

# EVIDENCE EXAM NOTES

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## HEARSAY

### Keep these in mind:

- Put yourself in the pos of counsel wishing to present the evidence
- Keep in mind: what are the issues to be proved?
  - What do you have to prove to get a conviction?
    - i.e identity is issue
      - you have evidence of a hearsay nature – i.e someone made an exclamation identifying the accused as the perpetrator and that person unavailable = statement in the form of hearsay
      - you have to prove identity
      - you should not use this evidence to show the state of mind of the person who made the statement, this will not help you succeed
      - then you will have to admit that the statement is truth, but this will be considered as hearsay
        - then you have to consider whether the statement falls under one of the exceptions of hearsay
  - keep in mind: you must note what has to be proved, and why you want to present the evidence
    - this will help you decide whether the purpose is to show the truth of the statement or whether to simply show that the statement was made
    - the question then is: is it relevant?

### Definition

- An out-of-court statement tendered to prove the truth of the facts asserted, which will be admissible when used as original evidence not to establish the truth of the statement but the fact that it was made: **Subramaniam v Public Prosecutor** [1956] 1 WLR 965 at 970.

### Original evidence

- If purpose of presenting the evidence is merely to prove that the statement was *made*, as opposed to asserting that it was *true*, it is not hearsay but rather 'original evidence' – see **Subramaniam v Public Prosecutor**

### GENERAL RULE

- Assertions of persons other than the witness testifying is inadmissible as evidence of the truth of that which is asserted
  - Evidence given in court by a witness is restricted to statement of facts on what they personally perceived
- Hearsay evidence is inadmissible because
  - The 'primary' evidence is not given on oath
  - Demeanour of primary witness cannot be assessed in court
  - cannot be cross-examined as to its accuracy (*Pollitt v R*)
- Therefore, unreliable (**Teper v R**)

### EXCEPTIONS

- In some circumstances hearsay evidence may be admitted where there is some *additional* factor present that makes such evidence more reliable and therefore safer to admit.
- Where the intention is to prove that B actually said the statement, this will be regarded as original evidence rather than hearsay

### DIRECT HEARSAY

- Case for distinguishing b/w direct hearsay + original evidence: **Subramaniam v Public Prosecutor** [1956] 1 WLR 965

**Subramaniam v Public Prosecutor** [1956] 1 WLR 965 bk 600-601

**Facts:** S in defence against his charge of possessing ammunition, said that his actions were under duress due to a group of terrorists who threatened to kill him. That evidence was ruled inadmissible as hearsay in the lower court

because, it was argued, that he was using the terrorist statements as evidence of truth as to their intentions.

**Held:** on appeal, the Privy Council held that the evidence was admissible, not as proof of the terrorist's intent, but as proof of the fact that those statements were made, and that they affected S's freedom of choice. The evidence was original evidence of the fact that threats were made.

The distinction was made at 970:

Evidence of a statement made to a witness by a person who is not himself called as a witness ... is hearsay and inadmissible when the **object of the evidence is to establish the truth of what is contained in the statement**. It is not hearsay and is admissible when it is proposed to establish by the evidence, **not the truth of the statement but the fact that it was made**.

- Whether evidence is direct hearsay or original evidence depends on the *purpose* for which it is offered and the *fact in issue* at which it is aimed.
- Application:**
  - Is the purpose of the evidence to show truth about the statement or is it to show that the statement was made?
  - Place yourself in the position of the counsel in presenting such evidence:
    - Why do you want to present this evidence?
    - Is it to show that the statement is true?
    - Or is it to show that it was made?
    - And is it sufficient to simply show that in order (for e.g) that the statement made induced a certain condition of the mind of the person who made the statement or to the person to whom the statement was made

### IMPLIED HEARSAY

- Define:** where a statement is made by someone not with the purpose to positively assert a certain fact, but the said fact is implied by the statement (*Teper v R*)
- Excluded like direct hearsay**

**Teper v R** [1952] AC 480 – authority that hearsay is applicable to implied hearsay

**Facts:** An accused burned down his own shop in order to defraud the insurance company. When the shop was on fire, a police constable approached the scene. Around 200 yards away from the shop, the police heard a woman shout: 'your place is burning, and you going away from the fire'. Immediately after hearing this, the police saw a black car passing, and the driver (according to him) resembled the accused. The woman's statement implied that it was the accused who was going away from the fire.

**Issue:** identity of the accused: whether such evidence was admitted correctly

**Held:** Privy Council held that it was hearsay by implication, where a fact could be inferred from a statement made by someone. The Court held that the woman's exclamation was too remote, and her intention was not to assert the identity of the accused, but rather surprise.

- The implied hearsay rule applies to Australia: **East Metropolitan Health Service v JE Popovic** [2019] WASCA 18
  - Walton v R*

### Proven lies or false denials

- A lie can be an implied admission of guilt: **Edwards direction**
  - Lie must be connected to the circumstances of the offence +
  - It must be assumed that the truth would implicate him in the offence, and this is the reason he told the lie

- In this event, a judge can direct the jury that they may use the lie as an implied inference of guilt.

**Edwards v R** (1993) 178 CLR 193

### Principle at 210-11:

A lie can constitute an admission against interest only if it is concerned with some circumstance or event **connected with the offence** (ie it relates to a material issue) and if it was told by the accused in **circumstances in which the explanation for the lie is that he knew that the truth would implicate him** in the offence. Thus, in any case where a lie is relied upon to prove guilt, the **lie should be precisely identified**, as should the circumstances and events that are said to indicate that it constitutes an admission against interest ... Moreover, the jury should be instructed that there **may be reasons for the telling of a lie** apart from the realisation of guilt.

- Jury cannot imply guilt from a lie if not at first given an Edwards direction
  - Where Edwards direction not given, the lie can only be used to discredit the accused's testimony.
- Edwards direction only given when prosecution is relying on the lie as evidence of guilt: **Zoneff v R** (2000) 200 CLR 234

### CONDUCT

- Must be conduct w/a communicative element

**Manchester Brewery v Coombs** (1990) 82 LT 347

**Facts:** D asserted that beer supplied by P's brewery were undrinkable. He presented evidence @ trial of patrons who left glasses of beer undrunk or threw it away after tasting it.  
**Held:** Court allowed evidence as the patron's actions spoke as loudly as their words

**Holloway v McFeeters** (1956) 94 CLR 470

Case involved an action for damages arising from a road accident. Court admitted evidence that the driver allegedly responsible for the accident drove off immediately afterwards without reporting it.

### STATEMENTS AS CIRCUMSTANTIAL EVIDENCE

- Statements from which a fact could be inferred from i.e:
  - Effect of statement on recipient's state of mind
    - i.e consent (**Bull v R**)
  - Mental state of maker can be inferred from statement
    - i.e belief of meeting a particular person (**Walton v R**)
    - i.e attitude towards someone (**O'Driscoll v SoWA**)
- State of mind/intent of maker:**
  - evidence of such statements is not merely hearsay because it has independent evidentiary value in proving the author's intentions, where those intentions are a fact in issue or are relevant to a fact in issue. (**Walton v R** Mason CJ at 288-9).
  - Such evidence is considered original evidence rather than an exception to the hearsay rule.

**Bull v R** (2000) 201 CLR 443 – state of mind of recipient bk 647-649

**Facts:** complainant had communicated her sexual fantasies to the accused over the phone, after which she went to his home where there were the two other co-accused. The complainant laid charges for sexual assault, against which the accused raised consent.

**Issue:** whether the phone conversation could be excluded as hearsay

**HC:** held it was not hearsay but circumstantial evidence – evidence not intended to show truth of what was stated, simply presented to show the state of mind of complainant going to the accused home, and the state of mind of the three accused in honestly believing she gave consent. Inference could be made from evidence as to whether she gave consent or not.

**Walton v R (1989) 166 CLR 283** – state of mind of maker bk 614-623

**Facts:** Case involved murder of W's wife, V and involved multiple witnesses, namely Ms Bragg (present partner of W), three witnesses (H, S, N), Ms Barwitt and W&V's son, Michael.

H, S, N testified that the day before the murder, V was going to meet W in the town centre.

Ms Barwitt was with V when she overheard a phone convo b/w V and (allegedly) W. V called Michael over and said 'daddy's on the phone', M picked up phone and said 'hello daddy' and had a short convo with the caller. Heard and was told by V that V arranged to meet with W in the town centre the next evening.

**Issue:** whether the witness statements were admissible.

**Held:** HSN: Evidence not hearsay: showed state of mind of deceased – to meet person the next day whom she believed to be W. Evidence could not be used by jury as evidence identifying the accused.

Barwitt: same ^

Michael: 'hello daddy' = hearsay b/c it went to identity of accused. Jury could infer that it was the accused who made the call. ← **authority for applicability of hearsay rule to implied assertions**

Mason CJ:

'Statements by a person about his intentions or state of mind are often admitted into evidence ... the better view is that evidence of such statements is not merely hearsay. Even when the testimony proffered is not that of the maker of the statement, but that of a person who heard the author make the statement, it is original evidence. It is because **the making of the statement has independent evidentiary value in proving the author's intentions**, those intentions being a fact in issue or a fact relevant to a fact in issue, that the witness' testimony does not infringe the hearsay rule.'

**O'Driscoll v SoWA [2011] WASCA 175** – state of mind of maker

**Facts:** O was convicted of murdering de-facto partner H. O insisted that the relationship was a happy and non-violent one. The TJ allowed evidence from H's friends of H's statements that O had assaulted her and that the relationship was not a happy one.

**Issue:** on appeal was whether the evidence from H's friends were admissible.

**Held:** Martin CJ [63] – evidence was not intended to prove truth of those statements or that O was a violent man. Evidence was led to establish H's state of mind, from which the jury could draw an inference as to the nature of the relationship w/O.

- H's statements were evidence of her attitude towards O → jury could legitimately draw inferences as to the nature of their relationship

**Pollitt v R (1992) 174 CLR 558** – state of knowledge of prior event **confused**

**Facts:** A contracted P to kill W, who mistakenly killed S instead. Post-killing, A made several statements to Mr+Mrs B, implying that he knew about the killing and that P was the killer. The Bs overheard A's phone call with another man: A said to caller that he would get the rest of the money once he does

the job properly. A then said to Bs other statements implying that P was the caller and that he committed the murder.

**Held:** evidence was admissible as to prove the identity of accused as the killer by circumstantial inference.

Mason CJ + Deane J thought hearsay rule should be relaxed to include statements made immediately after telephone convo + reactive statements

- Was of the opinion that the statements made by A in the phone convo where in the nature of implied assertion, and that implied assertions of this kind is spontaneous and likely to have a high degree of reliability.
  - Statement by caller to identity of receiver immediately after termination of telephone is highly spontaneous = free from possibility of concoction + high degree of reliability.
  - Also stance of Dean J ^
- However, majority disagreed
  - Brennan J: res gestae principle should not apply simply because the statement was uttered with apparent spontaneity. Concoction extremely likely
  - Toohey J: concoction possible b/c remarks made by A were not reactive – time b/w killing of S + A's statements were a few days = not contemporaneous. Scope of hearsay rule regarding spontaneous statements still undefined.
  - McHugh J: criminal nature of case = identification not sufficiently trustworthy to be admitted under res gestae exception. + other side of convo not heard = not appropriate to admit overheard convo

**Kamleh v R (2005) 213 ALR 97**

**Fact:** K was accused of murdering two people in an apartment in the company of Z. When the bodies were found, the TV had been at full volume – a fact not known to anyone except the police who arrived after the killing. Evidence was admitted that Z had told S that during the visit to the apartment he had turned up the volume on the television.

**Issue:** whether the evidence of Z's statement was admissible

**Held:** Court upheld admission of statement:

Gleeson CJ + McHugh J:

'Such evidence did not offend against the hearsay rule. The evidence was not tendered ... to prove that the TV set had been turned up. Rather, the fact that [Z] said what he did about the TC set was relevant because it **disclosed a state of knowledge on his part which had a tendency to prove that he was in [the apartment] at the time of the killings**. Thus, it had a **tendency to prove a fact relevant to a fact in issue**, because of other evidence which showed that he was in the presence of [K] at relevant times.'

#### COMMON LAW EXCEPTIONS TO THE HEARSAY RULE

- Where evidence is presented w/the purpose to show the truth of the content of that statement

#### Res gestae

- *Res gestae*, including 'spontaneous statements': Things so close in time or space to the matter being proved as to be inseparable from it.
  - i.e statements accompanying or explaining a relevant act, relating to an event in issue
- *Ratten v R* = leading authority for *res gestae*, rationale articulated by Lord Wilberforce indicates two elements:

1. **Contemporaneity** of the statement to the event which excited it and not a narrative of prior events.

2. Event must be such that any possibility for reflection or a concoction is eliminated – falsehood impossible. (cf majority judgement in *Pollitt v R*)

- *Ratten v R* elements applied in *R v Golightly*
- *SoWA v Montani*: another element: court said that statement must have been spontaneous
- where statement relates to a state of mind/emotion/physical sensation, it may be received as original evidence rather than an exception to hearsay rule. (*Walton v R*)
- cannot be a mere narrative of a past event – inadmissible

**Ratten v R [1972] AC 378** – good example of *res gestae* bk 607-608

**Facts:** A charged w/murder of wife w/shot gun. A's defence was that it was an accident: he was cleaning the gun when it went off. Crown rebutted defence w/telephone operator witness, who said a woman had called from the A's home where they lived, was sobbing + hysterical and said 'get me the police please' and gave the address. Hung up before she was put through to police.

**Issue:** whether evidence was admissible: hearsay

**PC Held:** not hearsay b/w witness statement was to show state of mind of deceased. If regarded as hearsay, statement would come under exception of *res gestae* b/c evidence was made almost immediately before the shooting.

Lord Wilberforce:

'...hearsay evidence may be admitted if the statement providing it is made in such conditions (being always those of approximate but not exact contemporaneity) of involvement or pressure so as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.'

**R v Beddingfield** – criticised narrow application of *res gestae* exception

**Facts:** A charged w/murder of wife. Deceased + A was in a certain room at a certain place. At a certain point of time, D came out of room and said to a bystander: 'oh dear see what B has done to me' – her throat was cut: died 10 mins later.

**Held:** Court refused to admit evidence of bystander witness because the deceased's statement did not occur as *part* of the event but shortly afterwards: not admitted as part of *res gestae* – **very strict and narrow approach**

**R v Golightly (1997) 17 WAR 401**

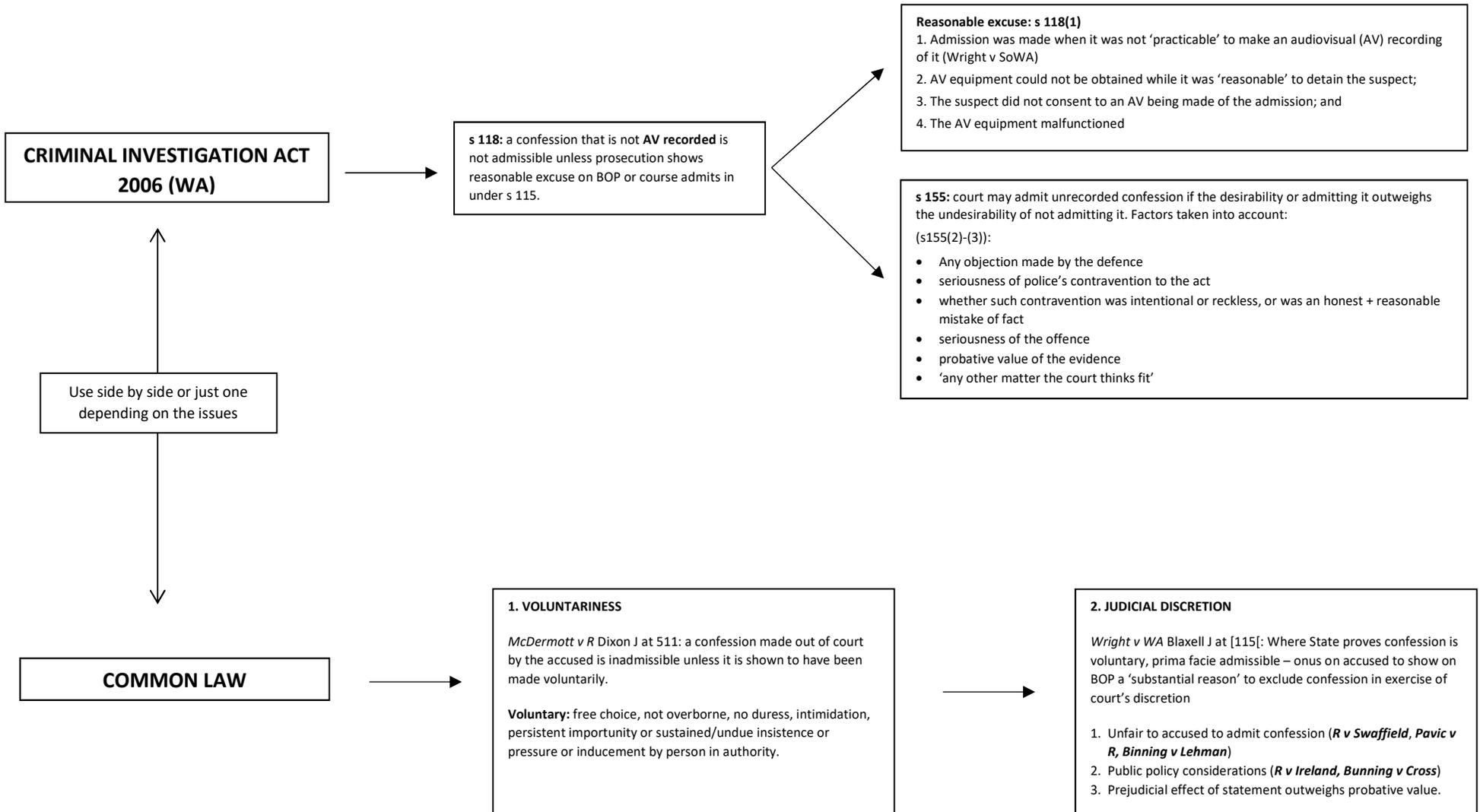
**Facts:** G charged with murder of T. Evidence was admitted by A of hearing two shotgun blasts and then T shouting '[G] shot me'.

**Held:** although no evidence that T expected to die, TJ admitted statement under *res gestae* exception since 'the elements of spontaneity and contemporaneity are sufficiently established to qualify the evidence for admission'.

**SoWA v Montani [2006] WASC 190** – authority for dying declarations except.

**Facts:** Deceased shot at a resort and uttered dying words to a security guard who came to where he was lying on the floor. Deceased said: "I've been shot, I'm gone, I'm dying, they've got me". When guard asked for his name he said "Johnny Montoyo".

# ADMITTING UNLAWFULLY OBTAINED EVIDENCE



## UNLAWFULLY OBTAINED EVIDENCE

- One of the exceptions to the hearsay
- \*\* confessions and informal admissions and real evidence
  - RULE IS FOR:
    - Unlawfully or improperly obtained confessions
      - Judicial discretion to exclude
      - Informal admissions treated on same basis of confession
    - Confessions have high probative value
      - What a person says to his/her detriment is usually true
      - Relevant and admissible as **exception to hearsay rule**
    - Confession must have been obtained in accordance to admissibility rules (dispute = decided in voir dire)
      - Jury attaches weight to confession
- An unlawfully obtained item of evidence is not automatically inadmissible.
- Admissibility is determined according to the discretion of the judge

### TWO REQUIREMENTS FOR ADMISSIBILITY: COMMON LAW

- A confession of crime or any incriminating statement is admissible against a party if it was made voluntarily by the accused.
- Involuntary confessions are excluded because it would be dangerous in the administration of justice to admit them
- Both required to exclude ✓

#### 1. Voluntariness

- Authority: **McDermott v R (1948) 76 CLR 501, 511 (Dixon J):**
  - No alleged confession by an accused is admitted unless it is shown to have been made voluntarily.
  - Means:
    - Free choice, not overborne; no duress, intimidation, persistent importunity or sustained/undue insistence or pressure or inducement by person in authority.
- It is for the accused to put the admissibility of a confession into issue. Whether it was made voluntarily is determined by the court on the voir dire. The onus will be on the State to prove voluntariness to the standard of the balance of probabilities. The accused will have an evidential burden to present some evidence to counter the State's case. (**Wendo v R (1963) 109 CLR 559, 572-3**).
- If the court finds that the confession was not voluntarily made it is inadmissible. But if the court finds that it was made voluntarily, there is still room for the exercise of the court's discretion.

#### 2. Judicial discretion (once voluntariness is proved)

- Where prosecution has established that the confession was made voluntarily, it is prima facie admissible as a matter of law. The onus is then on the accused to show on BoP a 'substantial reason' to exclude confession in the exercise of the court's discretion (**Wright v WA [2010] WASCA 199 [115]** Blaxell J)
- Three possible 'substantial reasons' for discretionary exclusion of a voluntary confession:
  - Unfair to accused to admit confession
    - Focuses on rights of the accused
  - Public policy considerations make admission of evidence unacceptable (i.e. police conduct)
    - Concerned with matters of public interest
  - Prejudicial effect of statement outweighs its probative value (**Wright [115]** Blaxell J)

- Focuses on probative value of evidence and guards against miscarriage of justice.
- ^ an additional basis for excluding confessional statements on top of the unfairness discretion (**Swaffield [65]**).
- These various considerations may well overlap (**Swaffield [74]**).

#### **Foster v R (1993) 66 A Crim R 112** – threats from person in authority

**Facts:** defence sought to have accused's confession excluded on the grounds that he was threatened by the police that if he did not sign the confession, he would be taken out to the back and beaten, and his younger brother would also be picked up.

**Held:** court excluded confession using both 'fairness' and 'public policy' tests – pg 121.

### UNFAIRNESS TO ACCUSED

- **R v Lee (1950) 82 CLR 133, 154:** a discretion to reject a confession made by the accused may be deemed inadmissible if, considering all circumstances it would be unfair to use it in evidence against him.
  - Unfairness = 'unfairness of such a nature whether procedural or substantive, as might jeopardize the right of the accused to a fair trial' **R v Williams (1992) 8 WAR 265, 273 Rowland + Owen JJ.**
    - i.e. procedural right (right to consult a solicitor when first apprehended) – **JWRL v SoWA**
    - i.e. fundamental right (right to silence).

#### **R v Swaffield** – secret recording of confession to police = inadmissible

**Facts:** Undercover police officer covertly recorded S's confession of arson one year earlier, where he had been investigated. Recording obtained after he exercised his right to speak to the police when first questioned by them in the prior investigation.

**Held:** breach of S's procedural right to choose whether or not to speak = inadmissible.

Toohey, Gaudron + Gummow JJ:

'Where the freedom [to speak to the police] has been impugned, the court has a discretion to reject the evidence ... 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.'

**Principle:** unfairness often arises from police's failure to comply with a suspect's procedural rights. Majority at 197: '*the purpose of the [unfairness] discretion is the protection of the rights and privileges of the accused*'.

#### **Pavic v R (1998) 192 CLR 159** – secret recording of confession to friend

**Facts:** Pavic had declined to speak to the police but had made a confession to a friend who was secretly recording the conversation in arrangement w/the police. The distinction b/w Swaffield + Pavic: Pavic was more likely to have been speaking freely + truthfully to a friend = more persuasive and reliable.

**Binning v Lehman [2002] WASCA 255** – admissible confession brought up by accused himself to undercover police

**Facts:** L made incriminating statements regarding an earlier firearm crime which he was unsuccessfully charged for to an undercover police who was recording the conversation for a different offence.

**Held:** Wheeler J at [18] distinguished from **Swaffield** on the basis that in S, undercover officer's purpose was to elicit admissions from the accused, but in this instance, L himself bought up the subject of the offence and the police

officer's purpose was not to overcome L's earlier failure to answer questions in relation to the earlier firearm offence.

**State of Western Australia v May [2011] WASC 365** – undercover operation violated accused's decision to silence

#### **Facts:**

- Accused took part in two audio interviews, but said nothing incriminating
- Accused put in lock up cell, then there was an undercover police officer who was put in cell as a 'person who has been arrested' → tried to get confession out of accused w/regard to the murder
  - Tried to get incriminating statements out but did not exceed
    - [33]: summary of what happened

#### **Held:**

- Court referred to Pavic, set out number of factors in [36]
  - Concluded in [46], although May refused to speak to police further, Court was satisfied that he said all he intended to say to the police
    - Accused has indicated that the said enough, doesn't want to say anything further. An undercover operative violates this decision not to say anything more to the police = inadmissible [50]

**Carr v State of Western Australia** – admissible, secretly recorded voluntary confession

#### **Fact:**

- Bank robbery – accused was arrested few months later
- Circumstantial evidence against accused:
  - Getaway car was similar to the one found at accused's home, and the car was stolen
  - Features of accused similar to the ones in the tape
  - Clothes of accused also similar to tape
  - Key piece of evidence: incriminating statements made in the police premises – they had a formal interview where he didn't say anything incriminating
  - However, when placed in a lock-up cell of police section, 2 officers, in their presence he started to make incriminating statements → bragged to police how the robbery was good
    - However, it was recorded
  - Accused argued that he was teasing the police officers and he didn't know he was being recorded
    - Clearly, not involuntary, was done out of free will

#### **Held:**

- No room to exercise discretion either on the basis of unfairness to accused, or on public policy
- Therefore, accused's statement was admissible.

### INFRINGEMENT OF THE ACCUSED'S PROCEDURAL RIGHTS BY THE POLICE

#### **State of Western Australia v Chatfield**

#### **Facts:**

- woman arrested after a stabbing incident, made incriminating statements at ambulance, then hospital, then police officer's office (video recording)
- She was in a highly emotional state, under the influence, and in a very distressed situation (just got news of her mum's death)

**Held:** Court held it would be unfair to admit this evidence against her