Truth of Confession on the Voir Dire

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A voir dire may arise any time that the admissibility of evidence is in doubt, and although not limited to contesting the admissibility of confessions, this area has inevitably generated the most case law. It is of the first importance in the administration of justice that an accused person should be able to enjoy complete freedom to challenge the admissibility of his or her previous confession.[1]

Principles governing the holding of a voir dire and the functions of judge and jury on preliminary issues and the ultimate issue have been well settled since at least *MacPherson v R.*[2] Wherever an issue arises as to the voluntariness of a confession,[3] the trial judge has the responsibility of deciding the issue in the absence of the jury on a voir dire. Where a confession is challenged on grounds other than solely on the fact that it was made,[4] the traditional approach[5] has been for the judge to determine, firstly, the issue of voluntariness, and then secondly, to consider discretionary exclusion on the basis of either unfairness[6] or public policy.[7] In *R v Swaffield*[8] a new approach was heralded by some members of the High Court where the fairness discretion would be replaced by exclusion based on considerations of reliability, and the balance of its operation would be subsumed in an overall discretion dealing with police illegality and impropriety. This

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1 *R v Brophy* [1982] AC 476, 481 (Lord Fraser). In some jurisdictions a pre-trial hearing is also available for this purpose: *Criminal Code 1899* (Qld) s 592A. The discussion herein is equally applicable to those proceedings.

2 (1981) 147 CLR 512, 519-23 (Gibbs CJ and Wilson J) and the authorities cited in this case.

3 The legal meaning of 'voluntary' will be discussed in detail below.

4 *Wendo v R* (1963) 109 CLR 559; *Adjohda v The State* [1982] AC 204.

5 *Foster v R* (1993) 67 ALJR 550, 554 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

6 *R v Lee* (1950) 82 CLR 133.

7 *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54.

8 (1998) 192 CLR 159, 181 (Brennan CJ), 194-5 (Toohey, Gaudron and Gummow JJ), 207-8 (Kirby J).

new approach and its impact on the topic of this article are discussed later in the article.

What freedom has an accused when evoking this fundamental procedure to challenge the admissibility of an alleged confession? In particular, if electing to give evidence on his or her own behalf on the voir dire, what is the extent to which an accused may be asked questions that tend to incriminate him or her in the offence charged? Such questions are essentially directed to the truth of matters contained within the alleged confession. Evidence given on the voir dire may also be relevant to the issues before the jury, and if the confession is admitted, can generally be given again in its entirety as evidence in the trial.[9] This raises the related issue – the extent to which the Crown at the trial proper can use answers given by the accused on the voir dire.

These questions have arisen in many jurisdictions[10] and have been affected in some jurisdictions by the operation of statute.[11] Examination of the cases where the questions have been discussed shows a reliance on a range of evidentiary principles and rationales. Of significance are notions of relevance, the right to silence, privilege against self-incrimination, discretionary exclusion based on disproportionate prejudicial value, and a general exclusionary discretion based on policy considerations.

Notwithstanding a number of State appellate courts giving consideration to such questions, including most recently the Queensland Court of Appeal in *R v Semyraha*,[12] in Australia the issue remains undecided by the High Court.[13] The most authoritative statement for Australian purposes remains the Privy Council decision of *Wong Kam-ming v R*.[14]

9 *Sinclair v R* (1946) 73 CLR 316, 326 (Rich J).

10 *Wong Kam-ming v R* [1980] AC 247; *R v Brophy* [1982] AC 476; *DeClerq v R* (1968) 70 DLR (2d) 530; *R v Wright* [1969] SASR 256; *Frijaf v R* [1982] WAR 128.

11 *Police and Criminal Evidence Act 1984* (UK), *Evidence Act 1995* (Cth). Detailed analysis of these provisions is outside the scope of this article.

12 [2001] 2 Qd R 208.

13 *MacPherson v R* (1981) 147 CLR 512, 524 (Gibbs CJ and Wilson J).

14 [1980] AC 247.

Wong Kam-ming v R[15]

The issue as to the extent to which an accused on a voir dire can be asked about the truth of the disputed confession and the subsequent use of those answers at the substantive trial arose directly in *Wong Kam-ming v R.*[16] In response to five formulated questions, the Privy Council, by majority,[17] held, first, that during cross-examination of an accused on the voir dire as to the admissibility of a statement made out of court, the accused may not be questioned as to the truth of such statement.[18] As their Lordships favoured total prohibition, it followed that the second question as to whether a discretion existed to exclude such cross-examination did not fall to be considered.[19] Third, the prosecution could not lead evidence regarding the testimony of the accused on the voir dire where the confession was excluded.[20] Fourth, even where the confession was accepted, the prosecution could not lead evidence regarding testimony of the accused on the voir dire.[21] Fifth, if the accused elected to give evidence at trial, cross-examination as to inconsistencies with the evidence given on the voir dire was permitted, but only where the confession had been accepted into evidence.[22]

The response to the first question as to permissible questioning has, both before and after the Privy Council decision, generated the most academic comment and case law. By comparison, the Privy Council's responses to the questions relating to the subsequent use of an accused's voir dire testimony have been generally accepted as correct and followed.[23] It is appropriate to deal with these questions at this

15 [1980] AC 247.

16 Ibid.

17 Ibid 260, 264. Lord Hailsham, in dissent, agreed with the majority as to the result of the appeal and concurred with the majority's answers to questions 3, 4 and 5.

18 Ibid 255-7.

19 Ibid.

20 Ibid 257-8.

21 Ibid.

22 Ibid 258-60.

23 *R v Brophy* [1982] AC 476; *'Mansfield'* (1992) 16 *Criminal Law Journal* 358; *Frijaf v R* [1982] WAR 128, 134 (Wickham J), 144-5 (Wallace J); *MacPherson v R* (1981) 147 CLR 512, 534-5 (Mason J); Alan W Mewett, 'The Risks of the Accused Testifying on the Voir Dire' (1984) 26 *Criminal Law Quarterly* 444, 460; Rosemary Pattenden, 'Informal Judicial Admissions of Criminal Activity: A Comparative Study of England, Canada and the United States' (1983) 32 *International and Comparative Law Quarterly* 812, 816-23; Peter Rowe, 'The Voir Dire and the Jury' [1986] *Criminal Law Review* 226, 227; Dennis Boyd, 'Justice on the Voir Dire: Two Cheers for *R v Brophy*' (1982) 33 *Northern Ireland Legal Quarterly* 70; *contra*

point, as the permitted subsequent use of an accused's testimony impacts on how the issue relating to permissible questioning should be answered.

Subsequent Use of Accused's Testimony

In *R v Brophy*,[24] the House of Lords confirmed the Privy Council's response to the third question that prohibited evidence being led of the accused's testimony on the voir dire where the confession has been excluded. The court based its decision on the relationship between two rights possessed by accused persons: the right to challenge the admissibility of a confession and the right of silence at trial. In their Lordships' view, an accused is 'virtually compelled to give evidence at the voir dire'.[25] An accused's right to remain silent at trial would be 'cut down' if evidence that they were obliged to give on the voir dire to exercise their right of challenge was admissible at the substantive trial.[26] The principle requiring inadmissibility was absolute and not one conditional on the exercise of judicial discretion.[27] This twofold rationale would support inadmissibility even where the confession was accepted.

Where the accused elects to give evidence at the substantive trial, their Lordships also seemed to accept that the same policy considerations would apply to prosecution attempts to cross-examine the accused on evidence from the voir dire where the confession had been excluded.[28] The Privy Council had relied upon the principle from *R v Treacy*[29] that once the accused's confession was ruled inadmissible, it was inadmissible for all purposes, including cross-examination.[30]

Where the confession has been accepted, the Privy Council had held that if the accused chose to testify and materially departed from the testimony given in the voir dire, the prosecution was permitted to cross-examine on those inconsistencies to test the accused's credit, subject to the trial judge's discretion to ensure that such cross-

Peter Murphy, 'Truth on the Voir Dire: A Challenge to *Wong Kam-ming*' [1979] *Criminal Law Review* 364; Stephen J Odgers, 'Case and Comment – *Mansfield*' (1992) 16 *Criminal Law Journal* 358, 360.

24 [1982] AC 476.

25 Ibid 709 (Lord Fraser).

26 Ibid.

27 Ibid 710 expressly disapproving Bray CJ in *R v Wright* [1969] SASR 256.

28 Ibid approving statements of Lord Hailsham in *Wong Kam-ming v R* [1980] AC 247, 261.

29 [1944] 2 All ER 299.

30 *Wong Kam-ming v R* [1980] AC 247, 259.

examination and rebuttal was not used unfairly or oppressively, and complied with statutory provisions relating to prior inconsistent statements.[31] This conclusion was reached because of the 'great injustice' that could result from the exclusion and no justification in legal principle that would render such cross-examination impermissible.[32] This issue did not arise before the House of Lords in *Brophy*. However, the 'right to silence' policy consideration has less weight when at the trial proper, the accused has freely decided to give evidence on the general issue.[33] Furthermore, policy considerations would weigh against a court seemingly condoning perjury.

In Canada, despite the courts adopting a different approach to the initial question of permissible questioning on the voir dire,[34] the approach to subsequent use is consistent with the common law position in the United Kingdom.[35] On this issue, the United States courts also agree, on the basis of the accused's freedom to enforce his or her constitutional rights.[36]

In Australia, prior to *Wong Kam-ming*, the permitted use of voir dire admissions had received a varied response.[37] In Tasmania, the courts had allowed the prosecution to lead evidence of the admission of truth at the trial proper, despite expressions that such precedent was unfortunate[38] and led to absurd results.[39] In Queensland, it had been held improper to allow evidence of what the accused said on the voir dire,[40] and that at the substantive trial it was permissible to cross-

31 Ibid 260 (Lord Edmund-Davies), 261 (Lord Hailsham).

32 Ibid 259.

33 Peter Mirfield, 'Two Side-Effects of Sections 34 and 37 of the Criminal Justice and Public Order Act 1994' [1995] *Criminal Law Review* 612, 620.

34 *DeClerq v R* (1968) 70 DLR (2d) 530. See Gerald C Grimaud, 'DeClerq v The Queen: A Confession's Reliability on Voir Dire' (1970) 8(3) *Osgoode Hall Journal* 559 for detailed discussion of this case.

35 Mewett, above n 23, 460-3; Pattenden, above n 23, 819-20.

36 *Simmons v US*, 390 US 377, 393-4 (1968) cited in Pattenden, above n 23, 819. Some doubt has been expressed as to whether the right to impeach the accused as to credit at the substantive trial based on inconsistencies with earlier voir dire testimony is limited to where the confession has been accepted into evidence: Pattenden, above n 23, 819-20.

37 *R v Toomey* [1969] Tas SR 99; *R v Silley* [1964] QWN 45; *R v Gray* [1965] Qd R 373; *R v Wright* [1969] SASR 256.

38 *R v Monk* (Unreported, Supreme Court of Tasmania, Morris CJ, August 1955) cited in F M Neasey, 'Cross-Examination of the Accused on the Voire Dire' (1960) 34 *Australian Law Journal* 110, 111.

39 Neasey, above n 38, 112.

40 *R v Silley* [1964] QWN 45.

examine the accused and prove an inconsistent statement from the voir dire.[41] South Australia had adopted a contrary approach in *R v Wright*,[42] with all judges agreeing that notwithstanding the confession had been excluded after a voir dire, the Crown had the right to lead evidence of admissions by the accused on the voir dire as to the truth of the confession, subject to the trial judge's discretion.

Following the House of Lord's rulings on subsequent use, the rulings were referred to without criticism in *R v Frijaf*.[43] In *MacPherson v R*,[44] there was some acceptance by the High Court that giving evidence on a voir dire may expose an accused to cross-examination at trial on discrepancies.[45] However, their Honours were of the view that this area was unclear and remained to be decided.[46] More recently, in *R v Mansfield*,[47] the New South Wales Court of Criminal Appeal held that the trial judge was correct in allowing evidence of the accused's admission of truth on the voir dire to be given in rebuttal of the accused's unsworn statement. In so doing, their Honours also confirmed the other rulings of the Privy Council relating to subsequent use.[48]

As stated above, the Privy Council's rulings on subsequent use are based on the double rationale of the right to challenge the admissibility of a confession and the right to silence.[49] The High Court's acknowledgment of the voir dire as an important procedural right,[50] and its regard for the privilege against self-incrimination as a fundamental principle of the common law,[51] make it likely that the High Court

41 *R v Gray* [1965] Qd R 373, 377-8. The inconsistency, however, related to a subsidiary issue, not the truth of the confession. That case also assumed a privilege against self-incrimination which has been held incorrect in Queensland: *R v Semyraha* [2001] 2 Qd R 208.

42 [1969] SASR 256.

43 [1982] WAR 129, 136 (Wickham J), 144 (Wallace J).

44 (1981) 147 CLR 512.

45 Ibid 535 (Mason J).

46 Ibid 523-4 (Gibbs CJ and Wilson J).

47 (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Handley JA and Loveday J, 17 February 1992); see also Odgers, above n 23.

48 Odgers, above n 23, 359.

49 Mirfield, above n 33, 620.

50 *MacPherson v R* (1981) 147 CLR 512, 534-5 (Mason J).

51 C R Williams, 'Silence in Australia: Probative Force and Rights in the Law of Evidence' (1994) 110 *Law Quarterly Review* 629, 637 citing *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 and *Sorby v Commonwealth* (1983) 152 CLR 281; see also G L Davies, 'The Prohibition Against Adverse Inferences

will follow the answers of the Privy Council, as confirmed by the House of Lords, in relation to subsequent use.

Permissible Questioning

In relation to the extent to which the accused may be asked and required to answer questions concerning the truth of a disputed confession, there seems to be unanimous agreement that the guiding principle (as with all evidence) is the concept of relevance.

Recently, in *Smith v R*,[52] the High Court, Kirby J dissenting, set aside a conviction on the basis that irrelevant evidence was admitted. Although the case was based on s 55 of the *Evidence Act 1995* (Cth), the majority judgment referred to two axioms that establish the fundamental rule that only relevant evidence is admissible: 'None but facts having rational probative value are admissible' and 'all facts having rational probative value are admissible, unless some specific rule forbids'.[53]

Their Honours emphasised that in determining relevance, it is fundamentally important to identify what are the issues at the trial. They concluded that the evidence in question did not rationally assist the process of reasoning.[54] Kirby J adopted a broader approach, noting the subjective nature of relevance, the fact that perspectives of relevance may develop as issues and applicable law become clearer, and that judicial rulings may be made on the run before all of the evidence is adduced.[55]

When determining the relevance of truth of the confession on the voir dire, it is submitted that the strict analysis of the majority is more appropriate in light of the narrow issues to be decided and the importance of the impugned evidence.

The credit of a witness may also be relevant to a fact in issue where it rationally affects the determination of the existence of that fact. In consequence, collateral facts, those affecting the credibility of a witness, may become relevant.[56] The question whether evidence is directly relevant to a fact in issue or one going to credit is sometimes

From Silence: A Rule Without Reason? – Part 1' (2000) 74 *Australian Law Journal* 26, 31.

52 (2001) 181 ALR 354 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

53 Ibid 355-6 citing Wigmore, *Evidence in Trials at Common Law* (Tillers rev) (1983) vol 1, 9-10.

54 Ibid 357.

55 Ibid 360.

56 J D Heydon, *Cross on Evidence* (6th ed, 2000) [1090].

difficult to determine. In both cases the evidence will be strictly admissible. However, the Crown would generally not be entitled to lead credit evidence as part of its case,[57] and the collateral evidence finality principle would further limit the use of such evidence.[58]

However, what are the facts in issue for the voluntariness rule and the fairness and public policy discretions, and is the truth of a confession relevant to these facts either directly or indirectly through its bearing on the accused's credit?

The principles in Australia governing the exclusionary rule of voluntariness and its relationship with the unfairness and public policy discretions have been in a state of development for some time.[59] It was much anticipated that the High Court in *R v Swaffield*[60] would clarify a number of issues, including the significance of reliability to the voluntariness rule and the unfairness discretion, and the overlap between the two discretions when police impropriety is alleged. The Court made some authoritative statements on the voluntariness rule and the meaning of unfairness, however, it appears to advocate a new approach to the overlap between the unfairness and public policy discretions.[61]

Voluntariness

There was unanimous agreement[62] that the fundamental requirement of voluntariness was the exercise of a free choice to speak or be silent as explained by Dixon J in *McDermott v R.*[63] The twin justifications for the rule are unreliability and the overbearing of the confessionalist's will.[64] Despite this, the court does not attempt to determine the actual reliability of the confession, but focuses on the effect of the alleged conduct on the confessionalist's will.[65] On this basis, the actual

57 *A-G v Hitchcock* (1847) 1 Exch 91.

58 *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533.

59 Jill Hunter, 'Unreliable Memoirs and the Accused: Bending and Stretching Hearsay (Pt 1)' (1994) 14 *Criminal Law Journal* 8; Peter Lowe, 'Confessional Statements and Protective Rights: Right and Remedies under the Uniform Evidence Act' (2000) 74 *Australian Law Journal* 179, 179-82.

60 (1998) 192 CLR 159.

61 For general discussion see Lowe, above n 59, 181-3. The judgment also raises other areas of law that are beyond the scope of this article.

62 (1998) 192 CLR 159, 171 (Brennan CJ), 188 (Toohey, Gaudron and Gummow JJ), 208 (Kirby J).

63 (1948) 76 CLR 501, 511.

64 *Swaffield v R* (1998) 192 CLR 159, 169 (Brennan CJ).

65 Ibid 171 (Brennan CJ).

truth of the confession is not a fact in issue to be determined on the voir dire when voluntariness is challenged. English and Canadian courts applying the voluntariness rule from *Ibrahim v R*[66] have also held that the truth of the confession is not the issue for determination on the voir dire.[67]

Wong Kam-ming[68] is often cited for the proposition that the truth of the confession is neither relevant to the facts in issue nor the credit of the accused.[69] However, it is not entirely clear that the total prohibition preferred by the majority was based on relevance rather than policy.[70]

The decision overruled the English Court of Appeal decision in *Hammond v R*,[71] where the accused had challenged the voluntariness of his confession on the basis that he had been forced to confess through physical abuse.[72] During cross-examination he admitted that the confession was true. In the Court's view, the question and answer were relevant to the issue of whether the story that the appellant was telling of being attacked and ill-treated by the police was true or false. The question went to the credit of the witness on the basis that 'if a man says "I was forced to tell the story, I was made to say this, that and the other", it must be relevant to know whether he was made to tell the truth or whether he was made to say a number of things which were untrue.'[73]

Cases following *Hammond v R*[74] have applied it on the basis that the permitted questioning goes no further than bearing on the question of the accused's credibility.[75]

In both *Hammond v R*[76] and *DeClerq v R*,[77] the allegation of involuntariness related only to the circumstances of the making of the con-

66 [1914] AC 599. In the United Kingdom, the *Police and Criminal Evidence Act 1984* (UK) now applies.

67 *DeClerq v R* (1968) 70 DLR (2d) 530, 532-3 (Cartwright CJC), 545-6 (Hall J).

68 [1980] AC 247.

69 Pattenden, above n 23; [1980] AC 247, 262 (Lord Hailsham).

70 Mirfield, above n 33, 617.

71 (1941) 28 Cr App R 84.

72 This judgment provides few factual details relating to the making of the confession. For a fuller version see *Frijaf v R* [1982] WAR 128, 148 (Brinsden J).

73 (1941) 28 Cr App R 84, 87 (Humpreys J).

74 Ibid.

75 *DeClerq v R* (1968) 70 DLR (2d) 530, 535 (Cartwright CJC); *R v La Plante* [1958] OWN 80, 81 (Laidlaw JA); cf Murphy, above n 23, 365.

76 (1941) 28 Cr App R 84.

fession, with no suggestion of concoction or falsity of the confession. As questioning as to the truth was permitted, the respective courts must be taken as holding, first, that the accused's credit is always relevant to the question of voluntariness, and second, that the truth or falsity of a confession is always relevant to the accused's credit.

The accused's credit will usually be relevant to the issue of voluntariness in assessing the accused's evidence against the conflicting evidence of Crown witnesses. However, relevance becomes tenuous when, as in *DeClerq*,[78] the accused's version did not materially differ from the police version.

The Privy Council majority in *Wong Kam-ming*[79] did not accept that relevance to credit in some unspecified way justified the practice of prosecuting counsel questioning the accused as to the truth of the confession. Nor was there any acceptance that truth was relevant to the issue of credit. In their analysis,[80] where the accused denies the truth of the confession, the accused's credibility cannot be affected, as the judge is not in a position to determine whether this denial is false until the substantive trial is completed.[81] On the other hand, if the accused admits the truth of the confession it would not in any way damage credit. If the accused should offer such damaging testimony, his or her veracity ought to be confirmed.[82]

Lord Hailsham concluded that it was impossible to say a priori that every question of truth or falsity of a confession was not relevant to the question at issue on the voir dire, or admissible as to credibility of either the prosecution or defence witnesses.[83] He provided an example where the accused alleges that the police concocted the confession and forced a signature. The police may want to prove that there are accurate matters contained within the confession, not known to police, that could only have come from the accused. Alternatively, the accused may point to inaccuracies as indicating concoction. In either case, although not directly affecting the allegation of signature under

77 (1968) 70 DLR (2d) 530 (Hall, Spence and Pigeon JJ dissenting).

78 Ibid 539 (Hall J) where transcript of voir dire reproduced.

79 [1980] AC 247, 256 (Lord Edmund-Davies).

80 Ibid.

81 As this issue relates to credit only, the Crown could not itself lead independent evidence as to truth: *DeClerq v R* (1968) 70 DLR (2d) 530, 533 (Cartwright CJC).

82 *Wong Kam-ming v R* [1980] AC 247, 256 (Edmund Davies L); *DeClerq v R* (1968) 70 DLR (2d) 530, 552 (Spence J); Grimaud, above n 34, 561.

83 *Wong Kam-ming v R* [1980] AC 247, 262.

pressure, the accuracy of the confession must be open to some inquiry.[84]

Where the accused alleges on the voir dire that the confession is false because of concoction or otherwise, it is arguable that evidence of any falsity goes directly to the issue of voluntariness, on the basis of the argument that the accused would not have provided so much inaccurate information to his or her detriment unless it was made involuntarily. That is, an accused's assertion that the statement is untrue may logically have a bearing on determining whether or not it was voluntary.[85] However, that does not work conversely. If the Crown obtains admissions or adduces evidence to support the truth of the confession, this does not prove that the statement was made voluntarily.[86] It only goes to negative the accused's argument based on falsity, and discredits the accused in respect of the balance of his or her evidence.[87]

In Australia, the High Court has not decided whether cross-examination on the truth of a confession should be permitted. Clearly, relevance is again the starting point.

In *Burns v R*,[88] there was support for the proposition that the truth of a confession was relevant to the jury determination of whether a confession was made. The majority judgment referred to the reasoning in *R v Hammond*[89] to support this notion. By contrast, Murphy J concluded that the truth of the matter alleged to have been stated does not logically tend to prove that it was stated. His Honour noted '[n]othing is more common in a concocted story than the inclusion of as much truth as possible'.[90] It was held in *Goonan v R*[91] by the New South Wales Court of Appeal (including the now Chief Justice of the High Court) that *Burns* was no longer good law in consequence of other High Court cases.[92] The Court ventured the opinion that the

84 Ibid 264.

85 *DeClerq v R* (1968) 70 DLR (2d) 530, 532-3 (Cartwright CJC).

86 *Wong Kam-ming v R* [1980] AC 247, 264 (Lord Hailsham), see also comments below on *Burns v R* (1975) 132 CLR 258.

87 Heydon, above n 56, [17600].

88 (1975) 132 CLR 258.

89 (1941) 28 Cr App R 84.

90 *Burns v R* (1975) 132 CLR 258, 267.

91 (1993) 69 A Crim R 338.

92 Ibid 345 (Hunt CJ).

High Court, by implication, would prefer the very persuasive view of the Privy Council.[93]

Prior to *Wong Kam-ming*,[94] the correctness of *Hammond v R*,[95] as authority that the truth of a confessional statement was relevant to the question of credibility, had been generally assumed.[96] However, in *Wright v R*,[97] Zelling J considered that credit itself was not always going to be relevant. His Honour provided the example of a voir dire where the judge was satisfied all witnesses were telling the truth to the best of their ability, and any difference in accounts arose from memory through time delays.[98] Bray J considered that on the question of voluntariness, the truth of the alleged confession may, in some cases, be relevant apart from the issue of credit, although no examples were given.[99]

Subsequent to *Wong Kam-ming*, the Supreme Court of Western Australia considered the issue of relevance of truth to the question of both voluntariness and discretionary exclusion of confession in *Frijaf v R*.[100] The factual basis of the challenge largely rested on the age and mental capacity of the accused, with no suggestion of concoction. The trial judge allowed cross-examination on the truth of the confession to determine discretionary exclusion. In his view, the truth of the confession was irrelevant to the issue of voluntariness. On appeal, Wickham J accepted the Privy Council approach to the voluntariness issue without comment.[101] Wallace J also assumed the correctness of the Privy Council decision, stating that whether a confession is true or false is, for the most part, irrelevant to the issue of voluntariness.[102]

Brinsden J undertook an analysis of the Privy Council majority approach and demonstrated by reference to factual examples how a total ban on the basis of relevance was going too far.[103] Where the accused alleged a story had been made up to relieve police pressure or that the statement was a police concoction forcibly signed, if the Crown were

93 Ibid.
94 [1980] AC 247.
95 (1941) 28 Cr App R 84.
96 *R* v *Toomey* [1969] Tas SR 99, 101; *R v Wright* [1969] SASR 256, 277 (Zelling J).
97 [1969] SASR 256.
98 Ibid 277.
99 Ibid 260.
100 [1982] WAR 128.
101 Ibid 134.
102 Ibid 145.
103 Ibid 147-9.

able to show that the statement contained matters entirely unknown to police and which could be proven as true, this would be relevant as tending to show that the accused is not to be believed in the story as to how the confession came to be made. There are two matters to be noted from this judgment. First, his Honour conceded that on the basis on which the accused challenged the confession in *Hammond v R*,[104] it was difficult to explain how the truth of the confession was relevant to credit. Second, the example of unknown facts was the same example offered by Murphy J in *Burns*[105] to illustrate when the truth of matters contained in a statement may support the fact it was made. Where certain matters would have been known only by the accused and are able to be proved to be true, an allegation of self or police fabrication would affect the accused's credit.

The issue came up for direct consideration by the Queensland Court of Appeal in *R v Semyraha*.[106] The facts were unusual in that the challenged confession contained statements more inculpatory than the statements that the accused alleged the police had told him to say after threats and physical abuse. The accused's case was, in essence, that he had confessed to relieve police pressure. Until specifically asked by the Crown, the accused had not alleged the confession was untrue. In any event, under further cross-examination, the accused confirmed the confession was not true. The appeal arose on the basis that in admitting the confession, the trial judge impermissibly took the accused's answers into account. Given the negative response, it is difficult to see how these answers would have disadvantaged the accused.

The Court of Appeal unanimously ruled that the proposition put forth by the Privy Council was too broadly stated, and that there will be many cases where questions that suggest to an accused that a confession was made because it was true, are relevant to the accused's credit on the question of whether it was voluntarily made. Their Honours ruled that it was so relevant in this case.[107] It is conceded, in accordance with the above discussion, that once the truth of the confession was in issue, the accused's answer could potentially affect his or her credit on both this point and his or her whole version as to how the confession was made. However, it seems unfair to the accused that the Crown, in effect, forced the accused to put the truth of

[104] (1941) 28 Cr App R 84.
[105] (1975) 132 CLR 258, 267-8.
[106] [2001] 2 Qd R 208.
[107] Ibid 211.

the confession in issue. Until that time, truth was not directly in issue, nor would it have been strictly relevant to the accused's credit.

The conclusion, which can be drawn at this point, is that it is not correct to say that the truth of a confession is never relevant on a voir dire to determine voluntariness. It is not a fact in issue and is arguably never directly relevant to a fact in issue. Where credit is relevant in determining the voluntariness of the confession, the truth of the confession may be relevant in assessing the accused's credit. In both cases, the concept of relevance must be examined and applied logically. The obvious case where these would both be satisfied is where the police and the accused have materially different accounts and the challenge relies on self or police fabrication or other allegation of falsity. Where there is some additional element, such as the accused's statement containing facts entirely unknown to the police that are admitted or able to be proved true, the truth of the confession is unquestionably relevant to the accused's credibility. Arguably, where the accused is able to prove inaccuracies in the disputed confession, these matters become directly relevant to the issue of voluntariness.

Fairness and Public Policy Discretions

Although *Wong Kam-ming*[108] was dealing with the voluntariness of confessions, cross-examination as to the truth of the confession when an accused is seeking discretionary exclusion raises the same issues of subsequent use and policy considerations. Once again, the starting point is relevance to the facts for determination, or to the credit of the accused where credit is relevant. It is in the area of discretionary exclusion where the decision in *Swaffield*[109] has potentially most impact.

Fairness Discretion[110]

The fairness discretion probably started life as a means of regulating police conduct when dealing with private individuals in the investigation of crime. It may have been seen as a necessary extension of the voluntariness rule, due to the courts not giving a sufficiently wide operation to the basal principle that to be admissible a confession must be voluntary.[111] Originally, the discretion required the judge to form

[108] [1980] AC 247.

[109] (1998) 192 CLR 159.

[110] See generally Pattenden, above n 23, 17-19; Lowe, above n 59, 181-3; and *R v Swaffield* (1998) 192 CLR 159, 171-5 (Brennan CJ).

[111] *McDermott v R* (1948) 76 CLR 501, 507 (Dixon J).

a judgment upon the propriety of the means by which the statement was obtained, by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.[112]

However, in subsequent cases, judges were unable to agree whether, in exercising the discretion, the unfairness was related to the accused's treatment by the police or the reception of the confession at trial.[113] If the latter, unfairness would arise 'if a statement was obtained in circumstances which affect the reliability of the statement'.[114] The confusion was undoubtedly fuelled by the application of the *Bunning v Cross*[115] discretion to confessions[116] and the overlap this created when police impropriety was alleged. *Foster v R*[117] was an important decision in clarifying that the fairness discretion covered both types of unfairness and was not limited to unreliability.

This point was confirmed in *Swaffield v R*,[118] where the joint judgment stated that '[w]hile unreliability may be a touchstone of unfairness, it has been said not to be the sole touchstone'. However, this case puts into question whether the reliability of a confession should be elevated to a test of exclusion[119] or justifies a new approach to the overlap of the discretions.

The new approach mooted by Brennan CJ would treat all police impropriety that did not affect reliability as governed by the public policy discretion.[120] This approach, which was approved in the joint judgment, turns

> first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to the contemporary community standards.[121]

[112] Ibid 513.
[113] *Cleland v R* (1982) 151 CLR 1, 18 (Deane J), 31 (Dawson J).
[114] *Van der Meer v R* (1988) 62 ALJR 656, 666 (Wilson, Dawson and Toohey JJ).
[115] (1978) 141 CLR 54.
[116] *Cleland v R* (1982) 151 CLR 1.
[117] (1993) 113 ALR 1.
[118] (1998) 192 CLR 159, 189 (Toohey, Gaudron and Gummow JJ).
[119] Ibid 210 (Kirby J).
[120] Ibid 181-2.
[121] Ibid 192 (Toohey, Gaudron and Gummow JJ).

Whichever approach is ultimately adopted in relation to the fairness discretion, reliability, and hence the truth of the confession, plays a key role in the fairness discretion. Whether the truth of the confession is directly relevant will depend upon the focus of the court's inquiry. Is the focus on the likelihood that the conduct may result in an untrue confession, or the actual reliability of the statement that the conduct generated? In other words, is the court required to undertake a subjective or an objective analysis?[122]

Traditionally, the cases appear to favour an objective approach. In *R v Lee*,[123] the High Court rejected a formulation of the discretion that suggested that the trial judge should consider whether a confession was true or false.[124] This was approved by Bray CJ in *R v Wright*,[125] where his Honour concluded that in exercising the discretion, the situation with regard to impropriety must be judged as it existed at the instant of time before the confession was made, and without regard to the truth or falsity of the confession subsequently made.

An inquiry into the probability or possibility of something producing a certain result is not the same as an inquiry into whether it did in fact produce that result.[126]

In contrast, Chamberlain J considered that the appropriate question was whether it would be unfair to admit a confession made in consequence of the police conduct.[127] This latter approach would seem to favour regarding the actual truth or falsity as an issue in the determination.

Lee v R[128] was again cited in *Frijaf v R*[129] to support the proposition that it is the tendency of the circumstances to bring about an unreliable confession that is material, not actual truth or falsity. By contrast, Wallace J considered that when seeking to evoke the unfairness dis-

[122] This dichotomy also arises in the interpretation of s 85 of the *Evidence Act 1995* (Cth): Odgers, *Uniform Evidence Law* (5th ed, 2002); Ian Dennis, 'The Admissibility of Confessions under Sections 84 and 85 of the *Evidence Act* 1995: An English Perspective' (1996) 18 *Sydney Law Review* 34, 46-9.

[123] (1950) 82 CLR 133.

[124] Ibid 152.

[125] [1969] SASR 256.

[126] Ibid 261-2.

[127] Ibid 269-70.

[128] (1950) 82 CLR 133.

[129] [1982] WAR 128, 135-6 (Wickham J).

cretion, an accused would be bound to disclose whether the confession was true, as that was the test of relevance.[130]

With emphasis on reliability as indicated in *Swaffield*,[131] it is unclear the role that actual reliability will play. Brennan J refers to the discretion in terms of 'focusing on cases where the conduct which induces the making of a voluntary confession throws doubt on its reliability'.[132] However, Kirby J considered reliability as one of the preliminary tests, along with voluntariness, that the judge must determine for exclusion.[133]

Public Policy Discretion

The public policy discretion is based on the judgment of Barwick J in *R v Ireland*,[134] and is concerned with broader questions of high public policy[135] than the unfairness discretion. The discretion is to be exercised by balancing the competing interests of convicting wrongdoers and not encouraging unlawful police conduct. The primary factors to balance, as identified in *Bunning v Cross*,[136] are the deliberate nature of the police conduct, the effect of the illegality on the cogency of the evidence, the ease with which the law may have been complied with, the nature of the crime the accused is charged with, and the purpose of the legislation that has been breached by those in authority.[137] The cogency factor should only be taken into account where the police conduct was not intentional or reckless, or where it is both vital to conviction and of a perishable and evanescent nature.[138]

The High Court seems to accept that on the traditional approach to the discretions, the reliability of the confession is relevant to the public policy discretion. In *Pollard v R*,[139] Deane J stated, 'the weight to be given to the public interest in the conviction and punishment of crime will vary according to the heinousness of the alleged crime or

[130] Ibid 145.

[131] (1998) 192 CLR 159.

[132] Ibid 181.

[133] Ibid 209-10.

[134] (1970) 126 CLR 321.

[135] *Bunning v Cross* (1978) 141 CLR 54, 74-5 (Stephen and Aicken JJ).

[136] (1978) 141 CLR 54, 78-80 (Stephen and Aicken JJ).

[137] See, for general discussion, Tim Carmody, 'Recent and Proposed Statutory Reforms to the Common Law Exclusionary Discretions' (1997) 71 *Australian Law Journal* 119.

[138] Ibid.

[139] (1992) 176 CLR 177, 203.

crimes and the reliability and unequivocalness of the alleged confessional statement'.

So too in *R v Swaffield*,[140] Brennan J noted that in exercising the discretion, any doubt about the reliability of a confession obtained by unlawful or improper conduct is a factor that would have to be taken into account. However, his Honour proceeded to advocate the approach discussed above and supported by the joint judgment, where the public policy discretion would only be considered once a determination had been already made that the police conduct had not produced a confession with doubtful reliability.[141]

The Northern Territory Court of Appeal in *R v Grimley*[142] held the trial judge had not erred in taking into account the apparent reliability of an accused confession in assessing cogency.[143] The Court noted that it did not have to decide the submission of the accused's counsel to the trial judge that the truth of the confession was irrelevant for that enquiry. In the Court's view, the trial judge's conclusion had been based on the lack of evidence that 'anything occurred during the period of questioning which was not recorded which affected the reliability of the material'.[144]

There seems little doubt that reliability of a confession would be one aspect in assessing the cogency of the evidence. However, it does seem that once assumed reliable, a confession is always going to be weighty, probative and important evidence in the Crown case.[145] If the new approach of Brennan CJ in *R v Swaffield* is applied strictly, reliability is not a fact in issue on the public policy discretion, as, at the time the discretion is considered, reliability has already been determined. The focus becomes the nature and seriousness of the illegality or impropriety and whether 'the public interest requires the rejection of a voluntary and apparently reliable confession'.[146]

Even assuming reliability is a live issue, the question still remains (as raised in the fairness discretion) whether the court makes a determi-

[140] (1998) 192 CLR 159, 180.

[141] Ibid 181-2. This is a departure from the traditional approach as illustrated in *Foster* (1993) 113 ALR 1.

[142] (1995) 121 FLR 282, 305.

[143] The *Bunning v Cross* factors were referred to in the application of the term 'interests of justice' in legislation requiring the recording of confessions.

[144] *R v Grimley* (1995) 121 FLR 282, 305.

[145] Although this factor will be generally disregarded where the impropriety was not accidental or mistaken.

[146] *R v Swaffield* (1998) 192 CLR 159, 182.

nation on actual reliability or hypothetical reliability. The above quote of Brennan J does suggest the latter. In *Frijaf v R*[147] there was disagreement on this point. Wickham J noted that it was the tendency of the circumstances, rather than the truth or falsity, that was relevant to this head of public policy. In his Honour's view, cogency as referred to in the factors does not mean true but convincing if true.[148] In contrast, Brinsden J considered the truth of the confession was relevant to the exercise of the discretion, on the basis that it might be difficult to judge the cogency of the evidence without considerations that might bear upon the truth of the confession.[149] His Honour pointed out that questioning as to truth might be proper only where the illegality arose from mistake.[150] Wallace J was also of the view that truth plays a part in the balancing process, noting that the falsity of a confession may require the exercise of the discretion in favour of the accused.[151]

Conclusion for Discretions

Obviously, a consistent approach must be taken in resolving this issue for both the fairness and public policy discretions. The question of whether truth of the confession is a fact in issue or directly relevant to a fact in issue is dependent on how the various judgments in *R v Swaffield*[152] are interpreted and which approach is to be preferred. At some stage, a decision will have to be made in respect of the fairness discretion, as to whether the primary rationale is regulating police conduct that may lead to unreliable confessions, or the exclusion of unreliable confessions themselves.

One policy consideration against treating truth and actual reliability as a fact in issue to both discretions is that this is an issue for jury determination, to be made after hearing all the evidence. A trial judge should not be required to carry out this exercise. Either a decision will be made on insufficient material or the voir dire will turn into a protracted affair essentially duplicating the evidence at trial.[153]

147 [1982] WAR 128.

148 Ibid 134 (Wickham J).

149 Ibid 150.

150 Ibid.

151 Ibid 146.

152 (1998) 192 CLR 159.

153 This may not be a legitimate concern as that is the current approach required to be taken to similar fact evidence on a voir dire: *Pfennig v R* (1995) 182 CLR 461.

Relevance to credit will largely depend on the same considerations as discussed above in relation to voluntariness. That is, credit will be relevant whenever the accused's version of the interrogation differs from the police. However, any question as to truth could only be relevant to the accused's credit where his or her version relies on the falsity of the confession, such as self or police fabrication. Only then would any proof or admission that the confession was true logically affect the accused's credit.

Policy Considerations

Although the truth of the confession may be relevant either directly or through credit to the issue for determination on the voir dire, policy considerations may require absolute or discretionary exclusion. As noted above, it is not clear whether the majority decision in *Wong Kam-ming v R*[154] was based on policy rather than legal considerations. Their Lordships were concerned that the actual truth of a confession disclosed on the voir dire may cause an otherwise involuntary confession to be admitted, and would invite and encourage police brutality and misconduct in the handling of suspects.[155]

The first concern, relating to the potential admission of involuntary confessions, concerns the role of the trial judge. This was also identified by Neasey J, writing extra-curially.[156] A trial judge is in the invidious position of having to decide the issue of voluntariness and unfairness or public policy exclusion with the 'oppressive knowledge'[157] that the accused has, in open court, confessed on oath to being guilty.

His Honour referred to the unreported decision of *R v Monks*, where the accused had admitted the truth of the confession during a voir dire. The trial judge ruled that the confession was voluntary, stating it would be a 'public scandal' if after a full confession upon oath in open court the accused could be acquitted.[158] Neasey J considered that it would take extraordinary powers of impartial and detached consideration from a judge to ignore the public interest in an admittedly true confession being presented to the jury.[159] The knowledge may

[154] [1980] AC 247.
[155] Ibid 257.
[156] Neasey, above n 38, 114.
[157] Ibid 111.
[158] Ibid.
[159] Ibid.

not only affect the decision on admissibility of the confession, but also the directions to and summing up before the jury at the end of the trial.[160] Of perhaps greater concern is the situation where there is no jury, and the trial judge must also determine the weight to be attached to the admitted confession and determine the ultimate issue of guilt.[161]

There have been cases where a confession has been excluded by a trial judge notwithstanding that the accused admitted truth on the voir dire.[162] In *Hammond v R*,[163] the trial judge made it clear that he decided the confession was voluntary not on the basis of the accused's admission that it was true, but on all the evidence. Not all trial judges set out the evidential basis of their conclusion, and, even so, it is almost impossible to assess the subconscious use of the knowledge of truth. This speculation led the American courts to prohibit questions about truth of the confession 'precisely because the force which it carried with the trial judge cannot be known'.[164]

Against this argument is the fact that trial judges are often charged with hearing very prejudicial and arguably incriminating evidence on a voir dire, and if it is excluded, will proceed to direct and sum up to the jury. A trial judge sitting alone is also often required to make ultimate determinations with knowledge of excluded evidence. In both situations, the trial judge's ability to detach himself or herself from the excluded evidence has not been challenged.

The second concern relates to the possibility of encouraging police misconduct in dealing with suspects.[165] This could arise in a few ways. First, if the issue of truth may sway a judge's mind either subconsciously or through public interest, police may be tempted to resort to improper tactics to ensure a guilty suspect confesses. Second, the effect of allowing questions as to truth may deter accused persons from testifying on the voir dire and thus exposing improper police practices.[166] It would be ironic if a procedure designed to enable accused persons to expose police misconduct was implemented in such a way as to deter them from evoking it.

[160] Boyd, above n 23, 83.

[161] *DeClerq v R* (1968) 70 DLR (2d) 530, 548 (Hall J).

[162] *Wright v R* [1969] SASR 256; *R v Amad* [1962] VR 545; *Wong Kam-ming v R* [1980] AC 247; *R v Brophy* [1982] AC 476.

[163] (1941) 28 Cr App R 84, 88.

[164] *Rogers v Richmond*, 365 US 534, 545 (1960) (Frankfurter J).

[165] Neasey, above n 38, 112-3.

[166] Grimaud, above n 34, 563.

A further policy consideration relates to the accused's privilege against self-incrimination.[167] If the accused elects to testify on the voir dire on the narrow question of admissibility of the confession, to allow questions essentially as to his or her guilt undermines the privilege against self-incrimination. The accused could have refused to answer such questions during pre-trial questioning without adverse inferences being drawn,[168] and could have elected not to give evidence at the trial proper, thus avoiding any questioning on guilt or innocence. As seen earlier, an accused has no right to the privilege during the voir dire.[169]

It may be argued that there is no compulsion in the strict sense, as it is the accused's choice whether to give evidence on the voir dire. However, the accused is compelled in so far as they can almost never make an effective challenge without giving evidence themselves.[170] Even if not treated as compulsory, the accused ought not to be prejudiced in his or her right not to give evidence on the main issue as to guilt by a decision to give evidence in a subsidiary inquiry.[171] The alternative to the accused incriminating him or herself is perjury. Unless a cynical view is taken, a judicial approach that allows questioning as to truth is a 'plain incitement to perjury'.[172]

Finally, a consideration not often addressed is that of forensic disadvantage to the defendant's case. Answers given in cross-examination on the voir dire may be decisive as to whether the accused will elect to testify at the trial proper, particularly in light of the fact that prior inconsistencies from the voir dire may be put to the accused.[173] Against this is the policy that an accused should not be allowed to give false evidence by giving one testimony on the voir dire and another in the presence of the jury. However, of greater concern is the impact on the conduct of the defence, in light of ethical principles binding defence counsel once they hear their client's admission of guilt.[174]

[167] *DeClerq v R* (1968) 70 DLR (2d) 530, 548-9 (Hall J); Grimaud, above n 34, 563.

[168] *Petty v R* (1991) 173 CLR 95.

[169] Above n 41, *contra* s 189(6) of the *Evidence Act 1995* (Cth).

[170] *R v Brophy* [1982] AC 476, 481 (Lord Fraser).

[171] *Frijaf v R* [1982] WAR 128, 144 (Wallace J) citing Hall J in *DeClerq v R* (1968) 70 DLR (2d) 530.

[172] Neasey, above n 38, 113.

[173] See above discussion on 'Subsequent Use'.

[174] J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (1995) 228-31.

Absolute vs Discretionary Exclusion

Of the above matters, the most weighty consideration is that of undermining the accused's right not to incriminate oneself. Does this, of itself or in conjunction with the other policy considerations, warrant a prohibition on questioning as to the truth of the confession, as adopted by the majority in *Wong Kam-ming*? The prohibition approach has limited support.[175] Adopting an analogy with the prohibition on subsequent use, it could be asserted that the right of the accused to give evidence at the voir dire without undermining his or her privilege against self-incrimination is absolute and not to be made conditional on an exercise of judicial discretion.[176]

However, a discretion to exclude such questions has more judicial support.[177] The basis of the discretion to exclude could be either a discretion to control cross-examination on credit (statutory or general law),[178] or the discretion to exclude evidence which, although technically admissible, would operate unfairly to the accused.[179] Unfairness, in this context, is strictly construed to mean placing the accused at risk of being improperly convicted. As subsequent use of the accused's testimony at trial has been essentially prohibited, it is difficult to see how any of the above policy considerations would satisfy this criteria.[180] Furthermore, it must be noted that the call for exercise of this discretion is occurring in the absence of the jury. The only possibility of improper conviction would arise if the challenged confession was admitted as a result of the knowledge of truth improperly operating on the trial judge's mind. Consequently, there is some doubt whether the exercise of the discretion during the voir dire would be justified at law.[181]

Perhaps in those jurisdictions where prior inconsistent statements go to the issues as well as to credit, an argument could be founded dur-

[175] *DeClerq v R* (1968) 70 DLR (2d) 530, 550 (Hall J), 554 (Pigeon J).

[176] *Brophy v R* [1982] AC 476, 483 (Lord Fraser).

[177] *DeClerq v R* (1968) 70 DLR (2d) 530, 535 (Cartwright CJC); *R v Toomey* [1969] Tas SR 99, 105 (Neasey J); *R v Post and Georgee* [1982] Qd R 495, 497-8 (Macrossan J); *R v Wright* [1969] SASR 256, 264-6 (Bray J).

[178] *R v Wright* [1969] SASR 256, 259 (Bray J).

[179] *Noor Mohamed v R* [1949] AC 182.

[180] *R v Wright* [1969] SASR 256, 271(Chamberlain J).

[181] Neasey, above n 38, 114.

ing the trial proper that the evidence should be excluded, as it is of little probative weight but is extremely prejudicial.[182]

In practical terms, a prohibition approach has many advantages. It avoids all of the difficulties and anomalies that the above considerations raise. It also would ensure trials are not protracted by pursuit of collateral issues such as the credit of the accused. A rule of law also avoids the limitations confronted by an appellate court when reviewing an exercise of discretion,[183] and the speculation as to the force the knowledge of truth carried with the trial judge. The High Court has shown a willingness to adopt a prohibition approach to enforce the privilege of self-incrimination and its related right to silence in the situation of pre-trial silence by prohibiting any suggestion by the Crown that an accused's exercise of the pre-trial right to silence provides a basis for inferring consciousness of guilt.[184] If the High Court were to accept that questions as to the truth of a confession on the voir dire undermine the accused's privilege against self-incrimination, it might also be disposed to prohibit such lines of questioning.

A further alternative that would directly resolve the issue would be statutory intervention giving the accused a privilege against self-incrimination on the voir dire or preliminary hearing.[185] This may have the disadvantage of hampering cross-examination by the Crown on legitimate and relevant lines of enquiry.

Conclusion

The voir dire is an important vehicle for the accused to challenge the admissibility of confessions. It also remains an important vehicle for the courts to ensure that the voluntariness rule and discretionary exclusions serve their purpose of only allowing into evidence confessions that are both reliable and not obtained at too high a price in terms of individual rights and bringing the justice system into disrepute. Allowing the accused to be questioned on the voir dire as to the truth of the disputed confession has the potential to undermine this function. It also has the potential of placing the accused at a forensic disadvantage and infringing the accused's privilege against self-incrimination. The High Court is likely to generally prohibit the

[182] *Evidence Act 1977* (Qld) s 101, *Evidence Act 1995* (Cth) s 60, *Evidence Act 1995* (NSW) s 60, *Evidence Act 2001* (Tas) s 60.

[183] *Australian Coal & Shale Employees Federation v Commonwealth* (1953) 94 CLR 621, 627 (Kitto J).

[184] *Petty v R* (1991) 173 CLR 95.

[185] *Evidence Act 1995* (Cth) s 189(6).

subsequent use of admissions of truth on the voir dire at the substantive trial. However, this only goes some way in addressing these concerns.

Judicial discretion to exclude such questioning on the voir dire would address these issues. However, there is some doubt that present authority would justify its application. The House of Lords' prohibition approach does have merit and can be supported by authority if a benevolent view is taken of the accused's privilege against self-incrimination. The alternate approach is to provide no special treatment to the accused in cross-examination on a voir dire. However, on this approach, the rules of evidence, particularly relevance and the finality of collateral issues rule, would need to be applied strictly.

The accused's basis of challenge needs to be carefully analysed in each case. There should be no assumptions of relevance between the truth of the confession and the issues for determination or the credit of the accused. As seen above, on the issue of voluntariness, truth is not relevant to the main fact in issue and will only be relevant to credit where the accused alleges falsity or concoction. The facts in issue when applying the fairness and public policy discretions are less clear. Arguably, truth is relevant to the main facts in issue. However, there needs to be more guidance by the High Court as to the primary rationale of the discretions, particularly the fairness discretion.

An approach that allows the issue of the confession's truth to be examined tends to blur the roles of the judge and jury. It also may lead to protracted trials if collateral issues are pursued. The courts would need to be vigilant that questioning as to truth of the confession on the voir dire did not become standard practice. This had been the situation immediately prior to *Wong Kam-ming*,[186] and may go some way in explaining the strict approach taken by the Privy Council majority.

[186] [1980] AC 247.