

Excluding Confessions from Criminal Proceedings in Queensland

A confession is a hearsay statement admitted as evidence (despite the rule against hearsay evidence) because it is a declaration against the accused's interests. In simple terms, the distinction between confessions and hearsay evidence generally is said to be the reliability of a declaration against interests. It is considered that an accused would not declare guilt if they are innocent.

At first glance, that reasoning is sound; however there are many factors which may lead to a person having an unintended confession alleged against them. For example, a misapprehension of the question put to a person by investigators, intoxicating substances, mental health and cultural issues can all lead to an unintended representation that could later be used against a person.

A significant volume of authority exists with respect to excluding confessions and this paper is intended to provide a brief refresher of relevant principals.

INVOLUNTARY CONFESSIONS

An issue of utmost importance in this context is voluntariness.

Common law has always regarded an involuntary confession as inadmissible. That is, when the statement is not made 'in the exercise of a free choice to speak or be silent'.¹ The question of voluntariness, and therefore admissibility, is a decision for the judge; whereas the truth (or otherwise) of an admissible confession is an issue for determination by the jury.²

Generally, the factor which renders such a statement involuntary is external to the person who is alleged to have confessed.³ For example the impact of interrogation for such time that, due to mental and physical strain, the suspect confesses out of an inability to continue rather than an exercise of free will.⁴

However a confession can also be rendered involuntary by internal factors.⁵ The influence of alcohol can render a confession involuntary if "the degree of intoxication is so great as to deprive him [or her] of understanding what he was confessing".⁶ Confessions have also been excluded where the person was labouring under the stress of a recent fainting fit,⁷ and where the accused had recently attempted suicide.⁸

Criminal Law Amendment Act 1984 (Qld), s10

Section 10 of the *Criminal Law Amendment Act 1984* (Qld) deems a confession involuntary in certain circumstances. It provides:

¹ *R v Lee* (1950) 82 CLR 133, 149.

² *Em v R* (2007) 232 CLR 67, [73].

³ *Tofilau v The Queen* (2007) 231 CLR 396, 506.

⁴ *Cornelius v R* (1936) 35 CLR 235, 252.

⁵ *R v Sica* [2012] QSC 5, [59].

⁶ *Sinclair v The King* (1946) 73 CLR 316, 336; see also *R v LR* [2006] 1 Qd R 435, 441, 442, 457.

⁷ *R v Burnett* [1944] VLR 115.

⁸ *R v Williams* [1959] NZLR 502.

No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown.

The onus is on the prosecution to establish that the confessional statement was made voluntarily.⁹ However before that point, the accused must produce some evidence of a threat or inducement to enliven the application of the section.¹⁰ Accordingly, the accused bears the evidential burden, following which the Crown must discharge their onus on the balance of probabilities.¹¹

Where the words of a person in authority could reasonably be considered to be holding out an inducement the court will “not attempt by fine analysis or the resolution of nice questions of construction to minimise the effect of such words”.¹²

There are many authorities which have considered conduct that involves a threat or promise. For example the following statements by police have been held to enliven the section (or jurisdictional equivalent):

- “Any statement made would be for your benefit”;¹³
- “I think it would be better if you made a statement and told me exactly what happened”;¹⁴
- “Doing something wrong is bad. Lying can be worse” (to a child);¹⁵ and
- Words to the effect that unless the suspect made a statement proceedings would be taken against his wife.¹⁶

Conversely, a simple caution to tell the truth would not render a confession inadmissible.¹⁷ Nor would an assurance that a suspect would not be charged if he were not a party to the crime.¹⁸

In *R v Griffiths*,¹⁹ during questioning the police had:

- Indicated that the accused could make things “good” for his family by speaking further with police;
- Used emotional language to describe how the deceaseds’ families might be feeling; and
- Stated that they were asking where the victims’ bodies were on behalf of the victims’ families.

Nevertheless, the court held there was no operative inducement and the confession had been made voluntarily.

⁹ *R v Q* [2003] QCA 421, [20].

¹⁰ *MacPherson v The Queen* (1981) 147 CLR 512, 519.

¹¹ *Tofilau v The Queen* (2007) 231 CLR 396, 480.

¹² *R v Plotski* [1972] Qd R 379.

¹³ *McNamara v Edwards* [1907] St R Qd 9.

¹⁴ *R v Richards* [1967] 1 All ER 829.

¹⁵ *R v M* [1976] Qd R 344.

¹⁶ *R v Hurst* [1958] VR 396.

¹⁷ *R v Baldry* (1952) 169 ER 568.

¹⁸ *R v Atterbury* [1933] QWN 25.

¹⁹ [2013] QCA 120.

The threat or promise need not necessarily be directed towards the accused. A threat or promise affecting a stranger may be sufficient to enliven the section.²⁰

To enliven s10, the threat or inducement must come from a person in authority. A person in authority includes police officers, the prosecutor, and others concerned in bringing the charge.²¹ A complainant in a sexual offence case is capable of being a person in authority.²² Also, an 'independent person' called to sit with a child accused while he was being interviewed has been held to be a person in authority.²³

Where a threat or promise by a person in authority is conveyed to the suspect by their lawyer, that of itself does not affect the fact that the threat or promise has been made by a person in authority.²⁴

Where an inducement is made the Crown bears the onus of establishing that the accused's confession has not been made under the influence of the inducement.²⁵

DISCRETION TO EXCLUDE

Where a confession is made voluntarily, the court may still exclude it on the grounds that:

1. Allowing it would be:
 - a. *Unfair* to the accused;
 - b. *Contrary to public policy*; and/or
2. The *prejudicial effect* of the evidence *outweighs its probative value*.

Of course, these grounds are not confined to confessions; they each apply to evidence against an accused generally. In the context of confessions the grounds commonly overlap.

As a practical note, practitioners should consider any audio of an alleged confession, as opposed to simply relying upon a transcript, to gain an understanding of the tone as a whole and its relevance to the grounds to exclude a confession.²⁶

Unfair to the accused

The unfairness ground is focused on the interests of the accused in that particular matter; as opposed to the public policy ground which is applied for the benefit of the community as a whole. The common law principal is recognised by s130 of the *Evidence Act 1977* (Qld).

In considering whether to exercise the discretion, the focus is on the effect of the particular evidence. As a result, applications to exclude such evidence are considered on a case by case basis.

In *R v Griffiths*, in relation to a charge of murder, the Court of Appeal held that the accused's state of well-being and health at the time of the confession (described as "highly emotional" and "sleep deprived") did not render the admission of the confession unfair.²⁷

²⁰ *R v Middleton* [1974] 2 ALL ER 1190.

²¹ *McDermott v R* (1948) 76 CLR 501.

²² *R v Burf* [2000] 1 Qd R 28 at [7], [39] and [48].

²³ *DPP v Toomalatai* (2006) 13 VR 310.

²⁴ *R v Naylor; ex parte A-G* (Qld) [2012] QCA 116.

²⁵ *R v O'Keefe* (1893) 14 LR (NSW) 345.

²⁶ Per comments of White JA in *R v Griffiths* [2013] QCA 120, [29].

In the matter of *R v Sica*, the Court held that, whilst there were reasons to exercise caution in accepting the relevant witness' evidence (that is, the witness to whom the alleged confession was made), the exclusion of her evidence was not necessary in order for the accused to obtain a fair trial and thus the evidence was admitted; the "reasons to exercise caution" were matters for the jury to assess.²⁸

An example where the discretion was applied to exclude a confession arises from *R v Swaffield*.²⁹ There the defendant was charged with break and entering. Importantly, he elected to exercise his right to silence and refused an interview with police. The prosecution, recognising their weak case, offered no evidence before committal and the accused was discharged. Years later an undercover police officer secretly recorded a conversation in which the accused made admissions regarding the break and enter offence. He was recharged with the offence. Despite objections from the defence, the trial judge allowed evidence of the confession. The High Court majority held that the confession should be excluded as it breached the accused's right to choose whether or not to speak.

Contrary to Public Policy

The discretion to exclude evidence on public policy grounds is exercised, not because to admit the evidence would give rise to an unfair trial, but rather, to discourage unlawful and bad practices by law enforcement agencies. The basis for the discretion is the furtherance of the policy that the law should not be seen as condoning or encouraging the unlawful conduct of those whose task it is to enforce it.³⁰

As mentioned, in cases where there is also unfairness to the accused, this ground will frequently overlap with the unfairness discretion. However unfairness is only one factor which if present will be considered in a potential exercise of the public policy discretion.

The discretion can be traced to *Bunning v Cross* where it was held that:

*It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.*³¹

Illegally obtained evidence is not by that fact alone inadmissible. Prior to an exercise of the discretion the Court will have regard to:

1. Whether or not police have deliberately disregarded the law;
2. Whether or not the illegality results in the evidence obtained being less reliable;
3. How easy it would have been for the police to have complied with the law in the circumstances in which they found themselves;
4. The nature of the offence; and

²⁷ *R v Griffiths* [2013] QCA 120, [105]-[106]; note though that each such matter is considered on its individual merits; that in dissent, note also (Dalton J) held that the conviction should be quashed and a new trial ordered due to the trial judge's lack of independent consideration of the factors relevant to the public policy and unfairness discretions.

²⁸ *R v Sica* [2012] QSC 5, [88].

²⁹ (1998) 192 CLR 159.

³⁰ Heydon, JD, *Cross on Evidence*, Chapter 14 – Public Interest, [27240].

³¹ *Bunning v Cross* (1978) 141 CLR 54, 75.

5. The manner in which the legislature appears to have sought to restrict or control police actions.³²

Accordingly, practitioners should be familiar with the law concerning the gathering of evidence by police under the *Police Powers and Responsibilities Act 2000*. In certain circumstances regard may also be had to comments concerning failures by Police to electronically record alleged confessions and the potential effect thereof.³³

More prejudicial than probative

Given the similarities in the concepts of unfairness and prejudice, it is difficult to see how this ground could arise independent of the unfairness discretion. Indeed many authorities appear to combine their consideration of the issues.³⁴ Nevertheless, the application of the principal as a distinct basis to exclude confessional evidence has been accepted.³⁵

The mere fact that a confession is prejudicial to the accused is of course not of itself reason to exclude it. The accused must show that the evidence is too prejudicial to the prospects of a fair trial to admit it.

In determining whether to exclude or admit such evidence, the trial judge will take the evidence at its highest without determining whether the jury should or should not accept the statement as true. The statement may be deemed prejudicial if the jury are likely to give the evidence more weight than it deserves or, where the nature of the evidence would inflame the jury or divert them from their task.³⁶

CONCLUSION

There is a myriad of factors that can lead to a person having alleged against them a confession which they did not intend or necessarily understand. Given the significance that a jury will place upon confessional evidence, an accused in such situation is in a precarious position. In those circumstances, an application to exclude the statement from evidence will be a crucial step in the proper and successful representation of a client.

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³² *Bunning v Cross* (1978) 141 CLR 54, 78-80.

³³ See for example *Williams* (2001) 1 Qd R 212, [10] and *R v D* [2000] QCA 203, [21].

³⁴ See also *R v Swaffield* (1998) 192 CLR 159, 193 [65] where it was questioned, though not decided, whether the basis was distinct from the unfairness discretion.

³⁵ *R v Christie* [1914] AC 545, 560 & 564-565; *Tofilau v The Queen* (2007) 231 CLR 396, 402; *R v Griffiths* [2013] QCA 120, [86].

³⁶ Heydon, JD, *Cross on Evidence*, Chapter 6 – Discretion to Exclude Relevant Evidence in Criminal Proceedings, [11125].