WILLIAMS TO CARR - WHERE NOW?

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History will show that the case of *Williams v. The Queen*[1] came about in consequence of the need to seek legal solutions to the factual difficulties and injustices caused by alleged 'police verbals'.

Sir Anthony Mason in a paper entitled "Some Recent Developments in the Australian Criminal Law", presented at the Tasmanian Bar Association annual convention in Bicheno in October 1977, made the following significant and relevant observations:

> The consequence [of *Driscoll v. The Queen*[2] and *Wright v. The Queen*[3]] is that no less than five members of the Court now subscribe to the proposition that a trial judge has a discretion to exclude an unsigned record of interview and that in general a proper exercise of that discretion will result in the exclusion of the unsigned record unless there are special circumstances which justify its admission into evidence, as, for example, an acknowledgement by the accused of the accuracy of its contents in the presence of some impartial person not connected with the interrogation or if the manner of conduct of the trial has made it necessary to admit the record. There is, however, general agreement that a necessary, though not a sufficient, condition of eligibility of admission into evidence of an unsigned record is that there should be evidence of adoption or acknowledgement of its contents by the accused.

Earlier in his paper Sir Anthony noted:

> The recent decisions will of course have an immediate and direct effect on the conduct of criminal trials. They will also have an ultimate and indirect effect in encouraging a closer and more thorough investigation of criminal offences with a view to the presentation of cogent evidence of a non-confessional character.

Whether in fact this has occurred will only be known by the current audience.

The High Court decisions in *Driscoll* and *Wright* had not been accepted in Tasmania as authority for the proposition that unsigned records of interview should generally not be admitted in evidence in consequence of the exercise of a discretion in favour of an accused person. An example of this response is *Mead v. R.*[4] where Cosgrove J. made the following observations:

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1. 161 C.L.R. 278
2. (1977) 137 CLR 517
3. (1977) 15 ALR 305
4. No. 62/1977, Supreme Court of Tasmania

> But with the possible exception of *Murphy J.* I do not read their Honours as purporting to lay down any general rule. The discretion to exclude evidence otherwise admissible in the interests of justice, and must remain an unfettered discretion; (see *Selve*'s case,[5] *Jessop*,[6] and *Kuruma*[7]). Their Honours did not, in my opinion, seek to impose upon this unfettered discretion, a fetter by way of a rule of practice.

Compare also the ruling of Brettingham-Moore J. in *Williams*:[8]

> As for the record of interview in relation to the Scottsdale matters, I see no reason at the moment why such record should not go before the jury provided that they are told that it is not signed by the accused. It will be for the jury to consider whether there is evidence that it was adopted. I do not understand the comments of Gibbs J. (as he was then) in *Driscoll v. The Queen*[9] at 542 as indicating that unsigned records of interview should invariably be excluded from the jury room.

Further the Crown frequently relies upon s. 81B of the *Evidence Act* 1910 (Tas) to authorise the admission into evidence of signed records of interview irrespective of whether there is evidence accepted by a court that the contents of the interview have been adopted by the accused. Section 81B insofar as it is relevant is attached hereto as Appendix A.

The Court of Criminal Appeal in Tasmania in *Jones v. The Queen*[10] said of s. 81B of the Tasmanian *Evidence Act*: "the terms of [the section] appear to be unique to Tasmania". Chambers J. in *R. v. England*[11] said:

> At this stage of the trial the Crown have sought to have admitted into evidence an unsigned record of interview on the basis that it was adopted by the accused. Its admission was objected to and I have upheld the objection because I was not satisfied that the accused had clearly adopted the document...
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> I therefore feel bound to reject the argument that s. 81B has no application to unsigned records of interview. ...
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> In this case I will allow the record of interview to be admitted as evidence and it may be read out but it will not be made available to the jury as an exhibit. In other words, the document will not be in the jury room with them and they will never see it.
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> The possible dangers adverted to by the High Court in *Driscoll v. The Queen* will thereby be avoided, or largely avoided, as I see it.

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5. [1970] AC 304
6. [1974] Tas SR 64
7. [1955] AC 197
8. at p 7
9. (1977) 137 CLR 517
10. No. 47/1988, Supreme Court of Tasmania
11. (1978) Tas SR 79 at 80

> In giving my ruling I have not over-looked the discretion conferred upon the court by s. 81H but I do not think that section should be invoked in a case such as the present as the mere reading of the record of interview cannot be said to be likely to create undue prejudice within the meaning of the section..

Neasey J. in *R. v. Cupit*[12] agreed with Chambers J.'s views as to the utilisation of s. 81B however was less concerned about the result of such an interpretation; compare:[13]

> I agree with the judgment of Chambers in the case of *Reg. v. England*,[14] although, with respect, I do not share the reservations expressed by His Honour based upon the case of *Prestage v. The Queen*.[15] To my mind, the evidentiary law relating to a witness refreshment of memory contains a deal of illogicality which, amongst other things, this particular legislation was passed to overcome.
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> It is, in my opinion, fairer to the accused to produce the actual document itself and give before the jury an accurate version of the alleged conversation, and not one based upon a possibly faulty memory.

Reference should also be made to the judgement of Cosgrove J. in *R. v. Fox*,[16] where His Honour said in ruling upon the admissibility of an unsigned record of interview:

> The first of these objections is, in my opinion, based on a misunderstanding of the law. Admissibility of a document of this nature does not rest upon proof that the document was in fact adopted by the accused but upon the existence of evidence fit for the consideration of a jury that it was adopted.

Until the High Court decided *McPherson v. The Queen*[17] and the House of Lords *Adjodha*[18] the artificial response to the factual difficulties caused by verbals was highlighted by the assertion that in respect of any confessional material, the admissibility of which was challenged by the use of a *voir dire*, there was never any need for the Crown to satisfy the court that in fact the admissions were made and then satisfy the court that such admissions were made in circumstances which were voluntary and did not warrant the exercise of a discretion in favour of the accused. It was assumed that the admissions were made and the examination of the admissibility of the evidence more often than not involved a highly artificial process in which the factual circumstances in which the alleged admissions were made were examined, without the need for a finding of fact that the alleged admissions were made. Hopefully this approach was put to rest by the High Court of Australia in *McPherson* and more particularly by the Privy

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12. (1978) Tas SR at 96
13. also at 96
14. [1978] Tas SR
15. [1976] Tas SR
16. No. 10 of 1981, at 2 and see [1981] Tas SR (NC) 5
17. (1981) 147 CLR 512
18. [1982] AC 204

Council in *Adjodha*. *McPherson* was decided after *Adjodha* had been decided.[19] The Privy Council in *Adjodha* said:[20]

> Hearing evidence on the *voir dire*, the judge will of necessity examine all the circumstances and form his own view of how the statement came to be written and signed. In practice the issue as to authorship and that as to whether the signature was voluntary are likely to be inseparably linked. One can hardly envisage a case where a judge might decide that an accused was not responsible for the contents of the statement but that it had been signed voluntarily. A purist might say that, in considering the issue of authorship, the judge was usurping the function of the jury; but if it is necessary to consider the issue of authorship before the judge can be satisfied that the statement was signed voluntarily, there is in truth no usurpation but only a discharge by the judge of his necessary function in deciding the question of admissibility. If the judge rules the statement to have been signed voluntarily and therefore admissible, in this, as in the simple case, the issues both as to authorship and as to the manner in which the signature was obtained will again have to be canvassed before and left for consideration by the jury.

This view has recently been re-enforced by the High Court in *Hoch v. R*:[21]

> But in determining the admissibility of certain special classes of evidence it is inevitable that the trial judge must make an initial determination of questions of fact which the jury may ultimately have to decide.

Robert Mulholland Q.C. in his paper "Judicial Discretion in a Criminal Trial: Protection or Pretence?"[22] observed:

> Still less is there reason to allow the evidence if the judge is satisfied the evidence was fabricated or planted. Indeed it is difficult to understand how evidence can ever be regarded as 'cogent' when there are doubts about its authenticity. It is no answer to the argument to say this is a question for the jury. For a long time this was the objection to the judge considering the question of the voluntariness of the confessional evidence on *voir dire* where there was also an allegation of its fabrication until the fallacy of this reasoning was exposed to the High Court in *McPherson v. R.*

And now to *Williams*.

The meaning attached to the phrase "as soon as practicable" was to be the subject of debate in many jurisdictions. The various cases referred to in *Williams v. The Queen* disclose that the phrase had been examined in New South Wales as early as 1935

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19. Compare Gibbs C.J. and Wilson J. at 523, Mason J. 536, Brennan J. 547.
20. at p 221
21. (1988) 62 ALRJ 582 per Brennan and Dawson JJ. at 587
22. Delivered at the Second International Criminal Law Congress at Surfers Paradise 23 June 1988

in *Bales v. Parmeter*,[23] in Victoria in 1971 in *Clune*[24] and that in a number of cases in South Australia the meaning of the word 'forthwith' in a similar context was considered. The approach to be taken to provisions such as or similar to s. 34A of the *Justices Act* 1959 (Tas) was to be found articulated in the various cases.

One of the most important sign posts on the road to *Williams* was *Iorlano*.[25] Stephen Clarke was charged with murder in Tasmania in 1983. Shortly before his trial in Launceston in Tasmania in November 1983, Judge Mullaly ruled in the County Court of Victoria in the case of *Iorlano* that the confessional material in that case had been unlawfully obtained and His Honour exercised his discretion to exclude the evidence. That ruling was sought to be overturned both in the Supreme Court of Victoria and in the High Court of Australia. The Full High Court said of s. 212 of the *Customs Act* 1901:[26]

> There is simply nothing in the provisions of s. 212, or in the context in which that section appears that suggest that the fact that the arresting officer desires to question the arrested person affords any legitimate reason for delay in taking him before a justice. The section gives no power to question an arrested person, and does not make justifiable a delay which resulted only from the fact that the arresting officer wished to engage in questioning.

Judge Mullaly's ruling had been referred to the Trial Judge in *Clarke* during a *voir dire*. The High Court's decision had been referred to the Court of Criminal Appeal in *Clarke* essentially followed the English cases subsequent to House of Lords decision in *John Lewis & Co. v. Timbs*[27] thus giving the police extremely wide powers. It can be argued that the Court of Criminal Appeal decision in *Clarke* was directly contrary to *R. v. Iorlano*.[28]

> The Tasmanian Court of Criminal Appeal thus appears to have accepted the proposition that when a person, having been lawfully arrested, is in the custody of a police officer, s.34A(1) does not require the police officer to bring him before a justice before the police officer has had a reasonable opportunity to question the person arrested about the offence for which he has been arrested and other offences about which the person is willing to provide information to the police. That proposition is contrary to principle and is inconsistent with the unanimous judgment of the Court in *Reg. v. Iorlano*.

Compare also the judgment of Mason C.J. in *Van der Meer v. The Queen*.[29]

The unusual factual situation of *Clarke v. The Queen* made it unlikely to be an appropriate case in which special leave to appeal would have been granted.

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23. (1935) 35 NSW 182
24. [1971] VR 1
25. (1983) 151 CLR 678
26. at 680
27. [1952] AC 676
28. Compare **Williams** per Mason and Brennan JJ. at 291
29. (1988) 62 ALJR 655

The facts found by the trial judge in *Williams* were such that they provided appropriate finding of fact to bring squarely in issue the meaning to be attached to the phrase "as soon as practicable" in s. 34A of the *Justices Act*.

The judgments in the High Court more than adequately set out the factual circumstances of the case and the matters which influenced the learned trial judge and the members of the Court of Criminal Appeal. It should be noted that it can be argued that Gibbs C.J. was in the minority in *Williams* in respect of his view as to the exercise of the discretion by the learned trial judge.

In the written outline of argument handed to the Court during the application for special leave in the High Court in *Williams* the following paragraph appeared:

> A consideration of this appeal involves an examination of the decision of this Honourable Court in *Cleland v. The Queen*[30] and the question of whether that decision is authority for the proposition that evidence unlawfully obtained, in circumstances where it would not be unfair to the accused to use the evidence, would only be excluded from evidence in exceptional circumstances.

It was my opinion that there was a considerable difficulty associated with the case of *Cleland v. The Queen* and that there were legitimately divergent opinions as to the *ratio decidendi* to be extracted from that case in respect of the circumstances in which a discretion to exclude evidence can be activated in consequence of the fact that the evidence has been unlawfully obtained and/or obtained in circumstances where the accused was unlawfully in custody. That difficulty was highlighted in a very good paper prepared by Dr Mark Weinberg Q.C.. Dr Weinberg highlighted the crucial sentence in Dawson J.'s judgment in *Cleland*[31] which has given rise to much debate and may still give rise to debate in the future:

> It is not, however, difficult to see that little is ordinarily required to persuade a trial judge that a confession obtained whilst an accused person is in custody, particularly unlawful custody, is not shown to be voluntary or is such that it would be unfair to the accused to admit it in evidence against him.

The post-*Williams* debate in my opinion has failed to recognise that there will be many occasions when a finding that evidence has either been unlawfully obtained and/or obtained in circumstances where an accused is unlawfully detained will have significant factual ramifications insofar as the 'unfairness discretion' is concerned. The absolute vulnerability of an accused person in the custody of the police is well described by Deane J. in his judgment in *Cleland*'s case.[32] It is my opinion that it was these passages that significantly influenced the trial judge in *Williams* to exercise his discretion in favour of the accused. The trial judge's ruling in *Williams* contained the following paragraph:

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30. (1983) 151 CLR 1
31. at p 35
32. at 24-26

From what I have said it is clear that the accused was unlawfully detained after 2.15 p.m. on 17th May. He was subjected to lengthy questioning about matters other than those for which he was arrested and he was unable to get before the court and ask for legal advice. It seems to me not to matter whether or not he volunteered certain information. The fact is that he was unlawfully detained for about 20 hours longer than he should have been. This appears to be a clear case where I should exercise my discretion to exclude evidence of the confessions made in the records of interview other than those in relation to the Scottsdale matters. *In my view it would be unfair to the accused to admit such evidence having regard to the circumstances in which it was procured.* Furthermore, it seems to me that public policy considerations should induce me to discourage what occurred here. See *Bunning v. Cross*,[33] *Cleland v. The Queen*,[34] and *R. v. Larson and Lee*[35] [my emphasis].
In the present case I think the police zeal in pursuing enquiries other than in respect of the matters for which the accused had been arrested was destructive of his civil liberties.

Deane J.'s comments highlighting the vulnerability of an accused were amplified by His Honour in his judgment in *Carr v. The Queen*,[36] especially in the following passages:

(a) "An accused person who is questioned by police officers while he is held in their custody is in an environment over which he possesses little or no control. He has been deprived of any independent power to procure the presence of a non-police witness to attest to what he does and does not admit while under interrogation. He ordinarily will not enjoy the opportunity of obtaining or using any mechanical device to record his interrogation by the police. On the other hand, law enforcement agencies who hold an accused person in custody effectively control the environment in which they hold him."[37]

(b) "Once it is recognised, as it must be, that a person held in involuntary police custody is rendered peculiarly vulnerable to the risk of the fabrication of evidence of an oral admission of fault anthat that risk is not, in this country, one which can simply be disregarded. ...

33. (1978) 141 CLR 54
34. (1983) 57 ALJR 15
35. [1984] VR 559
36. (1988) 81 ALR 236
37. at 252

> That being so, recognition of a perceptible risk of the fabrication of evidence of a confession of guilt in circumstances where accused persons are interrogated while in police custody without the safeguards of modern recording facilities, entails acceptance of the fact that, in a case where police evidence of a disputed oral confession allegedly made by the accused while being so interrogated is relied upon by the prosecution on his trial, there is ordinarily a perceptible risk of an unfair trial and of a miscarriage of justice. That perceptible risk cannot, as a matter of fairness to an accused, be simply disregarded by a trial judge in directing the jury. It should be dealt with by appropriate specific directions."[38]

It is my opinion that a significant responsibility rests upon counsel involved in criminal matters which involve the question of the disputed admissibility of alleged confessional evidence to very carefully analyse the factual ramifications of each lawful or unlawful detention of a person in custody. It is clear that the isolation of a suspect in circumstances where that person may need the assistance of friends, family and/or legal advice is but one of the factors which could and will operate to induce the court to accept that the accused has been unfairly treated and/or that it would be unfair to use confessional material thus obtained. It can also be said that the obtaining of alleged confessional material from an accused in such circumstances where there is no independent corroboration of the fact of the confession in itself operates unfairly, *inter alia*, as a consequence of the various factors referred to in the judgments of the majority of the High Court in *Carr v. The Queen*. In practical terms one benefit to be obtained by an accused in consequence of strict compliance with *Williams v. The Queen* by law enforcement agencies, in Tasmania, is that the person who has been taken into custody must be brought before a Court of Petty Sessions usually constituted by a magistrate. That magistrate has the statutory responsibility pursuant to Rule 35 of the *Justices Rules* 1959 to state to a defendant:

> You are charged with [here state in simple language the nature of the charge]. I am not asking you to plead at this stage but I would like you to tell me if you understand what the charge means.
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> You may plead guilty or not guilty, or you may plead that for some reason you should not be tried on this complaint.
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> If you want time to consider your course of action *or to obtain legal advice* you are entitled to an adjournment. Do you require an adjournment or are you ready to plead? [my emphasis]

Such an invitation is likely to bring home to accused persons that there exists an opportunity to seek advice as to their predicament and/or that they then and there have the opportunity to come into contact with somebody independent of the investigation currently being undertaken. The importance of such an opportunity can never be over estimated.

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38. at 254

These reasons, *inter alia*, lead me to the conclusion that *Williams v. The Queen* has always been about 'verbals'. Once one considers the practical effect of *Williams* and reaches a view as to the correctness or otherwise of the views expressed herein about *Cleland v. The Queen* it is then appropriate to proceed to consider the judgment of King C.J. in *Waye v. The Queen*.[39] That decision has not been the subject of precise consideration by the Full High Court. The issues arising in *Van der Meer* did not require consideration of what is in my opinion the crucial passage from King C.J.'s judgment:[40]

> There are differences of emphasis in the judgements (in *Cleland's* case), and the guidance which they provide for the exercise of the discretion in particular situation is necessarily limited. Like all discretions, the discretion to exclude legally admissible evidence must be exercised for the purposes for which it exists having regard to all relevant facts and circumstances. The purpose for which the *Bunning v. Cross* discretion exists appear to me to be two-fold. One such purpose is to protect the public from illegal or improper conduct by those entrusted with law enforcement in the curse of their efforts to investigate crime and to obtain evidence; this purpose is sought to be achieved by excluding evidence obtained by those means thereby rendering such over-zealous conduct unprofitable. The other purpose is to maintain respect for the law by withholding any appearance of judicial condonation of unlawful or improper conduct by those responsible for enforcing the law, which might arise from the receipt and use of evidence obtained by means of such conduct. The discretion in the present case ought to be exercised with those purposes in mind.

See also King C.J.:[41]

> The exclusion of the confession in the present case will not result in the release on the public of the perpetrator of a monstrous crime or of a person who has shown himself to be a dangerous criminal.

and Johnston J.:[42]

> ...that I would wish to reserve for further consideration the question of the extent to which and the manner in which the seriousness of the crime in question should influence the exercise of the discretion to exclude confessional statements; whether the discretion be that discussed in *R. v. Lee* or the wider discretion discussed in *Bunning v. Cross*.

In one sense *Van der Meer* may be regarded as an unusual set of facts to be considered by an Appellate Court as in that case there was no dispute as to the accuracy of the narration of the utterances which took place between the police officers and the various accused. The scope for successfully invoking the Court's discretion to exclude evidence unlawfully obtained in circumstances where there is no dispute as to the accuracy of the evidence is much narrower than in the other cases mentioned. In fact

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39. (1983) 35 SASR 247
40. at 251
41. at 252
42. at 254

in *Van der Meer* the accused relied heavily upon the evidence sought to be excluded to exculpate themselves.

Robert Mulholland Q.C., in the paper earlier referred to, made the following observations:[43]

> We are probably all in agreement that it is highly desirable the guilty are apprehended convicted and punished. The point of disagreement occurs when the price to be paid is considered. This is not sentiment but a recognition of the importance attaching to the fact that those sworn to uphold the law are required to obey it. The argument against the latter approach is that police are largely unaffected by judicial criticism and that realism requires that police in some cases use illegal means in order to apprehend and convict criminals.

The author continued:

> If, as some argue, police show little sign of responding to judicial exclusion of evidence and adverse comment from the bench then it is submitted that this results from a lack of consistency in the application of the discretionary rule and the tendency to permit evidence to be given in the case of serious crime despite flagrant violation of safe guards. It is one thing to rule out photographs or a breathalyser test but quite another to exclude the results of medical examination in a murder case or evidence obtained as a result of an illegal search in a drug trafficking case.

Notwithstanding all the foregoing there will still inevitable be occasion where disputed uncorroborated alleged admissions will form a significant part of or the substantial part of a Crown case against a particular accused. Once such evidence is held to be admissible the question arises as to the use to which the jury should put the evidence and the warnings which ought to be given to the jury. This of course brings me to a consideration of *Carr v. The Queen*.

There is a fine analysis by Paul Byrne of *Carr* in an article entitled "Judicial Directions on Disputed Confessional Evidence".[44] In the final paragraph of that article the author says:

> Whilst Deane J. was alone in holding that the courts should adopt a procedure which closely resembles that suggested by the Australian Law Reform Commission by requiring that a warning ordinarily be given where there is disputed evidence of a confession said to be made to the police, there can be no doubt that the impact of the various judgments in *Carr* will be to increase the occasions on which trial judges are required to give warning to juries. The general circumstances of *Carr* are so unexceptional that at least some form of warning will now need to be given in most cases where there is disputed confessional evidence.

Debate in Tasmania whether in real terms a *Carr* direction should be given in all cases involving disputed confessions or whether it should only be given in cases where

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43. at p 8
44. (1988) 62 ALJ 1046

there is evidence inconsistent with the guilt of the accused or inconsistent with the accuracy of the confession in continuing. No doubt such debates will in all take place in other parts of Australia.

It is understandable that courts will be reluctant to apply *Carr v. The Queen*, particularly in circumstances where there is a widely held belief that the law has too much 'interfered' with the deliberations of the jury. In *Brown v. The Queen*[45] (argued after *Carr v. The Queen*, but before the same Court of Criminal Appeal heard *Carr*) Wright J. said:

> I have no regret in saying that there is no rule of law or practice which requires a criminal trial, which has been otherwise fairly conducted and in which the accused has been represented by competent counsel, to be encumbered to this extent by admonitions to the jury as to the way in which they should approach their task of evaluating issues of credit and fact. By a process of adding caution upon caution even the strongest case can be made to look weak and insubstantial and the prosecution's task transformed from being merely difficult to insurmountable. I have no hesitation in saying as Neasey J. said in *The Queen v. Walker*[46] that:
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> > "In the course of many years' experience at the Bar and on the bench, I have never been able to engender any confidence that I can make a correct subjective judgment about whether practiced witnesses, which of course experienced detectives usually are, are telling the truth or not."
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> With a consciousness of such limitations, I would regard it as quite unwarranted for me to say that I am in some position of superior capacity which entitles me to counsel twelve citizens, who have seen and heard the evidence in the trial, that police evidence of oral admissions is inherently suspect and should be scrutinized with particular care.
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> If and when a court of binding authority tells me that such modest is unbecoming, I will respectfully defer to their directions but until then I must reject the appellant's submissions in this respect. Whilst there may be some special cases in which a warning as to confessional evidence is called for, I can see no circumstances in the present case which could require such a course.

An example of a "*Carr* direction" which has been given appears in Appendix B.

Those with significant experience in the criminal law cannot doubt that Deane J.'s judgment in *Carr* is one of the most significant judgments in the development of the criminal law. That the remaining members of the High Court did not concur in Deane J.'s conclusions and/or his reasoning does not detract from the force of the reasoning in that judgment and from the implications it has for the development of the criminal law in future.

The ultimate responsibility which rests upon Counsel is to seek to ascertain factual and legal remedies or solutions to a situation(s) which is likely to and has

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45. No 69 of 1987, Supreme Court of Tasmania
46. No 31/87, Supreme Court of Tasmania

inevitably caused significant injustice. The bottom line must be fairness. The trial process must be fair. The obligation upon the Bench is to be strident in the protection of the accused and his position and to recognise that the authorities have within their own resources a capacity to ensure that persons are never unlawfully detained and that alleged admissions can be corroborated satisfactorily in one way or another. The failure by the authorities to take appropriate steps will make it unfair to an accused to use such evidence at his trial. One should bear in mind the comments of Neasey J. in *The Queen v. Walker*,[47] a decision in which His Honour granted to an acquitted accused person her costs of trial. In that case His Honour said:

> In summing up to the jury, I left them in no doubt that my view on the evidence was that there was a grave danger of injustice being done to the applicant if she should be found guilty of the charge on the evidence before them unless they felt sufficiently confident of their ability to make a subjective judgment about the truth or otherwise of the evidence of oral admissions given by the police officers, so as to rely upon this as the principal basis of being satisfied of the applicant's guilt beyond reasonable doubt.

His Honour added:[48]

> Nevertheless, I hold the view that juries and other tribunals should be extremely cautious before convicting any person on a grave criminal charge on evidence which depends upon subjective acceptance of the truth of testimony that the accused made an oral admission of guilt.
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> I think also that experienced police officers are, or should be, aware that if their own evidence is involved in this way, however truthful they may themselves know it to be, such evidence is an unsafe and unsure basis for conviction on a criminal charge if it is not sufficiently supported by other evidence.

That the law should be so slow to keep up with technology and the pace of society in this century is not only a matter for regret but also justifies severe criticism of those who have the opportunity to bring this aspect of our legal system up to date. I sometimes suspect that the issues raised in this paper are too difficult for legislatures and that governments of all political persuasions would prefer to have the very delicate balance required, to be maintained by the Courts. This is not enough.

It is in my opinion an abrogation of the responsibility of the legislatures to leave such significant areas of law without up to date and practical legislature amendments. Since arguing *Carr* I have had referred to me the judgment of Roden J. in *Hinton* (N.S.W.),[49] where His Honour said:

> There is no provision in our law for the imposition on suspects of some form of restraint for questioning prior to formal arrest. There is no grey area between the black and white of liberty and custody. In all probability, many persons 'invited' to accompany the police and to assist them in their inquiries are unaware of the

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47. at 19
48. at 21
49. (1978) **Petty Sessions Review** 1724 at 1728

> liberty to which they are then entitled. The view is said to be widely held that it is only so long as there is such ignorance that the present system is acceptable.
> I believe that this is an area crying out for legislative reform. I believe that we ought not to tolerate a situation within the administration of criminal justice which enables us to proclaim the freedom and protection which our system notionally provides, whilst in real terms the system only works because a sufficient number of persons are unaware of an thus fail to avail themselves of them.
> This is neither the time nor the place to comment on what the law should be. I believe, however, that the opportunity ought not to be allowed to pass without observing that steps ought to be taken one way or the other to ensure that the law, whatever it be, be both widely known and widely observed.

Earlier in the same judgment[50] in respect of police evidence upon the *voir dire* His Honour made some observations very similar to those to be found in the High Court Judgments in *Carr*. His Honour said:

> So far as the police are concerned, they gave their evidence with that detached competence with which one becomes familiar in these courts.
> Indeed the evidence-giving process is so routine with police officers, and they necessarily rely so heavily upon their prepared statements, that it is not unusual for their manner of giving evidence to reflect nothing that is of assistance to the court one way or the other; and experienced police officers are so accustomed to being the object of allegations of impropriety, that it is no surprise, and certainly no indicator of the truth or falsehood of those allegations, when they appear, as did the police in this case, quite unmoved by the most gross and at times almost grotesque allegations of impropriety put to them. Add to that that this is the third time round for this matter, after committal proceedings and a previous trial, and I believe it would be fatuous to speak of the accused or the police as by their demeanour giving any indication at all of where the truth lies.

The responsibility of those who participate in the criminal law is to be vigilant in the protection of the rights of individuals. No better exposition of the fundamental framework in which our criminal law exists and ought to exist can be found than in the judgment of Deane J. in *Van der Meer*:[51]

> The complementary direct objectives of the administration of the criminal law are the conviction and punishment of the guilty and the acquittal of the innocent. The frailty of all human institutions precludes the complete achievement of both. That being so, there is inevitable tension between them. In the context of such tension, the entrenched and guiding these of the criminal law of this country is, that the searing injustice and consequential social injury which is involved when the law turns upon itself and convicts an innocent person far outweigh the failure of justice and the consequential social injury involved when the processes of the law proclaim the innocence of a guilty one. Outside the courts, the law's insistence upon the protection of the innocent from wrongful conviction is increasingly

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50. at 1726
51. at 669

portrayed as an over-concern for those whose guilt the self-righteous are prepared to assume. Within the courts, it must be vigilantly observed and safeguarded unless and until the law is changed by valid legislation to impose different values and standards. The law's insistence upon the pre-eminence of the need to ensure that the innocent are protected from wrongful conviction inspires the basic principle that guilt of a criminal office must be proved beyond reasonable doubt (see, for example, *In re Winship*[52]). It is also reflected in the guiding requirement of fairness to a suspect or an accused in the administration and enforcement of the criminal law.

As indicated earlier in the paper it is my belief that the real question to be answered by those in authority is "what is a fair manner in which to treat an accused person?" A system which ensures that there can be absolute knowledge on the part of the Courts and therefore the public of everything that takes place between an accused and the authorities is a system which will ensure that the judgment as to what is or is not fair will be made only by those fully informed of the facts. It will be in that circumstance that the question of whether or not the vulnerability earlier referred to has resulted in, or might result in injustice, or in the potential for an innocent person to be convicted is likely to be correctly answered. To me it is of far greater importance that there be absolute knowledge of what takes place between a suspect and the authorities and fair rules applied as to that time than it is to arbitrarily delineate the time during which the authorities may have access to a suspect with his or her consent.

52. 397 US 358 at 371-372 per Harlan J.(1969)

Documentary evidence of facts in issue where maker of representation in document is called as witness.

Cf. A.C.T. Ordinance No. 4 of 1971, s. 28; Imp., 1968, Ch. 64, s. 6 (1).

S. 81B inserted by No. 91 of 1974, s. 5.

81B—(1) Where direct oral evidence of a fact or of an opinion would be admissible in a proceeding, a representation made by a person in a document tending to establish the fact or expressing the opinion, as the case may be, is, subject to this Division, admissible as evidence of the fact or the opinion in the proceeding, if—

(a) in the case of a representation—

(i) tending to establish a fact, the maker of the representation had personal knowledge of the matters dealt with by the representation; or

(ii) expressing an opinion, the person expressing the opinion is qualified to give evidence of his opinion;

(b) the maker of the representation is called as a witness in the proceeding or, in a proceeding where evidence is given by affidavit, makes an affidavit; and

(c) the court is satisfied, in the case of a representation—

(i) tending to establish a fact, that the representation was made at a time when the facts stated in the document were fresh in the memory of the witness; or

(ii) expressing an opinion, that the facts on which the opinion was based were fresh in the mind of the person expressing the opinion.

(2) Subsection (1) applies whether a representation is or is not consistent with the evidence given by the maker of the representation, but, where the representation—

(a) is tendered by the party by whom the witness is being called; and

(b) is inconsistent with the evidence given by the witness in the proceeding,

the representation is admissible in evidence only with the leave of the court.

(3) A representation referred to in this section shall not, without the leave of the court, be tendered in evidence by the party by whom the witness making the representation has been called, except at the conclusion of the examination-in-chief of that witness and before his cross-examination.

(4) Where in any proceeding a representation in a document is sought to be given in evidence under this section, it may be proved by the production of that document or, whether or not the document is still in existence, by the production of a copy of that document, or of the material part thereof, authenticated in such a manner as the court may approve.

APPENDIX B

I am required to direct you that you should closely scrutinise that confessional evidence, that is a legal requirement which I am bound to convey to you. You should keep in mind, I am directed to convey to you when you are conducting your scrutiny of the confessional evidence, the obvious fact that the police officers are accustomed to giving evidence and of course when police officers give evidence in the great majority of cases, they will have a demeanour which is much more impressive than the demeanour of the accused but impressive demeanour is not necessarily a wholly reliable indication of veracity. It would be wrong of me to suggest to you that demeanour is not important, demeanour is important and, I'll be having more to say about that later. But it is true that impressive demeanour is not necessarily a wholly reliable indication of veracity but it is true that the police officers are practised witnesses and it's not easy to test the truths of the evidence of practised witnesses. But I think we should be fair and keep an even balance and we should add to that that the accused is represented by distinguished counsel, he's not left to struggle on his own and that distinguished counsel is skilled at testing evidence. I repeat there is a need to exercise caution before convicting upon this disputed confession, which is not corroborated by any satisfactory evidence which comes from a source other than the police station officers. You must acquit unless the Crown satisfied you beyond reasonable doubt that the accused made this confession which the police officers allege he made and that confession was true. You should be carefully consider, ladies and gentlemen, all the evidence in all the circumstances of the case as they appear to you. That is to say, as they appear to you from the evidence. You should carefully consider the arguments of counsel. At the end of the day, one must insist upon this and one represents the community for this purpose when one does so. When you have a system of trial by jury, not trial by judge or judges and you take an oath to give a true verdict according to the evidence, that means your view of the evidence formed after carefully considering all of the evidence, the arguments of counsel and the summing up. Whether the Crown has satisfied you beyond reasonable doubt of the guilt of the accused, is a question of fact and it falls within your domain, within the area of your authority, the community will answer and by the law of this land it answers through you. The making of that decision in this serious case falls within the scope of your power, it falls within the scope of your duty, it falls within the scope of your privilege and that power, that duty and that privilege must not be unduly trespassed upon.