03/78

HIGH COURT OF AUSTRALIA

DRISCOLL v R

Barwick CJ, Gibbs, Mason, Jacobs and Murphy JJ

10 August 1977

[1977] HCA 43; (1977) 137 CLR 517; (1977) 15 ALR 47; (1977) 51 ALJR 731 (Noted 51 ALJ 838; 52 ALJ 40; 54 ALJ 36; 4 Mon LR 251; 1 Crim LJ 271)

EVIDENCE – ADMISSIBILITY OF CONFESSIONAL STATEMENT – INTERVIEWING POLICE OFFICER DID NOT WANT SOLICITOR PRESENT AT THE INTERVIEW WITH THE ACCUSED – POLICE OFFICER MISLED THE SOLICITOR – RECORD OF INTERVIEW – ACCUSED NOT OVERBORNE OR COERCED – CLAIM BY ACCUSED THAT HE DID NOT MAKE STATEMENTS – WHETHER STATEMENTS WERE MADE – WHETHER IN THE CIRCUMSTANCES THE UNSIGNED RECORD OF INTERVIEW OUGHT NOT TO HAVE BEEN ADMITTED INTO EVIDENCE – ADMISSIBILITY OF RECORDS OF INTERVIEW WHEN UNSIGNED – EVIDENCE OF COMMISSION OF OTHER CRIMINAL ACTS – FINDING IN ACCUSED'S HOUSE OF GUN SIMILAR TO THAT ALLEGED TO HAVE BEEN USED IN OFFENCE CHARGED AND OTHER GUNS – WHETHER RELEVANT – PREVIOUS INCONSISTENT STATEMENT OF WITNESS – CREDIT – WHETHER JUDGE BOUND TO DIRECT JURY THAT EVIDENCE OF WITNESS UNRELIABLE – UNSIGNED CONFESSION – DISCRETION OF TRIAL JUDGE – SOLICITOR NOT ALLOWED TO BE PRESENT AT INTERVIEW BETWEEN ACCUSED AND POLICE – WHETHER RELEVANT: *CRIMINAL APPEAL ACT* 1912 (NSW), SS6(1), 8(1).

In all cases in which an unsigned record of interview is tendered the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded. The exclusion of unsigned records of interview should not hamper the police in their increasingly difficult task, because oral evidence of the interview itself may of course be given, and the record is available to refresh the memory of the police witnesses if necessary. If the police wish to have supporting evidence of an interrogation there are other methods, such as tape recording, or the use of videotape, which would be likely to be more effective than the production of unsigned records of interview, and would not be open to the same objection. In any case the paramount requirement is that the trial should be conducted fairly and the admission of an unsigned record would in some cases tip the scales unfairly against the accused – e.g., if it had been acknowledged by the accused in the presence of some impartial person, such as a Magistrate not connected with the interrogation, or if the manner in which the trial had been conducted on behalf of the accused made it necessary to admit the record.

BARWICK CJ: My brother Gibbs has afforded me the opportunity of reading the reasons for judgment which he has prepared in this case. As my brother there recites the relevant facts and submissions made in support of this application for special leave to appeal, I have no need to set out those facts and arguments.

There were several matters admitted into or maintained in evidence over objection at the trial of the applicant which are said to have been inadmissible. I need only list them briefly. First, there is the evidence of the discovery of the 'armoury' in the house in Prahran, Victoria, and the holographs of the weapons; secondly, there is the reference in the unsigned record of interview to that discovery; thirdly, there is the discovery of weapons in a box under undergrowth near the house at Oatley, New South Wales, about which the applicant was said to have made statements; fourthly, there was the evidence of Mrs Dauroff as to the use of a 'black gun' at the house at Oatley.

In my opinion, none of this evidence was admissible and, in that respect, I am in agreement with the reasons for its inadmissibility given by my brother Gibbs. In my opinion, the reference to the armoury at Prahran ought to have been excised from the record of interview.

I can quite understand that, at the time the evidence about the use of the 'black gun'

was given, it might have been expected by the prosecutor — and, indeed, the learned trial judge evidently thought — that the gun would be identified with the murder weapon. It may be, of course, that the witness who described the incident in court did not come to the proof she has given. But identification of the weapon was not forthcoming. The evidence of the shooting was, therefore, clearly enough, inadmissible.

Whether or not the effect of its admission could have been removed by suitable direction of the jury, or whether only the extreme course of discharging the jury would have sufficed in the circumstances to countervail that effect, need not presently be decided because, in the event, neither course was taken.

I agree with what my brother Gibbs has written as to the reasons given by the Court of Criminal Appeal for rejecting the applicant's submissions as to the inadmissibility of this evidence. I would merely add for myself that those submissions called for a deeper consideration than the reasons for judgment of the Court of Criminal Appeal would indicate that they had received. They were submissions of a substantial kind: the admission of the evidence could not be disposed of by resort to some justifying principle of providing necessary background or of completeness of the relevant incidents of which evidence was being given.

There was the further submission of the applicant that the evidence of a solicitor had been wrongly excluded. The details of the evidence which was sought to be tendered is to be found in my brother Gibbs' reasons for judgment. The question is whether such evidence was admissible. It was said to be relevant to the question whether the applicant made the statements attributed to him by the police officer and recorded that it was claimed and, indeed, in any case I do not think it could properly have been claimed that the solicitor's evidence was relevant to the question whether, if those statements were in fact made by the applicant, they were true.

The evidence, if accepted, would have tended to show that the police officer did not want the solicitor present at the interview he proposed to have with the applicant and that the police officer misled the solicitor as to his, the police officer's, knowledge of the applicant having been arrested. The contest between the applicant and the police officer is whether the applicant made the confessional statements attributed to him. The applicant does not complain of having been overborne or coerced into statements which he concedes were made. He says that he had discussions with the police officer but that he did make these statements.

What logical inference can properly be drawn from the fact that the police officer did not want the solicitor present at the interview and was prepared by deceit to put him off? That the officer believed that the applicant was likely to speak more freely in the absence of the solicitor, or, put another way, that the solicitor was likely to advise the applicant to refuse to answer questions, or at least some questions, put to him could well be inferred. That the police officer's conduct, if made out, was reprehensible and ought not to have taken place may at once be conceded. But is it logically permissible to infer from the police officer's conduct, if it occurred, that the record of the interrogation in the absence of the solicitor was likely to be false. In other words, does the officer's conduct in relation to the solicitor warrant any logical inference on the issue of whether the statements attributed to the applicant were in fact made? I have come to the conclusion that it does not. Whether or not those statements were made depends on the oral evidence of the police officer and of the applicant. The fact that the officer did not want the solicitor present and that he deceived the solicitor might properly be used to affect the credit to be given to the officer's evidence. But I do not think it could be used as evidence on the issue itself, i.e. the issue whether the statements were made. Of course, it is proper in considering such an issue that all the circumstances in which the confessional statement is said to have been made should be examined. But such a principle can only relate to such circumstances as afford either alone or in association with other relevant facts a basis for a conclusion one way or the other as to the making of the confessional statement. The evidence of the solicitor sought to be tendered was, in my opinion, inadmissible.

The applicant then claimed that an unsigned record of interview ought not to have been admitted for several reasons. My brother Gibbs has dealt with those reasons: I agree with his conclusion that none of them required the rejection of the unsigned record. I also agree that, if practicable, a solicitor should be allowed to be present at an interrogation if the person to be

interrogated requests his presence and that a copy of the record of interview should be made immediately available to that person whether or not a solicitor has been present. But failure to follow such good practice does not make the record for that reason inadmissible in evidence. I say nothing as to any inferences which could properly be drawn from a failure to allow the practice. Circumstances in which interrogations take place are likely to be too various to allow of any generalisation on that subject being made. Nor, as at present advised, am I convinced that resort to mechanical recording devices is either desirable or practicable. Much more knowledge than I possess would be necessary and the consideration of the differing points of view, fully expressed and argued, which may possibly be held on that matter would be necessary before a considered view could be reached.

However, it is not inappropriate to say that a trial judge when called upon to admit such a record should, before doing so, consider its contents and the circumstances in which the record came into existence, being careful to limit them, in so far as the jury may see them, to admissible material. If the typist who made the record in the presence of the person interrogated is called to verify the circumstances of its making, such a record differs only from a mechanically recorded statement in that it depends less on human credibility. The record of interview, so verified, is little different from a shorthand writer's transcribed notes verified by the shorthand writer's if need be by the production of his shorthand notes.

Also a trial judge should consider the nature and terms of the acknowledgment of the accuracy of the record which is attributed to the person interrogated. Signature is perhaps the best, but clearly not the only, method of such acknowledgment. The record becomes admissible only because it has become the document of the person interrogated. If it has not become his document it should not be admitted into evidence as such.

Of course, the unsigned record can always be used to refresh recollection. Such a use is, in my opinion, its preferable use. A cross-examiner will be entitled to look at it, if it is so used without coming under an obligation to tender it, or rendering it liable to be tendered for the prosecutor merely because the cross-examiner has inspected it. Tendered, the record may have an undue influence in the consideration of the jury who, in general, do not have before them in their room the transcript of the oral evidence. That circumstance is, in my opinion, a factor for consideration when the trial judge has occasion to consider whether in all the circumstances the reception of the record into evidence would unfairly prejudice the accused. But, in determining what is fair in the circumstances, the judge must not lose sight of the interest of the Crown as representing the community in the conviction by due and fair process of those who break the law.

It seems that the practice of admitting the unsigned record of interview has grown apace since McClemens J in 1964 favoured its reception in *R v Ragen* 81 WN Pt 1 (NSW) 572 at p574; 33 WN (NSW) 106. As I have said, for my part, I would regard it as better practice to use the contemporaneous record as a means of refreshment of recollection unless by clear evidence the accused has made it his document. Such a practice is more likely to keep the jury's mind on the central question, namely, whether the police officer is credible when he gives evidence of confessional or other relevant statements. In any case, the admission of the unsigned record should not be a matter of course. However, I cannot account the admission or use in this case of the unsigned record of interview as an irregularity in the trial, apart from the inclusion in it of the reference to the armoury found in the house of Prahran.

I turn now to what is in reality the major and, I think, the most difficult question in this case — that is, does the conviction by the jury of the applicant in the circumstances of the trial amount to a miscarriage of justice so as to warrant the grant of a new trial?

Attention was called in *Ratten v R* [1974] HCA 35; (1974) 131 CLR 510; 4 ALR 93; 48 ALJR 380 (Ratten's Case) to the function of a Court of Criminal Appeal operating under a statute couched in the terms of the *Criminal Appeal Act* 1912 as amended (NSW) (the Criminal Appeal Act). It seems to me desirable in dealing with the instant case to expand a little upon what was there said. That case was dealing with the manner in which additional evidence should be considered. Here we have an application for a new trial, because of errors said to have occurred in the admission and rejection of evidence.

Section 6 of the *Criminal Appeal Act* is in identical terms to those of s4(1) and (2) of the *Criminal Appeal Act* 1907 (UK). The meaning of the expression 'miscarriage of justice' as used in these sections has been elucidated over many years. It has, in my opinion correctly been said that the test of miscarriage in relation to the proviso to s6(1) is whether the court is satisfied that no reasonable jury, properly directed, could have failed to return a verdict of guilty on the evidence before it had it applied itself to its task in a proper manner, making in favour of the accused the presumption of innocence and bearing in mind the necessity that the charge be proved beyond all reasonable doubt: see *R v McGibbony* [1956] VicLawRp 68; (1956) VLR 424 at pp426-7; [1956] ALR 975; or, put another way, that no reasonable jury properly directed could fail in the performance of their duty on the evidence before them to have convicted the accused of the charge laid against him.

[His Honour then considered whether the circumstances amounted to a miscarriage of justice so as to warrant the grant of a new trial and continued:] Now, in the instant case, the applicant unquestionably up to the day of the murder had been in the possession of the machine pistol which had been fully established as being the murder weapon. But the applicant claimed to have sold and parted with the possession of the gun that day to Kaczmarek, who is said to have had a motive to be violent towards the deceased. Kaczmarek gave evidence, which, being believed, would have made it quite unreasonable for the jury to have done other than convict the applicant of the murder. In the result, the jury, hearing the evidence of each man, both in chief and in cross-examination, evidently believed Kaczmarek and not the applicant. Thus, if the jury's view of the respective credit of the two men is accepted, there could be no doubt, in my opinion, that no miscarriage of justice occurred.

But might the jury have been influenced in their view of the respective credibility of the two men by the inadmissible evidence to which I have made reference? The principal matter of credit in contest was whether the applicant had parted with the gun to Kaczmarek. Logically, I have difficulty in accepting that the evidence of the possession of other weapons or of the irresponsible use of a weapon not identified as the murder weapon could influence the decision as to which of the two men examined and cross-examined in the courtroom should be believed as to what was said in evidence. But I am bound to concede that laymen may not always restrict their consideration of questions of credit to completely logical consideration. I think it must be conceded as possible, though perhaps to my mind only barely possible, that a jury might be less inclined to believe the applicant upon the relevant issues because he had been shown to be a man at least likely to resort to violence, and perhaps irresponsibly so. However, but for a further consideration to which I am about to refer, I would be disinclined, notwithstanding the possibility of lay illogicality, to find that there had been a miscarriage of justice, making such a concession to lay illogicality. I would be inclined to conclude that the inadmissible evidence was not such a factor in the contest as to credibility – affected as it must have been by various other proved circumstances and probabilities – as would warrant the conclusion that by reason of its admission a miscarriage had in fact occurred ...

GIBBS J: The applicant, Linus Patrick Driscoll, was indicted before the Supreme Court of New South Wales on a charge that on or about the 24th November 1972 at Revesby in the State of New South Wales he murdered John Patrick Maloney. After a trial which lasted for nine days the jury returned a verdict of guilty of murder. An appeal to the Court of Criminal Appeal of New South Wales was dismissed. The applicant now seeks special leave to appeal to this Court.

The body of the deceased man, Maloney, was found in a house at Revesby in the early morning of the 25th November 1972. He had been shot twice in the head. No-one saw or heard the murder. There was evidence from which it could be inferred that the shots had been from a .22 machine pistol which was, on the 20th December 1972, found by an abalone diver in the sea off Bondi. When found, the machine pistol was wrapped in part of a blue shirt. A silencer which fitted the pistol was later found in the sea nearby. There was evidence on which the jury could have found that the pistol had been owned by the applicant and that he had carried it with him on the night of 24th November 1972, wrapped in blue cloth. However, the applicant, who gave evidence, said that he had sold the pistol on the 24th November 1972 to a man named Richard Kaczmarek. This was denied by Kaczmarek. The Crown alleged that the applicant had a motive for the murder. The applicant had on the 19th October 1972 discovered a bomb in his car and there was evidence that he believed that Maloney had been responsible for placing it there. It is

necessary to add that the place in which Kaczmarek had been living had also been bombed – about two months before Maloney died – and there was some evidence that Kaczmarek gave evidence that one night about a week before the death of Maloney he accompanied the applicant to the flat where Maloney was living. The applicant had a revolver. The applicant said;

> 'You go up and knock on the door and when he comes out on the balcony to see who it is I'll shoot him.'

Kaczmarek said that he replied:

> 'Not in this place, it's too crowded.'

This evidence was denied by the applicant. After the murder the applicant disappeared. He was eventually arrested in Melbourne on 5th July 1974. The police searched the house at Prahran where he had been living, and it will be necessary to refer later in this judgment to the results of that search. The applicant was questioned by the police on 6th and 8th July 1974. Records of these interrogations, typed in the form of question and answer, were prepared by the police. There was oral evidence that the applicant admitted that these 'records of interview' were correct records of what had been said but that he refused to sign them. The records contained statements damaging to the applicant – some very damaging. The records, although unsigned, were admitted in evidence. The applicant gave evidence that he had been questioned by the police, but that the result of the questioning was not truly recorded in the documents. It is unnecessary to set out in further detail the Crown case against the accused because it is not contested that there was evidence which, if accepted, amply supported the conviction. From what had already been said however it will have appeared that there were important questions of credibility to be decided by the jury.

It is submitted on behalf of the applicant that a number of irregularities occurred in the course of the trial and that those irregularities led to a miscarriage of justice.

The first ground upon which the application is supported is that evidence was wrongly admitted as to the discovery of a number of firearms at the house at Prahran in which the applicant had been living. After the applicant was arrested on the 5th July 1974 he was taken by police officers to a house at 9 Kent Street, Prahran. The evidence given by the police was to the following effect. While the applicant was being driven by the police to Prahran he said to Detective Sergeant Lalor:

> 'Well, Mr Lalor, there is a gun down there that I want you to take particular notice of.'

Detective-Sergeant Lalor asked him why, and the applicant replied:

> 'Well, I am wanted badly over the murder of Jake Maloney in Sydney and there is this gun down there, I reckon if the Sydney detectives come down here they will take the gun back with them and carry out their tests and they will try and say that that is the gun that killed Jake. But I can assure you, Mr Lalor, that is not the one that killed him.'

When the officers searched the house they found a .32 Browning automatic pistol, a .303 rifle, a sawn-off shotgun, a .22 machine pistol and some ammunition. The applicant admitted that all the weapons were his. The police officers also found photographs of two men, Reagan and Zizza, who were said to be criminals. The machine pistol found at Prahran was very similar to that used to commit the murder. When the applicant was asked when he had got it, he replied:

> 'I have had it a couple of years, Mr Lalor, I got it off a chap, but I can assure you that that is not the one that killed Jake.'

The applicant gave evidence at the trial and in cross-examination admitted that the weapons and photographs were found and that he had conversations with the police similar to those recounted in the police evidence.

None of this evidence was objected to when it was given. It should however be said that at an early stage of the trial another police witness, Detective-Sergeant Morey, gave evidence that he saw four firearms at Russell Street Police Station. These were no doubt the weapons earlier found at Prahran. Counsel for the applicant then objected 'on the basis of the distance in point of time

between the happenings in this case and the date of the present incident in Melbourne, namely 5th July 1974' but the evidence was allowed. The record of the interrogation of the accused by the police on the 6th July 1974 contained the following questions and answers in relation to this matter:

> 'Q 10. I have been told that following your arrest tonight Police searched your home at 9 Kent Street, Prahran, and found an arsenal of weapons consisting of a .303 calibre colt automatic pistol and a machine pistol fitted with a silencer. There was also a large amount of ammunition and I show you these weapons ...
>
> A. They are just tools of trade Mr Morey, protection you know.
>
> Q 11. Also in your possession was found this notebook which contains photographs of two people known to me in Sydney and they are John Stewart Reagan and Anthony Samuel Zizza. I show you those photographs.
> A. Yes I've never met the men I just wanted to know what they look like.'

Counsel for the applicant objected to the admission into evidence of the record of this interrogation on grounds which are unconnected with the matter now under discussion, but when the record was admitted did not seek to have expunged from it the passages which I have just quoted.

In argument before us the Solicitor-General pointed out that some other evidence as to the discovery of fire-arms was given at the trial and that the admission of that evidence was not made a ground of the present application. On the 30th November 1972 Detective-Sergeant Ashford searched a house at Oatley which was the home of Mr & Mrs Dauroff. There was evidence that Mrs Dauroff had formed what was described as 'a relationship' with Maloney, and that Mrs Dauroff's sister, Pauline Bradley, was the mistress of the applicant. Sergeant Ashford found in the yard of the house, under some undergrowth, a box containing a sub-machine gun, some magazines and ammunition and two walkie-talkie sets. Objection was taken to this evidence but the objection was over-ruled. A fingerprint found on one of the walkie-talkies was that of the applicant. According to one of the records of interview the applicant admitted that all these articles were his and said 'there was a bomb put under my car and you have to fight fire with fire.' However, there was nothing to suggest that any of those articles was used in the killing of Maloney.

The evidence of the finding of the machine pistol and of the statements made by the applicant relevant to it was plainly admissible. On the 5th July 1974 the applicant did not know that the machine pistol which had been used in the murder, and which had apparently afterwards been thrown into the sea, had been found and was in the possession of the police. In the circumstances, the insistence by the applicant that the machine pistol found at Prahran was not the weapon used in the murder might have been regarded as very significant. The jury might have inferred that the applicant knew what sort of weapon had been used in the murder and also that he believed that the weapon so used had been disposed of and was unlikely to be found. If the jury took this view the evidence strongly assisted the Crown case. On the other hand, although it seems unlikely, the jury might have regarded the evidence as showing that the applicant was conscious of his innocence and wished to assist the police. Whatever effect the jury may have given to the evidence it was relevant and admissible.

However, the evidence that the other weapons were found at Prahran was inadmissible. Those other weapons were not used in the crime charged and the fact that they had belonged to the applicant did not tend to show that he had committed the crime. The crucial issue in the case was one of identity: was the applicant the person who shot Maloney? No question of intention arose. The fact that the applicant had a number of weapons which were not used in the crime was not probative of the fact that he was the person who had committed the murder with which he was charged.

The learned judges of the Court of Criminal Appeal, in their judgment, said that they were unable to conclude that the applicant's possession of or association with the weapons tended to show that he was a person of bad character. They added:

> 'These references arose incidentally in the course of the Crown's presentation of a complete account of all relevant events and disclosed no more than the appellant's possession of unlicensed weapons.'

Similarly, they held, possession of the photographs did not show that the applicant was of bad character. If this evidence did show that the applicant was a person of criminal propensities or bad character, and was likely to have committed the murder for that reason, its admission would have offended against a fundamental rule of the criminal law. If however the Court of Criminal Appeal was right in thinking that the evidence was sufficient to show that the applicant had criminal propensities, or was of bad character, the evidence was nevertheless quite irrelevant for, as I have said, it did not in any way tend to establish the identity of the applicant as the murderer. However the evidence was regarded, it was admissible.

The admission of this evidence cannot be defended on the ground that it formed part of the circumstances which it was necessary to place before the jury to provide them with the necessary background and to enable them properly to understand and appreciate what had occurred. That has been called the 'principle of completeness' did not justify the admission of the evidence. That phrase is taken from the judgment of Barwick CJ and Menzies J in *Thompson and Wran v R* [1968] HCA 21; (1968) 117 CLR 313, at p317; [1968] ALR 432; 42 ALJR 16. In that case the appellants were charged with breaking, entering and stealing and it was held that evidence that they had in their possession safe-breaking implements which were not used, and were not appropriate for use, in the commission of the crime with which they were charged was wrongly admitted. Barwick CJ and Menzies J said at p317:

> 'It is to be observed however, that, in a case such as this, when there is found in the possession of prisoners some implements which might have been used to commit the crimes charged and other implements which could not be put to that unlawful use, it is not always an easy matter to apply the principle which acknowledges the admissibility of evidence of the possession of tools of a burglar to identify the accused with the crimes charged. The principle of completeness might sometimes dictate that evidence should be admitted going beyond proving the possession of tools which might have been used to commit the crime in question.'

That statement does not assist the Crown in the present case. The evidence that other weapons and photographs were found at Prahran does not throw any light on the admissible evidence which tends to connect the applicant with the crime charged, and is not so inextricably interwoven with the admissible evidence that the latter could not properly be presented if the former were excluded. The account by the police of the finding of the machine pistol at Prahran would have been perfectly understandable if no mention had been made of the other weapons or of the photographs. The record of interview could easily have been 'edited', in accordance with the common and useful practice, by omitting the references to the weapons and photographs and the excision of those references would not have affected the sense of what remained or rendered it any the less intelligible. It was not difficult in the present case to sift the inadmissible from the admissible evidence, and to tender only the latter, and if this had been done the picture presented to the jury would not have been incomplete.

For these reasons I hold that the evidence led by the Crown that the weapons (other than the machine pistol) and photographs were found at Prahran and the references in the record of interview to that effect, were inadmissible. It is possible that the evidence as to the finding of the weapons at Oatley may be in a different situation, having regard to what the applicant allegedly said on the subject, but since the admission of that evidence was not made a ground of this application I need not decide that question.

The second ground on which this application is supported is that certain evidence given by Mrs Dauroff was wrongly admitted. Mrs Dauroff said that a week or so before the death of Maloney she was at Oatley with Pauline Bradley and another man named Phillip Moore. Moore began to hit Pauline Bradley. The applicant came into the room carrying a gun, which she described as 'a black gun', and he fired it at Moore's foot. Moore ran from the room and the incident ended.

No objection was taken to this evidence when it was given, but on the following day counsel for the applicant asked for the discharge of the jury on the ground that the evidence had been wrongly admitted. The learned trial judge refused the application. It appears that he thought that the gun allegedly fired at Moore's feet was the machine pistol, and that the evidence was relevant to show that the applicant was in possession of the weapon used to commit the murder. However in fact no evidence had then been given, and none was subsequently given, that the firearm used in the incident was the machine pistol used to commit the murder.

When the applicant gave evidence he was cross-examined by the Crown Prosecutor as to this incident. He said that it was Moore who had carried the gun, and that the gun was discharged in the course of a struggle.

The incident involving Moore occurred at about the same time as the alleged conversation between the applicant and Kaczmarek which I have already mentioned, in the course of which the applicant suggested that he would shoot Maloney. The learned judges of the Court of Criminal Appeal, in dealing with the admission of the evidence given by Mrs Dauroff as to the incident concerning Moore, mentioned the evidence given by Kaczmarek and then said:

> 'These two happenings about the same time established that the appellant was then in possession of a weapon which he was prepared to use. The evidence touching the discharge of the revolver at Moore's feet was relevant for the purpose of appreciating the connected events which were necessary for the proper understanding of the appellant's part in the crime.'

The evidence given by Kaczmarek that the applicant suggested shooting Maloney was of course admissible. With the greatest respect however I am unable to agree that the evidence that the applicant discharged a gun at Moore's feet was in any way relevant. The incident involving Moore was not shown to have had any connection whatever with the death of Maloney. For that matter it was quite unconnected with the incident described in evidence by Kaczmarek. It is true to say that the evidence now in question showed that the applicant had a gun and was prepared to use it. In other words it tended to show that the applicant was a man of violent disposition who was likely to use firearms. However it showed no more than this. It was evidence whose only purpose was to lead to the conclusion that the applicant was a person likely from his criminal conduct or character to have committed the offence for which he was being tried, to echo the words of the classic statement of Lord Herschell LC in *Makin v Attorney-General for New South Wales* [1894] LR AC 57 at p65; [1891-1894] All ER 24. The admission of this evidence contravened the fundamental rule of the criminal law to which I have already referred.

The next ground taken on behalf of the applicant is that the learned trial judge failed to give a proper direction to the jury in respect of the evidence of two witnesses each of whom was declared by the judge to be adverse and was cross-examined as to a statement previously made and inconsistent with the testimony given by the witness in the witness box.

The learned trial judge in the course of his summing up told the jury that they could act only on evidence given in court, and that a previous inconsistent statement was not evidence in the trial, but could only be used to weaken the effect of the evidence given by the witness in court.

In the present case, it was of course necessary to warn the jury that they could not treat Mrs Dauroff's previous statement as evidence. The learned trial judge did however give a warning to that effect. The previous statement was more damaging to the applicant than the evidence which Mrs Dauroff gave in court and in the circumstances it was not essential that the jury should be directed that Mrs Dauroff's evidence should be regarded as unreliable. Counsel did not ask for any re-direction to that effect. This ground in my opinion fails.

The next ground taken is that certain evidence of Mr Heazlewood, a solicitor, was wrongly rejected. On the *voir dire* Mr Heazlewood gave the following evidence. On the night of the 5th July 1974 he was informed that the applicant had been arrested. He rang another solicitor in Melbourne and asked him to go to Russell Street Police Station and try to find to applicant. He then went to Mascot airport to emplane for Melbourne. At the airport he saw Detective-Sergeant Morey and had a conversation with him, evidence as to the conversation was as follows:

> 'I said to Detective-Sergeant Morey, "I suppose you are going to Melbourne to speak to Driscoll;" and Detective-Sergeant Morey replied, "I am going to Melbourne to make enquiries about him", I said, "Well, he was arrested today". He said, "Oh, was he; I did not know that" and I then said, "If he is to be interviewed I would like to be present" and Sergeant Morey then said, "No way". And I said, "I am asking you formally if I can be present when he is interviewed" to which he replied, "No"'.

Before Mr Heazlewood was called in the presence of the jury, Detective-Sergeant Morey had given evidence. He admitted, in cross-examination, that he had had a conversation at the airport with Mr Heazlewood and that Mr Heazlewood had made a formal application to be present

at any interview with the applicant. Detective-Sergeant Morey said that his reply to that request was to say:

> 'That is a matter for Driscoll to decide. If he desires you to be there will you please contact me on your arrival in Melbourne and I will arrange it'.

He denied that he told Mr Heazlewood that he did not know that the applicant had been arrested.

Detective-Sergeant Morey commenced to interrogate the applicant at Russell Street Police Station in the early hours of the morning of the 6th July – the record of interview shows the commencing time as 12.10am. The applicant said in evidence that he asked for a solicitor to be present but that his request was denied by the police. According to the police evidence, the applicant did not ask for a solicitor. No solicitor was in fact present.

It was held in the Court of Criminal Appeal that the evidence of Mr Heazlewood went only to the credit of Detective-Sergeant Morey and was inadmissible. If the only purpose of Mr Heazlewood's evidence had been to contradict the evidence of Detective-Sergeant Morey as to facts going to his credit as a witness, it would not have been admissible, for it would not have come within any exception to the settled rule that prevents a party from impeaching the credit of his opponent's witness by calling evidence to contradict him as to matters collateral to the issues in the case. However, the evidence sought to be adduced from Mr Heazlewood did not go only to credit. It was evidence as to facts relevant to the facts in issue. The fact, if it was a fact, that the applicant had made the statements attributed to him in the record of interview dated 6th July was relevant to the question in issue, viz., whether he had committed the murder. One question for the jury to decide was whether he had made those statements; another, whether the statements if made were true. It has been held that all the circumstances that surround the making of an alleged confession and which tend to show either that it can safely be relied upon or that it would be unwise to do so are admissible; *Jackson v R* [1962] HCA 49; (1962) 108 CLR 591 at p596; 36 ALJR 198. Similarly it is clear in principle that evidence of any circumstances which tend to show either that the statement was or that it was not made is admissible. For example if it is alleged that a prisoner has made a confession in reply to questioning at a particular time and place, it will be admissible to prove that at that time he was seen at another place, or that he was then suffering from a disease which rendered him temporarily incapable of speech, or that he did not understand the language in which the questions were asked. Such evidence might of course contradict another witness and impeach his credit, but it would go further and would tend to show that the confession had not been made. For that reason it would be admissible.

A jury called upon to decide whether an oral confession has been made in response to police questioning often faces a difficult task. It is very common for an accused person to deny that he made an oral confession which police witnesses swear that he made. The accused has an obvious motive to claim that police testimony of this kind is false. On the other hand it would be unreal to imagine that every police officer in every case is too scrupulous to succumb to the temptation to attempt to secure the conviction of a person whom he believes to be guilty by saying that he has confessed to the crime with which he is charged when in fact he has not done so. In some cases the evidence that an oral confession was made will be the only, or the vital, evidence against the accused. It is of special importance that a jury which has to decide such a question should have before it, evidence of all facts which tend to prove or disprove the making of the alleged confession. The fact that a police officer has attempted to prevent a solicitor from getting in touch with a client who is held for questioning, and has refused to allow the solicitor to be present when the questions are asked, is relevant to the question whether the admissions, alleged by the police to have been made in the course of the interrogations, were in fact made. It is not of course conclusive.

For those reasons in my opinion the evidence of Mr Heazlewood was admissible and was wrongly rejected.

The final ground on which the application is made is that three unsigned records of interview made on the 6th and 8th July 1974 respectively were wrongly admitted into evidence. It was submitted that the learned trial judge should have rejected the tender of these records,

because the police conducting the interviews refused to allow the solicitor for the applicant to be present, and failed to give a copy of the records of the interview to the applicant forthwith after they were made. If the police did prevent the applicant from seeing his solicitor (the learned trial judge made no finding on that question) their conduct was not only reprehensible but, as I have said, was a matter to be considered by the jury in deciding whether the answers recorded in the records of interview were in fact given. It is the fair and proper practice to serve a copy of a record of interview upon an accused person as soon as practicable after it is made and the failure to do so may give rise to the suspicion that the record has been altered; that also will be a matter to be considered by a jury if called upon to decide whether the record if a true one: See *R v Dugan* (1970) 92 WN (NSW) 767. However neither a failure to allow the solicitor to be present nor a failure to make a record of the interview immediately available to the applicant, would in itself render evidence of the interrogation inadmissible, although it might be a ground for the judge to reject the confession in the exercise of his discretion if he regarded it as unfair to allow it to be used.

There then arises the question, which was not raised in the court below, whether the records of interview, being unsigned, should in any case have been admitted in evidence. The question whether a document which is alleged to contain a record of an interview between an accused person and the police is admissible against the accused although it has not been signed by him has been considered in Australia in a number of cases in recent years. It is sufficient to mention the following: in Victoria, *R v Kerr (No.1)* [1951] VicLawRp 27; (1951) VLR 211; [1951] ALR 490; *R v Lapuse* [1964] VicRp 7; (1964) VR 43, at p45; *R v Oliver* [1968] VicRp 27; (1968) VR 243 at p245; in New South Wales, *R v Raven* (1964) 81 WN (NSW) (Pt 1) 572, *R v Vandine* (1968) 1 NSWR 417; *R v Harris* (1970) WN (NSW) 720, at pp725-728; [1970] 1 NSWR 280; 71 SR (NSW) 8; *R v Daren* (1971) 2 NSWLR 423, at p434; and in Queensland, *R v West* (1973) Qd R 338. What those cases establish is that if the accused has acknowledged or adopted the document as such – e.g. by agreeing that it was a correct account of the interview – it is admissible. The same view appears to have been adopted in this Court in *Dawson v R* [1961] HCA 74; (1961) 106 CLR 1 at p13 (see also at pp6-7); [1962] ALR 365; 35 ALJR 360. If part only of the document does not contain an admission of any relevant fact it will be inadmissible for that reason, and it will in any case be inadmissible if the admissions which it contains were not voluntarily obtained.

Although as a matter of law a document is admissible against an accused person who has adopted it, that does not seem to me to be the end of the matter. It has long been established that the judge presiding at a criminal trial has a discretion to exclude evidence if the strict rule of admissibility would operate unfairly against the accused. The exercise of this discretion is particularly called for if the evidence has little or no weight, but may be gravely prejudicial to the accused: see, e.g. *R v Christie* (1911) AC 545, at p560; [1914-15] All ER 63; (1914) 10 Cr App R 141: *Noor Mohamed v R* (1949) AC 182, at p192; [1949] 1 All ER 365; 65 TLR 134; 93 Sol Jo 180; *Harris v DPP* (1952) AC 694 at p707; [1952] 1 All ER 1044; 36 Cr App R 39; [1952] 1 TLR 1075; 116 JP 248; and *Kuruma v R* (1955) AC 197, at p204; [1955] 1 All ER 236. In *R v Clarke* (1964) QWN 8; 58 QJPR 48, Lucas AJ in the exercise of this discretion, advised the Crown Prosecutor not to tender the typed record of an interview between a police officer and the accused, when although assenting to the truth of the facts recorded, refused to sign the document. From later reported cases, however, it would appear that not all judges have shown the same disposition to exercise their discretion by excluding the evidence in cases of this kind.

It is manifestly in the interests of justice that wherever possible a contemporaneous written record should be prepared of the interrogation by the police of a person suspected of having committed a serious crime. Any person who prepared or supervised the preparation of such a record, or read it while the facts were fresh in his memory, could use it to refresh his memory, either before the trial or if necessary in court. In *R v Ragen*, McClemens J, at p574, suggested that it would be more satisfactory to put before the jury the contemporaneous record itself than to allow a witness to give oral evidence which he had probably learnt by heart after studying the record. The answer to this suggestion is that as a general rule such a record, if unsigned, will add nothing to the weight of the testimony of the police officers who give oral evidence as to what was said in the course of the interrogation, and will in itself be of little evidential value. The fact that a police officer has sworn that the accused adopted the record makes it legally admissible, but it is for the jury to decide whether they are satisfied that the accused did adopt it and if they are not so satisfied they may not use it in reaching their decision. The fact that the record had been prepared would in most cases be of no assistance to the jury in deciding whether the accused

person had adopted it. The mere existence of a record is no safeguard against perjury.

If the police officers are prepared to give false testimony as to what the accused said, it may be expected that they will not shrink from compiling a false document as well. The danger is that a jury may erroneously regard the written record as in some way strengthening or corroborating the oral testimony. Moreover the record, if admitted, will be taken into the jury room when the jury retire to consider their verdict, and by its very availability may have an influence upon their deliberations which is cut of all proportion to its real weight. For these reasons, it would appear to me that in all cases in which an unsigned record of interview is tendered the judge should give the most careful consideration to the question whether it is desirable in the interests of justice that it should be excluded. The exclusion of unsigned records of interview should not hamper the police in their increasingly difficult task, because oral evidence of the interview itself may of course be given, and the record is available to refresh the memory of the police witnesses if necessary. If the police wish to have supporting evidence of an interrogation there are other methods, such as tape recording, or the use of video-tape, which would be likely to be more effective than the production of unsigned records of interview, and would not be open to the same objection. In any case the paramount requirement is that the trial should be conducted fairly and for the reasons I have given I consider that the admission of an unsigned record would in some cases tip the scales unfairly against the accused. There will of course be cases in which it would be plainly right to admit an unsigned record - e.g., if it had been acknowledged by the accused in the presence of some impartial person such as a magistrate, not connected with the interrogation, or if the manner in which the trial had been conducted on behalf of the accused made it necessary to admit the record. In the present case however it is unnecessary to consider further this aspect of the matter, since for reasons I am about to give I have reached the conclusion that there must in any case be a new trial...

MASON J: I have had the advantage of reading the reasons for judgment prepared by Gibbs J with which I agree. I would grant special leave to appeal, allow the appeal, quash the conviction and order a new trial.

JACOBS J: I agree with the conclusion of Gibbs J and with all that he has said in his reasons for judgment.

MURPHY J: The evidence of the finding of a machine gun pistol on the applicant's promises in Prahran, Victoria, more than a year after the murder in Sydney and of conversations concerning the pistol was admissible. This evidence was clearly relevant as disclosing the applicant's awareness of the precise type of weapon used to commit the murder. For the same reason, the evidence of discovery of and conversations concerning the weapons found with the pistol was also admissible. The fact that the applicant drew attention to only one of a number of weapons in his arsenal was admissible to strengthen the inference that he was aware that the deceased had been killed with an almost identical weapon.

Evidence concerning photographs of two Sydney criminals found in his possession was strictly inadmissible against the accused. Apart from objection on a ground (voluntariness) which is not material to this appeal, it was tendered and admitted without objection. This was understandable because the evidence could be used to the applicant's advantage; he said he feared the criminals and possessed weapons to protect himself from them. In this circumstance, the trial judge did not err in admitting the evidence.

On the other grounds, I agree with Mr Justice Gibbs' conclusion and reasons. On the questions of whether an unsigned record (as distinct from the oral account) of an interview should be admitted, a trial judge's discretion to exclude admissible evidence should generally be exercised against the admission of an unsigned record when the accused disputes its correctness. Special leave should be granted, the appeal allowed and a new trial ordered.
