PARTIES:	GRIMLEY, David Simon v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	COURT OF APPEAL
FILE NO:	CA2 OF 1995
DELIVERED:	27 July 1995
HEARING DATES:	5, 6 April 1995
JUDGMENT OF:	MARTIN CJ, MILDREN AND THOMAS JJ

CATCHWORDS:

Criminal Law and Procedure - Evidence - Confession - Appeal by Accused against the Trial Judge's discretion - Question of mixed law and fact - Leave required

Criminal Code (NT) s.140 (b)

Williams v The Queen (1986) 161 CLR 278, followed

Criminal Law and Procedure - Evidence - Confession - When whether arrested - Factors to be considered

Police Administration Act ss.137 and 137(2)

Smith v The Queen (1956-7) 97 CLR 100, followed
The Queen v Amad [1962] VR 545, referred to
O'Donoghue (1988) 34 A Crim R 397, referred to
Trotter, Sutherland and Jordan (1992) 60 A Crim R 1, followed
The Queen v Conley (1982) 30 SASR 226, followed

Criminal Law and Procedure - Evidence - Confession - Accused alleged cross-examination when interviewed by Police - Only applies to person in custody - Trial Judge's discretion to allow evidence - Factors to be considered

McDermott v The King (1947-8) 76 CLR 501, followed
The Queen v Amad [1962] VR 545, followed

Criminal Law and Procedure - Evidence - Confession - Exclusion - Trial Judge's discretion - Relevant factors - Credibility - Inferences drawn

M v The Queen (1994) 126 ALR 324, referred to

Brunskill and Another v Sovereign Marine and General Insurance Co Ltd and Others (1985) 62 ALR 53, referred to
Warren v Coombs and Another (1979) 23 ALR 405, referred to
Gronow v Gronow (1979-80) 144 CLR 513, followed

Criminal Law and Procedure - Evidence - Exclusion - Confession made where recording facilities available inadmissible unless recorded - Discretion - Interests of justice

Police Administration Act ss.142 and 143

Rostron v The Queen (1991) 1 NTLR 191, followed
O'Donoghue (1988) 34 A Crim R 397, followed
Heiss v The Queen; Kamm v The Queen (1992) 2 NTLR 150, followed

Criminal Law and Procedure - Evidence - Confession - Appeal against Trial Jugde's discretion - Insufficient weight given to length of questioning before interview electronically recorded - Failure to take into account vulnerability of accused

Criminal Law and Procedure - Evidence - Confession - Recording of confessional material - Admissibility - Factors to be considered - "the interests of justice"

Police Administration Act ss.137(2), 140, 141, 142, 142(1)(b) and 143

Pollard v The Queen (1994) 176 CLR 177, referred to
Heatherington v The Queen (1994) 120 ALR 591, referred to
Bina Raso (1993) 68 A Crim R 495, referred to
George v Rockett and Another (1990) 170 CLR 104, referred to
Domican and Thurgar (1989) 43 A Crim R 24, referred to
Bankinvest AG v Seabrook and Others (1990) 90 ALR 407, followed
Bunning v Cross (1978) 141 CLR 54, followed
Foster v The Queen (1993) 113 ALR 1, referred to
Wong Kam-Ming v The Queen [1980] AC 247, distinguished
Cleland v The Queen (1982-3) 151 CLR 1, followed
Williams v The Queen (1986) 161 CLR 278, referred to
Van der Meer v The Queen (1988) 62 ALJR 656, referred to
Duke v The Queen (1989) 63 ALJR 139, referred to
The King v Lee (1950-1) 82 CLR 133, referred to
The Queen v Wright [1969] SASR 256, referred to
Regina v Toomey and Frost [1969] Tas R 99, referred to
Burns v The Queen (1975) 132 CLR 258

REPRESENTATION

Counsel:

Appellant: K. Kilvington
Respondent: C. Cato

Solicitors:

Appellant: Legal Aid Commission of the Northern Territory
Respondent: The Office of the Director of Public Prosecutions

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

No. CA2 of 1995

BETWEEN:

DAVID SIMON GRIMLEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN & THOMAS JJ.

REASONS FOR JUDGMENT

(Delivered 27 July 1995)

Background

On 5 August last the appellant was convicted for that on 29 January 1994, at Darwin, he unlawfully assaulted a six year old girl with intent to commit an act of gross indecency upon her, and thereby committed such an act upon her, and further that he unlawfully assaulted her with circumstances of aggravation in that she was a female and he a male. The learned trial Judge admitted evidence of confessions made by the appellant at the trial, consequent upon an examination on the voir dire undertaken pursuant to s26L of the *Evidence Act*, in the exercise of his discretion. It is made clear in *Williams v The Queen* (1986) 161 CLR 278 at

pp287, 302 and 314 that such an appeal involves a question of mixed law and fact. The appellant wishing to appeal against his Honour's decision, leave is required under s140(b) of the *Criminal Code*. The application for leave was heard along with the submissions as to the merits of the appeal as if leave had been granted.

The appeal was not against his Honour's finding that the confessions were made voluntarily, but it is put that his Honour erred in the exercise of his discretion, both at common law and under statute.

The grounds of appeal covered a wide field and it is necessary to go into factual detail.

On the early morning of Saturday 29 January 1994, the police received information regarding unlawful entry and sexual assault at premises at 3 Moil Crescent, Moil (a suburb of Darwin) involving a six year old female. A number of police became involved, but for these purposes it is sufficient to show what happened by reference to the evidence of Detective Senior Constable Edwards. Upon arrival at the scene, Edwards took possession of a flannelette shirt which had been found outside a window. Two days later he received information from police investigating another matter and he went to premises in nearby Byrne Circuit. He spoke to an occupant, ascertained that the appellant was living there and was given permission to look into the room which the appellant

occupied. He noticed clothing which was similar in description to that described by the girl as having been worn by the person who assaulted her. Information was obtained from police records that the appellant had been involved in sexual offending. He was then at the University attending a trades course and, in his words, Edwards "decided to go and find Mr Grimley - I mean we had no other person to speak to, he was another person of interest - so I decided to go to the Uni and see if I could locate him to speak to him". He located the appellant, introduced himself and asked if he could speak to him, away from the University, perhaps at the Police Station. The appellant replied: "Yeah what's it about?". Edwards said: "Well, I don't want to say here in front of these people", and the appellant replied: "Oh yeah, all right, when I drop the vehicle home" or words to that effect. It was arranged that the appellant would drive his vehicle to the house where he was living. Edwards said to the appellant: "I'll pick you up from there". The subsequent happenings are most usefully summarised in a chronology incorporated by his Honour into his reasons for judgment in which he sets out the evidence of the various witnesses regarding fifty events which were alleged to have occurred on 31 January and 1 February.

Monday, 31 January 1994

1. 2:45pm

   Police left the University with the accused following them, driving the motor vehicle owned by

Ms Grimster, the occupier of the House in Byrne Circuit, Moil, where the accused was then residing.

2. 2:50pm

The two vehicles arrived at the house in Byrne Circuit. The accused came to the Police car. Edwards says that he told the accused that he wanted to speak to him about an assault in Moil on Saturday morning. Constable Gibson says the Saturday incident was mentioned and the accused said he knew that that was what it was about. The accused says that he asked what the Police wanted to talk to him about, and was told that he would be informed at the Berrimah Police Centre.

3. 3:00pm

The detectives arrived at the Berrimah Police Centre with the accused in the Police car.

4. 3:00pm or shortly thereafter

The accused was placed in an interview room in the CIB offices and Edwards accompanied by Gibson commenced to interview him. According to them, the accused first talked about various personal matters - his employment and social affairs - for "a good half an hour or so", so that "it was probably getting on to 4 o'clock" before they got on to the subject of his movements on the Friday night and Saturday morning with which they were concerned.

5. 3:20pm

According to the accused, Edwards first spoke to him about this time in the interview room. He told the accused why he wanted to question him. The accused then asked "to see a lawyer and speak to lawyer"; Edwards responded -

> "You'll get nothing from us until you tell us what you actually did on Friday night.".

Edwards and Gibson deny that that exchange occurred.

The accused said that he was questioned continuously by the Police from 3:20pm until 8:00pm, with intervening periods when they left him alone. Edwards and Gibson deny that the accused was continually questioned over this approximate 5 hour period.

The accused says that the Police first left him alone in the interview room at 3:00pm, for some 20 minutes; they then came in and questioned him about

his whereabouts on Friday night 28 January. He told them of his movements on that night and that he had then gone home to Byrne Circuit about 2:45am on Saturday 29 January, and gone to bed. He said that the Police said that this account was "lies". He was required to repeat his account about six times between 3:20pm and 8:00pm, because he was being continually questioned by Edwards. The Police deny the allegations as to "lies", and that the questioning was continual.

Edwards says that "approximately half an hour" (that is, at about 3:50pm) after he had asked the accused about his whereabouts on Friday night 28 January, the accused then started to talk about why he was in Darwin.

The accused says that between 3:30pm and 4:00pm he was told by Edwards that the Police Forensic section had discovered fibres from the flannelette shirt found at the victim's home, on the accused's belt. Edwards denies this allegation.

6. "Just before 4:00pm"

The Police evidence was that Edwards discussed the victim's statement with Senior Constable Reed, and the need to obtain from the victim more detail about the intruder. Reed says that at Edwards' direction, she telephoned the victim's mother, and arranged for her to attend with the victim at Berrimah Police Centre, to be re-interviewed. Edwards said this call was at about 4:15pm. Reed also arranged for a Forensic officer, Senior Constable Chilton, to attend at Berrimah Police Centre.

7. 4:00pm

Edwards said that his first conversation with the accused ceased at about 4:00pm. By then the accused had recounted his movements on Friday night 28 January, concluding with his going home to bed in Byrne Circuit and waking up the following morning Saturday 29 January. Edwards then took the accused to the toilet.

8. "After the [4:00pm] period"

Edwards said that he resumed questioning the accused, specifically about the time in which the accused had said he had been asleep in the house at Byrne Circuit, in the early hours of Saturday morning 29 January.

9. 4:15 - 4:30pm

Edwards said that the accused started to talk about a "blank period" in his memory, from the time he went to sleep in the early hours of Saturday morning 29 January until he woke up sitting on the toilet at 6:00am. This questioning lasted some "10 or 15 minutes".

10. 4:30pm

The accused said that about this time he started to talk to Edwards about his "blank period" in the early hours of Saturday. He explained this period on the basis that "my mind was blank due to the fact that I was asleep."

11. "Close to 5:00pm"

The Police said they commenced talking to the accused about the "blank period", for some "10 minutes or so"; this was after he had been taken to the toilet again, and had been given more coffee. Edwards says he decided to await the outcome of the re-interviewing of the victim by Reed, and thereafter did not speak much to the accused (presumably until about 7.20pm - see Item 21).

12. 5:15pm

The victim and her mother arrived at Berrimah Police Centre. Edwards says he spoke to them for about 10 to 15 minutes. Reed then sought to obtain from the victim further details by way of a description of the intruder, for the purpose of preparing an Identikit. She said that she did not show any photograph of the accused to the victim, at any time.

13. 5:30pm

Chilton from the Police Forensic section arrived at Berrimah Police Centre. Reed spoke to him and attempted with the victim to construct an Identikit of the intruder, without success.

14. 5:45pm (plus or minus 10 minutes)

The accused said that Edwards and Gibson formed a "human shield" around him when taking him from the interview room to the toilet, and back.

15. 5:30pm - 6:00pm

According to the accused a Polaroid photograph (Exhibit D1) was taken of him by Edwards, in the

interview room. Edwards denies this; see Item 41.

16. 6:00 - 6:30pm

Edwards says he telephoned the cyclist, Mr Shepherd, who doubted his ability to identify from a photograph, the person he had seen in the early hours of Saturday 29 January.

17. 6:30pm

Edwards says that he asked the accused if he would like to have a meal, and ordered a meal for him. Edwards, Reed and Gibson watched the News program on television, as there had been a Media Release about the crime of 29 January. The victim and her mother departed from Berrimah Police Centre. Reed spoke to Edwards, telling him of the result of her re-interviewing the victim and her mother, and of the unsuccessful outcome of the attempt at an Identikit of the intruder.

18. 6:30pm

The accused says that a meal was placed in front of him at this time, but he was not sure as to the time. Compare Item 20.

19. "Later on"

The accused says that Edwards told him that he had been identified by the victim from the Polaroid photograph (Exhibit D1). Edwards denies saying this; see Item 41.

20. 7:00pm

Edwards says that the accused's meal arrived. Exhibit P5 puts this time as from 7:00pm to 8:00pm.

21. 7:20pm

Edwards says that he started to talk to the accused again about his "blank period". He said that the accused stated that gradually it was coming back to him.

22. 7:00 - 7:30pm

According to the accused, he had the following discussion with Edwards, viz:-

> "Tell us the nature of that discussion? - - - Senior Constable Edwards said to me 'don't worry about the female out there, I'm not worried about it. You tell us what happened

> and I'll give you - I'll make sure you get bail.'
>
> 'Was this during some questioning or did he just come in and say this; how did it happen? - - - He came in on his own, sat down, put his feet up on the desk, tried to make me relax a little bit'." (transcript, pp133-4).

Edwards denies he said this.

23. 7:30 - 8:00pm

The accused gave the following evidence -

> "Did anyone else say anything that upset you or intimidated you during this period? - - - Yeah, Later on Constable Gibson came in and said 'well, come on, tell us the full story or we'll send the heavies in'." (transcript, p134).

Gibson denies she said this (transcript, p113).

24. Approximately 7:50pm

According to the accused, before Edwards wrote out his hand written note of the first admissions by the accused, Gibson received a telephone call from Detective Sergeant Chapman, which he overhead viz:-

> "And can you tell us please what the conversation was that you overheard? - - - It was, 'Have you charged him yet?'. - - - So you heard things, 'Have you charged - - -?' - - -' Have you charged the bastard yet?' The answer to was - to that was, "Not yet, but we're getting there.". Then later on there was another phone call, "Just throw the bloody book at him.". (transcript, p135).

Gibson said she did not speak on the telephone with Chapman (transcript, 101), but overheard Edwards' telephone call to Chapman; see Item 36.

25. "About [8:00pm]"

Edwards said that the accused started talking about what happened during his "blank period", and made incriminating admissions. The accused agrees that this was the time when he made admissions. Edwards made a contemporaneous note of these admissions (Exhibit P2).

26. 8:00pm

Gibson said that the accused started talking about

his "blank period".

27. 8:10 - 8:15pm

Edwards said that he finished taking his note of the accused's incriminating remarks (Exhibit P2). He then spoke to Constable Reed about certain information in that note, in which "exposed beams" were mentioned by the accused.

28. "Approximately 8:00pm"

Reed telephoned the victim's father to ascertain if the victim's house had exposed beams; neither she nor Edwards had been inside the victim's house. She communicated the information she received to Edwards. They also looked at some photographs of the house interior, in the Police possession; these showed a pool table and an exposed beam. Edwards decided that he had sufficient evidence to charge the accused with the alleged offences of 29 January.

29. Time not specified

Edwards commenced a tape recorded interview with the accused (Exhibits P3 and P4). He cautioned the accused (p1 of Exhibit P4). The interview stopped at 8.42pm and re-commenced at 8.55pm, concluding at 9.01pm.

30. "After 8:00pm"

Gibson said she was in the interview room alone once with the accused for a short period; the accused told her he found the flannelette shirt in the park, with 3 cigarettes in the pocket. The accused has introduced the topic. The accused gave a different account; see Item 33.

31. 8:30pm

Reed was requested by Edwards to contact Chapman. She was unable to do so.

32. 8:40pm

According to the accused he was told by Edwards that he was under arrest. This accords with p5 of Exhibit P4.

33. 8:42 - 8:55pm

According to the accused, during the break in the tape recorded interview (Exhibits P3 and P4) - see Item 29 - Gibson asked him about the flannelette shirt, viz:-

"Did you talk to Officer Gibson about a shirt, did you raise that topic of conversation with her? - - - No, she came into the interview room between the time the tape was stopped at - here it is in front of me - 12.42 - sorry, 8.42 and 8.55, and asked me what did I find in the park.

Had you had a conversation with her prior to the tape being put on? - - - The tape was restarted at 8.55, it was stopped at 8.42, and then restarted at 8.55, as it is on the sheet, and it was during that time that she asked me about the flannelette shirt.

- - -

You volunteered information about the shirt did you? - - - That it was picked up in the park?

Yes?---She asked me where I got it from. I was asked where I got it from, I do not own any flannelette shirts myself, I will not wear flannelette shirts, because I do not like the feel of flannelette shirts.

But you gave that information about the flannelette to Officer Gibson?---Yes, yes. I also gave her information that there were three smokes in the pocket and that information was also on the front page of the 'Sunday Territorian'." (transcript, p144).

34. 9:01pm

The tape recorded interview (Item 29) (Exhibits P3 and P4) concluded. The accused said the door to the interview room was closed after that.

35. 9:01 - 9:30pm

Edwards said that he wrote up his notes for s137 purposes and made a chronology (Exhibit P5). He said he sent Reed to Byrne Circuit to collect the accused's yellow shirt and thongs.

Gibson says that while she was in the interview room with Edwards the accused mentioned that the victim had urinated. Edwards says he was outside the room at that time; and when he was told by Gibson about it, he told the accused it would be dealt with in the videoed interview. According to the accused in cross-examination, the subject arose in this way -

"Do you recall talking to Constable Erica Gibson about, 'the little girl urinated'? ---

Actually, Detective Senior Constable Edwards was in the room at the same time.

Did you tell her - did you give her that information?---Sitting in the room, in the interview room that I was in, I was questioned - Detective Edwards said to me, 'did anything else happen' and my answer to that was, 'oh, like what?', he said, 'you know, like people say, I just shit myself', I turned around and said, 'what, did she piss herself' without even thinking.

Was that your response, 'did she piss herself'?---Without any thinking.

I put it to you you told the Police Officer that she had urinated?---I - that was just a off-the-tongue - it was just a thought that's sort of straight off the tongue, 'did she piss herself' is what I said." (transcript, p.145).

36. 9:30pm

Chapman says he was telephoned at home by either Edwards or Reed. It was a short call. He says he did not use the words referred to in Item 24 and in the period 7.30pm - 8pm he was out of town at his block. Edwards says he telephoned Chapman, requesting him to come to Berrimah Police Centre. The conversation was short. Detective Edwards said that this was the only telephone call he made to Chapman. Edwards' s137 record times this call at 9.04pm.

Edwards denies that the words referred to in Item 24 were used (transcript, p84-85).

37. 9:45pm

Chapman arrived at Berrimah Police Centre. Edwards and Chapman spoke for "20 minutes or so".

38. 10:31pm

A formal record of interview (Exhibits P6 and P7) commenced, taped on video.

39. 11:20pm

The formal interview (Exhibits P6 and P7) on video tape concluded. According to Edwards, on completion of this record of interview he mentioned to the accused the possibility of doing a video re-enactment the following morning, Tuesday 1 February. The accused denies that any such conversation took

place.

40. 11:45pm

The accused was taken to the Watchhouse.

41. "Quite late in the night"

Edwards says that either he or another Police Officer took the Polaroid photograph of the accused in the Watchhouse (Exhibit D1). The accused denies this; see Item 15.

Tuesday, 1 February 1994

42. "Next morning"

Reed went with Edwards to the house in Byrne Circuit and seized the remainder of the accused's clothing. Edwards handed over the accused's clothing to Chilton of the Police Forensic section.

43. 8:32am

The accused was taken from the Watchhouse to the CIB interview room at the Berrimah Police Centre.

44. 9:04am

On tape (Exhibits P8 and P9), Edwards asked the accused to participate in a video re-enactment; he agreed.

45. 9:05am

The taped interview (Exhibits P8 and P9) concluded.

46. 10:08am

Edwards, Reed and Gibson, and the accused, drove to Byrne Circuit, Moil.

47. 10:35am

The video of the re-enactment (Exhibit P10) commenced.

48. 10:49am

The video of the re-enactment (Exhibit P10) concluded.

49. 10:55am

The Police and the accused returned to Berrimah Police Centre.

50. 2:00pm

The accused was brought before the Court of Summary Jurisdiction in Darwin by Reed.

Grounds of Appeal

The amended grounds of appeal as argued upon the hearing are as follows:

"1. On the application pursuant to s.26L Evidence Act the learned trial Judge erred in law and/or in fact in holding:-

(i) that the appellant was not in police custody whilst being questioned at Berrimah Police Station;

(ii) that the appellant was not cross-examined by police before he made admissions.

(iii) that the appellant was not exposed to oppressive conduct by the police before admissions were made.

2. On the application pursuant to s.26L Evidence Act the discretion of the learned trial Judge to admit the alleged admissions of the appellant pursuant to s143 Police Administration Act, notwithstanding the failure to comply with s142 Police Administration Act, miscarried for the following reasons:

(i) the learned trial Judge erred in failing to take into account the fact that the appellant was being held unlawfully in police custody at the time the first admissions were made;

(ii) the learned trial Judge erred in failing to take into account the failure to issue the s.140 Police Administration Act warning before questioning began, which warning was required if the appellant was then in police custody;

(iii) the learned trial Judge erred in failing to take into account the fact that the appellant was cross-examined by the police before admissions were made;

(iv) the learned trial Judge erred in failing to take into account the fact that the appellant was exposed to oppressive conduct by the police before admissions were made;

(v) the learned trial Judge erred in failing to give sufficient weight to the length of time over which the appellant was questioned before the questioning was electronically recorded;

(vi) the learned trial Judge erred in law in failing to take into account, or in failing to place any proper weight, on the position of vulnerability to intimidation, threats, oppressive behaviour, inducements and other pressure that the appellant was placed in by reason of a failure to electronically record the preliminary questioning;

(vii) the learned trial Judge erred in law in disregarding the appellant's position of vulnerability by using his own finding that the police did not act improperly during the preliminary questioning;

(viii) the learned trial Judge erred in failing to place sufficient weight on the gravity of the police departure from the requirements of s.142(1)(b) Police Administration Act;

(ix) the learned trial Judge erred in failing to take into account the failure of the Police Force of the northern (sic) Territory to establish a procedure which complied with s.142(1)(b) Police Administration Act as explained in *R v Pollard* (1992) 176 CLR 177, or to explain why such a procedure had not been implemented;

(x) the learned trial Judge erred in failing to take into account the fact that the failure of the police to electronically record all questioning of the appellant was the result of a deliberate decision by the investigating police officers not to do so;

(xi) the learned trial Judge placed too much emphasis on the fact that Senior Constable Edwards gave evidence that he did not understand that his questioning of the appellant was contrary to the requirements of s.142(1)(b) Police Administration Act;

(xii) The learned trial Judge erred in law in taking into account his finding that the confessions were voluntary and reliable;

(xiii) The learned trial Judge erred in law in forming his own judgment of the reliability of the admissions by reference to a number of factors and taking this into account in exercising his discretion.

(xiv) The learned trial Judge erred in law in failing to take into account that the failure to electronically record was the result of a conscious decision by Edwards not to electronically record.

(xv) The learned trial Judge erred in the law in failing to take into account the evidence that facilities to electronically record the questioning were readily available.

Findings of Fact

Given the conflicts of evidence, as detailed in the chronology, his Honour gave careful and detailed consideration to the credibility of the primary witnesses for the police, namely Mr Edwards, Ms Gibson, and the appellant. He rejected a submission by counsel for the appellant that Edwards had kept "all his options" open by failing to make a full record of the events which took place at the police station until the accused started to make admissions shortly before 8pm, and that therefore Edwards' evidence should be approached with some suspicion. His Honour did not consider that in all the circumstances Edwards' failure to make such a record during

the period from 3pm to 8pm demonstrated irresponsible behaviour on his part. He found Edwards to be a convincing, restrained and careful witness and where there was any apparent divergence between his evidence and that of Gibson, it was not such as to raise any doubt as to their respective credibility, but the discrepancies tended rather to show the honesty of them both. As to Gibson, his Honour held that she was an honest, impressive and largely accurate witness with good recall. On the other hand, he considered the appellant lacked credibility and found that his account was largely fabricated to take advantage of the fact that in the five hours between 3pm and 8pm Edwards failed to utilise the electronic recording facilities available at the police centre to record their exchanges. In assessing the appellant's credibility, his Honour placed weight on his demeanour during the videoed interview on 31 January at 10.31pm and in the video re-enactment the following morning as indicating no sign of a person whose choice to speak or be silent had been overborne, nor did his Honour accept that the appellant's will had already been broken because he had earlier succumbed to pressure. Taking into account the evidence and his findings as to credibility, his Honour:

1. Rejected the allegation that Edwards had told the accused an interrogatory lie in relation to the alleged use of the polaroid photograph.

2. Attached no significance adverse to the police for their

arranging for the victim to attend the police centre on the afternoon of 31 January. It was done with a view to seeing whether she could successfully produce an Identikit description of her attacker.

3. Found that the formal videoed interview and the first admissions made by the appellant at about 8pm were not brought about by oppressive conduct on the part of police. Taking into account the other activities being undertaken by Edwards, in particular, his Honour considered that Edwards' estimate of some two hours of actual questioning within the five hour period was "close to the mark", and that that was not excessively long in the circumstances nor was it oppressive.

4. Considered the likelihood was that Edwards questioned the accused more closely after he started to talk about a "blank period" in his memory which covered the time when the alleged assaults were believed to have been perpetrated. He accepted the appellant's evidence that he may have been taken over his story about six times in all by Edwards.

5. Did not accept the appellant's evidence that Edwards was continuously expressing disbelief in his story nor that Edwards' questioning in the period prior to the admissions at about 8pm amounted to cross-examination of the accused, or to questioning which tended to overbear

his free choice whether to speak or not.

6. Placed reliance on the appellant's admission in evidence that he was aware that he "did not have to say anything" and that he went to the police station because he was: "asked to assist (police) with their enquiries". His Honour was satisfied that the appellant was well aware of his rights in that respect, as would be expected of a person with his previous criminal record.

7. Noted that the appellant had been formally arrested after 8pm. He had no doubt that the police viewed him with suspicion prior to that, but was satisfied that the appellant was not in a position of "defacto arrest" or in custody until he made his first inculpatory admissions shortly before 8pm.

8. Rejected a submission that the provision of an unwanted dinner showed a "subtle form of intimidation" by the police and accepted Edwards' account of that incident, nor did he accept the appellant's account that he overheard a telephone conversation between two police officers, the contents of which intimidated him.

9. Did not accept the accused's account that Edwards denied him access to a lawyer, or that he told him he would be bailed if he "came clean", or that he had told him the "interrogatory lie" about fibres from the flannelette

shirt being found on his belt or that Gibson threatened to "get the heavies" on him. His Honour regarded that evidence as having been fabricated; the alleged "denial of right, inducement, trick and threat did not occur". It was not accepted that the police gave the appellant the impression that he could not leave until he talked, but, he held that the appellant was well aware that police could not exercise any restraint whatsoever on him, or detain him in any way, unless they arrested him.

10. Did not consider that Edwards had cautioned the accused too late in the circumstances, as police were not required under the legislation to alert a suspect who is voluntarily assisting them and not in custody as to his rights.

A submission that the accused was not brought before the Court "as soon as is practical after being taken into custody" as required by s137(1) of the *Police Administration Act*, in that he was not brought before a Court until 10am on 1 February, was rejected after consideration of the provisions of subss(2) and (3) of s137 when read with s138.

In the light of those findings of fact his Honour did not consider that it had been shown by the appellant that the police used unfair, improper or illegal methods to obtain the admissions which the appellant made, or that he was denied procedural fairness. He did not consider that it had been

shown that the admissions were probably unreliable. Nor did his Honour consider that the public interest warranted the exclusion of the confessions when the competing requirements of public policy were weighed. There was no unlawfulness in the obtaining of the confessions.

Recording of Questioning

Section 142 of the *Police Administration Act*, relates to the exclusion from evidence of confessions made to a member of the police force by a person suspected of having committed a relevant offence, unless the questioning and anything said by the person was electronically recorded and the recording is available to be tendered in evidence. Detailed consideration of that provision, against his findings, relating to the admissions made by the accused about 8pm, as recorded in Edwards' notes, and in the audio tape, led his Honour to hold the admissions some two hours later in the videoed interview and in the re-enactment next morning, inadmissible. However, holding that admission of the evidence would not be contrary to the interests of justice, his Honour exercised the discretion conferred by s143 of the *Act* and admitted that evidence.

Approach to the Appeal

In so far as the appeal calls into question his Honour's findings of fact, to succeed the appellant must show

that there was no evidence to support the challenged finding or that the evidence in relation to the matter was all one way. This Court has no power to substitute its own findings for those of the trial Judge (per Nader and Mildren JJ. in *Rostron v The Queen* (1991) 1 NTLR 191 at 196 and *O'Donoghue* (1988) 34 A Crim R 397 at 401).

In so far as the appeal is against the exercise of his Honour's discretion, see the extract from *House v The King* (1936) 55 CLR 499 at 504-5 in *Rostron* quoted at length at p197, see also *Heiss v The Queen; Kamm v The Queen* (1992) 2 NTLR 150 at 154. A relevant error must be shown to have occurred in the exercise of the discretion, and it is not enough for the Judges of this Court to consider that if they had been in the position of the primary Judge they would have taken a different course. If no error can be found, then it must be demonstrated that the decision is unreasonable or plainly unjust and thus enable the appellate Court to infer that in some way there has been a failure properly to exercise the discretion.

The importance which an assessment of credibility made by a finder of fact has in the judicial process has again been emphasised by the High Court in *M v The Queen* (1994) 126 ALR 324 at p329 per Mason CJ., Deane, Dawson and Toohey JJ.; see also *Brunskill and Another v Sovereign Marine & General Insurance Co Ltd and Others* (1985) 62 ALR 53 at p56.

As to inferences the established principles which define the duty of an appellate court after questions of credibility have been decided and when the matter which remains for decision is what inferences should be drawn from facts which have been found and are no longer in contest are that:

> "... in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.":*Warren v Coombs and Another* (1979) 23 ALR 405 at 423 (per Gibbs ACJ., Jacobs and Murphy JJ).

However, this principle does not apply to appeals against the exercise of a discretion : *Gronow v Gronow* (1979-80) 144 CLR 513, at 525-6, 532-3, 539-40; (1979) 54 ALJR 243, at 248, 250 and 253.

When was the accused taken into custody?

His Honour held that the accused was not taken into custody until about 8pm (see above), but much time was spent upon the hearing of this appeal on that issue. The contents of the affidavit in support of the application for leave to appeal contained brief reference to twenty four separate items of evidence going to the question. It was not shown that his Honour had failed to take into account any of those matters.

This Court was invited to take a view of the evidence, contrary to that found by his Honour after assessing the credibility of the witnesses.

The power of police to arrest without warrant is circumscribed by a need for the member of the police force to believe on reasonable grounds that the person has committed an offence. It was not established that any of the police involved in this matter had such a belief prior to the time of the arrest at about 8pm, shortly after the appellant had started to make his confession. The consequences of a wrongful arrest can be quite serious, hence the oft offered invitation to a person to go to the police station. A formal arrest is not necessary to detain a person in custody:

> "Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody." per Williams J. *Smith v The Queen* (1956-7) 97 CLR 100, at 129.

A person is in custody, say, in a police vehicle or on police premises when the police by their words or conduct give him reasonable grounds for believing, and cause him to believe, that he would not be allowed to go should he try to do so (per Smith J. *R v Amad* [1962] VR 545 at 546). There is also a brief reference to the same principle in *O'Donoghue* (1988) 34 A Crim R 397 at 401. In *Trotter, Sutherland and*

Jordan (1992) 60 A Crim R 1 at p12, Perry J. adopted the words of King CJ. in *Conley* (1982) 30 SASR 226 at 239-240:

> "Frequently a police officer invites or requests of a suspect to accompany him to a police station or some other place for the purpose of pursuing police enquiries and the suspect voluntarily complies. Such an invitation or request does not amount to deprivation of liberty .... even though the police officer would have made an arrest if the suspect did not comply and even though the suspect believed that that would be the result of non-compliance. If, however, the circumstances are such that the words uttered, although in form an invitation or request, would in the circumstances convey to a reasonable person that he had no genuine choice as to whether to accompany the police officer, it becomes incumbent upon the police officer to make it clear that the suspect is not under arrest and is free to refuse to accompany him, and in the absence of such an intimation the apparent invitation or request may constitute an apprehension".

As Perry J. points out at p13, there could be other circumstances which could possibly give rise to an apprehension, in the sense of taking a person into custody. In this case it was sought to establish that that situation had arisen, possibly at the earliest when the appellant was invited to go with the police to the police centre in the police motor vehicle, or at various stages during the course of the afternoon prior to 8pm whilst he was there.

Summarising his findings on this aspect of the matter, his Honour said:

> "I do not accept the accused's account that the police gave him the impression that he could not leave until he talked (Item (ii), p7). I consider that he was well aware that the police could not exercise any restraint whatsoever on him, or detain him in any way, unless they arrested him. If he nevertheless came to think that he could not leave,

> that was a product of matters in his own mind, not stemming from anything the police had said or done".

His Honour found that the appellant was not a "person in custody" until after he gave an account at about 8pm which contained incriminating details. Thereafter he was treated as under arrest. There was evidence upon which is Honour could make those findings of fact and draw the necessary inferences to arrive at the conclusion he did. To a large extent those findings of fact were based upon his view of the credibility of the witnesses. It will be recalled that the accused had had previous dealings with police and understood the procedures. When later asked about his knowledge as to whether or not he was under arrest when first taken to the police centre, he acknowledged that he had not been told that he was under arrest and he knew that he was not under arrest, but he said that he felt, or was made to feel, that he could not leave the station. His Honour did not hold the admission made by the appellant that he knew he was not under arrest against him, but on an assessment of credibility, rejected his evidence that he was made to feel that he could not leave the station. We are not persuaded that it has been shown that there was no evidence to support the conclusions of the learned trial Judge, nor that his conclusions were unreasonable or plainly unjust.

All arguments on behalf of the appellant based upon the proposition that he was in custody prior to making the

incriminating statements at about 8pm, and thus was unlawfully detained, must fail. It must not be overlooked that a person with a guilty mind, particularly one experienced in the investigative process, may well wish to give every appearance of cooperating with police and their enquiries so as to find out as much as possible as to what the police know about the events being investigated, and so as to cast him or herself in a favourable light as having nothing to hide or fear from questioning. It is easy enough to later try and persuade a trier of fact that he or she had been apprehended and was being held unlawfully.

In the circumstances of this case, as they were found to be, the provisions of s137 of the *Police Administration Act* did not apply until the arrest at about 8pm. That section only operates where a person has been taken into custody. There was thus no need for the police to take the steps required under s140 prior to that time, since there was no questioning or investigation carried out by the police pursuant to the powers under s137(2).

Cross-examination

There are grounds of appeal alleging error on the part of his Honour in holding that the appellant was not cross-examined before he made his admissions and that his Honour failed to take into account the fact that he was cross-examined by the police before admissions were made.

The appellant referred to two authorities, *McDermott v The King* (1947-8) 76 CLR 501 at 517 and *R v Amad* at p547, and it is clear from both cases that unfairness, said to arise from cross-examination, only applies to a person in custody. As a matter of law, therefore, there was no impropriety on the part of the police since the appellant was not in custody at the relevant time. His Honour so held. His Honour accepted the evidence of the appellant that he may have been taken over his story about six times in all by Edwards. That occurred during a discontinuous period of about two hours between 3pm and 8pm. His Honour considered the likelihood was that Edwards questioned the accused more closely after he started to talk about the "blank period" in his memory, which covered the time when the assaults were believed to have been perpetrated. His Honour rejected the appellant's evidence that Edwards was continuously expressing disbelief in his story. In any event, looking at the submissions made in the affidavit in support of the application for leave to appeal on this point, we are far from satisfied that his Honour was wrong in finding that there was no cross-examination of the appellant. The submissions revolved around the appellant being asked to go over his story on a number of occasions. No appeal is brought against his Honour's finding that Edwards did not accuse the appellant of lying, and telling him that the police wanted to know his real whereabouts. For an example of cross-examination in this context, see *Amad* at p546 and 547. It was that conduct on the part of police that the Judge described as being gravely improper in that case, at

p548, Smith J. described cross-examination as including submitting a person in custody:

> ".... to a searching questioning in which disbelief is repeatedly expressed in his denials of complicity, his account of his movements is challenged and checked, he is confronted with evidence of its falsity, he is accused explicitly of lying, and his refusal of further information is met with a statement that there are questions which the interrogator must ask him".

His Honour observed that the law is for the protection of the person in custody and holds it to be improper to subject him, even after caution, to any form of cross-examination, the tendency of which is in fact to extort admissions or to overcome his mental resistance to making admissions:

> "There is no exception from this principle in favour of an interrogator whose desire is solely to find out the truth and not to obtain evidence for use against the accused. It is what the interrogator does and not his state of mind that is decisive." (at p548).

None of the elements which gave rise to a rejection of the confession of Mr Amad were demonstrated on the evidence accepted by his Honour in this case, and that is so whether the appellant was in custody or not. The appellant went no further in his evidence than outlined above. He did not condescend to any particularity upon which to base a proper submission or finding that there had been oppressive cross-examination.

Other oppressive conduct

Under this heading the appellant submits that his Honour failed to give sufficient weight to the length of time over which the appellant was questioned before the questioning was electronically recorded, nor to take account of the position of vulnerability of the appellant. In an affidavit in support of this ground, it was conceded that credit issues being generally resolved against the appellant, the only oppressive conduct relied upon was constituted by the cross-examination and that the questioning continued over such a lengthy period, from 3pm to 8pm. As to cross-examination, see above. As to the length of questioning, note the earlier findings of his Honour, which were open to him on the evidence, that of the period the appellant spent at the police station between 3 o'clock and 8 o'clock, the questioning extended over about two hours and that period was not continuous. Much of that time was taken up by the appellant's responses. It is further put in the affidavit that the appellant made many allegations of misconduct by the police during that five hour period, but they were all rejected by his Honour on the basis of his assessment of credibility of the witnesses, including the denials of the police. Given that the appellant was not in custody prior to making the confessions, his experience in dealing with police, and the finding that he was not subjected to oppressive conduct, it was not necessary for his Honour to be expressly concerned with the question of vulnerability. The appellant rejected

the opportunity to contact a person of his choice when invited to do so pursuant to s140 at about 8pm. If, as is suggested, his Honour was in error in not paying special attention to the question of vulnerability, for the reasons given, we would not disturb the exercise of his discretion on that account.

Recording of confessional material

Section 142 of the *Police Administration Act* provides that 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 such an offence, unless certain requirements as to electronic recording have been undertaken, and the recording is available to be tendered in evidence. Electronic recording includes a recording of sound and/or pictures by electronic means. There are some procedural requirements in s142 consequent upon the electronic recording which are of no concern in this appeal. His Honour held that the requirements of s142 had not been complied with because of a failure to observe the provisions of subs(1)(b) of s142, that a confession or admission made during questioning be so recorded. In his Honour's opinion, the "questioning", in the circumstances of this case, was not limited to that which took place after the inculpatory statements were made by the appellant at about 8pm, but included the whole of the questioning which took place after he accompanied the police to the police centre (*Pollard v The*

Queen (1994) 176 CLR 177; *Heatherington v The Queen* (1994) 120 ALR 591). That is not a question before this Court. As to who is a "person suspected" for the purposes of s142(1), his Honour referred to *Bina Raso* (1993) 68 A Crim R 495 at pp526-529; *George v Rockett and Another* (1990) 170 CLR 104 at p115 and *R v Maratabanga* (1993) 3 NTLR 77 at p86. He disagreed with Mildren J., in the latter case, that "the kind of suspicion required must be such as to engender a belief, whether reasonable or not, and whether or not proof is lacking, in the mind of the police officer that the person being questioned is probably guilty of the relevant offence". His Honour would substitute "possibly" for "probably". Similarly, it was not argued that "questioning" in s142 means questioning after an arrest has been made, see ss137(2), 140 & 141).

What is raised is the exercise of his Honour's discretion under s143 to admit the evidence, notwithstanding that the requirements had not been complied with, after taking into account the nature of, and the reasons for, the non-compliance and other relevant matters, and being satisfied that in the circumstances of the case the admission of the evidence would not be contrary to the interests of justice. The legislation operating in the State of Victoria, considered by the High Court in *Pollard* and *Heatherington*, provides that the discretion to admit evidence of a confession or admission otherwise inadmissible by reason of the failure to comply with the recording provisions in the statute, can not be exercised

unless the person seeking to adduce the evidence satisfies the Court, on the balance of probabilities, that the circumstances (a) are exceptional; and (b) justify the reception of the evidence. The discretion available under the Northern Territory statute is not constrained by the requirement that the circumstances be exceptional. The onus of persuading the Court that the evidence should be admitted rests upon the party which brings the evidence forward, in this case, the Crown. It is to be noted that during the questioning, which was not recorded as required by s142, there were no confessions or admissions by the accused which linked him to the offences until about 8pm (see later). There is no complaint that after he made that first inculpatory statement, the investigating police failed to comply with the provisions of the *Police Administration Act* as to arrest, caution and recording. His Honour held, and there is no reason to disturb his findings, that the confessions and admissions which were made were voluntary, and there was nothing in the conduct of the police prior to the making of those confessions that would require the exclusion of them in the exercise of a discretion in respect of matters upon which the appellant bore the onus.

Turning to the confessions and admissions. They started to emerge from the appellant at about 8pm when, according to Edwards, he was saying: "Well, its coming back to me". Edwards was watching him and the appellant started talking about the "blank period", that things were coming back to him, and then, according to Edwards, he mentioned or

started saying something about: "I got up - adjusted the fan" or something to that effect. Edwards then started to write what the appellant was saying, which notes the appellant later acknowledged by signing. They were placed into evidence. The notes recorded the appellant as having described how he could not get to sleep until about 3.30 or 4 o'clock in the morning and "went looking for an able bodied female"; how he went down a hallway, saw a female asleep on a bed and woke her up, enticed her downstairs, placed her on a table and referred to lights on some exposed beams and a pool table; he became aware the female was a child wearing a nightdress and he was not sure if he had pulled her pants down and was not sure if she had pants on, but she was screaming because: "I dropped my pants down, I think". He then realised what he was doing because she was screaming, and he returned back to where he was living. After a pause, he described how he got into the house, put his hand over the female's mouth and told her to shut up, but could not remember whether he hit her or not.

Edwards recognised that if there were exposed beams in the house then the appellant may well have been there, so he made enquiries and obtained photographs taken as part of the investigation, which showed exposed beams on the ceiling running above the pool table. He believed that the appellant was the offender. He obtained a tape recorder and tape and did what he called "a section 140 on the tape". That tape and a transcript of it are in evidence. They show that Edwards had warned the appellant that he did not have to answer any

questions unless he wished to do so, confirmed that what was being said was recorded and might be played in Court in evidence, and advised him that if he wished to contact anyone concerning his whereabouts he could do so. The appellant indicated that he understood all of that and declined the opportunity to contact anybody on the basis that the people he was staying with were fully aware of his whereabouts.

Immediately after giving the audio taped caution and advice, Edwards invited the appellant to read the notes aloud, the appellant did, and added further information sometimes volunteered and sometimes as a result of prompting from Edwards. Once that part of the interview was completed the appellant was invited to sign at the bottom of the notes and did so. He explained that the "blank period" came about as a result of stress he had been under from work and at trade school. He confirmed that the questions he had answered and the statements he had made were of his own free will and when asked: "Have you been forced or threatened or promised anything to force you to answer those questions?", he answered: "Not to my knowledge", "or make those statements?" answering: "Not to my knowledge". He was then told: "Do you understand that because of the statements you have made to me now, that you are under arrest?" and he replied "Yes". He was informed that that was why he had been cautioned at the start of the recorded questioning.

That conversation was completed at 8.42pm and

shortly afterwards the appellant spoke to Constable Gibson about the flannelette shirt. Edwards interviewed him further regarding that, commencing at 8.55pm, the conversation being tape recorded. The appellant told how he had found the shirt which had a couple of smokes in the pocket and that he later put it on and removed it, leaving it at the house when it got caught on something. At the conclusion of that interview, which touched upon some other matters, Edwards informed the accused that it was not a "formal interview" as he wished to do that later when he would have exhibits to show. That interview ceased at 9.01pm. The chronology tells what happened between then and 10.31pm when a further interview took place between Edwards and the appellant, this time on video tape. After some introductory matters, Edwards again informed the appellant that he was not free to leave the police station, told him what the enquiry was about and cautioned him in the usual manner.

During the course of this "formal" record, the appellant again told the police of his activities on the night upon which the offences were committed and confirmed some other details which indicated that he had been at the house on that night. He made admissions as to what he had done to the girl which gave rise to the charge of committing an act of gross indecency upon her. He identified the shirt as being the one he had been wearing and clothing produced to him as being the other clothing that he had on at the time, which was broadly in accordance with the description given by the

victim. At the conclusion of the interview, given the opportunity, he made no complaints regarding police conduct towards him.

As the chronology shows he was taken to the Watchhouse at 11.45pm, Edwards asserting that he was then being held pursuant to the powers contained in s137 of the *Police Administration Act* so that further enquiries could be made and to allow the appellant to rest. Prior to taking him to the Watchhouse, Edwards had asked him about undertaking a re-enactment the next morning. That does not appear to have been recorded, but relying upon what he called, "the arrangement made", Edwards collected him from the Watchhouse the next morning, took him to the CIB interview room and he then asked if he would be willing to participate in a re-enactment. The appellant agreed to do so. That conversation was recorded. The re-enactment was recorded on video and audio tape.

The re-enactment took place during the course of the morning concluding at 10.49am when the appellant was returned to the police centre, charged, and taken before the Court of Summary Jurisdiction at Darwin at 2pm. There is no ground of appeal suggesting that the detention of the appellant after his arrest at 8pm, and the failure to bring him before a Justice or Court of Summary Jurisdiction prior to 2pm the next day, was an unlawful detention. Police may detain such a person for a reasonable period to enable him or her to be

questioned or an investigation carried out to obtain evidence in relation to an offence (s137(2)). As to the matters which can be taken into account in determining what is a reasonable period, see s138 *Police Administration Act*.

In considering whether to admit evidence of confessions or admissions which have not been recorded in accordance with s142, the Court is directed by s143 to have regard to the nature of, and reasons for, the non-compliance and any other relevant matters and, having done so, to consider whether, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice. His Honour correctly held that in this case the burden of satisfying the Court that the evidence rendered inadmissible by s142 should be admitted, as a matter of discretion, lies on the Crown, and in that regard the probabilities standard applies. He described it as being "no light burden". The Crown submission before his Honour and before this Court was that "the interests of justice" require not only taking into account what justice to the accused requires, but also society's interests in ensuring that persons who commit crimes are punished, and that the system of administration of criminal justice is, and is perceived to be, fair. In that regard reliance was placed upon what Hunt J. said in *Domican and Thurgar* (1989) 43 A Crim R 24 at 26 where, in the context of an application for separate trials, his Honour observed: "The interests of the administration of justice are as relevant as the interests of the parties",

indicating that there are interests above and beyond that of the parties which are to be taken into account in assessing the interests of justice. It would, however, be undesirable to endeavour to spell out what is meant in more definitive terms. What is called for is a decision based upon the facts and circumstances of the individual case. As Kirby P. said in *Bankinvest AG v Seabrook and Others* (1990) 90 ALR 407 at 411:

> "The more general the expression of the criteria for the exercise of a statutory discretion, the more natural is it for courts to endeavour to provide elaboration and guidance for the future. Yet the more general is the expression of the criteria, the more difficult it may be to give that guidance without frustrating the legislative objective of an individualised decision in each case. Often that discretion may invite an ultimate judgment which is little more than one of impression reached after reference to the relevant considerations".

The learned trial Judge said that the provisions of s143 are designed to ensure the fair treatment of suspects being questioned and should not be narrowly construed, but we would not like it to be thought that they were the only interests which ought to be borne in mind. For example, society has an interest in ensuring that persons who commit crimes are apprehended and dealt with by the Courts, and the interests of justice also embrace the engendering of public confidence in the criminal justice process from investigation of crime to final disposition by the Courts.

His Honour accepted that the reason for non-compliance with s142 lay in Edwards' lack of understanding of

what s142(1) required of him in relation to the recording and the questioning of the appellant, which occurred over a period of about two hours between the time he reached the police centre, at approximately 3.20pm, and 8pm when he made his first inculpatory statement. There had been no decisions of this Court relating to the application of s142 to investigating police at the time the appellant was questioned. The decision in *Pollard* had been delivered on 24 December 1992, and was based upon facts and legislation distinguishable from those prevailing here, and that in *Heatherington* was not delivered until 20 April 1994 after the circumstances here under consideration. There is evidence upon which his Honour could make that finding of fact and there is no reason to disturb it. No doubt his Honour had in mind the remarks of Stephen and Aickin JJ., with which Barwick CJ. concurred, in *Bunning v Cross* (1978) 141 CLR 54 at p78 where their Honours drew a distinction between unlawfulness based upon the result of a mistaken belief as to what was required, as opposed to a deliberate or reckless disregard of the law by those whose duty it is to enforce it. Their Honours went on at p79 to note that the nature of the illegality, in obtaining the evidence, did not in that case affect the cogency of the evidence so obtained:

> "To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damming enough that will of itself suffice to atone for the illegality involved in procuring it. For this reason cogency should, generally, be allowed to play no part in the

> exercise of discretion where the illegality involved in procuring it is intentional or reckless. .... Where, as here, the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had. It bears upon one of the competing policy considerations, the desirability of bringing wrongdoers to conviction."

The nature of the non-compliance with s142 in this case lies in the failure to record in the prescribed manner the questioning which took place prior to 8pm. There were no confessions or admissions during that period of time. The reason for the non-compliance, as found by his Honour, was that Edwards had acted in good faith, though mistakenly, in not recording that period of questioning; he did not proceed in reckless disregard of the requirements. His Honour was entitled to put those findings in the balance in favour of the admission of the confessions. On the other hand, impropriety on the part of police in failing to record questioning, may well weigh in the balance against admission of confessional material obtained when the statute should have been obeyed.

It should not be thought that the reference to *Bunning v Cross* carries with it any direction that the various criteria to which regard may be had in determining whether to exercise a discretion in favour of an accused person seeking to exclude a confession said to have been obtained unlawfully or improperly, is necessarily of application to the exercise of a discretion under s143. That section is not directly to do with the obtaining of confessions or admissions, but with the recording of them. However, it must not be overlooked

that one of the purposes behind provisions such as s142 is to discourage investigating police officers who may be tempted to use unlawful, improper or unfair means of obtaining confessions from a suspect or person in custody. As Deane J. put it in *Pollard v The Queen* at p205:

> "The rationale of the provisions .... is, in part, the protection of the individual from unfair or oppressive treatment while held in custody. In part, it is the advancement of the efficient administration of criminal justice by the courts both by minimising the possibility of miscarriage of justice through the fabrication of police evidence of voluntary confessional statements allegedly made by accused persons while detained in police custody and by reducing the undesirably high proportion of limited court resources which were being devoted ..... to disputes about whether such alleged confessional statements had, in fact, been made or made voluntarily".

Assuming that s142 applies to suspects not in custody, we would extend this observation to that situation as well.

Here, his Honour was satisfied on the viva voce evidence after assessing the credibility of the witnesses, including the appellant, and upon viewing the questioning which was recorded on video, that there had been no unfair or oppressive conduct on the part of police prior to the recording being commenced, nor during it. The position may be different if an accused person is able to raise in the minds of the trier of fact a sufficient doubt as to whether there had been any unlawful or otherwise inappropriate conduct on the part of police (whether going to the voluntariness of the

confession, or a discretion under which it might be excluded), which doubt might be resolved by listening to, or observing and listening to, tapes of questioning, and none were available. In those circumstances the result might be that although the accused has not satisfied the Court that the confession ought to be excluded, the Crown may yet fail to have the discretion under s143 exercised in favour of admission of the confession because of the failure to record the questioning. That may be upon the basis that it would be unfair to the accused to admit the evidence, not because there is evidence of any confession having been induced by unlawful or improper conduct, but because the accused has been deprived of the opportunity of the protection against such conduct which the requirement as to recording brings about.

As to the range of matters which might be taken into account in the exercise of a discretion under s143, reference might be had to the guidance given by the High Court in *Foster v The Queen* (1993) 113 ALR 1 at pp6-7, but it must be remembered that the objection in cases like this is not to the way in which the evidence was obtained, but the failure of the investigating police to have it recorded, in relation to which additional considerations may well apply. Governing all such considerations, however, is that enunciated by Deane J. in *Pollard* at pp202-203:

> "It is the duty of the courts to be vigilant to ensure that unlawful conduct on the part of the police is not encouraged by an appearance of judicial acquiescence. In some circumstances, the

> discharge of that duty requires the discretionary exclusion, in the public interest, of evidence obtained by such unlawful conduct. In part, this is necessary to prevent statements of judicial disapproval appearing hollow and insincere in a context where curial advantage is seen to be obtained from the unlawful conduct. In part it is necessary to ensure that the courts are not themselves demeaned by the uncontrolled use of the fruits of illegality in the judicial process."

At p203 his Honour referred to the balancing of the issues that go to the exercise of a discretion to admit or exclude evidence on public policy grounds:

> "In the balancing of policy considerations, the relevance and importance of fairness or unfairness to the particular accused will depend upon the circumstances of the particular case".

These comments lose no impact when read so as to relate to inadmissibility brought about by a failure to record in accordance with s142 (whether unlawful or not).

It was a submission by the Crown before the learned trial Judge that on the balance of probabilities the confessions were voluntary and reliable and that those were factors to be taken into account in the exercise of the discretion under s143. As to that, his Honour said that he accepted that those matters accurately reflected the facts, that is, that the confession was voluntary and was reliable. However, he also seems to have accepted a submission of counsel for the appellant that it would be wrong to take into account, as a matter relevant to "the interests of justice" in

s143, and favouring the admission of the confession, that its contents contain details of the alleged crime of such a nature that only the person who had committed it could have provided them. He held that it was irrelevant for the purpose of s143 to embark upon consideration of the truth of the confession and noted that questions on the voir dire directed to that end were improper, see *Wong Kam-Ming v The Queen* [1980] AC 247. If his Honour accepted those submissions by counsel for the appellant, the grounds of appeal based upon an allegation that he erred in taking into account his findings that the confessions were reliable, and that he erred in law in forming his own judgment of the reliability of the admissions by reference to a number of factors, and taking that into account in the exercise of his discretion, would not appear to avail the appellant. But, with respect, the position is not clear. In giving his conclusions on the exercise of the discretion under s143, his Honour held that the admissions in the various exhibits:

> ".... are not more prejudicial to the accused than probative, and the jury is not likely to be misled by them; accordingly, their admission into evidence would not hamper a fair trial, since they are not unreliable".

Assuming that his Honour did weigh in the balance in favour of the Crown the reliability of the confessions, we are not prepared to hold that he was wrong to do so. The consideration to be given to the question of cogency referred to in *Bunning v Cross* has already been referred to, and

although that was a case dealing with "real evidence", there is no reason in principle why the rule in that case should be so confined (*Cleland v The Queen* (1982-3) 151 CLR 1). Although the rule in *Bunning v Cross* applies to real evidence, there is no good reason why the same factors which go to the application of the rule should not also apply to confessional evidence. As to reliability, in *Cleland,* at p36 Dawson J. said:

> "Considerations of fairness in the exercise of the older discretion relating to the exclusion of evidence of confessional statements must now be limited to fairness in the sense of fairness to the accused: whether it would be unfair to the accused to admit the evidence because of unreliability arising from the means by which, or the circumstances in which, it was procured".

In *Williams v The Queen* (1986) 161 CLR 278 at 286 Gibbs CJ. approving what was said by Dawson J. in *Cleland* said:

> "The unfair methods by which evidence has been obtained may not affect the reliability of the evidence, and in consequence it may not be unfair to admit it against the accused."

In *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666 Wilson, Dawson and Toohey JJ. said:

> "Unfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement".

And see also *Duke v The Queen* (1989) 63 ALJR 139 at 140 per Wilson and Dawson JJ., and Brennan J. at 141 where his Honour held that the discretion might be exercised:

> "not only because the conduct of the preceding investigations has produced a confession which is unreliable ....".

For an early exposition of the concept see *The King v Lee* (1950-1) 82 CLR 133 at p153.

It would seem that the High Court is embracing both an objective and subjective reliability test, but reliability on either basis is not determinative of the issue. His Honour has not erred in the exercise of his discretion to permit the confessional material to be admitted at trial by taking into account its reliability. There was nothing to show that anything occurred during the period of questioning which was not recorded which affected the reliability of the material.

It was submitted that his Honour breached the principles in *Wong Kam-Ming v The Queen* by taking reliability into account. That case has to do with asking questions of an accused person in a voir dire examination going to voluntariness, on the issue of the truthfulness of the confession. It is distinguishable from this case. In any event, we are not satisfied that it is of universal application in Australia (see, for example, *The Queen v Wright* [1969] SASR 256; *Regina v Toomey and Frost* [1969] Tas R 99;

Burns v The Queen (1975) 132 CLR 258 and the dissenting judgment of Lord Hailsham in *Wong Kam-Ming* at p263. Questions may also arise from the privilege against self incrimination).

It is trite to say that the fact that a confession was made voluntarily is irrelevant to the question of whether it should be excluded in the exercise of discretion. It is suggested by the appellant that his Honour took the fact that the confessional material in this case was voluntary into account when exercising his discretion to admit the evidence. We do not accept that he did so. The only reference to voluntariness, in this context, was to the acceptance of voluntariness as a fact amongst many which the Crown put forward as part of its submissions. It is not apparent, and can not be inferred, that that fact was taken into account in the exercise of the discretion. It is not further mentioned. The appellant does not satisfy us that his Honour took into account an irrelevant matter.

Conclusion

Since this is the first opportunity which the Court of Criminal Appeal has had to consider ss142 and 143 of the *Police Administration Act*, we would grant leave to appeal. For the reasons given we would dismiss the appeal.