

FORM 1

IN THE SUPREME COURT OF SOUTH AUSTRALIA

No 1 of 2011

BETWEEN

R (Director of Public Prosecutions)

and

Martin Bruce (Accused)

ACCUSED'S OUTLINE OF ARGUMENT

PRACTICAL EXERCISE NO: 5

Background

1. The accused, Mr Martin Bruce, has made an application for a ruling that the records of the interview that he participated in on the 15th of May 2011 not be admitted into evidence at his forthcoming trial on a charge of robbery.
2. These records, comprising the written statement of Detective Senior Sergeant Tracy, and the videotaped record of an interview marked DT1, both contain confessional statements by the accused. These statements were made in the presence of Sen Sgt Tracy and Detective Sergeant York ('the detectives') when they attended his home at 2:00pm on 15 May 2011.

Circumstances of the confession

3. At the time of the confession, the accused was still under the influence of alcohol after heavy drinking on the afternoon of 14 May 2011.
4. Upon arrival at the back door of the accused's home, Detective Sergeant York pointed a gun at the accused.
5. As part of a bond for good behaviour the accused is on a program of regular medical supervision and treatment. The combination of alcohol and medication adversely affected Mr Bruce's right to understand his rights in the situation and what the police were seeking from him.
6. The accused was in a disoriented state of fear and confusion at the time of the confession due to the intoxication described above, as well as being intimidated by Sgt York's bearing of a weapon at him.

Voluntariness

7. The confession of the accused was not made voluntarily.
 - a. The prosecution bears the burden of proof of establishing voluntariness on the balance of probabilities.

Foster v The Queen (1993) 66 A Crim R 112, 121-2
 - b. The accused did not substantially exercise a free choice to speak or remain silent

in making the statements to Detectives Senior Sergeant Tracy and Sergeant York at his home on 15 May 2011.

McDermott v The King (1948) 76 CLR 501, 511 (Dixon J)

- c. The principle that a confession must be voluntary in order to be admissible is flexible in application. It is not limited by any category of inducements that may prevail over the will of the accused, but inducements may take the form of some fear of prejudice or hope of advantage exercised or held out by the person in authority.

McDermott v The King (1948) 76 CLR 501, 511–2 (Dixon J)

- d. The will of the accused was overborne by external pressures. In particular, the following acts induced him to make a confession:
- i. Sgt York, a person in authority, held out a threat of harm to the accused by brandishing a gun to intimidate him; and
 - ii. the detectives put undue pressure on the accused by making statements about the prior convictions of the accused and his potential future sentence; and
 - iii. Sgt York held out a promise to help the accused reach a deal with the police.

Tofilau v The Queen (2007) 231 CLR 396, 517 (Callinan, Heydon and Crennan JJ)

- e. In making a judgment about what kind of conduct will be taken to render a statement involuntary, it is useful to consider whether a person, speaking colloquially, may say that he or she had no choice. Although the law may treat a great deal of such conduct as voluntary, the original rationale for the principle of exclusion of involuntary statements was the concern about the unreliability of coerced statements. In the present circumstances, the threat of violence and intimidation, combined with the accused's intoxicated state, induced a confession that is highly unreliable.

Tofilau v The Queen (2007) 231 CLR 396, 406 (Gleeson CJ)

Discretionary exclusion – unfairness

8. In the alternative (if the confession was voluntary) the Court should exercise its

discretion to exclude the evidence of the interview on the ground that its reception would be unfair to the accused in all the circumstances.

R v Swaffield (1998) 192 CLR 159, 181–3 (Brennan CJ); 191–195 (Toohey, Gaudron and Gummow JJ)

Cleland v The Queen (1982) 151 CLR 1, 18–9 (Deane J)

9. The accused bears the burden of establishing grounds for the exercise of the discretionary exclusion of evidence on the balance of probabilities.

Foster v The Queen (1993) 66 A Crim R 112, 121-2

10. The admission of this evidence would raise an unacceptable risk of wrongful conviction due to its unreliability, because:

- a. The accused made the confessional statements in a state of fear, vulnerability and confusion.
- b. The statements were induced by threats and promises held out by the detectives as submitted above.
- c. The accused made the statements while under the combined effects of alcohol, anti-depressants and sedative medication. This intoxication impaired the ability of the accused to understand his right to remain silent and his capacity to freely exercise that right.

R v Smith (1992) 58 SASR 491, 498 (Perry J)

11. The accused will call expert evidence to establish the nature, extent and effect of his intoxication.

R v Smith (1992) 58 SASR 491, 496 (Perry J)

12. The prejudice to the accused outweighs the probative value of the evidence, because:

- a. The detectives make reference to the prior convictions of the accused during the interview.
- b. The jury may draw inferences from the reaction of the accused to the arrival of the detectives, and the fact that he was met at the back door near the bin where the handbag was dumped.
- c. Sen Sgt Tracy's evidence discloses that he and the accused knew each other by name.

R v Christie [1914] AC 545

Foster v The Queen (1993) 66 A Crim R 112, 117–8 (Mason CJ, Deane,

Dawson, Toohey and Gaudron JJ)

McDermott v The King (1948) 76 CLR 501, 506–7 (Latham CJ)

Discretionary exclusion – public policy

13. In the alternative, the Court should exercise its discretion to exclude the evidence on public policy grounds. The admission of the evidence would be bought at a price which is unacceptable having regard to contemporary community standards.

Bunning v Cross (1977) 141 CLR 54, 74–80 (Stephen and Aickin JJ)

Cleland v The Queen (1982) 151 CLR 1, 34–5 (Dawson J)

Foster v The Queen (1993) 66 A Crim R 112, 117 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ)

14. The detectives' impropriety in investigating the charge and procuring such evidence resulted in a denial of the rights or privileges of the accused, and the public interest in protecting individuals from unlawful or improper treatment outweighs the public need to bring to conviction those who commit offences. In particular:

- a. The detectives failed to advise the accused as to his right to silence once they had reached the accusatory stage of their investigation.
- b. The detectives could have avoided the impropriety with ease by giving the accused a caution upon finding the handbag on his property.
- c. The impropriety had a significant effect on the accused, in that it induced him to co-operate with the police under the belief that he would be able to 'do a deal' with the police.
- d. Sgt York's use of a gun was a highly disproportionate response to any threat the accused may have posed.
- e. In the absence of the impropriety, the confession may not have been made at all.

R v Swaffield (1998) 192 CLR 159, 181 (Brennan CJ)

- f. Sen Sgt Tracy's statement that the accused should 'save any comments for the interview' demonstrates that the impropriety was not accidental, but deliberate. The intentional or reckless nature of the impropriety means that the cogency of the evidence obtained should not be considered in exercising the discretion.

R v Murphy (1996) 66 SASR 406, 411–2 (Doyle CJ)

- g. The seriousness or severity of the charge is not such that the public interest in having the confessional evidence available for trial outweighs the public interest in ensuring that police do not adopt tactics designed simply to avoid the limitations on their inquisitorial functions. In the circumstances the accused caused no lasting physical harm to the victim, or endanger the life of another. The charge is one where the court should sacrifice the public interest in convicting the accused in order to discourage the use of unacceptable police methods.

Bunning v Cross (1977) 141 CLR 54, 79–80 (Stephen and Aickin JJ)

R v Swaffield (1998) 192 CLR 159, 185 (Brennan CJ)

Cleland v The Queen (1982) 151 CLR 1, 34 (Dawson J)

Res gestae

15. The prosecution has submitted that the confession is admissible under the doctrine of res gestae, as an exception to the hearsay rule, because the accused made the statements under the continued pressure of the crime when arrest or questioning was still likely.

16. The defence submits that the doctrine of res gestae does not render the statements admissible. The accused's statements were not made contemporaneously with the events in issue. As the events that the accused recounted took place on the previous day, they were not made proximately to the original occurrence.

17. The statements were 'in the nature of a historical account rather than in the nature of a statement made as part and parcel of the occurrence.'

Vocisano v Vocisano (1973) 130 CLR 267, 272-4 (Barwick CJ)

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ACCUSED'S LIST OF AUTHORITIES

PRACTICAL EXERCISE NO: 5

Part 1: Authorities to be Read

1. *McDermott v The King* (1948) 76 CLR 501, 511–2 (Dixon J).
2. *Tofilau v The Queen* (2007) 231 CLR 396, 406 (Gleeson CJ).
3. *R v Swaffield* (1998) 192 CLR 159, 181–3 (Brennan CJ).
4. *R v Swaffield* (1998) 192 CLR 159, 191–195 (Toohey, Gaudron and Gummow JJ).
5. *R v Smith* (1992) 58 SASR 491, 498 (Perry J).
6. *Foster v The Queen* (1993) 66 A Crim R 112, 117–8 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
7. *Bunning v Cross* (1977) 141 CLR 54, 74–80 (Stephen and Aickin JJ).

Part 1: Authorities to be Referred to

1. *R v Christie* [1914] AC 545.
1. *R v Murphy* (1996) 66 SASR 406.
2. *Cleland v The Queen* (1982) 151 CLR 1.
3. *Vocisano v Vocisano* (1973) 130 CLR 267.