# NOTES

## UNCORROBORATED CONFESSIONS: RECENT DECISIONS IN THE NEW SOUTH WALES COURT OF CRIMINAL APPEAL

### 1. *Introduction*

It is now well recognised that evidence tendered against the accused by the prosecution in criminal cases is not uncommonly fabricated by certain members of the police force. Such evidence may be statements, admissions or confessions allegedly made by the accused to the police.[1] "Verbals", as they are known, can be presented either as oral evidence by a police witness, as an alleged record in a police notebook or in the form of a purported unsigned record of interview between the police and accused.

Challenges to the authenticity of such evidence usually occur where the accused refuses to admit guilt and there is insufficient other evidence to found a conviction. The accused will either deny having made the statement altogether or will dispute the terms in which the statement is alleged to have been made; the question in effect is reduced to one of credit. As the Australian Law Reform Commission has pointed out, this problem will not be resolved "as long as a confession is regarded as an adequate proof of guilt".[2]

Since it is fundamental that the accused retains a right to remain silent in the face of police questioning, only voluntary statements of the accused are admissible.[3] However, the High Court recognised in *R.* v. *Lee*,[4] that where circumstances show that the admission of such evidence, although *prima facie* admissible, would cause unfairness to the accused the trial judge should exercise his discretion to exclude it. Once admitted it is for the jury to determine the weight to be accorded the statement. A conviction indicates that the jury has accepted beyond reasonable doubt that the confession was made and is true, so that rarely, if ever, will the finding be overturned on appeal; especially since as a concomitant there is generally involved an allegation of police perjury (the accused asserting that he has been "verballed"). Clearly, the continued suspicions surrounding the use of such documents is destructive of the liberty of the accused, the reputation of the police and the proper administration of justice.[5] Moreover, the courts are becoming

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[1] See generally: *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland* (1977) (henceforth the Lucas Report); *Report of the Board of Inquiry into Allegations against Members of the Victoria Police Force* (1978) (henceforth the Beach Report); and the Australian Law Reform Commission Report No. 2, *Criminal Investigation* (1975).

[2] Note 1 *supra*, 70.

[3] S. 410 Crimes Act 1900 (N.S.W.). As to the classic formulation of voluntariness, see *McDermott* v. *R.* (1948) 76 C.L.R. 501.

[4] (1950) 82 C.L.R. 133.

[5] *Burns* v. *R.* (1975) C.L.R. 258, 265 (Murphy J.).

impatient with the prolongation of trials by alleged excessive resort to *voir dire* procedures and their attendant expenditure of public funds.[6]

Judicial disquiet as to the use of these statements by police is of long standing. In 1893 Cave J. had caustically observed:

> It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory, but when it is not satisfactory and clear, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession, a desire that vanishes as soon as he appears in a court of justice.[7]

At a time when distressing implications were revealed in a series of government inquiries, the High Court in *Burns* v. *R.* and two years later in *Driscoll* v. *R.*[8] appeared to adopt a stricter approach to the use in evidence of unsigned records of interview. Despite the strong warnings in these cases, recent decisions in the New South Wales Court of Criminal Appeal reveal a reluctance to fetter the discretion of the trial judge.

## 2. *Burns* v. *R.*

In *Burns* the only evidence implicating the accused on a charge of armed robbery was a confession which the accused denied having made. The High Court accepted that where the making of a confession by the accused was in issue, evidence which showed that a confession if made was true, was relevant to the question of whether the confession was in fact made.[9] According to the police, Burns had confessed that his newly acquired wealth subsequent to the robbery was part of the proceeds of the crime. On this basis the prosecution alleged that the reference to new wealth in the alleged confession itself tended to prove that the applicant did make the confession. However, the Court warned that the effect of placing before the jury such evidence, highly prejudicial and of little probative weight could be dangerous as it would focus away the jury's attention from the main issue of the credibility of the police officer giving evidence. Moreover, the alleged confession should be excluded where the police at the time of the alleged interview already know these facts since this might improperly lend weight to the argument that the police could have concocted the confession.[10]

These principles have arisen for consideration in two recent decisions of the New South Wales Court of Criminal Appeal. In *R.* v. *Burke*[11] where the Crown had given oral evidence of an unsigned record of

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[6] Note the comment by Street C.J. in *R.* v. *Lattouf and Carr*, unreported, N.S.W. Court of Criminal Appeal, 31 March 1980.

[7] *R.* v. *Thompson* [1893] 2 Q.B. 12.

[8] (1977) 137 C.L.R. 517.

[9] Note 5 *supra*, 263-264 (*per* Barwick C.J., Gibbs and Mason JJ.).

[10] Only Murphy J. disputed the logic of the Court's reasoning. With respect to the majority it is difficult to see the necessity in the argument that the truth of the content of a particular statement in a disputed confession in itself tends to prove that the confession was made. As His Honour said: "Nothing is more common in a concocted story than the inclusion of as much truth as possible": *id.*, 267.

[11] Unreported, N.S.W. Court of Criminal Appeal, 17 November 1978.

interview, counsel for the accused attempted to challenge its reliability by asserting as a rule of law that such oral evidence should be withdrawn from the consideration of the jury; or alternatively the oral evidence is, in itself, insufficient a ground upon which to support a conviction where it is uncorroborated, contains inaccuracies and is based on information which the police admit to already having had in their possession.

Relying on the decision in *Burns*, Cross J. considered that the argument of the accused was open only on the question of *whether the confession was in fact made* and would not afford a ground in itself for the exclusion of the record of interview. His Honour asserted that since police will often question a plurality of suspects, the mere fact that they have prior knowledge of facts admitted in the confession is not a reason *per se* to exclude it. If this were the case police investigations would be thwarted. Adopting a less legalistic line, Street C.J. rejected the argument of counsel as "too filmsy a basis upon which to regard the confession as suspect so as to justify the intervention of [the] court".[12] Confining the authorities to their own facts, His Honour's only concession was that prior knowledge of the matters in the statement is a relevant circumstance.

The main issue in *Burke* arose for reconsideration in *R.* v. *Lattouf and Carr*[13] where the appellant, relying on *Burns*, challenged the refusal of the trial judge to allow a *voir dire* examination of a police witness on the issue of the state of police knowledge at the time when the statement was taken. Affirming his observations in *Burke's* case that this question was but one element, "a relevant circumstance . . . that could be pointed out to the jury", Street C.J. rejected counsel's submission in terms that:

> if accepted as a generality, would open the floodgates and would lead to abuse of the voir dire procedure.[14]

However, Moffitt P., endorsing the judgment of Cross J. in *Burke*, sought vehemently to refute the appellant's argument, endeavouring to clarify a purported grave misreading of *Burns'* case. According to His Honour, *Burns'* case decided that where evidence highly prejudicial to the accused and of little probative weight is tendered by the police to indicate the reliability of a confession, such facts should not be admitted where they were already known to the police at the time of the alleged confession.[15] Moffitt P. drew a distinction between the admissibility of the confession and such accompanying evidence tendered by the police to establish that the confession was in fact made. According to this argument, facts indicating that the confession was made may be excluded if their probative weight is minimal and their prejudice to the accused great; especially if there is a suggestion that the police had knowledge of these facts at the time of the interview. The Court therefore rejected counsel's

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[12] *Id.*, 6.

[13] Note 6 *supra.*

[14] *Id.*, 9.

[15] Although strictly speaking *Burns'* case dealt only with the question of the jury's finding, both *Burke* and *Lattouf and Carr* treated it as establishing the wider proposition.

submission that the admissions themselves should be excluded if the police had prior knowledge of their contents.

In considering the validity and implications of this distinction it is instructive to consider the context in which such questions arise. Before questioning a suspect, police may have grave suspicions of his or her guilt either because, for instance, they are aware that there was a motive to commit the crime (as occurred in *Matusevich* v. *R.*[16]) or that the accused had newly acquired wealth (as in *Burns*). In these circumstances the Court in *Burns* considered that if such facts were admitted in the confession and the police prior to such statement had no knowledge of such facts then this was cogent evidence that the confession was made. However, if they had knowledge of such facts then their prejudice to the accused might outweigh their probative value that the confession was in fact made and should therefore generally be excluded on this issue.

However, in *Burke* and *Lattouf and Carr* the appellant argued that prior police knowledge of facts allegedly admitted in the confession would itself justify the exclusion of the confession because this circumstance would call in question its reliability. This argument was rejected on the basis that to so decide would circumscribe police investigations, since in many cases police will have prior knowledge of the facts asserted in the record of interview. In fact, as Waight and Williams point out, the police may argue that since they knew these facts they would have put them to the accused at the interview.[17] However, the competing argument is that it is precisely in such circumstances that the police have the opportunity to concoct a statement.[18] Moreover, the High Court in *Matusevich*[19] thought that the trial judge may well exclude such confessions.

Although not expressly considering this question, the problems inherent in logical proof of confessional evidence are highlighted in the decision of *R.* v. *Boyson and Gray*[20] where the Court of Criminal Appeal considered, *inter alia*, the question of the admissibility of admissions of a co-accused allegedly adopted orally by the accused. A major factor persuading Begg and Cantor JJ. that the trial judge rightly admitted the record of interview of Gray was that it conformed in all but minor respects with the answers given by the appellant Boyson in his own recollection of the interview.

With due respect to the learned judges, it is difficult to understand why the uniformity of two records could have any bearing on the issue of whether the accused in fact adopted the statement by the co-accused and whether his entire confession was a fabrication. Similar problems attend the view adopted by Hunt J. in the same case that the statement of the co-accused should only be admitted against the accused if signed, since the mere proof of the statements asserted in the unsigned record

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[16] (1977) 137 C.L.R. 633.
[17] P. Waight and C. Williams, *Cases and Materials on Evidence* (1980) 745.
[18] See Murphy J. in *Burns*' case note 5 *supra*, 267.
[19] Note 16 *supra*, 665-666.
[20] Unreported, N.S.W. Court of Criminal Appeal, 28 September 1979.

do not necessitate the conclusion that the statement was in fact made, especially where, as here, the police have prior knowledge of these facts. Moreover, the admission of such statements although of great probative weight would be highly prejudicial to the accused.[21] These are are same logical errors that featured in *Burns'* case.[22]

The Court unanimously accepted that it is proper police practice for an accused to be shown the record of interview of a co-accused.[23] However, Hunt J. warned that to avoid condoning a method of interrogation that would in effect circumvent *Driscoll* v. *R.*,[24] it would be preferable for each admission to be put to the accused and his reaction sought to each (rather than, as here, by one oral acknowledgment of the truth of the entire record). Although conceding that in this case the trial judge rightly admitted the statement,[25] His Honour commented that:

> It may only be the repeated exercise of the discretion against the admission of the document sought to be used as was the document in question here which will preclude the method of interrogation followed in this case.[26]

### 3. *Driscoll* v. *R.*

Following *Burns*, the High Court in *Driscoll* v. *R.* voiced differing degrees of disquiet at the admission of unsigned records of interviews. Barwick C.J. and Gibbs J. predicted that by admitting such evidence, undue weight would be attached to it by the jury, distracting them from the main issue of credibility.[27] The Court unanimously considered therefore, that since evidence of an unsigned record of interview could be given in oral testimony by the Crown witnesses, unless there is some evidence of adoption of the written statement by the accused, the trial judge should carefully consider "whether it is desirable in the interests of justice that it should be excluded".[28] However, Gibbs J. observed that if there was evidence, for instance, that the accused had acknowledged making the statement in the presence of some impartial person uncon-

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[21] If the reasoning in *Burns'* case is thus applied, it becomes evident that the decision in *Boyson and Gray* is at odds with *Burns*.

[22] Note 5 *supra*.

[23] Asserting that this would give the accused an opportunity to deny adverse allegations and give their own account; rather than recognising the psychological impact of such procedure—as to which see G. Williams, "The Authentification of Statements to the Police" [1979] *Crim. Law R.* 6, 8-9.

[24] Note 8 *supra*.

[25] This conclusion manifestly conflicts with His Honour's finding on the first issue since there was no corroboration of the statement.

[26] Note 20 *supra*, 8.

[27] This point was averted to by Aickin J. in *Wright* v. *R.* (1977) 15 A.L.R. 305 where he pointed out the danger of putting unsigned records of interviews as exhibits—because, as in that case, even though there were fundamental discrepancies in the Crown case, the jury still convicted notwithstanding that in his view there was a reasonable doubt that the confessions were made.

[28] Note 8 *supra*, 542 *per* Gibbs J.; dissenting from this more tentative statement, Murphy J. asserted that the trial judge's discretion should generally be exercised against admission.

nected with the interrogation, it would be correct to admit the written record of the statement. His Honour stipulated in addition that if admitted, since its admission was merely as to the issue of credibility, not being evidence of the truth of the matters stated in it, the trial judge must direct the jury as to the limited use of such statement.[29] The emphasis being therefore against the admissibility of unsigned records of interview, the High Court in *Driscoll* were diverging from the New South Wales decision of *R.* v. *Ragen*[30] and added by way of gratuitous comment that

> [t]here are other methods, such as tape recording, or the use of video-tape, which would be likely to be more effective than the production of unsigned records of interview and would not be open to the same objection.[31]

The initial reaction to *Driscoll* was revealed in *R.* v. *Mead*[32] and *R.* v. *Davis*[33] where the courts would not accept that *Driscoll* intended to qualify the discretion of the trial judge to admit unsigned records of interview. Moreover, shortly after the decision in *Driscoll*, Barwick C.J. commented in *Wright's* case:

> It seems to me that there is considerable danger in the generalization that, because on occasions unsigned records of interview have proved false, all such records are suspect and all officers who support the making of them are of doubtful credibility.[34]

The most recent decision to consider this issue is *Boyson and Gray* where the New South Wales Court of Criminal Appeal unanimously held that nothing in *Driscoll* compelled the view that all unsigned records of interview should be rejected. A division may, however, be discerned in the Court's understanding of just what *Driscoll* decided.

The majority (Begg and Cantor JJ.) set out four propositions which they considered may be derived from *Driscoll*:

(a) That a document is admissible against an accused person who has adopted it.

(b) That an accused person may adopt a document by a wide variety of words, actions and/or writings, apart from appending his signature thereto.

(c) That the nature, the scope and the extent, and the circumstances of the adoption of the document are some of the factors to be considered by the trial judge in arriving at his decision as to whether he should exclude the document itself, whilst permitting its contents to be used as an aide memoire by the witness.

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[29] *Id.*, 536.

[30] [1964] N.S.W.R. 1515. It may be possible to infer from this decision an inclination towards a reverse onus.

[31] Note 8 *supra*, 542 *per* Gibbs J. Barwick C.J. also made mention of the use of mechanical devices, but declined to decide this issue. These views echo those of Murphy J. in *Burns* case.

[32] Unreported, Supreme Court of Tasmania, 24 August 1977, cited in M. Aronson, N. Reaburn and M. Weinberg *Litigation-Evidence Procedure* (2nd ed. 1979) 364.

[33] Unreported, Supreme Court of Victoria, 21 November 1977.

[34] Note 27 *supra*, 307-308.

(d) That the overriding consideration which should exercise the trial judge's mind in deciding whether he should use his discretion to exclude otherwise admissible evidence in the form of a fully adopted but unsigned record of interview, is whether the probative value of the document is substantially outweighed by its prejudicial aspects to the accused.[35]

In addition, they noted that each case turning as it does on its own facts, the question of admissibility is ultimately one for the trial judge. This approach manifestly accords with that taken by the courts in *Mead* and *Davis*.

Although acknowledging the warnings contained in *Driscoll*, Begg and Cantor JJ. held in *Boyson and Gray* that in this case the trial judge had correctly admitted the unsigned record of interview, notwithstanding that the only evidence of adoption (in conflict with his unsworn statement from the dock) was the sworn testimony of two police officers.[36] Referring to *Driscoll* at this point Hunt J. commented that this "could hardly be described as impartial in the sense suggested by the High Court".[37] His Honour dissented on the point of admissibility, adopting a stricter view of *Driscoll* asserting that "some positive reason should be established before the possibility of the prejudice referred to is permitted by the admission of an unsigned record".[38] It is instructive that Hunt J. denied that the High Court in *Driscoll* had considered proof of police perjury as a prerequisite to the rejection of an unsigned record of interview.[39]

Notwithstanding this difference of opinion, however, the appellant's claim was defeated by the unanimous finding that no miscarriage of justice had occurred.

The Court thus seems to have diverged from *Driscoll* considering as adequate the direction of the trial judge, notwithstanding that no warning was given as to the weight to be attached to such evidence. In another case where no warning was given to the jury, Street C.J. commented:

> I do not assent to the suggestion that there is any rule of law to be applied governing the terms of the directions appropriate to be

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[35] Note 20 *supra*, 7.

[36] Similar findings were made in *R.* v. *Williamson*, unreported, N.S.W. Court of Criminal Appeal, 5 July 1979, where the testimony of the police witness was accepted even though there was no evidence that the defendant had the knowledge or experience to have been able to make the admissions. See also *Wright's* case, note 27 *supra*.

[37] Note 20 *supra*, 5.

[38] *Ibid.*

[39] It is noteworthy that this point was considered in *R.* v. *Hoeney*, unreported, N.S.W. Court of Criminal Appeal, 13 June 1978. In this case the trial judge in his address to the jury made extensive comment on the seriousness of the allegations of the accused and the consequences for the particular police officers: "They amount, in effect to charging them with having themselves committed serious criminal offences . . ." (*id.*, 12). Although Street C.J. conceded that it would have been preferable for the trial judge to have omitted these forceful comments, he decided that in context they were "[n]o less than just in so far as they emphasized to the jury the seriousness of the allegations . . ." (*id.*, 13).

> given to a jury where the crown case is dependent essentially upon an alleged and oral confession to investigating police.[40]

It is apparent that forceful though the dicta in *Driscoll* appeared, it has not been interpreted as limiting in any way the judicial discretion to admit such evidence.

In both *Burke* and *Lattouf and Carr* it is a salient feature that in keeping with *Driscoll* the confessional evidence was tendered orally by the Crown, the record being used only to refresh the memory of the witness. However, in *R.* v. *Jones*[41] the Court considered that allowing the police witness to read verbatim the unsigned record of interview was tantamount to admitting the document and therefore, where the document is excluded (as in that case) and is a significant part of the Crown case, such a practice should not be allowed.

Another aspect of *Driscoll* which has recently been the subject of comment in *Lattouf and Carr*, is whether the trial judge erred in preventing counsel for the accused from cross-examining a police witness as to the possibility of the use of tapes; that is, to demonstrate that a means of obtaining more convincing evidence was available—where the confession had taken the form of notes in a notebook, no transcript being provided for the accused. In allowing this ground Street C.J. noted that it was permissible to cross-examine on all matters going to the weight which should be attached to the evidence. However, in the outcome His Honour did not consider that this error, merely "a red herring" would have affected the jury's assessment, being a topic "on the very periphery".[42] Moffitt P. dissenting on this point considered that to establish that there existed more reliable methods of recording and proving a confession did not aid a determination of the credit of those who testify to the alleged confession. He asserted that such questions fell within the realm of police department policy and hence rejected that *Driscoll* was any authority supporting the appellant's argument.

### 4. *Conclusion*

As is apparent from trends evident in the foregoing survey of recent decisions, any suggestion of the adoption of a stricter rule fettering the discretion to admit unsigned records of interview has been recanted. Moreover, current practice seems to be that the Crown avoids tendering the document itself, relying merely on oral evidence of admissions whereby limited use of the document is permissible for the purposes of refreshing memory.

The courts seem to take undue cognisance of circumstances tending to show that the fabrication claim is unfounded: for instance, that the

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[40] *R.* v. *Shepherd*, unreported N.S.W. Court of Criminal Appeal, 19 July 1979.

[41] Unreported, N.S.W. Court of Criminal Appeal, 18 May 1979.

[42] Note 20 *supra*, 13. *Cf.* Australian Law Reform Commission which says that the trial judge should reject the confession where there is evidence that it would have been practicable to employ a safeguard: Note 1 *supra*, 74. One doubtful comment by Street C.J. is that notebook, formal record and tape evidence are of equal weight; and that an unauthenticated tape (?) is no more admissible than an unauthenticated note or written record of interview.

unsigned record contained the usual acknowledgment.[43] Street C.J. in *Burke* considered as "offensive and utterly without foundation" the suggestion that police evidence should be corroborated:

> I find this submission is unpalatable and wholly unacceptable. It denigrates absolutely unjustly and unjustifiably, the police force of this state.[44]

As Paul Byrne has recently commented, the courts' vehement support of the police force, salutory though it may be, so that the court will unhesitatingly believe the word of the police against that of the accused, reveals a lack of sensitivity to the real nature of the problem.[45]

Although the court may be thus persuaded by equivocal material to the detriment of the accused, it will not take as conclusive either breaches of the judges rules or other circumstances which either in themselves or in combination (as they were in *Burke's* case) would cast doubt upon the authenticity of the statements, even in circumstances where the entire crown case is built on one alleged confession.

By withdrawing from the stricter approach adopted in *Driscoll* one prevailing concern is to prevent excessive litigation and protracted trials. In view of the competing interests, such an approach only avoids the issue. The repeated exercise of the discretion to exclude from evidence confessions obtained in doubtful circumstances will automatically place restraints on interrogation techniques, so that even without formally adopting the recommendations of the various government inquiries, the challenges to the authenticity of statements would decline as police begin to adopt methods whereby their evidence would be acceptable to the court.

Wendy Amigo

## TRADE PRACTICES COMMISSION v. C.S.B.P. & FARMERS LTD

In *Trade Practices Commission* v. *C.S.B.P. & Farmers Ltd*[1] the Trade Practices Commission sought to recover penalties under section 77 of the Trade Practices Act 1974 (Cth) ("the Act") in respect of alleged contraventions of section 45(2)(a) and section 46 of the Act. The action was heard in the Federal Court before Fisher J. at first instance.

The Act is the most recent of a line of Commonwealth legislation dealing with the anti-competitive conduct of corporations.[2] The purpose of the Act is "to control restrictive trade practices and monopolisation"[3]

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[43] *R.* v. *Burke* note 11 *supra.*

[44] *Id.*, 4-5.

[45] P. Byrne, "Disputed Evidence of Confessional Statements" (1979) 2 *Briefnotes* 86, 91.

[1] [1980] A.T.P.R. 42,154.

[2] Australian Industries Preservation Act 1906 (Cth); Trade Practices Act 1965 (Cth); Restrictive Trade Practices Act 1971 (Cth).

[3] The Act also attempts "to protect consumers from unfair commercial conduct": Part V of the Act.