Quo Cheng Lai v The Queen [2001] NTSC 79

PARTIES:	QUO CHENG LAI v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Defendant:	D Dalrymple
Respondent:	J Karczewski

Solicitors:

Defendant:	NTLAC
Respondent:	DPP

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Quo Cheng Lai v The Queen [2001] NTSC 79
No. SCC 9909126

BETWEEN:

QUO CHENG LAI
Defendant

AND:

THE QUEEN
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 4 September 2001)

Background

[1] On 14 February 2001, at the conclusion of an eight day trial of the then accused, Quo Cheng Lai, the jury unanimously returned a verdict of guilty of the offence of murder. Mr Lai was subsequently sentenced on 16 February 2001 to imprisonment for life in accordance with s 164 of the *Criminal Code*.

[2] Before the trial, Mr Dalrymple on behalf of Mr Lai had applied pursuant to s 26L of the *Evidence Act* to exclude a statement (Exhibit P2) signed by Mr Lai during the early hours of the morning of 25 April 1999.

On 19 May 2000 I ruled that the statement was admissible as part of the prosecution's case. I did not give detailed reasons at the time of the ruling. I said at that time:

> "I do not propose to give reasons for the ruling at this stage. The issues raised in this application are, to a very large extent, concerned with the weight and credibility of evidence from relevant police officers and the accused himself. My reasons for ruling the statement admissible necessarily require me to detail my assessment of the weight and credibility of evidence which, of course, is the jury's exclusive province.
>
> In addition, the accused is entitled not only to a fair trial but a trial which is seen to be fair. The nature of a detailed ruling on the issues in the present application would require me to make findings as to his credibility and also the credibility of the six police officers who gave evidence in the present application and are expected to be witnesses at the trial.
>
> Findings, in this context, could undermine the accused's confidence in his receiving a fair trial because he might be led to believe that I have made up my mind about the relative credibility of his evidence and that of the police officers. In the circumstances of this case, as I have indicated I will not provide detailed reasons for the ruling unless this becomes necessary after the trial, on the request of counsel."

[3] Counsel for Mr Lai (who I shall refer to as 'the accused' in these reasons) has requested me to publish detailed reasons for the ruling made on 19 May 2000. I now proceed to do so.

[4] It was the Crown's case at trial – and subsequently accepted by the jury – that the accused murdered his wife, Ligia Jose Lai, on 24 April 1999. The circumstances may be summarised as follows.

[5] The accused and the deceased were married in Portugal in 1981. Both were originally from (former) Portuguese Timor. They moved to Darwin in 1982 and from 1983 they took over the running of the Ebony Coffee Lounge at the Hibiscus Shopping Centre, Leanyer. The deceased continued to operate that establishment until the date of her death.

[6] The accused and the deceased were living apart at the date of the death. The deceased was living at 35 Clarence Street, Woodleigh Gardens and the accused was living at 17 Coburg Drive, Leanyer. Both properties were owned jointly by the accused and the deceased and together with the Ebony Coffee Lounge were scheduled to be sold under an arrangement in Family Court proceedings. As part of the agreed arrangements, the proceeds of sale were to be divided with 60% going to the deceased and 40% to the accused.

[7] Two of the couple's four children (a girl aged 10 and a boy aged 3) were living in Darwin at the date of the deceased's death. They resided with their mother from Monday to Friday evenings and with their father during weekends. This was part of an agreed arrangement sanctioned by the Family Court. It was also part of that arrangement that the accused and the deceased had swapped houses some ten days before the deceased met her death.

[8] The trigger to the couple's marital breakdown appears to have been a relationship which the deceased had developed with an Indonesian businessman, Risal Ongkosaputra. They had met in 1998. There had been

business dealings between the accused, the deceased and Mr Ongkosaputra who had stayed with the couple at Clarence Street for a short period and later rented the house at Coburg Drive.

[9] A close relationship had developed between the deceased and Mr Ongkosaputra. They went away on trips together to Bali and Singapore. In September 1998, Mr Ongkosaputra bought a finger ring for the deceased and had it engraved with the date 14 September 1998. The significance of the date was that this was when the deceased had first declared her love for Mr Ongkosaputra and said that she wanted to marry him.

[10] It was the Crown's case that in November 1998, the accused learnt that the deceased travelled to Singapore to be with Mr Ongkosaputra. The accused telephoned their hotel and told Mr Ongkosaputra that he should tell the deceased not to come back and, if she did, he would kill both her and Mr Ongkosaputra. Some days later the accused made a similar telephone threat to Mr Ongkosaputra that he would kill him and have his company ships burned if they sailed to Darwin.

[11] On 17 November 1998, the deceased applied for a restraining order against the accused under the *Domestic Violence Act*. On 18 November 1998, the Court of Summary Jurisdiction ordered, by consent, and without admission of liability, that for a period of six months from 18 November 1998, the accused was not to contact or approach the deceased directly or indirectly. The Family Court arrangements for property settlement, custody of the

children and swapping of residences were all structured to avoid any contact between the deceased and the accused.

[12] On 24 April 1999, the deceased worked at the Ebony Coffee Lounge until approximately 9.50 pm. That evening she was wearing a gold necklace given to her by Mr Ongkosaputra on 12 April 1999 to celebrate her 40th birthday.

[13] On the Crown's case, the deceased had driven the short distance from the Hibiscus Shopping Centre to her home at 35 Clarence Street. All the locks at that address had been changed on 14 April 1999 when she had moved from 17 Coburg Drive. When she arrived at Clarence Street, the accused was waiting inside the house for her. He had used a brick to break a large hole in the rear sliding (deadlocked) door. In the course of doing so, he had cut his fingers and left bloodstains on the broken glass of the sliding door and on the brick. The accused had used a broom and a red dustpan to sweep up the broken glass inside the house. He deposited it outside the broken door. In the process, he left bloodstains on two pieces of broken glass, the broom handle and the handle of the red dustpan.

[14] The Crown case was that the accused used a television video cable to strangle his wife to death. In doing so, he caused various minor bruises to the deceased's right shoulder, left kneecap, left eyebrow, left temporal region and the lateral aspect of her left wrist. The accused killed his wife

either in the bathroom where she was found or in some other part of the house from where he dragged her to the bathroom.

[15] According to the Crown case, the accused used a jug of water in an ineffective attempt to remove bloodstains, caused by his bleeding fingers, from the deceased's T-shirt. Before leaving Clarence Street through the front door, where he left a further bloodstain, the accused took the gold necklace which the deceased had been wearing. In taking the necklace from the deceased, the clasp was broken from the necklace. Police later found the clasp near the deceased's body.

[16] The accused walked from Clarence Street to his home at 17 Coburg Drive where he had left his two young children watching videos in his bedroom. He took his two children to a fast-food establishment, McDonalds, on Bagot Road. Before leaving the house, he lifted up the mattress of his bed and placed the deceased's broken necklace in a brown clutch bag.

[17] During the car trip to McDonalds, the accused told his ten year old daughter that if anyone asked whether he went out that day, she should say that he stayed at home. Shortly after his return to Coburg Drive, police officers arrived at around 12.30 am. The police had become aware of the deceased's death. They were also aware that the accused was estranged from the deceased. The police wished to check on the welfare of the children.

[18] The accused gave the impression of knowing nothing of his wife's death. He repeatedly suggested or asked if something terrible had happened. He also suggested that, if it had, Risal Ongkosaputra might be responsible.

[19] The accused accompanied police officers to the Berrimah Police Headquarters and subsequently made the statement (Exhibit P2) which was the subject of the application pursuant to section 26L of the *Evidence Act*.

[20] The statement on its face is entirely self-serving and exculpatory. The Crown sought to adduce the statement as part of its case against the accused on the basis that, in the light of other evidence, the statement amounted to an implied admission or a statement against interest. In particular, the Crown's case was that parts of the statement concerning when the accused last met the deceased and last visited 35 Clarence Street were deliberate and material lies motivated by a realisation of his guilt and a fear of telling the truth.

[21] Mr Dalrymple's application to exclude the accused's statement from evidence was advanced on a number of bases. Firstly, it was submitted, that the statement was not voluntary. In the alternative, submissions were made that the statement should be excluded from evidence in the exercise of judicial discretion in accordance with the principles considered by the High Court in *R v Swaffield* (1997) 192 CLR 159. Finally, Mr Dalrymple submitted that the statement was inadmissible under s 142 of the *Police Administration Act* because of the failure of the police to have the accused

confirm the substance of the statement in an electronic recording. In his submission the court should decline to exercise its discretion to admit the statement pursuant to s 143 of that Act.

[22] On 19 May 2000, I ruled that I was satisfied on the balance of probabilities that the accused's statement was voluntary. I was also satisfied that the statement should not be excluded in the exercise of judicial discretion. Finally, I ruled that there had been no breach of s 142 of the *Police Administration Act*. In the event that I was wrong in that regard, I indicated that I would have admitted the statement pursuant to s 143 of the *Police Administration Act*, having been satisfied that, in all the circumstances, admission of the statement would not be contrary to the interests of justice.

Evidence

[23] Mr Karczewski, for the Crown, called evidence from Constable Sandra Nash, who together with Constable Gordon Hillcoat, attended 35 Clarence Street at around 11.10 pm on 24 April 1999.

[24] Constable Nash gave evidence that she and Constable Hillcoat were shown into the house at 35 Clarence Street by an ambulance officer. She saw the deceased lying on her back in the bathroom with a black cord knotted around her neck. The deceased's face was very red and bloated and she did not appear to be breathing.

[25] Constable Nash's evidence was that she spoke to several persons who were present outside the house at 35 Clarence Street. She learnt of the deceased's

identity from Risal Ongkosaputra who also told her that the deceased and the accused were separated; that the deceased had a restraining order against the accused and that the accused had made threats to kill him, the deceased and the couple's children. Constable Nash accompanied other police officers to the accused's residence at 17 Coburg Drive to look for the deceased's children. The officers established that the house was unoccupied. They entered the house through a laundry window and checked all the rooms. Constable Nash's evidence was that she then returned to 35 Clarence Street. Approximately one hour later, she and Constable Hillcoat were instructed to search for the accused's vehicle. They located the vehicle at 17 Coburg Drive and were soon joined by Acting Sergeant Bahnert. The officers had trouble in attracting the attention of the occupants. All three climbed over a fence and Constable Nash knocked on a window.

[26] Constable Nash's evidence was that the accused said "Who's there" and was informed it was the police. At the front door, the accused said "What has happened. Something terrible, bad – Something has happened". Constable Nash, who had been instructed not to tell the accused that his wife may be dead, explained to the accused that "there has been a domestic situation in Clarence Street" and that she did not have all the details, but had been asked to come and check on the children. The accused permitted the police officers to enter the house and check on the two children. Acting Sergeant Bahnert said he would find out what had happened at Clarence Street and the

accused agreed that Constables Nash and Hillcoat would keep him company until Banhert returned with further information.

[27] According to Constable Nash, she and Constable Hillcoat chatted with the accused for around 30 minutes. She did not make any notes of the conversation, but recalled that a number of general matters were discussed including the pending sale of 17 Coburg Drive, the fact that the accused had been married for 20 years, had four children and that his first language was Mandarin and that his English was not very good. The accused also said that he still loved his wife, his country did not have domestic violence orders and that if he still lived in his country, his wife would still be with him today.

[28] Constable Nash's evidence was that the accused did not appear to have any difficulty understanding what she and Constable Hillcoat said to him. She did not have any difficulty in understanding the accused.

[29] Detective Gregory Lade arrived and said to the accused words to the effect that the police wanted or needed to have a word with him and wanted him to come to Berrimah Police Headquarters. Constable Nash's evidence was that the accused willingly went with Detective Lade, pausing only to ask about his children. It was explained to the accused that arrangements had been made for their uncle to look after them and the accused had then left with Detective Lade.

[30] Constable Nash's evidence was that she did not consider the accused to be a suspect during her dealings with him despite the information she had received from Mr Ongkosaputra. She considered that the accused was a person to whom the police obviously wished to talk. She would not have prevented him leaving 17 Coburg Drive if he had wished to do so – but she would have sought to dissuade him from going to the crime scene at Clarence Street and sought a contact telephone number if he had wished to go elsewhere.

[31] The evidence of Constable Hillcoat was substantially the same as that of Constable Nash as to what occurred while he was at 17 Coburg Drive. His memory of what was discussed with the accused was somewhat less detailed than that of Constable Nash, but he did recall that there was general conversation as to the accused's family and children. Constable Hillcoat's evidence was that he had no difficulty in understanding the accused and that the accused appeared to have no difficulty understanding him.

[32] Constable Hillcoat recalled Detective Lade arriving (with Senior Constable Bennett) and that the accused left with Detective Lade. However he was not privy to the conversation that led to the accused's departure from the house at 17 Coburg Drive.

[33] Senior Constable Mark Bennett gave evidence that after visiting 35 Clarence Street, he went with Detective Lade to 17 Coburg Drive. He was present

when Detective Lade advised the accused that he wished to speak to him at police headquarters, but did not now recall his exact words.

[34] Senior Constable Bennett accompanied Detective Lade and the accused to police headquarters. They arrived around 1.10 am on Sunday 25 April 1999. Detective Lade had a conversation with the accused in an interview room, where the accused was told his wife was dead. He became upset and cried. He indicated that he did not know about what had happened. Detective Lade continued to talk to the accused while making notes. It was noticed that the accused had cuts on his fingers. The accused claimed to have cut his fingers while gardening.

[35] At the conclusion of the conversation between Lade and the accused, Bennett was instructed by Lade to take a statement from the accused. Bennett asked the accused questions and made notes (Exhibit P1) of the answers. He then typed up a statement (Exhibit P2) which he read to the accused. The accused then signed the statement. The four-page statement was made in the form of a statutory declaration in accordance with the *Oaths Act* and included an acknowledgement that the statement had been read to the accused because he could not read English. In addition to signing the declaration at the conclusion of the statement, the accused signed and dated each page of the statement. Bennett denied that at any stage the accused asked to consult a lawyer before signing the statement and denied that the accused at any stage expressed reservations about the contents of the statement. Bennett also denied that the accused ever asked when he could

go home or that he had told the accused he could go home after signing the statement.

[36] Senior Constable Bennett gave evidence that he began typing the statement at around 3.10 am. He was not able to say how long it took to complete it. He did not caution the accused or electronically record their conversations because at that stage the accused was not considered to be a suspect. According to Bennett, the accused was "a person that we needed to speak to" and a potential witness.

[37] Senior Constable Bennett's evidence was that he had no difficulty in understanding the accused. Bennett was asked if the accused appeared to have any difficulties understanding him and replied:

> "There may have been the odd word here and there that we had to sort out, but as a whole, we understood each other quite well, I thought."

[38] The statement was read back to the accused because the accused had said either he could not read English or he could not read English very well. The accused appeared to understand the contents of the statement when it was read back to him and appeared to understand what was required of him when asked to sign it.

[39] Senior Constable Bennett gave evidence that Constable Edmund Turner had spoken to the accused at some time after the statement was completed. He was aware Turner knew the accused. He had not requested Turner to speak

to the accused. Senior Constable Bennett was present when Detective Lade arrested the accused at 5.08 am on 25 April 1999.

[40] Bennett became aware that there was a restraining order against the accused in favour of the deceased but could not recall at what stage he learnt of this. He believes the accused may have referred to it in the initial conversation with Detective Lade. He was not aware that Risal Ongkosaputra had told Constable Sandra Nash that the accused had made threats to kill his wife.

[41] Detective Lade gave evidence that, after visiting 35 Clarence Street, he and Senior Constable Bennett went to 17 Coburg Drive at just after 1 am on Sunday 25 April 1999. Lade had told the accused words to the effect that he would like the accused to accompany him back to the police station as he had something serious to talk to him about. The accused had readily agreed to accompany him once the accused had been satisfied that arrangements had been made to look after his children.

[42] At police headquarters, Detective Lade had a conversation with the accused. Senior Constable Bennett was present. Detective Lade made contemporaneous notes (Exhibit P3). The conversation commenced at 1.18 am. At 1.25 am, Detective Lade advised the accused of his wife's death. The accused appeared a "bit surprised by that, a bit shocked. He broke down". After the accused composed himself, Detective Lade continued to talk to him regarding his movements during the evening of 24 April. Detective Lade continued to make notes of what the accused told

him. He then instructed Senior Constable Bennett to take a statement from the accused while Lade interviewed a witness who had been present outside 35 Clarence Street. Detective Lade had completed taking that statement at 2.32 am. Lade also oversaw the taking of witness statements by other police officers and prepared a list of tasks in connection with the investigation of the deceased's death.

[43] Detective Lade's evidence was that shortly before 5 am, having received information from other witness statements and having considered the accused's statement (Exhibit P2), he concluded that there was sufficient evidence to arrest the accused. In arriving at this conclusion, Lade prepared a list (Exhibit P6) of what he regarded as significant matters arising from the results of the investigation. Lade discussed these matters with Detective Nixon and the accused was arrested at 5.08 am on 25 April 1999.

[44] It was Detective Lade's evidence that the accused was not a suspect until around 5 am. Before that time, Lade regarded the accused as only a "person of interest". Lade's evidence was that if the accused had indicated a desire to leave the police station after 3.30 am he would have had to evaluate the available evidence against him. The accused had not indicated any desire to leave and Lade had prepared the list (Exhibit P6) and considered the position between approximately 4.30 am and 5.00 am.

[45] Detective Lade gave evidence of further investigations he undertook during Sunday 25 April. At 6.15 pm that day the accused was invited to participate

in an electronically recorded record of interview. The accused declined to do so (Exhibit P5).

[46] Detective Lade's evidence was that he had no difficulty understanding the accused and the accused appeared to have no difficulty understanding him.

[47] Detective Senior Constable Edmund Turner gave evidence that during the early hours of Sunday 25 April 1999, he heard the accused sobbing. Turner knew the accused and asked Detective Bennett if he could speak to the accused to ascertain his welfare. Turner had a brief conversation with the accused in which he offered to telephone anyone for the accused and give him any other assistance. Turner denied that the accused had asked him when he (the accused) could go home. He had known the accused for about 6 years and considered him "more than an acquaintance but falling short of a friend". Turner's evidence was that he had no difficulty in communicating with the accused in English. On occasions the accused would speak in Indonesian and Turner would reply in English. On other occasions they would converse in English. It was Turner's evidence that the accused could understand English well, but the accused preferred to speak in Indonesian if the subject matter was complicated.

[48] Detective Sergeant John Nixon gave evidence confirming that Detective Lade had had a discussion with him at around 5 am on 25 April and that he had agreed with Lade's assessment that there was sufficient evidence available to arrest the accused for the murder of his wife.

[49] The accused gave evidence with the assistance of an interpreter. His evidence was that his first language is Hakka (a Chinese language) which he usually used in conversation with the deceased. He also speaks Indonesian and had some rudimentary education in the English language as a primary school student in Timor. He came to Australia in 1981 and was employed for the first two and a half years as a cleaner, a position not requiring him to speak much English. From 1983 he had worked with his wife in operating the Ebony Coffee Lounge. His work was mainly in the kitchen where he did not need to speak English. His wife conducted all their business dealings in English because she was more proficient than him in that language.

[50] The accused gave evidence about the arrival of the police at 17 Coburg Drive in the early morning hours of 25 April 1999. His version of events corroborated the evidence of Constables Nash and Hillcoat upon their arrival. The accused sat with Nash and Hillcoat for some time before Detective Lade arrived. They had discussed the sale of the house at 17 Coburg Drive and the accused's separation from his wife. They also discussed the custody arrangements for his children and the restraining order against him. His evidence was that he had "no choice" in accompanying the police to the Berrimah police headquarters. He could not recall what Lade had said, but he remembered Lade made it clear that he wanted the accused to go with him to the police station. His did not want to go because he was concerned about his children and was worried about what might have happened to his wife at 35 Clarence Street.

[51] The accused recalled speaking to Detective Lade at the police station. Lade told him that his wife was dead. The accused said that he was upset and was not really paying attention to what Lade said to him. His evidence was that he went to another room at around 1.30 am with Senior Constable Bennett. He asked to speak to his lawyer. Around 2.00 am Constable Turner arrived and spoke to him. He told Turner that he wanted to go home, but Turner said he would have to check with his superior. Aside from this aspect, the accused's version of what was said largely accords with the evidence of Turner.

[52] The accused's evidence was that Bennett made notes while they talked. Bennett asked about the accused's family, his marital situation and what he had done on Saturday 24 April. He had explained to Bennett how he had come to have cuts on his hands. The accused said that he repeatedly asked to be allowed to go home, but his requests were ignored. Bennett prepared a statement which he read to the accused. The accused disagreed with the contents and said he wanted to talk to his solicitor. The accused could not recall now what parts of this statement he disagreed with. Bennett prepared another statement (Exhibit P2) which was not read to the accused. He had signed it because Bennett had told him he would be allowed to go home if he signed the document. The accused claimed to have not "really understood" what Lade had said to him, only "bits and pieces". He had explained that his English was not good and had asked for a lawyer. He also claimed not to

have totally understood what Bennett had said to him. Bennett had repeated things two or three times to make sure that he understood.

[53] The accused agreed that he had "picked up a lot of English" during the 18 years that he had been in Australia – "but not very fully".

Credibility of the Witnesses

[54] I am satisfied that each of the six police officers who gave evidence was entirely honest in the account they gave of their dealings with the accused. Each of them impressed me as persons doing their best to give an honest and accurate account of events. There were some discrepancies in their evidence, for example, whether Bennett had spoken to Turner about the latter checking on the accused's welfare and whether the cuts on the accused's fingers were discussed in the initial conversation with Lade at the police station or only later when the accused spoke to Bennett. However, such discrepancies in the evidence which did emerge were no more than to be expected from honest witnesses endeavouring to do their best to recall matters of detail which may have appeared to have been of little significance at the relevant time. The contemporaneous notes of both Lade and Bennett corroborate their version of events as to what was discussed with the accused. In many, or even most, respects the accused's evidence as to what was said is in agreement with the evidence of Lade and Bennett.

[55] In contrast to the prosecution's witnesses, I am satisfied that the accused has embellished his version of events and exaggerated his difficulties with the

English language. Where there is any difference between his evidence and that of the prosecution witnesses, I reject his version of events. I am satisfied that the prosecution witnesses were both accurate and honest in their evidence.

[56] The subject-matter of the accused's discussions with the various officers was largely confined to factual matters such as his marital and family situation and his movements on Saturday 24 April. It stretches credibility to breaking point to believe that a man who has lived in Australia for 18 years and spent much of that time operating a retail business with his wife is so deficient in English that he could not understand what was being asked of him. Despite the accused's claims of lack of full comprehension, it was apparent from his evidence that his memory and understanding of his dealings with the police very largely accord with the evidence of the police officers. Where he differs is in regard to his alleged requests to consult a lawyer and to be allowed to go home. I do not believe that he made such requests, nor do I believe that Bennett encouraged him to sign the statement (Exhibit P2) by holding out the prospect of being allowed to leave the police station. The accused in substance agreed with the evidence of Lade as to how he came to accompany police to the police station. He claims he was reluctant to do so and had "no choice", but even on his own evidence he expressed no reservations to Lade (beyond a concern for his children, for which arrangements had been made) and there is nothing to suggest any improper conduct on the part of Lade.

[57] I am satisfied that the accused's statement was taken in the manner described in evidence by Bennett. I am satisfied that the statement was read back to him by Bennett and that he was given an opportunity to amend it before signing the document. I am satisfied that the accused's ability in the English language was adequate for him to comprehend his conversations with the police officers and that any isolated language problems which might have arisen were met by the police officers clarifying, and if necessary, repeating relevant matters and questions.

Submissions

[58] I have noted previously that Mr Dalrymple's application to have the accused's statement excluded from evidence was advanced on a number of bases. Submissions were made that the Crown had not established upon a balance of probabilities that the statement was voluntary. In the alternative, it was submitted that the statement should be excluded in the exercise of judicial discretion or that it was inadmissible pursuant to s 142 of the *Police Administration Act*.

[59] There was a good deal of overlap in the submissions directed at the various alternatives relied upon by Mr Dalrymple. I do not consider that it is either necessary or desirable to attempt a full summary of the submissions made on behalf of the accused. Many of the submissions fall away in the light of my findings as to the respective credibility of the prosecution witnesses and the accused.

[60] The principal submissions relied upon by Mr Dalrymple may be briefly summarised as follows:

(a) there was said to be a "power imbalance" between the police officers and the accused based on the power of police officers to arrest a person and make far-reaching decisions as to his liberty and future generally. In the accused's circumstances, the imbalance was said to be particularly acute given his background as a person from a non-English speaking country with limited ability in the English language.
Mr Dalrymple referred to Detective Turner's evidence that the accused preferred to speak in Indonesian when talking of complex matters.
He also emphasised the accused's lack of experience in dealing with the police and the risk that the officers who dealt with the accused had over-estimated his ability to comprehend English, particularly given the accused's distressed condition upon learning of his wife's death;

(b) Mr Dalrymple pointed to the accused's evidence that he had on several occasions indicated that he wanted to consult a lawyer and wanted to go home;

(c) it was submitted that there must be doubts about the reliability of the contents of the accused's statement in the light of his limited ability in English;

(d) Mr Dalrymple submitted, perhaps somewhat faintly, that the police generally had sufficient information to consider the accused as a

"suspect" (and were thus obliged to caution him) at some stage before the statement was completed;

(e) the evidence from the accused that he thought he had "no choice" but to co-operate with the police and accompany them to the police station was highlighted and said to indicate that the accused may have considered that he was not free to leave and was being held in police custody;

(f) Mr Dalrymple emphasised the instruction given to Constables Nash and Hillcoat that the accused was not to be informed of his wife's death – this was said to demonstrate the eagerness of the police to have the accused accompany them to the police station;

(g) it was submitted that the absence of any reference in the accused's statement to the cuts on his fingers and how these came about (despite the evidence of Bennett and the accused that this had been discussed) raised a real concern about the statement's reliability and suggested a bias, deliberate or unintended, for the statement to be written in a way that did not accurately reflect what was said by the accused;

(h) in a novel submission, it was submitted that the requirement of s 142(1)(a) of the *Police Administration Act* (to electronically post-record admissions of a suspect made before the commencement of questioning) extended to admissions made by a person who while not a suspect when he made the admissions later became a suspect.

Voluntariness

[61] It is a fundamental requirement of the common law that an admission (including as in the present context an implied admission or statement against interest) must be voluntary, that is, "made in the exercise of a free choice to speak or to be silent" (*R v Lee* (1950) 82 CLR 133 at 149). The relevant principle was stated by Dixon J in *McDermott v R* (1948) 76 CLR 501 at 511 (and recently cited with approval by the High Court in *R v Swaffield* 192 CLR 159 at 188):

> "If (the) statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made."

[62] In the present case, I am satisfied that there is nothing in the circumstances of how the accused came to be at the police headquarters and make the statement (Exhibit P2) to engage the principle in *McDermott*, supra. On the basis of all the evidence and my findings as to credibility I am satisfied that the accused willingly accompanied Lade and Bennett to the police headquarters and freely chose to make a statement. It is not to the point whether the accused had some unexpressed reluctance to accompany the police. He willingly went with the police after satisfying himself to the arrangements for care of his children. Whether he felt that he had "no choice" could be relevant only if the police by their conduct had induced such a belief. I am satisfied that neither Lade nor any other officer did

anything to cause the accused to believe he was under arrest or not free to decline the invitation to attend at the police station.

[63] I am also satisfied on the basis of the evidence of Lade and Bennett, together with the other prosecution witnesses that the accused was not a "suspect" until around 5 am on Sunday 25 April. I accept as true the evidence of Lade that it was not until he sat down between 4.30 am and 5.00 am to consider the progress of the investigation that he formed the subjective belief that the accused was "probably" (*R v Maratabunga* (1993) 3 NTLR 77 at 86 per Mildren J) or "possibly" (*R v Grimley* (1994) 121 FLR 236 at 258 per Kearney J) guilty of murdering his wife. Similarly, I accept as true Bennett's evidence that he did not consider the accused to be a 'suspect' during the taking of the statement.

[64] I have previously rejected the accused's evidence that he both asked to consult a lawyer and indicated that he wanted to go home. I have also found that the accused's grasp of English was adequate for him to understand what was being asked of him and to understand the contents of the statement when it was read back to him. The omission in the statement of any reference to the cuts on the accused's fingers and how they came to be there does not cause me to doubt the voluntary character of the accused's statement. Bennett explained this as an oversight on his part and I accept the truth of his evidence.

[65] I am satisfied that the accused made his statement in a free choice of whether to speak or to be silent. The police were not obliged to caution him before he became in their minds a "suspect". The accused chose to speak and he chose to sign the statement.

[66] In conclusion, I am satisfied on the balance of probabilities that the statement (Exhibit P2) was voluntary.

Discretionary Exclusion

[67] The next question is whether I should exclude the statement in the exercise of the fairness discretion or on public policy grounds.

[68] In *R v Swaffield*, supra, the High Court appeared to favour a simplification and re-expression of the tests for the admissibility of disputed confessions or admissions. In summary, the Court favoured an approach of considering first whether the admission was voluntary; next whether it was reliable, and, if so, whether it should nevertheless be excluded from evidence in the exercise of an overall judicial discretion based upon unfairness to the accused, public policy considerations and disproportionate prejudice outweighing the probate value of the disputed evidence. At p 196, Toohey, Gaudron and Gummow JJ observed:

> "One matter which emerges from the decided cases is that it is not always possible to treat voluntariness, reliability, unfairness to the accused and public policy considerations as discrete issues. The overlapping nature of the unfairness discretion and the policy discretion can be discerned in *Cleland v The Queen* (1982) 151 CLR 1. It was held in that case that where a voluntary confession was procured by improper conduct on the part of law enforcement officers,

> the trial judge should consider whether the statement should be excluded either on the ground that it would be unfair to the accused to allow it to be admitted or because, on balance, relevant considerations of public policy require that it be excluded. That overlapping is also to be discerned in the rationale for the rejection of involuntary statements. It is said that they are inadmissible not because the law presumes them to be untrue, but because of the danger that they might be unreliable. That rationale trenches on considerations of fairness to the accused. And if admissibility did not depend on voluntariness, policy considerations would justify the exclusion of confessional statements procured by violence and other abuses of power."

[69] In the present case, Mr Dalrymple did not seek to argue that the prejudice arising from the accused's statement outweighed its probative value. The thrust of his submissions was that admission of the statement would be unfair to the accused, albeit he referred to public policy considerations by reference to the decision of the police not to immediately advise the accused of the death of his wife.

[70] A good deal of Mr Dalrymple's argument as to the alleged unfairness of admitting the statement focussed upon the accused's non-English speaking background and alleged poor ability in English. I have already rejected submissions that the accused's level of English ability impacted upon his decision to make the statement or its reliability. I am not satisfied that any unfairness to the accused arose from what Mr Dalrymple referred to as the "power imbalance" between the police and the accused. His English was equal to the task and I am not persuaded that his overseas origins, more than 18 years in the past, put him at any disadvantage in dealing with the police. The accused chose to make a statement which was entirely self-serving and

exculpatory on its face. I am not persuaded that there would be any unfairness to the accused in its admission into evidence.

[71] Similarly, I am not satisfied that there is any basis to exclude the statement on public policy grounds. Mr Dalrymple suggested, albeit faintly, that the police had deliberately kept the accused in the dark for a time about the death of his wife and may have arranged their investigation with an eye to the accused not becoming a "suspect" until a statement had been obtained from him.

[72] I do not consider that there was any impropriety on the part of the police. The decision not to immediately tell the accused of his wife's death was both reasonable and understandable. The immediate concern of the police was for the welfare of the children of the accused and the deceased. The children were in the custody of the accused. The deceased's identity and cause of death were not formally established. The police undoubtedly wished to speak with the accused at an early stage of the investigation. I do not consider the course they undertook was improper in any way. I also reject the suggestion that either Bennett was deliberately kept in the dark or that Lade deliberately kept himself in the dark regarding progress with the investigation before a statement was obtained from the accused. The process of taking statements from the accused and other witnesses continued during the early hours of the Sunday morning. I accept that it was not until around 5 am that Lade had received and considered sufficient evidence to

change the status of the accused in his own mind from "a person of interest" to a "suspect".

[73] In conclusion, I am satisfied that the accused's statement should not be excluded on discretionary grounds.

S 142(a) of the *Police Administration Act*

[74] Sections 142(1) and 143 of the *Police Administration Act* provide:

> "142(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; or
> >
> > (b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,
>
> and the electronic recording is available to be tendered in evidence."
>
> "143 A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice."

[75] Mr Dalrymple submitted that there might be an ambiguity in the application of s 142(1)(a) to admissions made by a person at a time when that person was not suspected of having committed a relevant offence. In Mr Dalrymple's submission it was possible to interpret s 142(1)(a) as

applicable to the admissions or confessions of a person made both "before the commencement of the questioning" **and** before that person was suspected of having committed an offence. On this approach, subject to s 143, the substance of any admissions or confessions of a person made at any time before he was a "suspect" would need to be confirmed by an electronic recording if such admissions or confessions were to be admissible as part of the prosecution case.

[76] I am not aware of any authority which goes so far as this. As Kearney J observed in *R v Grimley* (1994) 121 FLR 236 at 257:

> "The concept of 'person suspected' is central to s 142(1). Section 142(1) is 'directed to confessions made by suspects generally' as Mason CJ said in *Pollard v The Queen* (1992) 176 CLR 177 at 182-183; that is, it is not confined to persons in custody, as are ss 137 and 140. Mr Kilvington (counsel for the accused) rightly conceded that before s 142(1)(b) applied, the accused had to be 'a person suspected of having committed a relevant offence'".

[77] Mr Dalrymple submitted that s 142 was enacted to meet concerns in relation to frequently made accusations that admissions or confessions which were not electronically recorded were either unreliable or fabricated. In Mr Dalrymple's submissions such concerns applied equally to admissions and confessions made before or after a person was a "suspect". He submitted that it is at least arguable that the intent of s 142 was to require electronically recorded confirmation of all admissions or confessions made by a person regardless of whether they were made before or after the person became a suspect.

[78] Cases such as *Pollard*, supra, *Heatherington v The Queen* (1994) 179 CLR 370 and *Grimley*, supra are concerned with recording the whole **questioning** process. The difficulty is to know when the **questioning** has begun. However, I consider that whatever uncertainties arise in connection with that matter, the terms of s 142 are unambiguously confined to confessions or admissions made by a "suspect" at a time when he was a "suspect". If the legislation had intended that s 142 was to apply to all confessions or admissions made by a person regardless of that person's status as a "suspect" then it would have been a simple matter to say that s 142 applies to all confessions or admissions made by a "person".

[79] On Mr Dalrymple's approach to s 142, the police would be obliged, in practical terms, to record electronically everything said by a "possible suspect" or "person of interest". Such an approach may well be desirable in providing an objective, verifiable and tamper-proof record of what occurs between the police and those they speak to: see for example, the comments of Kearney J in *Grimley*, supra at 248. However, in the real world. It would be practically impossible and probably undesirable for the police to record everything said by a person who attends a police station voluntarily to assist with police investigations.

[80] In the present case, I have found that the accused was not a "suspect" until some time after he had completed his statement. Section 142 of the *Police Administration Act* had no application in the circumstances.

[81] If I was wrong in that conclusion, I would admit the accused's statement in exercise of discretion pursuant to s 143 of the *Police Administration Act*. I am satisfied that to do so would not be contrary to the interests of justice. I have found previously that the police committed no impropriety in their dealings with the accused. Any failure to comply with s 142 by not electronically recording the accused's statement would not have been a deliberate flouting of the legislative requirements – on the basis of decided cases, the Police would have had no reason to consider that it was necessary to electronically record a statement from a person who was not regarded at the time as a suspect. Finally, after the accused had become a suspect and been arrested, he was given an opportunity to confirm what he had told the police in his statement by participating in a formal electronically recorded record of interview. He declined that opportunity. In conclusion, in the circumstances of this case, failure to admit the statement into evidence would be entirely contrary to the interests of justice. Exclusion of the statement would be an affront to commonsense and be likely to shock the public conscience.

Conclusion

[82] In the result, I was satisfied that the statement was voluntary and that there was no basis on which to exclude it as evidence in the prosecution's case.

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