducement be really calculated to cause an untrue admission of guilt. In all parts of the Commonwealth, there remains a discretion in the trial judge which supplements the exclusion of involuntary confessions[21]. The extent of a trial judge's discretion must next be considered.

The unfairness discretion

14 A discretionary category of exclusion arose after the rule against admission of involuntary confessions was established and in response to a new set of circumstances. It came to be known as the discretion to exclude for unfairness. In *McDermott*[22] Dixon J explained:

> "The view that a judge presiding at a criminal trial possesses a discretion to exclude evidence of confessional statements is of comparatively recent growth. To some extent the course of its development is traced by Lord Sumner in *Ibrahim's Case*[23]. In part perhaps it may be a consequence of a failure to perceive how far the settled rule of the common law goes in excluding statements that are not the outcome of an accused person's free choice to speak. In part the development may be due to the fact that the judges in 1912 framed or approved of rules for the guidance of the police in their inquiries (see *R v Voisin*[24]; *Archbold on Pleading, Evidence and Practice in Criminal Cases*[25]) and not unnaturally have sought to insist on their observance. In part too it may be due to the existence of the jurisdiction of the Court of Criminal Appeal to quash a conviction if the court is of opinion that on any ground whatsoever there was a miscarriage of justice. But whatever may be the cause, there has arisen almost in our own time a practice in England of excluding confessional statements made

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

22 (1948) 76 CLR 501 at 512-513.

23 [1914] AC 599 at 611-614.

24 [1918] 1 KB 531 at 539.

25 28th ed (1931) at 406.

> to officers of police if it is considered *upon a review of all the circumstances that they have been obtained in an improper manner*. The abuse of the power of arrest by using the detention of an accused person as an occasion for securing from him evidence by admission is treated as an impropriety justifying the exclusion of the evidence. So is insistence upon questions or an attempt to break down or qualify the effect of an accused person's statement so far as it may be exculpatory." (Emphasis added.)

Dixon J appears to have regarded the propriety of the conduct of the police as the critical factor in the exercise of the discretion, in much the same way as the nature and effect of the conduct of persons in authority had come to be regarded as the critical factor in determining whether a confession was voluntary. His Honour said[26]:

> "It [the discretion] may be regarded as an extension of the common law rule excluding voluntary statements. In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused."

Similarly, in *Wendo v The Queen*[27], Taylor and Owen JJ, speaking of the issues which the trial judge was required to decide on the voir dire, said:

> "Those issues were whether the statements were voluntary or, in the alternative, whether, being voluntary, they had been obtained in the course of the investigation by the use of unfair or improper methods so as to make it right as a matter of discretion to reject them. The fact that relevant evidence has been unlawfully or irregularly obtained does not, in itself, afford a reason for refusing to admit it in evidence ... although if it has been so obtained that is a matter to be considered, along with all other relevant circumstances, in determining whether the evidence should be admitted against an accused person in a criminal trial."

15 Taking this approach, the purpose of the exercise of the fairness discretion would be to constrain the police or other law enforcement officers in their dealings with a suspect, so that the suspect should be fairly treated in the

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26 (1948) 76 CLR 501 at 513.

27 (1963) 109 CLR 559 at 570.

investigation. If a suspect were unfairly treated by the employment of illegal or improper methods and a confession were thereby obtained, the court would reserve a power to exclude the confession from evidence and thereby deprive the police or law enforcement officers of the fruit of their illegal or improper methods. If the confession were obtained by unfair treatment, it could be said to be unfair to allow that confession to be used in evidence against the confessionalist. Focussing on the illegal or improper methods employed to obtain a confession, Dixon J in *McDermott*[28] questioned whether, if the scope of the rule which excluded involuntary confessions were fully appreciated, there would be much work for the fairness discretion to do. In *Lee*[29], the Court acknowledged the recency of the origin of the discretion and agreed[30] that the unfairness which enlivened the discretion "must arise from the circumstances under which [the confession] was made". But the Court held that it is relevant to consider whether or not the circumstances are calculated to cause an untrue admission to be made[31]. Significantly, the Court denied that evidence of a voluntary confession should be rejected as "some sort [of] sanction for a failure by a police officer to obey the rules of his own organization[32], a matter which is of course entirely for the executive"[33]. If the rejection of evidence is not to be seen as a sanction for a failure by a police officer to obey police regulations, the fairness discretion must have a purpose other than police discipline. The purpose is, of course, to safeguard a person from the unfairness of using his confession in evidence against him at his trial. The relevant unfairness is not so much in "the use made by the police of their position in relation to the accused", as Dixon J said in *McDermott*[34], but in the admission into evidence against an accused of a confession obtained by improper or illegal means. Ex hypothesi, any such confession has been voluntarily made.

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28 (1948) 76 CLR 501 at 512.

29 (1950) 82 CLR 133 at 148.

30 (1950) 82 CLR 133 at 152.

31 (1950) 82 CLR 133 at 153.

32 A reference to the Victorian Chief Commissioner's Standing Orders which correspond with the English Judges' Rules of 1912.

33 *R v Lee* (1950) 82 CLR 133 at 154.

34 (1948) 76 CLR 501 at 513.

16 In *Cleland*[35], Deane J said of a voluntary confession which has been procured by unlawful or improper conduct on the part of law enforcement officers:

> "It will also, if it be established that the confession was voluntary, give rise to a subsequent question whether, in the discretion of the trial judge, evidence of the alleged confessional statement should be excluded for the reason that the reception of such evidence would be unfair to the accused: in this regard, the question is not whether the accused was treated unfairly; it is whether the reception of evidence of the confession would be unfair to him".

17 Perceiving the limited scope for the use of the fairness discretion, Dawson J said[36]:

> "when it was said that there was a discretion to reject confessional statements when it would be unfair to admit them, what was meant was that it would be unfair to the accused. That in turn meant that the admission of the evidence would preclude a fair trial and that could only have been because the evidence was in some way unreliable or untrustworthy. This accords with the view that the development of the discretion coincided with the establishment in England of a Court of Criminal Appeal with power to quash a conviction on the ground of miscarriage of justice."

Later in that case, his Honour said[37] that he would confine the operation of the fairness discretion to cases where -

> "it would be unfair to the accused to admit the evidence because of unreliability arising from the means by which, or the circumstances in which, it was procured."

18 If attention is directed to the dubious reliability of a confession obtained by illegal or improper means, the exercise of the discretion must be governed by the effect of the illegality or impropriety rather than by the inherent quality of the conduct of the police or other person in a position of authority over the confessionalist. Want of reliability or dubious reliability was regarded as an

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35 (1982) 151 CLR 1 at 18.

36 (1982) 151 CLR 1 at 30.

37 (1982) 151 CLR 1 at 36.

important factor in the exercise of the fairness discretion in *Van der Meer v The Queen*[38] by Wilson, Dawson and Toohey JJ:

> " In considering whether a confessional statement should be excluded, the question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him: *Lee*[39]; *Cleland*[40]. Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement."

19 However, in *Van der Meer*[41], Mason CJ allowed a wider operation to the fairness discretion. In the circumstances of that case, he observed that:

> "[T]he police conduct of the interrogation was such as to make it unfair to use the later statements made by Ayliffe and those made by Storhannus against them. Had the police observed the principles governing the interrogation of suspects, it might well have transpired that the statements *would not have been made* or *not have been made in the form* in which they were made." (Emphasis added.)

His Honour found unfairness not in the admitting of a confession of dubious reliability but in the admitting of a confession that might not have been made or not made in the same form but for the improper conduct of the police. Later, in *Duke v The Queen*[42], I expressed the view that the fairness discretion should not be confined to the exclusion of confessions where reliability is doubtful:

> "*R v Lee* attributes a broader scope to that discretion. The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been

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38 (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26; see also per Deane J at 669; at 32.

39 (1950) 82 CLR 133 at 154.

40 (1982) 151 CLR 1 at 18.

41 (1988) 62 ALJR 656 at 662; 82 ALR 10 at 20.

42 (1989) 180 CLR 508 at 513.

made suspect or for any other reason, that evidence should be excluded. Trickery, misrepresentation, omission to inquire into material facts lest they be exculpatory, cross-examination going beyond the clarification of information voluntarily given, or detaining a suspect or keeping him in isolation without lawful justification - to name but some improprieties - may justify rejection of evidence of a confession if the impropriety had some material effect on the confessionalist, albeit the confession is reliable and was apparently made in the exercise of a free choice to speak or to be silent. The fact that an impropriety occurred does not by itself carry the consequence that evidence of a voluntary confession procured in the course of the investigation must be excluded. The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case."

20 However, if dubious reliability is not the only justification for excluding a voluntary confession on the ground of unfairness, the nature of the unfairness which justifies the exclusion of a confession that is voluntary and apparently reliable should be identified. Before addressing that matter, reference should be made to the development of the third category of exclusion, a category which came to be known as the *Bunning v Cross* or public policy discretion.

The public policy discretion

21 The origin of the public policy discretion is to be found in the judgment of Barwick CJ in *R v Ireland*[43] with whose judgment McTiernan, Windeyer, Owen and Walsh JJ agreed. That case related to the admissibility not of confessional evidence but of evidence of a photograph and medical examination of an accused person's hand. Barwick CJ said[44]:

" Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. ... On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and

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43 (1970) 126 CLR 321; followed in *Merchant v The Queen* (1971) 126 CLR 414 at 417-418.

44 (1970) 126 CLR 321 at 334-335.

> weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

22 This discretion called for a balance to be struck between the competing public requirements to which Barwick CJ referred. Although "protection of the individual", not "fairness" to the accused, was the public interest to be placed on one side of the balance, it may have been thought that the difference between the two concepts, if any, was extremely fine. Indeed, in his judgment in *Bunning v Cross*[45] where the admissibility of evidence of a breathalyzer test was in issue, Barwick CJ reverted to the term "unfairness", saying:

> " The question is whether the public interest in the enforcement of the law as to safety in the driving of vehicles on the roads and in obtaining evidence in aid of that enforcement is so outweighed by unfairness to the applicant in the manner in which the evidence came into existence or into the hands of the Crown that, notwithstanding its admissibility and cogency, it should be rejected."

However, his Honour agreed with the judgment of Stephen and Aickin JJ who attributed to the principle expressed in *Ireland* a wider purpose than the avoiding of unfairness to an accused. Their Honours said[46]:

> "What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration."

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45 (1978) 141 CLR 54 at 64.

46 (1978) 141 CLR 54 at 74-75.

Their Honours exemplified the principle in *Ireland* by citation from earlier Irish and Scottish authorities[47]:

> " Several passages from earlier cases exemplify the principle which finds expression in *Ireland's Case*. In *People v O'Brien*[48] Kingsmill Moore J said:
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> > 'I am disposed to lay emphasis not so much on alleged fairness to the accused as on the public interest that the law should be observed even in the investigation of crime.'

In *Lawrie v Muir*[49] (in a passage later cited by Lord Hodson, speaking for their Lordships in the Judicial Committee, in *King v The Queen*[50]) the Lord Justice-General, Lord Cooper said:

> 'From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.'"

Thus the chief object of the public policy discretion is the constraining of law enforcement authorities so as to prevent their engaging in illegal or improper

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47 (1978) 141 CLR 54 at 75-76.

48 [1965] IR 142 at 160.

49 [1950] SLT 37 at 39-40.

50 [1969] 1 AC 304 at 315.

conduct, although the securing of fairness to an accused is a relevant factor in the exercise of the discretion. But if a confession of an offence is voluntarily made in circumstances that throw no doubt on its reliability, it is difficult to identify the unfairness that may be thought to affect the admission of his confession in evidence at his trial for that offence. The unfairness, if any, must consist in the admission of a confession which would not have been made or would not have been made in the form in which it was made if a person or persons in authority had treated the confessionalist in a lawful and proper manner. Unfairness of this kind, if it is to be regarded as unfairness, is different from the unfairness of admitting a confession of dubious reliability into evidence with the attendant risk of wrongful conviction. Unfairness of the former kind is simply the disadvantage suffered as the result of the conduct of the person or persons in authority. To characterise that disadvantage as "unfair", the conduct which produced the confession must be of such a nature and degree that no suspect in the confessionalist's place ought to be subjected to it. That judgment must be made by reference to either a controlling statute or public policy.

23 When the public policy discretion was held in *Cleland* to apply to confessional evidence, it was inevitable that there would be a considerable overlap between that discretion and the fairness discretion. That situation was recognised by Deane J in *Cleland*[51]:

> " It follows that where it appears that a voluntary confessional statement has been procured by unlawful or improper conduct on the part of law enforcement officers, there arise two independent, but related, questions as to whether evidence of the making of the statement should be excluded in the exercise of judicial discretion. That does not mean that there will be a need for two independent inquiries on the voir dire. The material relevant to the exercise of both discretions will ordinarily be the same. The unlawful or improper conduct of the law enforcement officers will ordinarily be relevant on the question of unfairness to the accused and unfairness to the accused will ordinarily be relevant on the question of the requirements of public policy. The task of the trial judge, in such a case, will involve determining whether, on the material before him, the evidence of the voluntary confessional statement should be excluded for the reason that it would be unfair to the accused to allow it to be led or for the reason that, on balance, relevant considerations of public policy require that it should be excluded."

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51 (1982) 151 CLR 1 at 23-24.

Dawson J accepted the distinction between the fairness discretion and the public policy discretion, but he expected that there would be few occasions when an objection to the admission of a confession on the ground of unfairness would fail and an objection on the ground of public policy would succeed. He said[52]:

> " The rule in *Bunning v Cross* entails its own considerations. Theoretically at least, it is conceivable that notwithstanding that it may not be unfair to the accused to admit a confessional statement in evidence, the competing policy requirements referred to in *Bunning v Cross* may require the rejection of the evidence in the discretion of the trial judge. No doubt such instances will be rare for, on the one hand, the law is markedly sensitive in the area of confessional statements and, on the other hand, the exercise of the discretion to reject relevant evidence, on the ground that the public interest in the protection of the individual from unlawful or improper treatment outweighs the public need to bring to conviction those who commit criminal offences, will not lightly be made. In *Collins v The Queen*[53], Brennan J said:
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> > 'Factors of the kinds which, in *Ireland's Case* and in *Bunning v Cross*, were said to be relevant in exercising a discretion with respect to the admission of real evidence, may be relevant in exercising a discretion with respect to the admission of voluntary confessions, but it is difficult to conceive of a case - though I do not say such a case could never arise - where a voluntary confession which might fairly be admitted against an accused person would be rejected in the public interest because of unlawful conduct leading to the making of the confession. When the admission of confessional evidence is in question, the material facts are evaluated primarily to determine whether it is unfair to the accused to use his confession against him, and it would be only in a very exceptional case that the residual question would arise as to whether the public interest requires the rejection of the confession.'
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> With those words I respectfully agree".

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52 (1982) 151 CLR 1 at 34-35; and see per Gibbs CJ in *Williams v The Queen* (1986) 161 CLR 278 at 286.

53 (1980) 31 ALR 257 at 317.

24 The latest and most authoritative statement on the relationship between the fairness discretion and the public policy discretion appears in the judgment of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in *Foster v The Queen*[54]:

> " It is now settled[55] that, in a case where a voluntary confessional statement has been procured by unlawful police conduct, a trial judge should, if appropriate objection is taken on behalf of the accused, consider whether evidence of the statement should be excluded in the exercise of either of two independent discretions. The first of those discretions exists as part of a cohesive body of principles and rules on the special subject of evidence of confessional statements. It is the discretion to exclude evidence on the ground that its reception would be unfair to the accused, a discretion which is not confined to unlawfully obtained evidence.[56] The second of those discretions is a particular instance of a discretion which exists in relation to unlawfully obtained evidence generally, whether confessional or 'real'. It is the discretion to exclude evidence of such a confessional statement on public policy grounds. The considerations relevant to the exercise of each discretion have been identified in a number of past cases in the Court.[57] To no small extent, they overlap. The focus of the two discretions is, however, different. In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on *the effect of the unlawful conduct on the particular accused* whereas, when the question of the requirements of public policy is under consideration, the focus will be on *'large matters of public policy'*[58] and the relevance and importance of fairness and unfairness to the particular accused will depend

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54 (1993) 67 ALJR 550 at 554; 113 ALR 1 at 6-7.

55 See, in particular, *Cleland v The Queen* (1982) 151 CLR 1 at 9, 23-24, 34-35; *Pollard v The Queen* (1992) 176 CLR 177 at 184, 196, 200-201, 234-235.

56 See *Duke v The Queen* (1989) 180 CLR 508 at 513 per Brennan J; *Van der Meer v The Queen* (1988) 62 ALJR 656 at 665-666 per Wilson, Dawson and Toohey JJ; 82 ALR 10 at 25-26. See also *Collins v The Queen* (1980) 31 ALR 257 at 277 per Muirhead J, at 313 per Brennan J.

57 See, as regards the unfairness discretion, *McDermott v The King* (1948) 76 CLR 501 at 513-515; *R v Lee* (1950) 82 CLR 133 at 148-155; *Pollard v The Queen* (1992) 176 CLR 177 at 234-235 and, as regards the public policy discretion, *R v Ireland* (1970) 126 CLR 321 at 334-335; *Bunning v Cross* (1978) 141 CLR 54 at 74-80; *Pollard v The Queen* (1992) 176 CLR 177 at 184, 196-197, 201-205.

58 *Bunning v Cross* (1978) 141 CLR 54 at 77 per Stephen and Aickin JJ.

upon the circumstances of the particular case.[59] In a case where both discretions are relied upon to support an application for the exclusion of a voluntary incriminating statement obtained by unlawful police conduct, it will commonly be convenient for the court to address first the question whether the evidence should be excluded on the ground that its reception and use in evidence would be unfair to the accused. It is so in the present case." (Emphasis added.)

25 In its application to evidence of confessions, the public policy discretion requires a balance to be struck between the public interest in placing the court in possession of all relevant admissible evidence and the public interest in ensuring that law enforcement officers do not act unlawfully or improperly. In striking this balance, any doubt about the reliability of a confession obtained by the unlawful or improper conduct is a factor that would have to be taken into account.

The overlap of the fairness and public policy discretion

26 The elements, or factors relevant to the exercise, of the two discretions to exclude a voluntary confession are substantially the same. Before either discretion is enlivened there has to be some illegality or impropriety on the part of law enforcement officers that results in the making of the confession. In either case, the public interest in placing the court in possession of relevant admissible evidence is material. But a distinction can be made between the admission of a confession which, by reason of the conduct of the law enforcement officers, is of dubious reliability - an established kind of unfairness -and the admission of a confession which is both voluntary and apparently reliable but which would not have been made or would not have been made in the particular form but for the illegal or improper conduct of law enforcement officers. Should this distinction mark out the areas in which the two discretions operate, so that the fairness discretion is enlivened when the reliability of the confession is dubious and the public policy discretion is enlivened in other cases?

27 Mason CJ in *Van der Meer*[60] and I in *Duke*[61] rejected this dichotomy. We regarded the admission of confessions in the latter situation as falling for consideration under the fairness discretion. That approach would leave the

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59 (1978) 141 CLR 54 at 77-78; *Pollard v The Queen* (1992) 176 CLR 177 at 203.

60 (1988) 62 ALJR 656 at 662; 82 ALR 10 at 20.

61 (1989) 180 CLR 508 at 512.

public policy discretion with little work to do. In exercising the fairness discretion, the quality and degree of any unlawful or improper conduct by law enforcement officers would be evaluated. That approach is consistent with the judgment of Dixon J in *McDermott*. But now that the development of the public policy discretion allows for the balancing of the public interest in refusing to sanction unlawful or improper conduct and the public interest in placing all relevant and admissible evidence before a court, there is much to be said for remitting consideration of the conduct of law enforcement officers to the public policy discretion in all cases except where that conduct makes the reliability of the confession dubious. The fairness discretion would then focus on cases where the conduct which induces the making of a voluntary confession throws doubt on its reliability and thereby establishes the unfairness of using the confession against the confessionalist on his trial. Taking this approach, the public policy discretion would focus on the kind and degree of illegal or improper conduct that produced the confession or produced the confession in a particular form. If the focus is on the conduct of the law enforcement officers, the issue can be sharply delineated: is the confession, albeit voluntary and apparently reliable, to be admitted in the public interest or is it to be excluded in the public interest because of the conduct by which it was obtained? In answering this question, the weight to be given to the competing factors would depend on the nature of the charge and the circumstances of the case. As Deane J said in *Pollard v The Queen*[62]:

> "The weight to be given to the public interest in the conviction and punishment of crime will vary according to the heinousness of the alleged crime or crimes and the reliability and unequivocalness of the alleged confessional statement. The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence will vary according to other factors of which the most important will ordinarily be the nature and the seriousness of the unlawful conduct engaged in by the law enforcement officers."

28 Of course, the two discretions do overlap and in a sense it is immaterial whether a trial judge considers the facts of a case under one heading rather than another. But a consideration of the nature and degree of the conduct of law enforcement officers under the heading of public policy clarifies the significance of any illegal or improper conduct on the part of law enforcement officers. If the confession is voluntary and apparently reliable, the only unfairness to an accused in admitting his confession against him is that he was induced to make the confession by conduct which is contrary to statute or to public policy. For example, if a confession is obtained in breach of an important statutory directive

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62 (1992) 176 CLR 177 at 203.

to law enforcement officers or by their deliberate or reckless disregard for the law or for proper standards of conduct, the public interest may require the rejection of a voluntary and apparently reliable confession. In such a case, the public policy discretion will be exercised in much the same way as Dixon J contemplated in *McDermott* that the fairness discretion would be exercised or as Toohey J appears to have intended that discretion to be exercised in *Duke*[63]:

> "[W]hile doubts about the reliability of a confession may provide a basis for concern and in turn for the exercise of the discretion, the methods by which a confession is obtained may themselves warrant a conclusion that it would be unfair to admit the material though there may be no room to doubt its reliability. In the present case a relevant factor to consider in the exercise of the discretion is whether the confession was obtained while the applicant was held in unlawful custody and whether it would thereby be unfair to him to admit the confessional evidence. In suggesting that there could be no unfairness in admitting the confession because it was voluntary, the learned trial judge was in error. A finding of voluntariness does not preclude the exercise of the discretion to exclude evidence by reason of unfairness or public interest."

Unduly prejudicial evidence

29 There is one further possible category of exclusion of evidence including voluntary confessional statements. That category consists of evidence the probative value of which is small but the undue prejudice which it is likely to produce is substantial. In *R v Christie*[64], Lord Reading said:

> "Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it."

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63 (1989) 180 CLR 508 at 526-527.

64 [1914] AC 545 at 564-565.

A more robust approach to exclusion was taken in later cases. In *Driscoll v The Queen*[65], Gibbs J was able to say:

> "It has long been established that the judge presiding at a criminal trial has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against the accused. The exercise of this discretion is particularly called for if the evidence has little or no weight, but may be gravely prejudicial to the accused".

The same view was taken in England by Lord Diplock in *R v Sang*[66]:

> "A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value."

30 However, once a confession is admitted in evidence, the weight to be placed upon it is a matter for the jury[67]. In *Wendo v The Queen*[68] Dixon CJ said:

> "It appears to me that once it was established that a prisoner understood what he was doing in making a statement which, if true, would amount to a confession, it is admissible in evidence quite independently of its probative value. See the discussion in *Sinclair's Case*[69]. I do not think really that probative value is ever a question for the judge to decide conclusively. At all events I am not able to call to mind any conditions in which it would be."

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65 (1977) 137 CLR 517 at 541, citing *R v Christie* [1914] AC 545 at 560; *Noor Mohamed v The King* [1949] AC 182 at 192; *Harris v Director of Public Prosecutions* [1952] AC 694 at 707; *Kuruma v The Queen* [1955] AC 197 at 204.

66 [1980] AC 402 at 437; but cf per McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461 at 528.

67 *Sinclair v The King* (1946) 73 CLR 316 at 338. We are not here concerned with the form in which evidence of a confession is tendered but with the exclusion of confessional evidence, whatever its form, on the ground that the content of the confession, if admitted, would be unduly prejudicial.

68 (1963) 109 CLR 559 at 562.

69 (1946) 73 CLR 316 at 336-338.

Perhaps a case such as *Surujpaul v The Queen*[70], where the confessionalist has no knowledge of the fact confessed, is an example of the application of this category of exclusion to a statement that is prima facie inculpatory. The scope of this exclusion has been considered in several cases[71] but it is not necessary to consider them in these proceedings.

The application of the principles in these cases

31 In Swaffield's case, the Court of Appeal allowed the appeal because, in the view of the majority, the evidence of Swaffield's admissions to Constable Jacob Marshall, the undercover police officer who had gained Swaffield's confidence, ought to have been excluded. Consistently with the role he was purporting to play, Constable Marshall had not given Swaffield any caution before leading the conversation to the point where he elicited the inculpatory admissions from Swaffield. The circumstances in which those admissions were made throw no doubt on their voluntary nature or on their reliability. I would therefore consider the case under the public policy discretion.

32 Helman J, with whom Fitzgerald P agreed, observed that, if the evidence were admitted

> "the requirements of the Judges' Rules could be avoided by the simple expedient of the investigating police officer's assuming a suitable disguise and then proceeding to interrogate the suspect."

His Honour concluded that the trial judge

> "was clearly wrong in failing to give sufficient weight to the protection of the appellant's right to silence, and as a result of that error his discretion miscarried."

33 The "right to silence" to which his Honour referred was simply the entitlement of Swaffield, whom the police believed to be guilty of the alleged

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70 [1958] 1 WLR 1050; [1958] 3 All ER 300.

71 In criminal cases, admissions of a fact of which the confessionalist has no personal knowledge are sometimes treated as having no probative force: see *Surujpaul v The Queen* [1958] 1 WLR 1050; [1958] 3 All ER 300; *Comptroller of Customs v Western Lectric Co Ltd* [1966] AC 367 at 371; *R v Hart* [1979] Qd R 8; but cf *Brady* (1980) 2 A Crim R 42; *Anglim & Cooke v Thomas* [1974] VR 363 at 372; *R v Longford* (1970) 17 FLR 37.

arson of the Leichhardt Rowing Club, to be cautioned by any police officer who proposed to question him about that alleged arson. Giving that content to the "right", it is correct to say that the trial judge did not give weight to Swaffield's "right to silence". But it would be a mistake to assume that there is some general "right to silence" wider than or different from the privilege that any person enjoys not to answer questions asked of him about an alleged offence by persons in authority, his entitlement to be treated in a lawful and proper manner by persons in authority engaged in investigating an offence and the immunity from the drawing of adverse inferences from his refusal to answer questions about the offence asked by persons in authority. In Swaffield's case, Constable Marshall, who was relevantly a person in authority, deliberately represented himself not to be a police officer in order to secure answers to questions which Swaffield had earlier told the police that he would not answer. True it is that Constable Marshall had adopted an undercover guise in order to pursue investigations into drug offences, not into the arson offence. There was nothing improper in Constable Marshall adopting that guise in order to obtain evidence of drug offences, but Constable Marshall went outside the investigation into drug offences. He deliberately sought admissions relating to the arson which Swaffield had previously refused to make to the police, as he was entitled to do.

34 There is a public interest in ensuring that the police do not adopt tactics that are designed simply to avoid the limitations on their inquisitorial functions that the courts regard as appropriate in a free society. In the particular circumstances of this case, the majority of the Court of Appeal gave great weight to that interest. Against that interest, the public interest in having Swaffield's admissions available to the Court on his trial for arson has to be weighed. Pincus JA dissented. There is much to be said for either view. This Court can determine which view ought to have prevailed but when the question touches the standards and methods of police investigation in a particular case, it is undesirable for this Court to intervene except in cases where the decision of the Court below has proceeded on an erroneous principle or is otherwise manifestly wrong. In Swaffield's case, that condition is not satisfied. I would therefore dismiss the appeal in that case.

35 In Pavic's case, the confessional statements were made to Clancy whom Pavic knew as a friend. Clancy was not a police officer or other person in authority over Pavic. There was no impropriety in the police obtaining Clancy's consent to the recording by Clancy of his intended conversation with Pavic. A serious crime had been committed and the means adopted for its solution and for the securing of evidence against the prime suspect were quite legitimate. The investigation of crime is not a game governed by a sportsman's code of fair

play[72]. Fairness to those suspected of crime is not the giving of a sporting opportunity to escape the consequences of any legitimate and proper investigation or the giving of a sufficient opportunity "to invent plausible falsehoods"[73].

36 The fact that Clancy was regarded as trustworthy by Pavic is an indicator of the reliability of the admissions made to Clancy. There was no public interest to be served by rejecting those admissions. The Court of Appeal in Victoria was therefore right to dismiss Pavic's application for leave to appeal.

37 In my opinion, both appeals should be dismissed.

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72 *Bunning v Cross* (1978) 141 CLR 54 at 75 per Stephen and Aickin JJ.

73 *R v Lee* (1950) 82 CLR 133 at 152.

38 TOOHEY, GAUDRON AND GUMMOW JJ. These appeals, which were heard together, concern the admissibility of evidence obtained by means of a conversation recorded without the knowledge, in the first case of the respondent and in the second case of the appellant. Since the convicted person is, in one case, the respondent and, in the other, the appellant, it makes for greater clarity to refer to them by name. Some reference to the facts in each case is necessary.

Swaffield

39 Swaffield was convicted in the District Court of Queensland of the three offences with which he had been charged. The first was of breaking and entering the workshop of Metal Recyclers (Qld) Pty Ltd and stealing various articles including cutting equipment. The second was of breaking and entering the premises of Leichhardt Rowing Club with intent to commit an indictable offence. The third was of wilfully and unlawfully setting fire to the Leichhardt Rowing Club. The cutting equipment, the subject of the first charge, was used in connection with the second offence.

40 Swaffield was convicted of these offences on 7 December 1995. He was initially charged with the offences on 7 September 1993. He had declined to be formally interviewed by the police. Blood and hair samples were then taken from him. A committal hearing was set for 13 November 1993 but on that day the police offered no evidence against him and he was discharged. At that time the only evidence against Swaffield was that a car similar to his had been seen in the vicinity of the Rowing Club on the night the premises were set alight.

41 In May 1994 the police began an undercover operation aimed at the detection of drug suppliers in the areas of Yeppoon and Rockhampton in Queensland. Swaffield was one of the operation's targets. In July 1994 a police officer concerned with the investigation of the arson offence passed on the brief of evidence to the "controller" of Constable Marshall, who was an undercover officer in the drug detection operation. On 11 August 1994 Constable Marshall held a conversation with Swaffield, during which the former pretended that his brother-in-law "down the coast" was in trouble for burning a car. In conversations between the two men Swaffield made admissions of his involvement in the fire at the Rowing Club.

42 In consequence of the admissions made by Swaffield, fresh charges were laid against him. He was duly committed for trial and his trial began on 5 December 1995. When the trial began counsel for Swaffield submitted that evidence of his conversations with Constable Marshall should not be admitted, on the ground that there had been a disregard of the Judges' Rules and that the unfairness this involved should lead to an exercise of the trial judge's discretion

to exclude the evidence. Although reference is made in the transcript of proceedings to Rule 3 of the Judges' Rules, it was assumed in the Court of Appeal that Rule 2 was the relevant rule. The matter proceeded in this Court on that footing.

43 Rule 2 reads:

> "Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be."

44 The trial judge, in the exercise of his discretion, declined to exclude the conversations from evidence. Swaffield was convicted of the three offences; his appeal to the Court of Appeal was against the conviction for arson only. The Court by majority (Fitzgerald P and Helman J, Pincus JA dissenting) allowed the appeal, quashed the conviction and entered a verdict of acquittal. The Crown has appealed to this Court.

Pavic

45 On 15 December 1994 Andrew Astbury disappeared. On 18 December several police officers questioned Pavic and members of his family about the disappearance. Pavic was told that he did not have to speak with the police and also that if he had been in a fight with Astbury he ought to obtain legal advice and, depending on that advice, attend the police station to take part in a tape-recorded interview.

46 On 26 December 1994 the body of Andrew Astbury was found. On 3 January 1995 the police took Pavic into custody and conducted an interview with him in accordance with Pt 3 Div 1 Subdiv 30A of the *Crimes Act* 1958 (Vic)[74]. During that interview Pavic maintained his right not to answer any questions. At the end of the interview the police officers concerned told Pavic that they believed he had committed the offence of murder. However they did not charge him and he was released from custody.

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74 Section 464A prescribes the procedure to be followed when a person is taken into custody for an offence. If a person suspected of having committed an offence is in custody, an investigating official may, within a reasonable time, question the person but must first inform the person that he or she does not have to say anything but that anything the person says may be given in evidence.

47 On 9 January 1995 police officers took a statement from Lewis James Clancy, a close friend of the appellant. At the conclusion of the interview the investigating police officers believed they had enough evidence to charge Pavic with the murder of Andrew Astbury. However, they suggested to Clancy that he, on behalf of the police, speak with Pavic and that, for the purpose, he carry a recording device. Clancy agreed to the proposal and spoke to Pavic who made admissions of his involvement in the killing of Andrew Astbury.

48 In due course Pavic was committed for trial. In the Supreme Court of Victoria he pleaded not guilty to a charge of murder but guilty to manslaughter of the deceased. At the commencement of his trial, Pavic's counsel objected to evidence of the interview with Clancy on the ground that it would be unfair to Pavic to admit the evidence and submitted that the trial judge should exercise his discretion to exclude it. The trial judge declined so to exercise his discretion; the evidence played a substantial part in the case against Pavic. He was convicted of murder and his appeal to the Court of Criminal Appeal was dismissed. He has appealed to this Court.

The issues

49 As mentioned earlier, the two appeals were heard together on the footing that they involved the same issues although the factual aspects were different. And, of course, one was a Crown appeal against a judgment upholding an appeal against the refusal to exercise the discretion. As will appear, the arguments originally presented to this Court underwent development in response to questioning from the Bench. It is, we think, helpful to look first at the arguments as originally presented and then to identify the footing on which each of the appeals was left for determination by the Court.

50 In each of the appeals, what the accused had sought to have excluded was a confessional statement, that is, a statement acknowledging, or from which an acknowledgment might be drawn, that he was guilty of the offence charged. Four bases for the rejection of a statement by an accused person are to be discerned in decisions of this Court. The first lies in the fundamental requirement of the common law that a confessional statement must be voluntary, that is, "made in the exercise of a free choice to speak or be silent"[75]. The will of

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75 *R v Lee* (1950) 82 CLR 133 at 149. See also *MacPherson v The Queen* (1981) 147 CLR 512 at 519; *Cleland v The Queen* (1982) 151 CLR 1 at 5; *Collins v The Queen* (1980) 31 ALR 257 at 307.

the statement-maker must not have been overborne. The relevant principle was stated by Dixon J in *McDermott v The King*[76] in these terms:

> "If [the] statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made".

It should be said immediately that in neither of the appeals was it contended that the confession was made involuntarily.

51 The second, third and fourth bases for the rejection of a statement made by an accused person proceed on the footing that the statement was made voluntarily. Each involves the exercise of a judicial discretion.

52 The second basis is that it would be unfair to the accused to admit the statement. The purpose of the discretion to exclude evidence for unfairness is to protect the rights and privileges of the accused person. The third basis focuses, not on unfairness to the accused, but on considerations of public policy which make it unacceptable to admit the statement into evidence, notwithstanding that the statement was made voluntarily and that its admission would work no particular unfairness to the accused. The purpose of the discretion which is brought to bear with that emphasis is the protection of the public interest. The fourth basis focuses on the probative value of the statement, there being a power, usually referred to as a discretion, to reject evidence the prejudicial impact of which is greater than its probative value. The purpose of that power or discretion is to guard against a miscarriage of justice.

Unfairness

53 The term "unfairness" necessarily lacks precision; it involves an evaluation of circumstances. But one thing is clear:

> "[T]he question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him ... Unfairness, in this sense, is concerned with the accused's right to a

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76 (1948) 76 CLR 501 at 511.

fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement."[77]

54 Unfairness then relates to the right of an accused to a fair trial; in that situation the unfairness discretion overlaps with the power or discretion to reject evidence which is more prejudicial than probative, each looking to the risk that an accused may be improperly convicted. While unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone. It may be, for instance, that no confession might have been made at all, had the police investigation been properly conducted[78]. And once considerations other than unreliability are introduced, the line between unfairness and policy may become blurred.

55 The appeal relating to Swaffield involved the Judges' Rules in Queensland. Their precise status is still a matter for debate but it is apparent that they are regarded as a yardstick against which issues of unfairness (and impropriety) may be measured[79].

56 It will be necessary to return to the unfairness discretion and to the Judges' Rules but, before doing so, it is helpful to say something more about the policy discretion and, also, about the power or discretion to exclude evidence which is more prejudicial than probative.

Policy discretion

57 The concept of a discretion to exclude confessional evidence, even where no unfairness to the accused has been demonstrated, was recognised in *R v Ireland* where Barwick CJ, with whom McTiernan, Windeyer, Owen and Walsh JJ agreed, said[80]:

" Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible ...

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77 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26 per Wilson, Dawson and Toohey JJ.

78 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 662; 82 ALR 10 at 20 per Mason CJ; *Duke v The Queen* (1989) 180 CLR 508 at 513 per Brennan J.

79 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26 per Wilson, Dawson and Toohey JJ.

80 (1970) 126 CLR 321 at 334-335.

> Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence ... In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price."

58 Barwick CJ spoke in terms both of unlawfulness and unfairness. It is not certain whether the Chief Justice was giving additional scope to the unfairness discretion or was recognising an independent discretion to exclude evidence. Earlier in *McDermott* Dixon J had spoken in broad terms when he said[81]:

> "In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused."

59 In *Bunning v Cross* this aspect was put beyond doubt when Stephen and Aickin JJ, with whom Barwick CJ agreed, spoke in terms of "broader questions of high public policy"[82]. They did so in explanation of *Ireland*[83] where evidence had been obtained in breach of a statutory provision relating to the photographing of a suspect. *Bunning v Cross* was seen in *Ridgeway v The Queen* as supporting the exclusion of evidence of an offence, or an element of an offence, procured by unlawful or improper conduct on the part of law enforcement officers[84].

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81 (1948) 76 CLR 501 at 513.

82 (1978) 141 CLR 54 at 74. Strictly speaking, the case was concerned with the admission of a breathalyser test on a charge of driving under the influence of alcohol. But in *Cleland v The Queen* (1982) 151 CLR 1 it was made clear that the principles in *Bunning v Cross* extended to confessional statements.

83 (1970) 126 CLR 321.

84 (1995) 184 CLR 19, especially at 34, 36 and 37.

60 In *Foster v The Queen*[85], which was decided two years before *Ridgeway*, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said that although in many cases the two discretions will overlap, their focus is different.

> "In particular, when the question of unfairness to the accused is under consideration, the focus will tend to be on the effect of the unlawful conduct on the particular accused whereas, when the question of the requirements of public policy is under consideration, the focus will be on 'large matters of public policy'".

Their Honours added that in cases where both discretions are relied upon, "it will commonly be convenient for the court to address first the question whether the evidence should be excluded on the ground that its reception and use in evidence would be unfair to the accused".

61 In *Ridgeway* Mason CJ, Deane and Dawson JJ referred to the discretion to exclude evidence of an illegally procured offence as arguably not distinct and independent of the discretion to exclude illegally procured evidence, but as "complementary aspects of a single discretion which encompasses them both"[86].

The discretion to exclude evidence where prejudicial effect exceeds probative value

62 In *Cross on Evidence*[87] the following statement appears under the heading "Discretion to exclude relevant evidence in criminal proceedings":

> "Evidence may be excluded where its prejudicial effect exceeds its probative value. This is commonly applied in relation to similar fact evidence, but can apply more generally."

63 Certainly there are judicial statements to that effect as for instance in *R v Edelsten*[88] where the Court of Criminal Appeal adopted a passage from the judgment of Hunt J in *R v Merritt and Roso*[89] in which it is said that there are

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85 (1993) 67 ALJR 550 at 554; 113 ALR 1 at 7.

86 (1995) 184 CLR 19 at 38.

87 *Cross on Evidence*, 5th Australian ed (1996) at 294.

88 (1990) 21 NSWLR 542 at 551-552.

89 (1985) 19 A Crim R 360 at 377.

three distinct areas of the trial judge's discretion to exclude evidence that is technically admissible, the first arising "where the prejudicial effect of that evidence outweighs its probative value".

64 A number of the authorities relied upon in *Edelsten* to support this proposition deal with similar fact or propensity evidence. However, as a matter of principle there is no reason why the power or discretion to exclude evidence which is unduly prejudicial should not extend to a statement made by an accused person and to other evidence upon which it would be dangerous for a jury to act[90]. In the case of propensity evidence which is not of a kind that compels an inference of guilt[91], evidence which is prejudicial rather than probative is simply inadmissible. In other situations it may be necessary to reject such evidence because "no account ought to be taken of [it] ... for any evidentiary purpose"[92]. And there may be yet other situations where it is necessary to reject evidence which is prejudicial rather than probative to avoid a risk of a miscarriage of justice[93]. In such cases it is not entirely accurate to speak in terms of a discretion. In *Pfennig v The Queen*[94] Mason CJ, Deane and Dawson JJ spoke of two relevant principles enunciated by Lord Herschell LC in *Makin v Attorney-General (NSW)*[95], the second of which "seemed to imply that propensity evidence was ... inadmissible for some overriding policy reason, ie, that in many cases its prejudicial effect would outweigh its probative force". And the discretion has sometimes been seen to involve considerations of fairness to the

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90 See, for instance, *R v Kallis* [1994] 2 Qd R 88 where the Queensland Court of Appeal said that comments by police officers should have been excluded from a video-taped interview.

91 See *Hoch v The Queen* (1988) 165 CLR 292 at 294-295; *Harriman v The Queen* (1989) 167 CLR 590 at 600; *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482; *BRS v The Queen* (1997) 71 ALJR 1512 at 1524; 148 ALR 101 at 117.

92 *Sinclair v The King* (1946) 73 CLR 316 at 338.

93 See with respect to the need to give a warning to avoid a perceptible risk of a miscarriage of justice, *Bromley v The Queen* (1986) 161 CLR 315 at 325; *Carr v The Queen* (1988) 165 CLR 314 at 330; *Longman v The Queen* (1989) 168 CLR 79 at 87; *Duke v The Queen* (1989) 180 CLR 508 at 515; *McKinney v The Queen* (1991) 171 CLR 468 at 480; *Pollitt v The Queen* (1992) 174 CLR 558 at 586, 605; *BRS v The Queen* (1997) 71 ALJR 1512 at 1526; 148 ALR 101 at 119-120.

94 (1995) 182 CLR 461 at 475-476.

95 [1894] AC 57 at 65.

accused. Thus in *R v Wray*[96] Martland J, speaking for a majority of the Supreme Court of Canada, said:

> "The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly."[97]

However, the fairness at issue in cases involving the exercise of a discretion to exclude unduly prejudicial evidence is the fairness of the trial, in the sense of a trial that does not involve a perceptible risk of a miscarriage of justice.

65 Since "the unfairness discretion" is a recognised basis for excluding confessional statements and is dealt with in the authorities as a discrete discretion, the issue whether there is some additional basis for excluding such statements in terms of probative value versus prejudicial effect does not call for further exploration in the present context. Where confessional statements have been excluded in exercise of the unfairness discretion, it has not been after a weighing of probative value against prejudicial effect has been carried out[98].

General considerations

66 It has been said, rightly, that fairness is a vague concept. It has also been said that the application of the unfairness discretion is uncertain because courts have failed to define the policy behind the discretion or considerations relevant to it[99]. This, it is argued, makes satisfactory appellate review of the discretion difficult. The criticism has force though the very nature of the concept inhibits

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96 [1971] SCR 272 at 293.

97 Note that in *R v Sang* [1980] AC 402 at 437, *R v Corbett* [1988] 1 SCR 670 at 745 and *R v Potvin* [1989] 1 SCR 525 at 531-532 the discretion has been expressed more broadly, in terms of the prejudicial effect substantially outweighing the probative value of the evidence.

98 The weighing process has been carried out in some situations as, for instance, in relation to the withdrawal of a plea of guilty or to edit a confession. See Pattenden, *Judicial Discretion and Criminal Litigation*, (1990) at 246.

99 Australian Law Reform Commission Report No 26, *Evidence*, (1985), vol 2 at 208-210.

great precision. An approach to unfairness which focuses on whether reception of the evidence in question may have jeopardised the accused's right to a fair trial because the statement was obtained in circumstances affecting its reliability does admit of application by a trial judge and review on appeal. However, the unfairness discretion would achieve nothing beyond what is already required by the general law if it were concerned solely to ensure a fair trial.

67 The concept of unfairness has been expressed in the widest possible form in the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW). Section 90 of both Acts reads:

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

68 Neither in s 90 nor anywhere else in either Act is there to be found a definition of unfairness. Part 3.11 - "Discretions to Exclude Evidence" contains a number of provisions of a general nature empowering the court to refuse to admit evidence or to limit its use. In particular s 138(1) prohibits the admission of evidence obtained

> "(a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> ... unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained".

This expresses in the widest terms the policy discretion developed by the common law. It is true that an approach, expressed in such terms, lacks certainty. But as the Law Reform Commission of Canada has said[100]:

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100 See Australian Law Reform Commission Report No 26, *Evidence*, (1985), vol 1 at 534.

> "there is an undeniable advantage in granting judges discretionary power, since it keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities".

69 It is appropriate now to see how the argument developed in the present appeals. When the Court resumed after the first day's hearing, the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards.

70 Putting to one side the question of voluntariness, the approach which the Court invited counsel to consider with respect to the common law in Australia is reflected in the sections of the *Evidence Acts* to which reference has been made, when those sections are taken in combination. The question which arises immediately is whether the adoption of such a broad principle is an appropriate evolution of the common law or whether its adoption is more truly a matter for legislative action. Subject to one matter, an analysis of recent cases, together with an understanding of the purposes served by the fairness and policy discretions and the rationale for the inadmissibility of non-voluntary confessions, support the view that the approach suggested by the Chief Justice in argument already inheres in the common law and should now be recognised as the approach to be adopted when questions arise as to the admission or rejection of confessional material. The qualification is that the decided cases also reveal that one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessional statements improperly obtained.

The unfairness and policy discretions: further analysis

71 The seeds of a broader approach to the admissibility of confessional evidence may be found in *Duke v The Queen*[101]. That appeal was determined after *Bunning v Cross* but before *Foster*. In *Duke* Brennan J said[102]:

> "The unfairness against which an exercise of the discretion is intended to protect an accused may arise not only because the conduct of the preceding investigation has produced a confession which is unreliable but because no confession might have been made if the investigation had been properly conducted. If, by reason of the manner of the investigation, it is unfair to admit evidence of the confession, whether because the reliability of the confession has been made suspect or for any other reason, that evidence should be excluded."

His Honour then proceeded to refer to trickery, misrepresentation, unlawful detention and other factors as justifying rejection of evidence of a confession but emphasised that the fact that an impropriety occurred did not carry the consequence that a voluntary confession must be excluded. He concluded[103]:

> "The effect of the impropriety in procuring the confession must be evaluated in all the circumstances of the case."

72 In his judgment Toohey J said[104]:

> "In the present case a relevant factor to consider in the exercise of the discretion is whether the confession was obtained while the applicant was held in unlawful custody and whether it would thereby be unfair to him to admit the confessional evidence. In suggesting that there could be no unfairness in admitting the confession because it was voluntary, the learned trial judge was in error. A finding of voluntariness does not preclude the exercise of the discretion to exclude evidence by reason of unfairness or public interest."

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101 (1989) 180 CLR 508.

102 (1989) 180 CLR 508 at 513.

103 (1989) 180 CLR 508 at 513.

104 (1989) 180 CLR 508 at 527.

73 Reference has been made already to the judgment of the majority in *Foster*. Having referred to the focus of the two discretions, their Honours identified various considerations which weighed heavily in favour of the exclusion of the appellant's confessional statement[105]. These were the police infringement of the appellant's rights by arresting him for the purpose of questioning, the fact that the unlawful arrest and detention were for the purpose of questioning him in an environment from which he had no opportunity to withdraw, and also the existence of a real question whether admissions made by the appellant were made in the exercise of a free choice to speak or be silent. The last of these considerations sounds more in voluntariness but it was taken into account in the exercise of the discretion to exclude the admissions.

74 One matter which emerges from the decided cases is that it is not always possible to treat voluntariness, reliability, unfairness to the accused and public policy considerations as discrete issues. The overlapping nature of the unfairness discretion and the policy discretion can be discerned in *Cleland v The Queen*[106]. It was held in that case that where a voluntary confession was procured by improper conduct on the part of law enforcement officers, the trial judge should consider whether the statement should be excluded either on the ground that it would be unfair to the accused to allow it to be admitted or because, on balance, relevant considerations of public policy require that it be excluded. That overlapping is also to be discerned in the rationale for the rejection of involuntary statements. It is said that they are inadmissible not because the law presumes them to be untrue, but because of the danger that they might be unreliable[107]. That rationale trenches on considerations of fairness to the accused. And if admissibility did not depend on voluntariness, policy considerations would justify the exclusion of confessional statements procured by violence and other abuses of power.

75 In *McDermott*, Dixon J spoke of voluntariness in terms of the "free choice to speak"[108] and expressed doubts "whether ... in this country, a sufficiently wide

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105 (1993) 67 ALJR 550 at 555-556; 113 ALR 1 at 8-10.

106 (1982) 151 CLR 1. See also *Foster v The Queen* (1993) 67 ALJR 550; 113 ALR 1.

107 See *Sinclair v The King* (1946) 73 CLR 316 at 335 per Dixon J, referring to *R v Warickshall* (1783) 1 Leach 263 [168 ER 234] and *R v Baldry* (1852) 2 Den 430 at 445 [169 ER 568 at 574]. See also *Cleland v The Queen* (1982) 151 CLR 1 at 27-28; *R v Scott* (1856) 1 Dears & Bell 47 at 58 [169 ER 909 at 913-914].

108 (1948) 76 CLR 501 at 512. See also *R v Lee* (1950) 82 CLR 133 at 144, 149; *Wendo v The Queen* (1963) 109 CLR 559 at 565; *MacPherson v The Queen* (1981)

(Footnote continues on next page)

operation has been given to the basal principle that to be admissible a confession must be voluntary, a principle the application of which is flexible and is not limited by any category of inducements that may prevail over a man's will"[109]. And in *Cleland* Murphy J said[110]:

> "It may be a question of classification whether a confession induced by false representations or other trickery is voluntary."

His Honour referred to older decisions which treated trickery as negating voluntariness[111].

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

77 In *R v Lee*, the likelihood of an impropriety resulting in the making of an untrue admission was treated as "relevant, though not necessarily decisive"[112]. As the authorities stand, the likelihood of an unreliable confession does not mandate the exercise of the unfairness discretion to exclude that evidence. Nevertheless, it is hard to understand why, in such circumstances, the discretion would not be exercised in that way, particularly when regard is had to the consideration that the risk of an untrue admission is the rationale for the inadmissibility of a non-voluntary confessional statement.

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147 CLR 512 at 519; *Cleland v The Queen* (1982) 151 CLR 1 at 5; *Van der Meer v The Queen* (1988) 62 ALJR 656 at 660, 665-666; 82 ALR 10 at 16, 26; *Foster v The Queen* (1993) 67 ALJR 550 at 556; 113 ALR 1 at 9.

109 (1948) 76 CLR 501 at 512. See also *R v Lee* (1950) 82 CLR 133 at 149; *Cleland v The Queen* (1982) 151 CLR 1 at 29.

110 (1982) 151 CLR 1 at 13.

111 *R v Johnston* (1864) 151 ICLR 60; *Attorney-General for NSW v Martin* (1909) 9 CLR 713.

112 (1950) 82 CLR 133 at 153.

78 Unreliability is an important aspect of the unfairness discretion but it is not exclusive. As mentioned earlier, the purpose of that discretion is the protection of the rights and privileges of the accused. Those rights include procedural rights. There may be occasions when, because of some impropriety, a confessional statement is made which, if admitted, would result in the accused being disadvantaged in the conduct of his defence. Thus, in *McDermott*, where the accused did not admit his guilt, but admitted making admissions of guilt to others, it was hypothesised by Williams J that it might have been unfair to admit his statement if the persons to whom the admissions were made were not called as witnesses. In *R v Amad*[113], Smith J rejected admissions which were voluntary and which the accused accepted were true because the manner in which he was questioned led to apparent inconsistencies which might be used to impair his credit as a witness. And the significance of forensic disadvantage is to be seen in *Foster* where the inability of the accused to have his version of events corroborated was taken into account[114].

79 It was said by Gibbs CJ, Wilson and Dawson JJ in *Cleland* that it will only be in an exceptional case that a voluntary confession which it would not be unfair to the accused to admit could be rejected on the ground of public interest[115]. That is too narrow an approach, particularly in the light of *Ridgeway*.

Conversations secretly recorded

80 In two recent decisions of the Queensland Court of Appeal the issue was whether evidence, secretly tape-recorded at the request of the police, should have been excluded. In *R v O'Neill*[116] the Court (Pincus JA and Dowsett J, Fitzgerald P dissenting) held that the evidence was rightly admitted. The difference in approach between the majority and the minority is perhaps best encapsulated in the following passage from the judgment of Fitzgerald P[117]:

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113 [1962] VR 545.

114 (1993) 67 ALJR 550 at 554-555; 113 ALR 1 at 7. See also *Cleland v The Queen* (1982) 151 CLR 1 at 25-26.

115 (1982) 151 CLR 1 at 9, 17, 34-35. See also *Collins v The Queen* (1980) 31 ALR 257 at 317.

116 [1996] 2 Qd R 326.

117 [1996] 2 Qd R 326 at 422.

> " This is not a case in which the behaviour of the police who procured Lally to engage the appellant in conversation in order to obtain and record inculpatory admissions should be condemned as improper. I do not consider it necessarily improper to use deception in law enforcement activities to detect, investigate or prevent crime. Nor will evidence obtained in the course of, or through, such activities necessarily be excluded. However, that is not the issue. Lally's conduct, at police instigation, entrenched on the appellant's privilege against self-incrimination, which was a basic personal right and it did so for that express purpose. The appellant was deliberately tricked into surrendering her right to silence at the instance of law enforcement personnel by an implicit misrepresentation that Lally sought her confidence as a friend, not a police agent. That being so, in my opinion, it was unfair to the appellant to receive evidence of her recorded statements to Lally at the appellant's trial."

81 Here the emphasis is placed on the privilege against self-incrimination and what Fitzgerald P regarded as the loss of that right through trickery. This, it was said, made it unfair to the appellant to receive evidence of her recorded statements. In the passage questions of unfairness and police behaviour seem to be subsumed in a broad approach based on the loss of the privilege.

82 Fitzgerald P took much the same approach (again, in dissent) in *R v Davidson and Moyle, Ex parte Attorney-General* when he said[118]:

> " At a more fundamental level, a reference such as the present distracts attention from matters of legal principle to considerations which, in my opinion, are irrelevant; namely, the 'reliability' of the evidence and related matters such as the demonstrable guilt of the accused (according to the impugned evidence) and the seriousness of the offence. While I accept that others do not share my view, I am of opinion that, as the law now stands, the discretion to reject evidence on the ground of unfairness starts from the premise that the evidence is admissible and hence relevant and, given the context, inculpatory. Further, differently from the 'policy' discretion to reject admissible evidence, the nature of the offence is immaterial to the unfairness discretion. The judge at a criminal trial in considering the unfairness discretion is required only to determine whether the circumstances in which evidence was obtained, viewed in the context of the legal rights which the accused person enjoys with all other citizens, make it unfair to receive the evidence against him or her."

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118 [1996] 2 Qd R 505 at 507.

83 The Canadian authorities are instructive in this regard though it is necessary to keep in mind the existence of the *Canadian Charter of Rights and Freedoms* and to identify the extent to which any authority turns on the language of the Charter.

84 In *R v Hebert*[119] the Crown relied at trial upon statements made by the accused after he had consulted with counsel and had indicated that he did not wish to make a statement. He was then placed in a cell with an undercover police officer to whom he made statements implicating himself in the robbery with which he had been charged. The Supreme Court of Canada unanimously, though in more than one judgment, held that the statements should have been excluded.

85 McLachlin J delivered a judgment with which Dickson CJC, Lamer, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ concurred. Her Ladyship observed that the principles of fundamental justice are to be found in the basic tenets of the legal system though a fundamental principle of justice expressed in the Charter may be broader and more general than the particular rules which exemplify it[120]. McLachlin J then said[121]:

> " The common law rules related to the right to silence suggest that the scope of the right in the pre-trial detention period must be based on the fundamental concept of the suspect's right to choose whether to speak to the authorities or remain silent."

After some reference to the Charter, McLachlin J continued[122]:

> "Even before the *Charter*, this Court had taken a step away from the traditional 'threat-promise' formula by recognizing that the decision to speak to the police must be the product of an operating mind.
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> ...

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119 [1990] 2 SCR 151.

120 Any reference in these reasons to Canadian cases are to discussions of the common law, not dependent upon any provision of the Charter.

121 [1990] 2 SCR 151 at 181.

122 [1990] 2 SCR 151 at 182.

The idea that judges can reject confessions on grounds of unfairness and concerns for the repute and integrity of the judicial process has long been accepted in other democratic countries without apparent adverse consequences. ... The jurisprudence on the rights of detained persons can only benefit, in my view, from rejection of the narrow confessions formula and adoption of a rule which permits consideration of the accused's informed choice, as well as fairness to the accused and the repute of the administration of justice."

86 Dealing with the use of undercover agents, McLachlin J drew a distinction between observing a suspect and actively eliciting information in violation of the suspect's choice to remain silent. She said[123]:

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

87 In *R v Broyles*[124] the Supreme Court of Canada was constituted by La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. The judgment of the Court was delivered by Iacobucci J. The accused was charged with murder; the evidence against him was largely circumstantial but it included a statement which the accused made to a friend after his arrest and after he had been cautioned that he was not required to say anything. The friend visited the accused in prison at the request of the police. The friend wore a recording device. The friend questioned the accused about the killing of the deceased.

88 The evidence of the statements made to the friend was excluded pursuant to a provision of the Charter. The Court identified two questions which were necessary for decision but which did not have to be answered in *Hebert*. The first was whether the friend was an agent of the State. The second was whether the accused's statement had been elicited by the friend. The Court held that the friend was an agent of the State during the conversation. The meeting was set up

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123 [1990] 2 SCR 151 at 185.

124 [1991] 3 SCR 595.

and facilitated by the police and, without the intervention of the authorities, there would have been no conversation. The Court held further that the statement had been elicited because parts of the conversation were in the nature of an interrogation, not just parts of a conversation which flowed naturally. It concluded that the admission of the evidence would render the trial unfair.

89 The Australian decisions generally have not expressed the relevant principles by reference to the informed choice spoken of in Canadian cases. At least in terms of voluntariness, they have tended to approach the matter in terms of an immunity from compulsion. The emphasis has been on whether duress has been brought to bear on the suspect, that is whether the will has been overborne in some way. That emphasis is well placed when voluntariness is at issue but it is too narrow when the exercise of discretion is involved.

90 In *Environment Protection Authority v Caltex Refining Co Pty Ltd*[125] Deane, Dawson and Gaudron JJ referred to *Pyneboard Pty Ltd v Trade Practices Commission*[126] where Mason ACJ, Wilson and Dawson JJ observed that it is not easy to assert confidently that the privilege against self-incrimination serves one particular policy or purpose. Deane, Dawson and Gaudron JJ then commented[127]:

> "It is generally recognized that it emerged as a reaction against procedures of the Courts of Star Chamber and High Commission, and in particular their use of the ex officio, or inquisitorial, oath. This was compulsorily administered so that a person might be examined and himself provide the accusation to be made against him."

Against this historical background, it can be seen why the courts have spoken in terms of compulsion to speak[128].

91 However, the notion of compulsion is not an integral part of the fairness discretion and it plays no part in the policy discretion. In the light of recent decisions of this Court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been

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125 (1993) 178 CLR 477 at 526.

126 (1983) 152 CLR 328 at 335.

127 (1993) 178 CLR 477 at 526.

128 *Rees v Kratzmann* (1965) 114 CLR 63 at 80.

impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. This invests a broad discretion in the court but it does not prevent the development of rules to meet particular situations.

92 It is relevant to bear in mind the provisions of the *Evidence Acts*. Although, in general, the Commonwealth Act applies only in the external Territories and in proceedings in federal courts and courts of the Australian Capital Territory[129], it has been substantially re-enacted in New South Wales. It may well be re-enacted in other States. It may be thought undesirable to have two streams, as it were, one legislative and the other judicial, the latter simply echoing the former or perhaps deviating from it. On the other hand there is no comparable legislative provision in Queensland and Victoria, the two States with which the Court is presently concerned. It is therefore appropriate to develop the common law in Australia in terms of a broad principle based on the right to choose whether or not to speak.

Conclusion - Swaffield

93 Nothing which Constable Marshall did in relation to his conversation with Swaffield can be said to have been illegal. In that respect there is a clear distinction with the situation in *Ridgeway*.

94 However, there is the broader question of whether what Constable Marshall did was in violation of Swaffield's right to choose whether or not to speak to the police. There is the added question whether there had been a breach of Rule 2 of the Judges' Rules and, if so, the consequence for the admissibility of the conversation. As for Rule 2, there can be no doubt that a police officer had "made up his mind to charge a person with a crime". He had been charged on 7 September 1993, just under a year before the conversation with Constable Marshall. So far as the Judges' Rules are concerned, the critical point is the absence of a caution.

95 Certainly no caution was administered by Constable Marshall before the conversation on 11 August 1994. However, as the Australian authorities stand,

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129 ss 4, 5 and 6.

the absence of a caution triggers the exercise of a discretion to exclude what was said but does not require exclusion. That is clear from the decision of this Court in *Stapleton v The Queen*[130]. And in *R v Azar*[131] after referring to *Stapleton*, Gleeson CJ said:

> "There are numerous statements in the law reports to the effect that a confessional statement to a police officer is not inadmissible merely because no caution has been administered. It is hardly likely that those statements were intended to apply only in the case of an accused person who knows of his right to silence even without a caution."

It follows that unless *Stapleton* and a number of other decisions are overturned the breach of Rule 2 permitted but did not dictate exclusion of the conversation.

96 In the Court of Appeal Pincus JA, who dissented, asked what it was that made the absence of a caution so significant as to warrant interfering with the trial judge's exercise of discretion to admit the conversation. His Honour thought it could only be because the charge had earlier been dropped. He thought that the real significance of the dropped charge "is that it establishes that the police not only suspected, but believed, that [Swaffield] was guilty". We agree with Pincus JA that the distinction between suspecting on the one hand and believing or knowing on the other is not a satisfactory one in the present context.

97 What if a test is applied by reference to Swaffield's right to choose whether or not to speak to the police? The application of such a test turns, at least so far as the Canadian authorities are concerned, on the extent to which any admission was elicited. It is clear from *Hebert* that the Canadian Supreme Court regards the use of a subterfuge to obtain a statement as likely to be in violation of the choice whether or not to speak but even then would treat a quite unelicited admission as not calling for the exercise of the discretion to exclude.

98 In the circumstances of this case, the admissions were elicited by an undercover police officer, in clear breach of Swaffield's right to choose whether or not to speak. The Court of Appeal was right in its conclusion and this appeal should be dismissed.

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130 (1952) 86 CLR 358 at 375-376.

131 (1991) 56 A Crim R 414 at 420.

Conclusion - Pavic

99 As in the case of Swaffield, nothing which the police did in relation to Pavic was illegal. Since Pavic was not in custody at the time he spoke with Clancy, s 464A of the *Crimes Act* 1958 (Vic) had no application. No reference was made to the Judges' Rules in the course of argument.

100 No caution was administered by Clancy, which is hardly surprising in the circumstances. The circumstances are close to those in *Broyles*, the Canadian decision. As in *Broyles*, the person with whom Pavic spoke must be regarded as an agent of the State. The meeting was not directly set up by the police but Clancy spoke with Pavic at the request of the police who equipped him with a recording device.

101 If *Broyles* is applied, the next question is whether the admissions by Pavic were elicited by Clancy or were made in the course of a conversation. Put another way, was there an interrogation by Clancy?

102 Pavic argued that he was misled by Clancy into making the admissions he did. The trial judge approached the exercise of his discretion on that footing and said:

> " Whilst the role of the accused in the killing was volunteered by him to Clancy in a somewhat limited fashion, it cannot, in my view, be said to be the result of, or inextricably linked to, the expressed fear of Clancy that he may be charged with an offence."

103 In all the circumstances there is no sufficient reason to interfere with the trial judge's refusal to exclude the evidence of the conversation. This appeal should also be dismissed.

104 KIRBY J. These appeals concern the admissibility of confessions recorded by an undercover police operative or police agent, using a hidden recording device, when it was known that the suspect had earlier declined to answer police questions.

The Pavic Case - Background

105 On 7 March 1996, Mr Steven Pavic was convicted in the Supreme Court of Victoria of the murder of Andrew John Astbury, who was killed at Warrandyte, in Victoria, on 15 December 1994. Following his conviction, Mr Pavic appealed, relevantly, on the basis that the trial judge had erred in admitting into evidence a tape recorded conversation conducted between him and Mr Lewis Clancy[132]. The appeal was unanimously dismissed by the Court of Appeal[133]. By special leave, Mr Pavic has appealed to this Court.

106 The Crown case was that Mr Pavic and the deceased were rivals in love. They were competing for the affections of a woman with whom Mr Pavic had had a turbulent relationship. During 1994, a friendship had developed between Mr Astbury and this woman. The Crown's case was that the friendship caused the accused to become uncontrollably jealous. Evidence was given as to the extent of his anger and of statements and actions giving vent to it[134]. The Crown led evidence that Mr Pavic had told Mr Clancy, who was a close friend, that in late November 1994, he had gone to the deceased's house, had waited outside with the intention of killing him but had left without doing so[135].

107 On 15 December 1994, Mr Astbury disappeared after leaving a Christmas dinner at the woman's home. A blood trail was found outside his house. Eleven days later, his body was found in the Yarra River at Coldstream, handcuffed to a metal weight[136].

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132 The notice of appeal also raised a further ground of appeal against the conviction. This was not pressed before the Court of Appeal. There was also an appeal against sentence, but this was dismissed by the Court of Appeal and not renewed before this Court.

133 *R v Pavic* unreported, Court of Appeal of Victoria, 19 December 1996.

134 *R v Pavic* unreported, Court of Appeal of Victoria, 19 December 1996 at 3-4.

135 *R v Pavic* unreported, Court of Appeal of Victoria, 19 December 1996 at 3-4.

136 *R v Pavic* unreported, Court of Appeal of Victoria, 19 December 1996 at 3-4.

108 Shortly after Mr Astbury disappeared, suspicion fell on Mr Pavic. He was interviewed by police at his home on 18 December 1994, and, after the body was discovered, at the local police station on 3 January 1995. At the first interview, he denied any involvement in the murder. At the second, he declined to answer any questions, as was his right[137]. He was not charged and was allowed to go.

109 On 9 January 1995, Mr Clancy was interviewed by police. He was apprehensive that he himself was suspected as the perpetrator of the crime. He agreed to assist the police by participating in a taped conversation with Mr Pavic. The trial judge summarised Mr Clancy's position in terms which I accept[138]:

> "He said the police hinted that he could be charged; that the use of the tape recorder was their idea; that he wanted to prove he had nothing to do with the murder; that he understood that he would effectively be participating in the investigation and that he understood what the police wanted was an admission from the accused."

110 The conversation between the two friends took place on the night of 9 January 1995. According to the transcript of the recording, Mr Pavic made a number of highly incriminating admissions. Responding to Mr Clancy's suggestion that he was under suspicion and might be charged, Mr Pavic replied:

> "[Pavic]: ... Just keep fucking quiet and shut up. I've spoken to the solicitor, right?
> [Clancy]: Yeah.
> [Pavic]: And when it comes to the crunch, I'm going to spew my guts and tell them what happened.
> [Clancy]: Right.
> [Pavic]: I stabbed this cunt with the, but,
> ...
>
> [Clancy]: Why did you, why fuck?
> [Pavic]: I couldn't help it mate. It was just one of those fucking drunken rages."

111 Another significant exchange between the pair was relevant to the question of whether the killing was premeditated. Mr Pavic disclosed that, on an earlier

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137 cf *Crimes Act* 1958 (Vic), s 464J(a).

138 Ruling of Coldrey J in *R v Pavic* unreported, Supreme Court of Victoria, 21 February 1996 at 55.

occasion, he had entered Mr Astbury's house carrying a knife and had stolen some of his belongings. He said:

> "[Pavic]: ... But it was, like I'd had a few beers, and we were fucking, I can't sort of say that much, right? But it's like I can probably sort of get away with manslaughter. So that's what, just have to make sure that, like no one knew it was premeditated. Just don't say nothing Lou..."

112 At least one of the investigating police officers believed that there was sufficient evidence to charge Mr Pavic and told him so before the taped conversation with Mr Clancy was arranged. However, the case against the accused, at that time, had largely been circumstantial[139]. It needed reinforcement. The impediment was the exercise by the suspect of his privilege to decline to answer further police questions. If the police could overcome that impediment, they might strengthen the prosecution case. In arranging the taped conversation with Mr Clancy, they set out to do that.

The Swaffield Case - Background

113 On 7 March 1993, the Leichhardt Rowing Club at Rockhampton in Queensland was substantially damaged by fire. A safe inside the club had been opened, using oxy propane cutting equipment. This had apparently ignited the fire. After the fire, Mr Jason Swaffield was twice interviewed by police. On both occasions he declined to answer any questions. However, he co-operated with the investigating officers by providing two sets of blood samples and hair samples[140]. These samples did not match traces of human tissue found at the club. The police also seized Mr Swaffield's car for examination. They found no incriminating evidence inside it. The only evidence capable of implicating Mr Swaffield was that a car, similar in colour and make to his, was reportedly seen near the club at the relevant time.

114 Mr Swaffield was charged on 7 September 1993 with several offences including arson. However, at the committal hearing on 13 November 1993, the police did not offer any evidence against him. Mr Swaffield was discharged.

115 In May 1994, an undercover police operation was commenced in the Yeppoon-Rockhampton region of Queensland. The operation was targeted at

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139 *R v Pavic* unreported, Court of Appeal of Victoria, 19 December 1996 at 10.

140 *R v Swaffield* unreported, District Court of Rockhampton, 8 December 1995, transcript at 13.

suspected drug offences. Mr Swaffield was one of the suspects. In the course of the operation, the police decided to attempt to obtain an admission from Mr Swaffield concerning the earlier offences. An undercover operative, Constable Jacob Marshall, made contact with Mr Swaffield on two occasions. In the course of the first conversation, in which the constable represented that a relative was in trouble for burning a car, the following recorded exchange took place:

> "[Marshall]: What you didn't mean to set fire to it though[?]
> [Swaffield]: [Unintelligible] set, I was involved in it but I didn't set fire to it."

116 Later in that conversation, Mr Swaffield admitted to having sought to eliminate any incriminating evidence from his car prior to its inspection by the police. He told Constable Marshall that the police had seized his car, and that "before they done that I had to fucken change my tyres fucken put sand all over me boot and carpet vacuumed out".

117 In the second conversation, Mr Swaffield again admitted to being involved with the events of 7 March 1993. He again denied having actually set fire to the club. However, under the *Criminal Code* (Q), it is not necessary to show that a particular result was intended in order to establish arson.[141]

118 Following the recorded conversations with Constable Marshall, Mr Swaffield was re-charged with the same offences namely arson; break, enter and steal; and breaking and entering a place with intent to commit an indictable offence. At his trial in the District Court of Queensland, over objection, Nase DCJ admitted into evidence the transcripts of the recorded conversations with Constable Marshall. The jury found Mr Swaffield guilty of all three offences[142]. He was convicted. He appealed to the Court of Appeal of Queensland, but only against his conviction of arson. The ground of the appeal was that the trial judge had erred in admitting the recorded conversations. By majority, the Court of Appeal upheld the appeal. The conviction of arson was quashed[143]. By special leave, the Crown has appealed to this Court, asking that

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141 *Criminal Code* (Q), ss 23, 461.

142 *R v Swaffield* unreported, District Court of Rockhampton, 8 December 1995.

143 *Swaffield v The Queen* unreported, Court of Appeal of Queensland, 19 July 1996 per Fitzgerald P and Helman J, Pincus JA dissenting.

the conviction be restored. By agreement of all parties the two appeals were heard together.

The admissibility of confessions

119 As Toohey, Gaudron and Gummow JJ have described, the Chief Justice, during argument, asked counsel to consider whether it might be appropriate for the tests for the admissibility of disputed confessions to be re-expressed by the Court and simplified. This would involve consideration, in turn, of three matters namely whether the confession was voluntary; if so, whether it was reliable; and, if so, whether it should nonetheless be excluded from evidence in the exercise of an overall judicial discretion. This last consideration would permit attention to be given to factors which, in the past, this Court has accepted as relevant. They would include unfairness to the accused; disproportionate prejudice outweighing the probative value of such evidence; and relevant public policy considerations. The last might involve official conduct which was illegal or improper or which would otherwise involve securing the conviction of the accused at too high a price.

120 I favour such a re-expression of the tests to be applied. Let me examine each of the three concepts in turn:

The voluntariness test

121 The requirement of voluntariness is well-established by our law. No discretion is here involved although judgment and classification will be required to decide whether a confession is voluntary or involuntary. In making that decision the essential question is whether the confession has been made in the exercise of a free choice on the part of the accused. In *McDermott v The King*[144], Dixon J explained:

> "If he speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made".

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144 (1948) 76 CLR 501 at 511.

Since these words were written, a controversy has surrounded the need to show that the confessional statement which is challenged was the "result of" improper pressure. The Australian Law Reform Commission in its comprehensive examination of the law of evidence pointed out that it should not be necessary to affirmatively establish a causal link between the impugned conduct and the contested admission for the latter to be inadmissible[145]. This stricter approach to voluntariness is reflected in the *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW) ("the Uniform Evidence Acts"). Neither of those Acts applies to the present appeals. However, it is useful to consider how they have chosen to express the applicable tests and discretions. The expression of the common law upon such subjects in terms that are generally harmonious with those Acts would, in my view, be desirable, to the fullest extent that principle permits.

122 In the Uniform Evidence Acts voluntariness is dealt with by s 84. That section provides that:

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

123 There was no suggestion in either of the present appeals that the confessions were made involuntarily in any of the foregoing senses. Justices Toohey, Gaudron and Gummow have called attention to the observations by Dixon J in *McDermott*[146] and by Murphy J in *Cleland v The Queen*[147] to the effect that voluntariness is a flexible principle. Justice Murphy, at least, was

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145 Australian Law Reform Commission, Report No 38, *Evidence,* (1987) at p xxxiii, par 34, commenting on cl 72.

146 (1948) 76 CLR 501 at 512.

147 (1982) 151 CLR 1 at 13.

prepared to contemplate that involuntariness might extend to "false representations or other trickery", arguably relevant to the present cases. However, as this point was not embraced by either accused in these appeals, I shall assume that each of the confessions here was voluntary in the relevant sense. The first test is therefore passed. Failure on the test of voluntariness is fatal to the admissibility of a confession. If it is found to have been made involuntarily, the confession must be excluded and the subsequent tests do not arise.

The reliability test

124 The importance of the reliability of confessional evidence has been acknowledged by this Court in many cases. They include *R v Lee* [148], *R v Ireland*[149], *Bunning v Cross*[150], *Cleland* [151] and *Van der Meer v The Queen*[152]. As I read those cases, reliability has generally been considered as a factor which explains why an involuntary confession should not be received in evidence. If the free choice of the accused was overborne, any statement made as a result might be unreliable, depending on the circumstances. It might therefore be unjust or unsafe to allow the evidence to go before a jury[153].

125 Concern about the reliability of confessional evidence should not, however, only be taken into account in the way that has occurred in past authority, relevant to other admissibility considerations. Unreliable evidence not only taints individual trials. It also undermines community confidence in the administration of justice and in law enforcement. If evidence is properly classified by the judge as unreliable, it should not be admitted. Subsequent questions raised under the general judicial discretion do not then arise.

126 In the case of covertly recorded conversations, particular risks of unreliability may present themselves quite apart from the question of

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148 (1950) 82 CLR 133.

149 (1970) 126 CLR 321.

150 (1978) 141 CLR 54.

151 (1982) 151 CLR 1.

152 (1988) 62 ALJR 656; 82 ALR 10.

153 See for example *Rees v Kratzmann* (1965) 114 CLR 63 at 80; *Cleland v The Queen* (1982) 151 CLR 1 at 18-19.

voluntariness[154]. Within a criminal subculture, false boasts of criminal behaviour, bravado and false accusations against others may be common and perhaps even considered necessary in certain circumstances[155]. As Fitzgerald P pointed out in *R v Davidson and Moyle, Ex parte Attorney-General*[156], if reliability of the evidence is not taken into account as a distinct precondition to admissibility, apart from issues such as voluntariness, fairness to the accused and public policy, "those most vulnerable will be the intellectually limited and the under-educated". If the judge considers that, although voluntarily made, the impugned evidence is properly classified as unreliable, it should be excluded on that ground.

127 In the present cases, each of the trial judges concluded that the covertly recorded conversations were reliable. Reliability was not in contest in the appeals. The second test is therefore also passed in each case.

Discretionary exclusion

128 Overlapping discretions In *Foster v The Queen*[157], the majority in this Court[158] expressed what they described as the two residual judicial discretions to be exercised by a trial judge in relation to evidence of a confession[159]:

> "The first of those discretions exists as part of a cohesive body of principles and rules on the special subject of evidence of confessional statements. It is the discretion to exclude evidence on the ground that its reception would be unfair to the accused, a discretion which is not confined to unlawfully obtained evidence. The second of those discretions is a particular instance of a discretion which exists in relation to unlawfully obtained evidence

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154 Bronitt, "Electronic Surveillance, Human Rights and Criminal Justice" (1997) 3(2) *Australian Journal of Human Rights* 183 at 205; cf *R v Williams* (1992) 8 WAR 265 at 273-274.

155 *R v Davidson and Moyle, Ex parte Attorney-General* [1996] 2 Qd R 505 at 508 per Fitzgerald P.

156 [1996] 2 Qd R 505 at 508.

157 (1993) 67 ALJR 550; 113 ALR 1.

158 Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

159 (1993) 67 ALJR 550 at 554; 113 ALR 1 at 6-7 (citation omitted).

> generally, whether confessional or 'real'. It is the discretion to exclude evidence of such a confessional statement on public policy grounds."

Their Honours acknowledged that the two discretions will overlap "[t]o no small extent"[160]. However, they distinguished them on the basis that the main focus of the unfairness discretion is on the effect of the conduct on the accused, whilst the policy discretion centres on "large matters of public policy"[161]. Rightly in my view, their Honours did not propound a separate discretion based on considerations of illegality. They recognised that illegality could lead to exclusion under either, or both, of these aspects of the judicial discretion, depending on its nature[162].

129 Unfairness to the accused The concept of unfairness has been criticised by commentators, fairly, for its vagueness. In *Van der Meer*, Wilson, Dawson and Toohey JJ pointed out that[163]:

> " In considering whether a confessional statement should be excluded, the question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him. Unfairness, in this sense, is concerned with the accused's right to a fair trial".

130 A discretion to exclude on the grounds of unfairness now appears in s 90 of the Uniform Evidence Acts. That section provides[164]:

> "In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

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160 (1993) 67 ALJR 550 at 554; 113 ALR 1 at 7.

161 (1993) 67 ALJR 550 at 554; 113 ALR 1 at 7; citing *Bunning v Cross* (1978) 141 CLR 54 at 77 per Stephen and Aickin JJ.

162 See for example *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54.

163 (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26 (citations omitted).

164 On this provision, see Australian Law Reform Commission, Report No 38, *Evidence,* (1987) at 234, commenting on cl 79. On the fairness discretion generally, see Clough, "The Exclusion Of Voluntary Confessions: A Question Of Fairness" (1997) 20 *University of New South Wales Law Journal* 25.

(a) the evidence is adduced by the prosecution; and

(b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence."

131 The section reflects the common law unfairness discretion because "unfairness" is not defined anywhere in the Uniform Evidence Acts. Both at common law and under the Acts, fairness is a concept broad enough to adapt to changing circumstances as well as evolving community values.

132 Public policy This Court has also recognised that a judge has a discretion to exclude evidence on the basis of "high public policy" although such evidence passes every other test[165]. This discretion is distinct from considerations of fairness to the accused. In *Ireland*[166], Barwick CJ explained that the process involves a matter of weighing competing public requirements[167]:

"On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price."

133 It is useful to recall the considerations which have been taken into account in past cases involving the exercise of this policy discretion. In the three leading cases - *Ireland*[168], *Bunning v Cross*[169] and *Ridgeway v The Queen*[170], the principal issue was not whether the conduct of the police had been illegal or improper. As such, that issue would not properly arise for trial and determination, being a matter for police discipline, criminal charges or civil

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165 *Bunning v Cross* (1978) 141 CLR 54 at 74. See also *R v Ireland* (1970) 126 CLR 321 at 334-335; *Cleland v The Queen* (1982) 151 CLR 1 at 16-17 per Murphy J; *Pollard v The Queen* (1992) 176 CLR 177 at 202-203; *Foster v The Queen* (1993) 67 ALJR 550 at 554; 113 ALR 1 at 7.

166 With whom McTiernan, Windeyer, Owen and Walsh JJ agreed.

167 (1970) 126 CLR 321 at 335.

168 (1970) 126 CLR 321.

169 (1978) 141 CLR 54.

170 (1995) 184 CLR 19.

remedies. Instead, the issue to be decided in the course of the criminal trial of the accused was whether confessional or "real" evidence, obtained as a result of, or following, such official illegality or impropriety, should be excluded from that trial notwithstanding its probative value as contributing to bringing a guilty person to justice.

134 In relation to covertly recorded confessions, it will often be unclear, or at least disputable, as to whether police have engaged in illegal or improper conduct. In the present appeals, neither Mr Pavic nor Mr Swaffield contended that the covert recordings made in their cases constituted illegal or improper behaviour by police, such as to enliven, as such, the public policy discretion. I will assume for the moment that this is so. I therefore turn to the other factors which have been addressed in the decisions of this Court.

135 In *Bunning v Cross*, Stephen and Aickin JJ outlined some of the relevant considerations[171]. One of them was the nature of the offence charged[172]. Also commonly mentioned has been the probative value of the evidence, and its importance in the proceedings[173]. The remaining considerations which Stephen and Aickin JJ listed were:

(i) whether the conduct was deliberate, or resulted from a mistake;

(ii) whether the nature of the conduct affected the cogency of the evidence so obtained;

(iii) the ease with which those responsible might have complied with the law in procuring the evidence in question; and

(iv) the legislative intention (if any) in relation to the law that is said to have been infringed.

To the foregoing, Mason CJ, Deane and Dawson JJ in *Ridgeway*[174] added an additional consideration:

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171 (1978) 141 CLR 54 at 78-80.

172 (1978) 141 CLR 54 at 80. This factor is also one of those to be taken into account under the Uniform Evidence Acts, s138(3)(c).

173 See Uniform Evidence Acts, ss 138(3)(a) and 138(3)(b).

174 (1995) 184 CLR 19 at 38.

(v) "whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings."

For my part, I would add two further considerations to this non-exhaustive list, namely:

(vi) whether the conduct, if proved in court, would involve the court itself in giving, or appearing to give, effect to illegality or impropriety in a way that would be incompatible with the functions of a court, or such, or which might damage the repute and integrity of the judicial process[175]; and

(vii) whether the conduct would be contrary to, or inconsistent with, a right of the individual which should be regarded as fundamental.

In judging whether a right is fundamental, regard might be had to any relevant constitutional or statutory provisions and to the common law. Thus, the common law (for reasons explained in the other opinions in this case) has long exhibited a bias against compulsory interrogation, derogating from the privilege against self incrimination and the extraction of self accusation from a suspect[176]. It is also helpful, in considering fundamental rights, to take cognisance of international statements of such rights, appearing in instruments to which Australia is a party, particularly where breach of such rights give rise to procedures of individual complaint[177]. In the present case it is pertinent to note that the *International Covenant on Civil and Political Rights* (which provides such procedures) includes, amongst the "minimum guarantees" to be enjoyed "in full equality" in the determination of any criminal charge against an accused person, certain rights to legal advice and representation and a right "[n]ot to be compelled to testify

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175 cf *Ridgeway v The Queen* (1995) 184 CLR 19 at 34; *R v Hebert* [1990] 2 SCR 151 at 182 per McLachlin J cited in the reasons of Toohey, Gaudron and Gummow JJ; *Sorrells v United States* 287 US 435 at 457 (1932); *Sherman v United States* 356 US 369 at 385 (1958).

176 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 335; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 526.

177 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

against himself or to confess guilt"[178]. These provisions reflect notions with which Australian law is generally compatible. To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence[179].

Admissibility of covertly recorded confessions

136 Introduction In some cases, evidence of covert surveillance will be excluded from a criminal trial on the basis that it does not satisfy the tests of voluntariness or reliability. More commonly, the issue will be whether it should be excluded in the exercise of the residual judicial discretion. In the present appeals, counsel for the accused did not advance their arguments in terms of the public policy discretion. They each argued that the trial judge should have exercised his discretion to exclude the confessional evidence on the basis that it was unfair to the accused to admit the evidence, in the sense that it interfered in the accused's right to a fair trial. Nevertheless, the foundation of the submission as to unfairness, in each case, is an allegation of unacceptable conduct on the part of the investigating police[180]. Obviously, that allegation raises questions of public policy which are broader than concerns confined to the fairness of the trial of the particular accused. At stake is the acceptability of the police practice in two States of the Commonwealth which these appeals illustrate.

137 Concentrating first on the suggested unfairness to the accused, one issue may readily be disposed of. The suggestion that the conversation between Mr Pavic and Mr Clancy was conducted in breach of Pt 3, Div 30A of the *Crimes Act* 1958 (Vic), regulating investigation whilst a person is in custody, must be rejected. The accused was not in custody when the conversation took place. Further, whilst there were some suggestions in the taped conversation

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178 Art 14.3(g). See also Art 14.3(d); Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) at 264; cf *European Convention on Human Rights*, Art 6(1); *Murray v United Kingdom* (1996) 22 EHRR 29; *Saunders v United Kingdom* (1996) 23 EHRR 313.

179 This consideration is also recognised in the Uniform Evidence Acts, s 138(3)(f). See also *Newcrest Mining v The Commonwealth* (1997) 71 ALJR 1346 at 1423-1426; 147 ALR 42 at 147-151.

180 *Swaffield v The Queen* unreported, Court of Appeal of Queensland, 19 July 1996 per Helman J at 7.

between Mr Pavic and Mr Clancy that both had been assaulted by police, this submission was not pressed for Mr Pavic, either at the trial or before the Court of Appeal. It can therefore be ignored. In Mr Swaffield's case, it was not submitted that anything that Constable Marshall had done was illegal or improper in the sense that would attract exclusion of the evidence on that ground, without more.

138 These conclusions notwithstanding, four principal considerations arise in relation to the covert use by police of surveillance tapes. They are that such circumstances involve depriving the suspect of a caution which would otherwise be required of police; of the opportunity to consult a lawyer; of the right to remain silent; and of the general privilege of the suspect against self-incrimination. I will deal with these points in turn.

139 Absence of a caution The practice of cautioning suspects when interviewed by police is generally regarded as flowing from the Judges' Rules ("the rules"), formulated in England in 1912 for the guidance of police officers and copied elsewhere throughout the common law world, including in Australia. In England, the rules were modified by the judges on several occasions, before being superseded by Codes of Practice under the *Police and Criminal Evidence Act* 1984 (UK). Whilst the rules have never had the force of law in England, or in this country[181], they have continued to provide guidance as to the standards of fairness to be observed when a question later arises as to the admissibility of a confessional statement made to police[182]. In *Van der Meer*[183], Deane J observed:

> "Their breach will not automatically mandate exclusion; nor will adherence to them necessarily prevent it".

Bearing in mind the general practice to use the rules as a yardstick[184], and acknowledging their different formulations and applications in the two Australian jurisdictions in question here, the obligations imposed on police officers by the rules may be simply stated. Where a police officer has made up his or her mind to charge a person with a crime, that person should first be cautioned, before any

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181 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 669; 82 ALR 10 at 32 per Deane J.

182 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 661; 82 ALR 10 at 18 per Mason CJ; at 666, 26 per Wilson, Dawson and Toohey JJ; at 669, 32 per Deane J.

183 (1988) 62 ALJR 656 at 669; 82 ALR 10 at 32.

184 (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26.

further questions are asked. The caution should alert the accused that anything thereafter said may be recorded and given in evidence at a subsequent trial. It is worth noting that the Uniform Evidence Acts contain[185] provisions in substantially similar terms. Failure to comply with the provisions enlivens the exercise of the public policy discretion to exclude the evidence.

140 Applying this threshold test to covertly recorded confessions is not a simple process. It will often be a matter of great dispute and doubt as to whether the police had made up their minds to charge the accused at the time the critical admission or confession was secured. Secret surveillance, such as covert recordings, will frequently be carried out at a stage in the investigation when police have a strong suspicion about the accused's guilt, but require further evidence before deciding whether to lay charges. However, even if the threshold test is satisfied, failure to caution the accused will not necessarily make the evidence inadmissible[186]. It will simply attract the exercise of a judicial discretion.

141 In the present appeals, it is clear that in neither instance was the accused cautioned. Such caution would have been absurd, being completely inconsistent with the mode of questioning that was undertaken. A first issue is whether the questioning was carried out by a police officer at all, so as to enliven the prima facie obligation to give a caution. In *Swaffield*, it is plain that Constable Marshall, the undercover operative, was a police officer. In *Pavic*, the question is a little more difficult. Mr Clancy was not a police officer. But was he an agent of the police? If he was, did the Victorian requirement imposing on police officers the obligation to caution Mr Pavic arise? For the moment I will assume that each of these questions should be answered in the affirmative.

142 The second issue relevant to cautioning is whether the police had reason to believe, at the time of the recorded conversations, that they had sufficient evidence to charge each accused with the offences of which they were later severally charged and convicted. In Mr Pavic's case the position is complicated once again by conflicting evidence. However, the better view is that such a stage had not been reached, otherwise the police would not have allowed Mr Pavic to go free after his second interrogation. In Mr Swaffield's case, it seems clear enough that the police did not have sufficient evidence to charge him with arson when they embarked on the procedure of deception used by Constable Marshall. As much seems to follow from their decision not to offer any evidence at the

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185 s 139(1); see also s 138(1)(a).

186 *Stapleton v The Queen* (1952) 86 CLR 358 at 375.

committal hearing in November 1993, nine months prior to the recorded conversations. True, the police had charged Mr Swaffield before that time. However, the charges had effectively been dropped. Accordingly, in neither case had a point been reached where the requirement to caution descended upon the police before the questioning of each accused was undertaken. Nice questions arise as to whether that point was reached during the recorded conversations so that the caution should then have been given. In view of my conclusions, I shall pass these questions by.

143 Loss of the right to consult a lawyer The right of an accused to consult a lawyer at a point during police interrogation has long been recognised under Australian law and by Australian police practice[187]. As I am ready to assume that, in the circumstances, the police were not obliged to caution either Mr Pavic or Mr Swaffield, I would also assume that there was no obligation to give either accused the opportunity to have the advice of a lawyer before responding to questions by or for the police. These assumptions may be made to bring me to the remaining, and crucial, considerations.

144 Right to remain silent and the privilege against self-incrimination In certain circumstances, it is desirable to separate these two considerations[188]. However, for the purposes of the present appeals, there is no need to distinguish between them. For the sake of simplicity, I will refer to them compendiously as "the right to silence".

145 A useful statement of the scope of this right in Australia appears in *Petty v The Queen*[189]. There this Court held that[190]:

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187 *Driscoll v The Queen* (1977) 137 CLR 517 at 539-540; *Pollard v The Queen* (1992) 176 CLR 177 at 235; *Foster v The Queen* (1993) 67 ALJR 550 at 554; 113 ALR 1 at 7; *R v Borsellino* [1978] Qd R 507; *R v Hart* [1979] Qd R 8; *R v Watkins* (1989) 50 SASR 467; *Crimes Act* 1914 (Cth), ss 23G, 23L (these provisions also apply in the Australian Capital Territory by virtue of the *Crimes Act* 1914 (Cth), s 23A(6)); *Crimes Act* 1958 (Vic), s 464C.

188 See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 526-527; see also *International Covenant on Civil and Political Rights*, Art 14.3(g).

189 (1991) 173 CLR 95.

190 (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ.

" A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played."

146 There are many reasons, consistent with innocence, why a person might wish to remain silent when confronted by police investigating a crime[191]. They may be shocked by the accusation or suspicion of their involvement. They may be upset or confused. They may want to protect somebody else or themselves from embarrassing, but not necessarily unlawful, facts. They may lack the ability to articulate a defence or explanation for their actions[192]. They may just be suspicious of police officers and other officials of the State. They may have been so advised by lawyers or others.

147 Against these considerations must be weighed the undoubted desirability of bringing wrongdoers to justice. Modern surveillance technology and covert police operations are potentially effective means for achieving that end. In the context of secretly recorded conversations, several issues arise. The first is whether the right to silence extends to conversations with an undercover police operative, where the accused is unaware that he or she is speaking to a police officer. If so, a second issue is whether it extends to a conversation between the accused and a friend or acquaintance, where that person is, unbeknown to the suspect, an agent of, or informant for, the police. In order to answer these questions, it is necessary to consider in a little more detail the essential reasons for the right to silence.

148 Counsel for Mr Pavic submitted that there were three reasons: to maintain a fair balance between the State and the individual[193]; to ensure that no-one might be compelled to betray himself or herself[194]; and to safeguard the principle that, in discharging its burden of proof, the Crown cannot oblige the accused to assist

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191 See the discussion by the UK Royal Commission on Criminal Justice (Cmnd 2263, 1993), Ch 4, par 27 and submissions made in *R v Cowan* [1995] 3 WLR 818.

192 *R v Williams* (1992) 8 WAR 265 at 277.

193 *Miranda v Arizona* 384 US 436 at 460 (1966); *R v Hebert* [1990] 2 SCR 151 at 201; *R v Broyles* [1991] 3 SCR 595 at 607.

194 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 526.

it in any way[195]. On this basis, counsel argued, a secretly recorded conversation with an undercover police agent was a breach of the right to silence. Evidence thereby obtained should have been excluded by the trial judge in the exercise of his residual discretion.

149 For my part, I do not see the right as being so broadly based. As was pointed out in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[196], the privilege against self-incrimination "emerged as a reaction against procedures of the Courts of Star Chamber and High Commission, and in particular their use of the ex officio, or inquisitorial, oath"[197]. Although such procedures no longer exist, the underlying foundation of the rule remains the same. It is, as Brennan J described it in *Petty*, "to prevent oppression by the police or other authorities of the State"[198].

150 In applying the right to silence to covertly recorded conversations, consideration of United States and Canadian judicial authority is instructive. It must be remembered that, in those countries, the right to silence ordinarily derives, in the case of the United States of America, from the Fifth Amendment privilege against self-incrimination and in Canada, now, from the *Canadian Charter of Rights and Freedoms*. Additionally, in both countries the right does not usually extend beyond the protection of statements made while the accused is in custody[199]. Bearing these considerations in mind, it is still helpful to review the way that the right has been applied in the context of covert official surveillance by police designed to gather evidence for use against an accused in a criminal prosecution.

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195 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 527.

196 (1993) 178 CLR 477.

197 (1993) 178 CLR 477 at 526.

198 (1991) 173 CLR 95 at 107.

199 In the United States of America, see *Miranda v Arizona* 384 US 436 at 444 (1966); *Hoffa v United States* 385 US 293 at 303-304 (1966); *Illinois v Perkins* 496 US 292 at 296-298 (1990). In Canada, see *R v Hebert* [1990] 2 SCR 151 at 184; *R v Unger* (1993) 83 CCC (3d) 228 at 249-250.

151 In *Illinois v Perkins*[200], the Supreme Court of the United States characterised the right to silence as a matter of preserving the balance between the State and the individual. The Court held that[201]:

> "The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. ... When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. ... '[W]hen the agent carries neither badge nor gun and wears not "police blue," but the same prison gray' as the suspect, there is no '*interplay* between police interrogation and police custody.'"

152 This statement of the test may not be appropriate for Australian conditions where there is no constitutional foundation for the right. However, the general atmosphere of a conversation must be considered in assessing fairness. It is also important to take into account the way in which the confession was made, and, in particular, whether it can be said to have been elicited by interrogation and questioning directed at procuring a confession.

153 The Canadian authorities do not draw an automatic distinction between confessions to an undercover police officer and those to a friend or acquaintance.

In *R v Hebert*[202], a majority of the Supreme Court of Canada[203] held that[204]:

> "[T]he right to silence predicated on the suspect's right to choose freely whether to speak to the police or to remain silent does not affect voluntary statements made to fellow cell mates. ... This would be the case regardless of whether the agent used to subvert the accused's right was a cell mate, acting at the time as a police informant, or an undercover police officer."

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200 496 US 292 (1990).

201 496 US 292 at 296-297 (1990).

202 [1990] 2 SCR 151.

203 McLachlin J; Dickson CJ, Lamer, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ concurring.

204 [1990] 2 SCR 151 at 184.

However, the majority went on to distinguish between[205]:

> "the use of undercover agents to observe the suspect, and the use of undercover agents to actively elicit information in violation of the suspect's choice to remain silent. ... [I]n the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police."

Citing United States authority, the Canadian judges concluded that[206]:

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

154 This concept of elicitation was further refined by the Supreme Court of Canada in *R v Broyles*[207]. There, the Court held that the question to be answered was whether, considering all the circumstances of the exchange between the accused and the state agent, there was a causal link between the conduct of the agent and the making of the inculpating statement by the accused[208]. In responding to this question, the Court held that two sets of factors should be taken into account[209]:

> " The first set of factors concerns the nature of the exchange between the accused and the state agent. Did the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done? The focus should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation.

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205 [1990] 2 SCR 151 at 184-185.

206 [1990] 2 SCR 151 at 185, citing *Kuhlmann v Wilson* 477 US 436 at 459 (1986).

207 [1991] 3 SCR 595; cf *R v Brown* [1993] 2 SCR 918 at 927-929.

208 [1991] 3 SCR 595 at 611.

209 [1991] 3 SCR 595 at 611.

> The second set of factors concerns the nature of the relationship between the state agent and the accused. Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?"

155 I agree in the approach expressed by the Supreme Court of Canada. I do not consider that it is derived from the *Charter* so as to make it inapplicable to analogous circumstances in Australia. The test propounded is consistent with the general approach which our law has taken towards deception by law enforcement officials. Subterfuge, ruses and tricks may be lawfully employed by police, acting in the public interest[210]. There is nothing improper in these tactics where they are lawfully deployed in the endeavour to investigate crime so as to bring the guilty to justice. Nor is there anything wrong in the use of technology, such as telephonic interception and listening devices although this will commonly require statutory authority[211]. Such facilities must be employed by any modern police service. The critical question is not whether the accused has been tricked and secretly recorded. It is not even whether the trick has resulted in self-incrimination, electronically preserved to do great damage to the accused at the trial. It is whether the trick may be thought to involve such unfairness to the accused or otherwise to be so contrary to public policy that a court should exercise its discretion to exclude the evidence notwithstanding its high probative value. In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police (or by a person acting as an agent of the police) in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent. Or it will be crossed where police have exploited any special characteristics of the relationship between the suspect and their agent so as to extract a statement which would not otherwise have been made.

156 Having stated what I believe to be the applicable principles, I now consider whether, in either case before the Court, the accused was entitled to have the residual judicial discretion exercised in a way favourable to him so as to exclude his admissions.

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

211 cf *Ousley v The Queen* (1997) 71 ALJR 1548; 148 ALR 510 at 558.

Admissibility in the present cases

157 The Pavic Case In Mr Pavic's case, his friend Mr Clancy was, in my view, an agent of the police for the purpose of conducting the conversation which resulted in the recording containing the damaging admissions. The first question, therefore, is whether, considering all the circumstances of the exchange between the two, Mr Pavic's admissions were elicited by Mr Clancy, or merely arose during the course of the conversation. To answer that question there is no alternative but to examine the transcript. Because I differ on this point from my colleagues, I must explain the difference, even at the cost of more detail.

158 Mr Clancy began the conversation by informing Mr Pavic that he had had a visit from the police:

> "[Clancy]: Just say mate, I had a visit, fucking 5 hours mate.
> [Pavic]: Did you? Work it out?...
> [Clancy]: They're implicating me in this.
> [Pavic]: No Lou. When it comes to the crunch, you won't have to fucking worry. ...
> ...
>
> [Clancy]: They want, they want, that'd fucking take me down mate.
> [Pavic]: Mate, Lou.
> [Clancy]: Fucking they're saying, they're talking about clothes mate. Fucking clothes. Showing me fucking photographs of my fucking clothes.
> [Pavic]: Yeah.
> [Clancy]: Fucking 'no, no'. There's fucking blood all over the fucking things mate ...
> [Pavic]: Yeah, don't worry Lou. Because I'm not going to, when, Lou, its going to go down sort of soon, and I'm going to go down big time. I'm not going to fucking drag you into it. And I'll just, I'm going to sort of have to spill my guts I think."

Mr Clancy repeatedly complained that he, who had nothing to do with the crime, was at risk of taking the blame. He went directly to give advice to his friend:

> "[Clancy]: Pav, if I was you, I'd fucking,
> [Pavic]: What?
> [Clancy]: Go and tell them what happened. Because they fucking, they reckon I'm in on it. That's it mate, they don't believe me."

After complaining that he was unable to sleep, Mr Clancy began questioning the accused directly about whether he had taken a knife to the deceased's home on the occasion that he had previously gone there.

> "[Clancy]: Did you, did you have a knife on you?
> [Pavic]: That big.
> [Clancy]: Steve, fuck mate."

After Mr Pavic admitted that he had killed the deceased, Mr Clancy continued with his questions as to why the accused had done it. He returned to his own fears about the police suspicions directed at him. Mr Clancy referred several times to police questioning concerning a bag of his clothes which he had left in the accused's car. The bag had been found by police concealed in a hollow log close to an access trail near the place where the deceased's body was found. It contained blood-stained towels in addition to the clothes belonging to Mr Clancy. This resulted in the accused begging Mr Clancy not to "spill your guts". Mr Clancy's questioning continued:

> "[Clancy]: What did you do, dump the body the next day?
> [Pavic]: The same day, same night.
> [Clancy]: All by yourself?
> [Pavic]: Yep."

Not content with these statements, the friend went on to question Mr Pavic further eliciting the answer:

> "[Pavic]: I'll show them where I fucking got it from. I'll show them exactly everything. I'll just walk through it with them. So Lou, you've got no problems. When it comes to the crunch then, because nothing's going to happen to you Lou. There isn't."

Later Mr Clancy went on to ask questions about a vehicle but by this time Mr Pavic was becoming more cautious:

> "[Clancy]: ... What's your fucking, with the 4 wheel drive mate, is that just a bloody red herring they're looking for?
> [Pavic]: I can't sort of say that much about it Lou, fair dinkum. Because you sort of know heaps already, and I can't sort of say anything else. Because they're going to get it out of you, I can sort of tell.
> [Clancy]: Yeah, better off not saying anything mate."

The conversation edged towards its close with a declaration by Mr Clancy that it was "[m]uch better being a kid ... when life was simple" which produced the somewhat optimistic invitation from his friend:

> "[Pavic]: Come on a holiday with me Lou."

159 After Mr Pavic departed and before the police arrived to terminate the tape, the record contains a telephone conversation between Mr Clancy and a friend named Ken. Mr Clancy revealed that he was wired for recording and that the police were returning:

> "[Clancy]: Well they were going to put me in gaol at one stage. Hey? No. No. I don't know whether it was all threats and that, but it was just, I was a victim of bloody circumstances Ken. That's all it was. Yeah, yeah, I had to give them another one. Because I didn't tell them everything with the last one, so. Yeah, well it'll be very shortly I dare say. Because what I was doing tonight was basically trying to prove you know, innocence if you see. Because from where I was standing, I didn't care whether they were bluffing or what they were saying. I wasn't going to the boob for anything I hadn't done."

160 Although in the foregoing passages of the recorded conversation there are a number of leading questions, plainly designed to get Mr Pavic to implicate himself in specific ways, it is arguable that the proper characterisation of what occurred is that the inculpatory parts of the conversation were not a functional interrogation. It certainly came close to that at several points. But I will assume that it did not infringe the first set of factors expressed in *Broyles*. I can do this because, in my view, the second set of factors in *Broyles* is decisive. In particular, the way in which the police, after the privilege of silence had been claimed, exploited the relationship between the two close friends in order to extract the statements from Mr Pavic which they needed.

161 These were not conversationalists who had the relationship of two prisoners in a common cell. They were not new acquaintances engaging in conversation in a social setting. They were close friends, one of whom had been led to believe that he was a suspect and who was motivated to prove his innocence by obtaining for the police as many inculpatory admissions from the other as repeated expressions of anxiety for his own situation could elicit. The police did not remove the fears of Mr Clancy. They sent him to conduct the recorded conversation, counting on those fears. They relied, in the language of *Broyles*, on the relationship between the two men. They would have anticipated that Mr Clancy, as their agent, would set out to exploit the special characteristics of his relationship with Mr Pavic so as to secure inculpatory statements from him. They were not disappointed. They relied on the association of trust between the two men. Because of the protested fears of Mr Clancy, they could have expected that Mr Pavic, as a close friend, would feel obligated or vulnerable. They were not disappointed. The line of questioning which Mr Clancy pursued was clearly directed to bring about the situation where Mr Pavic would be more likely to talk. By the tests in *Broyles,* these tactics crossed the forbidden line. I would apply those tests here.

162 I would take this course because, when the police arranged for Mr Clancy to act in this way, they knew that Mr Pavic had already exercised his legal entitlement to refuse to answer further police questions. The course adopted was designed effectively to deprive Mr Pavic of that right. Its purpose was to take away his right freely to choose whether to speak or to be silent in response to the serious accusation of complicity in a crime of which he was suspected.

163 The evidence of the conversation between Mr Pavic and Mr Clancy ought properly to have been excluded under the judicial discretion. This would not mean that Mr Pavic would walk away from responsibility for the homicide. He had offered to plead guilty to manslaughter. But it would mean that the earlier police caution to him and his refusal to answer questions would be respected. His right to require the Crown to prove its case, otherwise than from his admissions, would be safeguarded. His right to speak in awareness that what he said might be used in court would be upheld and not circumvented. The use of a person whom he trusted, and in relation to whose predicament he was vulnerable, would be discouraged. Securing the conviction of Mr Pavic of murder was important. But if such tactics become the common rule, the police caution and the right to speak or to be silent would be undermined and police would be encouraged to use family and close friends to circumvent the current law where that law proved an obstacle. It has been a common feature of totalitarian societies that police and security forces enlist the aid of family and friends to inform on suspects, overriding the legal rights of the accused. It has not until now been a feature of our society.

164 Mr Pavic's appeal should be allowed. There should be a new trial in which the recorded confession is excluded from the evidence.

165 The Swaffield Case I can deal more briefly with Mr Swaffield's case because I agree in the conclusions reached by the other members of the Court. The fact that the conversations were with an undercover police officer is not alone decisive. It is necessary to consider the way in which the conversations proceeded. Having examined the transcripts, I have concluded that Constable Marshall did not speak to the accused as an acquaintance might have done, neutrally or indifferently. Instead, by his questions, he actively sought to elicit critical information - such that the exchange is properly to be characterised as akin to a police interrogation. Such an interrogation by an undercover police officer unfairly derogated from Mr Swaffield's free choice to speak or be silent. The resulting confessional statements ought therefore to have been excluded in the exercise of the residual discretion.

166 Conclusions Both statements by the accused were accepted as voluntary. Each was reliable. Each was certainly relevant and otherwise admissible. They were not said to have been illegally or improperly obtained. But they were obtained

unfairly in derogation of a fundamental right belonging to the accused in each case. Each accused had exercised that right, as his interrogators well knew. To circumvent the free choice to speak or be silent, which the suspect had exercised in favour of silence, by use of an undercover police officer or a police agent, was not only productive of the risk of an unfair trial to the accused. It was also, in my view, contrary to the public policy which protects the fundamental rights of suspects and holds police, their agents and other investigating officials in check when they are engaged in the questioning of suspects. A conviction of each accused based on such evidence would have been purchased at too high a price.

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

Orders

168 In the case of Mr Pavic, I propose the following orders: Appeal allowed; set aside the order of the Court of Appeal of the Supreme Court of Victoria. In lieu thereof, grant leave to appeal to that Court against conviction; allow the appeal; quash the conviction; and order that a new trial be had. In the case of Mr Swaffield, the appeal should be dismissed.