MCKINNEY V THE QUEEN; JUDGE V THE QUEEN

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This case[1] is of significant interest on two levels: as an important decision concerning the admission of confessional evidence, and as an excursion into what should properly be a field reserved to the executive and legislature.

THE FACTS[2]

The two applicants and a co-accused were arrested by New South Wales police in a dawn raid. They were detained in custody in what the High Court considered were unlawful circumstances, and charged with jointly breaking and entering certain premises, assault with intent to rob, and assault occasioning grievous bodily harm. It was the Crown's case that upon entering the premises the subject of the charge, one of the trio, who was equipped with a firearm, demanded money from an occupant and that a little later another occupant was seriously injured by a shot discharged from a weapon. This evidence was uncontested.

The applicants were directly linked to the offences by signed records of interview. Apart from their signatures confirming the contents of the records, no independent evidence corroborated the making of the statements.

Each applicant maintained his record of interview was fabricated. They claimed they had signed their confessions because their wills had been

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1. *McKinney v The Queen; Judge v The Queen* (1991) 171 CLR 468 ("*McKinney*").
2. The facts are summarised from the superficial account in the majority judgment at 471. A more detailed and revealing exposition and analysis of the facts is contained in the judgment of Toohey J at 498-501.

overborne. The co-accused was acquitted after trial; the applicants' subsequent appeals to the New South Wales Court of Criminal Appeal failed.[3]

Their applications to the High Court for special leave to appeal were based upon a single ground; namely, that the trial judge should have warned the jury of the danger of convicting them on the basis of their records of interview. Indeed, as stated by Justice Brennan the question for the High Court was:

> [W]hether [this] particular trial [had] miscarried for want of a warning of a danger in convicting where the only evidence, or the only substantial evidence, against the accused consisted in disputed and uncorroborated confessional statements made to police in an interview reduced to writing and signed by the accused.[4]

THE LAW PRE-MCKINNEY

The question of what warning, if any, ought to be given in such circumstances was not novel, the High Court having given consideration to the issue in a line of cases which can be traced back to *Ross v The King*.[5] More recently, the matter had been considered in *Carr v The Queen* ("*Carr*")[6] and *Duke v The Queen* ("*Duke*").[7] In the former, the High Court rejected the argument that there should be a general rule of practice that a trial judge must warn a jury that it may be dangerous to act upon a disputed and uncorroborated confessional statement, although the Court allowed the appeal against conviction having concluded that, upon the particular facts of that case, a warning should have been given. Only Justice Deane considered that there should be a *prima facie* requirement for such a direction.[8] In *Duke*, the Court rejected an argument that the trial judge should have given a warning.

THE LAW POST-MCKINNEY

In a joint judgment, Chief Justice Mason, Justices Deane, Gaudron and McHugh prescribed for the future a general rule of practice whenever police evidence of a confessional statement allegedly made by an accused while in police custody is disputed.[9] The jury should be told that they ought to consider

3. See *Judge and McKinney* (1990) 49 A Crim R 7.
4. Supra n 1 Brennan J, 479.
5. (1922) 30 CLR 246.
6. (1988) 165 CLR 314 Wilson, Brennan, Deane, Dawson and Gaudron JJ.
7. (1989) 63 ALJR 139 Wilson, Brennan, Deane, Dawson and Toohey JJ.
8. Supra n 6, 335.
9. Supra n 1, 475.

carefully the dangers involved in convicting where the only, or substantially the only, evidence establishing guilt is a disputed confession allegedly made in police custody, the making of which is unsupported by reliable corroboration.[10]

In the context of such a warning the trial judge should:[11]

(a) emphasise the need for careful scrutiny of the evidence;
(b) inform the jury that it is more difficult for an accused in custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated;
(c) draw attention to the fact that police witnesses are often practised witnesses and it is not easy to determine whether a practiced witness is telling the truth;
(d) draw the jury's attention to matters which bring the reliability of the confessional evidence into question;
(e) remind the jury "with appropriate comment" that persons who make confessions sometimes repudiate them.

Any challenge to confessional evidence inevitably raises the possibility that the police evidence is untruthful and that the police witnesses have perjured themselves and conspired to that end. The jury should never be directed in terms which suggest that they should:[12]

(a) decide that issue; or
(b) make judgments concerning the conduct of police witnesses which, although it may bear on their credit, was not directly brought into issue by a challenge to their evidence about the making of the confessional statement.

WHY THE RULE OF PRACTICE?

The need for such a rule of practice had only recently been considered in *Carr* and *Duke* and rejected. The majority in *McKinney* claimed that:

(a) the "existence and increasing availability of reliable and accurate means of audiovisual recording"; and

10. Ibid, 476.
11. Ibid.
12. Ibid, 476-477.

(b) the inability to satisfactorily reconcile the decisions in *Carr* and *Duke*

made it "incumbent upon the Court" to reconsider the whole question.[13]

That reconsideration led them to conclude that a rule along the lines suggested by Justice Deane in *Carr* (who alone in that case favoured the introduction of such a rule) should be adopted.[14] However, the majority emphasised that their rule had a different basis to that expressed by Justice Deane in *Carr*. That case was concerned with a disputed and unsigned record of interview; in the present case, however, the disputed confessions bore acknowledgments signed by the accused that the contents were true. The majority, having accepted the possibility that a record of interview may be fabricated was compelled to the further conclusion that "the atmosphere" which allows for such fabrication may also be conducive to the suspect in police custody signing a false confession. Accordingly, while a suspect's signature will usually constitute reliable corroboration, that will not always be the case. The justification for the warning was therefore borne of the need for reliable corroboration.[15]

That corroboration may be supplied by the presence of an independent person, or by "independent material which ... unmistakably confirms its making."[16] Reliable corroboration could be provided by audiovisual recording of the interview, or the presence of a solicitor or independent third party.

The rule, they averred, would operate "to counter the relative disadvantage accruing to an accused person who is interviewed while in police custody at a place lacking recording facilities."[17] Furthermore, as the means of recording become generally available, the absence of a recording will tend to bring the reliability of a confessional statement into issue and so raise the question whether a warning should be given "in line with what was said in *Bromley v The Queen*, and quite apart from anything said in *Carr*."[18]

13. Ibid, 473-474.
14. Ibid, 474.
15. Ibid, 474-475.
16. Ibid, 475 adopting Deane J in *Carr*, supra n 8.
17. Ibid, 474.
18. Ibid. *Bromley v The Queen* (1986) 161 CLR 315 ("*Bromley*") considered what warning should be given in respect of an important witness who has some mental disability which may affect his capacity to give reliable evidence. See Gibbs CJ, 319:

> What is required, in a case where the evidence of a witness may be potentially unreliable ... is that the jury must be made aware, in words which meet the justice of the particular case, of the dangers of convicting on such evidence.

WHY NOT?

The dissenting judgments largely concentrated on refuting the foundations upon which the majority judgment was based.

1. Could *Carr* and *Duke* have been reconciled?

Indeed, did *Carr* and *Duke* need to be reconciled?

All three minority judgments considered that *Carr* and *Duke* were not irreconcilable and could be distinguished on their facts.[19] Furthermore, upon the question of principle involved, *Duke* did not depart from *Carr* but followed it. Neither case held that under no circumstances should a warning be given; what was denied was the propriety of a universal rule that in every case where uncorroborated police evidence of a confession was tendered and challenged a warning was mandatory.[20] No reconciliation was called for. Justice Brennan warned of the dangers of the Court departing from its own decisions which repeatedly affirm a proposition, without cogent reasons for doing so.[21]

All agreed that any proposed role for the rule of practice could be more adequately met by the existing general law which required, in appropriate circumstances to avoid a perceptible risk of a miscarriage of justice, a direction tailored to the circumstances of the case.[22]

Each warned of the dangers of prescribing a general rule of practice to be applied regardless of the facts of the particular case.[23] The circumstances of the present case did not require a warning to be given.[24]

> If it appears that a witness whose evidence is important has some mental disability which may affect his or her capacity to give reliable evidence, common sense clearly dictates that the jury should be given a warning, appropriate to the circumstances of the case, of the possible danger of basing a conviction on the testimony of that witness unless it is confirmed by other evidence. The warning should be clear and, in a case in which a lay juror might not understand why the evidence of the witness was potentially unreliable, it should be explained to the jury why that is so. There is no particular formula that must be used; the words used must depend on the circumstances of the case.

19. Supra n 1 Brennan J, 480; Dawson J 491; Toohey J, 498.
20. Ibid Brennan J, 481; Dawson J, 491-492; Toohey J, 498.
21. Ibid, 481-482.
22. Ibid Brennan J, 481, 483-484; Dawson J, 487-488; Toohey J, 493, 497-498; *Longman v The Queen* (1989) 168 CLR 79 Brennan, Dawson and Toohey JJ, 86.
23. Ibid Brennan J, 484; Dawson J, 488-489; Toohey J, 496, 497.
24. Ibid Brennan J, 481; Dawson J, 492; Toohey J, 504-505.

2. Availability of Audiovisual Recording and "Redressing the Balance"

The majority referred to the significant progress made since *Carr* in the audiovisual recording of interviews.[25] The new rule of practice would operate to counter the relative disadvantage accruing to an accused person who was interviewed while in police custody at a place lacking recording facilities. As such facilities become generally available, the absence of a recorded interview would tend to bring the reliability of a confessional statement into issue.[26]

The majority considered that the "basis" for their rule of practice lay in the "special position of vulnerability" of an accused to fabrication of confessional material when he is held involuntarily, in that his detention will have deprived him of the possibility of any corroboration of a denial of the alleged material.[27]

All three dissenters supported the desirability of audiovisually recording police interviews of suspects. However, Justice Brennan recognised that "[t]o entertain that view is one thing; to allow it to shape a judgment is another. The question in this case is not whether electronic equipment should be installed for the recording of police interviews" but whether the particular trial had miscarried for want of a warning to the jury.[28]

It was wrong, and not the proper function of a court, to prescribe rules of practice to compel or induce action by the executive government. To require a warning which reflects adversely on police confessional evidence because equipment for the electronic recording of interviews is not provided is to unbalance the even-handed administration of the law in order to procure an improvement in the administration of criminal justice for which the executive is primarily responsible.[29] Sometimes the failure by police to use available recording equipment might justify an adverse comment, but to require a judge to make an adverse comment in *every* case, whether equipment or other means of corroboration were available or not, is the very negation of fairness.[30] Furthermore, the purpose of a warning is to ensure fairness in the trial, not to offer some form of compensation for what is thought to be

25. Ibid, 474.
26. Ibid, 474. See supra n 18 and infra 42: why this should be so is difficult to understand.
27. Ibid, 478.
28. Ibid, 479.
29. Ibid, 486.
30. Ibid, 486.

unfairness in the course of a police interrogation (for which there were other remedies, such as the exclusion of evidence) or to supply a judicial counterbalance for any supposed advantage enjoyed by the police in the investigation of crime.[31]

Justice Dawson noted that audiovisual recording was costly and not solely the responsibility of the police to provide. Some States had made considerable progress in equipping police. However, it went beyond the proper limits of judicial activism to encourage the audio or visual recording of confessions by requiring a direction regarding confessions obtained in the absence of such facilities.[32] Nor, in his view, would such a rule counter the "relative disadvantage" accruing to an accused whose confession is not recorded; it assumes that the recording of an interview by such means would confirm the accused's complaint about it. He pointed out that in those States where confessions were routinely taped, the number of confessions had not lessened, but the occasions on which they were challenged had, so it was "hardly realistic to speak in terms of the relative disadvantage accruing to an accused whose confession was not recorded on audio or video tape."[33]

Justice Toohey confirmed the desirability of electronic recording but warned that it would not completely foreclose argument on whether a confession is voluntary. It was unsatisfactory to prescribe general rules of practice as some form of substitute for tape and visual recording, or as a compensation for their absence, particularly as a "stop-gap" measure until facilities are provided to police.[34] The rule of practice was no substitute for a direction properly tailored to the circumstances of the trial.

3. A Special Category of Evidence?

The majority stressed that the basis of a *prima facie* requirement that a warning be given was not a suggestion that police evidence is inherently unreliable or that the police should be put in some special category of unreliable witnesses.[35]

Justice Brennan disagreed; the very requirement for a warning added the weight of judicial suspicion to an attack on police evidence, and placed police evidence in a special category of unreliability along with the evidence of

31. Ibid, 483.
32. Ibid, 490.
33. Ibid, 491.
34. Ibid, 497.
35. Ibid, 478.

accomplices, young children, and the victims of sexual offences. There was no sufficient material before the court to justify categorising the evidence of police in such a way, and would only encourage the occurrence of challenges.[36] Justice Dawson considered that the applicants sought to have the Court create a new category of suspect witness (police giving evidence of an alleged confession), in respect of whom "a compulsory warning of an undefined but necessarily of a depreciatory kind, must be given".[37] Justice Toohey also felt that, whatever the intent, the requirement for a warning would have the effect of categorising police confessional evidence as inherently unreliable.[38] All agreed that the effect would be to impair the function of the trial judge to "hold the scales so as to maintain an even balance" in the conduct of the trial for both sides.[39]

COMMENT

In prescribing the new rule of practice, the majority have departed from a long line of cases, including *Carr* and *Duke* which have held against the necessity for such a rule.

The reasoning the majority relied on to support that course is singularly unconvincing. Whatever one's view of the compatibility of the results in *Carr* and *Duke*, it is incontrovertible that the Court in each case was consistent in its rejection of any general rule of practice. Furthermore, if such a rule of practice was unnecessary and undesirable at the time of *Carr*, when audiovisual recording was generally unavailable, it is difficult to understand how the increasing availability of those facilities warrants its introduction. The position of the accused has not changed; only that of the police. The majority does not explain why today's suspect is in greater need of protection.

Furthermore, the majority fails to satisfactorily explain how an accused interviewed in the absence of audiovisual recording facilities is now "relatively disadvantaged" compared to an accused whose interview is recorded or is otherwise "reliably" corroborated.

The forensic purpose served by audiovisual recording is to corroborate the evidence of interviewing police, not the accused. There is no advantage to an accused in having the police account of his interview "reliably

36. Ibid, 484-485.
37. Ibid, 488.
38. Ibid, 496.
39. Eg: ibid Dawson J, 488.

corroborated" by audiovisual recording or independent persons; in a sense he may be "disadvantaged" in that avenues of possible challenge are narrowed.

It is only if it is assumed that police fabricate confessions, and will do so if they have the opportunity, that a suspect interviewed in the absence of recording facilities will be "disadvantaged."[40]

Of course there will always be the possibility that police evidence may be fabricated. That possibility is not limited to confessional evidence.[41] Inevitably, any forensic dispute regarding that will be resolved upon a contest of credit between police and the accused. The rule of practice has handicapped the police in that contest by effectively categorising them as inherently unreliable witnesses, and even signed confessions as *prima facie* suspect. It is only in that context that the majority's rule of practice and their reference to *Bromley*[42] which considered the appropriate warning to be given in cases of witnesses whose *capacity* to give reliable evidence is in doubt, becomes explicable.

As might be expected, some commentators have emotively greeted the decision as a recognition by the High Court of widespread corruption in police forces throughout Australia, and claimed that the new warning will somehow reduce the risk of confessions being fabricated.[43] All members of the Court recognised the existence of a problem in that regard, at least. However, in the view of the minority, that alone did not warrant the prescription of a rule of universal application.[44]

40. Ibid, as Dawson J recognised, 489.
41. Having regard to the mischief it is supposed to overcome, the rule of practice is surprisingly limited in its operation; see also supra n 1 Dawson J, 488.
42. It is impossible to see a valid parallel between the situation in *Bromley* and the need for a warning in the circumstances considered in *McKinney*. Sensibly, no matter how widespread the availability of audiovisual recording, or availability of independent third party corroboration, the absence of those alone cannot lead to the inference of fabrication or unreliability, especially if a suspect retains the option whether to permit his interview to be recorded in writing, electronically or in the absence of others. Furthermore the majority, although alluding to various factors which may influence an accused to adopt a false confession or prevent him supporting his allegation of falsification, fail to identify how the fact of non-independent corroboration itself can affect a police officer's "capacity to give reliable evidence".
43. Recent notes include: S Flood "McKinney and Judge" (1991) 15 CLJ 287; D Dixon "Interrogation, Corroboration, and the Limits of Judicial Activism" (1991) 16 Legal Service Bulletin 103.
44. Supra n 1 Brennan J, 483, 484; Dawson J, 491; Toohey J, 495-496.

Audiovisual recording was introduced in Western Australia in May 1989 on a two year trial basis at selected Squads and metropolitan and country stations. The pilot programme has proved to be an outstanding success and its use is to be extended throughout the State. More than 80 per cent of suspects whose interviews were videotaped subsequently pleaded 'guilty'; at "control" stations where facilities were unavailable, some 60 per cent of those interviewed pleaded 'not guilty' and went to trial. As noted by Justice Dawson, it is unsafe to assume that an accused who disputes his confession always does so upon a sound basis.[45]

However, the equipment is costly; often it may not be practicable to provide the facilities so that they are readily available in all circumstances. Further, the offender has the option whether to have his confession recorded audiovisually, or in the traditional written form, or insist on the absence of third parties. Confessions may be made in circumstances where independent corroboration is unavailable. Other considerations are mentioned by Justice Brennan.[46] The majority has not had regard to the practical difficulties that may be faced by police in having confessions audiovisually recorded or independently corroborated.

For the reasons pointed out by the minority, an adverse reflection by a trial judge on police confessional evidence because audiovisual recording equipment was unavailable or was for some other reason not used, without regard to the circumstances of the particular case, is to effectively categorise police as a special class of unreliable witness. It is certain to distort the trial process and encourage challenges to police evidence without achieving its intended result of reducing the danger of fabrication, let alone corruption generally. It may also result in absurdities; whereas a warning is called for in the case of police evidence of a signed albeit disputed record of interview, none may be necessary in respect of the disputed evidence of a single police officer of seizure of incriminating evidence from an accused.

THE WESTERN AUSTRALIAN POSITION

Yet to be resolved is the extent to which the decision will apply in Western Australia. Views differ regarding its likely impact. Section 50 of the Evidence Act 1906 (WA) provides that a judge is not required by any rule of law or practice to give a corroboration warning to a jury, and shall not give a corroboration warning unless satisfied that such a warning is justified in the

45. Ibid, 491.
46. Ibid, 485.

circumstances. "Corroboration warning" is defined to mean "a warning to the effect that it is unsafe to convict the person who is being tried on the uncorroborated evidence of one witness".[47] To date, the Western Australian Court of Criminal Appeal has not had occasion to consider *McKinney* in the light of section 50. However, the warning contemplated by *McKinney* does not concern the uncorroborated evidence of one witness, but the dangers of convicting on disputed evidence of any number of police witnesses unless there is "reliable" corroboration either by audiovisual recording or an independent third party. Accordingly, it is unlikely that section 50 will impinge upon the applicability of the new rule of practice in this State.[48]

47. Evidence Act 1906 (WA) s 50(1).
48. Murray J in *Chew v The Queen* (unreported) Supreme Court of Western Australia 15 August 1991 no 34 and no 39 of 1991, 47, considered *obiter* that the rule "might require to be applied in WA as a guide as to the circumstances which the trial Judge might consider to be of the particular character which would justify a warning in the case before him".