12/06; [2006] VSC 63

SUPREME COURT OF VICTORIA

R v WATERS

Osborn J

20-23, 27 February 2006 — (2006) 163 A Crim R 312

EVIDENCE – ADMISSIBILITY OF RECORD OF INTERVIEW – MATTERS TO BE CONSIDERED WHEN OBJECTION TAKEN TO ADMISSION OF RECORD OF INTERVIEW – INVOLUNTARINESS – UNRELIABILITY – INVESTIGATIVE UNFAIRNESS – WHETHER RECORD OF INTERVIEW SHOULD BE EXCLUDED FROM EVIDENCE.

In 1996, the body of W.'s father was found at his home. The apparent cause of death was hanging. In 2004, W. participated in a video taped record of interview in which he stated he had killed his father by strangulation with a short piece of rope. W. gave an apparently detailed and circumstantial account of his reasons for doing so, the manner of the strangulation and the faking of the hanging. Also, there were other antecedent statements concerning an acrimonious exchange of SMS messages between W. and his children on the evening preceding his record of interview. In the course of this exchange W. was in effect challenged to prove that he killed his father as an element of demonstrating honesty in statements made in the context of his relationship with his own children. W. was charged with the murder of his father and at the trial, the record of interview was challenged on the grounds of involuntariness, unreliability and unfairness.

HELD: Record of interview not excluded from evidence.

1. Whilst the record of interview may have been provoked by the exchange of text messages which occurred between W. and his children, this was not a case of basal involuntariness. W. was not compelled to confess. He elected to go to police to make statements which he knew might be used in evidence against him. There was no evidence that W.'s will was at that time overborne in the fundamental sense required to demonstrate the record of interview was involuntary.

2. Insofar as unreliability is concerned, if it could be positively demonstrated that the unreliability of the record of interview was such that W. would not receive a fair trial if the record of interview were admitted in evidence, then it should in the court's discretion be excluded from evidence. Unreliability of evidence is a matter of degree. If unreliability of itself does not justify exclusion of a confession, it may still be relevant to consideration of the discretion arising by reason of other factors such as evidence tainted by unfairness or procedural impropriety. As there were no such questions arising in the present case, the question was whether the record of interview could be demonstrated to be so unreliable as to justify exclusion on that ground alone.

3. Even if the confessional evidence was admissible, the intellectual or mental state of the accused may go to the exercise of a discretion to reject the evidence. It may touch upon the propriety of the means by which the confessional statement was obtained, the reliability of the statement itself and the fairness involved in permitting the statement to be used against the accused. In the present case, having regard to the medical evidence and the other evidence concerning the circumstances of the death, the confessional statement was one of possible unreliability but not of inherently unreliability.

4. The record of interview was conducted openly, fairly and with all necessary cautions. The confessions were both confirmed and elaborated freely after W. was fully cautioned and when he knew precisely what the consequences of such a confession were likely to be. Accordingly, there were no circumstances which justified the conclusion that the admission of the confession into evidence would result in unfairness to W.

OSBORN J:

1. On 16 February 1996 the body of Edward Waters was found at his home in Jeparit. The apparent cause of death was hanging. The body was slumped partially over the rear steps to the house with a noose around the neck accompanied by clear evidence of compression injury to the neck.

2. It appeared that the rope above the noose had broken from one of two ends of a rope tied and knotted carefully around a beam above.

3. Subsequently a coroner returned a finding without inquest that the deceased had died as a result of asphyxia by hanging and no other person contributed to the death.

4. On 3 August 2004 the accused participated in a video taped record of interview in which he stated that he had killed the deceased his father, by strangulation with a short piece of rope. He gave an apparently detailed and circumstantial account of his reasons for doing so, the manner of the strangulation and the faking of the hanging. At the conclusion of this interview the accused was charged with the murder of the deceased.

5. Mr Kennan and Mr Laschko now make preliminary application to have the record of interview together with certain antecedent confessional statements excluded from evidence upon the trial.

6. The application with respect to the antecedent statements is provisional in the sense that it is put as part of a global objection. If the record of interview is not excluded from evidence the accused's representatives would wish to consider whether the antecedent statements should remain the subject of continuing objection, because they may be necessary to the defence case in order to put forward an explanation by reference to the sequence of events which triggered the record of interview. In particular the antecedent statements include components of an acrimonious exchange of SMS messages between the accused and his children on the evening preceding his record of interview. In the course of this exchange he was in effect challenged to prove he killed his father as an element of demonstrating honesty in statements made in the context of his relationship with his own children.

7. The record of interview is challenged on the grounds of involuntariness, unreliability and unfairness.

Involuntariness

8. In my view it cannot be said to have been involuntary. It may have been provoked by the exchange of text messages which occurred between the accused and his children, but this is not a case of basal involuntariness such as *R v S L*[1]. The accused was not compelled to confess. He was challenged as to his truthfulness and elected to go to the police to make statements which he knew might be used in evidence against him. No evidence was called from the accused himself on the *voir dire* as to his state of mind at the time of the record of interview and there is no evidence that the accused's will was at that time overborne in the fundamental sense required to demonstrate the record of interview was involuntary[2].

Unreliability

9. Insofar as unreliability and unfairness are concerned, I accept that if it can be positively demonstrated that the unreliability of a record of interview is such that the accused would not receive a fair trial if the record of interview were admitted in evidence, then it should in the court's discretion be excluded from evidence. It is fundamental to our system of justice that a person should not be convicted of an offence save after a fair trial according to law[3].

10. Nevertheless a distinction must be drawn between cases where the record of interview is inherently or intrinsically unreliable, and cases where the relative degree of its reliability is only capable of assessment by reference to extrinsic factors including circumstantial evidence as to the effect of which views might legitimately differ. The common law has always permitted potentially unreliable evidence to go to juries subject to appropriate directions and warnings as to its use. As the Full Court stated in *Rozenes v Beljajev*[4]:

> "'Unreliability' means what has been described by the High Court as 'potential unreliability' on a number of occasions in considering whether the position of a witness required that a warning about corroboration, or some similar warning, be given.
> ...
>
> 'Unreliability' of evidence is a matter of degree: almost all evidence is, we suppose, unreliable in the sense that there is a risk or probability that it will not be accurate in every respect. The expression is used in the cases dealing with warnings to be given to juries to convey that the evidence in question is unreliable to what might be called an uncommon degree."

Further, it has been accepted that it could only be in "a most exceptional case"[5] that one could say, as Vincent J put it in *R v Peirce*[6] that the considerations affecting reliability were not "comprehensible to a jury and capable of assessment by them as the proper tribunal of fact."

11. This Court has in recent times on a number of occasions been required to apply the principles stated by the High Court in the cases of *R v Swaffield*, *R v Pavic*[7], to circumstances in which confessional statements have been elicited by police under cover operatives and covertly taped. As the joint judgment of Toohey, Gaudron and Gummow JJ stated[8]:

> "As the authorities stand, the likelihood of an unreliable confession does not mandate the exercise of the unfairness discretion to exclude that evidence. Nevertheless, it is hard to understand why, in such circumstances, the discretion would not be exercised in that way, particularly when regard is had to the consideration that the risk of an untrue admission is the rationale for the inadmissibility of a non-voluntary confessional statement."

12. Ultimately, their Honours together with Kirby J adopted the view that the admissibility of confessional material turns first on the question of voluntariness, next an exclusion based on considerations of reliability, and finally on a overall discretion taking account of all the circumstances (including the means by which any admission was elicited and whether unfair forensic disadvantage may be occasioned by the admission of the evidence), to determine whether the admission of the evidence would come at an unacceptable price having regard to contemporary community standards.

13. The first question involves consideration of a mandatory precondition to admissibility. The discretionary considerations then referred to may be sufficient in themselves or may overlap. Thus unreliability itself may justify exclusion of a confession in some cases, but if it does not, it may still be relevant to consideration of the discretion otherwise arising by reason of other factors. Thus potential (as distinct from demonstrable) unreliability may not justify exclusion of evidence in itself but it may be a significant factor favouring the exclusion of evidence otherwise tainted by unfairness or procedural impropriety.

14. In the present case no question of procedural impropriety arises with respect to the record of interview and for reasons to which I shall return I am satisfied it is not tainted by unfairness. It follows that unlike some cases involving covertly taped confessions, the critical question in this case is simply whether the record of interview can be demonstrated to be so unreliable as to justify exclusion on that ground alone.

15. In both *R v Favata*[9] and *R v Clarke*[10], Teague and Kellam JJ respectively, when considering covertly taped confessions, made reference to that line of authority which holds that evidence of mental disorder may lead to the conclusion that a confession is so inherently unreliable that it should not be admitted. In *Pfitzner v R*[11] Doyle CJ after a consideration of the relevant authorities and in particular the judgment of the High Court in *Sinclair v R*[12] posed the relevant test as being "based upon affirmative satisfaction that the admissions are inherently unreliable as distinct from possibly unreliable".

16. This test accords with that adopted by the Full Court in *R v Starecki*[13] namely whether the evidence showed the accused was suffering from such unbalance of mind that no account should be taken of what he said.

17. In my view this test is appropriate where the sole or essential ground upon which exclusion of a confessional statement is sought is that of unreliability. As I have said it may be however that potential unreliability will be a relevant discretionary consideration when coupled with other matters.

18. It is desirable to refer more fully in the present case to the principles forming the background to the test stated in *Pfitzner*[14], because of the significance sought to be attributed in this case to the mental state of the accused. The underlying principles were summarised by Gleeson CJ in *R v Parker*[15]:

> "Cases in which a Crown case depends, wholly or substantially, upon confessions alleged to have been made by an accused person who is suffering from some form of mental disability, whether such

cases are proceeding as ordinary criminal trials or pursuant to the special procedures contained in Pt XIA of the Crimes Act, present obvious difficulties. The principles relevant to the resolution of those difficulties may be summarised as follows:

> 1. The fact that an accused person who has allegedly confessed to committing a crime was, at the time of the alleged confession, suffering from some form of unsoundness of mind or psychiatric disorder may, depending upon the circumstances, be of importance in considering the evidentiary value of the confession, and may in some circumstances deprive it of all evidentiary value.[16] It does not, however, necessarily make evidence of the confession inadmissible.[17] As Dixon J observed in *Sinclair*, an insane person is not necessarily an incompetent witness. Persons who are intellectually handicapped or who suffer from disease or disorder of the mind are by no means necessarily incapable of telling, or admitting, the truth.
>
> 2. Even if such evidence is admissible, a consideration of the quality of the evidence may, in a given case, result in a conclusion that a verdict founded upon it is unsafe and unsatisfactory.[18]
>
> 3. The intellectual capacity of the accused, or the existence of some disease or disorder of the mind, may go to the issue of whether the confession was voluntary and may in that respect bear upon the admissibility of the evidence. It may be relevant to the question whether the confession was made in the exercise of free choice, as for example, where an accused is incapable of making such a free choice, or of understanding his right to choose between speaking and remaining silent. Depending upon the circumstances, it may have an important bearing upon whether the statement was made as the result of duress, intimidation or undue insistence or pressure. The circumstances in which such a fact may be relevant to an issue as to the voluntariness of a confession are multifarious.[19]
>
> 4. Further, even if the confessional evidence is admissible, the intellectual or mental state of the accused may, in a number of possible ways, go to the exercise of a trial judge's discretion to reject the evidence.[20] It may, for example, touch upon the propriety of the means by which the confessional statement was obtained, *the reliability of the statement itself*, and the fairness involved in permitting the statement to be used against the accused.
> 5. A person's vocabulary and standard of comprehension may also be of relevance in determining an issue as to whether such a person in fact made or intended the admissions attributed to him.[21]
>
> 6. If a Crown case is based in whole or in part upon the confession of a person suffering from some mental disability which may affect the reliability of the confession then a trial judge in his summing-up should use appropriate means to bring to the attention of the jury the possible danger of basing a conviction on such evidence unless it is confirmed by other evidence.[22]"

(Citations taken to foot, my emphasis.)

19. It was submitted on behalf of the accused that I should be satisfied in terms of the test stated in *Pfitzner*[23] that the admissions in the record of interview were inherently unreliable as distinct from possibly unreliable.

20. I have come to the view that the present case is one of possible unreliability not of inherent unreliability and that the matters which go to a final determination of the reliability of the alleged confessions are matters properly left to the jury to determine. My reasons for this conclusion are as follows.

21. The application is made on the basis of evidence:

(a) as to the probable state of mind of the accused at the time of the alleged confession; and

(b) as to the consistency of the account given by him in his record of interview with the "external" circumstantial evidence—

- concerning the circumstances of the killing generally;
- concerning the condition of the body after death; and
- concerning the circumstances indicative of a hanging.

22. As to the first matter namely the state of mind of the accused at the time of the alleged confessional statements, evidence was called from Dr Walton a psychiatrist, to the effect that at the time of the deceased's death the accused suffered from chronic depression, produced in large part by a history of severe sexual abuse inflicted by the deceased upon both the accused and his siblings as children. This depression had in turn been aggravated by alcohol abuse, the break down of the accused's first marriage, the breakdown of the relationship with his children by that

marriage, and injuries suffered by him in a car accident. The stress caused by his depression was ultimately further aggravated by the acrimonious exchange with his children immediately prior to the making of the confessional statements.

23. Dr Walton is of the view that the accused's depression induced feelings of guilt and self loathing to such a degree that he felt compelled to confess to a killing for which he was not in fact responsible. Dr Walton says further that it is common for victims of sexual abuse to feel guilt and blame themselves for what occurred, to be confused as to their identity, to suffer from low self esteem and depression, and to engage in alcohol abuse and self destructive behaviour. It follows that the accused was one of a class of victims known to suffer from precisely the type of psychological difficulties which Dr Walton attributes to him.

24. Dr Walton's evidence is not that the accused was at the time of his record of interview incapable of making true confessional statements, but rather that there is substantial reason to believe the statements were untrue. It is not enough as was submitted to me that Dr Walton says there is a distinct possibility of the accused inventing the confession as a result of this mental condition. Such evidence shows that it is potentially not inherently unreliable.

25. Further, the opinion of Dr Walton was not supported by direct evidence from the accused as to his state of mind at the time of the record of interview. It will ultimately fall to the jury to assess his state of mind having regard among other things to the evidence available to them as to his history; the whole of the circumstantial evidence as to the circumstances of the deceased's death; the subsequent history of the accused's actions over the years following the deceased's death; and the manner and nature of the confession available to them to view on video tape.

26. I turn then to the evidence as to the general circumstances of the killing. It is submitted firstly that the record of interview contains assertions of particular fact which are inconsistent with the objective circumstantial evidence relating to the circumstances in which the deceased died. It is submitted next that the balance of medical opinion favours the view that the deceased died by hanging and not by strangulation in the manner described in the record of interview. It is then further submitted that the balance of the engineering evidence supports the conclusion that the accused did not attempt to hang the deceased up in the manner described by him in the record of interview.[24]

27. It is submitted that the record of interview is directly inconsistent with objective circumstances in a number of instances including:

- the manner in which the rope at the scene was found to have been tied to the beam rather than looped over it as illustrated by the accused during the course of the record of interview;
- the time at which the accused initially states the killing occurred namely 9.00 am when it is apparent death occurred in the late afternoon;
- the denial by the accused to police officers that he had a psychiatric history;
- the demonstration of a length of rope used in the strangling, which would be insufficient;
- description of a blue and yellow telecom rope as the rope used in the hanging, when the rope used in the hanging was orange;
- differing versions of where the rope was obtained;
- failure to explain without prompting why the accused went out to get cigarettes for his father after his father's death.

28. Conversely, Ms Williams submits that the record of interview contains reference to a number of significant matters that confirm the Crown case including matters that only the killer would know:

- the existence of a powerful motive to kill triggered ultimately by particular statements of the deceased;
- the deceased did not struggle when strangled;

• the deceased was dragged to the back verandah on a chair in a manner demonstrated on the videotape;

• there was a need to fit the hangman's noose to the preexisting strangulation mark;

• the rope used in the attempted hanging appeared too long after the event.

29. The contentions of both the Crown and the defence fall to be assessed against an account given eight years after the events in issue, by a man whose memory may be less than perfect for that reason alone. These and other circumstances will ultimately be addressed in accordance with the principles stated by the High Court in the following much cited passage from the judgment of Gibb CJ and Mason J in *Chamberlain v R (No 2)*[25]

> "We have no doubt that the position is correctly stated in the following passage in *R v Beble*[26] that: 'It is not the law that a jury should examine separately each item of evidence adduced by the prosecution, apply the onus of proof beyond reasonable doubt as to that evidence and reject if they are not so satisfied.' At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness 'separately in, so to speak, a hermetically sealed compartment'; they should consider the accumulation of the evidence[27].

Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the circumstances put together'[28]. In *Plomp v R*[29], it was argued that the motives of the accused could not be considered until it was shown by evidence that in some physical way his actions were responsible for his wife's death. The court rejected this argument. Dixon CJ said[30]:

> 'All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. I cannot think, however, that in a case where the prosecution is based on circumstantial evidence any part of the circumstances can be put on one side as relating to motive only, and therefore not to be weighed as part of the proofs of what was done.'
>
> It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence ..."
> (Citations taken to foot.)

30. It is further to be observed that as juries are routinely instructed, it is not for the Crown to prove every detail of what happened leading up to, at or about the time of and after the deceased's death. The Crown must prove the criminal elements of the accused's conduct and critically in this case that the accused caused the deceased's death. The evidence of circumstances surrounding the alleged killing may bear directly on the credibility of the accused's confession as part of a record of interview which is otherwise shown to be untrustworthy but they can do no more than this. The weight that might be given to allegedly critical consistencies or inconsistencies between the record of interview and items of objective circumstantial evidence is a matter for the jury as the tribunal of fact.

31. I turn then to the evidence of Drs. Lynch, Langdren and Gall. In my view their evidence

cannot be regarded (either on its own or taken with other matters) as justifying the conclusion that the critical confessional statements are unreliable. Nor is their evidence materially supplemented by the original opinions reached by Dr. Bourke and Dr. Humphries post mortem.

32. None of the medical witnesses say that the now available evidence as to the state of the deceased's body after death, justifies the conclusion that he could not have been strangled in the manner described by the accused. Both Dr. Langdren and Dr. Gall identify matters which tend to favour on the balance of probabilities the hypothesis that the deceased died as a result of hanging. Nevertheless each of the factors identified may be said to be subject to relativities which were ventilated in cross examination and taken at their highest, they do no more than justify a conclusion based upon the medical part of the evidence only. As such they cannot be said to require a particular conclusion on the whole of the evidence as to the ultimate facts in issue.

33. Likewise the evidence of the local police officer as to lack of signs of struggling at the scene of death, of the informant as to rope lengths found at the scene, and of the engineers Professor Kuhnell, Dr. Field and Mr. Dohrmann, does not compel the view that the accused's account of the killing and its aftermath is inherently unreliable.

34. First the engineering experts set out to test the feasibility of actions hypothetically undertaken by the deceased but not directly witnessed on the one hand and of actions of the accused described in answers contained in the record of interview which are themselves open to debate as to their precise meaning. Both the scenarios tested are subject to some uncertainty.[31]

35. Secondly, both Professor Kuhnell and Dr. Field put forward hypotheses which are consistent with the confessional statements made by the accused.

36. Thirdly, although there is substantial force in Mr. Kennan's submission that the Crown cannot persuasively pick and choose aspects of the record of interview as being truthful, alleged inconsistencies between the accused's account and the circumstances analysed by Mr. Dohrmann go ultimately to the weight to be given to the accused's confession of murder by strangulation. They do not directly demonstrate that the alleged killing could not have occurred as admitted or otherwise invalidate the terms of the confession going to the manner of strangulation.

37. Fourthly, the evidence as to the fake hanging scenario advanced in the record of interview which is criticised by Mr Dohrmann, is part only of the circumstantial evidence in the case, and must be assessed as part of the evidence as a whole in accordance with the principles stated in *Chamberlain (No. 2)* cited above.

Investigative Unfairness

38. Lastly it is submitted that the manner in which the confession was provoked makes its reception into evidence unfair. I reject this submission. First the confessional statements relied on represent the culmination of a series of statements made over many years and commencing well before the final exchange of SMS messages between the accused and his children. Secondly, the confessions were both confirmed and elaborated freely and fully after the accused was cautioned and when he knew precisely what the consequences of such confession were likely to be. Thirdly once it is accepted for the reasons I have set out above that the confessional statements were voluntary and were not inherently unreliable; there are in my view no further circumstances which justify the conclusion that the admission of them into evidence would result in unfairness to the accused. The last of the SMS messages sent to the accused by his daughter Sarah was in terms suggested by a police officer[32], but they did no more than continue the terms of the prior exchange which included both the proposition "you killed grandad" and repeated admissions "I did kill Ted".

39. The record of interview was conducted openly, fairly and with all necessary cautions. It is for the jury to determine whether ultimately the accused was provoked into a false confession or whether in fact he confessed to a killing of which he was guilty.

40. They will do so subject to the fundamental direction required by authorities such as *R v Green*[33], and such further warnings as the evidence may require.

41. For the above reasons I am not prepared to exclude the record of interview from evidence.

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[1] [2005] VSCA 292.
[2] *McDermott v R* [1948] HCA 23; (1948) 76 CLR 501 at 511; [1948] 2 ALR 466 per Dixon J; and see *Collins v R* [1980] FCA 72; (1980) 31 ALR 257 per Brennan J (dissenting on the facts) at 307-308.
[3] *Rozenes v Beljajev* [1995] VicRp 34; [1995] 1 VR 533 at 549; (1994) 126 ALR 481; 8 VAR 1; *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176 at CLR 299-30 per Mason CJ and McHugh J, at CLR 326 per Deane J and at CLR 362 per Gaudron J.
[4] Above at 550.
[5] Above at 599.
[6] [1992] VicRp 17; (1992) 1 VR 273 at 277.
[7] [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5.
[8] Above at 197 [77].
[9] [2004] VSC 7.
[10] [2004] VSC 11.
[11] [1996] SASC 5462; (1996) 66 SASR 161; (1996) 85 A Crim R 120.
[12] [1946] HCA 55; (1946) 73 CLR 316; [1947] ALR 37.
[13] [1960] VicRp 22; (1960) VR 141 at 152.
[14] above.
[15] (1990) 19 NSWLR 177 at 183-4; 47 A Crim R 281.
[16] *Jackson v R* [1962] HCA 49; (1962) 108 CLR 591; 36 ALJR 198.
[17] *Sinclair v R* [1946] HCA 55; (1946) 73 CLR 316; [1947] ALR 37 and *R v Starecki* [1960] VicRp 22; [1960] VR 141.
[18] *Morris v R* [1987] HCA 50; (1987) 163 CLR 454; 74 ALR 161; 28 A Crim R 48; 61 ALJR 588.
[19] cf *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517 and *Van Der Meer v R* [1988] HCA 56; (1988) 62 ALJR 656; 82 ALR 10; (1988) 35 A Crim R 232.
[20] cf *McDermott v R* [1948] HCA 23; (1948) 76 CLR 501; [1948] 2 ALR 466; *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517.
[21] *Murphy v R* [1989] HCA 28; (1989) 167 CLR 94; 86 ALR 35; (1989) 63 ALJR 422; 40 A Crim R 361.
[22] cf *Bromley v R* [1986] HCA 49; (1986) 161 CLR 315; (1986) 67 ALR 12; 22 A Crim R 216; 60 ALJR 651.
[23] Above.
[24] The argument shifted across the submissions but I have listed them in this order for convenience.
[25] [1984] HCA 7; (1984) 153 CLR 521 at 535-6; 51 ALR 225; (1984) 58 ALJR 133.
[26] [1979] Qd R 278 at 289.
[27] cf *Weeder v R* (1980) 71 Cr App R 228 at 231; [1980] Crim LR.
[28] per Lord Cairns, in *Belhaven and Stenton Peerage* (1875) 1 AC 278 at 279, cited in *R v Van Beelen* (1973) 4 SASR 353 at 373; and see *Thomas v R* [1972] NZLR 34–8 at 37, 40, and cases there cited.
[29] [1963] HCA 44; (1963) 110 CLR 234; [1964] ALR 267.
[30] [1963] HCA 44; (1963) 110 CLR 234 at 242; [1964] ALR 267.
[31] eg. The meaning of the statement: "And then I started to drag it up and actually got him almost to his feet I think and then the bloody rope snapped."
[32] "You didn't have the guts to kill grandad. Why would they say it was suicide if you did it. If you did, how did you do it?"
[33] [2002] VSCA 34; (2002) 4 VR 471 at 481; (2002) 128 A Crim R 513.

APPEARANCES: For the Crown: Ms M Williams SC, counsel. Office of Public Prosecutions. For the accused Waters: Mr J Kennan SC with Mr D Laschko, counsel. Mr D Laschko, solicitor.
