Flowers v The Queen [2005] NTCCA 5

PARTIES:	FLOWERS, Nicholas Joseph v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPLICATION FOR LEAVE TO APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 13 of 2003 (20207164)
DELIVERED:	13 May 2005
HEARING DATES:	9 February 2005
JUDGMENT OF:	MARTIN (BR) CJ, RILEY AND SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW

Appeal – appeal to Court of Criminal Application for leave to appeal following refusal of leave by a single Judge – appeal against conviction – police conversation – denial of knowledge of complainant – appellant intoxicated at time of police conversation – record of interview when appellant sober – appellant acknowledged identity of complainant – exculpatory interview – Crown declined to lead exculpatory interview at trial – admissibility of exculpatory interview - application for leave refused.

EVIDENCE

Admissibility of prior inconsistent statement of accused – spontaneous or considered response – part of the exculpatory version of events not admissible at behest of the applicant.

EVIDENCE

Admissibility – hearsay – statements – self-serving – admissibility in criminal proceedings – criminal law – failure to object – fair trial.

Festa v The Queen (2001) 208 CLR 593; *Kelly v The Queen* (2003) 205 ALR 274, applied.

R v Callaghan [1994] 2 Qd R 300, approved.

S (2002) 132 A Crim R 326; *Assafiri v Horne* [2004] WASCA 40 at 59; *Middleton v R* (1998) 19 WAR 179, considered.

Higgins (1829) 3 C & P 603 at 604, followed.

REPRESENTATION:

Counsel:

Appellant:	M Johnson pro bono
Respondent:	M Carey

Solicitors:

Appellant:	M Johnson pro bono
Respondent:	Office of the Director of Public Prosecutions

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

Flowers v The Queen [2005] NTCCA 5
No. CA 13 of 2003 (20207164)

BETWEEN:

NICHOLAS JOSEPH FLOWERS
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 13 May 2005)

Martin (BR) CJ:

[1] The applicant applies for leave to appeal against convictions recorded by a jury following refusal of leave by a single Judge. The facts are set out in the judgment of Riley J. Subject to the following remarks, I agree with his Honour's reasons for refusing leave.

[2] At about 9am on the day following the events in question, police attended at the block of flats where the events had occurred and spoke with the applicant. The following conversation occurred:

> "Q. What is your name?
>
> A. What for?

Q. Are you Nicholas Flowers?

A. Yes I am.

Q. Nicholas, we are investigating a sexual assault upon a young girl, a 12 year old girl, and we want to talk to you about that matter.

A. I don't even know that little girl.

Q. I'm arresting you for that assault. I'd like you to accompany us back to the Berrimah Police Centre."

[3] The interviewing officer gave evidence that the applicant was intoxicated when the conversation occurred. A little under an hour later the officer decided not to speak further with the applicant because of the applicant's state of intoxication. Later in the day when the applicant had sobered up, police conducted a formal interview with him. The applicant admitted that he knew the complainant, but denied committing any offence. Speaking generally, the interview was entirely exculpatory.

[4] At the outset of the trial before any evidence had been given, the Crown indicated that it did not intend to lead evidence of the exculpatory interview. Counsel for the applicant did not contest the right of the Crown to decline to lead the evidence. The learned trial Judge observed that counsel could not cross-examine the investigating officer to elicit what was said in the exculpatory interview.

[5] On appeal, different counsel for the applicant did not contest that the Crown was entitled to decline to lead evidence of the exculpatory interview. He submitted it was unfair to prevent counsel for the applicant from cross-

examining to elicit evidence of the content of that interview. Counsel based his argument upon a comparison between the circumstances under consideration and evidence of a recent complaint by a complainant in a sexual assault matter. The argument on that basis is unsustainable.

[6] The issue that has caused me concern relates to the consequences of the choice made by the Crown to lead evidence of the initial denial by the applicant when first confronted by the police at a time when he was intoxicated. That evidence was led as evidence of a false denial demonstrative of a guilty conscience. The use to which the Crown sought to put that evidence is well demonstrated by the cross-examination of the applicant at trial. Crown counsel put to the applicant that when the officer first spoke to him, the officer did not identify the young girl who had made the complaint. Against that background the following cross-examination occurred:

> "Q. You see your answer, "I don't even know that little girl".
>
> A. I could've said that, I don't know.
>
> Q. But if you had done nothing wrong in respect of any little girl or any 12 year old girl, wouldn't you have said, "I don't know what you're talking about, I don't know any 12 year old girls". Something like that.
>
> A. Say that again.
>
> Q. Why didn't you say, "I don't know what your talking about, I haven't been anywhere near a 12 year old girl".
>
> A. I don't know.
>
> Q. You said, "I don't even know that little girl".

A. Well I don't know.

Q. You knew what little girl he was talking about didn't you?

A. No I didn't."

[7] This Court did not have a transcript of the addresses of counsel, but counsel for the applicant did not suggest that in final submissions counsel for the Crown made any use of the applicant's initial response to police or his answers in cross-examination. In summarising the addresses of counsel, the trial Judge did not mention any point made by the Crown based on this evidence. Similarly, there is no mention of this topic in the summary of the submissions by counsel for the applicant.

[8] In the course of his directions to the jury, the trial Judge reminded the jury of the evidence of various witnesses. In that process his Honour referred to the evidence of the police officer that when he first spoke to the applicant, who appeared to be intoxicated, the applicant had responded "I don't even know that little girl". His Honour did not give an Edwards direction nor any direction as to the proper use of the evidence.

[9] During the discussions at the outset of the trial concerning the exculpatory interview, no mention was made of the initial statement by the applicant. The trial Judge may not have been aware of that proposed evidence. Once the evidence was led, however, it would have been preferable if the Crown had been required to identify the purpose for which the evidence was led. If the Crown indicated it was led as evidence of a consciousness of guilt, or

even if the Crown asserted that its purpose was limited to the credit of the applicant, in my opinion the applicant would have been entitled to cross-examine the investigating officer to establish that later in the day, after the applicant had sobered up, he gave an exculpatory account in which he admitted knowing the complainant.

[10] This is not a case in which a sober suspect, having made an initial false denial, had time for sober reflection or to obtain legal advice before offering to the police an exculpatory explanation. When the accused first responded to police questions, he was so intoxicated that the investigating officer considered it was unfair to continue to question him. When the exculpatory interview occurred a few hours later, in substance it was the first occasion on which the applicant was confronted with the allegations at a time when he was in a sober state and able to respond properly.

[11] Against the background of the initial statement having been led in examination of the investigating officer, experienced counsel did not seek a ruling from the trial Judge. No application was made to cross-examine the officer to establish that later in the day when the applicant had sobered up he admitted knowing the complainant and gave an exculpatory account of the events. Similarly, no attempt was made to examine the applicant to that effect. Following the cross-examination of the applicant about his initial statement, counsel did not seek to re-examine the applicant.

[12] In addition, notwithstanding cross-examination of the applicant about that statement, counsel did not request the trial Judge to give a direction on the topic of the initial statement. In particular, counsel did not seek an Edwards direction or any form of direction as to the proper use of that evidence.

[13] I have read the draft reasons of Southwood J concerning the admissibility of the initial statement. I am unable to agree that the statement was inadmissible on the basis that, by reason of the later interview, the evidence of the initial conversation "did not give the whole picture". The evidence as to that particular conversation was complete. The Crown did not seek to lead evidence of only part of that conversation.

[14] As to s 142 of the Police Administration Act, in my opinion this Court is not in a position to draw safely any conclusion as to why the application of s 142 was not raised with the trial Judge. In addition, the point was not taken before this Court. It these circumstances it is inappropriate to consider that issue.

[15] I am unable to agree with the conclusion of Southwood J that the conduct of counsel resulted in an unfair trial. I am satisfied that no miscarriage of justice has occurred: s 411(2) Criminal Code; *Festa v The Queen* (2001) 208 CLR 593; *Kelly v The Queen* (2003) 205 ALR 274.

[16] The evidence of guilt was very strong. The complainant's evidence was directly and strongly corroborated by the evidence of Sharon who was present and observed the sexual assault. As Riley J has pointed out, the

inconsistencies within the evidence of the complainant and between her evidence and that of the witness Sharon were no more than to be expected in the particular circumstances. Counsel for the applicant on appeal agreed there was no basis within the evidence of Sharon upon which he could submit that it was unsafe to rely upon her evidence. I am not left with a doubt about the applicant's guilt of both offences.

[17] In all the circumstances to which I have referred, in my opinion the absence of an Edwards type direction or some other direction as to the proper use of the evidence concerning the initial statement is of little significance. As I have explained, very little attention was given to that evidence. Given the applicant's state of intoxication at the time of the initial statement, it is hardly surprising that it received such little attention.

[18] Similarly, in my view the absence of evidence that later in the day the applicant admitted knowing the complainant and gave an exculpatory account would not have made a difference to the ultimate result. While in my view the conduct of the Crown in leading the initial statement made the evidence admissible, in all the circumstances it would not have had any impact. The credit of the applicant was obviously a significant matter, but in the particular circumstances under consideration the fact that the applicant gave an exculpatory account when sober would have been of minimal significance to an assessment of his credit. Although the applicant had been sobering up in the intervening period, and even if he was so intoxicated that he could not remember his initial statement, nevertheless the

applicant was aware of the thrust of the allegations and his time sobering up had given him a limited opportunity to reflect upon his situation.

[19] I am satisfied that the applicant has not lost a chance of acquittal that was fairly open to him. To put it another way, I am satisfied that if the evidence of the exculpatory interview had been led the jury would inevitably have convicted.

[20] I emphasise that the views I have expressed concerning the admissibility of the exculpatory statement relate to the particular circumstances of this applicant, the respective statements made by the applicant and the conduct of the trial. These circumstances are well removed from the general run of authorities concerned with the exclusion of prior consistent or self-serving statements. Even in the particular circumstances under consideration, it might be said with some force that I have taken an overly generous view of the admissibility of the exculpatory statement. If that be so, it is a view borne out of a concern to ensure that the strict rules of admissibility do not operate unfairly against an accused charged with serious crimes.

[21] The application should be refused.

Riley J

[22] Following a trial by jury the applicant was convicted of the unlawful aggravated assault of his de facto wife, Sharon, on 8 May 2002 and, on the same date, having had sexual intercourse with a 12-year old girl, J, without her consent. The applicant seeks leave to appeal against his conviction.

[23] The Crown case was that the child J was with friends at a unit in Coconut Grove. She smoked some cannabis that caused her to vomit. Sharon lived next door to the unit with her de facto husband, the applicant. Sharon became aware of the illness of J and invited her into her unit. The applicant was present in the unit drinking beer with two male friends. Sharon and J went into the bedroom of the unit and proceeded to smoke cannabis with the aid of an improvised bong. Some time later the applicant entered the bedroom and asked Sharon whether he could have sexual intercourse with J. Sharon said no. The applicant then obtained a large shifting spanner and threatened Sharon and the child by raising it above his head and waving it about. He demanded they both remove their clothes and they did so. He then required J to lie on the bed and he touched her breasts and inserted at least one and possibly two fingers into her vagina. The insertion of the applicant's fingers was of brief duration. He then asked J if he could have sexual intercourse with her in exchange for cannabis and she, sensing an opportunity to escape, responded that he could. When the applicant left the flat to obtain the cannabis, J quickly dressed and left the unit by jumping off the first floor rear balcony.

[24] When the applicant returned to the unit he found J missing and, as a consequence, punched Sharon in the head three times and kicked her in the face and arms. The blows were delivered with some force.

[25] At the conclusion of submissions only two of the proposed grounds of appeal were pressed on behalf of the applicant.

GROUND 1

[26] The first proposed ground of appeal is that the verdicts were unsafe, unsatisfactory and unreasonable and could not be supported having regard to the evidence. Consequently it was submitted there was a miscarriage of justice.

[27] In this regard counsel for the applicant conducted a detailed review of the evidence of the principal Crown witnesses, being Sharon and J. He submitted the evidence contained significant internal and external inconsistencies which, it was claimed, could not be explained as simple errors.

[28] Examination of the so-called inconsistencies failed to live up to the expectations raised by the submissions. There were some differences of emphasis in the description of events provided by J when compared with the evidence of Sharon but, of course, that was to be expected. The discussion between counsel and this Court on the hearing of the application revealed that the inconsistencies were no more than would ordinarily be expected and could not be legitimately characterised as differences that would give rise to any real concern that the verdict was unreasonable or that there was a miscarriage of justice.

[29] In circumstances where an appellant submits that a verdict is unsafe or unsatisfactory there is an obligation imposed upon the Court of Criminal Appeal to undertake an independent examination of the relevant evidence to

determine whether it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused. The Court must assess the quality of the evidence; *Morris v R* (1987) 163 CLR 454. The test is whether it was open to a reasonable jury to be satisfied beyond reasonable doubt of the guilt of the accused. As was observed by Mason CJ in *Chidiac v R* (1990-1991) 171 CLR 432 at 444:

> "In resolving that question the Court must necessarily recognize that the issues of credibility and reliability of oral testimony are matters for the jury. For that reason, if for no other, an appellate court will infrequently set aside a conviction as being unsafe because the evidence of a vital Crown witness lacked reliability or credibility."

[30] A consideration of the evidence may reveal that it contains discrepancies, displays inadequacies or is tainted or otherwise lacks probative force in such a way as to lead the court to conclude that, even making allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted. In such circumstances the court is bound to act and set aside the verdict: *M v The Queen* (1994) 181 CLR 487.

[31] In this case there was a very strong Crown case. Although there were some discrepancies within the evidence of J there existed the unusual circumstance that her evidence in relation to the essential elements of the offence was corroborated by an eyewitness, Sharon. Sharon directly corroborated the evidence of sexual assault of which J complained.

GROUND 2

[32] The second proposed ground of appeal was that the learned trial judge erred in ruling that the applicant was not entitled to cross-examine the police officers who conducted a formal interview with him so as to allow the evidence of his denials and/or admissions to be placed before the jury as being evidence of the consistency of the applicant in recounting to police and to the jury his version of what had occurred on the date and at the times in question.

[33] It is necessary to place this proposed ground of appeal into a context. The events of which complaint is made took place on the night of 8 May 2002. At 9 am on 9 May 2002 Detective Newman went to the residence of the applicant and spoke with him. At that time the applicant was thought to be intoxicated. He was told that the police were investigating a sexual assault upon a 12-year old girl and he responded: "I don't even know that little girl". He was arrested and taken into custody. It was not until quite some time later that he was able to be interviewed and when that occurred he provided an exculpatory version of events. In the course of the record of interview he acknowledged that he knew J.

[34] At the commencement of the trial counsel for the applicant foreshadowed an application to require the Crown to lead evidence of the record of interview. The Crown declined to do so and, after discussion with the learned trial judge, defence counsel did not press his application. He agreed with the

trial judge that the Crown could not be forced to place the record of interview into evidence. His Honour then went on to observe:

> "And you can't get it in through the back door by cross-examining the policeman to say what he might have said in his record of interview."

[35] The prosecution did not seek to tender the electronic record of the interview. Counsel for the applicant did not make any application to cross-examine Detective Newman to establish that in the course of the record of interview the applicant had corrected his initial denial of knowledge of J.

[36] Before this Court the applicant acknowledged that the record of interview amounted to an exculpatory explanation of relevant matters and was therefore a prior consistent statement. It was submitted that such a statement was admissible in the same way as evidence of the complaint of a complainant in a sexual offence was received into evidence. It was submitted that the applicant was denied an opportunity to demonstrate consistency of response by him. The submission on behalf of the applicant was that, in the circumstances, it was open to the jury to conclude that any version of events provided by him in his evidence in the course of the trial included a recent concoction by him of his exculpatory version of the events.

[37] This issue has been considered by superior courts in other jurisdictions. In *R v Callaghan* [1994] 2 Qd R 300 Pincus JA and Thomas J observed that in Australia the rules against self-corroboration and the general prohibition

against proving the prior consistent statements of a witness are well established. Their Honours went on to say (303):

> "There may be exceptional cases where the interests of justice require some special qualification of a strict application of the hearsay rule (eg *Daylight* (1989) 41 A Crim R 354; cf *Walton* (1989) 166 CLR 283, 293), but it is highly desirable that the limits upon admissibility of evidence remain identifiable. If an accused person can introduce his own self-serving version to a police officer as evidence, why may he not also introduce such versions that he gives to others at the scene, or to his wife or anyone else? If an accused can corroborate himself by means of his own consistent statements why may not other defence witnesses do so? Why for that matter should not the prosecution witnesses similarly be able to do so?
>
> A number of rationales have been suggested for the non-receivability of self-serving statements. One of these is the danger of manufactured evidence being put before the jury… Another is that "self-serving statements are inherently unreliable, and any rule which keeps them out has some justification"… They certainly lack the rationale which justifies the reception of admissions against interest as an exception to the hearsay rule. In our view there is no good reason to sanction the introduction of such evidence…".

[38] This case was followed in the Court of Criminal Appeal in Western Australia in *S* (2002) 132 A Crim R 326 where the court dealt with a matter in which defence counsel sought to introduce evidence of, and to give emphasis to, self-serving elements of a record of interview. Parker J, with whom Anderson and Steytler JJ agreed, said (330):

> "The prevailing overall flavour of the interview was, however, distinctly self-serving. The law is well settled, however, that by virtue of those parts of the interview which may be accepted as against the applicant's interests, or "confessional in character", the statement, that is, the whole record of the interview, might have been led in evidence by the prosecution: *Middleton* (1998) 19 WAR 179 at 182 and 189… But if the prosecution determines against introducing the record of interview it could not have been led in

> evidence or be the subject of questions in cross-examination by the defence: *Callaghan* [1994] 2 Qd R 300 at 303-304… This position has been well settled for approaching two centuries: *Higgins* (1829) 3 C & P 603 at 604; 172 ER 565 at 565."

[39] In *Higgins* (supra) Parke J made the now familiar observation that:

> "Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner as well as against him …".

[40] In the case of *Assafiri v Horne* [2004] WASCA 40 Roberts-Smith J said (at para 59 and 60):

> "An admission or confession by the defendant is admissible for the prosecution as an exception to the rule against hearsay. The rationale is that it is a statement against interest and therefore likely to be true. An admission of a fact in issue or a fact relevant to a fact in issue is accordingly evidence of the fact and so is relevant. Mere denials, however, have no probative value and so are irrelevant and hence inadmissible (*R v Haycock* [1989] 2 Qd R 56, 59). The prosecution need not, and cannot be compelled to, give evidence of mere denials (*R v Graham* (1972) 26 DLR (3d) 579; *R v Newsome* (1980) 71 Cr App Rep 325; *Wogandt* (1988) 33 A Crim R 31) and nor can the accused elicit them in cross-examination of prosecution witnesses or give evidence of them in the defence case. If the prosecution does not tender a statement of the defendant which contains both admissions and self-serving material, the defendant cannot tender, or seek to elicit by cross-examination, the self-serving parts (*R v Callaghan* [1994] 2 Qd R 300, 303-4)."

[41] In the absence of the agreement of the prosecution the only basis for receiving any part of the record of interview into evidence would be as an exception to the rule against hearsay: *Middleton v R* (1998) 19 WAR 179 at 189. In that case Ipp J discussed the situation where an inculpatory statement was made on one occasion and, on a distinct or separate occasion,

an exculpatory utterance was made, and contrasted this with circumstances where both inculpatory and exculpatory statements were made on the one occasion. He said (190):

> "Thus, the rationale for admitting the exculpatory parts of one whole statement is that, having been uttered on the same occasion that the crime is admitted, their reliability is greater than otherwise would have been the case. Where exculpatory utterances are made as part of a separate statement, this consideration does not apply."

[42] The submission of the applicant that the learned trial judge erred in ruling that the applicant was not entitled to cross-examine the police officers who conducted the formal record of interview with him so as to introduce evidence of consistent denials is not sustainable.

[43] One aspect of the record of interview warrants separate consideration. The evidence of Detective Newman that, at the time of arrest, the applicant had responded to the advice that the investigation concerned an assault upon a 12-year old girl by saying "I don't even know that little girl" may have been led by the prosecution to demonstrate a consciousness of guilt. The subsequent acknowledgment in the record of interview that the accused did know the girl was argued to be admissible in order to disprove the inference of the presence of a guilty mind that otherwise might arise from the earlier denial. However that was a statement made on a later distinct and separate occasion. By then the applicant had time to consider his position and determine his response. This was no longer a spontaneous response but rather a considered one made some time after the event. It could not be

regarded as part of the res gestae. It was, in the circumstances, simply part of the exculpatory version of events provided in the record of interview which the Crown chose not to introduce into evidence. The evidence was not admissible at the behest of the applicant. In any event no application was made to the trial judge to cross-examine on this issue or to lead the evidence from the applicant when he gave evidence.

[44] Even if leave to appeal was granted and it was decided that error existed, I would dismiss the appeal because in all the circumstances of this matter no substantial miscarriage of justice has actually occurred. The Crown case was overwhelming.

[45] In the circumstances both proposed grounds of appeal must fail. Leave to appeal should not be granted.

Southwood J

Introduction

[46] This application for leave to appeal arises out of the refusal of a single Judge to grant Nicholas Joseph Flowers ("the applicant") leave to appeal following his convictions in the Supreme Court of the Northern Territory for the unlawful aggravated assault of his de facto wife and for having had sexual intercourse with a 12 year old girl without her consent. There are three issues in the application for leave to appeal.

[47] The first issue is whether the jury verdicts were unsafe and unsatisfactory and could not be supported having regard to the evidence. The second issue is whether the trial Judge erred in ruling that the applicant was not entitled to cross examine the police witnesses about exculpatory statements that the applicant had made to them, for the purpose adducing evidence showing consistency in the account given by the applicant of what occurred. The third issue is whether the applicant received a fair trial.

[48] Of principal concern in relation to the third issue is the decision made by the Crown, without objection by the applicant or intervention by the trial Judge, to lead evidence of a false denial made by the applicant to police when he was arrested. The evidence was led in circumstances where the Crown did not to tender the applicant's video taped interview by police because it was largely exculpatory and the trial Judge had ruled that the applicant could not cross examine the police witnesses about what the applicant said to them during his video taped interview. The applicant was drunk when he was arrested. The video taped interview of the applicant was conducted by the police later on same day that he was arrested but after he had sobered up. It was the first occasion on which the applicant was capable of properly responding to the allegations made against him.

[49] The third issue was not formally pleaded. It arose during the course of argument.

Unsafe and Unsatisfactory

[50] Subject to what I have stated below in relation to the third issue, I agree with Riley J that the jury verdicts were not unsafe and unsatisfactory and that the verdicts were supported by the evidence tendered at the trial.

The admissibility of the applicant's record of interview

[51] As to the second issue, counsel for the applicant, Mr Johnson, who appeared pro bono, argued that the statements made by the applicant during his video taped interview by police could be tendered in evidence on the same basis that the Crown could tender evidence of recent complaint in the prosecution of a sexual offence. It was said that the applicant's video taped interview may be tendered as either evidence of the consistency of the account given by the applicant of what had occurred or of his reaction when challenged about the offending by the police. This was not a case involving the making of a self-serving statement following the receipt of legal advice (cf *Newsome* (1980) 71 Cr App R 325). The applicant was interviewed by police as soon as he was sober.

[52] Subject to certain qualifications, evidence of an accused's statement to police is admissible for such purposes in England: *R v Pearce* (1979) 69 Cr App R 274; *R v McCarthy* (1980) 71 Cr App R. 142; *R v Tooke* (1990) 90 Cr App R 417. It has been said that one of the best pieces of evidence that an innocent man can give is his reaction to an accusation that he has

committed a crime: *R v McCarthy* (supra) at 145 per Lawton LJ. The qualifications for the tender of such evidence are that the statements must be spontaneous and relevant and must add weight to the other testimony which has been given in the case: *R v Tooke* (supra).

[53] In England such evidence does not itself go to establish the facts of which an accused speaks to police or gives evidence in court.

[54] The position is different in Australia. The argument that was put to the Court of Criminal Appeal by counsel for the applicant is the same argument that was rejected by a majority of the Court of Appeal of Queensland in *R v Callaghan* [1994] 2 Qd R 300. That decision is supported by a considerable line of authority including: *Higgins* (1829) 3 C & P 603 at 604, 172 ER 565; *Allied Interstate (Qld) Pty Ltd v Barnes* (1968) 118 CLR 581,585; *Lopes v Taylor* (1970) 44 ALJR 412,421; *R v Williamson* [1972] 2 NSWLR 281, 294-296; *Herbert v The Queen* (1982) 6 A Crim R 1, 29-32; *R v Cox* [1986] 2 Qd R 55, 63-65; *Kochnieff* (1987) 33 A Crim R 1, 4; and *Spence v Demasi* (1988) 48 SASR 536, 540-546. The decision was followed by the Court of Criminal Appeal of Western Australia in *S* (2002) 132 A Crim R 326. All of these cases support the proposition that in Australia there is no exception to rule against prior consistent statements which permits an accused to tender prior consistent statements whether by cross examination of police witnesses or otherwise for the purpose of showing either the accused's

reaction when challenged about his offending by police or consistency in the account which he has given of what occurred.

[55] The difference between the position in England and the position in Australia seems to be explained by the fact that in Australia when one party puts in evidence a statement made by the other, the whole of the statement including the self-serving parts, becomes evidence of the truth of what is stated although the trier of fact is not bound to accept all of the parts of the statement as true, and may give different weight to different parts thereof: *Lopes v Taylor* (supra).

[56] For these reasons the argument that the trial Judge erred in refusing to allow counsel for the applicant to cross-examine police officers about the content of the applicant's video taped interview by police so as to place before the jury evidence establishing consistency in the applicant's account of what occurred must be rejected.

Fair trial

[57] I turn to consider whether the applicant had a fair trial. To do so it is necessary to place all of the applicant's discussions with the police in context and to set out the relevant parts of the course of the trial in the Supreme Court. The applicant is an aboriginal man. The offences for which the applicant was convicted took place close to midnight on 8 May 2002. From about 3.00 pm on 8 May 2002 until the early hours of the morning on 9 May 2002, the applicant had been consuming VB beer with

his friends and he became very intoxicated. At 9.00 am on 9 May 2002 Detective Sergeant ("DS") Roger Newman attended the residence of the applicant which was a unit in a block of units located on Dick Ward Drive and arrested the applicant. Prior to the arrest of the applicant the following conversation occurred:

> "Newman: What is your name?
>
> Flowers: What for?
>
> Newman: Are you Nicholas Flowers?
>
> Flowers: Yes I am.
>
> Newman: Nicholas, we are investigating a sexual assault upon a young girl, a 12 year old girl, and we want to talk to you about that matter.
>
> Flowers: I don't even know that little girl.
>
> Newman: I'm arresting you for that assault. I'd like you to accompany us back to the Berrimah Police Centre.

[58] Contrary to what he said to DS Newman, the applicant did know the 12 year old girl. However, at the time of his arrest the applicant was intoxicated. After his arrest the applicant was taken to Berrimah Police Station. He was not interviewed when he first arrived at the Berrimah Police Station as the police were of the opinion that he was too intoxicated for a video taped interview to be conducted at that time. He was placed in a cell where he slept for most of the day.

[59] From time to time during 9 May 2002 police officers checked on the applicant to see if he had sobered up sufficiently for a video taped

interview to be conducted. It was not until 7.30 pm on 9 May 2002 that the police interviewed the applicant. Prior to the interview the applicant did not speak to a lawyer. He had an opportunity to speak to his sister who was present during the video taped interview by police. The interview of the applicant was conducted by Detective Senior Constable ("DSC") Wayne Brayshaw and Detective Acting Sergeant ("DAS") Michelle Gavin.

[60] I have seen and heard the applicant's video taped interview by police. Part of the applicant's video taped interview was tendered as Exhibit P3 at the trial. During his interview by DSC Brayshaw and DAS Gavin the applicant said freely and spontaneously that he knew the 12 year old girl and that she was related to his de facto wife. He said that he did not know the name of the 12 year old girl and he denied assaulting his de facto wife and sexually assaulting the 12 year old girl without her consent. He also said that early in the morning before he was arrested he had been told by Peter Hooker who lived in the same unit as the applicant that the residents of unit 2 of the block of flats in which he lived had said that the 12 year old girl had accused him of sexually assaulting her. He was not asked by the interviewing police officers if he had told DS Newman that he did not even know that little girl. The content of the record of interview was largely exculpatory. However, during the interview of the applicant DSC Brayshaw did read out the 12 year old

girl's statement to police (As to the inappropriateness of such a technique see *R v C* (1991) 59 A Crim R 46).

[61] The trial of the applicant in the Supreme Court commenced before Bailey J on 20 June 2003. Before any evidence was placed before the jury, counsel for the parties sought rulings about various evidentiary matters. Bailey J was told by counsel for the Crown that the Crown did not propose to tender the applicant's video taped interview by police. Mr Lewis, who appeared on behalf of the applicant at the trial, did not contest that the Crown was entitled to elect not to tender the applicant's video taped interview by police. Instead he made a misconceived application for a ruling from Bailey J that he was entitled to cross-examine the police officers who interviewed the applicant about what the applicant had said to them when he was interviewed. The purpose of seeking this ruling appears to have been to try and lead evidence of the exculpatory statements that the applicant made to police. The applicant's video taped interview by police was not played to Bailey J nor did either counsel inform him of the detail of the content of the applicant's video taped interview nor was Bailey J told of the evidence that the Crown proposed to lead from DS Newman about the conversation he had with the applicant at the time of his arrest. Bailey J was simply told that the content of the video taped interview was largely exculpatory. As a result Bailey J ruled that counsel for the applicant could not cross-examine into evidence what the applicant said to the police during his video taped interview.

[62] Counsel for the applicant seems to have thought that the ruling by Bailey J precluded him from cross-examining all police witnesses about the content of the applicant's video taped interview regardless of what evidence emerged during the trial and regardless of how the prosecution used the evidence which emerged during the course of the trial and that it foreclosed any further agitation of the issue. Counsel for the applicant did not seek a ruling from Bailey J that the evidence of DS Newman that the applicant had denied that he knew the 12 year old girl was inadmissible unless the applicant's video taped interview by police was also tendered.

[63] DS Newman gave evidence on 24 June 2003. He said that he did not participate in the video taped interview of the applicant. He told the court that when the applicant was arrested the applicant said to him that he did not even know the little girl. This evidence was placed before the jury without objection by the applicant and the trial Judge did not raise with counsel any concerns about the admissibility of the evidence of DS Newman nor did he ask if counsel for the accused wished to renew his application to cross examine the police witnesses about the content of the applicant's video taped interview by police. DS Newman was cross examined about the applicant's state of intoxication at the time of his arrest and after he was taken to Berrimah Police Station. The cross-examination went as follows:

"Counsel: When you saw him at 10 to 10 he appeared to be under the influence of alcohol, is that correct?

Newman: Yes, to a lesser degree.

Counsel: And your judgment was it was better not to question him then; otherwise it might not be good evidence?

Newman: Yes, I think I had a second conversation with him, in relation to section 140 of the Police Administration Act.

Counsel: You see in that conversation you said, 'Well there's a 12 year old girl saying that you put your fingers into her vagina?'

Newman: Yes, if that is what it says.

Counsel: You said, 'Okay, now I asked you before, okay?' And Flowers said, 'What's her name?' Then you said, 'Now you don't have to talk, you don't have to say anything.' Flowers said, 'What's her name?' You said, 'No, listen. You don't have to say anything about this if you don't want to. He said, 'Yeah.' Do you agree with that?

Newman: If it's in the transcript, sir, yes.

Counsel: Thank you. That conversation went on a little but in the end you concluded that still he was affected by alcohol and still you would not press on?

Newman: At that stage, yes, sir.

DS Newman was also cross examined about whether the accused had an infected right middle finger.

[64] After there had been some cross-examination of DS Newman about the conversations between him and the applicant at Berrimah Police station, counsel for the accused said to Bailey J, "Your Honour, there is a ruling in existence, but I don't think this breached it. I'm trying to confine my cross-examination to those areas raised by my learned friend in his

evidence in chief and this goes to that. I would submit that I have not breached the ruling." His Honour replied, "Keep going until there is an objection, Mr Lewis." Cross-examination then continued for the sole purpose of establishing the level of the applicant's intoxication when he was spoken to by DS Newman at Berrimah Police Station.

[65] At the completion of the evidence of DS Newman counsel for the applicant did not renew his application to cross-examine the police witnesses about the content of the applicant's video taped interview by police.

[66] DAS Michelle Gavin also gave evidence in the Supreme Court on 24 June 2003. She gave evidence after DS Newman. Her evidence in chief was extremely brief. It was confined to the fact that she was involved in various aspects of the investigation into the allegations against the applicant. Despite the evidence led from DS Newman about the applicant's denial that he knew the 12 year old girl she was not cross-examined about the content of the applicant's record of interview.

[67] DSC Wayne Brayshaw gave evidence immediately after DAS Michelle Gavin. His evidence in chief was also very brief. It was confined to the fact that he was the officer in charge of the investigation into the allegations against the applicant and that he co-ordinated the investigation. Cross-examination was confined to the fact that he conducted a video taped interview of the applicant during which the

applicant answered questions, the intoxication of the applicant at about 4.00pm on 9 May 2002 and the applicant's infected finger. He was not cross-examined about the content of the applicant's video taped interview. Nor was a fresh application made for a ruling that counsel for the applicant be allowed to cross-examine DSC Brayshaw about the content of the applicant's video taped interview by police.

[68] The applicant gave evidence on 25 June 2005. His evidence in chief was broadly consistent with what he told police when he participated in the video taped interview by police. He denied both of the charges against him. He was asked if he spoke the words that DS Newman said that he spoke at the time of his arrest. In substance the applicant said that because he was drunk he did not know what he said to DS Newman. He was not asked during his evidence in chief if, before he was arrested, he had become aware that the 12 year old girl was making allegations of sexual intercourse against him. Nor was he asked what he said to police during his video taped interview at the Berrimah Police Station. Nor was he asked if he deliberately intended to mislead DS Newman or if later that day, he had freely volunteered to DSC Brayshaw that he knew the 12 year old girl.

[69] The applicant was cross-examined about what he said to DS Newman when he was arrested. It was put to him by counsel for the Crown that if he had done nothing to any little girl he would have said, "I do not know what you are talking about, I do not know any 12 year old girls". It was

also put to the applicant that he knew what little girl DS Newman was talking about when he was arrested. The applicant was not re-examined.

[70] During his summing up Bailey J stated, "As for the police officers, you might remember that there was Detective Sergeant Newman. He was the officer who arrested the accused at 9 0'clock on Thursday 9 May 2002. He told you that at the time the accused appeared intoxicated and Newman told the accused that the police were investigating a sexual assault on a young girl, a 12 year old girl, and according to Newman, the accused said, 'I do not even know that little girl.' Then Newman took the accused back to Berrimah Police Headquarters and as you know various attempts were made to interview him during the day, but he was still intoxicated and eventually was interviewed later in the day." He also stated, "Wayne Brayshaw and Michelle Gavin, they conducted a record of interview with the accused. You have not had an opportunity to see that interview; it has not been put in evidence apart from that very small piece which I will deal with in summarising the accused's evidence." Further, with respect to the accused's evidence his Honour said, "In relation to Sergeant Newman's evidence, about what Sergeant Newman said, he could not recall because he was drunk and he does not recall saying, 'I do not even know that little girl'. He says he was drunk and he cannot recall whether he said that. He may have done."

[71] Bailey J did not instruct the jury that they may take the false denial that the applicant made to DS Newman at the time of his arrest into account

only if they were satisfied, having regard to the relevant circumstances and events, that it revealed a knowledge of the offence or some aspect of it and that it was told because the accused knew that the truth of the matter about which he gave the false denial would implicate him in the offence or because of a realization of guilt and a fear of the truth nor did he instruct the jury that there may be reasons for the telling of a lie apart from the realisation of guilt and, where that is the explanation for the lie, that they cannot regard it as an admission: *Edwards v R* [1993] 178 CLR 193. At the trial no complaint was made by the applicant about the failure of the trial Judge to give an Edwards direction nor was any complaint made by the applicant about the trial Judge's summing up when the application for leave to appeal was argued in the Court of Criminal Appeal.

[72] DS Newman's evidence that the applicant had denied that he knew the 12 year old girl was evidence of an implied admission of guilt. It was led as evidence of a false denial demonstrative of a guilty conscience. The applicant's denial that he knew the 12 year old girl was made in circumstances in which the explanation for what he said may be that he knew that the truth would implicate him in the offence. It can be inferred from what the applicant said to DS Newman, that at the time of his arrest he knew what little girl the police were talking about before the police told him who she was and that he accepted that she had been sexually assaulted because there was no denial of the sexual assault. The applicant

could only be aware of these matters if he had seen, heard or been told what had happened before the police arrived or if he had committed the sexual assault himself.

[73] The applicant's statement to DS Newman that he did not even know that little girl and the statements that he made during his video taped interview by police were part of a connected series of statements which should have been available for consideration by the jury as forming one narrative: *Middleton v R* (1998) 19 WAR 179 at 202 per Heenan J. Standing alone the evidence of what the applicant said to DS Newman was inadmissible on the ground that the evidence did not give the whole picture and the Crown was required to give the whole picture as to the false denial/implied admission of guilt: *Jack v Smail* (1905) 2 CLR 684 at 695, 708; *R v Cassell* (1998) 45 NSWLR 325 at 328. Counsel for the applicant should have told the trial Judge of those parts of the applicant's video taped interview by police which should be tendered to give the whole picture so far as the false denial went. The trial Judge should then have ruled what parts of the applicant's video taped interview by police ought reasonably be tendered by the Crown to give the whole picture and if the Crown did not wish to tender the relevant parts of the video taped interview the Crown tender of the evidence of DS Newman as to the false denial should have been rejected: *R v Cassell* (supra) at 338 per Smart J; *Spence v Demasi* (supra) at 540 per Cox J; *M v R* (1994) 62 SASR 364.

However, no such objection was taken at trial by counsel for the applicant.

[74] The evidence of DS Newman that the applicant said to him that he did not even know that little girl was also arguably inadmissible on the ground that as the evidence was evidence of an implied admission it was precluded from being put in evidence by subsection 142(1)(a) of the Police Administration Act as the false denial was not confirmed during the applicant's video taped interview by police: *Nicholls v The Queen* [2005] HCA 1 (13 February 2005). Subsection 142(1)(a) of the Police Administration Act provides:

> "142. Electronic recording of confessions and admissions
>
> (1) Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless –
>
> > (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded;"

[75] An apparently exculpatory statement by an accused may be an admission: *Edwards v R* [1993] 178 CLR 193 at 208; *R v Horton* (1998) 45 NSWLR 426; *R v Esposito* (1998) 45 NSWLR 442; *R v Duff* (unreported, 17 September 1998, BC9804709); *R v Raso* (1993) 115 FLR 319 at 346; *Kelly v R* (2004) 205 ALR 274 at [21] (not decided); *R v GH* (2000) 105 FCR 419 (Contra); *Edmunds v Edmunds* [1935] VLR 177 at 186. However, as this ground of objection was not taken at the trial and as the point was not argued before the Court of Criminal Appeal it is undesirable to decide the point now.

[76] The applicant's failure to object to the admissibility of the evidence of DS Newman about the applicant's denial that he knew the 12 year old girl on the ground that it did not give the jury the whole picture and the Crown was required to give the whole picture is not necessarily fatal to the current application. The strict doctrine of waiver applicable in the civil area is inappropriate in criminal trials. There remains an obligation on a trial judge to consider the admissibility of certain kinds of evidence even if no objection is taken: *R v Pemble* (1971) 124 CLR 107 at 117; *Stirland v Director of Public Prosecutions* [1944] AC 315 at 327; *R v Meier* (NSWCA unreported 21 May 1996, BC9601936). There are also obligations upon a trial judge which may, on occasion, necessitate intervention even if counsel remains inactive: *R v Pemble* (supra)*; R v Meier* (supra). There are two particular areas in respect of which it has been held that a trial judge should act of his or her own volition to protect

an accused. One is the area of admissions or confessions. The other is in relation to the judicial discretion to exclude unfairly obtained or grossly prejudicial evidence: *R v Meier* at 18 to 22 per Gleeson CJ; M Weinberg, *"The Consequences of Failure to Object to Inadmissible Evidence in Criminal Cases"* (1977-78) 11 MULR 408

[77] There are many situations in which for reasons that might not be apparent to the trial Judge, and which a trial judge could never ascertain, counsel might not object to evidence of doubtful admissibility. Indeed as a practical matter, much of the evidence given at criminal or civil trials is technically inadmissible. It is received because nobody has an interest to object to it. In the present case, however, the evidence in question was both important and clearly damaging to the applicant's defence. There was no possible reason why the applicant could have desired its reception. In the present case there was, at the commencement of the trial, an inadequately presented attempt to obtain a ruling which would have enabled counsel for the applicant to cross examine the police witnesses about the content of the video taped interview. The ruling of the trial Judge led to a misapprehension that it foreclosed any further agitation of the content of the applicant's video taped interview by police. While the learned trial judge was justified in disposing of the application at that stage, a new and potentially important factual issue emerged which put a different complexion on that evidence. In the circumstances, in the interests of securing a fair trial, the trial Judge should have intervened

and raised the admissibility of the evidence of DS Newman that when the applicant was arrested he denied that he even knew the 12 year old girl.

Substantial miscarriage of justice

[78] The Crown failed to establish that the tender of DS Newman's evidence did not result in a substantial miscarriage of justice so far as the applicant was concerned. It is true that during his summing up the trial Judge did not give particular emphasis to the false denial that the applicant made to DS Newman at the time of his arrest. The evidence against the applicant was reasonably strong. There was the direct evidence of Sharon Tipiloura. However, if the applicant's false denial had been excluded, the Crown case against the applicant would have been weaker. The applicant's false denial was powerful and persuasive evidence which was capable of tilting the balance in the case. Without the tender of the applicant's false denial by the Crown the cross examination of the applicant would have been significantly restricted. He could not have been cross examined about the false denial. Furthermore, if as a result of the issue being raised the Crown had elected to tender the applicant's video taped interview by police the course of the trial would have been different. In these circumstances I am not satisfied that the applicant would have been convicted without the evidence of the applicant's false denial or alternatively if the Crown had not been allowed to pick and choose and the jury had been given the whole picture as to the false denial.

[79] This is a case in which the trial Judge was not given the assistance from counsel to which he was entitled. However, from the point of view of an appellate court, what is determinative is the effect of what happened on the applicant's right to a fair trial: *R v Meier* at 22 per Gleeson CJ. The applicant was deprived of having the trial Judge's ruling on a matter of substantial importance. As a result there was a miscarriage of justice.

Order

[80] The application for leave to appeal should be granted.
