

Out-of-Court Confessional Statements

The prosecution relies on answers said to have been given by the defendant in an interview with police as supporting its case against him. In order to rely on that evidence, you must be satisfied that he did give the answers that are attributed to him, and that they were true.

1. Whether the confession was made:

Where the circumstances of a disputed, unrecorded, oral admission call for a warning.¹

The police officers say that (insert defendant's name) made an admission of guilt to them; he denies that he 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.² It is the fact, of course, that sometimes people who make confessions 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. But in circumstances such as these, where it is said that an admission, which is not in any way recorded, was made while the defendant was in the custody of the police, you should treat it with great caution. A person in that position is at a very grave disadvantage; he 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 guilt, and very difficult for the defendant (X) 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 (X) make no arrangements to ensure that the conversation could be recorded? As you have heard, it is now standard procedure in this State to record electronically all interviews with suspects; and the police officers' own evidence in this case

¹ *Black v The Queen* [1993] 179 CLR 44; *R v Lawson* [1996] 2 Qd R 587; *R v Van Wirdum* [1994] QCA 476; *R v Williams* [2001] 1 Qd R 212.

² See *Police Powers and Responsibilities Act 2000*; s 418 as to the right to have a friend or relative present, s 435 and s 436 as to the requirement for electronic recording where practicable and s 437 as to the requirements for a written record.

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 ... Why did they not at the least prepare a note of what he is alleged to have said to them and offer it to him to read, and if he accepted it as a true account of what he 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 made. [You may think that ...provides some independent evidence of the making of the admissions]³. 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.

Confession to a prison informer

The prosecution relies on the evidence of (Y) , a former cellmate of (X), who says that (X) confessed the offence to him while they were in custody together. Before you act on the evidence of (Y), you should consider whether you are satisfied of his 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 (X)'s position to refute it. [There is no independent evidence available either way.] You should also take into account the prospect that (Y) may have been motivated to fabricate his evidence, thinking that he will derive some benefit in terms of sentence, treatment or release on parole.

³ The occasion for giving the warning was identified in *McKinney* (1991) 171 CLR 468 as the absence of reliable corroboration for the making of the confession. Any corroboration direction should therefore address the need to look for independent evidence of the confession's making, rather than other evidence implicating the accused in the crime. See also the comments on this issue in *Pollitt* (1992) 174 CLR 558 at 588, 601, 606.

You would have regard to (Y)'s record of convictions for dishonesty, and you would have regard to what he stood to gain, or thought he 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: ... ⁴].

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 him⁵ (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 evidence.

Electronically Recorded Interview

The evidence of (X)'s admissions is in the form of a videotape which you have seen played, and are entitled to have played again as often as you wish. During the course of 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 (X), 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.⁶

2. Whether the confession is true and accurate

If you are satisfied that the statement was indeed made by (X), the second aspect you must consider is whether those parts that the prosecution relies on as indicating guilt are true and accurate. It is up to you to decide whether you are satisfied that those things said by the defendant which would tend to indicate that

⁴ Such evidence should be addressed to the making of the alleged confession; see above at f.2 re *Pollitt*.

⁵ See *Clough* (1992) 28 NSWLR 396.

⁶ See Direction No 20 on "Tape Recordings and Transcripts".

he is guilty of the offence were true; because if you are not satisfied, you cannot rely on them as going to prove his guilt.⁷

3. Use of the interview

During the course of the interview a number of questions were asked by the police officers of (X). The same reasoning applies here as you were told about in relation to questions by counsel of a witness. If (X) did not agree to or in some way accept the contents of a question asked of him, the question cannot become any evidence against him. So, for example, the proposition was put to him that ... He denied it, and clearly, then there is no evidence from this interview that the proposition was correct. On the other hand, he answered the question ... “Yes”, and there is therefore evidence that he ...

In the course of the interview, it is said, (X) made statements which the prosecution relies on as pointing to his guilt. If you accept them as having been made by (X) and as true, it is up to you to decide what weight you give them, and what you think they prove. He also gave answers which you might view as indicating his innocence.⁸ You are entitled to have regard to those answers if you accept them, and to give them whatever weight you think appropriate, bearing in mind that they have not been tested by cross-examination.⁹ In relation to both the answers which the prosecution relies on as indicating guilt, and those which point to innocence, it is entirely up to you what use you make of them and what weight you give them.

The jury should be instructed that, before acting on any confessional statement, they must be satisfied, firstly, that the alleged admissions were in fact made and secondly, that they were truthful and accurate.¹⁰

⁷ Whether the jury is entitled in considering that issue, to look, not just at the confession itself, but at all the evidence, in order to reach a conclusion as to 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.

⁸ *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.

⁹ cf *Aziz* 49 at 50; *Wedd v The Queen* (2000) 115 A Crim R 205 at 207; *R v Lace* [2001] QCA 255. See also *Mule v The Queen* (2005) 79 ALJR 1573 and *R v Cox* [1986] 2 Qd R 55 at 65 and *R v Bagley* [2014] QCA 271 at [41].

¹⁰ *Burns*.

They should also be told that statements by police during the course of a record of interview in which allegations are put to the defendant are not evidence unless accepted by the defendant.¹¹

In *McKinney*, 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 direction¹² 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.¹³

In *Derbas*¹⁴ Hunt CJ suggests 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) *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 *Williams*¹⁵ the Court of Appeal, while concluding in that instance 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, foreshadowed a possible need to give *McKinney* style directions if police officers persisted in failing to record conversations.

In *Black*¹⁶ the High Court noted a number of circumstances requiring that the jury should have been told to scrutinise closely the police evidence of an interview. In that case the confession was oral, disputed and uncorroborated. It was made in the course of an interview at a police station where the detectives held strong suspicions as to the defendant’s guilt. No note was made until after the interview and no attempt made to obtain the appellant’s signature to the note, while 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.¹⁷

A warning may be required, depending on the circumstances,¹⁸ as to the danger of acting on the uncorroborated evidence of a prison informer giving evidence of a confessional statement by a fellow prisoner.¹⁹ Any direction must, as a result of the October 2000 amendment to the *Criminal Code*²⁰ avoid reference to the class of prison informers at large, and should instead be directed to the circumstances and motivation of the particular witness.

Any warning 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

¹¹ *Ugle v The Queen* (1989) 167 CLR 647 at 651.

¹² Page 476.

¹³ Page 477.

¹⁴ *R v Derbas* (1993) 66 A Crim R 327 at 336.

¹⁵ *Williams* at 216-21.

¹⁶ *Black v The Queen* (1993) 179 CLR 44 at 54.

¹⁷ See also *Lawson*.

¹⁸ See s 632(2) *Code*; but see also *Robinson v The Queen* (1999) 197 CLR 162.

¹⁹ *Pollitt*.

²⁰ *The Criminal Law Amendment Act 2000*.

in the crime itself.²¹ 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.²²

²¹ *Pollitt* at 558, 588, 601, 606; *Clough* at 405.

²² *Clough* at 406.