CITATION:	*Deacon v The Queen* [2019] NTCCA 21
PARTIES:	DEACON, Danny Jack v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 13 of 2016 (21459053)
DELIVERED:	11 October 2019
HEARING DATES:	8-9 February, 28 August 2017
JUDGMENT OF:	Grant CJ, Southwood J and Riley AJ

CATCHWORDS:

CRIME – Appeals – Appeal against conviction – Application for leave to appeal – Application for extension of time in which to seek leave

Whether admissions made to undercover police influenced by "oppressive conduct" – Mr Big operation – Application for leave to appeal dismissed.

Criminal Code 1983 (NT) s 410, s 417
Evidence (National Uniform Legislation) Act 2011 (NT) s 84, s 85, s 90, s 137, s 138, s 142, s 189
Police Administration Act 1978 (NT) s 140

Donai v R [2011] NSWCCA 173, *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299, *Higgins v The Queen* [2007] NSWCCA 56, *Ibrahim v The King* [1914] AC 599, *Lauchlan v State of Western Australia* [2008] WASCA 227, *McDermott v The King* (1948) 76 CLR 501, *R v Baldry* (1852) 169 ER

568, *R v Cowan* (2013) 237 A Crim R 388, *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* [2015] QCA 87, *R v Deacon (Ruling No 1)* [2016] NTSC 30, *R v Fulling* [1987] QB 426, *R v Hart* [2014] 2 SCR 544, *R v Heffernan; R v Peters* (Unreported, NSW Court of Criminal Appeal, 16 June 1998), *R v Helmhout (No 2)* [2000] NSWSC 225, *R v Jelicic* [2016] SASC 57, *R v JF* [2009] ACTSC 104, *R v Karakas (Ruling No 1)* [2009] VSC 480, *R v LL* (Unreported, NSW Supreme Court, 1 April 1996), *R v Simmons; R v Moore (No 2)* [2015] NSWSC 143, *R v Sumpton* [2014] NSWSC 1432, *R v Swaffield* (1998) 192 CLR 159, *R v Tang* [2010] VSC 578, *R v Taylor* [2016] QSC 116, *R v Ul-Haque* (2007) 177 A Crim R 348, *R v Weaven (Ruling No 1)* [2011] VSC 442, *R v Ye Zhang* [2000] NSWSC 1099, *Re Proulx* [2001] 1 All ER 57, *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546, *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396, *Weaven v The Queen* [2018] VSCA 127, referred to.

Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985)
Greg Taylor, "The Difference Between ss 84 and 85 of the Uniform Evidence Acts" (2019) 93 *Australian Law Journal* 53
Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 11th ed, 2014)

REPRESENTATION:

Counsel:

Appellant:	JCA Tippett QC
Respondent	WJ Karczewski QC, Director of Public Prosecutions, with M Chalmers

Solicitors:

Appellant:	Maleys
Respondent	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	46

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Deacon v The Queen [2019] NTCCA 21
No. CA 13 of 2016 (21459053)

BETWEEN:

DANNY JACK DEACON
Applicant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD J and RILEY AJ

REASONS FOR JUDGMENT

(Delivered 11 October 2019)

THE COURT:

[1] This is an application for an extension of time to apply for leave to appeal against a finding of guilt on a ground that involves a question of mixed law and fact.[1] The contention is that certain admissions made by the applicant to undercover police should not have been admitted into evidence at the trial on the basis that the trial court could not have been satisfied that they were not influenced by "oppressive conduct" within the meaning of s 84 of the *Evidence (National Uniform Legislation) Act 2011* (NT) (***ENULA***).

1 *Criminal Code 1983* (NT) (***Criminal Code***), ss 410(b), 417.

Procedural history

[2] On 24 September 2015, the applicant pleaded not guilty to an *ex officio* indictment charging him with the murder of his *de facto* partner (**the deceased**) contrary to s 156 of the *Criminal Code*.

[3] Prior to the empanelment of the jury, a *voir dire* hearing was conducted over 15 days in May 2016. The purpose of the hearing was to determine the admissibility of admissions made by the respondent in December 2014, first to undercover police officers and subsequently during the course of an electronically recorded interview with police. The trial judge ruled that the admissions were admissible.[2]

[4] The trial proceeded before the jury between 10 August and 9 September 2016. During the course of the trial the applicant gave evidence in which he admitted killing the deceased but asserted he had done so under provocation.[3] At the commencement of his closing address to the jury, senior counsel for the applicant framed the defence case in the following terms:

> On 18 June 2013, Mr Deacon hit his partner to the side of the head and she fell down and hit her head very hard on concrete. He then choked her. He killed her. He committed a crime and I expect, as the community would, [you] to convict him of the crime he committed. He will be – he would expect and you would expect

2 *R v Deacon (Ruling No 1)* [2016] NTSC 30.

3 Section 158 of the *Criminal Code* provides a partial defence of provocation to the offence of murder. In circumstances where the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased, and the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased, a defendant liable to be convicted of murder must be convicted of manslaughter instead.

> and the community would expect him to be severely punished for that crime.
>
> But the crime in this case is not murder; it's manslaughter. And there's a reason for that, ladies and gentlemen. You see, an intentional killing that is done under provocation is not murder; it is manslaughter. It's a law that's been recognised for hundreds of years. It's a law that is about us; about the frailty of us. It recognises that in a moment, regardless of the feelings we may have had before, regardless of who we are, the fact is that in a moment we can do something because of a severe loss of self-control because of rage. Emotions pour out of us like a river, like a dam breaking, and we strike out, not with a weapon, with a fist.

[5] On 9 September 2016, the applicant was found guilty of murder by majority verdict.

[6] On 16 September 2016, the trial judge formally convicted the applicant. Upon conviction the applicant became liable to mandatory imprisonment for life.[4] A non-parole period of 21 years and six months was fixed,[5] backdated to the time of the applicant's arrest on 19 December 2014.

[7] On 7 December 2016, the applicant filed a notice of appeal, an application for leave to appeal,[6] and an application for an extension of time within which to bring that application for leave.[7]

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4 *Criminal Code*, s 157.

5 *Sentencing Act 1995* (NT), s 53A(1)(a), (4).

6 A person found guilty on indictment may appeal to the Court of Criminal Appeal with the leave of the Court against the finding of guilt on any ground that involves a question of mixed law and fact: *Criminal Code* s 410(b).

7 Any person found guilty desiring to obtain the leave of the Court to appeal from any finding of guilt is required to give notice of application for leave to appeal within 28 days after the date of such finding of guilt, and the time within which notice of an application for leave to appeal may be given may be extended at any time by the Court: *Criminal Code*, s 417.

[8] The respondent does not take issue with the late filing of the application for leave on the basis that it has suffered any prejudice as a result. Rather, the respondent's position is that the application for leave to appeal is not attended by sufficient prospects of success to warrant an extension of time.

The context in which the admissions were made

[9] Following the deceased's disappearance on 18 June 2013, the applicant told police that she had walked out on him following an argument and that he had not seen her again. Over successive interviews with police the applicant maintained that he had no involvement with her disappearance. At one point he went to the extent of suggesting that the deceased may have tried to set him up to make it look like he had murdered her.[8]

[10] Police subsequently conducted an undercover operation against the applicant using what is colloquially referred to as the "Mr Big" methodology. The use of this methodology is typically reserved for murder investigations where traditional investigative techniques have reached an impasse. The technique involves creating a fictitious crime group comprised of covert police operatives and luring the target into the group. The group members form social bonds with the target and gain his or her confidence through the inclusion of the target in a

8 Transcript of recorded conversation of 8 May 2014, annexure 'A' to the statutory declaration of Martin John Dole declared 11 February 2015, p 4/24; adopted by the applicant in his EROI, 22 December 2014, transcript pp 144-149.

criminal enterprise relationship. The basic premise of the methodology is that suspects are likely to incriminate themselves if there is a perceived benefit for them and they feel safe doing so.

The *voir dire* hearing

[11] The course of the operation is described at some length in the ruling on the *voir dire*.[9] The findings of fact made by the trial judge can be summarised as follows. In August 2014, undercover police officers made contact with the applicant using a subterfuge. One undercover operative in particular established a rapport with the applicant and befriended him. Over the following month the undercover operatives gained the applicant's confidence to the extent that he started to participate in the activities of the fictitious criminal group.

[12] From that point up to 16 December 2014 the applicant participated in a total of 33 tasks or scenarios which were purportedly to test his commitment to the group. Most of those scenarios involved fictitious criminal activity designed to make the applicant think he was participating in a criminal enterprise. The applicant received cash payments for his involvement to foster that belief. There was in fact no illegal activity. The applicant's role in the scenarios largely involved picking up and counting money or acting as a lookout, although his involvement was increased over time to make him feel

9 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [9]-[19].

more connected to the group. Over the course of October 2014 he received seven payments, each of $200. Over the course of November 2014 he received seven payments of $200, three payments of $250 and one payment of $500. In December 2014 he received one payment of $50, five payments of $200, one payment of $400 and one payment of $600, as well as travel and other benefits. The money paid to the applicant operated as both a positive reinforcement of his bond with the group and an incentive to continue to participate.

[13] The discussions and activities in these scenarios were designed to make the applicant believe that the group had power by reason of its links to corrupt law enforcement officers; and, in particular, the power to destroy incriminating evidence. The applicant was told that in order to be accepted within the group he would require the approval of a fictitious crime boss, who expected trust, loyalty and honesty from group members. To that end, on 17 December 2014 the applicant met with the "boss" in a room at a Perth hotel. The "boss" was also an undercover operative and the controller of the police operation. The meeting was the culmination of hundreds of hours of artifice, deceit and the contrived criminal interactions already described. The objective of the meeting from the applicant's perspective was to obtain the boss's approval to participate in two upcoming jobs. The objective of the meeting from the police perspective was to have the applicant

make truthful admissions to the crime and to obtain evidence to corroborate those admissions.

[14] Having made those findings of general fact and context, the trial judge then went on to extract and carefully analyse the conversation leading to the first admissions.[10] During the course of the meeting the "boss" told the applicant that the group was professional, careful and well-connected. The "boss" told the applicant that on joining the group he would be provided with a new vehicle selected by him. He told the applicant that he wanted him on the team, but needed to get the "shit up in Darwin" sorted out lest it adversely affect the group's activities. He told the applicant that he should leave if he did not want to talk about the issue. The applicant indicated his preparedness to discuss the matter. The "boss" then invited the applicant to tell him "the story".

[15] The applicant initially maintained the general account he had given police during the course of previous interviews conducted in Darwin. The "boss" then emphasised the importance of trust, loyalty and honesty within the group, and assured the applicant that every now and then members had problems that "we have to get sorted". He advised the applicant that on the basis of information received from a fictitious corrupt police informant in Darwin the applicant had a problem that needed to be sorted out before he could participate in any further

10 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [28]-[48].

activities with the group. The “boss” also said words to the effect that it was important for the applicant to eliminate his exposure to criminal liability because his son needed a father. Later in the conversation the “boss” came back to that issue and reminded the applicant that if he was incarcerated his son would be left without a father.

[16] The applicant then sought to determine from the “boss” whether police knew if the deceased was dead. Once the applicant had ascertained that no body had been found, he apparently saw no reason to confess to the “boss”. The “boss” persisted with the notion that police would continue pursuing the applicant with the potential to cause problems for the group. The applicant maintained his position, and suggested that the deceased had taken money from the business and was likely living somewhere in Asia. The “boss” then sought to assert his authority as leader of the group and insisted that the applicant tell him the story so the matter could be addressed and the applicant’s involvement in the group could move forward. The “boss” utilised an interview technique known as “minimization”, by which he sought to devalue the deceased and other women in order to establish a common bond of misogyny with the applicant and to demonstrate a lack of moral concern about the circumstances in which the deceased might have gone missing.

[17] The applicant volunteered that he knew how to dispose of a body, but would not be drawn in relation to the deceased. The “boss” persisted

with the line that a number of lucrative jobs were on hold pending the resolution of the applicant's circumstances, together with the assurance that he had the financial and other means to achieve that resolution. The applicant responded that police had no information or other basis on which to arrest him. The "boss" asserted that on his information police were coming after the applicant for murder. The applicant again made reference to the lack of a body and his purported belief that the deceased was overseas.

[18] The applicant then became suspicious and questioned whether the group and the meeting were a "set up". He reminded himself that he had only known the members of the group for some months and expressed the possibility that the "boss" was a police officer. The "boss" feigned anger at the suggestion and demanded that the applicant draw him a map of where the body was buried. The applicant then drew a map and stated that the deceased was buried at a depth of two metres in a hole he had dug with an excavator. The "boss" then questioned the applicant, during which the applicant made further admissions and expressed pride in his organisation and execution. The admissions made by the applicant during the course of the meeting were:

- that he killed the deceased at his concreting yard in Darwin;[11]

11 Transcript of conversation 17 December 2014 between the "boss" and the applicant at Room 601 Crown Hotel (**Crown Hotel transcript**), p 26.1.

- that he had punched the deceased to the head which caused her to lose consciousness, and he then "choked her out";[12]
- that he wrapped her body in plastic and tarpaulin before secreting her in the boot of her vehicle and leaving her there overnight;[13] and
- that the next morning, he buried the body of the deceased at a location where, about one month earlier, he had dug a hole using his excavator.[14]

[19] At that point the undercover operative who had formed the closest relationship with the applicant joined the meeting to bring it to a conclusion, and took the applicant to lunch at a different hotel. The applicant subsequently returned to Darwin and on the following evening took a number of covert operatives, whom he still understood to be members of the criminal group, to the site where the deceased was buried in the Darwin rural area. He was arrested by police on 19 December 2014 and during the course of a formal police interview on 23 December 2014 confessed to killing the deceased.

[20] The applicant did not give evidence during the course of the *voir dire* hearing. Based on the recordings of his conversations with the undercover operatives, and the subsequent formal interviews with

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12 Crown Hotel transcript, pp 26.8, 32.2.

13 Crown Hotel transcript, p 26.7.

14 Crown Hotel transcript, pp 25.4, 29.5.

police, the trial judge made findings in relation to the factors which influenced the applicant's decision to confess to the fictitious crime boss.[15]

[21] First, although the applicant considered the risk that the deceased's body would be found by police to be low, his conversation with the crime boss had created some level of doubt in his mind. He perceived the group as having the necessary resources and contacts to eliminate that risk and the dire consequences which it potentially presented to him.

[22] Secondly, the applicant considered that if the risk was eliminated there would be no obstacle to him becoming a member of a criminal organisation which he held in high regard and which had the potential to be a relatively lucrative involvement. The applicant had a strong financial motivation.

[23] Thirdly, the applicant was sufficiently reassured that the "boss" was who he represented himself to be by his feigned anger at the suggestion he was a police officer, and that it was therefore both safe and in the applicant's interests to make the disclosure. In that calculus, the applicant also considered that making a truthful disclosure to the "boss" was necessary both to appease him and to establish the applicant's honesty and trustworthiness within the organisation.

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15 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [60]-[65].

[24] Senior counsel for the applicant does not seek to impugn any particular aspect of those findings of fact. The applicant's primary contention is that the trial judge erred in the application of the legal standard of "oppressive conduct" to those facts. There are a number of features of the operation which must be recognised before going on to assess whether it was oppressive in the relevant sense.

[25] First, the applicant was regularly told that he could cease his involvement at any time. He consistently indicated a willingness to be involved and voluntarily participated in the activities associated with each scenario. During the course of the meeting with the "boss", the applicant was given opportunity to leave the meeting without discussing the circumstances of the deceased's disappearance. During the course of his evidence at the hearing of the *voir dire*, the undercover operative who played the role of the boss accepted that his behaviour at and leading up to the point at which he feigned anger may have appeared intimidatory, and that it was directed to establishing his position of authority and power within the fictitious organisation. After a careful consideration of the audiovisual record of that meeting, the trial judge was unable to discern any objective evidence to suggest that the applicant apprehended a physical threat. Although it was made plain that a failure to disclose his involvement in the death of the deceased would preclude his participation in the potentially lucrative

future jobs, and perhaps in the organisation altogether, that was the extent of any coercion.

[26] Secondly, during the meeting with the "boss" the applicant did not consider himself to be a suspect under interrogation by a person in lawful authority. Although the applicant entertained and probably continued to harbour at least some residual suspicion that the scenario might be a "set up", the context was not one in which the applicant was, or considered himself to be, detained by an investigating official determining whether there was sufficient evidence to establish that he had committed an offence, and who had the power to arrest him on that basis.

[27] Thirdly, this is not a case in which there can be any suggestion that the applicant made a false or unreliable confession in reward for potential financial gain or in response to some threat. Not only did the applicant make a confession, he also led the covert operatives to the site of the deceased's remains and subsequently gave evidence at trial that he had killed her under provocation.

Violent, oppressive, inhuman or degrading conduct

[28] The applicant's draft Notice of Appeal which was filed with the applications for leave and an extension of time includes as a ground that the trial judge erred in the application of ss 84, 137 and 138 of the *ENULA*. No submission was made during the course of the *voir dire*

hearing in relation to ss 137 and 138 of the *ENULA*, and nor are those matters considered in the *voir dire* ruling. Despite the content of the draft Notice of Appeal, no reliance was placed on ss 137 and 138 of the *ENULA* as the matter was argued in this Court in the hearing of the applications for leave and an extension of time. The issues for determination arise solely from the provisions of s 84 of the *ENULA*.

[29] Section 84 of the *ENULA* relevantly provides:

> **Exclusion of admissions influenced by violence and certain other conduct**
>
> (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
>
> (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
>
> (b) a threat of conduct of that kind.
>
> (2) …

[30] The Australian Law Reform Commission (**ALRC**) proposal on which the provision is based was directed to the prohibition of techniques "likely to substantially impair the mental freedom of a suspect" with the result that "an admission made subsequent to such conduct may be untrue".[16] However, the operation of the provision is not in its terms contingent on the party against whom the evidence is adduced

16 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) [765].

establishing that the admission was involuntary or is unreliable.[17] Once the issue is raised in proceedings, the onus is on the party seeking to adduce the evidence to establish on the balance of probabilities[18] that the admission and its making were "not influenced by" proscribed conduct.[19] It is not enough to establish that the party's will was not overborne;[20] or to establish voluntariness or reliability, although those qualities may be put at risk by the conduct proscribed.[21]

[31] This operation reflects the ALRC criticism of voluntariness as a test on the ground that there were no tools to ascertain the extent to which any particular individual's capacity for choice has been impaired or will overborne.[22] Sections 84, 85, 90 and 138 of the *ENULA* have in varying aspects and with differing focus replaced the common law requirement of voluntariness. Section 84, unlike s 85, is not limited to admissions made to an investigating official or as a result of an act of a person in authority, and is unconcerned with whether the truth of the admission was adversely affected.

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17 In addition, *ENULA*, s 189(3) provides that in the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

18 *ENULA*, s 142(1).

19 *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34; 76 NSWLR 299 at [273].

20 *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299 at [237], *R v Ul-Haque* [2007] NSWSC 1251; 177 A Crim R 348 at [119]; *R v JF* [2009] ACTSC 104 at [33].

21 *R v JF* [2009] ACTSC 104 at [33]. For this reason, s 84 of the *ENULA* has been described as having a deontological purpose directed to the protection of a suspect's basic rights, rather than a teleological purpose directed to the rejection of admissions which might be unreliable (*ENULA*, s 85) or a purpose directed to avoiding the contamination of court processes by unfairness (*ENULA*, s 90): see Greg Taylor, "The Difference Between ss 84 and 85 of the Uniform Evidence Acts" (2019) 93 *Australian Law Journal* 53.

22 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985), [372]-[374].

[32] Section 84 will operate where the party seeking to adduce the admission cannot establish that it was "not influenced by" the proscribed conduct. That connotes a causal relationship between the making of the admission and the conduct which has been described as "not a stringent test"[23], and which does not require that conduct to be the sole factor which influenced the making of the admission.[24] It is not in dispute that the conduct of the covert operatives influenced the applicant in the making of the admissions. However, a distinction is properly drawn between admissions made as the consequence of perceived psychological pressure which is a response to an individual's predicament, and those which are the product of oppressive conduct.[25]

[33] The applicant does not suggest that undercover police engaged in violent, inhuman or degrading conduct within the meaning of the provision. The contention is that the conduct was "oppressive".[26] Neither that term nor any of the other species of conduct referred to in s 84(1) are defined in the *ENULA*. The New South Wales Court of Appeal considered the scope of that term in *Habib v Nationwide News Pty Ltd*.[27] The Court observed that the dictionary definition of

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23 *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299 at [239]-[240]; *R v Ye Zhang* [2000] NSWSC 1099 at [44].

24 *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299 at [280]; *R v Ye Zhang* [2000] NSWSC 1099 at [44]; *R v JF* [2009] ACTSC 104 at [33].

25 *R v Tang* [2010] VSC 578 at [25].

26 All violent, inhuman or degrading conduct is oppressive, but not all oppressive conduct is violent, inhuman or degrading: see Greg Taylor, "The Difference Between ss 84 and 85 of the Uniform Evidence Acts" (2019) 93 ALJ 53 at 55-56.

27 *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299 at [245]-[251].

"oppressive" included "burdensome, unjustly harsh … causing discomfort because uncomfortably great, intense"; and that the term "oppression" was defined as "the exercise of authority or power in a burdensome, cruel or unjust manner".[28] The concept of "authority" in this context necessarily extends to the exercise of *de facto* authority, control and power in an oppressive manner even where it emanates from a non-official source. Oppressive conduct is not limited to physical conduct, and extends to encompass mental and psychological pressure.[29] The assumption of unlawful powers of direction, control and detention may also amount to oppression in the relevant sense.[30] In making that assessment, however, it is necessary to bear in mind that the term "oppressive" is to be read *eujsdem generis* with the other terms in s 84(1)(a),[31] and is not to be given an overly expansive interpretation.[32]

[34] Having regard to the legislative history and purpose described above, the concept of "oppressive conduct" is not to be equated with "oppression" under the common law rules relating to voluntariness.[33]

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28 See also *R v Fulling* [1987] QB 426 at 432; *Re Proulx* [2001] 1 All ER 57 at 80.

29 *Higgins v The Queen* [2007] NSWCCA 56.

30 *R v Ul-Haque* (2007) 177 A Crim R 348.

31 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 11th ed, 2014), [1.3.5020].

32 *R v Heffernan; R v Peters* (Unreported, New South Wales Court of Criminal Appeal, 16 June 1998).

33 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 11th ed, 2014), [1.3.5020]; *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299 at [181]-[195].That distinction notwithstanding, there will be circumstances in which conduct which would constitute "oppression" at common law will also constitute "oppressive conduct" within the meaning of s 84 of the *ENULA*: see, for example, *R v LL* (Unreported, NSW Supreme Court, 1 April 1996).

As Dixon J explained in *McDermott v The King*[34], the determination whether a confessional statement should be excluded on the basis of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure will depend on whether the nature of the questioning had the effect that the confession (or admission) was not voluntary. The operation of the term "oppressive" in s 84 of the *ENULA* is directed to the conduct rather than the result, and has more in common with s 76 of the *Police and Criminal Evidence Act 1984* (UK), which excludes admissions obtained by "oppression" defined to include "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)".[35]

[35] In *Tofilau v R* (***Tofilau***)[36], the High Court considered four appeals involving circumstances similar to those presenting in this appeal, in that each of the appellants had been tricked into confessing by undercover police officers posing as criminals. The scenarios were summarised generically by Gummow and Hayne JJ in terms which disclose a remarkable equivalence with the operation conducted in relation to the applicant in this appeal:[37]

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34 *McDermott v The King* (1948) 76 CLR 501 at 515.

35 The developments in case law and the Judges' Rules leading to the enactment of the provision are described in "The Difference Between ss 84 and 85 of the Uniform Evidence Acts" (2019) 93 *Australian Law Journal* 53 at 57-58.

36 *Tofilau v R; Marks v R; Hill v R; Clarke v R* [2007] HCA 39; 231 CLR 396.

37 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [26].

> Undercover police, posing as criminals, tell a murder suspect that, to join their gang and profit from their activities, he must tell their boss the truth about his involvement in the murder. They tell him that, if he does that, the boss can and will make any problems "go away". The undercover police play out various scenarios designed to show the suspect how successful and powerful they are as criminals. Any initial protestations of innocence by the suspect are met with insistence upon the need to tell the truth because charging and conviction are inevitable if the gang's help is rejected.

[36] The admissibility of the confessions under consideration in *Tofilau* was governed by the common law rather than the uniform evidence legislation. The appellants argued that the confessions were caught by the mandatory rule excluding confessional statements if induced by fear of prejudice or hope of advantage exercised or held out by a person in authority;[38] or in the alternative that the confessions were the result of duress or coercion in the more general sense described in *McDermott v The King*.[39] Some of the appellants argued in addition that even if voluntary, the confessions were properly excluded on the basis that it would be unfair to admit statements made in consequence of a breach of the rights and privileges of an accused, or because the police conduct was improper and the admission of the statements was therefore unacceptable on public policy grounds.[40]

[37] Justices Callinan, Heydon and Crennan described the similarity between s 84 of the *ENULA* and the United Kingdom legislation, and

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38 *Ibrahim v The King* [1914] AC 599 at 609.

39 *McDermott v The King* (1948) 76 CLR 501 at 511.

40 *R v Swaffield* (1998) 192 CLR 159 at 189 per Toohey, Gaudron and Gummow JJ.

certain differences between the common law rules of admissibility and the scheme of the uniform evidence legislation:[41]

> … In England the equivalent to ss 84 and 85 is s 76 of the *Police and Criminal Evidence Act 1984*. Confessions may be excluded if obtained by oppression (ie torture, inhuman or degrading treatment, and the use or threat of violence, whether or not amounting to torture): s 76(2)(a) and (8). Confessions may also be excluded if obtained in consequence of anything said or done which was likely to render unreliable any confession: s 76(2)(b). To modify the inducement rule as the appellants wish would be to take a step favourable to the interests of defendants generally. But that was not the way the legislatures, accepting the advice of expert law reform bodies, chose to act. They got rid of the "person in authority" requirement, but also made changes hostile to the interests of defendants generally by emphatically reversing the trend which *R v Baldry* had criticised, checked, but not reversed …

[38] The criticism made by the House of Lords in *R v Baldry*[42] was that the case law surrounding inducement had developed such that very vague observations made by persons in authority, and sometimes what were effectively warnings against self-incrimination, had been held to amount to a threat or promise. The reference in the passage extracted above to the "person in authority" requirement recognised that in order for the appellants in *Tofilau* to succeed on the ground of inducement the common law rule would have to be extended to undercover police officers not ostensibly exercising the state's coercive authority. The point made by Callinan, Heydon and Crennan JJ was that while s 84 of the uniform evidence legislation had removed the "person in authority"

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41 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [322(d)].

42 *R v Baldry* (1852) 2 Den 430 [169 ER 568].

requirement, the companion to that removal was that an admission was only to be excluded if influenced by violent, oppressive, inhuman or degrading conduct, or the threat of conduct of that kind.

[39] Having rejected the appellants' invitation to modify the common law inducement rule, their Honours stated *obiter dicta*:[43]

> Nor is there any injustice to the present appellants in not taking this step: it is highly unlikely that the appellants' confessions would have been excluded under ss 84 or 85 if those provisions had been in force in Victoria, since the conduct of the operatives was not violent, oppressive, inhuman or degrading within the meaning of s 84, and since, on the findings of the trial judges, it was unlikely that the truth of the admissions was affected by that conduct within the meaning of s 85.

[40] Justices Callinan, Heydon and Crennan went on to make a number of observations about the character of the police investigation. In response to the submission that the operations had denied the appellants' rights, their Honours drew attention to the fact that the statutory provisions protecting the rights of subjects under interrogation did not apply to the undercover police. In addition, the appellants were not in custody and the police were not exercising coercive powers which attracted any statutory or other duty to inform the person that he did not have to say anything but that anything he did say or do may be given in evidence.[44] The same observation concerning custody may be made in the present case in relation to the

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43 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [322(d)].

44 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [341]-[342].

relevant provisions of the *ENULA* and the *Police Administration Act 1978* (NT).[45]

[41] In rejecting a submission that police had engaged in the functional equivalent of interrogation by improper means in order to infringe the appellants' right to silence, Callinan, Heydon and Crennan JJ stated:[46]

> … The police officers committed no crimes or civil wrongs or other illegalities. They had the benefit of statutory exemption from various aspects of the regime protecting suspects under interrogation. They were investigating four murders in relation to which more conventional methods had not yielded useful results. One of those murders had taken place 20 years earlier. In the circumstances, the means employed, while deceitful, cannot be described as "improper". Nor, unless police officers are to be forbidden from addressing questions to anyone whom they later charge, or at least from relying on the answers, can what happened be described as an impermissible interference with the right to silence.

[42] In rejecting a submission that the appellants had been subjected to duress of a type which would have afforded a defence to a criminal charge, Callinan, Heydon and Crennan JJ stated:[47]

> … There is no analogy between the present appellants and persons who commit crimes under duress. To use Lord Simon of Glaisdale's language, their intention to confess did not conflict with their wish not to do so. They intended to confess because they wished to. To use Professor Atiyah's language, the undercover police officers made no threats: they only offered the advantages of immunity from prosecution and a livelihood from the gang ...

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45 *ENULA*, s 139; *Police Administration Act 1978*, s 140.

46 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [359].

47 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [369].

[43] Finally, in rejecting a submission by one of the appellants that his confession should be excluded in the exercise of judicial discretion because police had used illegal or improper means, Callinan, Heydon and Crennan JJ stated:[48]

> The correctness of that submission must be evaluated against the following circumstances. The police had failed - and their failure was not said to be culpable - to collect sufficient evidence against Clarke to charge him. The crime being investigated was very serious. It had remained unsolved for 20 years. The scenario technique was one which had been in use for a long time in Canada, and had been approved by the Canadian courts. It was not embarked on as an unthinking frolic by junior officers. It had been deliberately selected by the superiors of those involved in the light of Canadian experience. No alternative was available if the investigation was to continue. It was reasonable for the police to seek to employ this technique, new in Australia, in carrying out their important duty to investigate an old crime. The technique was employed in a discriminating way, with considerable care being taken to avoid illegality. No doubt psychological pressure was built up, but conventional police interrogation of the most proper kind naturally involves pressure. Counsel submitted that the process was "designed to circumvent the [appellant's] right to silence". Clarke was in fact an experienced criminal who understood that he did not have to answer anyone's questions. He had not claimed any right to silence when interviewed by non-undercover officers soon after the murder. He actively cooperated in the questioning by the undercover officers. The questioning took place in the course of a relationship which he entered freely, and did not exploit some pre-existing or collateral relationship. The interrogation elements in the conversations were patent, and consistent with the roles which he believed the undercover officers were occupying. He had not been charged, and there was no proper basis to charge him. There was no illegality and no breach of Police Standing Orders. Part III Div 1 Subdiv 30A of the *Crimes Act* did not apply. The failure of other investigative methods

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48 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [413]. In the subsequent case of *R v Cowan* (2013) 237 A Crim R 388, the Supreme Court of Queensland drew heavily on this passage in determining an application to have admissions or confessions made by the accused during a covert "scenario" operation excluded from evidence on the basis that the prosecution could not prove they were made voluntarily or, if they were made voluntarily, that it would be unfair to admit them in the case against the accused. The Court concluded both that the confessions were made voluntarily and that it would not be unfair to the accused to admit them into evidence.

> which made it necessary to conduct the undercover operation also made it necessary for a process of active "elicitation" to take place. The admissions eventually obtained formed a significant part of the prosecution case. The operatives stressed the need to tell the truth. The undercover officers did not prey upon any special characteristics of Clarke related to his gender, race, age, education or health. The means of elicitation were not so disproportionate to the problem confronting the police as to be inherently unfair or contrary to public policy.

[44] Chief Justice Gleeson also rejected the appellants' contentions that the confessions should be excluded. His Honour noted that "deception is a very common method of seeking to obtain confessions from people suspected of crime", and that a confession obtained by artifice, misrepresentation, breach of faith, or other underhand means will not render it inadmissible at common law.[49] In answer to the submission that the techniques adopted by the undercover police infringed the appellants' right to silence, Gleeson CJ stated:[50]

> … it must again be observed that many forms of undercover police activity, and of covert surveillance, involve attempts to gain information from people who, if they were aware of what was going on, would remain inactive or silent. There is a sense in which it can be said that intercepting a telephone conversation, or secretly recording an interview, always deprives a person of the opportunity to remain silent in circumstances where, if the person had realised that he or she was under observation, the person would have remained silent. That does not mean that there has been an infringement of one of the legal rules which together make up the right to silence. Nor does it mean that what is being said in the conversation is involuntary. The argument seems to equate the right to silence with a right of privacy, and to treat as involuntary any statement that is made without a fully-informed

49 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [18]. That observation was subject to the qualification that s 410 of the *Crimes Act 1900* (NSW) had previously excluded evidence of confessions induced by deliberately false representations made by persons in authority.

50 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [21].

appreciation of the possible consequences. Neither step is consistent with legal principle.

[45] Justices Gummow and Hayne also rejected the appeals. The conclusion drawn in relation to the first appellant is generally reflective of their Honours' reasoning in relation to all four appellants:[51]

> The statements the appellant made to undercover police officers were not made under compulsion. Nothing that was said to or done with the appellant constituted compulsion of a kind that would meet the criteria leading to the conclusion that what was said was not said voluntarily. There was no duress or intimidation. The police operation was elaborate and took place over an extended period. The appellant thought that he would benefit from saying what he did. More than once the appellant was told how important it was that he be frank about his past and about the circumstances of Ms Romeo's death in particular. He was repeatedly told that if he had a problem the boss would make it "go away". But no coercion was applied to the appellant by those to whom he made his confession. There was no importunity, insistence or pressure of a kind exerted by those to whom the confession was made that would found the conclusion that the appellant had no free choice whether to speak or stay silent. Observing that the appellant may have felt under pressure requires no different conclusion. What is important is the absence of coercion by those to whom he spoke. That he may have felt under the pressure that he himself generated by his desire to join the gang and thus gain not only the financial benefits said to follow from that membership but also resolution of what otherwise appeared to be his inevitable prosecution for murder is not to the point.

[46] Their Honours' references to "duress or intimidation" and "importunity, insistence or pressure" pick up Dixon J's formulation of oppression at common law from *McDermott v The King*[52]. That formulation was directed to what has come to be termed "basal

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51 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [81].

52 *McDermott v The King* (1948) 76 CLR 501 at 511.

voluntariness" at common law, but it is unlikely that conduct which does not rise even to that level could, without more, reasonably be characterised as "oppressive conduct" within the meaning of s 84 of the *ENULA*.

[47] In relation to an allegation of police impropriety, Gummow and Hayne JJ stated:[53]

> … the appellant sought to describe the methods employed by investigating police as "improper". That description was given colour and, perhaps, some content, by reference to the playing out of what appeared to be serious criminal activity. But in fact, no crime was committed in the course of the various scenarios conducted by the covert police operatives. The "impropriety" to which the appellant pointed was, in the end, said to lie in the "pressure" that had been applied to him. That "pressure" was constituted by creating in his mind the belief that the only way he could avoid being charged with and convicted of the murder of Bonnie Clarke was to tell the "boss" that he had done it.

[48] Only Kirby J found that the confession should be excluded. That finding was made on two bases. The first was that under the scenarios which had been created, the undercover officers were properly characterised as "persons in authority" for the purposes of the mandatory rule excluding confessional statements if induced by a person in authority.[54] That characterisation was rejected by the other members of the Court.[55] The second basis for Kirby J's determination was that in each case the will of the suspect was overborne by the

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53 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [113].

54 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [188]-[190].

55 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 per Gleeson CJ at [13]; per Gummow and Hayne JJ at [45], [79]; per Callinan, Heydon and Crennan JJ at [317]-[319].

tactics used to extract the confessional statements in a manner which rendered them involuntary.[56] Of importance in that finding was the conclusion that the deception targeted what was described as "the suspect's fundamental legal right … to remain silent". As the passages extracted above make plain, that was also a conclusion rejected by the other members of the Court.[57]

[49] The preliminary question is whether police engaged in "oppressive conduct". Only if they are found to have done so does it become necessary to consider whether the admissions were influenced by that conduct.[58] As already described, that preliminary question resolves to whether the police conduct in this case was burdensome or unjustly harsh; whether it involved the exercise of authority in a cruel or unjust manner; whether the applicant was subjected to oppressive mental and psychological pressure; and/or whether police assumed unlawful powers of direction or control over the applicant.

[50] The observations by the members of the majority in *Tofilau* which are extracted above were directed to either inducement by a person in

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56 *Tofilau v R; Marks v R; Hill v R; Clarke v R* (2007) 231 CLR 396 at [204].

57 Following the decision in *Tofilau*, in *R v Karakas (Ruling No 1)* [2009] VSC 480 the Supreme Court of Victoria refused an application to exclude confessional evidence in the exercise of the discretion. The principal contention was that the confession was unreliable because of the circumstances in which it had been made. That matter also involved a covert investigation with police posing as members of a crime gang. The model was the same as that deployed in the present case, and involved the gang promising financial reward for the suspect's involvement, emphasising the importance of honesty, trust and loyalty, and creating an impression of power to "fix" things. A similar conclusion concerning a similar operation was reached by the Western Australian Court of Appeal in *Lauchlan v State of Western Australia* [2008] WASCA 227.

58 As noted above, it is not in dispute that the conduct of the covert operatives influence the applicant in making the admissions.

authority, basal voluntariness or discretionary exclusion at common law, and the process under s 84 of the *ENULA* involves a different test and does not involve the exercise of discretion. Those differences notwithstanding, parts of the analyses in *Tofilau* are concerned with the propriety and lawfulness of police conduct, the presence or absence of psychological duress and intimidation, and the circumstances in which a suspect's rights will be infringed. Those considerations properly inform the question whether police in the present case engaged in "oppressive conduct" in the relevant sense, although they are not determinative of the question.[59]

[51] The High Court has not had occasion to consider the admissibility under the uniform evidence legislation of confessional material obtained in this type of undercover operation, but the matter has arisen for determination in the superior courts in New South Wales and Victoria.

[52] In *R v Weaven (Ruling No 1)* (***Weaven***)[60], Weinberg JA rejected an application to exclude confessional evidence in the exercise of the discretions conferred by ss 90, 135, 137 and 138 of the *ENULA*.[61] That

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59 Senior counsel for the applicant in this matter appears to accept the relevance of the analyses in *Tofilau* to the determination in this matter. A principal plank of the applicant's submission is that this Court should adopt the reasoning of Kirby J in *Tofilau* in support of a finding that undercover police engaged in oppressive conduct.

60 *R v Weaven (Ruling No 1)* [2011] VSC 442.

61 An application for an extension of time within which to appeal against conviction on the basis of fresh evidence was subsequently refused by the Victorian Court of Appeal in *Weaven v The Queen* [2018] VSCA 127.

confession was made in a context similar to the present matter. Police commenced the covert operation approximately seven months after the stabbing of the victim. Over a period of three months the target took part in 17 different scenarios in which he believed that he was participating in the activities of an organised criminal gang, and that he was being groomed for possible membership of that gang. The accused was paid various amounts of money for his assistance in these "criminal" activities, and was led to believe that there was opportunity to earn a great deal more. Following that initial grooming period the target met a man whom he believed was the "Mr Big" of the organisation in a hotel room. He told the target that he was on the verge of being accepted as a member of the gang, but there was a problem because the target was a suspect in relation the victim's murder and the police investigation into that matter was continuing. "Mr Big" said that he could "fix" the problem, but only if the accused told him the entire truth about his involvement in the victim's death. He made it plain to the target that his membership of the gang was dependent upon him being completely truthful about that matter. The target then made a series of incriminating admissions.

[53] Having summarised the operation and dealt with the detail of the final conversation with "Mr Big", Weinberg JA stated:[62]

62 *R v Weaven (Ruling No 1)* [2011] VSC 442 at [26]-[35].

Although counsel did not seek to place any reliance upon either s 84 (exclusion of admissions influenced by, inter alia, oppressive conduct) or s 85 (exclusion of admissions made as a result of inducement by person reasonably believed to be capable of influencing decision whether prosecution of accused should be brought or continued), I gave consideration to whether the confessional evidence should be excluded on the basis of these provisions.

Section 85 plainly had no application to the facts of this case …

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As regards [s 84], I concluded that the confessional evidence had not been influenced by 'violent, oppressive, inhuman, or degrading conduct', or by any threat of conduct of that kind.

In approaching the matter in that way, I had regard to *Tofilau v The Queen* in which the High Court upheld the admissibility of confessional evidence obtained as a result of the 'scenario' investigative technique. That case, though decided under common law and not pursuant to the Act, makes it difficult to contend that the conduct of the covert operatives in the present case, which was essentially the same as that of the covert operatives in *Tofilau*, could be stigmatised in the way contemplated by s 84.

In *Tofilau*, it was held that, notwithstanding the inducements offered by the covert operatives to the accused to confess their criminal conduct, the admissions thereby procured were admissible, and had been properly received in evidence. One reason for that conclusion was that a covert operative was not, in any relevant sense, a 'person in authority'. At common law, only an inducement offered by a 'person in authority' would render a confession involuntary. Importantly, however, the High Court went further. It concluded that there was no basis for the exclusion of the confessional evidence in that case in the exercise of the 'unfairness discretion', as formulated in *R v Lee*.

I did not think, in the light of *Tofilau*, that the conduct of the police in carrying out the scenarios in the present case, as a prelude to Gary's questioning of the accused, could properly be stigmatised as 'oppressive'. Nor did I think that the manner of Gary's questioning could be viewed in that way. Had the High Court taken the view that the use of the scenario method was in any sense 'oppressive', it would presumably have upheld the challenge to the admissibility of the confessional evidence on the basis of the unfairness discretion. The fact that the High Court held that the unfairness discretion could not be invoked in *Tofilau* was, in my view, a powerful reason for holding that s 84 could not apply to the present case.

> It was presumably for these reasons that counsel for the accused did not seek to invoke s 84 in this case. He relied instead, as I have indicated, upon ss 90, 137, 135 and 138.

[54] The trial judge in the matter the subject of this application rightly approached that conclusion with some circumspection.[63] His Honour noted that in the exercise of the discretion to exclude confessional material at common law reliability and the seriousness of the crime are relevant considerations, and the chief focus is on the fairness of using the statement in court rather than the method by which it was obtained. However, for the reasons we have already given, we are of the opinion that parts of the analyses in *Tofilau* have significant force in the determination whether conduct of this nature may properly be characterised as "oppressive".

[55] Weinberg JA went on in *Weaven* to consider the exercise of the discretion under the other provisions of the *ENULA*. In determining that it would not be unfair within the meaning of s 90 to admit the evidence, Weinberg JA took into account a number of matters.[64] First, the means used to obtain the confession were not in themselves illegal or improper. Secondly, the mental and emotional state of the accused at the time he made the admissions was not such as to render it unfair to receive the evidence. Thirdly, there was nothing in the lead up to or

63 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [102]-[108].

64 *R v Weaven (Ruling No 1)* [2011] VSC 442 at [39]-[46].

method of the ultimate questioning which cast doubt on the reliability of the admissions.

[56] In the application of s 137 of the *ENULA*, Weinberg JA concluded that there was no real risk that the jury would misuse the evidence or give it more weight than it could properly bear, and that its probative value was not outweighed by the danger of unfair prejudice.[65] His Honour came to the same conclusion in the application of s 135 of the *ENULA*.[66] In the application of s 138 of the *ENULA*, Weinberg JA observed that the scenario technique itself was entirely legitimate, and the only possible impropriety was an alleged overstatement by "Mr Big" of the strength of the police case against the accused. His Honour found that if there was any impropriety in that respect it was neither grave nor deliberate, and was substantially outweighed by the matters militating in favour of the admission of the evidence under s 138(3).[67] His Honour's reluctance to find that there was any impropriety in the relevant sense is consistent with the approach described by Basten JA in *Robinson v Woolworths Ltd*.[68]

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65 *R v Weaven (Ruling No 1)* [2011] VSC 442 at [53]-[58].

66 *R v Weaven (Ruling No 1)* [2011] VSC 442 at [59]-[61].

67 *R v Weaven (Ruling No 1)* [2011] VSC 442 at [63]-[69].

68 *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23]. There, his Honour observed: "It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as 'the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement'. Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be 'quite inconsistent with' or 'clearly inconsistent with' those standards."

[57] A similar objection to the admissibility of inculpatory statements made in the context of a covert "scenario" operation was considered by the Supreme Court of New South Wales in *R v Simmons; R v Moore (No 2)*.[69] Again, the accused did not seek to invoke s 84 of the *ENULA*, but sought to have the confessional evidence excluded in the exercise of the discretions conferred by ss 90, 137 and 138. After making reference to *Tofilau*, and a raft of New South Wales and Victorian cases dealing with the extent to which an assessment of reliability and credibility informed the exercise of the discretions, the Court ruled that the statements were admissible but that those parts of the recordings disclosing previous criminal activities and other irrelevant and prejudicial material should be excluded.[70]

Consideration

[58] The assessment of the applicant's contentions is properly guided by the principles discussed in those authorities. As Peek J observed in *R v Jelicic*:[71]

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69 *R v Simmons; R v Moore (No 2)* [2015] NSWSC 143.

70 This exclusion was made in accordance with the decision in *Donai v R* [2011] NSWCCA 173. In that case, the New South Wales Court of Criminal Appeal considered a different issue involving an undercover operation in which a police officer posing as the boss of an organised criminal gang befriended the appellant. During the course of a conversation with the undercover operative, the appellant admitted having committed other crimes and expressed a willingness to commit further crimes. However, he made no admissions of an immediate involvement in the murders with which he was charged, and at trial denied any involvement in the killings. No point was taken by defence counsel concerning the admissibility of the evidence. The appeal was allowed on the basis that the admissions made to the undercover operative were not relevant to his prosecution for the subject offences, were not led as tendency evidence, were not admissible as context evidence, and irretrievably prejudiced the appellant's defence.

71 *R v Jelicic* [2016] SASC 57 at [16], with reference to *Tofilau*; *Lauchlan v Western Australia* [2008] WASCA 227; *R v Karakas (Ruling No 1)* [2009] VSC 480; *Donai v The Queen* [2011] NSWCCA 173; *R*

> Thus, while it is often said, in a general way, that little is to be gained from a comparison of the facts of one case with that of another, that observation may be less true in the case of *Mr Big* cases. By dint of the above processes, the ambit of objection to the admission of evidence derived from *Mr Big* operations conducted in Australia has tended to become more predictable. To at least some extent, a comparison may usefully be made of the different ways in which essentially the same operation was carried out in different Australian cases.

[59] Of course, it is not enough to say in a general sense that covert "scenario" operations do not constitute "oppressive conduct" requiring the exclusion of confessions or admissions made in the course of such operations.[72] It is necessary to give attention to the character and content of this particular operation, the context in which the admissions were made, and the applicant's personal characteristics and position in the matter.

[60] We turn first to consider the nature of the operation during its active phase in the lead up to the conversation with the "boss" and the making of the operative admissions. We agree with the trial judge's reasoning and conclusion that the operation was not conducted in a manner which created a coercive environment or infringed the applicant's rights and privileges so as to draw characterisation as "oppressive conduct". For the reasons described in *Tofilau*, the fact that the operation involved deception and trickery was neither unlawful nor unusual in the context

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v Weaven (Ruling No 1) [2011] VSC 442; *R v Cowan* (2013) 237 A Crim R 388; *R v Simmons; R v Moore (No 2)* [2015] NSWSC 143; *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* [2015] QCA 87.

72 See, for example, *R v Taylor* [2016] QSC 116 at [106]-[107].

of police investigative and information gathering techniques. The adoption of that methodology did not constitute the assumption of unlawful powers of direction or control over the applicant, or the exercise of authority in a cruel or unjust manner. There was no actual criminal activity or violence involved in any of the scenarios which formed part of the ruse. The applicant's participation in each of those scenarios was free and voluntary. So much was apparent from the fact that the applicant declined to participate in some of those activities due to other commitments.

[61] For reasons also described in *Tofilau,* it cannot be said that police used illegal or improper means or infringed the applicant's right to silence. Police were not exercising coercive powers which attracted the operation of s 139 of the *ENULA* or s 140 of the *Police Administration Act*. It is also relevant in that assessment that the applicant had not previously exercised his right to silence. He had spoken voluntarily and freely with police acting in an official capacity on a number of occasions, during which he maintained that the deceased had walked out on him following an argument and that he had no involvement with her disappearance. The making of those positive and wholly exculpatory statements was quite inconsistent with any intention to

maintain the right to silence or the privilege against self-incrimination.[73]

[62] There is nothing in the applicant's personal characteristics to suggest that he suffered from any vulnerability which made him susceptible to coercion or oppression. Having reviewed the recorded material received during the course of the *voir dire* the trial judge characterised him as "intelligent and careful".[74] There is no basis on which to impugn or question that characterisation. The applicant was an independent man of mature age with considerable life experience. He had been married twice and had lived in different parts of Australia working in various occupations requiring organisation and skill. He was running an active concreting business. He was not socially isolated from family or peers. The most that could be said, and what was found by the trial judge, was that by reason of ordinary human failings the applicant was attracted by the prospect of money, adventure and lifestyle.

[63] We turn then to applicant's conversation with the "boss" during which the operative admissions were made. As the trial judge observed, the applicant's life experience, personal background and employment history were also relevant considerations in assessing whether the

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73 See *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* [2015] QCA 87 at [135].

74 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [84].

circumstances and content of that conversation constituted "oppressive conduct".

[64] The trial judge analysed the conversation from the applicant's perspective according to his belief at the time.[75] He understood the "boss" to be the head of a powerful criminal organisation and a prospective employer, and himself to be the prospective employee. The "boss" said a number of things which led the applicant to believe that the organisation valued his skills and involvement. Although the "boss" held the advantage as a powerful prospective employer, he did not abuse the advantage by threat or intimidation. The applicant was initially confident in both his bargaining position as a prospective employee and his successful disposal of the deceased's remains. That confidence was shaken by the assertion that the police were coming after the applicant. That put pressure on the accused to tell the truth. The show of anger by the "boss" at the suggestion that he was a police officer reassured the applicant that he was not, but did not intimidate him. The trial judge found cautious support for that analysis of the applicant's position from what was said by the applicant in the conversation with another covert operative immediately following the meeting. We concur with that analysis.

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75 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [90]-[96].

[65] Having regard to that characterisation, a number of observations can be made about that conversation and the admissions made. First, there was no duress or intimidation beyond the fact that the applicant considered the "boss" to be a man of power and influence. Although the applicant suggested in a formal interview with police on 23 December 2014 that he thought the "boss" was going to punch him at one stage during the course of the conversation, the audiovisual record of that meeting does not suggest that the applicant apprehended a physical threat. Secondly, during the course of that conversation the applicant came to the considered conclusion that he would benefit from saying what he did. Those potential benefits took the form of the financial advantage which he thought would come from membership of the gang and his belief that the gang could make his exposure to criminal liability for the murder of the deceased "go away". Thirdly, the applicant had free choice whether to stay or leave, and whether to speak or stay silent. The fact that he may have felt under pressure to disclose his involvement in the death of the deceased in order to stay in the gang requires no different conclusion.

[66] Senior counsel for the applicant makes a number of contentions about the trial judge's findings. First, it is contended that the trial judge erred in assessing the conduct of the undercover operatives only in terms of its bearing and effect on the applicant rather than by reference to the fact that it was a technique which by its nature was "oppressive"

because it involved deception, subverted the right to silence, and was directed solely to obtaining a confession. As the authorities demonstrate, those features are hallmarks of this particular type of operation and for the reasons already discussed do not of themselves constitute "oppressive conduct".

[67] The second contention is that the covert operatives were exercising the authority of the state during the time they placed pressure on and offered inducements to the applicant. The written submission in that respect was as follows:[76]

> The police in this case may have been covert operatives but they were nonetheless exercising the authority of the state. The fact that they were acting covertly does not mean that their activities do not fall within the definition of "oppressive conduct" as envisaged by the provisions of s 84. The fact that the concept of "person in authority" no longer excludes the effects of their behaviour under s 84 it is submitted that contravening the *McDermott v The King* principles of duress, intimidation, persistent importunity or sustained or undue influence or pressure and inducement amount to "oppressive conduct".
>
> The Mr Big operation was reliant for the admissibility of its "product", the confession, on the fact that it did not breach right to silence principle because the admissions were not the product of duress, intimidation, persistent importunity or sustained or undue influence or pressure or inducement because that behaviour was not carried out by a person in authority, that is by a person known to the suspect to be wielding state power. Section 84 removes that caveat and exposes the methodology to the application of the concept of "oppressive conduct".

[68] That submission misstates, conflates and confuses a number of different rules and principles. First, the decision in *Tofilau* is high and

76 Appellant's Outline of Argument filed 16 August 2017, paras [39]-[40].

binding authority for the proposition that undercover operatives in this type of operation are not in their dealings with the target exercising the authority of the state. Secondly, and regardless of whether the police officers were acting overtly or covertly, s 84 is not limited to admissions made to an investigating official or as a result of an act of a person in authority. Thirdly, the "definite" rule referred to by Dixon J in *McDermott v The King* only extends to inducements held out by a person in authority.[77] The general rule referred to by Dixon J in *McDermott v The King* concerning duress, intimidation, persistent importunity or sustained or undue insistence or pressure has application regardless whether the person bringing that pressure to bear does so in the exercise of the coercive power of the state, and is directed to the issue of voluntariness. That is not the focus of the enquiry under s 84 of the *ENULA*. Fourthly, those authorities which have ruled confessions obtained using the Mr Big methodology admissible in the application of common law principles do not do so on the basis that the covert operatives are not exercising the authority of the state such that the general rule in *McDermott v The King* has no application. They do so on the basis that the confessions are voluntarily made, and that considerations of fairness and public policy do not require their exclusion.

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77 For that reason, senior counsel for the applicant's reliance on inducements in the form of financial advantage, motor vehicles and assistance in disposing of evidence is misconceived. In any event, the question remains whether the conduct was "oppressive".

[69] Leaving aside those issues, it can readily be accepted that duress, intimidation, persistent importunity or sustained or undue insistence or pressure may, depending on questions of fact and degree, constitute "oppressive conduct" within the meaning of s 84 of the *ENULA*. That simply brings the enquiry back to whether such pressure as was exerted by the undercover operatives did in fact constitute "oppressive conduct". For the reasons we have given, it did not.

[70] Senior counsel for the applicant relies on two particular matters in pressing that it did. The first was the suggestion by the "boss" that the applicant's son would be left fatherless if he went to gaol. As the trial judge observed, that was no doubt a matter to which the applicant had given consideration over the previous 18 months.[78] Moreover, it was not a threat of prejudice made by a person with the ostensible authority to bring that threat to fruition. The situation under consideration in this appeal is clearly distinguishable from the situation which presented in *R v Helmhout (No 2)*[79], in which a suspect holding her baby at a police station was led to believe by a police officer that if she did not participate in an electronic record of interview and tell the truth she could lose her children. The second particular suggestion which senior counsel for the applicant makes in this respect is that the importunity applied during the course of the conversation with the "boss" was "far

78 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [94].

79 *R v Helmhout (No 2)* [2000] NSWSC 225.

more oppressive" than the conduct of police in *R v Sumpton.*[80] Again, that comparison is inapposite. The accused in that case was unlawfully detained for many hours in police custody; the accused knew that he was being questioned by police officers exercising the authority of the state; the mode of questioning was unfair and improper; police continued questioning the accused after he sought to terminate it; he was subjected to more than 2000 questions in the course of a formal police interview; he was denied access to a lawyer; he was sleep deprived; police prevailed upon him after he had clearly and repeatedly invoked his right to silence; and he was subjected to psychological and emotional pressure directed to having him change his version of events.

[71] The third contention made by senior counsel for the applicant appears to be that the trial judge misdirected himself as to the meaning of "oppressive conduct". That contention is based on the propositions that: (i) "the concept of oppressive conduct does not have precise boundaries", and is not "limited to physical or threatened physical conduct but can encompass mental and psychological pressure"; (ii) "oppressive conduct includes a deception designed to deprive a citizen of his or her rights at law"; and (iii) "the concept of oppressive

80 *R v Sumpton* [2014] NSWSC 1432. It is recognised by the courts that questioning in police custody is "inherently oppressive" in a general sense (*R v Fulling* [1987] QB 426), and that police in those circumstances are cloaked in the "uniquely coercive power of the state" (*Gradinetti* [2005] 1 SCR 27 at 38 referred to in *Tofilau* at [12] per Gleeson CJ).

conduct has been held to be satisfied at a threshold lower than that which is required to satisfy the concept of 'oppression'".[81]

[72] The first proposition can be accepted, as it was by the trial judge in almost precisely those terms.[82] The second proposition may also be accepted, but whether the deprivation constitutes "oppressive conduct" will depend upon the nature of the illegality. The assumption of unlawful powers of direction or control may constitute "oppressive conduct", but there was no such assumption in the present case and, for reasons we have already given, no infringement of the applicant's rights and privileges. The third proposition is misconceived. It is based on a misunderstanding of the judicial statement that: "Oppressive conduct as countenanced by s 84 is distinct from the common law concept of oppression overbearing the will of an accused so as to make subsequent admissions involuntary".[83] That statement has nothing to say about the relative stringency of each test.

[73] On a proper analysis, it cannot be maintained that in the conduct of the covert operation police engaged in "oppressive conduct". The applicant's contentions in that respect are not attended by sufficient prospects of success to warrant a grant of leave.

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81 Appellant's Outline of Argument filed 16 August 2017, paras [5]-[7], [25]; Affidavit of Peter John Maley sworn 17 January 2017, para [17].

82 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [71], [80].

83 *R v Tang* [2010] VSC 578 at [25].

[74] There is one further and final matter which warrants some mention. During the course of oral submissions some reference was made to the decision of the Supreme Court of Canada in *R v Hart*.[84] In that case Moldaver J expressed a new common law rule of evidence to assess the admissibility of confessions obtained through Mr Big operations:[85]

> The first prong recognizes a new common law rule of evidence for assessing the admissibility of these confessions. The rule operates as follows: Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value turns on an assessment of its reliability. Its prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession in context. If the Crown is unable to demonstrate that the accused's confession is admissible, the rest of the evidence surrounding the Mr. Big operation becomes irrelevant and thus inadmissible. This rule, like the confessions rule in the case of conventional police interrogations, operates as a specific qualification to the party admissions exception to the hearsay rule.

[75] As the Victorian Court of Appeal recognised in *Weaven v The Queen*[86], that position does not represent the law in Australia. Similarly, in *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* the Queensland Court of Appeal observed:[87]

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84 *R v Hart* [2014] 2 SCR 544.

85 *R v Hart* [2014] 2 SCR 544 at 580.

86 *Weaven v The Queen* [2018] VSCA 127 at [40]-[42].

87 See *R v Cowan; R v Cowan; Ex parte Attorney-General (Qld)* [2015] QCA 87 at [85]-[87] per McMurdo P (Fraser JA concurring).

> Some emphasis was placed by the appellant in his written submissions on the recent Canadian case, *R v Hart*. In oral submissions, however, senior counsel for the appellant submitted that there was a divergence on the issue of the admissibility of confessional evidence between the common law of Australia and that of Canada so that *Hart* was of no real assistance in this case. Covert police operations of the kind used in the present case have been deployed in Canada for many years with approval by the Canadian courts. In *Hart*, the Canadian Supreme Court found there was insufficient protection for accused people who confessed during undercover operations of this kind and recognised a new common law rule of evidence. The court stated its concern about an aura of violence in these covert operations with threats or acts of violence in the presence of the accused. It was also important to protect suspects against the abuse of state power which threatened the integrity of the justice system.
>
> Since *Hart*, admissions made in the course of such undercover operations are presumed inadmissible in Canada, unless the prosecution can establish on the balance of probabilities that the probative value of the confession outweighs its prejudicial effect. The probative value of such a confession turns on its reliability and the circumstances in which it was made. The court must then weigh the probative value and prejudicial effect of the confession and decide whether the Crown has met that burden.
>
> Even were *Hart* binding on this Court, it would be of no assistance to the appellant. The question of reliability is not a matter in his favour in seeking to exclude the evidence. Further, the present case, unlike *Hart*, did not involve threatened use of violence to those who were untrustworthy or who betrayed the criminal gang. But in any case, as the appellant has conceded, Canadian jurisprudence has taken a different path from the common law of Australia and it is the Australian authorities which guide and bind this Court.

[76] The absence of violence was a consideration identified by the trial judge in the present matter.[88] As his Honour observed, there was no evidence that the scenarios in which the applicant participated involved violence. His Honour contrasted that position with the scenarios in some of the Mr Big operations in Canada, which utilised violence to

88 *R v Deacon (Ruling No 1)* [2016] NTSC 30 at [84], fn 82.

create an impression that the fictitious criminal organisation tolerated and was prepared to use violence.[89] That was not a feature of the operation under consideration in this appeal. It is also the case that the Canadian approach would be of no assistance to the applicant in this matter to the extent that approach requires a consideration of the reliability of the confession. As we observed at the outset, not only did the applicant make a confession, he also led the covert operatives to the site of the deceased's remains and subsequently gave evidence at trial that he had killed her.

Disposition

[77] We make the following orders:

1. Time to apply for leave to appeal against the finding of guilt is extended.
2. The application for leave is refused.

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89 See, for example, *Allgood v R* (Saskatchewan Court of Appeal) 2015 SKCA 88 and *R v Johnston* (British Columbia Court of Appeal) 2016 BCCA 3.