36. Defendant's out-of-court admissions or self-serving statements – including police interviews and pre-text calls

36.1 Legislation

[Last reviewed: March 2025]

Police Powers and Responsibilities Act 2000

Section 418 – Right to communicate with friend, relative or lawyer

Section 435 – Rights of a person to be electronically recorded

Section 436 – Recording of questioning etc

Section 437 – Requirements for written record of confession or admission

36.2 Commentary

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An 'out-of-court' confessional statement by a Defendant includes statements made by the Defendant to others – including statements made during their interview with police or during a pre-text call.

Where the prosecution rely upon a Defendant's silence in response to an accusation see **Chapter 50A**.

The jury should be instructed that, before acting on any confessional statement, they must be satisfied, first, that the alleged admissions were in fact made and secondly, that they were truthful and accurate: (*Burns v The Queen* (1975) 132 CLR 258).

It may also be necessary to direct the jury that the have to be satisfied of the truthfulness and accuracy of the alleged admissions *beyond reasonable* doubt before acting on them in proof of guilt: see *R v BEE* [2023] QCA 261. Whether such a direction is required will depend on the circumstances of the case.

Where the statements are recorded – as is usually the case for police interviews or pre-text calls – the first requirement is fulfilled.

See the *Police Powers and Responsibilities Act* 2000; section 418 as to the right to have a friend or relative present during an interview; sections 435 and 436 as to the requirement for electronic recording where practicable; and section 437 as to the requirements for a written record.

Whether the jury is entitled to look, not just at the confession itself, but at all the evidence, to decide whether it is true or not will depend on all the circumstances of the

case, including what was known to the questioner at the time of interview: (*Burns v The Queen* (1975) 132 CLR 258).

The jury should also be told that statements by police during the course of an interview in which allegations are put to the Defendant are not evidence unless accepted by the Defendant: (*Ugle v The Queen* (1989) 167 CLR 647 at [651]).

For pre-text calls, see *R v Han* [2022] QCA 199 in which the Court of Appeal dealt with and dismissed arguments about the inadequacy of the directions given. Extracts from this case which may be of assistance are set out below.

Often, a Defendant's confession (or admission against interest falling short of a confession) is not made as a standalone statement. Usually, the confession/admission is made during a longer conversation or police interview. Sometimes, the Defendant makes exculpatory/self-serving statements in the same conversation/interview.

If the Crown wish to rely upon a Defendant's out-of-court confession/admission as evidence of their guilt, they are required to place before the jury the whole of the statement/conversation/interview during which the Defendant confessed or made an admission against interest. In other words, the prosecution cannot pick and choose the parts of a statement/conversation/interview which they place before the jury: See, for example, *R v Ferri* [2019] QCA 67; [2019] 3 Qd R 496, especially at [37] and [47]. At [47], Sofronoff P said:

> *'if the Crown wishes to tender a record of interview, or other statements by an accused, it is not entitled unilaterally to choose to tender only those parts of the statement that happen to help its case. Nor is it a matter for the trial Judge to censor such evidence. In general, subject to the exclusion of irrelevant statements and the exclusion of statements that would be unfair to the accused to allow into evidence and, perhaps some other categories, the whole statement must be tendered.'*

Care must be taken to ensure the jury are correctly directed on the use to which they might put those parts of the whole of the statement/conversation/interview which are exculpatory or self-serving: A jury does not have to be satisfied that a Defendant's exculpatory/self-serving statement is truthful and accurate before acting on it. If the jury think it might be true, then it is a matter for them whether the exculpatory/self-serving statement raises a reasonable doubt about a Defendant's guilt: see *R v Spencer* [2020] QCA 265.

See also *R v Rose* [2021] QCA 262 which discussed the circumstances in which a *Liberato* direction should be given. In *Rose,* the Court of Appeal explained at [49] *ff* that the *Liberato* direction is commonly given in cases described as 'word against word', where a Plaintiff and a Defendant give evidence. It is important, in those circumstances, to ensure that the jury understand that by giving evidence, a Defendant does not alter the prosecution's onus of proof. They must be told that, even if they do

not positively believe the Defendant, they cannot find an issue against the Accused contrary to their evidence if their evidence gives rise to a reasonable doubt about that issue. A *Liberato* direction may be required in circumstances other than where there is conflicting sworn evidence, including where the Accused's version is contained in a record of interview: *Rose* [51].

See also *R v Aziz* [1996] AC 41; *cf Callaghan v The Queen* [1994] 2 Qd R 300; *Griffiths v The Queen* (1994) 125 ALR 545; 69 ALJR 77 at [81] about the use to which exculpatory statements may be put.

Pre-text calls

Appropriate directions for admissions made during pre-text calls were considered at length in *R v Han* [2022] QCA 199. In that decision, referring to authority, Flanagan J made the following points –

- Each summing up must be tailor-made to fit the requirements of the case at hand [76]. The leading decision about the use of confessional statements, *Burns v The Queen* (1975) 132 CLR 258, explains that the nature of the necessary direction will depend upon all of the circumstances of the case: [78].

- Whether the direction ought to also refer to the exculpatory statements made by a Defendant during the call will depend on the circumstances: [77].

- If a direction is to include a reference to the exculpatory parts of the pre-text call, in support of the Defendant's case, then the prosecution is likely to seek a direction to the effect that the jury may give less weight to the exculpatory assertions than to the admissions, as explained by the High Court in *Nguyen v The Queen* (2020) 269 CLR 299 at [24]:

  > *Howsoever mixed statements come to be admitted into evidence they are invariably subject to a direction to the jury that they may give less weight to exculpatory assertions than to admissions and that it is for them to decide what weight is to be given to a particular statement. The rationale for the direction is that exculpatory statements are not statements against interest, are not made oath and are not subject to cross-examination.*

- With that in mind, defence counsel may not seek a mixed statement direction (referring to the exculpatory statements by a defendant) for forensic reasons, including that such a direction may highlight the inculpatory part of the pre-text call: [98].

- If a Defendant does not reply to accusations made by a Complainant during a pre-text call, the jury ought to be directed that they may only take the silence as an admission of the truth of the accusations if they are satisfied that the

Defendant has – by their silence (or speech or other conduct) – admitted their truth: [99] & [100]. In *Han*, the jury were directed to consider everything said during the pretext call in assessing the quality of the admissions said to have been made. There was no suggestion that they could reason that, just because the Defendant failed to respond to an allegation made by the Complainant, he was agreeing to it. In light of the way in which the trial was conducted, no such direction was necessary.

- Whether a trial judge is required to give a direction which precisely identifies which allegations are said to be the subject of admissions, will depend on the issues at trial and the use made of the pretext call by the Crown [102]-[103].

- If words spoken by a Defendant are reasonably capable of being construed as an admission, they are admissible, and it is for the jury to determine whether or not the words amount to an admission and what weight, if any, to give the admission [105]-[106].

- Sometimes, a specific direction about the use to be made of admissions may be required – including, for example, when there are admissions to sexual interest in a complainant but not to any particular charge [107].

On that last point: Evidence of statements by the defendant in a pre-text telephone call may be such as to evidence a sexual interest in the complainant, because of apparent admissions by the Defendant in the conversation about other sexual conduct towards the Complainant: see for example *R v IE* [2013] QCA 291 and *R v BCQ* (2013) 240 A Crim R 153; [2013] QCA 388. See **Chapter 70** at 70.4.

Uncorroborated confessional statements

An interview containing a confessional statement which is recorded is corroborated, as is a confessional statement transcribed by police and signed by a Defendant (unless there is a challenge to the circumstances in which the Defendant came to sign the statement).

Almost invariably, confessional statements to police are recorded in formal or field interviews. These days, it is rare for police to give evidence of confessional statements which have not been recorded or signed.

In *McKinney v The Queen* (1991) 171 CLR 468, the majority laid down a '*rule of practice of general application'* in respect of uncorroborated and disputed police evidence of confessional statements allegedly made by a Defendant in police custody.

The majority judgment sets out the required contents of such a direction (at page 476) and emphasises that it should not include any suggestion that the jury is required to decide whether there has in fact been perjury and/or conspiracy by the police officers involved or that there is any need to form a judgment about their conduct at all (at page 477).

In *R v Derbas* (1993) 66 A Crim R 327 at [336], Hunt CJ suggested that it is proper to add an indication to the jury that the direction is necessary in every case in which the police evidence is substantially the only evidence establishing guilt, and is not the result of any particular view of the trial judge. However, s 632(3) of the *Criminal Code* precludes any direction or suggestion as to the unreliability of a class of witnesses, so that it would seem that the direction in Queensland must be confined to the circumstances of the particular case.

In *R v Williams* [2001] 1 Qd R 212, while concluding in that case that there was no need for a general warning as to the danger of acting on disputed and unrecorded oral admissions where they formed only one part of a substantial circumstantial case, the Court of Appeal foreshadowed a possible need to give *McKinney* style directions if police officers persisted in failing to record conversations.

In *Black v The Queen* (1993) 179 CLR 44 at [54], the High Court held that the jury should have been told to scrutinise closely the police evidence of an interview during which a confession was said to have been made. In that case, the confession was: oral, disputed and uncorroborated. It was made during an interview at a police station when the detectives held strong suspicions as to the Defendant's guilt. No note was made of the interview until after the interview; no attempt made to obtain the Appellant's signature to the note; and unconvincing reasons were given for that course of conduct. The answers supposedly given by the Defendant were improbable. The alleged confession was critical to the prosecution case and the Defendant was at a disadvantage because the police evidence was not challenged by other Defendants.

A warning may be required, depending on the circumstances, as to the danger of acting on the uncorroborated evidence of a prison informer giving evidence of a confessional statement by a fellow prisoner: (*Pollitt* (1992) 174 CLR 558). However, having regard to section 632(2) of the *Code,* the direction must not refer to prison informers as a class, and should instead be directed to the circumstances and motivation of the particular witness: see section 632(2) *Code* and *Robinson v The Queen* (1999) 197 CLR 162.

Any warning about the evidence of a prison informant should be directed to the issue of whether there exists corroboration of the making of the confession, rather than whether there is independent evidence implicating the Defendant in the crime itself: *Pollitt* at [558], [588], [601], [606]; *R v Clough* (1992) 28 NSWLR 396 at [405]. That is because prison informer evidence is almost always given in circumstances where there already exists other evidence of the Defendant's involvement in the crime, so the fact of such independent evidence is unlikely to make the informer's evidence any less suspect. To direct a jury on corroboration in traditional terms would risk their taking an unjustified comfort in such evidence as supporting the informer's account. Corroboration is unlikely to be provided by a fellow prisoner, to whom the same concerns as to unreliability will almost always be applicable: see *Clough* at [406].

36.3 Suggested Directions

[Last reviewed: March 2025]

(Where there is an electronically recorded interview containing confession or admission**):**

(Note, for clarity, this direction refers to 'admissions' rather than 'confessions' – but adapt as appropriate. Also, these directions will need to be crafted to reflect the evidence in the case. A Defendant may make a confession or admission to someone other than a police officer**).**

The prosecution relies on answers said to have been given by the Defendant in an interview with police as supporting its case against [him/her**].**

Before you may rely on that evidence, you must be satisfied that:

(a) [He/She**] did give the answers that are attributed to [**him/her**] and [**he/she**] was thereby confessing to the crime/making an admission against interest; and**

(b) That they were true.

The evidence of the Defendant's admissions is in the form of a [videotape/DVD**] which you have seen played and are entitled to have played again as often as you wish. During the trial, you were given transcripts to look at while the tape was played. Remember that those transcripts are really nothing more than someone else's opinion of what was said by the police officers and the Defendant and although they might have been of some help, it is for you to determine what you heard and saw. If your view of any part of the conversation differs from what the transcript shows, it is your view which must prevail. (**See also *Benchbook Chapter 20 on Tape Recordings and Transcripts***).**

<u>Whether the confession is true and accurate:</u>

You may have no trouble concluding that the Defendant said what the prosecution say [he/she**] said during the interview.**

You may also have no trouble in concluding that those statements by [him/her**] amounted to an admission – they indicated [**his/her**] guilt.**

If you are satisfied that the statements were indeed made by the Defendant, and that they indicated [his/her**] guilt, then you must then consider whether the statements the prosecution relies on as indicating guilt are truthful and accurate statements. It is up to you to decide whether you are satisfied that those things said by the Defendant which would tend to indicate that he is guilty of the offence were true; because if you are not so satisfied, you cannot rely on them as going to prove [**his/her**] guilt.**

<u>Use of the questions asked during the interview:</u>

During the interview, a number of questions were asked by the police officers of the Defendant. The same reasoning applies here as you were told about in relation to questions by counsel of a witness. If the Defendant did not agree to or in some way accept the contents of a question asked of [him/her**], the proposition contained in the question cannot become any evidence against [**him/her**].**

So, for example, the proposition was put to the Defendant that [XXX**]. [**He/She**] denied that proposition and clearly then there is no evidence from this interview that the proposition was correct. On the other hand, [**he/she**] answered the question [**XXX**] with a 'Yes', and there is therefore evidence that [**he/she**] [**XXX**].**

If you accept that the statements made by the Defendant during [his/her**] interview, which are relied upon by the prosecution, were made by [**him/her**], and that they were true, then it is up to you to decide what weight you give them, and what you think they prove.**

<u>Exculpatory statements made during the interview:</u>

The Defendant also gave answers which you might view as indicating [his/her**] innocence. You are entitled to have regard to those answers for the purposes of deciding whether they give rise to a reasonable doubt in your mind as to the Defendant's guilt.**

[Give *Liberato direction as* appropriate – see *Chapter 26*]**. For example:**

Where, as here, there is an out-of-court account from the Defendant in evidence, usually, one of three possible results will follow:

You may think that the Defendant's account [in his or her interview with the police or, otherwise describe the nature of the out-of-court statement**] is credible and reliable and that it provides a satisfying answer to the prosecution's case.**

If so, your verdict would be <u>not guilty</u>.

You might be uncertain about that account but consider that it *might* be true. In that case your verdict would be <u>not guilty</u>;

You might not accept the Defendant's account, in which case, you would <u>put it to one side</u>. But be careful not to jump from non-acceptance of the Defendant's account to an automatic conclusion of guilt. Go back to *the evidence that you do accept* and ask yourself if, on the basis of that evidence, the prosecution has proved the Defendant's guilt beyond reasonable doubt.

(Where there is <u>uncorroborated</u> confession/admission**):**

The prosecution relies on answers said to have been given by the Defendant in an interview with police as supporting its case against [him/her**].**

Before you may rely on that evidence, you must be satisfied that (a) [he/she] did give the answers that are attributed to [him/her**] and (b) that they were true.**

(As to (a), where the circumstances of a disputed, unrecorded, oral admission call for a warning (see *Black v The Queen* (1993) 179 CLR 44; *R v Lawson* [1996] 2 Qd R 587; *R v Van Wirdum* [1994] QCA 476)**).**

The police officers say that the Defendant made an admission of guilt to them; [he/she**] denies that [**he/she**] did so. The alleged admission was not recorded by videotape or audio tape, nor was the Defendant given any opportunity to read or sign any written record of it. There is no independent confirmation by any witness apart from the police officers as to what was said. It is the fact, of course, that sometimes people who make admissions repudiate them later; they regret having made the admission which points to their guilt and seek to avoid the consequences of it by denying ever having made it.**

Where it is said that an admission, which was not in any way recorded, was made while the defendant was in the custody of the police, you should treat the evidence of the admission with great caution. A person in that position is at a very grave disadvantage; [he/she**] can only deny what the police say, and there is no independent means available of establishing what happened. Bear in mind that it is easy for a police officer, or indeed police officers, to claim that a Defendant has said something to indicate [**his/her**] guilt, and very difficult for a Defendant to refute such a claim.**

In assessing the evidence of the police officers as to the alleged making of the admission, keep in mind that they have the advantage of being relatively experienced witnesses, accustomed to giving evidence.

Have regard to these matters: why did the officers, knowing in advance that they would be speaking to the Defendant make no arrangements to ensure that the conversation could be recorded? As you have heard, it is standard procedure in this State to record electronically all interviews with suspects; [and the police officers' own evidence in this case confirms that they did regard him as a suspect**]. Did you find the officers' explanations as to why they were unable to do so in this case convincing? You may consider that there were certain deficiencies and inconsistencies in their evidence on this point, for example [**XXX**]. Why did they not at the least prepare a note of what [**he/she**] is alleged to have said to them and offer it to [**him/her**] to read, and if [**he/she**] accepted it as a true account of what [**he/she**] had said, to sign it as correct? Given those difficulties, you will have to scrutinise their evidence very carefully to decide whether you can accept it and act upon the admission as having been made by the Defendant.**

Where a confession in police custody is the only or substantially the only evidence indicating guilt:

In a case such as this, where the alleged admission is really the only basis on which you could find guilt beyond reasonable doubt, you should consider whether there is any independent evidence which would satisfy you that the admissions were actually made. [You may think that …provides some independent evidence of the making of the admissions**]. It would be dangerous to convict acting on this evidence alone. However, you may act on it if, having regard to that warning, and having scrutinised it carefully, you are satisfied of its truth and accuracy.**

(Confessions to a prison informer**):**

The prosecution relies on the evidence of [Y**], a former cellmate of the Defendant, who says that the Defendant confessed the offence to [**him/her**] while they were in custody together. Before you act on the evidence of [**Y**], you should consider whether you are satisfied of [**his/her**] reliability, accuracy and honesty. You should take into account the fact that while it would be easy enough for [**Y**] to concoct that evidence, it is very difficult for someone in the Defendant's position to refute it. You should also take into account the prospect that [**Y**] may have been motivated to fabricate [**his/her**] evidence, thinking that [**he/she**] will derive some benefit in terms of sentence, treatment or release on parole.**

You would have regard to [Y**]'s record of convictions for dishonesty, and you would have regard to what [**he/she**] stood to gain, or thought [**he/she**] stood to gain, by giving evidence against the Defendant. It would be dangerous to act on the evidence of [**Y**], if there were no independent evidence confirming it. However, you should consider whether the following evidence does provide confirmation of what [**Y**] says about [**X**]'s having admitted the offence to [**him/her**] in the sense that it supports the making of the alleged confession: [**XXX**].**

(Where evidence confirmatory of making of admissions comes from another prisoner**):**

It is unlikely however that the evidence of [prisoner Z**] can assist you in this regard because the same concerns that I have explained to you as to the possible unreliability of [**Y**] apply equally to [**him/her**] [**detail any additional concerns re Z**]. You should act on it only if after very careful scrutiny and having regard to my warning and the matters I have identified to you, you are convinced of the truth and accuracy of [**his/her**] evidence.**